SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Full-Court Bench:
Mr. Justice Qazi Faez Isa, CJ
Mr. Justice Syed Mansoor Ali Shah
Mr. Justice Munib Akhtar
Mr. Justice Yahya Afridi
Mr. Justice Amin-ud-Din Khan
Mr. Justice Jamal Khan Mandokhail
Mr. Justice Muhammad Ali Mazhar
Mrs. Justice Ayesha A. Malik
Mr. Justice Athar Minallah
Mr. Justice Syed Hasan Azhar Rizvi
Mr. Justice Shahid Waheed
Mr. Justice Irfan Saadat Khan
Mr. Justice Naeem Akhtar Afghan

Civil Appeals No. 333 and 334 of 2024
AND
Civil Misc. Application No.2920 of 2024
[Stay application]
AND
Civil Misc. Application No. 5913 of 2024
[Application of PTI for impleadment]

Sunni Ittehad Council and another. (In both cases)
... Appellants

Versus

Election Commission of Pakistan and others.(In both cases)
... Respondents

Civil Petitions No. 1612 to 1617 of 2024
AND
C.M.A. No.3554 of 2024 in CP NIL/2024
[For permission to file and argue]

The Speaker, Provincial Assembly of Khyber Pakhtunkhwa,
Peshawar and others.
(In CPs.1612 to 1614/24)

Government of Khyber Pakhtunkhwa through Chief Secretary,
Peshawar and others.
(In CPs.1615 to 1617/24)

Kanwal Shauzab.
(In CMA.3554/24) ...Petitioners/Applicant

Versus

Shazia Tehmas Khan and others.
(in CPs.1612 and 1616/24)

Aiman Jalil Jan and others.
(in CP. 1613 and 1617/24)

Mehr Sultana and others.
(in CPs.1614 and 1615/24)

Election Commission of Pakistan, through its Secretary,
ECP House, Islamabad and others.
(in CMA.3554/24)

... Respondents

In Civil Appeals

For the Appellants *(In both Appeals)*	:	Mr. Faisal Siddiqui, ASC Assisted by Mr. Ammar Rafique, Adv. a/w Mr. Ajmal Ghaffar Toor, ASC Mr. Haider Bin Masud, Adv. And Mr. Sahibzada M. Hamid Raza *(appellant in person)*
For Respondent No. 1-ECP *(In both Appeals)*		Mr. Sikandar Bashir Mohmand, ASC Assisted by Mr. Abdullah Noor And Hamza Azmat, Advocates a/w Mr. M. Arshad, D.G (Law) ECP. Ms. Saima Tariq Janjua, D.D. Law (ECP)
For PPPP *(In both Appeals)*		Mr. Farooq H. Naek, Sr. ASC Asstt. by Mr. Asad Mehmood Abbasi, ASC Mr. Sheraz Shaukat Rajpar, Adv. Syed Qaim Shah, Adv.
For PML(N) *(In CA. 333/24)*		Mr. Haris Azmat, ASC. Assisted by Ms. Faiza Asad, Adv. Ch. Akhtar Ali, AOR.
For MQM		Nemo.
For Respondent No. 5 *(In CA. 333/24)*		Mr. M. Siddique Awan, ASC.
For Respondent No. 9 *(In CA. 333/24)*		Syed Rifaqat Hussain Shah, ASC/AOR.
For Respondent No. 11 *(In CA. 333/24)*		Mr. Kamran Murtaza, Sr. ASC
For Respondents No. 15 to 19, 21-22: *(In CA. 333/24)*		Mr. M. Makhdoom Ali Khan, Sr. ASC. Mr. Sarmad Hani, ASC. Mr. Saad Mumtaz Hashmi, ASC Asst. by Zarar Qadir Shoro, Adv a/w Yawar Mukhtar, Adv.
For Respondent No. 20 *(In CA. 333/24)*		Mr. Zulfikar Khalid Maluka, ASC.
For Respondent No. 9 *(In CA. 334/24)*		Mr. M. Shahzad Shaukat, ASC. Asstt. By Raza ur Rehman, Adv.

In Civil Petitions

For the Petitioners *(In CPs.1612-1614/24)*		Mr. Asad Jan Durrani, ASC. a/w Malik Khawas, Asst. Law Officer, KPK Assembly
For the Petitioners *(In CPs.1615-1617/24)*		Mr. Shah Faisal Utmankhail, Advocate-General, KP. Mr. Kausar Ali Shah, AAG, KPK Mr. Zahid Yousaf, AOR

For Respondent No. 1 *(In CPs.1612 & 1616/24)*	Mr. Amir Javed, ASC
For R-6 *(in CP 1612/24)* and For R-2 to 5 *(in CP 1616/24)*	Mr. Shah Khawar, ASC
For Respondent No.1 to 6 *(In CP.1613 & 1617/24)*	Mr. Kamran Murtaza, Sr. ASC Qari Abdul Rasheed, ASC
For Respondents No.1,2,3, 8 *(In CP.1614/24)*	Mr. Imran Khan, ASC
<u>In CMAs</u> For the Applicants: *(In CMAs. 3554 & 5913/24)*	 Mr. Salman Akram Raja, ASC. Mr. Sameer Khosa, ASC Assisted by Malik Ghulam Sabir, Ramsa Banuri, Samreen Qureshi, and Hamad Amin, Advocates.
<u>On Court Notice</u>: For the Federation:	Mr. Mansoor Usman Awan, Attorney-General for Pakistan. (Assisted by: Ms. Maryam Ali Abbasi, Adv.) a/w Malik Javed Iqbal Wains, AAGP Raja M. Shafqat Abbasi, DAG Ms. Maryam Rasheed, Adv
For Govt. of Punjab:	Mr. Khalid Ishaq, Advocate-General, Punjab. Mr. Sanaullah Zahid, Additional Advocate-General, Punjab.
For Govt. of Khyber Pakhtunkhwa:	Mr. Shah Faisal Utmankhail, Advocate-General, KP. Mr. Shah Faisal Ilyas, Additional Advocate-General, KP.
For Govt. of Sindh:	Mr. Miran Muhammad Shah, Addl. A.G. Sindh (through video-link from Karachi)
For Govt. of Balochistan :	Mr. Muhammad Asif Reki, Advocate-General, Balochistan. *(Through video-link from Quetta)* Mr. M. Ayaz Swati, Addl. AG Mr. Tahir Iqbal Khattak, Additional Advocate-General, Balochistan. *(At Islamabad)*
For ICT:	Mr. Muhammad Ayyaz Shaukat, A.G. Islamabad
Research Assistance:	Umer A. Ranjha, Judicial Law Clerk.
Date of Hearing:	09 July 2024

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JUDGMENT

Syed Mansoor Ali Shah J.-

Preface

At the core of our democratic Constitution lies the will of the people of Pakistan, with free and fair elections being fundamental to democracy. The principle that 'the most important political office is that of the private citizen'[1] underscores the crucial role of the people, whose right to vote is the lifeblood of democratic governance. Democracy thrives on the belief that authority inherently resides in the people, a principle enshrined in the Constitution of every democratic nation, including ours. Our Constitution is not merely a governmental blueprint but a covenant affirming the supreme role of the people in shaping their destiny.

2. Under our Constitution, while the sovereignty of the entire Universe belongs to Almighty Allah alone, the authority is to be exercised by the people of Pakistan as a "sacred trust" within the limits prescribed by Him. It posits that people are entrusted with the responsibility of governance, which is to be exercised through their chosen representatives. The notion of a "sacred trust" elevates the responsibility of both the government and the judiciary in our Islamic republic. It embeds a moral dimension into the practice of democracy, where the

[1] Justice Louis Brandeis, a U.S. Supreme Court Justice from 1916 to 1939, famously said: "The most important political office is that of the private citizen." This statement emphasizes the crucial role individuals play in a democracy and highlights that the strength of democratic governance depends on the active participation and vigilance of its citizens.

fidelity to this trust is seen as paramount. In the context of elections, this "sacred trust" implies that all the actors in the electoral process must adhere to a higher standard of fair and honest conduct ensuring electoral integrity.

3. Election authorities, as "electoral management bodies", are the "guarantor institutions" of democratic processes and are critical to democratic governance, akin to a "fourth branch of government". Their constitutional role is to ensure the conduct of elections by providing an equal and fair competitive field for all political entities and protect citizens' rights to vote. As an impartial steward of the electoral process, the Election Commission of Pakistan is not only an administrative body but also a guardian of electoral integrity and democracy's legitimacy. When election authorities engage in actions that undermine these principles, such as unlawfully denying the recognition of a major political party and treating its nominated candidates as independents, they not only compromise the rights of these candidates but also significantly infringe upon the rights of the electorate and corrode their own institutional legitimacy.

4. Political parties play a crucial role in representative democracies, acting as intermediaries between the state and its citizens. They are uniquely positioned to shape and structure electoral choices, organize public opinion, and integrate diverse interests into coherent platforms, thereby making electoral decisions meaningful and ensuring the proper functioning of democracy.[2] Moreover, political parties contribute to stable governance by facilitating consistent lawmaking and ensuring regular accountability. As such, they are essential to electoral competition and are key to the legitimacy, efficiency, and accountability of state institutions. This central role of political parties in the constitutional process is referred to as "constitutional particracy", meaning a system in which political parties serve as the primary foundation of governance.[3] For democracy to endure, political parties must be supported and strengthened, not eliminated. A democracy without political parties is unlikely to sustain itself for long.

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[2] Tarunabh Khaitan, Political Parties in Constitutional Theory, Current Legal Problems, Vol. 73 (2020), pp. 89-125.
[3] Aradhya Sethia, Constutitional Particracy: Political Parties and the Indian Constitution, (2024).

5. When the Election Commission errs or makes significant mistakes impacting the electoral process, judicial intervention becomes necessary to rectify them and ensure electoral justice. The judiciary, tasked with ensuring electoral justice, must foremost preserve the will of the people. Election disputes are viewed through this lens, emphasizing electoral integrity and democracy's legitimacy to maintain public confidence in governance. Electoral justice is vital to protecting political and electoral rights and is intertwined with electoral integrity. The role of the Supreme Court of Pakistan in overseeing electoral integrity is crucial for sustaining public trust in the democratic process, and the Court's power to do "complete justice" is a critical tool in the constitutional arsenal of this Court, enabling it to prevent democratic backsliding,[4] and protect democracy effectively with a focus on the electorate's rights. Denying electoral justice and compromising electoral integrity would undermine the very legitimacy of democracy.

6. When static interpretation fails to preserve the vitality of the Constitution's text and principles, judges have typically rejected it in favor of constitutional fidelity.[5] Constitutional fidelity as a concept embodies that to be faithful to the Constitution is to interpret its words and to apply its principles in ways that preserve the Constitution's meaning and democratic legitimacy over time. Constitutional fidelity and legitimacy both are framed in a means-end relationship; legitimacy as the end and constitutional fidelity as a means to that end.[6] We must remember that Constitutions are not ephemeral enactments, designed to meet passing situations but are 'designed to approach immortality as nearly as human institutions can approach it.'[7]

7. With this understanding of the importance of the will of the people, fair conduct of elections, role of the Election Commission as a guarantor institution, centrality of political parties to the electoral process, electoral justice, electoral integrity and rights of the electorate in a democracy, we approach this case.

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[4] Tom Ginsburg, 'Democracy Backsliding and the Rule of Law' 44 Ohio University Law Review 351 (2018).
[5] Goodwin Liu, Pamela S. Karlan and Christopher H. Schroeder, Keeping Faith with the Constitution, American Constitution Society for Law and Policy (2009).
[6] Frank I. Michelman, Fidelity and Legitimacy, Journal of the ACS Issue Groups, American Constitution Society for Law and Policy (Vol. 1, No. 2, 2007).
[7] Weems v. United States, 217 U.S. 349 (1910).

Nature of election disputes and responsibility of courts

8. Before proceeding to the relevant facts of the case and the issues arising therefrom, it is necessary to underscore the nature of election disputes and the responsibility of courts and other judicial and quasi-judicial bodies in adjudicating such disputes. During the hearing of these appeals, when certain facts and points of law were questioned by some members of the Bench, the learned counsel for the respondents submitted that those facts were not in the pleadings and that those points of law did not arise from the facts presented in the pleadings. They contended that in exercising its appellate jurisdiction under Article 185 of the Constitution, this Court cannot go beyond the pleadings. We are afraid, this contention is misconceived. It results from a misunderstanding of treating election disputes as mere civil disputes between two private parties, similar to other civil disputes.

9. Such a contention based on analogizing a petition on an election dispute to a civil suit was repelled by Morris J. as far back as 1875 in the *Tipperary Election Case*,[8] with the observation:

> I consider this is a fallacious analogy, because a petition [on an election dispute] is not a suit between two persons, but is a proceeding in which the constituency itself is the principal party interested.

This legal position was further elucidated the next year in 1876 by Grove J. in *Aldridge*[9] as follows:

> Numerous provisions of the Act have reference not merely to the individual interests or rights of petitioners or respondents, but to rights of electors, of constituencies, and of the public, in purity of election and in having the member seated who is duly returned by a majority of proper votes. ...

This English jurisprudence on the nature of election disputes was adopted in India and Pakistan. In *Sreenivasan*,[10] Aiyar J. of the Madras High Court also repelled such a contention of treating an election petition similar to a civil suit. He elaborated on the difference in the nature of proceedings of a civil suit and an election petition and eloquently enunciated the legal position thus:

> This view proceeds principally on the basis that an election petition is in all essential respects similar to an ordinary civil suit; but that is not quite so. An election petition is not a matter in which the only persons interested are candidates who strove against each other at the elections. The public also are substantially interested in it and this is not merely in

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[8] Morton v. Galway [1875] 3 O.M. & H. 19.
[9] Aldridge v. Hurst [1876] L.R. 1 C.P. 410.
[10] Sreenivasan v. Election Tribunal [1955] 11 E.L.R. 278.

> the sense that an election has news value. An election is an essential part of the democratic process. The citizens at large have an interest in seeing and they are justified in insisting that all elections are fair and free and not vitiated by corrupt or illegal practices. ... In view of the manifest difference between a civil suit and an election petition it will not be right, it seems to me, to press the analogy founded on the basis of a civil suit very far when we have to deal with an election petition.

Similarly, speaking for the Supreme Court of India in *Inamati*,[11] Bhagwati J. observed:

> It is this interest of the constituency as a whole which invests the proceedings before the Election Tribunals with a characteristic of their own and differentiates them from ordinary civil proceedings.
>
> An election contest as aforesaid would result in the declaration of the properly qualified candidate as duly elected and the maintenance of the purity of the elections in which the constituency as a whole is vitally interested and no person would get elected by flagrant breaches of the election law or by corrupt practices.

Again, in *Mohinder Singh*,[12] Krishna Iyer J. adeptly rearticulated the legal position as follows:

> [A]n election dispute is not like an ordinary lis between private parties. The entire electorate is vicariously, not inertly, before the court. ... We may, perhaps, call this species of cases collective litigation where judicial activism assures justice to the constituency, guardians the purity of the system and decides the rights of the candidates. ... Therefore, it is essential that courts, adjudicating upon election controversies, must play a verily active role, conscious all the time that every decision rendered by the Judge transcends private rights and defends the constituency and the democracy of the country.

In his inimitable style, he underscored the duty of courts to exercise "vigilant monitoring" of the election process, to call to order "lawless behaviour", and to function as "the bodyguards of the People against bumptious power, official or other" in election disputes thus:

> [T]he periodical process of free and fair elections, uninfluenced by the caprice, cowardices or partisanship of hierarchical authority holding it and unintimidated by the threat, tantrum or vandalism of strong-arm tactics, exacts the embarrassing price of vigilant monitoring. Democracy digs its grave where passions, tensions and violence, on an overpowering spree, upset results of peaceful polls, and the law of elections is guilty of sharp practice if it hastens to legitimate the fruits of lawlessness. The judicial branch has a sensitive responsibility here to call to order lawless behaviour. Forensic non-action may boomerang, for the court and the law are functionally the bodyguards of the People against bumptious power, official or other.

In Pakistan, the above legal position was reiterated by Syed Jamshed Ali J. in *Dilshad Khan*[13] and *Irshad Hussain*,[14] respectively, as follows:

> An election dispute is not stricto senso a dispute inter-parties because it affects the entire constituency, who have a right to insist that they are represented by a person who commands the will of the majority of

[11] Inamati Basappa v. Desai Ayyappa AIR 1958 SC 698.
[12] Mohinder Singh v. Chief Election Commissioner AIR 1978 SC 851.
[13] Dilshad Khan v. Arshad Ali 1999 MLD 2874 (DB).
[14] Irshad Hussain v. Ashraf Nagra 2003 YLR 812 (DB).

> electorate. Therefore, it is in the public interest that the election disputes are expeditiously resolved and parties are not put to a protracted trial.
>
> [A]n election dispute is not necessarily a lis inter se parties because it involves the entire constituency, therefore, all efforts are required to be made to expeditiously dispose of an election petition and an election petition is not to be treated like a civil suit.

We may respectfully say that the above cases correctly enunciate the nature of election disputes and the responsibility of courts and other judicial and quasi-judicial bodies in adjudicating such disputes. While we agree with these statements and principles of law, we think it would also be apposite to summarise our understanding as well.

10. Elections are a crucial part of the democratic process, and the public has a major stake in ensuring that they are held free and fair, unmarred by corrupt or illegal practices. Therefore, unlike ordinary civil cases, election cases involve substantial public interest. An election dispute is fundamentally different from other civil disputes, as it is not solely a dispute between two contesting parties but a proceeding where the constituency itself is the principal interested party. These cases involve not just the rights of the contesting candidates or political parties but also the rights of the voters, constituencies and the public. Election cases aim to fill public offices by properly qualified and duly elected candidates and to maintain the purity of elections, ensuring that no one takes charge of a public office through flagrant breaches of election laws or corrupt practices. The proceedings in election cases thus have unique characteristics because they serve the interests of the entire constituency, differentiating them from ordinary civil proceedings. This distinction clearly demonstrates the flaw in treating an election case as an ordinary civil case and limiting the judicial inquiry to the pleadings of the parties as it is in adversarial proceedings.

11. Since election cases are a species of collective or public interest litigation, the proceedings therein are inquisitorial in nature. In these cases, any judicial intervention is to ensure justice for the constituency and to safeguard the integrity of the electoral system. The process of free and fair elections requires vigilant judicial monitoring to check the influence of any capricious or partisan election or executive authority. In this regard, courts have a critical responsibility to address lawless behaviou`r in the electoral process, as their inaction or delay could undermine the legitimacy and credibility of the whole election. In adjudicating election controversies, courts must therefore play an active

role in an inquisitorial manner, defending the rights of the constituency and the values and principles of democracy. They must act as guardians of the fundamental rights of the people against any misuse of power or illegal action in the electoral process.

12. In handling election disputes, the primary obligation of courts is to protect the electorate's right to fair representation, ensuring that only candidates who have legitimately won the support of the electorate through fair processes assume office. Courts must rise above political biases and interests, focusing solely on legal and evidential matters to safeguard the electorate's interests. Their approach to election disputes reflects the judiciary's overarching responsibility to uphold the integrity of the electoral process. As the highest court in the judicial hierarchy, this Court bears a profound duty to prioritize and protect the rights of the electorate, ensuring that their voice and representation in elected bodies are not compromised by procedural failings or errors in the electoral process. This duty underscores the Court's unique and expansive constitutional mandate to oversee the electoral cycle comprehensively. Such a judicial approach not only reinforces the legitimacy of the electoral system but also strengthens the foundations of democratic governance by ensuring that the will of the electorate is accurately and fairly represented.

13. Unfortunately, the above legal position regarding the nature of election disputes and the responsibility of courts was not brought to the notice of the Bench by the learned counsel for the parties while making their arguments. However, eleven members of the Bench, being themselves aware of the above legal position, proceeded to inquire into the facts and points of law that were not presented before the court below, that is, the Peshawar High Court. Although these eleven members of the Bench disagreed to some extent on granting the eventual relief, their awareness of the true legal position as to the nature of election disputes and the responsibility of courts led them to a broader and more comprehensive judicial inquiry into all the relevant facts and law points concerning the election dispute involved in the present case, as set out next.

Relevant facts of the case

14. On 15 December 2023, the Election Commission of Pakistan ("Commission") announced the election programme for the General Elections-2024 to the National Assembly and Provincial Assemblies. According to this programme, the last date for candidates to file nomination papers with the Returning Officers was 22 December 2023, which was extended on that day to 24 December 2023. On 22 December 2023, the Commission also decided the then-pending matter of intra-party elections of the political party, Pakistan Tehreek-e-Insaf ("PTI"). The Commission determined that PTI had not conducted its intra-party elections in accordance with its constitution and election laws. As a result, the Commission declined to recognize PTI's intra-party elections and declared PTI ineligible to obtain its election symbol. Although this decision was initially suspended on 26 December 2023 and subsequently set aside on 10 January 2024 by the Peshawar High Court, this Court restored the Commission's decision on 13 January 2024. PTI candidates were thus not allotted the party symbol of PTI but instead were allotted various different symbols that had been prescribed by the Commission for independent candidates.

15. In the course of the election programme, when the Returning Officers published the lists of contesting candidates (Form-33)[15], they mentioned PTI candidates as independent candidates. One of the PTI candidates, Mr. Salman Akram Raja, challenged this action by the Returning Officer of his constituency before the Commission. By its order dated 2 February 2024, the Commission rejected his challenge and declared him an independent candidate. The poll for the elections was then held on 8 February 2024, and PTI candidates were notified by the Commission as independent returned candidates in the notification published in the official Gazette under Section 98 of the Elections Act 2017 ("Section-98 Notification").

16. After the publication of Section-98 Notification, a substantial number of independent returned candidates (86 for the National Assembly; 107 for the Punjab Assembly; 90 for the Khyber Pakhtunkhwa Assembly; and 9 for the Sindh Assembly) joined a political party, Sunni Ittehad Council ("SIC"), to obtain the share of proportional representation

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[15] See Rule 56(1) of the Election Rules, 2017.

in the seats reserved for women and non-Muslims in the National Assembly and the Provincial Assemblies of Khyber Pakhtunkhwa, Punjab and Sindh. SIC then informed the Commission of the joining of these returned candidates and requested the Commission, through four separate applications (letters) dated 21 February 2024, to allocate to it its due share in the seats reserved for women and non-Muslims in the National Assembly and the said three Provincial Assemblies.

17. Certain other political parties, such as Pakistan Muslim League (Nawaz) (PML(N)) and Muttahida Qaumi Movement (Pakistan) (MQM(P)), filed applications opposing SIC's request for reserved seats and prayed for the allocation of the reserved seats to them and other eligible political parties. Some individuals also filed applications opposing the SIC's request and praying that SIC should not be treated as a parliamentary party. The political party, Pakistan People's Party Parliamentarians (PPPP), appeared before the Commission as a proforma respondent in the application filed by MQM(P), while the political parties, Jamiat Ulema-e-Islam Pakistan (JUIP) and Pakistan Muslim League (PML), appeared in response to the Commission's notice and opposed SIC's request.

18. By its order dated 1 March 2024, the Commission rejected SIC's applications and decided that the reserved seats for women and non-Muslims, which had been requested by SIC but declined, would be allocated to other political parties as per the proportional representation system of political parties. Accordingly, those reserved seats (19 for women and 3 for non-Muslims in the National Assembly; 21 for women and 4 for non-Muslims in the Khyber Pakhtunkhwa Assembly; 24 for women and 3 for non-Muslims in the Punjab Assembly; and 2 for women and 1 for non-Muslims in the Sindh Assembly – 78 in total – hereinafter referred to as the "disputed reserved seats") were allocated to other political parties. SIC challenged the Commission's order before the Peshawar High Court in writ jurisdiction. By its judgment dated 25 March 2024 ("impugned judgment"), the Peshawar High Court dismissed the SIC's challenge and upheld the Commission's order. Hence, these appeals were filed by SIC with leave of the Court.

PTI's application for impleadment (CMA No. 5913 of 2024)

19. During the pendency of these appeals, PTI filed an application seeking its impleadment in these appeals and submitting therein the

facts and circumstances under which its returned candidates joined SIC. PTI submitted in its application, *inter alia*, that PTI issued party tickets to its candidates, which were to be filed with the respective Returning Officers by 4 pm on 13 January 2024, the day fixed for the allotment of election symbols. The Supreme Court took up the Commission's appeal against the judgment of the Peshawar High Court in the matter of PTI's intra-party elections and its election symbol on 12 January 2024 for hearing, which continued until late evening on 13 January 2024.

19.1. Faced with the possibility of an adverse decision by the Supreme Court after 4 pm that day, PTI entered into an arrangement with another political party, PTI-Nazriati, under which party tickets were issued to PTI candidates by that party to obtain a common symbol for PTI candidates to prevent the disenfranchisement of a large part of the electorate. However, the same day, the Chairman of PTI-Nazriati appeared on national television channels and disavowed the tickets issued. At about the same time, the Commission also issued an order dated 13 January 2024 directing the Returning Officers not to accept a political party's tickets for candidates who belonged to another political party. Therefore, most of PTI candidates withdrew the tickets of PTI-Nazriati and presented PTI's tickets to the Returning Officers. Some of the Returning Officers placed the same on file while others refused to receive the same pending the decision of the Supreme Court.

19.2. Awaiting the decision of the Supreme Court, the Commission extended the time for submitting the party tickets and the allotment of election symbols till 12 pm that day. The Supreme Court announced its short order at about 11 pm on 13 January 2024, whereupon the Returning Officers rejected PTI's tickets and, by treating PTI candidates as independent candidates, allotted them different election symbols. The poll was held on 8 February 2024, and PTI candidates won a large number of seats in the National and Provincial Assemblies. These candidates were notified as independent returned candidates by the Commission by relying upon Rule 94 of the Elections Rules 2017 and the judgment of the Supreme Court dated 13 January 2024.

19.3. The Commission had earlier accepted in 2018 a political party, Balochistan Awami Party, which had not contested for general seats, eligible for the allocation of reserved seats. Therefore, PTI-backed

returned candidates joined SIC, with which PTI had an ongoing alliance/ relationship, within three days of being so notified, in order to become entitled to the allocation of the reserved seats. In its application, PTI also made the following contentions:

> A primary purpose of [Articles 51(6)(d) & (e) and 106(3)(c) of] the Constitution is the establishment of a representative National Assembly and representative Provincial Assemblies. Denial of reserved seats to PTI would create an entirely unrepresented National Assembly as well as Provincial Assemblies that do not reflect the will of the people.
>
> [T]he denial of reserved seats to SIC/PTI and the allocation of a disproportionate number of reserved seats to other political parties would deepen the denial of the will of the people.

As per these contentions and the arguments made during the hearing, PTI claimed the allocation of the disputed reserved seats either to SIC or to itself (PTI).

Claim for allocating reserved seats to SIC or to PTI

20. It may also be pertinent to mention here that in the course of his arguments, the learned counsel for SIC also attempted to explain the above circumstances under which the returned candidates, who according to him were PTI candidates, joined SIC. However, some honourable members of the Bench reproved him, questioning how he could make conflicting arguments as he was supposed to plead the case of SIC, not of PTI. With respect, we say that both SIC and PTI took the same stance on the peculiar circumstances that led the returned candidates to join SIC; in no way did they make any conflicting assertions. Both emphasized that it is the right of the people who had voted for the returned candidates that their mandate should be reflected in allocating the disputed reserved seats to SIC or to PTI.

Questions of law

21. On the above facts and the contentions made by learned counsel for the parties, the following questions of law fall for determination:

i. What is the consequence of declaring a political party ineligible to obtain an election symbol under Section 215(5) of the Elections Act 2017? Does such a declaration affect the political party's other constitutional and statutory rights?

ii. Can a candidate nominated by a political party ineligible to obtain an election symbol be mentioned as an independent candidate in the list of contesting candidates (Form 33), and can such a returned candidate be notified as an independent returned candidate in the Section-98 Notification?

iii. Do Articles 51(6)(d) & (e) and 106(3)(c) of the Constitution refer to political parties that have contested for and won general seats or to all enlisted political parties? and

iv. How is the proportional representation of a political party to be calculated for the allocation of reserved seats under Articles 51(6)(d) & (e) and 106(3)(c) of the Constitution?

We shall discuss and decide the above questions seriatim. However, before doing so, we want to briefly state the scope of the fundamental right guaranteed by Articles 17(2) and 19 of the Constitution, as the whole case hinges upon it and the answer of all the above questions are rooted in it.

Scope of fundamental right guaranteed by Article 17(2) of the Constitution

22. The provisions of Article 17(2) of the Constitution are cited here for ease of reference and reading:

> **Article 17(2) of the Constitution:**
> Every citizen, not being in the service of Pakistan, shall have the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of Pakistan, and such law shall provide that where the Federal Government declares that any political party has been formed or is operating in a manner prejudicial to the sovereignty or integrity of Pakistan, the Federal Government shall, within fifteen days of such declaration, refer the matter to the Supreme Court, whose decision on such reference shall be final.

A bare reading of the provisions of Article 17(2) of the Constitution shows that it guarantees to every citizen of Pakistan who is not in the service of Pakistan, the right to form or be a member of a political party. As per this Article, any reasonable restrictions can be imposed on this right by law only in the interest of sovereignty or integrity of Pakistan. This right has been regarded so important by the constitution makers that the adjudication of the matter of its restriction on the specified two grounds has been entrusted to the apex court of the country—the Supreme Court of Pakistan—and not to any other court. The protection of this right is so essential for ensuring democracy and representative government that its significance cannot be overstated. Although all courts and tribunals are mandated to enforce the right guaranteed by this Article, this Court (the Supreme Court of Pakistan) is the ultimate guardian of it. Therefore, it is also because of the constitutional obligation of this Court to protect the right guaranteed by this Article, as specifically entrusted to it, that we

decided to make a broader and comprehensive judicial inquiry into all the relevant facts and law points concerning enforcement of the fundamental rights of both the voters and the political parties.

23. As held by this Court in *Nawaz Sharif*,[16] the fundamental rights guaranteed by the Constitution, an organic instrument, are not capable of precise or permanent definition delineating their meaning and scope for all times to come. With the passage of time, changes occur in the political, social and economic conditions of the society, which requires re-evaluation of their meaning and scope in consonance with the changed conditions. Therefore, keeping in view the prevailing socio-economic and politico-cultural values and ideals of the society, the courts construe the fundamental rights guaranteed by the Constitution with a progressive, liberal and dynamic approach. This approach ensures that the fundamental rights remain a vibrant and effective guarantee of citizens' rights, liberties and freedoms, adapting to the evolving needs and aspirations of society. With this approach, the courts expound the fundamental rights to give them "life and substance"[17] that are true to the reality of the changing times.

24. In view of the above principles of interpreting fundamental rights, this Court has expounded in several cases the scope of the "right to form or be a member of a political party" guaranteed by Article 17(2) and held that it includes the right to function and operate as a political party,[18] the right to participate in and contest an election as a political party,[19] the right to form the Government and complete the prescribed tenure if the members of the political party constitute the requisite majority,[20] the right to contest an election in his individual capacity or as a member of a political party,[21] the right to be governed by chosen representatives[22] and the right to vote.[23] This bouquet of political fundamental rights ensures a functional and a workable democracy and a representative government. It is underlined that 'representation in fact is democracy'.[24] Therefore, the right guaranteed by Article 17(2) is essential for actualizing the

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[16] Nawaz Sharif v. President of Pakistan PLD 1993 SC 473.
[17] Griswold v. Connecticut (1965) 381 US 479 per Justice Douglas.
[18] Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416; Benazir Bhutto v. Federation of Pakistan PLD 1989 SC 66 and Nawaz Sharif v. President of Pakistan PLD 1993 SC 473.
[19] Ibid.
[20] Nawaz Sharif v. President of Pakistan PLD 1993 SC 473.
[21] Javed Jabbar v. Federation of Pakistan PLD 2003 SC 955.
[22] Azhar Siddiqui v. Federation of Pakistan PLD 2012 SC 774.
[23] Province of Sindh v. M.Q.M. PLD 2014 SC 531.
[24] David Plotke, Representation is Democracy, Constellations 4 (1) (1997).

constitutional objective of establishing an order wherein the State exercises its powers and authority through the chosen representatives of the people.[25]

Right to vote and the freedom of expression guaranteed under Article 19

25. Furthermore, as a form of expression, the right to vote is part of the fundamental right to freedom of expression guaranteed by Article 19 of the Constitution,[26] which is cited here for ease of reference:

> **Article 19:** Every citizen shall have the right to freedom of speech and expression… subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security, or defence of Pakistan or any part thereof, friendly relations with foreign states, public order, decency, morality, or in relation to contempt of court, commission of or incitement to an offence.

The right to freedom of speech and expression is considered "preservative of all rights".[27] The act of voting for a candidate of a political party or an independent candidate is a form of expression and an inherent concept within the Constitution, fundamental to the democratic legitimacy and validity of the legislature. When individuals cast their votes, they express their opinions on how they believe their society should be governed, who should govern it, and what policies should be prioritized. This form of expression is crucial because it encapsulates the will of the electorate, conveying messages about public preferences.

26. In a democratic context, freedom of expression extends beyond individual speech to encompass the collective expression of a community's or nation's political will through their elected representatives. In essence, freedom of expression and representativeness are deeply interlinked, each reinforcing the other. A truly representative government not only exemplifies the collective expression of its people but also ensures that this expression influences governance. The right to form political parties, the right to contest elections and the right to vote are therefore pivotal extensions of representativeness and freedom of expression, essential for cultivating a socially just environment.

27. The fundamental rights enshrined in Articles 17(2) and 19 of the Constitution thus underscore the significance of political participation

[25] The Constitution, Preamble and Article 2A read with the Objectives Resolution.
[26] Province of Sindh v. M.Q.M. PLD 2014 SC 531.
[27] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

and freedom of expression, both of which are essential to the functioning of a representative democracy. Article 17(2) guarantees the right to form or join political parties, highlighting the vital role of political participation in safeguarding democracy, while Article 19 upholds the freedom of expression, which is integral to the electorate's ability to influence the formation of government by expressing their choices through their votes. Together, these Articles emphasize the importance of electoral integrity and political justice, ensuring that every citizen's voice and choice are heard and represented in the political process.

28. Having so briefly stated the scope of the rights guaranteed by Articles 17(2) and 19 of the Constitution, we will next discuss the questions and examine the implications of this right further.

(i) What is the consequence of declaring a political party ineligible to obtain an election symbol under Section 215(5) of the Elections Act 2017? Does such a declaration affect the political party's other constitutional and statutory rights?

29. The fundamental right to form a political party guaranteed by Article 17(2) of the Constitution is regulated by the Elections Act 2017 ("Elections Act"). Section 2(xxviii) of the Elections Act defines a "political party" to mean an association of citizens or a combination or group of such associations formed with a view to propagating or influencing political opinion and participating in elections for any elective public office or for membership of a legislative body, including an Assembly, the Senate, or local government. Chapter XI of the Elections Act, comprising Sections 200 to 213, contains the detailed provisions, inter alia, on the subjects of formation, enlistment, membership, functioning, intra-party elections, sources of funds, and dissolution of political parties, etc.

30. Section 202 makes it obligatory for the Commission to enlist a political party if the application for its enlistment is accompanied by (i) a copy of the constitution of the political party, (ii) the certificate and the information required to be submitted under Sections 201 and 209, (iii) a copy of consolidated statement of its accounts under Section 210, (iv) a list of at least two thousand members with their signatures or thumb impressions along with copies of their National Identity Cards, and (v) the deposit of two hundred thousand rupees in favour of the Commission in the Government Treasury as enlistment fee. A political party which has been refused enlistment by the Commission can file an appeal before the

Supreme Court. This provision aligns with the constitutional mandate entrusted to the Supreme Court under Article 17(2) of the Constitution as the ultimate guardian of the right guaranteed by that Article. It is also notable that a political party once enlisted under the Elections Act cannot be delisted; the Commission's power to cancel the enlistment of a political party under subsection (5) of Section 202 relates only to the political parties enlisted before the commencement of the Elections Act, i.e., under earlier law. Whereas Section 212 contains the provisions on the matter of dissolution of political parties, which are similar to those contained in Article 17(2) of the Constitution.

31. The provisions that are more relevant to the present case are those contained in Sections 208 and 209, concerning the intra-party elections of political parties. As per Section 208, the office-bearers of a political party are to be elected periodically in accordance with the constitution of the political party, provided that a period, not exceeding five years, intervenes between any two elections. Once the intra-party elections are conducted, the political party concerned is to publish the updated list of its central office-bearers on its website and also to send such list to the Commission. Similarly, under Section 209, within seven days from completion of its intra-party elections, a political party is to submit a certificate signed by an office-bearer authorized by the Party Head, to the Commission to the effect that the elections were held in accordance with the constitution of the political party. Such certificate should contain the following information: (a) the date of the last intra-party elections; (b) the names, designations, and addresses of office-bearers elected at the Federal, Provincial, and local levels, wherever applicable; (c) the election results; and (d) a copy of the political party's notifications declaring the results of the election. Within seven days from the receipt of such certificate of a political party, the Commission is to publish the certificate on its website. It is notable that under Section 208(5), where a political party fails to conduct intra-party elections as per the given time frame in its constitution (but not exceeding the statutory period of five years) despite a notice issued by the Commission to do so, then the Commission can impose a fine which may extend to two hundred thousand rupees but not be less than one hundred thousand rupees. While the consequence of failure to comply with the provisions of Section 209, which relates to the submission of a certificate containing the

specified information and signed by an office-bearer authorized by the Party Head, to the effect that the elections were held in accordance with the constitution of the political party, is provided in Section 215(5).

32. Section 215(5)[28] of the Elections Act provides that if a political party fails to comply with the provisions of Section 209 (regarding intra-party elections) or Section 210 (regarding sources of the party's funds), the Commission may, after affording it an opportunity of being heard, declare it ineligible to obtain an election symbol for election to *Majlis-e-Shoora* (Parliament), Provincial Assembly or a local government, and shall not allocate an election symbol to such political party in subsequent elections. 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. However, the consequence of making such a declaration is clearly specified and is not left to the discretion of the Commission. 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.

Principle of strict construction of statutes providing penal consequence or curtailing fundamental rights

33. It is a cardinal principle of the construction of statutes that any provision entailing penal consequence, whether of criminal law[29] or of civil law,[30] 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

[28] **215. Eligibility of party to obtain election symbol.**—(5) If a political party or parties to whom show cause notice has been issued under sub-section (4) fails to comply with the provision of section 209 or section 210, the Commission may after affording it or them an opportunity of being heard, declare it or them ineligible to obtain an election symbol for election to Majlis-e-Shoora (Parliament), Provincial Assembly or a local government, and the Commission shall not allocate an election symbol to such political party or combination of political parties in subsequent elections.

[29] Muhammad Ali v. State Bank of Pakistan 1973 SCMR 140; F. B. Ali v. State PLD 1975 SC 506; M.B. Abbasi v. State 2009 SCMR 808; Zahid Rehman v. State PLD 2015 SC 77; Tahir Naqash v. State PLD 2022 SC 385.

[30] PIA Corporation v. Labour Court PLD 1978 SC 239; Federal Land Commission v. Ghulam Qadir 1983 SCMR 867; Siddique Khan v. Abdul Shakur PLD 1984 SC 289; UBL v. Yousuf Dhadhi 1988 SCMR 82; Wukala Mahaz v. Federation of Pakistan PLD 1998 SC 1263; B.I.S.E. v. Rizwan Rashid 2005 SCMR 728; Tahir Hussain v. Liaqat Ali 2014 SCMR 637 and State Bank of Pakistan v. S.E.C.P. PLD 2018 SC 52.

or assumption. Penal actions can only be taken on the basis of express and clear provisions of law. The act attracting the penal consequence and the person responsible for it must fairly and squarely fall within the plain words of the law. Courts are not to strain or stretch the meaning of the words to bring the act or the subject within the ambit of penal provisions; in other words, the scope of penal provisions is not to be extended through liberal construction. Furthermore, if a penal provision is susceptible to two reasonable constructions, the one that does not extend the penalty is to be adopted. Any reasonable doubt or ambiguity is to be resolved in favour of the person who would be liable to the penalty, and the construction that avoids the penalty is to be adopted.[31]

34. Another well-established principle of constitutional and statutory construction is that while the fundamental rights guaranteed in the Constitution are to be construed progressively and liberally,[32] provisions in the Constitution or in any law that curtail the fundamental rights are to be construed restrictively and narrowly.[33] This principle owes its genesis to the broader principle of strict construction of statutes encroaching on rights, which applies to all fundamental rights recognized by common law, whether or not guaranteed in the Constitution. As per this principle, statutes that encroach on such rights of the subject are also subject to strict construction. They are to be construed, if possible, to protect such rights, and if there is any ambiguity, the construction that saves the right should be adopted.[34] In a constitutional democracy, laws are solicitous of the individual rights and liberties of citizens and interfere with them as little as possible in the public interest. By adopting a liberal and expansive interpretation of such laws, individual rights and liberties cannot be curtailed more than expressly provided by the legislature in the public interest. Therefore, laws that curtail

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[31] Maxwell on the Interpretation of Statutes (12th ed.) pp. 238-240 and Bennion on Statutory Interpretation (7th ed.) pp. 715-717.

[32] Nawaz Sharif v. President of Pakistan PLD 1993 SC 473; Justice Qazi Faez Isa v. President of Pakistan 2022 SCP 140 per Maqbool Baqar, J., et al. and Hamza Rasheed v. Election Appellate Tribunal 2024 SCP 66 per Syed Mansoor Ali Shah, J.

[33] F. B. Ali v. State PLD 1975 SC 506; Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416; Ghulam Mustafa Jatoi v. Returning Officer 1994 SCMR 1299; Wukala Mahaz v. Federation of Pakistan PLD 1998 SC 1263 and Hamza Rasheed v. Election Appellate Tribunal 2024 SCP 66 per Syed Mansoor Ali Shah, J.

[34] Maxwell on the Interpretation of Statutes (12th ed.) pp. 251-252 and Bennion on Statutory Interpretation, (7th ed.) pp. 718-719. (Although Maxwell states that statutes that encroach on the rights of the subject are subject to strict construction in the same way as penal statutes, we do not go thus far. In our tentative view, which is subject to detailed examination in an appropriate case, penalties can be imposed only by express enactment, not by necessary implication, but civil rights can be impaired not only by express enactment but also by necessary implication.)

individual rights and liberties, particularly the fundamental rights guaranteed in the Constitution, are to be construed strictly.[35]

35. These principles of statutory construction guide our analysis and interpretation of the provisions of Section 215(5) of the Elections Act. It is unequivocal that Section 215(5) prescribes a penal consequence for a political party's failure to comply with the provisions of Section 209 (regarding intra-party elections) or Section 210 (regarding the sources of the party's funds). The specified penalty of non-allocation of an election symbol curtails the political party's fundamental right to function and operate as a political party—a right implicit in the right to form a political party guaranteed by Article 17(2) of the Constitution.[36] Therefore, 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. Any interpretation of Section 215(5) that would impose further penalties beyond the expressly stipulated contravenes the principle of strict construction of laws that entail penal consequences or curtail fundamental rights. Thus, the scope of the penalty provided by Section 215(5) must remain confined to its express terms, ensuring that no other constitutional or statutory right of the political party is affected.

Answer to question (i) and its applicability to PTI

36. In light of the foregoing interpretation, we determine question (i) in the terms that the sole consequence of declaring a political party ineligible to obtain an election symbol under Section 215(5) of the Elections Act for failing to comply with the provisions of Section 209 regarding intra-party elections is the non-allocation of an election symbol to that party in subsequent elections—nothing more, nothing less. Furthermore, such a declaration does not affect the political party's other constitutional and statutory rights.

37. This was the effect of the Commission's order dated 22 December 2023 (upheld by this Court vide its order dated 13 January 2024), declaring PTI ineligible to obtain its election symbol under Section 215(5)

[35] Tahir Naqash v. State PLD 2022 SC 385.
[36] Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416; Benazir Bhutto v. Federation of Pakistan PLD 1989 SC 66 and Nawaz Sharif v. President of Pakistan PLD 1993 SC 473.

of the Elections Act; other constitutional and statutory rights of PTI to function and operate as a political party were not thereby affected. With respect, it is observed that had this Court clarified this legal position in its order dated 13 January 2024, or had the Commission clarified it in its order dated 22 December 2023 or order dated 13 January 2024, the entire confusion regarding the status of PTI candidates or PTI's right to reserved seats would not have occurred.

38. We feel constrained to observe here that we have some doubts about whether the Commission has the power to reject the certificate of intra-party elections submitted by a political party under Section 209, and whether the Commission exercised its discretion under Section 215(5) justly, fairly and reasonably in PTI's case, particularly when the election programme had already been announced and the fundamental right of citizens to vote for the political party of their choice was at stake. Similarly, we have certain reservations about how the matter of intra-party elections—a matter of internal governance of party—can trump the fundamental rights of citizens to vote and of political parties to effectively participate in and contest elections through obtaining a common symbol for their candidates, guaranteed under Articles 17(2) and 19 of the Constitution. However, since these questions are *sub judice* in the review petition filed by PTI against this Court's judgment dated 13 January 2024, we abstain from examining and expressing our definitive view on them. (One of us, Justice Muhammed Ali Mazhar, does not want to make the observations made in this paragraph because review petition against this Court's judgment dated 13 January 2024 is pending. He also wishes to make clear that nothing in this paragraph is intended to or will impact upon the hearing of the review petition).

Explanation to Rule 94 of the Elections Rules 2017 is ultra vires the Elections Act and the Constitution

39. The discussion under this question would, however, be incomplete without determining the legal status of the Explanation to Rule 94 of the Election Rules 2017 ("Election Rules"). It is pertinent to mention that the Election Rules have been made by the Commission in the exercise of its rule-making power under Section 239 of the Elections Act, which authorises the Commission to make rules for carrying out the purposes of the Act.

40. Rule 94[37] provides the procedure for the calculation, allocation and notification of the share of proportional representation of political parties in the seats reserved for women and non-Muslims. Its Explanation stipulates that '[f]or the purpose of this rule, the expression "political party" means a political party to which a symbol has been allocated by the Commission.' By defining a political party in this manner, the Explanation excludes a political party that has not been allotted a symbol by the Commission from being allocated a share of proportional representation in the reserved seats. No such exclusion of a political party, as created by the Explanation to Rule 94, is provided in Articles 51(6)(d) & (e) and 106(3)(c) of the Constitution, nor is any such consequence of non-allocation of the election symbol provided in Section 215(5) or any other provision of the Elections Act. In effect, it has introduced an additional penal consequence of declaring a political party ineligible to obtain an election symbol under Section 215(5) of the Elections Act, and it has also infringed the constitutional right of a political party, conferred by Articles 51(6)(d) & (e) and 106(3)(c) of the Constitution, to have its due share of proportional representation in the seats reserved for women and non-Muslims on the basis of general seats secured by such a political party. This Explanation has thus clearly gone beyond and against the provisions of the Elections Act and the Constitution.

41. It is an established principle of law that rules made under the rule-making authority conferred by an Act ("parent statute") can neither enlarge nor go beyond the scope of the parent statute, nor can they override or conflict with its provisions. If the rules are repugnant to or inconsistent with the provisions of the parent statute, they are *ultra vires* and invalid. The rule-making authority is conferred to give effect to the provisions of the parent statute, not to neutralise or contradict them. The primary purpose of the rules is to provide procedural details for carrying

[37] **94. Commission to declare seats won by each Political party.** — (1) The Commission shall, by notification in the official Gazette, declare the total number of reserved seats won by each political party in the National Assembly and the Provincial Assemblies respectively.
(2) The per centum share of each political party shall be worked out with reference to total number of general seats in the National Assembly, or, as the case may be, the respective Provincial Assembly.
(3) In calculating the number of seats, the highest fraction shall be taken as one seat till the allocation of total reserved seats in the concerned Assembly is completed.
(4) The seats reserved for non-Muslims and women shall be divided among the political parties on the basis of their per centum share as worked out in sub-rule (2) and in order of priority of the names of candidates mentioned in the party list: Provided that the list submitted by a political party shall not be subject to change or alteration, either in the order of priority or through addition of new names or subtraction of old names after expiry of the date of submission of nomination papers:
Explanation. — For the purpose of this rule, the expression "political party" means a political party to which a symbol has been allocated by the Commission.

out the purposes of the parent statute. They cannot militate against the substantive provisions of the parent statute.[38] Moreover, just as a provision in the parent statute that is inconsistent with any provision of the Constitution is *ultra vires* the Constitution and thus invalid,[39] so too are the rules made under its authority: the rules that are inconsistent with any provision of the Constitution are also *ultra vires* the Constitution and thus invalid. What cannot be done directly in the parent statute through primary legislation cannot be done indirectly in the rules through delegated legislation.

42. In view of the above, the Explanation to Rule 94 of the Election Rules, being beyond the scope of Section 215(5) of the Elections Act and inconsistent with the provisions of Articles 51(6)(d) & (e) and 106(3)(c) of the Constitution, is declared *ultra vires* the Elections Act and the Constitution, thus void and invalid.

(ii) Can a candidate nominated by a political party ineligible to obtain an election symbol be mentioned as an independent candidate in the list of contesting candidates (Form-33), and can such a returned candidate be notified as an independent returned candidate in the Section-98 Notification?

43. The answer to question (i) above, has made it easier to address this question. The only point that requires some discussion here is whether a political party has a constitutional and/or statutory right to nominate its candidates for an election to *Majlis-e-Shoora* (Parliament), Provincial Assembly or a local government. Fortunately, we need not grapple much with this point as it has already been discussed at some length and decided authoritatively by the Full Court Benches of this Court in the two cases of *Benazir Bhutto* decided in 1988.[40] Instead of burdening this judgment with extracts from those cases, we find it appropriate to state summarily what was decided therein on the point under consideration, with which we respectfully agree.

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[38] UIB v. Mohan Bashi PLD 1959 SC 296; East Pakistan v. Nur Ahmad PLD 1964 SC 451; Hirjina Salt Chemicals v. Union Council 1982 SCMR 522; Ziauddin v. Punjab Local Government 1985 SCMR 365; Matloob Ali v. ADJ 1988 SCMR 747; Chairman Railway Board v. Wahab Ud Din & Sons PLD 1990 SC 1034; Mehraj Flour Mills v. Provincial Government 2001 SCMR 1806; Collector of Sales Tax v. Superior Textile Mills PLD 2001 SC 600; Pakistan v. Aryan Petro Chemical Industries 2003 SCMR 370; Ahmad Hassaan v. Govt. of Punjab 2005 SCMR 186; Suo Motu Case No.13 of 2009 PLD 2011 SC 619; Suo Motu Case No.11 Of 2011 PLD 2014 SC 389 and NEPRA v. FESCO 2016 SCMR 550.

[39] Mubeen-us-Salam v. Federation of Pakistan PLD 2006 SC 602 (Many previous cases on the point are cited and discussed in it); Mobashir Hassan v. Federation of Pakistan PLD 2010 SC 265; Baz Muhammad Kakar v. Federation of Pakistan PLD 2012 SC 923; Lal Khan v. Crown PLD 1955 Lah 215 (FB) and Shorish Kashmiri v. Govt. of West Pakistan PLD 1969 Lah 438 (DB).

[40] Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416 (decided on 20 June 1988) and Benazir Bhutto v. Federation of Pakistan PLD 1989 SC 66 (decided on 2 October 1988).

Right to contest elections as a political party through its nominated candidates is a fundamental right under Article 17(2) of the Constitution

44. Article 17(2) of the Constitution guarantees the right to form or be a member of a political party. Because the formation of a political party necessarily implies the carrying on of all its activities, the right to form a political party extends to its functioning and operation. The functioning is implicit in the formation of a political party. Without the right to its functioning, the right to form a political party would be meaningless and of no avail. To participate in an election to Parliament or a Provincial Assembly and to nominate or put up candidates at any such election are the principal activities (functions) of a political party. Depriving a political party of these activities destroys the political existence of the party and is tantamount to its political extermination and virtual dissolution, which cannot be done otherwise than by the procedure and on the grounds provided in Article 17(2) of the Constitution. The right to participate in and contest an election as a political party is included in the right to form or be a member of a political party. Any provision of election law that fails to recognize the rights of political parties to participate in the elections is, therefore, *ultra vires* Article 17(2) of the Constitution.

45. The *Nawaz Sharif case*[41] decided in 1993 by a Full Court Bench of this Court not only endorsed the above scope of the right guaranteed by Article 17(2) of the Constitution but also advanced it further. The Court held that the right to form or be a member of a political party guaranteed by Article 17(2) includes not only the right to participate in and contest elections as a political party, as held in the *Benazir Bhutto cases*, but also the right to form the Government and complete the prescribed tenure if the members of the political party constitute the requisite majority.

46. Being in complete agreement with the above three decisions of the Full Court Benches of this Court on the scope of Article 17(2), we hold that the right to participate in and contest elections as a political party through its nominated candidates is a fundamental right guaranteed by Article 17(2) of the Constitution. The various sections of the Elections Act, including Sections 66 and 67, merely serve to give effect to this right as machinery provisions. This right is not, nor can it be, extinguished by

[41] Nawaz Sharif v. President of Pakistan PLD 1993 SC 473.

any provision of the Elections Act, including Section 215(5) thereof. Depriving a political party of participating in and contesting elections through its nominated candidates, it is reiterated, destroys the political existence of the party and is tantamount to its political extermination and virtual dissolution, which cannot be done except by the procedure and on the grounds provided in Article 17(2) of the Constitution. Similar would be the position if the candidates nominated by a political party are denied the status of being the candidates of that political party and are mentioned as independent candidates in the list of contesting candidates (Form-33), or such returned candidates are notified as independent returned candidates in the Section-98 Notification. Such actions of the Returning Officers and the Commission would also be *ultra vires* Article 17(2) of the Constitution, as they effectively nullify the party's right to participate in and contest elections.

The order of the Commission, dated 2 February 2024, made on the application of Mr. Salman Akram Raja (a PTI candidate) was both unconstitutional and unlawful.

47. As the Commission's order dated 2 February 2024, passed on the application of Mr. Salman Akram Raja ("Mr. Raja"), a PTI candidate, pertains to question (ii) under discussion, we deem it necessary to examine the legality of that order alongside answering this question, in order to ensure a comprehensive understanding of the matter. As noted above, when the Returning Officers published the lists of contesting candidates (Form-33), PTI candidates were mentioned therein as independent candidates. Mr. Raja, one of such candidates, challenged this entry in the list of contesting candidates (Form-33) before the Commission. However, the Commission, by its order dated 2 February 2024, rejected his challenge and declared him an independent candidate. In its order, the Commission reasoned:

> Notwithstanding, the affiliation of the petitioner with PTI and alleged party ticket including entries of party affiliation in the nomination papers of the petitioner, he cannot be treated as nominee of PTI nor his party (PTI) can be reflected in column 5 of Form 33 in absence of party symbol.
> ....
> The petitioner has been allotted symbol from the chart available for independent candidates as the party to which he claims affiliation has not been allocated Election Symbol by the Commission. Allowing any entry in absence of party symbol in column 5 of Form 33 and entry [of] applicant's name as Candidate of PTI will contradict the symbol and identity of Party as the petitioner is declared as an independent candidate.
>
> *(Emphasis supplied)*

To further support its decision, the Commission also relied upon the following observation of this Court made in its order dated 13 January 2024:

> Surprisingly, no declaration was sought, nor given, that intra party elections were held in PTI, let alone that the same were held in accordance with the law. If it had been established that elections had been held then ECP would have to justify if any legal benefit to such a political party was being withheld, but if intra party elections were not held the benefits accruing pursuant to the holding of elections could not be claimed.
>
> *(Emphasis supplied)*

From the cited extracts of the Commission's order, it appears that the Commission rejected Mr. Raja's claim primarily because he had been allotted a symbol from the chart of symbols prescribed for independent candidates, and the party (PTI) whose candidature he sought to be mentioned in Form-33 had not been allocated an election symbol. The Commission's reliance on the cited observation of this Court indicates that it understood a political party's capacity to nominate candidates for an election as one of "the benefits accruing pursuant to the holding of [intra-party] elections."

48. In defending the Commission's order and the Returning Officers' act of mentioning PTI candidates as independent candidates in Form-33, the learned counsel for the Commission took pains to explain the provisions of Section 67[42] of the Elections Act. According to him, Section 67 classifies candidates for symbol allocation into two categories: (i) candidates nominated by a political party that has been allocated a symbol by the Commission under Chapter XII, who are allotted the party symbol under subsection (2) of Section 67, and (ii) candidates not nominated by any political party, who are treated as independent candidates and are allotted one of the symbols not allocated to any political party. He emphasised that Section 67 does not recognise any

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[42] **67. Contested election and allotment of symbols.** — (1) If after withdrawal, if any, there are more than one contesting candidates in the constituency, the Returning Officer shall allot, subject to any direction of the Commission, one of the prescribed symbols to each contesting candidate.
(2) A candidate nominated by a political party at an election in any constituency shall be allotted the symbol allocated by the Commission to that political party under the provisions of Chapter XII and no other symbol.
(3) A candidate not nominated by any political party (hereinafter called as "independent candidate") shall choose and shall be allotted one of the symbols not allocated to any political party, in the following manner—
(a) where a symbol has been chosen by only one independent candidate, that symbol shall be allotted to that candidate and to no one else;
(b) if a symbol is chosen by more than one independent candidates and one of them has previously been a Member of the National Assembly or a Provincial Assembly, such symbol shall be allotted to that former Member; and
(c) if more than one independent candidates have given preference for the same symbol, that symbol shall be allotted by drawing of lots.
(4) No symbol shall be allotted to any candidate other than the prescribed symbols.
(5) In every constituency where election is contested, different symbol shall be allotted to each contesting candidate.

third category of candidates, such as candidates who are nominated by a political party (like PTI) that has not been allocated a symbol by the Commission under Chapter XII of the Elections Act.

49. We have given careful consideration to his arguments. We find that his focus has been solely on the express words of subsections (2) of Section 67, while overlooking its necessary implication. This necessary implication becomes clear when we invert the statement made in subsection (2) of Section 67. This subsection states that "[a] candidate nominated by a political party at an election in any constituency shall be allotted the symbol allocated by the Commission to that political party under the provisions of Chapter XII and no other symbol." By inverting this statement, we find as a necessary implication that a candidate nominated by a political party that has not been allocated a symbol by the Commission shall not be allotted the symbol declined by the Commission to that political party under Chapter XII, but rather any other symbol. Since any other symbol is allotted to candidates under subsection (3) of Section 67, a candidate nominated by a political party (such as PTI) that has not been allocated a symbol by the Commission is to be allotted, under that sub-section, one of the symbols not allocated to any political party. However, the allocation of a symbol under subsection (3) does not alter the candidate's status as a nominee of the political party, which is determined under Section 66 on the basis of his declaration and the party certificate (party ticket) issued in his favour.

50. The construction of subsections (2) and (3) of Section 67 proposed by the learned counsel for the Commission, if accepted, would extinguish the fundamental right guaranteed by Article 17(2) of the Constitution to participate in and contest elections as a political party through its nominated candidates. As held above, the various sections of the Elections Act, including Sections 66 and 67, merely serve to give effect to this fundamental right as machinery provisions, which cannot be extinguished by any provision of the Elections Act, including Section 215(5) thereof.

51. In view of the above, the Commission's order dated 2 February 2024 and the Returning Officers' act of mentioning PTI candidates as independent candidates in Form-33 were both unconstitutional and unlawful, and they are hereby declared as such. It would also be

appropriate to clarify that the Commission's reliance on the cited observation of this Court made in paragraph 11[43] of its order dated 13 January 2024 was misconceived and misplaced, as that observation pertained to Section 215(5) and not to Sections 66 and 67 of the Elections Act.

Difference between "interpretation" and "construction" of statutes

52. To explain how we have determined and declared the above legal position, despite it not being explicitly stated in subsections (2) and (3) of Section 67, as argued by the learned counsel for the Commission, we may underline a subtle difference between "interpretation" and "construction" of statutes. 'Strictly speaking, construction and interpretation are not the same', as Crawford wrote and this Court approvingly cited it in *Haider Zaidi,*[44] 'although the two terms are often used interchangeably. Construction, however, to be technically correct, is the drawing of conclusions with respect to subjects that are beyond the direct expression of the text, from elements known and given in the text, while interpretation is the process of discovering the true meaning of the language used. … The process to be used in any given case will depend upon the nature of the problem presented. And, as is apparent, both processes may be used in seeking the legislative intent in a given statute. If the legislative intent is not clear after the completion of interpretation, then the court will proceed to subject the statute to construction.'[45] We have thus drawn the above conclusion by construction from the "elements known and given in the text" of the provisions of Sections 66, 67 and 215(5) of the Elections Act as a necessary implication thereof.

53. It may however be clarified, as Crawford also did, that since for most practical purposes it is sufficient to designate the whole process of ascertaining the legislative intent as either interpretation or construction, the said distinction between the two processes has little importance so far as the courts are concerned and is usually relegated to the realm of academic discussion. But, as Crawford emphasised and so we do for our present purpose, 'by breaking the process of finding the legislative intent

[43] **This Court's order dated 13 January, complete para 11:** "11. Neither before the LHC nor before the PHC any provision of the Act, including section 215(5), was challenged. The observation of the learned Judges that the provision of the law was absurd was uncalled for, particularly when no provision thereof was declared to be unconstitutional. Surprisingly, no declaration was sought, nor given, that intra party elections were held in PTI, let alone that the same were held in accordance with the law. If it had been established that elections had been held then ECP would have to justify if any legal benefit to such a political party was being withheld, but if intra party elections were not held the benefits accruing pursuant to the holding of elections could not be claimed."

[44] Haider Zaidi v. Abdul Hafeez 1991 SCMR 1699.

[45] Crawford, The Construction of Statutes, (1st ed.) pp. 240-242.

into these two processes whose characters depend upon whether the court, strictly speaking, interprets or constructs the legislative enactment at hand, some light is shed upon how the courts exercise the judicial function of ascertaining the legislative intention.'[46]

Answer to question (ii) and its applicability to PTI

54. In view of the above, we answer question (ii) as follows: notwithstanding that a political party has been declared ineligible to obtain an election symbol, its nominated candidates cannot be mentioned as independent candidates in the list of contesting candidates (Form 33), despite allotment of different election symbols to them under Section 67(3) of the Elections Act, nor can they be notified as independent returned candidates in the Section-98 Notification.

55. Therefore, PTI's nominated candidates were wrongly shown independent candidates in the list of contesting candidates (Form 33) by the Returning Officers and were also wrongly notified as independent returned candidates in the Section-98 Notification by the Commission.

Validity of party tickets issued by Mr. Gohar Ali Khan as Chairman PTI

56. Before parting with this part of the judgment, it is necessary to address an ancillary point stated by the Commission in its order dated 2 February 2024 in rejecting Mr. Raja's claim. The Commission maintained that since the election of Mr. Gohar Ali Khan as Chairman of PTI had not been accepted by the Commission, he could not have issued the party ticket to Mr. Raja. We find that the Commission failed to recognise that its order dated 22 December 2023 regarding the intra-party elections of PTI was not in force from 26 December 2023 (when the Peshawar High Court suspended the Commission's order) to 13 January 2024 (when this Court restored the Commission's order). During this period, Mr. Gohar Ali Khan was holding the office of Chairman of PTI and had, therefore, validly issued party tickets to PTI candidates, including Mr. Raja.

57. We may also underline here that, notwithstanding a political party's failure to comply with the provisions of Section 209 of the Elections Act relating to its intra-party elections, the political party

[46] Ibid.

remains an enlisted political party, fully functional for the purposes of its formation, i.e., 'propagating or influencing political opinion and participating in elections for any elective public office or for membership of a legislative body, including an Assembly, the Senate, or local government.'[47] The only consequence of not complying with the said provisions of the Elections Act, as aforementioned, is that such a political party is not to be allocated an election symbol. It would be completely illogical to assume that a political party, a juristic person, is fully functional yet there are no natural persons who are either *de facto* or *de jure* performing its functions and running its affairs. We all know that juristic persons act through natural persons. An enlisted political party is a juristic person, and like other juristic persons, it acts through natural persons. Saying that a political party is an enlisted political party, fully functional for the purposes of its formation, yet there is no one that can perform its functions and run its affairs, amounts to blowing hot and cold in the same breath or approbating and reprobating one and the same fact. Therefore, after the intra-party elections (which were not later accepted by the Commission), Mr. Gohar Ali Khan had assumed at least *de facto* charge of PTI's functions and affairs as its Chairman. Consequently, the acts performed by him on behalf of PTI before 13 January 2024, when this Court restored the Commission's order dated 22 December 2023 declining to accept the intra-party elections, were fully valid and effective.

58. It is further clarified that when the office-bearers of a political party are elected under Section 208 of the Elections Act, in accordance with the party's constitution, and a certificate to that effect is submitted to the Commission under Section 209, the newly elected office-bearers *de facto* assume the functions of the party until the Commission accepts or rejects the elections. Upon acceptance, they also assume the functions of the party *de jure*. In the case of rejection of the intra-party elections, the previous office-bearers are reinstated, for no political party, as held above, can exist without either *de facto* or *de jure* office-bearers to perform its functions and manage its affairs. In this regard, the clarification dated 14 September 2024, passed by us on an application of the Commission, shall also be read as part of this judgment and is reproduced hereunder for the completion of the record:

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[47] The Elections Act, Section 2(xxviii).

Through CMA 7540/2024, and in terms [para 10] of the short order dated 12.07.2024 whereby these appeals were decided by majority ("Short Order") the Election Commission of Pakistan ("Commission") purports to seek guidance on the point that "[i]n absence of a valid organizational structure of Pakistan Tehreek-i-Insaf (PTI), who will confirm the political affiliation of the returned candidates (MNAs and MPAs) on behalf of PTI, who have filed their statements in light of the Supreme Court Order [dated 12 July 2024]." We may note that other than a copy of the Short Order the application is bereft of any other documentation.

2. In reply to the above application, the PTI has filed CMA 8139/2024, to which have been annexed a number of documents, including correspondence between the PTI and the Commission. We have considered the material that has been placed before us.

3. By way of brief recapitulation, in paragraphs 4 and 5 of the Short Order it has been categorically declared that the lack or denial of an election symbol does not in any manner affect the constitutional and legal rights of a political party to participate in an election (whether general or bye) and to field candidates, and that for the purposes, and within the meaning, of paragraphs (d) and (e) of clause (6) of Article 51 and paragraph (c) of clause (3) of Article 106 of the Constitution of the Islamic Republic of Pakistan, PTI was and is a political party, which secured or won (the two terms being interchangeable) general seats in the National and Provincial Assemblies in the General Elections of 2024 as provided in that Order. These paragraphs, and the preceding paragraph 3 of the Short Order, sound on the constitutional plane, being the proper interpretation and understanding of the relevant constitutional provisions. The other paragraphs of the Short Order, including in particular paragraphs 8 and 10, are consequential upon what has been held and declared in the paragraphs just noted, and flow and emanate from, and give effect to, constitutional conclusions. All of these points will be explicated in the detailed reasons for the decision of the majority (i.e., the Short Order), which is the binding judgment of the Court.

4. Turning now to the specific clarification purportedly sought, the PTI in its reply has annexed a number of notices issued by the Commission to the PTI through Barrister Gohar Ali Khan, in which it has itself identified the latter as the Chairman of PTI. Furthermore, the certifications required to be issued by a political party (here the PTI) and filed with the Commission in terms of paragraphs 8 and 10 of the Short Order have, as per the record placed before us in relation to the returned candidates (now respectively MNAs and MPAs) in the National and the Sindh, Punjab and Khyber Pakhtunkhwa Provincial Assemblies, been issued under the signatures of Barrister Gohar Ali Khan and Mr. Omar Ayub Khan, who are identified therein as being, respectively, the Chairman and Secretary General of the PTI. These certifications are dated 18.07.2024, 24.07.2024 and 25.07.2024 and list, in each case, the particulars of the relevant returned candidate (now MNA or MPA as the case may be) and in particular the dates on which the declaration required of the candidate (again, in terms of paragraphs 8 and 10 of the Short Order) was filed with the Commission. These dates obviously all precede the respective dates of certification.

5. Putting together the record placed before us, and considering the same in the light of the Short Order, leaves in little doubt that the clarification sought by the Commission in terms of the CMA 7540/2024 is nothing more than a contrived device and the adoption of dilatory tactics, adopted to delay, defeat and obstruct implementation of the decision of the Court. This cannot be countenanced. Even on the application of elementary principles of law, the application filed by the Commission is misconceived. Having itself recognized Barrister Gohar Ali Khan as the Chairman of PTI, the Commission cannot now turn around and purport to seek guidance from the Court with regard to how the certifications are to be dealt with. The Commission cannot approbate and reprobate, taking whatever (shifting)

stance as it desires and as may seem to suit its immediate purposes for the moment. Furthermore, the Commission, even if one were to consider the application in the most sympathetic light, has apparently forgotten the well known *de facto* doctrine or rule, in terms of which the acts of a person who holds an office are protected even if there may be (and no such conclusion is reached here in relation to the PTI) any issue with the position *de jure*. It sufficed and the Commission was duty bound in terms of the Constitution to keep in mind that the admitted position (as stated before the Court during the hearing of the appeals) is that the PTI was, and is, an enlisted political party. This position was not only accepted and relied upon by us (eight Judges) but also by our three learned colleagues in minority (Hon'ble the Chief Justice, Justice Yahya Afridi and Justice Jamal Khan Mandokhail). Their lordship appear to have also accepted the validity of the party certificates (party tickets) issued by Barrister Gohar Ali Khan and thus his capacity to act for PTI as its Chairman. Furthermore, having itself issued notices to the PTI through Barrister Gohar Ali Khan as its Chairman, the Commission gave recognition to both the party and the office holder. That sufficed absolutely for purposes of the Short Order. It would be completely illogical to assume that a political party, a juristic person, is fully functional yet there are no natural persons who are either *de facto* or *de jure* performing its functions or running its affairs. Saying (as the Commission now in effect does through CMA 7540/2024) that a political party is an enlisted political party, fully functional for the purposes of its formation, yet there is no one that can perform its functions and run its affairs, amounts to blowing hot and cold in the same breath or, as noted, approbating and reprobating one and the same fact. There could have been no conceivable doubt that the certifications referred to above were correct and valid in terms of the Short Order and the continued denial and refusal of the Commission to accept the same, as and when filed, is constitutionally and legally incorrect and may expose the Commission to such further or other action as may be warranted in terms of the Constitution and the law.

6. But there is another, and more fundamental, aspect that must also be alluded to. It was categorically declared in paragraph 8 of the Short Order that on filing the requisite statement and its confirmation by the political party concerned, the seat secured by such candidate shall be forthwith *deemed* to be a seat secured by that political party. Therefore, upon submission of the declarations and certifications referred to above, the position of the returned candidates (now respectively MNAs and MPAs) immediately and *ipso facto* stood determined and fixed as a matter of law as on those dates and no subsequent act can alter what became, on the respective dates, past and closed transactions. As per the position so determined, the said returned candidates were and are the returned candidates of PTI and thus members of the parliamentary party of PTI in the National Assembly and Provincial Assemblies concerned, for all constitutional and legal purposes. The attempt by the Commission to confuse and cloud what is otherwise absolutely clear as a matter of the Constitution and the law must therefore be strongly deprecated. The list required to be issued by the Commission in terms of paragraph 8 (read with paragraph 10) of the Short Order is nothing more than a ministerial act, for the information and convenience of all concerned, and has no substantive effect. Nonetheless, the continued failure of, and refusal by, the Commission to perform this legally binding obligation may, as noted, have consequences. This obligation must be discharged forthwith.

7. With the above clarifications, the present application is disposed of. Office shall dispatch a copy of this order to the respective parties.

We may underline here that, as the Commission sought clarification of our short order dated 12 July 2024 in order to give effect to it, in terms of para 10 thereof, there was no legal requirement, nor did we

find it necessary, to hear the parties before clarifying our own order on the point regarding which the Commission was unclear. Thus, we provided the above clarification without issuing notice to, or hearing, the parties on the Commission's application.

(iii) Do Articles 51(6)(d) & (e) and 106(3)(c) of the Constitution refer to political parties that have contested for and won general seats or to all enlisted political parties?

59. This question was much debated during the arguments presented by the learned counsel for the parties. It arises from their two rival contentions. The learned counsel for SIC contended that Articles 51(6)(d) & (e) and 106(3)(c) of the Constitution refer to all enlisted political parties that have "secured" general seats, either directly through their nominated candidates or through the joining of independent returned candidates. Conversely, the learned counsel for the Commission and other respondents argued that Articles 51(6)(d) & (e) and 106(3)(c) of the Constitution refer only to those political parties that have contested and won one or more general seats directly through their nominated candidates.

60. The provisions of Articles 51(6)(d) & (e) and 106(3)(c) of the Constitution are identical in their wording; the only difference is in their application. Article 51(6)(d) & (e) relates and applies to the seats reserved for women and non-Muslims in the National Assembly, while Article 106(3)(c) relates and applies to such seats in the Provincial Assemblies. Therefore, we shall discuss and determine the meaning of the provisions of Article 51(6)(d) & (e), which shall also apply mutatis mutandis to Article 106(3)(c) of the Constitution. The provisions of Articles 51(6)(d) & (e), along with other relevant clauses of the same Article, are reproduced here for reading and reference:

> 51. (1) There shall be **three hundred and thirty-six seats** for members in the National Assembly, including seats reserved for women and non-Muslims.
>
> (2) ....
>
> (3) The seats in the National Assembly referred to in clause (1), except the seats mentioned in clause (4), shall be allocated to each Province and the Federal Capital as under: ––

	General Seats	**Women Seats**	**Total Seats**
Balochistan	16	4	20
Khyber Pakhtunkhwa	45	10	55
Punjab	141	32	173
Sindh	61	14	75
Federal Capital	3	-	3

Total	**266**	**60**	**326**

(3A) ....

(4) In addition to the number of seats referred to in clause (3), there shall be, in the National Assembly, **ten seats** reserved for non-Muslims.

(5) ....

(6) For the purpose of election to the National Assembly, –

(a) ....

(b) each Province shall be a single constituency for all seats reserved for women which are allocated to the respective Provinces under clause (3);

(c) the constituency for all seats reserved for non-Muslims shall be the whole country;

(d) members to the seats reserved for women which are allocated to a Province under clause (3) shall be elected in accordance with law through proportional representation system of political parties' lists of candidates on the basis of total number of general seats **secured** by each political party from the Province concerned in the National Assembly:

Provided that for the purpose of this paragraph the total number of general seats **won** by a political party shall **include** the independent returned candidate or candidates who may duly join such political party within three days of the publication in the official Gazette of the names of the returned candidates; and

(e) members to the seats reserved for non-Muslims shall be elected in accordance with law through proportional representation system of political parties' lists of candidates on the basis of total number of general seats **won** by each political party in the National Assembly:

Provided that for the purpose of this paragraph the total number of general seats **won** by a political party shall include the independent returned candidate or candidates who may duly join such political party within three days of the publication in the official Gazette of the names of the returned candidates.

(Emphasis added)

A plain, literal reading of the above provisions of Article 51 of the Constitution shows that there are three hundred and thirty-six (336) seats for members in the National Assembly, including sixty (60) seats reserved for women and ten (10) for non-Muslims. Each Province is a single and separate constituency for all seats reserved for women allocated to that Province in the National Assembly, while the constituency for all seats reserved for non-Muslims is the whole country. Members for both the seats reserved for women and non-Muslims are elected in accordance with the law through a proportional representation system of political parties from the lists of their candidates. However, because of the said difference in constituencies, members to the seats reserved for women are elected on the basis of the total number of general seats secured by each political party in the National Assembly from the Province concerned, while members to the seats reserved for non-Muslims are elected on the basis of the total number of general seats won by each political party in the whole National Assembly irrespective of

the Province from which it wins such general seats. The total number of general seats won by a political party, for the purpose of determining its share in the proportional representation system, includes independent returned candidate(s) who may duly join such political party within three days of the publication of the names of the returned candidates in the official Gazette.

61. In support of his contention, the learned counsel for SIC argued that the proviso to Article 51(6)(d), which allows independent returned candidates to join a political party, makes it possible for a political party that has not contested and won any general seats directly through its nominated candidates to "secure" some general seats from the Province concerned through the joining of independent returned candidates. He emphasised the use of the word "secured" in Article 51(6)(d) rather than the word "won".

62. We have observed that the main provisions of paragraph (e) of Article 51(6) and the proviso thereof, which pertains to seats reserved for non-Muslims, both use the word "won" instead of "secured". This paragraph is to be interpreted in conjunction with paragraph (d) of Article 51(6), which relates to seats reserved for women, as no argument was presented to us from any of the learned counsel for the parties suggesting that paragraph (e) should be interpreted differently from paragraph (d). Nor do we find any reason or logic to interpret them differently. The only difference between them, as noted above, is with regard to the constituencies: for the election of members to seats reserved for women, each Province is a single and separate constituency, while for the election of members to seats reserved for non-Muslims, the whole country is the constituency. Furthermore, the term "won" is used in the provisos to both paragraphs (d) and (e) of Article 51(6). Considering both these closely related provisions conjunctively and harmoniously, we find that the words "secured" and "won" have been used interchangeably. Thus, nothing turns on the use of the word "secured" in paragraph (d) of Article 51(6).

Presumption that same words used in a statute carry same meaning and different words different meanings, is not absolute.

63. Although it is reasonable to presume that the same meaning is implied by the use of the same word in every part of a statute or a section thereof and that a change of word denotes a change in meaning,

the presumption is neither absolute nor determinative in all cases. The context takes precedence over this presumption in ascertaining the meaning of words used in a statute, as even the statutory definitions of the words and expressions are subject to this consideration. Therefore, it is quite possible that the same word may be used in different meanings in a statute or in a section of the statute, or, conversely, different words may be used for the same meaning. The causes for this may be various, as pointed out by Maxwell and Bennion, including that the statute is a consolidating enactment where the words are derived from two or more earlier enactments, or the statute is compiled from different sources, or the statute is the product of many minds jointly, or the statute undergoes alterations and additions from various hands in the process of its enactment in the Legislature, etc.[48]

Words "secured" and "won" carry the same meaning in paragraph (d) of Article 51(6) and have been used interchangeably in its main provisions and proviso.

64. We find that a similar circumstance might have caused the use of different words in the main provisions of Article 51(6)(d) and the proviso thereto for the same meaning—the word "secured" in the main provisions of paragraph (d) of Article 51(6) and the word "won" in the proviso thereto—either because both have been compiled from different sources or because different minds produced each of them. The legislative intention to mean "won" by both expressions is explicitly evident from the use of the word "won" both in the main provisions of the closely related paragraph (e) of Article 51(6) as well as in the proviso thereto. Even the drafter of the proviso to paragraph (d) of Article 51(6) appears to have assumed that the word "won" had been used in the main provisions, as he referred to them as such in the proviso. Therefore, it can be concluded with reasonable certainty that the words "secured" and "won" carry the same meaning in paragraph (d) of Article 51(6) and have been used interchangeably in its main provisions and proviso.

65. Once we have concluded that the words "secured" and "won" carry the same meaning in paragraph (d) of Article 51(6) and have been used interchangeably in its main provisions and proviso, the word "won" being specific and clearer than the word "secured" must be our guide in

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[48] Maxwell on the Interpretation of Statutes (12th ed.) pp. 278-289 and Bennion on Statutory Interpretation (7th ed.) pp. 513-517. See also Craies on Legislation (9th ed.) pp. 693-694.

construing the provisions of the said Article. Because when a statute, or any other instrument, uses two different words for the same meaning and any ambiguity arises as to the meaning of one of those words, the word which is specific and clearer should guide the interpretation of the general and obscure word, not *vice versa*. So read, the main provisions of paragraph (d) of Article 51(6) clearly refer to political parties that have "won" general seats in the National Assembly from the Province concerned. The consequential point, which hardly requires extensive supporting arguments, emerges inevitably that political parties win general seats by contesting for such seats through their nominated candidates.

66. Learned counsel for SIC did not dispute that political parties win general seats by contesting for such seats through their nominated candidates. His argument was that the proviso equates a political party that secures general seats by the joining of independent returned candidates with one that wins such seats directly through its nominated candidates as mentioned in the main provisions of paragraph (d) of Article 51(d). We are not impressed by this argument as it misconceives the subject and object of the proviso.

The subject and object of the proviso to Article 51(6)(d)

67. The subject and focus of the proviso, as we understand it, is on the "general seats" i.e., "*general seats* won (secured) by a political party", and not on the *political party* winning (securing) such seats. Its object is to prescribe how the "total number of general seats won (secured) by a political party" is to be determined for the purpose of the paragraph, not to define or explain political parties for the purpose of the paragraph. Had the proviso stated that, for the purpose of this paragraph, the political party winning general seats shall include a political party securing general seats by the joining of independent returned candidates, the argument would have had some weight. But the language of the proviso is not to this effect. The proviso does not in any way extend or explain the meaning of the expression "political party" as used in the main provisions of the paragraph.

The proviso to Article 51(6)(d) is not a true proviso

68. A true proviso, as is well established, serves as an exception to the main provisions to which it is added. It excepts a particular case from

the rule stated in the main provisions by limiting or qualifying the applicability of the main provisions. Its effect is generally described as being that, but for the proviso, the main provisions would have included the subject matter of the proviso.[49] However, since it is not the form but the substance that matters, the clear language of both the main provisions and the proviso may establish, as held by this Court in *Hamdard Dawakhana*,[50] that the proviso is not a limiting or qualifying clause of the main provisions but is, in itself, a substantive provision. Therefore, the best principle is that irrespective of the label, the contents of the main provisions and the proviso are to be read and construed together to ascertain the intention of the Legislature.

69. For determining the true character of the proviso presently under consideration, we find the Privy Council's case of *Atwill*[51] very enlightening. In that case, their Lordships of the Privy Council overturned the decision of the High Court of Australia, which had treated the proviso in its classic meaning, i.e., limiting or qualifying what precedes it. Their Lordships of the Privy Council did not agree and remarked:

> While in many cases that is the function of a proviso, it is the substance and content of the enactment, not its form, which has to be considered, and that which is expressed to be a proviso may itself add to and not merely limit or qualify that which precedes it.
> ……
> In a strict sense the use of the words "Provided that" in section 102(a) may also be disregarded as inapt. The meaning of that provision and the proviso would be the same if instead of the words "Provided that" there had appeared the word "and" … and to ascertain the true effect of the provision, the second part, that is to say, the proviso, is complementary and necessary in order to ascertain the full intention of the Legislature.

To strengthen their opinion, their Lordships cited the following observation of Lord Loreburn, L.C., made in the case of *Taff Vale Railway Company*:[52]

> But it is also true that the latter half of it, though in form a proviso, is in substance a fresh enactment, adding to and not merely qualifying that which goes before.

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[49] East & West Steamship Co. v. Pakistan PLD 1958 S C 41 (5MB) per Cornelius, J.; Pramatha Nath v. Kamir Mondal PLD 1965 SC 434; Hamdard Dawakhana v. C.I.T. PLD 1980 SC 84 (5MB); Kadir Bux v. Province of Sind 1982 SCMR 582 (5MB); K.E.S.C. Progressive Workers' Union v. K.E.S.C. Labour Union 1991 SCMR 888 (4MB) and Nawab Bibi v. Allah Ditta 1998 SCMR 2381.

[50] Hamdard Dawakhana v. C.I.T. PLD 1980 SC 84 (5MB). See also C.I.T. v. M/s Phillips Holzman PLD 1968 Kar. 95 (FB) and PIFFA v. Province of Sindh 2017 PTD 1 (DB).

[51] Commissioner of Stamp Duties v. Atwill [1973] AC 558.

[52] Rhondda Urban District Council v. Taff Vale Railway Company [1909] AC 253.

Their Lordships also cited extensively similar observations made by Viscount Maugham and Lord Wright in the case of *Jennings*,[53] on determining the true meaning of a proviso.

70. We find that the observations made by their Lordships of the Privy Council in *Atwill* fully apply to the proviso presently under consideration. In our opinion, the meaning of the main provisions of paragraph (d) of Article 51(6) and the proviso thereto would be the same if instead of the words "Provided that", there had appeared the word "and". In our considered opinion, to determine the true effect of the main provisions as per the intention of the Legislature, the second part, i.e., the proviso, is to be read as complementary to, not limiting or qualifying, the first part, i.e., the main provisions. This approach is also consistent with the principle stated above that irrespective of the label, the contents of the main provisions and the proviso are to be read and construed together to ascertain the intention of the Legislature.

71. We have determined above that the main provisions of paragraph (d) of Article 51(6) refer to political parties that have won general seats in the National Assembly from the Province concerned through their nominated candidates. The proviso stipulates that for the purpose of this paragraph, the total number of general seats won by a political party shall include any independent returned candidate or candidates who may duly join such political party. Without the proviso, the general seats won by independent returned candidates could not be considered as seats won by a political party. Therefore, the proviso, in the words of Lord Loreburn, 'is in substance a fresh enactment, adding to and not merely [limiting or] qualifying that which goes before' in the main provisions. Since the proviso does not except anything from the main provisions of paragraph (d) of Article 51(6) by limiting or qualifying them but rather adds to them, it is not a true proviso but a substantive provision that enacts a matter which would not otherwise have been covered by the main provisions of the paragraph.

72. However, the latter part of the proviso is, in the true sense, a proviso as it qualifies that which goes before, i.e., including the seats of independent returned candidates in the seats won by the political party to which they join, for the purpose of the paragraph. According to this

[53] Jennings v. Kelly [1940] AC 206.

part, for the joining to have the stipulated effect, it must occur within three days of the publication of the names of the returned candidates in the official Gazette. It thus excludes any joining of independent returned candidates made beyond that period from having effect for the purpose of the paragraph.

The effect of the use of the word "such" with "political party" in the latter part of the proviso

73. It is also a general rule of literal construction of statutes that 'a qualifying or relative word, phrase, or clause, such as "which", "said" and "such", is to be construed as applying to the word, phrase or clause next preceding, or as is frequently stated, to the next preceding antecedent, and not as extending to or including others more remote, unless a contrary intention appears.'[54]

74. The latter part of the proviso uses the qualifying term "such political party", to which the independent returned candidate or candidates may duly join. When we apply the above general rule to this qualifying term, it becomes evident that it refers to the term "a political party" next preceding, where the noun "political party" has been used to denote a political party that has won general seats. It thus inevitably follows that for the purpose of paragraph (d) of Article 51(6) and within the scope of the proviso, the independent returned candidate or candidates may duly join, or be allowed to join, only such a political party that has won one or more general seats through its nominated candidates in the National Assembly from the Province concerned.

Harmonious reading of Article 51(6(d) with Article 63A(2)

75. A constitution, as defined by Cooley, is 'the fundamental law of a state, containing the principles upon which the government is founded, regulating the division of the sovereign powers, and directing to what persons each of these powers is to be confined, and the manner in which it is to be exercised.'[55] Therefore, it is a fundamental principle of constitutional construction, well entrenched in our constitutional jurisprudence, that a constitution must be construed as an organic whole, harmonising its various parts, particularly those closely interlinked, and trying to give due effect to all of them, so as to make it an effective and efficacious instrument for the smooth and good

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[54] Maxwell on the Interpretation of Statutes (12th ed.) p. 331.
[55] Cooley, A treatise on the Constitutional Limitations, (1st ed.) p. 2.

governance of the state—one of the ultimate objectives sought to be achieved by it.[56]

76. In view of this principle of constitutional construction, the learned Attorney-General for Pakistan drew our attention to the provisions of clause (2) of Article 63A, which defines a member of a Parliamentary Party and also sheds light on how a political party constitutes a Parliamentary Party. Relying upon these provisions of Article 63A, he argued that only a political party whose nominated candidates become members of a House constitutes a Parliamentary Party. Therefore, he contended, the same meaning ought to be given to the expression 'political party' in clause (d) of Article 51(6), to harmonise both provisions with each other.

77. We have given anxious consideration to his contention and found it very persuasive and harmonious with the view which we are inclined to take on the meaning of the term "political party" used in Article 51(6)(d). The provisions of clause (2) of Article 63A are reproduced here for ready reference:

> (2) A member of a House shall be deemed to be a member of a Parliamentary Party if he, having been elected as a candidate or nominee of a political party which constitutes the Parliamentary Party in the House or, having been elected otherwise than as a candidate or nominee of a political party, has become a member of such Parliamentary Party after such election by means of a declaration in writing.

A bare reading of the above provisions shows that a member of a House becomes a member of a Parliamentary Party in two cases: (i) if he has been elected as a candidate or nominee of a political party which constitutes the Parliamentary Party, he automatically becomes a member of such Parliamentary Party, or (ii) if he, having been elected as an independent candidate (i.e., otherwise than as a candidate or nominee of a political party), joins such Parliamentary Party by means of a declaration in writing.

78. The qualifying term "such Parliamentary Party", as discussed above, refers to the term "Parliamentary Party" next preceding, where the noun "Parliamentary Party" has been used to denote a political party

[56] Presidential Reference PLD 1957 SC 219; Fazlul Quader Chowdhry v. Abdul Haque PLD 1963 SC 486; State v. Zia-ur-Rahman PLD 1973 SC 49; Federation of Pakistan v. Saeed Ahmad PLD 1974 SC 151; Nawaz Sharif v. President of Pakistan PLD 1993 SC 473; Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324; Shahid Nabi v. Chief Election Commissioner PLD 1997 SC 32; Wukala Mahaz v. Federation of Pakistan PLD 1998 SC 1263; Munir Hussain Bhatti v. Federation of Pakistan PLD 2011 SC 308 + 407; Presidential Reference PLD 2013 SC 279; Judges' Pension case PLD 2013 SC 829 and D.B.A., Rawalpindi v. Federation of Pakistan PLD 2015 SC 401.

whose candidate or nominee has been elected as a member of a House. It is thus evident that in the first case, one action of becoming a member of a House as a candidate or nominee of a political party produces two results: (i) it makes a political party, whose candidate or nominee is elected as a member of a House, a Parliamentary Party, and (ii) it makes that member of a House, a member of such Parliamentary Party. A member of a House elected as an independent candidate can become a member of a Parliamentary Party by joining only such a political party that constitutes a Parliamentary Party, not a political party that does not constitute a Parliamentary Party. Notwithstanding joining a political party of latter type, a member of a House shall not become a member of a Parliamentary Party and shall remain an independent member of a House for the purpose of all parliamentary proceedings.

Answer to question (iii) and its applicability to SIC and PTI

79. Thus, both the standalone reading of the provisions of Articles 51(6)(d) and (e), as well as their conjunctive and harmonious reading with the provisions of Article 63A(2), lead to one and only irresistible conclusion in terms of which this question is answered: Article 51(6)(d) of the Constitution refers to political parties that have contested for and won one or more general seats in the National Assembly from the Province concerned, not to all enlisted political parties. Similarly, Article 51(6)(e) of the Constitution refers to political parties that have contested for and won one or more general seats in the National Assembly from the whole country, i.e., from any of the Provinces or the Federal Capital.

80. Since SIC has not contested for and won one or more general seats in the National Assembly from the Provinces concerned or from anywhere in the country, it is not such a political party to which any of the independent returned candidates can join, for the purposes of paragraphs (d) and (e) of Article 51(6) of the Constitution. Therefore, the act of joining it by some returned candidates has not produced any result, and the legal status of such returned candidates remains the same as it was before such an act. As SIC has not won general seats, it is not entitled to allocation of the disputed reserved seats. However, as shall be mentioned later in detail, it has been determined by eleven members of the Bench with varying figures that PTI has contested for and won some general seats in the National Assembly from the Provinces

concerned, and it is a political party entitled to allocation of the disputed reserved seats under paragraphs (d) and (e) of Article 51(6) of the Constitution.

(iv) How is the proportional representation of a political party to be calculated for the allocation of reserved seats under Articles 51(6)(d) & (e) and 106(3)(c) of the Constitution?

81. This was perhaps the most debated and, if we may say so, the most challenging question involved in the case. Because of the illegal mentioning of contesting candidates of a political party (PTI) in the list of contesting candidates (Form-33) and its returned candidates as independent returned candidates in the Section-98 Notification, as held above, an unusual situation has arisen in a parliamentary democracy. This situation seemingly pits one of the fundamental principles of democracy—that the voice of the electorate should be truly reflected in the composition of the legislative bodies—against the constitutional objective of ensuring adequate representation of women and minorities (non-Muslims) in such bodies.[57] However, with the answers provided to questions (i), (ii) and (iii) above, it has become evident that this conflict does not actually arise.

Position of political parties and independent members of Parliament in a parliamentary democracy

82. Our Constitution, as held by this Court in *Benazir Bhutto*,[58] establishes a parliamentary democracy with a cabinet form of government, which is primarily composed of the representatives of the political party in majority. Therefore, the cabinet form of government is essentially a government of the political party in majority, or of political parties in the case of a coalition government. The political party or parties that form the Government are the connecting link between the Government (Executive) and the people, and between the Parliament (Legislature) and the people. They are the effective instrumentalities by which the will of the people is made vocal, and the enactment of laws and the governance of the country in accordance therewith made possible. Political parties form the bedrock of representation in a parliamentary

[57] The Constitution, Article 34: Steps shall be taken to ensure full participation of women in all spheres of national life. Article 36: The State shall safeguard the legitimate rights and interests of minorities, including their due representation in the Federal and Provincial services.
[58] Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416.

democracy and are fundamental, constitutive components of representation, not mere accessories.[59]

83. In the usual course of a parliamentary democracy, competing political parties, advocating for different manifestos, make the parliamentary election meaningful by giving voters a choice. They convert the results of a parliamentary election into a government The party or parties in the majority form the Government, while the party or parties in the minority serve as a fervent opposition. The opposition criticises the policies and actions of the Government and thus calls the Government to justify its policies and actions, thereby making it accountable to the people. Therefore, political parties are institutions of great importance in a parliamentary democracy and a vital feature of a representative government.[60]

84. On the other hand, persons elected as members of a House of Parliament (Legislature) in their personal capacities, as independent candidates, in the words of Nasim Hassan Shah, J., 'just toss around on the political scene, rudderless and without a destination'.[61] It is only when they join a political party that they become a force capable of exercising some influence through their activities for the welfare of the constituencies and the public they represent in Parliament. They, as members of a political party, and not as independent members of Parliament, can best achieve the objective of effectively representing their constituencies in Parliament—whether in legislative business and forming executive policies or taking executive actions if they become part of a party in government, or by holding the Government accountable for its policies and actions if they are part of a party in opposition.

85. The above position of political parties and that of the independent members of Parliament in a parliamentary democracy, such as ours, guides our understanding of the procedure prescribed for the allocation of the reserved seats.

86. As evident from the above-cited provisions of Article 51 of the Constitution, clause (3) thereof allocates the specific number of seats reserved for women to each Province and clause (6)(d) provides the

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[59] Nadia Urbinati, Representative Democracy: Principles and Genealogy (Chicago, Ill: University of Chicago Press, 2010).
[60] Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416.
[61] Ibid.

procedure for electing the members to those seats. A joint reading of both clauses makes it clear that the members to all the reserved seats allocated to a Province under clause (3) are to be elected under clause (6)(d) of Article 51 as per the proportional representation system of political parties from the lists of their candidates on the basis of total number of general seats won by each political party, and no reserved seat shall ordinarily remain vacant. Although the arguments before us presented divergent contentions on the meaning of the expression "political party" used in clause (6)(d), none disputed the proposition that only political parties, not independent returned candidates, are entitled to the allocation of the reserved seats. Independent returned candidates can only be counted towards the proportional representation if they act in accordance with the proviso and join a political party, in which case their seats shall be counted as the seats of the political parties to which they join for the purpose of determining the proportional representation of political parties.

Proportional representation system of political parties is a composite expression

87. A composite expression, as Bennion writes,[62] must be construed as a whole. While a certain meaning can be collected by taking each word in turn and then combining their several meanings, but it does not follow that this is the true meaning of the whole phrase. Each word in the phrase may modify the meaning of the others, giving the whole its own meaning. It, therefore, certainly is not a satisfactory method of arriving at the meaning of a compound phrase to sever it into several parts, as observed by Lord Halsbury,[63] and to construe it by the separate meaning of each of such parts when severed. The intention of the Legislature is to be discovered by taking the words as they occur—in the combination in which they are placed—not by breaking up a compound expression and weighing the words separately.[64] If a composite expression is comprehensive, it is unnecessary to determine the dividing line between different terms used in the expression.

88. The provisions of paragraph (d) of Article 51(6), when read in light of the above principles of interpreting a composite expression, remove the confusion that dwelled in the minds of some of us regarding the meaning

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[62] Bennion on Statutory Interpretation (7th ed.) pp. 533-535.
[63] Mersey Docks and Harbour Board v. Henderson Bros. (1888) 13 App Cas 595.
[64] Savoy Overseers v. Art Union of London [1896] AC 296 per Lord MacNaghton.

and scope of the "proportional representation system" envisaged by that paragraph. The complete and composite expression used in the said paragraph is "proportional representation system of political parties". The expression "lists of candidates", annexed to it with an apostrophe, only provides the mechanism for electing members to the reserved seats from the lists of candidates of the political parties. So read, the provisions of paragraph (d) of Article 51(6) become consistent with the above-stated legal position that the members to all the reserved seats allocated to a Province under clause (3) are to be elected under clause (6)(d) of Article 51 as per the proportional representation system of political parties from the lists of their candidates on the basis of total number of general seats won by each political party, ensuring that no reserved seat ordinarily remains vacant.

Constitutional objective of providing seats reserved for women and non-Muslims

89. The Principles of Policy provided in Chapter 2 of Part II of the Constitution, often referred to as the conscience of the Constitution,[65] require that steps be taken to ensure the full participation of women in all spheres of national life and to safeguard the legitimate rights and interests of minorities (non-Muslims), including their due representation in the Federal and Provincial services.[66] To actualise this constitutional objective, a certain number of seats have been reserved in the National Assembly and Provincial Assemblies for women and non-Muslims (minorities). This constitutional affirmative action aims to promote gender and minority-inclusive representation in the legislative bodies, allowing for the voices of various segments of society to be heard and considered in the law-making process. It ensures that the legislative bodies reflect the diverse perspectives and interests of the population.

90. The principle of proportional representation of political parties, according to which the members to the reserved seats are elected, aims to reflect the electoral support for political parties in the composition of the legislative bodies. By distributing the reserved seats among political parties based on the general seats won by them, the legislative bodies remain representative of the electorate's choice. Adopting an interpretation of paragraphs (d) and (e) of Article 51(6) that would result

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[65] Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416 and Ghulam Qasim v. Razia Begum PLD 2021 SC 812.
[66] The Constitution, Articles 34 and 36.

in holding certain reserved seats vacant would lead to a form of disenfranchisement, where the electorate's mandate is not fully realised in terms of gender and minority representation, and thus frustrate the constitutional objective of providing for such reserved seats.

91. Rule 95(2) of the Elections Rules, which provides that the seats won by independent candidates, other than those who join a political party, shall be excluded for the purpose of determining the share of each political party, is thus found consistent with the constitutional provisions, as it ensures the constitutional objective that no reserved seat should ordinarily remain vacant.

Answer to question (iv), and its applicability to PTI and other political parties

92. In view of the above, question (iv) is answered as follows: for the purpose of allocating reserved seats under Articles 51(6)(d) & (e), the proportional representation of political parties is to be calculated on the basis of total number of general seats won by each political party, including the seats of independent returned candidates who join it, but excluding the seats of other independent returned candidates. The Commission is to calculate the share of proportional representation of PTI and other political parties in the reserved seats accordingly.

Denial of due share of proportional representation in the reserved seats violates the fundamental rights of the political party and the electorate guaranteed by Articles 17(2) and 19 of the Constitution.

93. Before parting with this part of the judgment, we want to underline that the aforementioned principle of holistic and harmonious reading of closely interlinked provisions of the Constitution requires that the provisions of paragraphs (d) and (e) of Article 51 are to be read not only in conjunction with Article 63A(2) but also with Article 17(2) of the Constitution, which is also closely related thereto. As aforementioned, this Court has held in the cases of *Benazir Bhutto* and *Nawaz Sharif* that the right to form a political party guaranteed by Article 17(2) includes the right to participate in and contest elections as a political party, and the right to form the Government and complete the prescribed tenure if the members of the political party constitute the requisite majority. We find that the right to so many of the reserved seats that are proportionate to the general seats won by a political party is also an integral part of the right to form a political party, as this right also gives the "life and

substance" to the said named fundamental right. Therefore, denial of the right to reserved seats proportionate to the general seats won by it would violate the fundamental rights of a political party guaranteed by Article 17(2) as well as the fundamental right to vote of the electorate that have voted for such political party guaranteed by Article19 of the Constitution.

What relief would serve the ends of justice?

94. Having thus answered the questions of law, we shall now examine what relief would serve the ends of justice in the peculiar facts and circumstances of this case. When we speak of justice, we have the intuitive sense of putting things aright and in their appropriate place, of re-establishing a lost harmony and equilibrium, of remaining true to the nature of things, of giving each his due.[67] In this regard, we are also guided by the following golden words of Kaikaus, J., written in *Imtiaz Ahmad*:[68]

> Any [justice] system, which by giving effect to the form and not to the substance defeats substantive rights, is defective to that extent. The ideal must always be a [justice] system that gives to every person what is his.

His lordship further observed:

> I am unable to place the mistakes committed by the Administration [public functionaries] on the same footing as mere accidents. The difference is that in one case the harm caused to a party being the result of a mistake committed by the Administration there is an obligation on our part to undo it as far as that is possible. ... In relation to Courts there is a well-known saying that the act of Court will not prejudice anybody. I do not see why the principle of this maxim does not apply to the whole machinery of the Administration [public functionaries] of which the Courts are only a part. No mistake committed by this machinery should prejudice any person as far as that can be helped. If the mistake of the election authorities is like a misfortune why are elections set aside on the ground of irregularities committed by the officers who conduct the elections? Why does not the law regard these irregularities like events, which have happened and cannot be helped? It cannot be the intention of the law that rights of persons should be affected by the mistakes committed by public officers. ... We must put the parties in the same position, as they would have been if no mistake had been committed by the administration as long as we can do that.
>
> *(Emphasis added)*

The above principle of law, though enunciated by his Lordship in a dissenting judgment, has appealed "to the brooding spirit of the law, to the intelligence of a future day" and has now become well established and well entrenched in our jurisprudence.[69]

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[67] Seyyed Hossein Nasr, The Sacred Foundations of Justice in Islam.
[68] Imtiaz Ahmad v. Ghulam Ali PLD 1963 SC 382.
[69] Manager, J&K State Property v. Khuda Yar PLD 1975 SC 678; Sherin v. Fazal Muhammad 1995 SCMR 584; Ladha Khan v. Bhiranwan 2001 SCMR 533; Rauf Kadri v. SBP PLD 2002 SC 1111; Jawad Mir v. Haroon Mirza PLD 2007 SC 472 (5MB); Zulfiqar v. Shahdat Khan PLD 2007 SC 582; Razia Jafar v. Govt. of Balochistan 2007 SCMR 1256; Yasin v. Govt. of Punjab 2007 SCMR 1769; Saddaqat Khan v. Collector Land Acquisition PLD 2010 SC

95. We find that the said principle is not only premised on two maxims: (i) *actus curiae neminem gravabit* (an act of court [public functionary] shall prejudice no one) and (ii) *ex debito justitiae* (as a debt of justice), but are also rooted in the constitutional provisions of Article 4 of the Constitution. Under Article 4, it is an inalienable right of every citizen, and of every other person for the time being within Pakistan, to enjoy the protection of law and to be treated in accordance with law. This constitutional inalienable right casts a corresponding constitutional inalienable duty on all public functionaries of Pakistan to treat every citizen and every other person for the time being within Pakistan in accordance with law. From this constitutional right and the corresponding constitutional obligation, the principle emerges, in our opinion, that no person should be made to suffer or be prejudiced by an unlawful act or omission of public functionaries. If any person suffers the loss of any right or benefit because of an unlawful act or omission of a public functionary, he is entitled, by reason of an obligation of justice, to be restored to that right or benefit and put in the same position, insofar as is possible, as he would have been if such unlawful act or omission had not been made by the public functionary.

Unlawful acts and omissions of the Returning Officers and the Commission that caused prejudice to PTI

96. In the present case, as discussed and determined above, the unlawful acts and omissions of the Returning Officers and the Commission, which have caused confusion and prejudice to PTI, its candidates and the electorate who voted for PTI, are numerous and include the following:

(i) the wrong omission to clarify in its order dated 22 December 2023 by the Commission that PTI is an enlisted and functioning political party notwithstanding the rejection of its intra-party elections and non-allocation an election symbol;

(ii) the wrong omission to clarify in its order dated 13 January 2024 by the Commission that PTI is an enlisted and functioning political party notwithstanding that it has not been allocated an election symbol, and that the candidates nominated by it are to be treated and mentioned as PTI candidates, not as independent candidates in the whole election process;

878 (6MB); Ijaz Iqbal v. Faisalabad Chamber of Commerce PLD 1983 Lah 1 and Ahmad Latif Qureshi v. Controller of Examination PLD 1994 Lah 3.

> (ii) the wrong mentioning of the status of PTI candidates by the Returning Officers as independent candidates in the list of contesting candidates (Form-33);
>
> (iii) the wrong decision on the application of a PTI candidate (Mr. Raja) by the Commission in rejecting his claim to be mentioned as a PTI candidate in the list of contesting candidates (Form-33);
>
> (iv) the wrong mentioning of PTI returned candidates by the Commission as independent returned candidates in the Section-98 Notification; and
>
> (v) the wrong acceptance of the joining of some returned candidates to SIC by the Commission, despite that it was not such a political party to which an independent returned candidate could join under the proviso to paragraphs (d) & (e) of Article 51(6) and paragraph (c) of Article 106(3), or under clause (2) of Article 63A of the Constitution.

In addition to the above, the making of an unconstitutional rule, i.e., the Explanation to Rule 94 of the Elections Rules, by the Commission which disentitles a political party to which an election symbol is not allotted from the allocation of reserved seats despite its winning the general seats, also contributed to causing confusion and prejudice to PTI, its candidates and the electorate. Further, it is observed with respect, the decision by this Court on 13 January 2024 in the matter of intra-party elections of PTI on the very day that was fixed for submission of party certificates (party tickets) and allotment of the election symbols as per the Election Programme, and that too without clarifying that the said decision did not affect the electoral status of PTI and its candidates, also contributed in causing confusing and prejudice to PTI, its candidates and the electorate.

The scope of powers of the Commission under Article 218(3) and of the Supreme Court under Article 187(1) of the Constitution.

97. In view of the principle stated above, PTI, its candidates and the electorate should not be made to suffer or be prejudiced by the unlawful acts or omissions of public functionaries, namely the Returning Officers and the Commission. Given that they have been deprived of their constitutional right to proportional representation in the reserved seats due to these unlawful acts and omissions, they are entitled, by virtue of an obligation of justice (*ex debito justitiae*), to be restored to that right and placed, insofar as possible, in the same position they would have been if such unlawful acts and omissions had not occurred. However,

there is no specific provision in the Constitution or the Elections Act to address this situation and rectify the wrong.

98. Since the Legislature, while enacting a law on a subject, cannot foresee and cover all unforeseen matters or issues that may arise in the administration of such law in practice, it often enacts a provision that confers upon a specified authority the general power to address such unforeseen matters or issues. In the Elections Act, such a general power is conferred upon the Commission by Sections 4 and 8(c).[70] These statutory general powers are conferred upon the Commission, in addition to the similar constitutional general power vested in it under Article 218(3)[71] of the Constitution. Both these statutory and constitutional general powers are to be invoked and exercised by the Commission, as held by this Court in *Zulfiqar Bhatti*,[72] when there is no specific provision of law on the matter or issue that needs to be addressed.

99. Similar is the scope of the constitutional general power of the Supreme Court under Article 187(1)[73] of the Constitution: it is to be invoked and exercised by the Court to do complete justice in any case when there is no specific provision of law that covers or addresses the matter or issue involved.[74] While exercising such general powers, the Commission or the Court must, however, make an endeavour to adhere to the spirit and substance of the provisions of law that, although not covering the matter or issue, are closely related to it, so that the legislative intent may be given effect to the maximum extent possible.

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[70] **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.
(2) …
(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.

8. Power of Commission to ensure fair election. — Save as otherwise provided, the Commission may— ….. (c) issue such instructions, exercise such powers and make such consequential orders as may in its opinion, be necessary for ensuring that an election is conducted honestly, justly, fairly and in accordance with the provisions of this Act and the Rules.

[71] **Article 218(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 that the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against.

[72] Zulfiqar Bhatti v. ECP 2024 SCMR 997.

[73] **Article 187(1):** Subject to clause (2) of Article 175, the Supreme Court shall have power to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it, including an order for the purpose of securing the attendance of any person or the discovery or production of any document.

[74] Dossani Travels v. Travels Shop PLD 2014 SC 1: "The rationale [of power under Article 187(1)] appears to be that in situations which cannot be resolved by existing provisions of law and warrant an intervention by the Court, it may pass an order to ensure 'complete justice'."

100. In order to invoke and exercise the general power vested in this Court under Article 187(1) of the Constitution to address the matter involved in the present case, we have also been guided by the observations made by a six-member larger Bench of this Court in *Saddaqat Khan*.[75] After a detailed analysis of several previous cases, the larger Bench reached and announced the following conclusion:

> The ultimate goal sought to be achieved by the courts was thus to do complete justice between the parties and to ensure that the rights were delivered to those to whom they belonged and no hurdles were ever considered strong enough to detract the Courts from reaching the said end. Incorporation of provisions such as section 151, C.P.C.; section 561-A in the Cr.P.C.; revisional powers of wide amplitude exercisable even suo-motu under section 115 of the C.P.C. and section 439 of the Cr.P.C.; various provisions of the like contained in Order XLI, rule 4 and Order XLI, rule 33 of the C.P.C.; the provisions of Order XXXIII, rule 5 of the Supreme Court Rules of 1980; suo motu powers exercisable under Article 184(3) of the Constitution and provisions of Article 187 of the Constitution, are some of the examples which could be quoted as having been made available to the Courts at all levels to surmount any impediments which a Court might confront in the path of doing complete justice.

The ultimate objective sought to be achieved by laws, the courts and the justice system, as observed by Kaikaus, J., and as declared by the larger Bench, is to dispense justice by ensuring that rights are delivered to those to whom they belong; let justice be done, though the heavens fall (*fiat justitia, ruat caelum*). Thus, the power under Article 187(1) of the Constitution is focused on achieving and prioritizing fairness to ensure complete justice in any case.

Point of divergence between eight Judges and three Judges

101. Up to this point, in invoking and exercising the general power of this Court vested in Article 187(1) of the Constitution, we (the eight Judges) and the three Judges (Hon'ble the Chief Justice, Justice Yahya Afridi, and Justice Jamal Khan Mandokhail) were largely aligned. Unfortunately, from this point onward, despite several mutual discussions on various aspects of the matter, we could not reach a consensus on what ultimate relief would be "necessary for doing complete justice" in the present case.

102. We may underscore here what Chief Justice Dickson said about the working of the Supreme Court of Canada: "The people of Canada are not entitled to nine separate votes [of the nine Supreme Court Justices]. They are entitled to nine votes after each Justice has listened to and

[75] Saddaqat Khan v. Collector Land Acquisition PLD 2010 SC 878.

sincerely considered the views of the other eight."[76] Similarly, we believe, the people of Pakistan are entitled to a decision from a Bench of this Court after each Judge on the Bench has listened to and sincerely considered the views of the others. Judges need not always see eye to eye and may ultimately disagree, but the possibility of disagreement does not absolve them from engaging in a free and frank discussion before rendering their final opinion. Their professional responsibility to deliver a well-considered decision requires them to lay out both their own position and the defects they see in their colleagues' positions with utter frankness. Egos may be bruised, tempers tempted, yet all must pursue the process with respect and civility.

103. Guided by the above principle, we, in fulfilling our professional responsibility to deliver a well-considered decision on the matter involved in the present case, laid out both our own position and, with respect, the defects we saw in our colleagues' positions. We did listen to and sincerely consider their views as well. Unfortunately, neither could we convince them of our view, nor could we bring ourselves to agree with theirs.

104. We all (us eight and our three colleagues) agreed that due to unlawful acts and omissions of the Returning Officers and the Commission, PTI, its candidates and the electorate have suffered the loss of some of their constitutional and statutory rights, particularly their right to proportional representation in the reserved seats. However, we differed on how we could, by virtue of an obligation of justice (*ex debito justitiae*), restore them to that right and place them, insofar as possible, in the same position they would have been if such unlawful acts and omissions had not occurred.

105. Our learned colleagues (Hon'ble the Chief Justice and Justice Jamal Khan Mandokhail) have formed the opinion that "the candidates who had submitted their nomination papers declaring that they belonged to PTI and had not filed a document showing affiliation with another political party before the last date of withdrawal of the nomination papers, should have been treated[77]" as PTI returned candidates. Whereas our learned colleague (Justice Yahya Afridi) is of the view that "[a] candidate for a seat in the National Assembly or the Provincial Assembly,

[76] Chief Justice McLachlin reported this in her speech, Judging in a Democratic State (2004).
[77] Para 5 of their Lordships' short order.

who in his/her nomination paper has declared on oath to belong to PTI and duly submitted a certificate of the same political party confirming that he/she is the nominated candidate of PTI for the respective constituency, shall remain so,...unless he/she submitted a written declaration to the Election Commission of Pakistan or Returning Officer to be treated as the candidate of another political party or as an independent candidate[78]". We respect their opinions but disagree.

106. 'The logic of words should yield to the logic of realities'.[79] With great respect, our learned colleagues have assumed and accepted that PTI candidates filed declarations of their affiliation with another political party (PTI-Nazriati), which were not even accepted by the Returning Officers under the order of the Commission, by their own free will uninfluenced by any constraint of the circumstances. Our conscience and understanding of the realities of the case do not allow us to assume and accept this position. We are completely at a loss to understand the logic, other than the constraint of the circumstances, as to why a candidate of a national-level political party (PTI), which had once formed the Federal Government and two Provincial Governments, would supersede his candidature of that party (PTI) with a party (PTI-Nazriati) whose name had not even been heard by most of the electorate, or why he would leave the candidature of that party (PTI) and become an independent candidate, by his own free will. Had it been a case of one or two candidates, we might have imagined some plausibility of free will in their actions. However, we cannot assume by any stretch of the imagination that hundreds of candidates for the National Assembly and the Provincial Assemblies would act in such a manner by their own free will, not under the constraints of the circumstances created by the unlawful acts and omissions of the public functionaries—the Returning Officers and the Commission. Therefore, we have found that notwithstanding their subsequent filing of a declaration to be treated as candidates of PTI-Nazriati or as independent candidates, 39 returned candidates, out of the list of 80 submitted by the Commission, who had either filed party certificates (party tickets) of PTI or declared their

[78] para 2 (i) of his Lordship's short order.
[79] Di Santo v. Pennsylvania (1927) 273 US 34 per Justice Brandeis, approvingly cited in Manager, J&K State Property v. Khuda Yar PLD 1975 SC 678.

affiliation with PTI in their nomination forms or statutory declarations/affidavits, are the returned candidates of PTI.

107. Similar is the position of those candidates whom our learned colleagues have treated as independent returned candidates because they had not mentioned themselves as belonging to PTI in their nomination papers. In respect of these candidates, who are 41 according to the record produced by the Commission, our learned colleagues have presumed that they were independent candidates, and that none of them has appeared before the Court to rebut that presumption.

108. We must say that we tried hard to understand how, in a parliamentary democracy based on a political parties system, as underlined by this Court in *Benazir Bhutto*, such a large number of candidates to the seats in the National Assembly and the Provincial Assemblies could inspire and win the confidence of the electorate as independents. No satisfactory answer to this query was presented before us on behalf of the Commission and other respondents. The assertion of SIC and PTI that they were also PTI candidates and the electorate voted for them for their being PTI candidates though appears satisfactory but is not supported by the record presently before us. Therefore, it is the most challenging matter involved in the case where the scales of the requirements of law and of justice are to be justly, fairly and reasonably balanced.

109. We do not find any force in the argument that those returned candidates have not appeared before us to rebut the presumption accepted by our learned colleagues, because we find that they are before us speaking through SIC. What SIC says on facts is the version of those returned candidates—SIC speaks for them before us. Both SIC and PTI have narrated the same facts and circumstances that led to the mentioning of their status as independent candidates in the nomination papers. Both have claimed that they were also PTI candidates and that the electorate voted for them for being PTI candidates; they, in their individual capacities, did not have such voting support of the electorate.

110. As held above, while exercising their general powers under Article 218(3) and Article 187(1) of the Constitution respectively, the Commission and this Court must endeavour to adhere to the spirit and

substance of the provisions of law that, although not explicitly covering the matter or issue, are closely related to it, so that the legislative intent may be given effect to the maximum extent possible. According to Section 66 of the Elections Act, two elements make a person the candidate of a political party: (i) the candidate's own declaration that he belongs to that party, and (ii) the party's certificate (party ticket) nominating him as its candidate. It is thus a matter between the candidate and the party to which he claims affiliation. No consent or authorisation from any third person or authority is required to establish their relationship and the candidate's status. This is the substance and spirit of Section 66 of the Elections Act.

111. Therefore, we find it more just, fair and reasonable that this fact should be verified and then acted upon by adhering to the substance and spirit of Section 66 of the Elections Act so that the legislative intent may be given effect to the maximum extent possible. Instead of deciding such an important matter, which essentially relates to the right and value of the votes of millions of voters, merely on assumptions, presumptions or oral statements, this fact should be determined with certain and concrete material: (i) the written statement (declaration) by the returned candidate concerned, and (ii) its written confirmation (certificate) by PTI. Upon submission of written statements by the returned candidates and written confirmations by PTI through its *de facto* or *de jure* Chairman, the status of the 41 returned candidates shall immediately and *ipso facto* stand determined as a matter of law, with no subsequent act altering what, upon submission of the statements and confirmations, will become a past and closed transaction. Neither the returned candidates nor PTI can later resile from this position. It is also emphasized that this verification process is solely to determine whether the said 41 returned candidates were indeed the returned candidates of PTI, and in no way does it amount to accepting them as independent returned candidates and granting them another opportunity to join a political party under the provisos to paragraphs (d) and (e) of Article 51(6) of the Constitution. Once their status is determined upon submission of the requisite statements and confirmations, they shall be deemed returned candidates of PTI from the date of the publication of their names as returned candidates in the official Gazette. Consequently, they will be considered

members of the parliamentary party of PTI in the National Assembly from the date they took the oath of office as Members of the National Assembly (MNAs), for all constitutional and legal purposes.

112. As above held, the general power of the Commission under Article 218(3) of the Constitution read with Sections 4 and 8 of the Elections Act is similar to the general power of this Court under Article 187(1) of the Constitution. Therefore, in the present case the Commission should have, by the impugned order, in the words of Section 4(1), "issue[d] 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"; or, in the words of Section 8(c), "issue[d] such instructions, exercise[d] such powers and ma[d]e such consequential orders as may in its opinion, be necessary for ensuring that an election is conducted honestly, justly, fairly"; or, in the words of Article 218(3), "ma[d]e such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly". The Commission, however, again made an unlawful omission by failing to exercise its aforementioned general powers to undo the effects of its earlier unlawful acts and omissions and to restore PTI to its constitutional right as a Parliamentary Party and its entitlement to reserved seats proportionate to the won general seats, thereby placing PTI, insofar as possible, in the same position it would have been in if the said unlawful acts and omissions had not occurred. The previous unlawful acts and omissions, as well as the said unlawful omission, render the impugned order of the Commission *ultra vires* the Constitution, without lawful authority and of no legal effect.

The Commission has failed to perform its role as a "guarantor institution" of democratic processes

113. We find it important to emphasize that the Commission, as a constitutional "electoral management body", is not merely an administrative entity but a fundamental "guarantor institution" of democratic processes, with a constitutional status akin to a "fourth branch of government".[80] The Commission must therefore fully recognize

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[80] Micheal Pal, Electoral Management Bodies as a Fourth Branch of Government, Review of Constitutional Studies (Volume 21, Issue 1, 2016). See also Bruce Ackerman, The New Separation of Powers (2000) 113:3 Harvard Law Review 633 and Tarunabh Khatian, Guarantor Institutions, Asian Journal of Comparative law (Cambridge University Press 2021).

its constitutional position and the critical role it plays in a democracy while performing its duty to conduct free and fair elections. As a central pillar of democratic electoral processes, the Commission, in its role as a guarantor institution and impartial steward, is tasked with ensuring the transparency and fairness of elections to maintain public trust in the electoral system. This is essential for the legitimacy of elected representatives and the stability of the political system. The Commission must uphold democratic principles and the integrity of electoral processes by ensuring that elections truly reflect the will of the people, thereby preserving the democratic fabric of the nation. Unfortunately, the circumstances of the present case indicate that the Commission has failed to fulfill this role in the General Elections of 2024.

114. Another matter that has surprised us during the proceedings of these appeals is the way the Commission participated in and contested the matter before us as a primary contesting party against SIC and PTI. We are cognizant that the Commission's prime function, under Article 218(3) of the Constitution, is 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'. This function of the Commission, 'to organize and conduct the election', as held by this Court in *Aam Log Itehad*,[81] is primarily executive, not judicial or quasi-judicial. However, as found in the said case, the Commission also performs some quasi-judicial functions. In the present case, several political parties made counterclaims regarding their right to the disputed reserved seats, and the Commission decided these counterclaims as an adjudicatory body. The function performed by the Commission in the present case was, therefore, quasi-judicial. And, as held by this Court in *Wafaqi Mohtasib*[82] and *A. Rahim Foods*,[83] a body performing its quasi-judicial function in a matter between two rival parties cannot be treated as an aggrieved person if its decision is set aside or modified by a higher forum or by a court of competent jurisdiction. Such a body, therefore, does not have locus standi to challenge the decision of that higher forum or court. Nor, we may add, can such a body contest an appeal filed against its quasi-

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[81] Aam Log Itehad v. Election Commission PLD 2022 SC 39.
[82] Wafaqi Mohtasib v. SNGPL PLD 2020 SC 586.
[83] A. Rahim Foods v. K&N Foods PLD 2023 SC 516.

judicial decision by one of the rival parties as a primary contesting party. In the present case, the Commission was a proper party to assist the Court in effectually and completely adjudicating upon and settling all the questions involved in the case. It should have acted in this manner, not as a primary contesting party.

115. As for the impugned judgment of the Peshawar High Court, we know, as held by this Court in *Dossani Travels*,[84] that the ambit and scope of the power of the High Courts under Article 199 of the Constitution is not as wide as of the Supreme Court under Article 187 of the Constitution to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it. Nor do the High Courts possess such general constitutional power which the Commission has under Article 218(3) to ensure that elections are conducted honestly, justly and fairly. Therefore, without PTI's petition, the High Court could not have passed an order like the one we have, or the one that the Commission could have passed, for doing complete justice and ensuring that the election is conducted honestly, justly and fairly. However, what the Peshawar High Court could have done, but failed to do, in the present case is to remand the matter to the Commission with a direction to do what the Commission was required to do under Article 218(3) of the Constitution, read with Sections 4 and 8 of the Elections Act.

116. So far as the proceedings in the National Assembly and the Provincial Assemblies, wherein members elected on the disputed reserved seats under the impugned order of the Commission participated, are concerned, the same are protected under Articles 67 and 127 of the Constitution,[85] cannot be disputed in these collateral proceedings when no one has pointed out to us any proceedings of the National Assembly or Provincial Assemblies that could not have been successfully conducted if the members elected on the disputed reserved seats had not participated therein. Further, as held by this Court in *Raja*

[84] Dossani Travels v. Travels Shop PLD 2014 SC 1.

[85] **Article 67. (1)** Subject to the Constitution, a House may make 2 rules for regulating its procedure and the conduct of its business, and shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in the House shall not be invalid on the ground that some persons who were not entitled to do so sat, voted or otherwise took part in the proceedings.

Article 127. Subject to the Constitution, the provisions of clauses (2) to (8) of Article 53, clauses (2) and (3) of Article 54, Article 55, Articles 63 to 67, Article 69, Article 77, Article 87 and Article 88 shall apply to and in relation to a Provincial Assembly or a committee or members thereof or the Provincial Government,…

Amer,[86] acts done in accordance with the legal position prevailing at the time of their doing are generally protected under the doctrine of past and closed transactions. Therefore, to protect such acts and proceedings of the National Assembly and Provincial Assemblies concerned, which could have been successfully conducted even if the members elected on the disputed reserved seats had not participated, the notifications of the Commission declaring such members as returned candidates on the disputed reserved seats are quashed with effect from 6 May 2024, the date on which this Court suspended the impugned order of the Commission.

PTI is before the Court

117. Lastly, we want to say a few words to clarify that PTI, which has been granted relief in the present case, is before us with an application for its impleadment as a party to the case. In the normal course of procedure for civil cases, the application for impleadment is first decided and the applicant formally made a party to the case, before granting him any relief in the case. This case, as explained in the opening part of this judgment, is not an ordinary civil case but a *lis* of the highest order, where democracy—a salient feature of the Constitution—and the fundamental right of the people (the electorate) to choose their representatives for the legislative and executive organs of the State is to be preserved, protected and defended. The procedural formality of first accepting PTI's application and then granting it the relief does not carry much weight where the Court's concern is the protection of the right of vote of the people (the electorate) guaranteed under Articles 17(2) and 19 of the Constitution, more than the right of any political party—whether it be SIC or PTI or any other party. Indeed, more particularly for this kind of cases, where the rights of people are involved, not only of the parties before the Court, the words of Kaikaus, J., resound that 'the proper place of procedure in any system of administration of justice is to help and not thwart the grant to the people of their rights.'[87] Even otherwise, as held by this Court in several cases,[88] while doing complete justice in the exercise of its general power under Article 187(1) of the Constitution, this Court is not handicapped by any technicality or rule of practice or

[86] Raja Amer v. Federation of Pakistan 2024 SCP 91 per Syed Mansoor Ali Shah, J., concurred by majority (Many previous cases are referred to in this case).
[87] Imtiaz Ahmad v. Ghulam Ali PLD 1963 SC 382.
[88] Martin Dow Marker Ltd. V. Asadullah Khan 2020 SCMR 2147 (5MB) and State v. Alif Rehman 2021 SCMR 503 (Many previous cases are cited in these two cases).

procedure, nor is the exercise of this power by the Court dependent on an application by a party.

118. So far as the application (CMA 3554/2024) of Ms. Kanwal Shauzab, who claims to be a PTI candidate for the seats reserved for women in the National Assembly, is concerned, it also has little significance in the perspective we have approached and dealt with the present case. We may clarify that although we heard her counsel in the interest of justice, as important questions of interpretation of constitutional provisions were involved, she is not a necessary party to the case. We are of the considered view that a contesting candidate or a returned candidate to the seats reserved for women or non-Muslims is not a necessary party to a dispute where the matter to be decided is which political party and in what proportion is entitled to the reserved seats. The persons nominated by a political party for reserved seats or elected to such seats do not have a personal right to such seats. It is the right of the electorate guaranteed under Articles 17(2) and 19 of the Constitution, exercisable through political parties, to have proportional representation in the reserved seats, not of the person nominated for or elected to such seats.

Relief granted; short order reproduced

119. These are the detailed reasons for our short order dated 12 July 2024, which is reproduced here for completion of the record:

ORDER

> **Syed Mansoor Ali Shah, Munib Akhtar, Muhammad Ali Mazhar, Ayesha A. Malik, Athar Minallah, Syed Hasan Azhar Rizvi, Shahid Waheed and Irfan Saadat Khan, JJ.:** For detailed reasons to be recorded later and subject to what is set out therein by way of amplification and/or explanation or otherwise, these appeals are decided in the following terms:
>
> 1. The impugned judgment dated 25.03.2024 of the learned Full Bench of the High Court is set aside to the extent it is or may be inconsistent with this Order or the detailed reasons.
>
> 2. The order of the Election Commission of Pakistan ("Commission") dated 01.03.2024 ("Impugned Order") is declared to be ultra vires the Constitution, without lawful authority and of no legal effect.
>
> 3. The notifications (of various dates) whereby the persons respectively mentioned therein (being the persons identified in the Commission's notification No.F.5(1)/2024-Cord. dated 13.05.2024) have been declared to be returned candidates for reserved seats for women and minorities in the National and Provincial Assemblies are declared to be ultra vires the Constitution, without lawful authority and of no legal effect, and are quashed from 06.05.2024 onwards, being the date an interim order was made by the Court in CPLA Nos. 1328-9 of 2024, the leave petitions out of which the instant appeals arise.

4. It is declared that the lack or denial of an election symbol does not in any manner affect the constitutional and legal rights of a political party to participate in an election (whether general or bye) and to field candidates and the Commission is under a constitutional duty to act, and construe and apply all statutory provisions, accordingly.

5. It is declared that for the purposes, and within the meaning, of paragraphs (d) and (e) of clause (6) of Article 51 ("Article 51 Provisions") and paragraph (c) of clause (3) of Article 106 ("Article 106 Provisions") of the Constitution, the Pakistan Tehreek e Insaf ("PTI") was and is a political party, which secured or won (the two terms being interchangeable) general seats in the National and Provincial Assemblies in the General Elections of 2024 as herein after provided.

6. During the course of the hearing of the instant appeals, on 27.06.2024, learned counsel for the Commission placed before the Court a list ("the List") of 80 returned candidates for the National Assembly (now MNAs), setting out in tabular form particulars relating to their election. Learned counsel made a categorical statement that the Commission stood by the data so provided to the Court. In particular, the List contained three columns marked as follows: (i) "Statement (on nomination form) given in declaration and oath by the person nominated (i.e., 'I belong to')"; (ii) "Certificate of party affiliation under Section 66 of the Elections Act, 2017"; and (iii) "Statutory Declaration/affidavit accompanying section 66 certificate".

7. In the peculiar facts and circumstances of the General Election of 2024, it is declared that out of the aforesaid 80 returned candidates (now MNAs) those (being 39 in all and whose particulars are set out in Annex A to this Order) in respect of whom the Commission has shown "PTI" in any one of the aforesaid columns in the List, were and are the returned candidates whose seats were and have been secured by the PTI within the meaning, and for purposes of, para 5 above in relation to the Article 51 Provisions.

8. In the peculiar facts and circumstances of the General Election of 2024, it is further ordered that any of the remaining 41 returned candidates out of the aforesaid 80 (whose particulars are set out in Annex B to this Order) may, within 15 working days of this Order file a statement duly signed and notarized stating that he or she contested the General Election as a candidate of the political party specified therein. If any such statement(s) is/are filed, the Commission shall forthwith but in any case within 7 days thereafter give notice to the political party concerned to file, within 15 working days, a confirmation that the candidate contested the General Election as its candidate. A political party may in any case, at any time after the filing of a statement as aforesaid, of its own motion file its confirmation. If such a statement is filed, and is confirmed by the political party concerned, then the seat secured by such candidate shall be forthwith deemed to be a seat secured by that political party for the purposes of para 5 above in relation to the Article 51 Provisions. The Commission shall also forthwith issue, and post on its website, a list of the retuned candidates (now MNAs) and seats to which this para applies within 7 days after the last date on which a political party may file its confirmation and shall simultaneously file a compliance report in the Court.

9. For the purposes of para 5 of this Order in relation to the Article 51 Provisions, the number of general seats secured by PTI shall be the total of the seats declared in terms of para 7 and those, if any, to which para 8 applies. The PTI shall be entitled to reserved seats for women and minorities in the National Assembly accordingly. PTI shall, within 15 working days of this Order file its lists of candidates for the said reserved seats and the provisions of the Elections Act, 2017 ("Act") (including in particular s. 104) and the Elections Rules, 2017 ("Rules") shall be applied

to such lists in such manner as gives effect to this Order in full measure. The Commission shall, out of the reserved seats for women and minorities in the National Assembly to which para 3 of this Order applies, notify as elected in terms of the Article 51 Provisions, that number of candidates from the lists filed (or, as the case may be, to be filed) by the PTI as is proportionate to the general seats secured by it in terms of paras 7 and 8 of this Order.

10. The foregoing paras shall apply mutatis mutandis for purposes of the Article 106 Provisions in relation to PTI (as set out in para 5 herein above) for the reserved seats for women and minorities in the Khyber Pakhtunkwa, Punjab and Sindh Provincial Assemblies to which para 3 of this Order applies. In case the Commission or PTI need any clarification or order so as to give effect to this para in full measure, it shall forthwith apply to the Court by making an appropriate application, which shall be put up before the Judges constituting the majority in chambers for such orders and directions as may be deemed appropriate.

Annexure-A

(Names of Candidates Affiliated with the Pakistan Tehreek-e-Insaf as per the list verified from the data provided by ECP[89])

Sr. No.	Number and Name of the Constituency	Name of the Candidate
1.	NA-2 (Swat-I)	Amjad Ali Khan
2.	NA-3 (Swat-II)	Saleem Rehman
3.	NA-4 (Swat-III)	Sohail Sultan
4.	NA-6 (Lower Dir-I)	Muhammad Bashir Khan
5.	NA-7 (Lower Dir-II)	Mehboob Shah
6.	NA-9 (Malakand)	Junaid Akbar
7.	NA-17 (Abbottabad-II)	Ali Khan Jadoon
8.	NA-19 (Swabi-I)	Asad Qaiser
9.	NA-20 (Swabi-II)	Shahram Khan
10.	NA-21 (Mardan-I)	Mujahid Ali
11.	NA-24 (Charsadda-I)	Anwar Taj
12.	NA-25 (Charsadda-II)	Fazal Muhammad Khan
13.	NA-29 (Peshawar-II)	Arbab Amir Ayub
14.	NA-30 (Peshawar-III)	Shandana Gulzar Khan
15.	NA-31 (Peshawar-IV)	Sher Ali Arbab
16.	NA-32 (Peshawar-V)	Asif Khan
17.	NA-33 (Nowshera-I)	Syed Shah Ahad Ali Shah
18.	NA-38 (Karak)	Shahid Ahmad
19.	NA-39 (Bannu)	Nasim Ali Shah
20.	NA-41 (Lakki Marwat)	Sher Afzal Khan
21.	NA-83 (Sargodha-II)	Usama Ahmed Mela
22.	NA-84 (Sargodha-III)	Shafqat Abbas
23.	NA-95 (Faisalabad-I)	Ali Afzal Sahi

[89] CMA No.5924 of 2024 consists of Volume (I-VI).

24.	NA-96 (Faisalabad-II)	Rai Haider Ali Khan
25.	NA-100 (Faisalabad-VI)	Nisar Ahmed
26.	NA-101 (Faisalabad-VII)	Rana Atif
27.	NA-102 (Faisalabad-VIII)	Changaze Ahmad Khan
28.	NA-103 (Faisalabad-IX)	Muhammad Ali Sarfraz
29.	NA-115 (Sheikhupura-III)	Khurram Shahzad Virk
30.	NA-122 (Lahore-VI)	Sardar Muhammad Latif Khan Khosa
31.	NA-143 (Sahiwal-III)	Rai Hassan Nawaz Khan
32.	NA-149 (Multan-II)	Malik Muhammad Aamir Dogar
33.	NA-150 (Multan-III)	Makhdoom Zain Hussain Qureshi
34.	NA-154 (Lodhran-I)	Rana Muhammad Faraz Noon
35.	NA-171 (Rahim Yar Khan-III)	Mumtaz Mustafa
36.	NA-179 (Kot Addu-I)	Muhammad Shabbir Ali Qureshi
37.	NA-181 (Layyah-I)	Umber Majeed
38.	NA-182 (Layyah-II)	Awais Haider Jakhar
39.	NA-185 (D.G. Khan-II)	Zartaj Gul

Annexure-B

(*Names of Independent Candidates* [whom PTI claims as its candidates])

Sr. No.	Number and Name of the Constituency	Name of the Candidate
1.	NA-1 (Chitral Upper-cum- Chitral Lower)	Abdul Latif
2.	NA-5 (Upper Dir)	Sahibzada Sibghatullah
3.	NA-13 (Battagram)	Muhammad Nawaz Khan
4.	NA-22 (Mardan-II)	Muhammad Atif
5.	NA-23 (Mardan-III)	Ali Muhammad
6.	NA-26 (Mohmand)	Sajid Khan
7.	NA-27 (Khyber)	Muhammad Iqbal Khan
8.	NA-34 (Nowshera-II)	Zulfiqar Ali
9.	NA-35 (Kohat)	Shehryar Afridi
10.	NA-36 (Hangu-cum-Orakzai)	Yousaf Khan

11.	NA-42 (South Waziristan Upper-cum-South Waziristan Lower)	Zubair Khan
12.	NA-66 (Wazirabad)	Mohammad Ahmed Chattha
13.	NA-67 (Hafizabad)	Aniqa Mehdi
14.	NA-68 (Mandi Bahauddin-I)	Haji Imtiaz Ahmed Choudhry
15.	NA-78 (Gujranwala-II)	Muhammad Mobeen Arif
16.	NA-79 (Gujranwala-III)	Ihsan Ullah Virk
17.	NA-181 (Gujranwala-V)	Ch. Bilal Ejaz
18.	NA-86 (Sargodha-V)	Muhammad Miqdad Ali Khan
19.	NA-89 (Mianwali-I)	Muhammad Jamal Ahsan Khan
20.	NA-90 (Mianwali-II)	Umair Khan Niazi
21.	NA-91 (Bhakkar-I)	M. Sana Ullah Khan Mastikhel
22.	NA-93 (Chiniot-I)	Ghulam Muhammad
23.	NA-97 (Faisalabad-III)	Muhammad Saad Ullah
24.	NA-99 (Faisalabad-V)	Umar Farooq
25.	NA-105 (Toba Tek Singh-I)	Usama Hamza
26.	NA-107 (Toba Tek Singh-III)	Mohammad Riaz Khan
27.	NA-108 (Jhang-I)	Muhammad Mahbob Sultan
28.	NA-109 (Jhang-II)	Waqas Akram
29.	NA-110 (Jhang-III)	Muhammad Ameer Sultan
30.	NA-111 (Nankana Sahib-I)	Muhammad Arshad Sahi
31.	NA-116 (Sheikhupura-IV)	Khurram Munawar Manj
32.	NA-129 (Lahore-XIII)	Mian Muhammad Azhar
33.	NA-133 (Kasur-III)	Azim Uddin Zahid
34.	NA-137 (Okara-III)	Syed Raza Ali Gillani
35.	NA-156 (Vehari-I)	Ayesha Nazir
36.	NA-170 (Rahim Yar Khan-II)	Mian Ghous Muhammad
37.	NA-172 (Rahim Yar Khan-IV)	Javaid Iqbal

38.	NA-175 (Muzaffargarh-I)	Jamshaid Ahmad
39.	NA-177 (Muzaffargarh-III)	Muhammad Moazzam Ali Khan
40.	NA-180 (Kot Addu-II)	Fiaz Hussain
41.	NA-183 (Taunsa)	Khawaja Sheraz Mehmood

120. Before parting with the judgment, we feel constrained to observe, with a heavy heart, that our two learned colleagues in the minority (Justice Amin-ud-Din Khan and Justice Naeem Akhtar Afghan) have made certain observations in their dissenting judgment dated 3 August 2024, which do not behove Judges of the Supreme Court of Pakistan, the highest court of the land. After expressing their view that the order we passed on 12 July 2024 is not in accordance with the Constitution and that we ignored and disregarded its mandate, they observed that "[i]f the said 39 plus 41 persons take any step on the basis of this judgment which is not in accordance with the Constitution, they may lose their seats as returned candidates on the basis of violation of the Constitution",[90] and that "[a]ny order of the Court which is not in consonance with the constitutional provisions is not binding upon any other constitutional organ of the State."[91]

121. We take no issue with their having and expressing the view that, in their understanding, our order dated 12 July 2024 is not in accordance with the Constitution, as Members of a Bench of this Court, or any court, can legitimately differ on issues of fact and law. They may strongly express divergent opinions and make comments on each other's views, highlighting reasons why they believe other Members have erred. However, the manner in which they have expressed their disagreement falls short of the courtesy and restraint required of Judges of the Superior Courts. What is more disquieting is that, through the said observations, they appear to have gone beyond the parameters of propriety by warning the 39 plus 41 (80) returned candidates and urging the Commission not to comply with the majority order, which is the decision of a thirteen-member Full Court Bench of this Court. Such observations undermine the integrity of the highest institution of justice in the country and seem to constitute an attempt to obstruct the process of the Court and the administration of justice.

[90] Para 11 of their judgment.
[91] Para 13 of their judgment.

122. Considering the public importance of this judgment, the office is directed to ensure translation of this judgment into Urdu in order to enhance public access to its information, in accordance with Article 19A read with Article 251 of the Constitution. The Urdu version of the judgment shall be placed on the record of the case, uploaded on the Court's website and reported in the law journals alongside this official English version of the judgment.

JUDGE

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Delivered at Islamabad
On 23rd September, 2024
Approved for reporting
Sadaqat/Umer A. Ranjha, LC