IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:

MR. JUSTICE UMAR ATA BANDIAL, CJ
MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE MUNIB AKHTAR

CONSTITUTION PETITION NO.5 OF 2023
(Re. Setting aside order dated 22.03.2023 passed by the Election Commission of Pakistan being ultra vires the Constitution.)

Mohammad Sibtain Khan and others **... Petitioners**

versus

Election Commission of Pakistan through Chief Election Commissioner, Islamabad and others **... Respondents**

For the Petitioners	:	Syed Ali Zafar, ASC Mr. Gohar Ali Khan, ASC Assisted by: Syed Haider Ali Zafar, Advocate
For the Federation	:	Mr. Mansoor Usman Awan, Attorney General for Pakistan Assisted by: Ms. Mehwish Batool Sardar, Advocate Ch. Aamir Rehman, Addl. AGP Malik Javed Iqbal Wains, Addl. AG Mr. Hamood Uz Zaman Khan, Secretary Defence Mr. Aamir Mehmood, Addl. Sec. Finance
For ECP	:	Mr. Sajeel Shehryar Swati, ASC Mr. Irfan Qadir, ASC Mr. Omer Hamid Khan, Sec. ECP Mr. Zafar Iqbal Hussain, Spl. Sec. ECP Mr. M. Arshad, DG (Law) ECP Mr. Khurram Shehzad, ADG(L) ECP Ms. Saima Tariq Janjua, Dy. Dir. ECP Mr. Falak Sher, Legal Consultant
For Govt. of KPK	:	Mr. Aamir Javed, AG, KP Mian Shafaqat Jan, Addl. AG, KP
For Govt. of Punjab	:	Mr. Shangul, AG, Punjab (via Video-Link, Lahore) Mr. Wasim Mumtaz Malik, Addl. AG, Punjab Mr. Sanaullah Zahid, Addl. AG Barrister M. Mumtaz Ali, Addl. AG
Date of Hearing	:	27.03.2023, 28.03.2023, 29.03.2023, 30.03.2023, 31.03.2023 and 03.04.2023

JUDGMENT

Munib Akhtar, J.: This petition was disposed of by means of the following short order dated 04.04.2023:

> "For detailed reasons to be recorded later and subject to what is set out therein by way of amplification or otherwise:
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> 1. The impugned order dated 22.03.2023 ("EC Order") made by the Election Commission of Pakistan ("Commission") is declared to be unconstitutional, without lawful authority or jurisdiction, void ab-initio, of no legal effect and is hereby quashed. Neither the Constitution nor the law empowers the Commission to extend the date of elections beyond the 90 days period as provided in Article 224(2) of the Constitution.
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> 2. The Election Programme notified by the Commission under s. 57(2) of the Elections Act, 2017 on 08.03.2023 (vide notification No. F.2(3)/2023-Cord.) for the general election to the Punjab Assembly stands revived and restored immediately with, however, certain modifications. The need for the modifications arises for the following reason. On 22.03.2023, when the EC Order was made matters had reached up to stage 5 of the notified Election Programme. The EC Order unlawfully purported to withdraw the Election Programme. Thus, the remaining stages (Nos. 6 to 11) could not be given effect to. In the meanwhile 13 days have been lost on account of the unlawful order made by the Commission. In consequence thereof, the remaining stages have to be moved forward to take account of the lost period, and the Election Programme must be modified accordingly. We come to this conclusion with reluctance but consider it inevitable on account of the situation brought about by the EC Order. Therefore, the Election Programme will, in relation to stages No. 6 to 11, stand modified, and apply in the following manner:

6.	Last date for filing of appeals against decision of the Returning Officer rejecting/accepting the nomination papers	10.04.2023
7.	Last date for deciding of appeals by the Appellate Tribunal	17.04.2023
8.	Publication of revised list of candidates	18.04.2023
9.	Last date for	19.04.2023

	withdrawal of candidature and Publication of revised list of candidates	
10.	Allotment of Election Symbol to contesting candidates	20.04.2023
11.	Polling day	14.05.2023.

3. In consequence thereof, the polling day perforce must be shifted, and moved forward from 30.04.2023 to 14.05.2023.

4. It is to be noted that on specific queries from the Court, the Commission categorically stated that if it was provided with necessary aid and assistance by the executive authorities in the Federation and the Provinces in discharge of their constitutional obligations under Article 220, then the Commission, notwithstanding everything set out in the recitals of the EC Order, would be able to organize and conduct the general elections to the Punjab and KPK Assemblies honestly, justly, fairly and in accordance with law, as required in terms of Article 218(3) of the Constitution. Therefore, the following further orders are made and directions given:

5. The Federal Government shall forthwith and in any case by 10.04.2023 release and provide to the Commission funds in the sum of Rs. 21 Billion for purposes of the general elections to the Punjab and Khyber Pakhtunkhwa Assemblies. The Commission shall, by 11.04.2023, file a report in the Court stating whether the said funds have been provided and received and if so, whether in full or in part. The report shall be placed before the members of the Bench for consideration in Chambers. If the funds have not been provided or there is a shortfall, as the case may be, the Court may make such orders and give such directions as are deemed appropriate to such person or authority as necessary in this regard. The Commission shall be entitled to utilize the funds in the first instance for the purposes of the general election to the Punjab Assembly. If there is thereafter a shortfall for purposes of the general election to the KPK Assembly, the Commission may make an appropriate representation to this Court for such consideration and orders as deemed appropriate.

6. The caretaker Cabinet that constitutes the Government of Punjab and, in particular, the Chief Secretary and the Inspector General Police of that Province must forthwith, and not later than 10.04.2023, provide a plan acceptable to the Commission for, inter alia, providing sufficient personnel for election-duty and security purposes for the holding of the general election. Furthermore, and in any case, the Government of Punjab and all officials thereof must, in

discharge of constitutional and legal duties and responsibilities, proactively provide all aid and assistance to the Commission for the holding and conduct of the general election.

7. The Federal Government must, in exercise of its powers and position in terms of Article 243(1) of the Constitution, and all other constitutional and legal powers enabling it in that behalf, and in discharge of its constitutional duties under Articles 148(3) and 220, provide all such aid and assistance to the Commission as required by it for the holding and conduct of the general elections to the Punjab and KPK Assemblies. Without prejudice to the generality of the foregoing, the Federal Government must make available all necessary personnel, whether from the Armed Forces, Rangers, Frontier Constabulary and all other forces under the direct, indirect or ultimate command and control of the said Government, as are required by the Commission for security and other purposes related to the general elections. In this regard, the Federal Government must forthwith, and not later than 17.04.2023, provide a plan acceptable to the Commission.

8. If there is a failure by the Federal Government or the Caretaker Government in the Punjab to provide aid and assistance to the Commission and, without prejudice to the generality of the foregoing, in particular to comply with what has been set out hereinabove, the Commission may make an appropriate representation to this Court for such consideration and orders as deemed appropriate.

9. Our attention has been drawn to certain matters that were pending in this Court (being SMC 1/2023 and CP Nos. 1 and 2/2023) and which were heard and decided on 01.03.2023 by a five member Bench of the Court by a majority of 3:2 (Umar Ata Bandial, CJ and Munib Akhtar and Muhammad Ali Mazhar, JJ; Syed Mansoor Ali Shah and Jamal Khan Mandokhail, JJ dissenting). In particular, our attention has been drawn to the detailed reasons of the two learned Judges in minority (released on 27.03.2023), wherein it is, inter alia, stated that the said matters were decided (and dismissed) by a majority of 4:3. Respectfully, the position as claimed by the learned Judges in minority is erroneous and not sustainable in law.

10. Our attention has also been drawn to an order dated 29.03.2023 made in SMC 4/2022 by a majority of 2:1 by a learned three member Bench (Qazi Faez Isa and Aminuddin Khan, JJ; Shahid Waheed, J dissenting). The hearing of the present matter remained, and its decision by this Bench is, wholly unaffected by any observations made in the aforesaid majority order.

11. Insofar as the general election to the KPK Assembly is concerned, in relation to which the present petitioners have also sought relief, learned counsel who entered appearance on behalf of the Governor of KPK

> Province withdrew from such appearance on account of a certain stand taken by a political party which learned counsel was also representing. The Governor, KPK Province therefore ceased to have representation before the Court. In such circumstances, the matter relating to the KPK Province is not adjudicated upon, with permission granted to the petitioners to file such petition and/or seek such relief before such forum as is deemed appropriate."

The following are the reasons for the short order.

2. We may note at the outset that in an important sense this petition can be regarded as a follow up of the decision in a bunch of matters that had been taken up earlier, being SMC 1/2023 and two constitutional petitions filed under Article 184(3) of the Constitution. Those matters were ultimately heard by a five member Bench and decided by a majority of 3:2. The short order in those matters (herein after referred to as the "Earlier Short Order") was made on 01.03.2023 and the detailed reasons of the majority were released on 27.06.2023. Since the said matters are a prelude to the instant petition, in setting out our detailed reasons we assume that the reader is, at the very least, familiar with the terms of the Earlier Short Order. (That short order and the detailed reasons for the same are available on the website of the Court.)

3. After the Earlier Short Order, and in compliance thereof, the Election Commission of Pakistan ("Commission") wrote to the President of Pakistan on 03.03.2023. The President was requested, in terms of para 14(a) of the Earlier Short Order, to announce the date for the holding of the general election to the Punjab Assembly. The Commission proposed a poll date between 30.04.2023 and 07.05.2023. The President, by order of the same date, announced 30.04.2023 as being the date for the general election. The Commission also wrote, at the same time and in similar terms, to the Governor of Khyber Pakhtunkhwa Province, requesting him to announce the date for the holding of the general election to the KPK Assembly, and proposing certain dates in this regard. However, the Governor vacillated and, as of the date of the filing of the instant petition, had not given the date as required of him in terms of para 14(b) of the Earlier Short Order.

4. After the President announced the date of the general election to the Punjab Assembly the Commission, in compliance of its constitutional and statutory obligations and powers (the latter being under the Elections Act, 2017 ("2017 Act")), announced the election program on 08.03.2023 by notification No.F.2(3)/2023-Cord. That program ("Election Schedule") was in a table set out in the notification, which was in the following terms:

Sl. No.	**EVENTS**	**DATE**
1.	2	3
1.	Notification of Election Programme	08.03.2023
2.	Public Notice to be issued by the Returning Officer on	11.03.2023
3.	Dates for filing of nomination papers with the Returning Officer by the candidates	12.03.2023 to 14.03.2023
4.	Publication of names of the nominated candidates	15.03.2023
5.	Last date for Scrutiny of nomination papers by the Returning Officer	22.03.2023
6.	Last date for filing of appeals against decision of the Returning Officer rejecting/accepting the nomination papers	27.03.2023
7.	Last date for deciding of appeals by the Appellate Tribunal	03.04.2023
8.	Publication of revised list of candidates	04.04.2023
9.	Last date for withdrawal of candidature and Publication of revised list of candidates	05.04.2023
10.	Allotment of Election Symbol to contesting candidates	06.04.2023
11.	Polling day	30.04.2023.

5. The process for the holding of the general election, as per the Election Schedule, was well underway and the first four events in terms thereof were already complete when the Commission, on the last day of the fifth event, suddenly released an order, said to be in exercise of its powers under Article 218(3) of the Constitution read with ss. 58 and 8(c) of the 2017 Act and "all other" enabling powers, and for which the Commission claimed also to derive wisdom from a judgment of this Court reported as *Workers Party and others v Federation of*

Pakistan and others PLD 2012 SC 681. By the said order, impugned herein, the Commission purported to withdraw the aforementioned notification and the Election Schedule and ordered that "fresh schedule will be issued in due course of time with poll date on 8th October, 2023". (For completeness we may note that the impugned order was "corrected" by means of a corrigendum issued on 25.03.2023, but nothing material turns on that.)

6. Since the general election to the Punjab Assembly was thus suddenly shifted forward by several months, and no date at all had yet been given for the election to the KPK Assembly, the Speakers of both Assemblies and certain other petitioners filed the instant petition under Article 184(3) on or about 25.03.2023. The principal reliefs sought were for the annulment and setting aside of the aforementioned order of 22.03.2023 made by the Commission in relation to the Punjab Assembly (herein after "the impugned order") and a restoration of the Election Schedule and the date that had been announced the President, and a direction to the Governor, KPK to announce the date for the general election to the Assembly of that Province. We may note that this petition was initially fixed before a five member Bench, comprising of the Hon'ble Chief Justice and Ijaz Ul Ahsan, Munib Akhtar, Amin-Ud-Din Khan and Jamal Khan Mandokhail, JJ. Two of the learned members of the Bench, Amin-Ud-Din Khan and Jamal Khan Mandokhail, JJ., recused themselves on successive dates, with the result that the petition came to be heard and decided by the Bench as now constituted.

7. Learned counsel for the petitioners submitted that the core issue was whether the Commission could extend the date of a general election beyond the period stipulated in the Constitution. It was submitted that this question had necessarily to be answered in the negative. The Punjab Assembly having dissolved by efflux of time when the Governor did not act on the advice tendered by the then Chief Minister, the general election had to be held within 90 days. This was a mandatory constitutional requirement. The Commission could not go beyond that date. It was submitted that in doing so by means of the impugned order, the Commission had acted in gross breach of the Constitution and, inter alia, violated the

fundamental right inhering in terms of Article 17 not just in the petitioners but the entire electorate and citizens of Pakistan living in Punjab. All of them were, for that reason, aggrieved persons. Various cases were cited in support of the submissions made. Learned counsel submitted that the Earlier Short Order had been acted upon by the Commission itself and the President, in compliance thereof, had announced the election date. The Election Schedule had been released and was being acted upon when suddenly and abruptly the impugned order was made. It was completely unlawful.

8. Learned counsel submitted that the reasons given by the Commission for the short order were unsustainable in law and in terms of the Constitution. Those reasons were essentially the lack of financial resources and the inability of the concerned authorities to provide the necessary security. In this regard reliance was placed on Article 220 of the Constitution. It was prayed that the impugned order be set aside and the Election Schedule be restored, and the general election held on the stipulated date. As regards the KPK Assembly, it was prayed that the Governor be directed to give the date for the general election, as per his constitutional obligation and the direction contained in the Earlier Short Order.

9. The learned Attorney General opposed the petition. It was submitted that three points required attention. Firstly, a new date for the election had been given by the Commission in the impugned order. Secondly, the impugned order was made on the basis of information received from the concerned quarters regarding the financial position and the security situation. Thirdly, only one political party (the Pakistan Tehreek-e-Insaf) was before the Court (as one of the petitioners); it would be in the fitness of things if the other political parties were also heard. As regards the financial position, the learned Attorney General submitted that the economic and budgetary position was extremely dire. The Federal Government was in delicate negotiations with the International Monetary Fund, which was seeking to impose extremely tough measures and conditions. That made it very difficult, if not well nigh impossible, for the release of the required funds for the holding of the two general elections. As regards the security situation the learned Attorney General submitted that the Commission had sought the

assistance and provision of Armed Forces personnel for election duties. It was submitted that the prevailing security situation at the borders was such that such forces could not be released immediately. It was pointed out that in any case the National Assembly and the other Provincial Assemblies would stand dissolved at the expiry of their terms in around mid-August, when general elections would have to be held for them as well. The security situation was such as precluded the release twice over of personnel for election duties. The same, it was also submitted, could be said of the financial position. It would be much easier for all the general elections to be held on the same date. It was prayed that the petition be dismissed.

10. Learned counsel for the Commission submitted that there were two facets of the case presented before the Court, legal and factual. It was submitted that the fundamental constitutional point was that the duty of the Commission under Article 218(3) to hold elections honestly, justly and fairly was paramount. In particular, the provisions that stipulated the period within which general elections had to be held (here Article 224(2)) had to give way to the former. Unless and until the Commission was satisfied that it could perform its constitutional duty under Article 218(3) in the manner as required in terms thereof, it had the constitutional power to alter the date for the election and if necessary take it beyond the period set in the Constitution. Other constitutional provisions relating to the holding of elections were essentially subordinate to the fundamental duty cast on the Commission and had to be read holistically along with the same. It was submitted that in terms of ss. 57 and 58 of the 2017 Act the Commission had adequate statutory power and the same had been exercised by the issuance of the impugned order. Strong reliance was placed on *Workers Party and others v Federation of Pakistan and others* PLD 2012 SC 681 from which various paragraphs were read out. Reference was also made to judgments of the Lahore High Court reported as *Government of the Punjab and another v Chief Election Commissioner and others* PLD 2010 Lah 1 (single Judge) and (on appeal) *Muhammad Azhar Siddique and another v Government of Punjab and others* PLD 2010 Lah 138 (DB).

11. On the factual side, learned counsel took us in detail through the correspondence between the Commission and the

relevant ministries and departments of the Federal and Provincial Governments. It was submitted that the picture that emerged was that neither the financial resources could be provided or would be forthcoming nor would the security requirements be met. The culmination of this entire exercise which had been going on for months and, in particular, the several weeks immediately preceding the making of the impugned order was the decision of the Federal Cabinet on 22.03.2023, communicated to the Commission, in which the provision of financial and security resources was formally declined. This resulted in the decision taken by the Commission to issue the impugned order of 22.03.2023. It was submitted that the decision to push the general election to 08.10.2023 was not taken lightly. It was the result of the most serious and searching consideration of the constitutional and legal powers of the Commission and the factual situation that was then prevailing. It was prayed that the petition be dismissed.

12. The learned Advocate General Punjab submitted that it would be in the fitness of things if the general elections to all the Assemblies (i.e., National and Provincial) were held together and that in determining whether this ought to be so all the relevant facts had to be taken into consideration. Various cases were cited. The learned Advocate General KPK submitted that insofar as his Province was concerned the matter was at inception inasmuch as the Governor had not yet given the date for the election. Only once the date was given that the electoral process would begin. Insofar as the Governor was concerned learned counsel appearing on his behalf, on instructions from the political party to which the Governor belonged, withdrew from the case, with the result that the Governor was left unrepresented before the Court.

13. We have heard learned counsel as above and considered the relevant constitutional and statutory provisions and the material and case law referred to and relied upon. Article 218(3) provides as follows:

> “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.”

As noted above, the central theme of the submissions by learned counsel for the Commission was that this clause had a fundamental position in relation to constitutional provisions relating to electoral matters. All the provisions had to be read holistically and when so understood and applied the others had necessarily to yield to Article 218(3) and were subordinated to it. The Commission was a constitutional body charged with one of the most important tasks in any democracy, the holding of elections. It was therefore for the Commission itself, and it alone, to determine whether it could discharge its duty to hold elections honestly, justly and fairly. In this regard, great emphasis was placed by learned counsel on the word "conduct" appearing in Article 218(3). If the Commission concluded that it could not discharge this constitutional obligation then it had the constitutional power to take the elections forward, even if that meant that they would be held beyond the period(s) stipulated by clauses (1) or (2) of Article 224, as applicable. That was precisely what had happened in the present case, and hence the impugned order was fully within the remit of the Commission's constitutional duties and powers. We may note clauses (1) and (2) of Article 224:

> "(1) A general election to the National Assembly or a Provincial Assembly shall be held within a period of sixty days immediately following the day on which the day on which the term of the Assembly is due to expire, unless the Assembly has been sooner dissolved, and the results of the election shall be declared not later than fourteen days before that day."
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> "(2) When the National Assembly or a Provincial Assembly is dissolved, a general election to the Assembly shall be held within a period of ninety days after the dissolution, and the results of the election shall be declared not later than fourteen days after the conclusion of the polls."

The present case of course involves clause (2). However, the issues raised and points taken relate equally to clause (1), the only difference being as to the period involved.

14. Before we engage with the substance of what has been contended on behalf of the Commission one preliminary point, of some importance, may be made. Even if for the moment we take the Commission's case on its own terms, which obviously sets it at its highest level, one thing is clear. Anything done, whether an act, decision or omission, by the Commission, and

whether it sounds on the constitutional or statutory plane, is not beyond the purview of judicial review. There are two reasons for this. Firstly, to repeat the oft-quoted words of Marshall, CJ in *Marbury v Madison* 5 US (1 Cranch) 137 (1803)), "[it] is emphatically the province and duty of the Judicial Department to say what the law is". This duty applies in relation to both statutory and (with even greater force) constitutional provisions. Secondly, it is to be noted that the Constitution does not protect any act, omission or decision of the Commission with an ouster clause. The jurisprudence of the Court in relation to such clauses (which are all variants on the "shall not be called in question..." line) where they do exist need not therefore be set out here. The absence of such clauses in relation to the Commission does however indicate that there is no immunity from judicial scrutiny. Of course, the decisions and acts of the Commission are not to be taken lightly and are to be given due respect and consideration. But, in the end, it is for the Court itself to decide on the correctness and legality thereof.

15. We now turn to consider the merits of the Commission's case. With respect, we find it wanting. The case put forward fundamentally fails to maintain the difference between the legally distinct concepts of "duty" and "power". Indeed, if anything, it conflates the two. The context here, it must be kept in mind, is the operation on the constitutional plane of various provisions relating to the electoral process and elections, and their interaction and relationship *inter se*, and especially in relation to Article 218(3). In this context, and vis-à-vis other constitutional provisions, the said provision imposes a constitutional *duty*; it is not a *power*. Of course, in order to be able to discharge this duty, the Constitution and the law (i.e., 2017 Act) confer powers on the Commission. The most important of these is Article 220, which provides as follows:

> "It shall be the duty of all executive authorities in the Federation and in the Provinces to assist the Commissioner and the Election Commission in the discharge of his or their functions."

This provision is itself couched in terms of a duty. But to whom is the duty owed? Obviously, it is the Commission. The latter therefore has the constitutional power to call upon, require from and demand of the said executive authorities that

they perform their duty to assist the Commission. We will return to Article 220 later. The question can now be asked: to whom does the Commission owe the constitutional duty imposed by Article 218(3)? It is owed to the nation at large, to the electorate, to the political parties. In this sense, the submission made by learned counsel for the petitioners is correct: in the present case, it is not just the petitioners formally before the Court but the whole of the electorates of the Punjab and KPK Provinces and the citizens who live there who are the aggrieved persons in respect, inter alia, of fundamental rights conferred by Article 17.

16. But, so it would seem the Commission contends, Article 218(3) does not impose a duty to merely hold elections; it requires that they be held honestly, justly and fairly. And that confers on, or at least implies in, the Commission a power even in relation to other constitutional provisions: the power to decide whether and when it can do so. It is only when the Commission itself is so satisfied that it will act in discharge of its constitutional duty and if that upends other constitutional provisions then so be it. This brings us to the nub of the matter. The constitutional duty to hold elections as required (honestly, justly, fairly) does not, and cannot, convert the duty into a power vis-à-vis other constitutional provisions. That would, constitutionally speaking, make the Commission master of all matters electoral, which is in effect what learned counsel contends. Emphatically, that cannot be. On the constitutional plane, the Commission is not the master but rather the forum or organ that the Constitution has chosen to perform the task that lies at the heart of constitutional democracy. During the course of arguments learned counsel for the Commission was asked that if his stance be correct, then the Commission could withhold elections for an indeterminate period on the ground of an expressed inability to hold them honestly, justly and fairly. Would that be constitutionally permissible? To this question, which in our view goes to the very root of the matter, no satisfactory answer was, with respect, forthcoming. There is an obvious reason for this: no satisfactory answer can be given. The holding of elections cannot be placed at the will, i.e., power (howsoever bonafidely expressed or exercised) of any particular agency or forum, and howsoever exalted its creation or position

may be. Because democracy demands elections the Constitution commands elections. Democracy is meaningless without such an exercise, repeated periodically as required by the Constitution. To concede to the Commission the power, especially on the constitutional plane, to interfere with the electoral process in so fundamental a manner could be tantamount to derailing democracy itself, with incalculable consequences.

17. This brings us to the actual point in issue: can the Commission, in putative exercise of a claimed constitutional power, push elections beyond the applicable period set out in Article 224, and thereby defeat and deny the constitutional command therein enshrined? In our view, the answer can only be in the negative. It is to be noted that both clauses of Article 224 here relevant are couched in mandatory terms: each uses the word “shall” twice, first in relation to the period in which the elections are to be held and then the period in which the results are to be declared. These clauses are mandatory and binding. They tell us *when,* at the latest, the elections are to be held, and *when,* at the latest, the result is to be declared. (Of course, elections can be held at any time within the stipulated period, and the result ought to be declared as swiftly as possible, which is what the 2017 Act, quite properly, mandates.) Article 218(3) tells us *how* those elections are to be held. Both provisions impose constitutional duties. They are complementary. By fixing the time period(s) in Article 224, the Constitution binds everyone, including the Commission itself. The other duty, of holding the elections, is imposed on the Commission, and binds the executive branch to assist it in this regard. In their own terms both duties are mandatory. But the Commission cannot read one constitutional *duty* as conferring upon it the constitutional *power* to negate the other, and thereby convert what is mandatory into something that is only directory. It is this conflation of, and confusion between, “duty” and “power” on the constitutional plane that underlies the Commission’s case. With respect, it cannot be accepted.

18. The startling consequences of the Commission’s stance are not limited only to diluting the effect of Article 224. As noted above, the learned Attorney General submitted that it would be better if all the general elections (i.e., to the National and

Provincial Assemblies) were held on the same day. In fact, this submission was also echoed by learned counsel for the Commission. Now, the Constitution expressly confers on the Prime Minister in relation to the National Assembly, and the Chief Ministers in relation to the Provincial Assemblies, the power to advice dissolution before the stated term (see Articles 58(1) and 112(1) respectively). These are distinct constitutional powers, of a political nature. The effect of an early dissolution is reflected in Article 224 itself, and of course the then Chief Ministers of Punjab and KPK Provinces exercised their respective powers in the instant case. Now, if the central submission by learned counsel for the Commission were accepted, then the latter could take the stance that in order for it to meaningfully fulfill its constitutional duty under Article 218(3) it had the power to require that all elections be held on the same day (or very close together). Indeed, that is, in effect, what was argued before the Court. If so, that would mean that the Commission has a constitutional veto power over the expressly stated power to advice dissolution. One would have the unseemly spectacle of the Prime Minister or a Chief Minister, as the case may be, coming (as it were) cap in hand to the Commission, seeking its permission or preclearance before advising dissolution. This would be a negation of the constitutional powers conferred upon them. This cannot be what is contemplated by the constitutional scheme. Yet, that would be result. Again, this result would be brought about by a failure to maintain the constitutional distinction between “duty” and “power”. Article 218(3) is certainly not designed or intended to allow the Commission to steamroller over all other constitutional provisions relating to elections, including those that impose duties on the Commission itself.

19. We turn to the decision on which much reliance was placed by learned counsel for the Commission, *Workers Party and others v Federation of Pakistan and others* PLD 2012 SC 681. This was a petition filed under Article 184(3). In particular, reliance was placed on the last portion of para 39 (pg. 726) and para 41 (pp. 726-7). These are as follows:

> “39. ... A perusal of the above shows that the words "justly", "fairly" and "honestly" have similar shades of meaning. As has been rightly submitted by Mr. Farogh

> Naseem, these words imply that the Election Commission is under a direct constitutional obligation to exercise all powers invested in it in a bona fide manner, meeting the highest of standards and norms. As a natural corollary, therefore, all discretionary power is also to be exercised and tested against these standards."
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> "41. The Election Commission may also exercise its powers in anticipation of an ill that may have the effect of rendering the election unfair. In the case titled as In *Re: Petition filed by Syed Qaim Ali Shah Jellani* (PLD 1991 Jour. 41) the Elections Commission exercised its powers under Article 218(3) pre-emptively, by making all necessary arrangements to ensure that a certain class of people would be allowed to vote. This case implies that where a violation of the standards mentioned in Article 218(3) has not as yet taken place, the Election Commission is legally empowered under Article 218(3) to exercise its powers pre-emptively in order to avoid a violation of these standards. Furthermore, *Mst. Qamar Sultana v. Public at Large* (1989 MLD 360) and In *Re: Complaint of Malpractices in Constituency No. NA-57, Sargodha-V* (supra) both reinforce the argument that the Election Commission is fully empowered by Article 218(3) to make 'such orders as may in its opinion be necessary for ensuring that the election is fair, honest etc'. These decisions recognize that the Election Commission enjoys broad powers not only to take pre-emptive action but also to pass any and all orders necessary to ensure that the standards of 'honesty, justness and fairness' mentioned in Article 218(3) are met."

Learned counsel referred, in particular, to the word "pre-emptively" used in para 41.

20. The petition that was decided by the cited judgment did not, as such, present a *lis* before the Court. Rather, the petitioners sought declaratory reliefs in relation to various aspects of the electoral process and the holding of elections, with follow up relief by way of directions to be issued to the Commission for framing rules, etc. This is clear from the prayer clause of the petition, which is reproduced at pp. 698-700. It is in this context that the observations made by the Court, and sought to be relied upon, have to be understood. No doubt the Court did refer to "powers" in relation to Article 218(3), as is evident, e.g., from the opening sentence of para 39, which is as follows (pg. 722; emphasis in original):

> "39. The phrase "*the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against*" as used in Article 218(3) of the Constitution informs the content and scope of powers conferred by it on the Election Commission...."

Again, this observation has to be read contextually, in the light of what was sought by the petitioners and the relief that the Court granted (set out in paras 80-81, pp. 754-757). Nothing therein contained has, in our view, any bearing on the question now under consideration, i.e., whether the constitutional duty imposed on the Commission by Article 218(3) includes in it a constitutional power allowing it to essentially override other constitutional provisions relating to the electoral process and elections. This was never the question before the Court in the cited decision, which does not therefore constitute any authority for deciding the issue now before us as, with respect, erroneously contended by learned counsel for the Commission. The cited case does not have any relevance for present purposes. The other decision(s), of the Lahore High Court, relied upon will be considered later.

21. The next point to consider is whether there is anything in ss. 57 and 58 of the 2017 Act as would have allowed the Commission to push the poll date to 08.10.2023. At the relevant time, these sections were in material part as follows:

> "57. **Notification of Election Programme.—**(1) The President shall announce the date or dates of the general elections after consultation with the Commission.
>
> (2) Within seven days of the announcement under sub-section (1), the Commission shall, by notification in the official Gazette and by publication on its website, call upon the voters of the notified Assembly constituencies to elect their representatives in accordance with an Election Programme, which shall stipulate—
>
> [There then follow, in clauses (a) to (i) the detailed schedule of various stages, which begin (in clause (a)) with the filing of nominations, and culminate (in clause (i)) with the polling date. These stages are reflected in the notification and Election Schedule already set out above and therefore the specific clauses in not being reproduced here.] ...."

> "58. **Alteration in Election Programme.—**(1) Notwithstanding anything contained in section 57, the Commission may, at any time after the issue of the notification under sub-section (1) of that section, make such alterations in the Election Programme announced in that notification for the different stages of the election or may issue a fresh Election Programme as may, in its opinion to be recorded in writing, be necessary for the purposes of this Act:

> Provided that the Commission shall inform the President about any alteration in the Election Programme made under this sub-section....”

Learned counsel submitted that subsection (1) of s. 58 enabled the Commission to alter the Election Schedule in such manner as it deemed appropriate and that the impugned order was an application of the statutory power.

22. With respect, we are unable to agree. It is to be noted that the power to alter the election program is circumscribed and not open-ended. It can only be exercised if “necessary for the purposes of [the 2017] Act” and not otherwise. Furthermore, the power conferred comprises of two distinct limbs, which operate separately from each other. The first limb empowers the Commission to make “alterations in the Election Programme” “for the different stages of the election”. In other words, the dates given for the different stages or events in the election program may be altered or varied, but the overall program must recognizably remain the same. The second limb allows the Commission to “issue” “a fresh Election Programme”, i.e., to abandon the earlier notified program and issue an entirely new one. Several points may be made here. Firstly, and most importantly, there is nothing in ss. 57 and 58 as allows the Commission to go beyond the period(s) stipulated constitutionally in Article 224. Whatever it is that is permissible can only happen within the parameters, and in particular the outer limit, fixed by the Constitution itself. What the Constitution commands cannot be altered, denied, diluted or circumvented by legislative fiat or any interpretation or application thereof. Secondly, even within those limits once the election program is put into operation, i.e., the various stages thereof start being acted upon, it is doubtful whether the Commission can abandon it altogether and go to the second limb, i.e., notify a wholly new election program. All that it can, at most, do is to perhaps alter the various stages of the already notified program, to the extent made permissible by the first limb. Thirdly, in making the impugned order, the Commission has not in any event acted upon either limb. In purporting to withdraw the notification and the Election Schedule altogether it has clearly not acted in terms of the first limb. In no way can this be regarded as an “alteration” “for the different stages of the election”. And, in not issuing any fresh election program at

all but only giving an extended poll date it has certainly not acted in terms of the second limb. That would have required issuance of a “fresh Election Programme”, i.e., one complying with the requirements of s. 57(2). That is patently not the case. On any view of the matter therefore, ss. 57 and 58 neither did (nor could) empower the Commission to extend the date of the general election beyond the 90 day period nor did the impugned order in any case even facially comply with the terms of those provisions. Finally, s. 8(c) which was also relied upon in the impugned order. It has no relevance as it clearly contemplates an election already or about to be under way and applies accordingly. In no manner can this provision be read as allowing for the election to be abandoned altogether and the poll date shifted forward in the manner sought to be done by the impugned order.

23. Accordingly, we are of the view that the time period(s) imposed by Article 224 for the holding of general elections cannot be extended by the Commission by reason of any overriding constitutional power claimed to be conferred upon it by Article 218(3) or in terms of the 2017 Act, and certainly not in the manner and for the duration as has been done through the impugned order. In its relationship and interaction with other constitutional provisions, Article 218(3) cannot and does not operate as any sort of constitutional power enabling the Commission to render them nugatory or to override them or deny them their due application. No reading, holistic or otherwise, can end in a result that diminishes other constitutional provisions to the point that relegates them to being mere handmaidens to Article 218(3). That would be a travesty. This aspect of the decision is reflected in para 1 of the short order. It was noted in the Earlier Short Order and the detailed reasons for the same that the 90 day period would inevitably be crossed and a certain margin was therefore granted in this regard, which resulted in the election date of 30.04.2023. Between the making of the impugned order and its setting aside by the present short order another 13 days were lost. In order to make up for this it was ordered that the remaining stages or events of the Election Schedule be shifted forward by that period. This aspect of the decision is reflected in paras 2 and 3 of the short order.

24. We now turn to consider the factual aspect of the matter. The several recitals of the impugned order give the reasons why financial resources and security personnel were not available, and were in effect denied by the Federal and Provincial authorities. Learned counsel for the Commission, as noted, took us through the relevant record to show the correspondence and meetings between the Commission and representatives of various Federal and Provincial ministries, departments and authorities. As noted, it was submitted that all of the foregoing culminated in the decision of the Federal Cabinet of 22.03.2023. This reference to the record and the events by learned counsel was to justify the conclusion arrived at by the Commission that in the circumstances it rightly concluded that it could not fulfill and discharge its constitutional duty in terms of Article 218(3), hence necessitating the issuance of the impugned order.

25. We have carefully considered the record presented before the Court and in particular the recitals contained in the impugned order. With respect, we are unable to agree with what learned counsel has contended. This is so for two reasons. Firstly, during the course of submissions, learned counsel was asked a specific question: if the necessary funds and security arrangement/personnel were made available would the Commission be able to hold the general election consistently with its constitutional duty, and in the manner as contemplated by Article 218(3)? To this a categorical and unqualified answer in the affirmative was given. This question was in fact posed more than once. Each time, the same answer obtained. The essence of the point is contained in para 4 of the short order. Thus, notwithstanding the claims and submissions regarding the precariousness of the financial position and the security situation it was in the end simply a matter of not just will but also willingness to abide by the Constitution and obey the constitutional directive of holding the general election within the stipulated period. Once this became clear because of the answer given to the Court's query all objections and obstacles raised necessarily fell by the wayside. What was stated in the recitals then lost relevance or any meaningful significance.

26. Secondly, it will be noted that para 4 of the short order specifically referred to Article 220, which has already been

reproduced above in para 15. As explained there, this provision imposes a constitutional duty on the Federal and Provincial executive authorities to act in assistance of the Commission and thus confers a corresponding constitutional power on the latter to demand and require the same for the discharge of its functions. It is a matter of regret that the Commission failed to appreciate Article 220 in its true perspective, and did not fully understand its constitutional meaning and import. The constitutional relationship between the Commission and the executive authorities in the context of Article 220 unambiguously and unequivocally gives the upper hand to the former and not the latter. Regrettably, when the record is examined it appears that the Commission acted as though the constitutional position was the reverse. The impression created is not that of a constitutional organ robustly and muscularly exercising a constitutional power in relation to those on whom the Constitution has imposed an express duty in this regard. The impression, rather, is almost that of a supplicant timorously approaching a superior. For example, in a recital appearing at printed page 6 of the impugned order, it is recorded that the Commission "approached the Federal Government to provide necessary guidance". Similarly, the fourth recital on printed page 7 is as follows (emphasis in bold in original, in italics added):

> "**AND WHEREAS**, despite all the *best efforts by the Commission*, the Federal and Provincial Governments and all the executive authorities including law enforcement agencies have not been able to assist the Commission for conduct of free, fair and transparent elections in the Province of Punjab."

It is not for the Commission to seek guidance or to make best efforts. This is a negation and inversion of Article 220. It is for the Commission to exercise a constitutional power and for the executive authorities to fulfill a constitutional duty. Article 220 permits—nay, requires—the Commission to be demanding from a commanding position. That is the intent and purpose of the provision. It is a matter of regret that the Commission failed completely to appreciate its constitutional authority vis-à-vis the executive branch in the context of this provision. The result was that where (i.e., in relation to Article 224) the Commission did not have any power, it misread its constitutional duty under Article 218(3) as conferring such a power, but where (i.e., in

Article 220) it did have a constitutional power to require fulfillment of a constitutional duty it failed to assert itself.

27. But, it could be asked, what could the Commission do if the executive authorities failed or refused to fulfill their constitutional duties under Article 220? The answer, on the constitutional and legal plane, is clear. It was not for the Commission to (metaphorically) wring its hands and then, bowed under the weight of its own professed inability to persuade or cajole the executive authorities to obey the constitutional command of Article 220, pass an unconstitutional order pushing forward the election by several months. The legal path was clear. It was for the Commission to speedily approach this Court for relief in the shape of a writ of mandamus. Even a quick glance at Order XXV of the Supreme Court Rules, 1980, which relates to petitions under Article 184(3) shows that it expressly refers to relief sought in the nature of "Mandamus, Prohibition, Certiorari, Qua Warranto, etc." (from Rule 6 onwards). There can be no doubt that the Commission would be an aggrieved person both in its own right and as acting on behalf of the electorate as a whole, seeking fulfillment of a constitutional duty for the enforcement of a fundamental right (Article 17). Any such petition would of course be decided on its own merits in accordance with law. The point here is that even if we focus only on the Commission's (legally erroneous) conclusion that it could not conduct the general election consistently with its duty under Article 218(3), there was a legal path. Rather than being diverted into making an unlawful order in purported exercise of a power that did not exist on the constitutional plane, the Commission ought to have pursued the legal remedy readily available. Be that as it may, the directions and orders that were required to be given and made to the executive authorities with reference Article 220, had the proper legal remedy been followed, were dealt with in paras 5 to 8 of the short order.

28. Notwithstanding what has been said herein above, one point does need to be addressed. What would be the situation if, a general election being due and an election date announced and schedule released and acted upon, at the eleventh hour (or, perhaps, close to it) there is an emergent situation that requires an extension of the election date? The situation could simply

fall within the four corners of the 2017 Act, in which case it could be dealt with in terms of the first limb of s. 58 (subject to the limitations noted above). But the question here is whether, as the Commission purported to do (in the second last recital of the impugned order), the election date could be taken beyond the constitutional time period under cover of Article 254. That is what the Commission has asserted. Article 254 provides as follows:

> "When any act or thing is required by the Constitution to be done within a particular period and it is not done within that period, the doing of the act or thing shall not be invalid or otherwise ineffective by reason only that it was not done within that period."

The stance taken by the Commission is, with respect, erroneous. Firstly, it is in a sense self-contradictory. If (as erroneously claimed) Article 218(3) had overriding effect even in relation to other constitutional provisions, thus reducing the time periods given in clauses (1) and (2) of Article 224 to be merely directory, then the election(s) covered by that Article would not be an act or thing *required* to be done within a particular period. Therefore, no recourse would need to be taken to Article 254. But, secondly and more importantly, at least in the present context Article 254 is merely a saving provision, i.e., it prevents the act or thing required mandatorily to be done within a prescribed period from becoming unconstitutional if not so done. The provision does not however confer a power on an authority or forum required to do the act or thing to unilaterally extend the period, or shield any purported extension from judicial scrutiny and (if so found appropriate) legal condemnation. If at all, to revert to the question posed at the beginning of this para, such a situation arose in the present context and no solution was available in terms of the 2017 Act (which it was not) then the only legally viable course for the Commission would, again, be to itself seek remedy under Article 184(3). It would then be for the Court to decide, on the merits of the case, whether there was any constitutional or legal justification for going beyond the period stipulated in Article 224. A judicial finding in the affirmative, coupled with Article 254, would then be the legally permissible route enabling the act or thing to be done beyond the stipulated period. That, in fact, is what happened both in terms of the

Earlier Short Order and the short order in the present case, when for the reasons stated, first the election date had to be taken beyond the stipulated period, and then the election program further shifted forward by about a fortnight.

29. This brings us to the decisions of the Lahore High Court in *Government of the Punjab and another v Chief Election Commissioner and others* PLD 2010 Lah 1 (single Judge) and (on appeal) *Muhammad Azhar Siddique and another v Government of Punjab and others* PLD 2010 Lah 138 (DB). The petitions involved bye-elections for National Assembly seats from the Punjab and Provincial Assembly seats in that Province. Article 224(4) provides that a bye-election has to be held within 60 days of the seat falling vacant. The facts presented in these matters, and the litigation history, are rather complicated and need not be set out here. It suffices to note that on the question that would be of relevance here, i.e., whether the stipulated period is mandatory, the learned Single Judge refrained from recording any finding as such (at pg. 17, para 11) and likewise did not dilate upon Article 254 (*ibid*). When the matters reached the learned Division Bench in appeal, there are passing observations (e.g., at pg. 152) that tend to confirm the mandatory nature of the time period, though the point is not addressed directly. These cases are therefore, with respect, of no real assistance in respect of the issues raised in the present petition. In any case, the cited decisions would be subject to Article 189.

30. Insofar as the point noted in para 9 of the short order is concerned, that matter has been fully considered and dealt with in the detailed reasons issued in relation to the Earlier Short Order. No further elaboration is required here. As regards para 10, the order (by majority) of the learned three member Bench referred to there was in fact recalled by an order of a six member Bench on 04.04.2023, and the suo moto proceedings disposed of as having become infructuous. No further consideration is therefore required here. Finally, as regards para 11, as noted learned counsel for the Governor, KPK withdrew from representation and the Advocate General KPK submitted that since even the date of the election had not been given by the former no further assistance could be provided by the latter to the Court. In the circumstances, the relief sought

in relation to the general election to the KPK Assembly was deferred in the manner indicated.

31. The foregoing are the reasons for the short order whereby this petition was disposed of.

Chief Justice

Judge

Judge

Islamabad, the
4th April, 2023
*NAveed/**

Approved for reporting