

SUPREME COURT OF PAKISTAN
(Advisory Jurisdiction)

PRESENT:

Mr. Justice Gulzar Ahmed, CJ
Mr. Justice Mushir Alam
Mr. Justice Umar Ata Bandial
Mr. Justice Ijaz ul Ahsan
Mr. Justice Yahya Afridi

REFERENCE NO.1 OF 2020

[Reference by the President of the Islamic Republic of Pakistan, under Article 186 of the Constitution of the Islamic Republic of Pakistan, 1973]

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| For the Federation
<i>[in Reference No.1/2020]
[in CMA.127-128, 170,
989,1293/2021]</i> | : | Mr. Khalid Jawed Khan,
Attorney General for Pakistan
Mr. Sohail Mehmood, Addl. AGP
Mr. Ayaz Shaukat, DAG
<i>[Assisted by Ms. Maryum Rasheed, Advocate]</i> |
| For the National Assembly
<i>[in CMA.278/2021]</i> | : | Mr. Abdul Latif Yousafzai, Sr. ASC
Mr. Muhammad Mushtaq, Addl.
Secretary (Legislation)
Mr. Muhammad Waqar, DPO (Lit.) |
| For the Senate of Pakistan
<i>[in CMA.296/2021]</i> | : | Senator Muhammad Ali Khan Saif
Mr. Muhammad Javed Iqbal, DD |
| For the Election Commission
<i>[in CMA.210, 808, 880, 983,
1010/2021]</i> | : | Mr. Sikandar Sultan Raja, Chief
Election Commissioner
Mr. Justice (R) Muhammad Iltaf
Ibrahim Qureshi, Member (Punjab)
Mrs. Justice (R) Irshad Qaiser,
Member (KP)
Mr. Shah Mehmood Jatoui, Member
(Balochistan)
Mr. Nisar Ahmed Durrani, Member
(Sindh)
Mr. Sajeel Shehryar Swati, ASC
Mr. Sana Ullah Zahid, ASC, L.A.
Dr. Akhtar Nazir, Secretary
Mr. Muhammad Arshad, DG (Law) |
| For Government of Punjab
<i>[in CMA.95/2021]</i> | : | Mr. Ahmed Awais, AG
Barrister Qasim Ali Chohan,
Addl.AG
Ms. Imrana Baloch, AOR |
| For Government of Sindh
<i>[in CMA.386/2021]</i> | : | Mr. Salman Talib ud Din, AG
Mr. Sibtain Mahmud, Addl.AG
<i>(via video link from Karachi)</i> |
| For Government of KP
<i>[in CMA.104/2021]</i> | : | Mr. Shumail Ahmad Butt, AG
Mr. Atif Ali Khan, Addl.AG |
| For Government of Balochistan | : | Mr. Arbab M. Tahir, AG |

- [in CMA.185/2021]* Mr. Muhammad Ayaz Khan Swati, Addl.AG
Mr. Muhammad Fareed Dogar, AAG
- For ICT : Mr. Niazullah Khan Niazi, AG
[in CMA.149/2021]
- For JUI : Mr. Kamran Murtaza, Sr. ASC
[in CMA.129, 541/2021] Mr. Jehangir Khan Jadoon, ASC
- For SHCBA : Mr. Salahuddin Ahmed, ASC
[in CMA.297, 1119/2021] Barrister Omer Soomro, ASC
Syed Riffaqt Hussain Shah, AOR
[Assisted by Ravi Pinjani, ASC]
- [in CMA.130, 1201, 1292/2021]* : Mr. Hassan Irfan Khan, ASC
- For PPP : Mian Raza Rabbani, Sr. ASC
[in CMA.131, 704, 1217/2021] Mr. Mehmood A. Sheikh, AOR
- [in CMA.154,1295/2021]* : Malik Qamar Afzal, ASC
- For JI : Mr. Ishtiaq Ahmed Raja, ASC
[in CMA.211/2021]
- [in CMA.231/2021]* : Syed Iqbal Hashmi, ASC
- For PML (N) : Barrister Zafar Ullah, ASC
[in CMA.784, 1231/2021]
- For Pakistan Bar Council : Mr. Mansoor Usman Awan, ASC
[in CMA.807, 1200/2021]
- For PPP (P) : Mr. Farooq H. Naek, Sr. ASC
[in CMA.872,1218/2021]
- [in CMA.908, 1008, 1026-1030/2021]* : Mr. Khurram Shehzad Chughtai,
Advocate High Court, in person
- [in CMA.1115/2021]* : Mr. Azhar Iqbal, ASC
- [in CMA.1233/2021]* : Mr. Waheed Ahmed Kamal, in person
- Dates of Hearing : 04.01.2021, 11.01.2021, 13.01.2021,
14.01.2021, 02.02.2021, 03.02.2021,
04.02.2021, 08.02.2021, 10.02.2021,
11.02.2021, 15.02.2021, 16.02.2021,
17.02.2021, 18.02.2021, 19.02.2021,
22.02.2021, 23.02.2021, 24.02.2021; and
25.02.2021

OPINION

The President of the Islamic Republic of Pakistan has sent a REFERENCE under Article 186 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter to be referred to as “the

Constitution"), for opinion of this Court. The question asked in the REFERENCE is as follows:

*"Whether the condition of 'secret ballot' referred to in Article 226 of the Constitution of Islamic Republic of Pakistan, is applicable only for the elections held '**under**' the Constitution such as the election to the office of President of Pakistan, Speaker and Deputy Speaker of National Assembly, Chairman and Deputy Chairman of Senate, Speakers and Deputy Speakers of the Provincial Assemblies and not to other elections such as the election for the members of the Senate of Pakistan held under the Elections Act, 2017, enacted pursuant to Article 222 read with Entry 41, Part 1, Fourth Schedule to the Constitution, which may be held by way of secret or open ballot, as may be provided for in the Election Act, 2017.?"*

2. We have heard learned Attorney General for Pakistan, learned Advocate Generals of all four Provinces and ICT, learned counsel appearing for the National Assembly, the Senate of Pakistan, the Election Commission, Political Parties, Pakistan Bar Council, Sindh High Court Bar Association and the individuals, who have appeared in person.

3. For the detailed opinion to be recorded later, the REFERENCE is answered as follows:

- (i) The Elections to the Senate of Pakistan are held "under the Constitution" and the law;
- (ii) It is the duty of the Election Commission of Pakistan in terms of Article 218(3) of the Constitution, to ensure that the election is conducted honestly, justly, fairly and in accordance with law and that corrupt practices are guarded against on which this Court has given successive judgments and the most exhaustive being **Workers' Party Pakistan through Akhtar Hussain, Advocate, General Secretary & 6 others v. Federation of Pakistan & 2 others** (PLD 2012 SC 681);

- (iii) The Election Commission of Pakistan is required by the Constitution to take all necessary steps in order to fulfil the above mandate/duty in terms of Article 222 of the Constitution, which empowers the Parliament, subject to the Constitution to legislate, *inter alia*, on the conduct of elections and matters relating to corrupt practices and other offences in connection with elections but categorically provides that, *"no such law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Election Commission"* under Part VIII, Chapter 1 of the Constitution;
- (iv) Further in terms of Article 220 of the Constitution, all the executive authorities in the Federation and Provinces are obliged to assist the Commissioner and the Election Commission of Pakistan in discharge of his or their functions, as provided for in Article 218(3) of the Constitution;
- (v) As far as the secrecy of ballot is concerned, this Court has already answered this question in a judgment of a 5-member Bench of this Court reported as **Niaz Ahmad v. Azizuddin & others** (PLD 1967 SC 466), where it has been held that secrecy is not absolute and that *"the secrecy of the ballot, therefore, has not to be implemented in the ideal or absolute sense but to be tempered by practical considerations necessitated by the processes of election"*;
- (vi) Furthermore, in order to achieve the mandate of the Election Commission in terms of Article 218(3) read with Article 220 and other enabling provisions of the Constitution and the law, the Election Commission is required to take all available measures including utilizing technologies to fulfil the solemn constitutional duty to ensure that the election is "conducted honestly, justly, fairly and in accordance with law and that corrupt practices are guarded against".

The REFERENCE is answered accordingly.

CHIEF JUSTICE

JUDGE

JUDGE

JUDGE

With utmost respect the opinion sought being not a question of law within the contemplation of Article 186 of the Constitution is returned unanswered.

JUDGE

YAHYA AFRIDI, J.- For the reasons to be recorded later, with utmost respect, the opinion sought by the Worthy President, Islamic Republic of Pakistan in the instant Reference, is not a question of law within the contemplation of Article 186 of the Constitution of the Islamic Republic of Pakistan, 1973, accordingly, the same is returned unanswered.

Judge

OPINION OF THE COURT

For the detailed opinion to be recorded later, by majority of 4 against 1 (*Yahya Afridi, J.*) dissenting, the REFERENCE is answered as follows:

- (i) The Elections to the Senate of Pakistan are held “under the Constitution” and the law;
- (ii) It is the duty of the Election Commission of Pakistan in terms of Article 218(3) of the Constitution, to ensure that the election is conducted honestly, justly, fairly and in accordance with law and that corrupt practices are guarded against on which this Court has given successive judgments and the most exhaustive being *Workers’ Party Pakistan through Akhtar Hussain, Advocate, General Secretary & 6 others v. Federation of Pakistan & 2 others* (PLD 2012 SC 681);
- (iii) The Election Commission of Pakistan is required by the Constitution to take all necessary steps in order to fulfil the above mandate/duty in terms of Article 222 of the Constitution, which empowers the Parliament, subject to the Constitution to legislate, *inter alia*, on the conduct of elections and matters relating to corrupt practices and other offences in connection with elections but categorically provides that, “*no such law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Election Commission*” under Part VIII, Chapter 1 of the Constitution;
- (iv) Further in terms of Article 220 of the Constitution, all the executive authorities in the Federation and Provinces are obliged to assist the Commissioner and the Election Commission of Pakistan in discharge of his or their functions, as provided for in Article 218(3) of the Constitution;

- (v) As far as the secrecy of ballot is concerned, this Court has already answered this question in a judgment of a 5-member Bench of this Court reported as **Niaz Ahmad v. Azizuddin & others** (PLD 1967 SC 466), where it has been held that secrecy is not absolute and that *“the secrecy of the ballot, therefore, has not to be implemented in the ideal or absolute sense but to be tempered by practical considerations necessitated by the processes of election”*;
- (vi) Furthermore, in order to achieve the mandate of the Election Commission in terms of Article 218(3) read with Article 220 and other enabling provisions of the Constitution and the law, the Election Commission is required to take all available measures including utilizing technologies to fulfil the solemn constitutional duty to ensure that the election is “conducted honestly, justly, fairly and in accordance with law and that corrupt practices are guarded against”.

CHIEF JUSTICE

JUDGE

JUDGE

LARGER BENCH
ISLAMABAD
01.03.2021
Hashmi
APPROVED FOR REPORTING

JUDGE

JUDGE

Announced in open Court on _____ 01.03.2021 _____

CHIEF JUSTICE