

ORDER SHEET
HIGH COURT OF SINDH AT KARACHI

C.P.NO.D-1310, 811, 844 & 845 OF 2018

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

Before:-

Mr.Justice Muhammad Ali Mazhar

Mr.Justice Agha Faisal

- (1) Mir Shabbir Ali Khan Bijarini
- (2) Ehsan ur Rehman Mazari
- (3) Haji Abdul Rauf Khoso
- (4) Saleem Jan MazariPetitioners

V/s

Federation of Pakistan & others.....Respondents

Date of hearing: 11.5, 17.05 & 29.05.2018

Mr. Rafiq Ahmed Kalwar, Advocate for the Petitioners in C.P.Nos.D-811, 844 and 845 of 2018.

Mr. Haq Nawaz Talpur, Advocate for the Petitioner in C.P. No.D-1310/2018.

Mr. Asim Mansoor, DAG.

Malik Qamar Afzal, Advocate for the Election Commission of Pakistan.

Mr. Abdullah Hanjra, Law Officer, Election Commission.
Mr.Zaheer Ahmed Sahito, District Election Commissioner, Kashmore, Mr.Sain Bux Channar, Director, Headquarter, Election Commission and Mr.Rasheed Ahmed Bhatti, Joint Provincial Commissioner, Sindh, Mr.Muhammad Yousuf, District Election Commissioner, Karachi Central.

Mr.Masood Ahmed Qureshi, Deputy Director, Headquarter, Election Commission and Syed Nadeem Haider, Regional Election Commissioner, Shaheed Benazirabad.

Mr. Ghulam Shabbir Shah, Addl. A.G. Assisted by Mr.Hasnain Shah, Ms.Nadia Afzal and Ms.Sabeen, Advocates.

Ms. Rukhsana Mehnaz Durrani, State Counsel.

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Muhammad Ali Mazhar, J: These Constitution Petitions have been brought to challenge the first proviso attached to Sub-Rule (2) of Rule (8) of the Elections Rules, 2017 which provides that fraction of more than 0.5 may be counted as one seat and fraction of less than 0.5 may be ignored. All the petitioners in one voice have challenged the vires of the proviso being ultra vires to the Elections Act 1997 and also entreated for rectification in the delimitation of national assembly constituencies of District Kashmore, Jacobabad and Shikarpur.

2. The combined effect and crux of arguments articulated by the learned counsel for the petitioners is that before promulgation of the Elections Act, 2017 the delimitation of the constituencies were being carried out under Delimitation of Constituencies Act, 1974 and under Section 9(2) it was postulated that as far as may be the constituencies for the election shall be equal among themselves in population. So for intent and purpose, it was unequivocally well-defined that the constituencies in terms of populations shall be equal in size and no specific limit or percentage of deviation was specified. Earlier the population deviation was varied on case to case basis but in the current law this mischief and discontent has been removed and a specific limit of deviation if any has been placed under Section 20 (3) of the Election Act. It was further averred that on

promulgation of the Election 2017 all the laws relating to elections have been consolidated in one Act and provisions relating to delimitation are encompassed in chapter III of the Act. The learned counsel for the petitioners further argued that the impugned proviso is inconsistent with Sections 19 (1) and 20 (3) of the Elections Act, 2017. The Respondent No.2 (ECP) acted beyond the compass and radius of Sections 19 (1) and Section 20 (3) of the Election Act, 2017 which only permits variation up to 10% plus-minus whereas the impugned proviso allows variation to higher limit.

3. The Election Commission of Pakistan, issued a Notification bearing No.F.8(I)/2018-Elec-I dated 15.1.2018, wherein they notified the share of Districts/Agencies, FATA and Islamabad Capital Territory regarding National Assembly and Provincial Assemblies seats. The districts Jacobabad and Kashmore have been discriminated in the allocation of seats and their votes have been debased. It was further contended that the respondent No.2 has allowed excess variation of 28% of population in district Jacobabad and 39% excess variation in District Kashmore which is higher than the permissible limit of 10% as provided section 20 (3) of the Elections Act, 2017. They further averred that it is well settled principle of law that Rules cannot go beyond the Act. The Rules cannot create new rights or subjugate the rights created under the parent statute, therefore, the impugned proviso is inconsistent with parent statute. Debasement of vote is caused when the weight of the vote is diminished. In the instant case 02 votes of the Kashmore district and 02 votes of the Jacobabad District are equal to 01 vote of the neighboring district of

Shikarpur. Debasement has been universally recognized as violative of one man, one vote the basic tenet of democracy and is declared unconstitutional. Debasement is defined in **Black's law Dictionary** as *the act of reducing the value, quality and purity of something degradation*. The principle of one man, one vote is fully entrenched in our country in view of Articles 51 (5) of the Constitution and 20 (3) of the Election Act, 2017. The ECP has radically disturbed the concept of uniformity of population by creating such irrational disparity and has made it difficult to conduct elections in an honest, just and fair manner on the contrary it amounts to commit gerrymandering. It was further argued that the administrative/revenue districts are distinct from the electoral units. The Administrative/revenue districts are formed on the basis of factors other than population. Article 51 (5) of the Constitution of Pakistan provides that the seats in the National Assembly shall be allocated on the basis of population in accordance with the last preceding census officially published. The learned counsel also invited attention to Rule 10 (4) of the Election Rules which permits the Commission to overlap the administrative boundary in exceptional circumstances. The ECP in the instant delimitation has overlapped district boundaries in the province of Baluchistan citing the below average population ratio as exceptional circumstances.

4. The learned counsel also focused on the **Ouster Clause** provided under Section 236(3) of the Elections Act, 2017, that *“the validity of the delimitation of any constituency or of any proceedings taken or anything done by or under the authority of the Commission, under this*

Act shall not be called in question in any court". To cover up the bar contained in the ouster clause, the learned counsel argued that the constitutional jurisdiction of the High Court cannot be taken away by subordinate legislation and placed reliance on **PLD 2014 Lahore 221, PLD 2001 SC 607, PLD 1996 SC 632, PLD 1972 SC 139 and PLD 1989 SC 26**. It was further argued that the Rules have been framed under Section 239 of the Elections Act, 2017 by the ECP under the principles of delegated legislation which always considered to be subordinate legislation. The power and authority of the ECP to frame rules is subject to law and constitution. The learned counsel close down with the prayer that the first proviso of Rule 8(2) of the Election Rules, 2018 is ultra vires, illegal and unconstitutional being inconsistent with the parent statute hence the allocation of the NA seats while applying the formula provided in said rule may be set aside. In support of contention, the learned counsel for the petitioners cited following judicial precedents:-

[1. 2003 SCMR 370 (Pakistan through Secretary Finance, Islamabad and others vs. Aryan Petro Chemical Industries (Pvt.) Ltd., Peshawar and others). 2. 2005 SCMR 186 (Khawaja Ahmad Hassaan vs. Government of Punjab and others). 3. 2013 SCMR 642 (Zarai Taraqiati Bank Limited and others v. Said Rehman and others). 4. PLD 2014 SC 389. Suo Motu Case No.11 of 2011. (Action taken on the news clipping regarding scandal. of billions of rupees of National Police Foundation Land) 5. 2014 CLC 335 (M.Q.M. and others vs. Province of Sindh and others). 6. PLD 2014 Lahore 221 (Arshad Mehmood vs. Commissioner-Delimitation Authority, Gujranawala and others). 7. PLD 2014 Supreme Court 531 (Province of Sindh through Chief Secretary and others vs. M.Q.M. through Deputy Convener and others). 8. 2015 SCMR 1152 (Sue Evenwel, ET AL vs. Greg Abbott, Governor of Texas ET AL). 9. Kirkpatrick v. Preisler [394 US 526 (1969)]. 10. Reynolds v. Sims [377 US 533]. 11. Wesberry v Sanders [376 US 1]. 12. AIR 1986 SC 434 (State of Madhya Pradesh and Others v. Devilal). 13. AIR 2009 SC 3278 (Association of Resident of Mhow (ROM) v. Delimitation Commission of India).

5. The learned counsel for ECP argued that under the law for the purpose of delimitation the Commission may hold

inquiries, summon witnesses and record evidence and publish a preliminary report. The representation with regard to preliminary report may be filed within thirty days. Any voter may make a representation to the Commission and after hearing and considering the representations, amendments, alterations or modifications may be made. It was further contended that the ECP is cognizant of its duties commanded by the Constitution to conduct and organize free and fair elections. The learned counsel further averred that in the year, 2002 the Kashmore was Taluka of District Jacobabad but it was notified as independent district in 2004. As per Article 51 (5) of the Constitution, the Commission re-described the limits of the constituencies throughout the country before the General Election 2008 including NA-209 Jacobabad-cum-Kashmore (Old Jacobabad-II) and NA-210 Kashmore (Old Jacobabad-III).

6. The learned counsel for the Election Commission of Pakistan referred to sub-Article 3 of Article 218 of the Constitution and argued that it is the duty of the Election Commission to organize and conduct the elections and make such arrangement to ensure that the election is conducted honestly, fairly and in accordance with law. He further referred to Article 222 of the Constitution of Islamic Republic of Pakistan, 1973 which germane to Electoral Laws and under clause "b" the Majlis-e-Shoora (Parliament) may by law provide inter alia for delimitation of constituencies by the Election Commission including delimitation of constituencies of local government. He also referred to the definition of population provided in clause (xxix) of Section 2 of the Elections Act, 2017 which means the population in accordance the last preceding

censes officially published. The learned counsel for the Election Commission made much emphasis that according to Section 3 of the Elections Act, 2017, the Commission may regulate its own procedure. He also referred to us Chapter III of the 2017 Act which applies to the delimitation of constituencies. Under Section 17, the Commission has a right to delimit territorial constituencies for election of the National Assembly and Provincial Assembly and local government in accordance with the provisions of the Constitution, the Elections Act, 2017 and Elections Rules 2017. He further referred to Section 236 of the 2017 Act in which the jurisdiction of courts is barred with further emphasis that validity of the delimitation of any constituency or of any proceedings taken or anything done by or under the authority of the commission under this Act shall not be called in question in any court. The learned counsel for ECP cited following judicial precedents:

[1. 2013 CLC 1712 (Abdul Qadir Patel vs. Chief Election Commissioner and 2 others). 2. PLD 2014 Lahore 330 (Pakistan Peoples Party vs. Government of Punjab and others). 3. 2014 YLR 1583 (Ghulam Mustafa and others vs. Commissioner/Delimitation Authority, D.G. Khan Division, Dera Ghazi Khan and others). 4. 2014 CLC 335 (M.Q.M. and others vs. Province of Sindh and others). 5. PLD 2012 Supreme Court 681 (Workers' Party Pakistan through Akhtar Hussain, Advocate, General Secretary and others vs. Federation of Pakistan and 2 others). Art. 218(3). 6. PLD 2011 Supreme Court 997 (Watan Party another vs. Federation of Pakistan and others).

7. The learned DAG adopted the arguments of learned counsel for ECP. Whereas the learned A.A.G argued that there may be some lapses in the delegated legislation permitting to frame the rules by ECP devising the method for the allocation of seats but at present, entire nation is geared up for the elections to choose their representatives so at this stage if proviso under challenge is strike out, it

will seriously hamper the general elections. In support of his contention, the learned A.A.G referred to the dictum laid down by the apex court in the case of ***Federation of Pakistan vs. Haji Muhammad Saifullah Khan, reported in PLD 1989 S.C. 166.***

8. Heard the arguments. All the petitioners in one voice pursued the declaration that the first proviso attached to sub-Rule 2 of Rule 8 the Elections Rules, 2017 is illegal, ultra vires and inconsistent with the Elections Act, 2017. Directions have also been sought against the respondents to carve out the constituencies under strict compliance of Section 19 and 20 of the Elections Act, 2017 and fix the average population ratio within the legally permissible 10% plus-minus variation. The anthology and conception of delimitation is provided under Section 19 of the Elections Act, 2017 in which for the purpose of election of the National Assembly the Commission may divide each province into as many separate territorial constituencies as the number of general seats allocated to that province under Article 51 of the Constitution and for the purpose of election of provincial assemblies, the Commission may divide each province into as many separate territorial constituencies as the number of general seats specified in Article 106. In tandem, the principles of delimitation are provided under Section 20 of the Elections Act, 2017. The conspicuous and salient features of the quantified principles to be kept in mind are the distribution of population in geographically compact areas, physical features, existing boundaries of administrative units, facilities of communication and public convenience and other cognate factors to ensure homogeneity in the creation of constituencies with the

rider that as far as possible, variation in population in the constituencies shall not ordinarily exceed 10% and if it is exceeded in an exceptional case, the Commission shall record reasons.

9. In the sphere of Section 239 of the Elections Act, 2017, the Election Commission has framed Elections Rules, 2017. Chapter-III of the Rules is germane to delimitation of constituencies. In line with Rule 7 the Commission is vested with powers to carry out the delimitation of constituencies of general seats in an Assembly in accordance with section 19 and the procedure laid down in Chapter-III of the Rules on the basis of population in accordance with the last preceding census officially published. However, Rule 8 provides for configuration of quota in which the Commission may determine and notify the share of a district by dividing total population thereof with the quota per seat of National Assembly and will also determine and notify the share of a district by dividing total population with the quota per seat of the Provincial Assembly. It is significant to note that sub-Rule 2 of Rule 8 is relevant to the quota per seat of the National Assembly, whereas, in sub-Rule 4 the Commission may determine the share of district or quota per seat of Provincial Assembly but the proviso attached to sub-Rule 2 and sub-Rule 4 are couched in same phrasings and expressions which expound that on fraction of more than 0.5 shall be counted as one seat and fraction of less than 0.5 may be ignored. For the ease of convenience, Section 20 and Rule 8 of the Elections Rules, 2017 are produced as under:-

Elections Act 2017

20. Principles of delimitation.— (1) All constituencies for general seats shall, as far as practicable, be delimited having regard to the distribution of population in geographically compact areas, physical features, existing boundaries of administrative units, facilities of communication and public convenience and other cognate factors to ensure homogeneity in the creation of constituencies.

(2) For the purpose of delimiting constituencies for the general seats of the National Assembly for the Tribal Areas two or more separate areas may be grouped into one constituency.

(3) As far as possible, variation in population of constituencies of an Assembly or a local government shall not ordinarily exceed ten percent.

(4) If the limit of ten percent under sub-section (3) is exceeded in an exceptional case, the Commission shall record reasons thereof in the delimitation order.

Elections Rules 2017

8. Determination of quota.— (1) The Commission shall, after allocation of seats referred to in rule 7, determine the average population (hereinafter referred to as 'quota per seat' of a constituency for each Province, the Tribal Areas and the Federal Capital by dividing total population thereof by general seats in the National Assembly allocated to a Province, the Tribal Areas or, as the case may be, the Federal Capital.

(2) The Commission shall determine and notify the share of a district or districts, an agency or agencies or, as the case may be, the Federal Capital by dividing total population thereof with the quota per seat of the National Assembly as determined under this rule:

Provided that a fraction of more than 0.5 may be counted as one seat and a fraction of less than 0.5 may be ignored: [emphasis applied]

Provided further that the Commission may deviate from the principle laid down in the first proviso in exceptional cases for reasons to be recorded.

(3) The Commission shall divide total population of a Province by the number of general seats in the Provincial Assembly to determine quota per seat in that Assembly.

(4) The Commission shall determine and notify the share of a district or districts by dividing total population thereof with the quota per seat of the Provincial Assembly concerned as determined under this rule:

Provided that a fraction of more than 0.5 shall be counted as one seat and a fraction of less than 0.5 may be ignored. [emphasis applied]

Provided further that the Commission may deviate from the principle laid down in the first proviso in exceptional cases for reasons to be recorded.

10. It is also significant to note that Rule 10 emanates and originates command to the Delimitation Committee to obtain population data of last census officially published by Pakistan Bureau of Statistics along with relevant maps showing census charges, census circles and census blocks. It is also an obligation and sense of duty of Delimitation Committee to obtain district maps authenticated by Pakistan Bureau of Statistics or district head of Revenue Department indicating details of all administrative and revenue units to the level of a Patwari Circle or Tapedar Circle as well as prominent geographical and physical features. At the time of preparing draft proposals the Delimitation Committee is obliged to follow the principles of delimitation as laid down in Section 20 including the procedure provided under the Rules and the guidelines provided by the Commission from time to time. In sub-Rule 4 there is a strict condition that the constituency of an Assembly shall not ordinarily extend to more than one district except in exceptional circumstances for reasons to be recorded by the Delimitation Committee with a further stipulation that a Patwar Circle or as the case may be a Tapedar Circle shall be the basic unit for delimitation and it shall not be broken under any circumstances. At the same time sub-rule 5 of Rule 10 pave the way to start delimitation from Northern end of the district and proceed clock-wise in zigzag manner so that population among the constituencies of an assembly shall remain as close as may be practicable to the quota.

11. Though by means of these petitions, no more than the vires of proviso attached to the rules is under challenge but the learned counsel for the petitioners have

also made much emphasis to the tune of excess variation of population in district Jacobabad and District Kashmore as compare to the neighboring district of Shikarpur. The Elections Rules, 2017 have been framed under Section 239 of the Elections Act, 2017 after prior publication and hearing and deciding objections or suggestions filed within 15 days. Nevertheless Section 20 of the Act accentuates that the population of constituency shall not ordinarily exceed 10% and in case it is exceeded the Commission shall record reasons in the delimitation order whereas, the proviso under challenge only exemplifies and differentiates that fraction of more than 0.5 may be counted as one seat. So in our considerate view and for all intents and purposes, there is no direct clash, collision and or inconsistency at the heart of proviso attached to the rule under challenge. One provides that the population shall not exceed 10% in any constituency whereas the later relates solitary to the allocation of seats. The second proviso of Rule 8 further envisages that the Commission may deviate from the principle laid down in the first proviso. Though the petitioners have challenged the variation in the constituencies of district Jacobabad and Kashmore but at the same time it cannot be lost sight that the proviso in the Rules added much prominence and distinction that the constituencies shall not ordinarily extend to more than one district and the Patwar Circle or Tapedar Circle shall be the basic unit which cannot be broken in any circumstances. The petitioners want that the entire delimitation exercise should be carried out again with strict observance and implementation of rigors of 10% variation in the population but keeping in mind the relevant proviso of the rules which are otherwise not

under challenge in these petitions except the first proviso of Rule 8, there are many other characteristics and prerequisites which are to be in conformity with by the Delimitation Committee at the time of delimitation including the checks and control that constituencies may not extend to more than one district and the Patwar Circle or Tapedar Circle may not be broken. It would not be possible in all constituencies and districts to maintain strict harmony exactly to 10% variation and this maybe a far-sightedness that variation over and above 10% is permissible to some extent but in such eventuality and contingency, the Commission has to record the reasons.

12. The Petitioner in C.P. No.D-844/2018 attached the copy of his representation filed on 16.01.2018 to the Election Commission of Pakistan. He contended in his representation that as per census the total population of the district Jacobabad is 1,006297 and total population of district Kashmore is 1,089169 collectively so the total population of both the districts is 2,095466. Keeping in mind the population ratio with 10% plus-minus according to the petitioners the Jacobabad and Kashmore district qualified for three seats of the National Assembly but the Election Commission of Pakistan reduced the National Assembly seats of district Jacobabad and Kashmore from 3 to 2 on the ground of overlapping of administrative boundaries. The petitioner in C.P. No.D-811 of 2018 has also attached with his petition the same copy of representation of the petitioner in C.P. No.D-844/2018, whereas, petitioner in C.P. No.D-1310/2018 filed his proposal to the Election Commission on 07.01.2018. He proposed to the Election Commission of Pakistan to delimit district Jacobabad and Kashmore

though NA-208, 209 and 210 may be allowed to continue under new numbers. If his proposal was taken into consideration by ECP, he basically wanted fresh delimitation of all constituencies in view of his proposal. The above proposals unequivocally show that the petitioner wanted delimitation and carving out of areas by overlapping population from one district to another through jumping and breaking TC which under the letters of law cannot be broken. They further want that the population of three districts Kashmore, Jacobabad and Shikarpur should be combined. On the contrary, learned counsel for the Election Commission of Pakistan made much emphasis that in 2002 the Kashmore was Taluka of district Jacobabad which was notified as an independent district in 2004. He further contended that as the delimitation has already been notified in 2002 and the seats in National Assembly remained same, therefore, the Commission re-described the limits of constituencies throughout the country before the General Election 2008 including NA 209 Jacobabad-cum-Kashmore (Old Jacobabad-II), NA-210 Kashmore (Old Jacobabad-III).

13. Ultra vires is a Latin phrase and expression which means "**beyond the powers**". If an act entails legal authority and it is done with such authority, it is symbolized as intra vires (within the precincts of powers) but if it carries out shorn of authority, it is ultra vires. Acts that are intra vires may unvaryingly be acknowledged legal and those that are ultra vires illegal. The validity of the subordinate or delegated legislation can be challenged on the ground of being ultra vires the enabling or parent Act. If the subordinate or delegated legislation is found in excess of the powers conferred by

the parent Act or is made without following the procedure to be followed, the delegated or subordinate legislation may be declared invalid. It is a well settled that constitutionality of any law can be scrutinized and surveyed. The law can be struck down if it is found to be offending against the Constitution for absenteeism of lawmaking and jurisdictional competence or found in violation of fundamental rights. It is also established law that the vires of delegated legislation may be subject to judicial review. At the same time it is also well-known through plethora of dictums laid down by the superior courts that the law should be saved rather than be destroyed and the court must lean in favour of upholding the constitutionality of legislation unless ex facie violative of a Constitutional provision. When the subordinate or delegated legislation is made by the authority exercising its power mala fide or with ulterior motive or in an unreasonable and arbitrary manner then of course this court may declare it invalid. In literal sense, the expression ultra vires connotes that the rule making authority had no substantive powers under the parent statute to make rules in question. It is well known principle that Rule cannot go beyond the Act. The delegate cannot make a rule which is not authorized by the parent statute and the delegated legislation must fall within the four corners of the parent statute. To strengthen this particular scenario, we surveyed and browsed a few dictums which deduced and deciphered following tenets of law:

- 1. This is a settled principle that a statutory rule cannot enlarge the scope of the section under which it is framed and if a rule goes beyond what the section contemplates, the rule must yield to the statute.**

2. The authority of executive to make rules and regulations in order to effectuate the intention and policy of the Legislature, must be exercised within the limits of mandate given to the rule making authority and the rules framed under an enactment must be consistent with the provisions of said enactment.
3. The rules framed under a statute if are inconsistent with the provisions of the statute and defeat the intention of Legislature expressed in the main statute, same shall be invalid.
4. The rule making authority cannot clothe itself with power which is not given to it under the statutes and thus the rules made under a statute, neither enlarge the scope of act nor can go beyond the act and must not be in conflict with the provisions of statute or repugnant to any other law in force.
5. Rules must be read together with the Act under which they are made, cannot repeal or contradict express provisions in the Acts from which they derive their authority, and if the Act is plain, the rule must be interpreted so as to be reconciled with it, or, if it cannot be reconciled, the rule must give way to the plain terms of the Act.
6. If the rules framed under the statute are in excess of the provisions of the statute or are in contravention of or inconsistent with such provisions then those provisions must be regarded as ultra vires of the statute and cannot be given effect to.
7. The "rules' and "regulations" framed under any Act are meant to regulate and limit the statutory authority.
8. Rules and regulations being forms of subordinate legislation do not have substantial difference as power to frame them is rooted in the statute.
9. Statuary bodies are invariably authorized under the Act to make or adopt rules and regulations not inconsistent with the Act, with respect to such matters which fall within their lawful domain to carry out the purpose of the Act.
10. Rulemaking body cannot frame rules in conflict with or in derogation of the substantive provisions of the law or statute, under which the rules are framed.
11. Rules cannot go beyond the scope of the Act. No rule can be made which is inconsistent with the parent statute, whereas, no regulation can be framed which is inconsistent with the parent statute or the rules made thereunder.
12. If a statute is ex facie discriminatory or capable of discriminatory application or violated any provision of the Constitution, it may be declared void ab initio since its inception.
13. When a right is safeguarded by a Constitutional guarantee is called 'fundamental right' because by doing so it has been placed beyond the power of any organ of State, whether, Executive or Legislative to act in violation of it. Such a right cannot be taken away, suspended or abridged.
14. The fundamental rights are natural rights which are personal to the individual as a citizen of a free and civilized community.
15. The essential characteristic of fundamental rights is that they impose limitations, express or implied, on public authorities,

interfering with their exercise. It is the duty of the Court to protect Fundamental Rights granted in the Constitution.

Ref: 1. 2003 SCMR 370 (Pakistan through Secretary Finance, Islamabad and others vs. Aryan Petro Chemical Industries (Pvt.) Ltd., Peshawar and others). 2. 2005 SCMR 186 (Khawaja Ahmad Hassaan vs. Government of Punjab and others). 3. 2013 SCMR 642 (Zarai Taraqiati Bank Limited and others v. Said Rehman and others). 4. PLD 2014 SC 389. Suo Motu Case No.11 of 2011. (Action taken on the news clipping regarding scandal. of billions of rupees of National Police Foundation Land) 5. 2014 CLC 335 (M.Q.M. and others vs. Province of Sindh and others).

14. The learned counsel for the petitioners referred to case of 2014 CLC 335 (M.Q.M. and others vs. Province of Sindh) and PLD 2014 Lahore 221 (Arshad Mehmood vs. Commissioner-Delimitation Authority, Gujranawala and others). It is unequivocally perceptible that in both the matters, the elections of local government and some delimitation issues and amendments made by provincial governments in the local government laws were taken into consideration. Earlier to these judgments, no powers were vested in ECP for delimitation of boundaries/UCs for local government elections. Here for general elections not only Elections Act 2017 is already in force/vogue but the Elections Rules 2017 have also been framed. Precisely, thru these constitution petitions, the attack has been forestalled and envisioned on the propriety and legitimacy of the proviso alone which primarily designed and devised to allocate the seats which does not affect the right to vote which is a fundamental right and not a statutory right. Let us discuss the pith and substance of judicial precedents quoted vice versa .In the case of Sue Evenwel (2015 SCMR 1152), the principle of “one person, one vote” was discussed keeping in mind Equal Protection Clause of the Fourteenth Amendment to the US Constitution. It was held that use of a total-population baseline in drawing legislative districts served the principle of representational equality. In our laws also

principle is not somewhat different but a cap/ceiling of 10% variation in the population has been allowed. The court in the case of Kirkpatrick v. Preisler [394 US 526 (1969)] held that unless population variances among reapportioned congressional districts are shown to have resulted despite a state's good-faith effort to achieve precise mathematical equality, the state, in order to establish the constitutionality of its legislation reapportioning such districts, must present acceptable reasons to justify each variance. Here in our laws also despite fixing outer limit/maximum limit of 10% variation in population, the venue of exceeding limit is available provided ECP record the reasons of variation beyond 10%. In the case of Reynolds v. Sims [377 US 533], the court held that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts in both houses of its legislature as nearly of equal population as is practicable. The court further realized that it is impossible to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement. We also go along with the views expressed in the above cited case. One may wish for the equal population in all constituencies of the country with a plea to avoid debasement of vote or principle of one man one vote but in realism and practicality it is not possible and workable so in order to meet the exigency and emergent situations, the legislature has devised the principles of delimitation with some permissible limits and variations in the population in the constituencies subject to providing reasons and under the delegated authority, ECP has also framed the rules to deal with certain

procedural matters including determination of seat quota. In the case of *Wesberry v Sanders* [376 US 1], the court held that it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. In the case of *Abdul Qadir Patel vs. Chief Election Commissioner*, reported in 2013 CLC 1712, the court held that any interference in election process at such belated stage would cause interruption in the process and delay the same. (*this is more or less seems to be in line with the dictum laid down in the case of Haji Muhammad Saifullah Khan, PLD 1989 S.C. 166*), In the case of *Ghulam Mustafa vs. Commissioner /Delimitation Authority, D.G. Khan*, reported in 2014 YLR 1583, the court declined to interfere in delimitation process of union councils and wards merely for the reason that the entire process of delimitation was already finalized by competent authorities and election schedule had been announced. In the case of *M.Q.M. and others vs. Province of Sindh*, reported in 2014 CLC 335, the court inter alia held that proviso attached to any section could not be read in isolation. Powers given in the proviso could not be uncontrolled or independent to the original section. Normal function of a proviso was to except something out of the enactment or to qualify something enacted therein, which but for the proviso would be within the purview of the enactment. When the enacting portion of a section was not clear a proviso appended to it might give an indication as to its true meaning. The apex court in the case of *Workers' Party Pakistan vs. Federation of Pakistan*, PLD 2012 Supreme Court 681

held that Election Commission is under a direct constitutional obligation to exercise all powers vested in it in a bona fide manner, meeting the highest standards and norms, therefore, as a natural corollary all discretionary powers were also to be exercised and tested against such standards. Election Commission is charged with the duty to organize and conduct the election and responsible not only for conducting the election itself, but also for making all necessary arrangements for the said purpose, prior to the Election Day. Constitution conferred such responsibility on the Election Commission that all activities both prior and subsequent to Election Day were adhered to standards of justness and fairness, and free from corrupt and or illegal practices. In the case of Watan Party, PLD 2011 Supreme Court 997, the apex court held that to avoid political polarization and to break the cycle of ethnic strife and turf war, boundaries of administrative units like police stations, revenue estates, etc., ought to be altered so that the members of different communities may live together in peace and harmony, instead of allowing various groups to claim that particular areas belong to them and declaring certain areas as no go areas under their fearful influence.

15. In the case of **Federation of Pakistan and others vs. Haji Muhammad Saifullah Khan**, reported in PLD 1989 S.C. 166, the apex agreed that the grounds contained in the President's Order dated 29th May, 1988, dissolving the National Assembly and dismissing the Federal Cabinet had no nexus with the preconditions prescribed by Article 58(2)(b) of the Constitution but was not inclined to grant the reliefs to restore the National Assembly and reinstate the dissolved Federal Cabinet

despite this finding. The reasons for so doing were stated thus:

"But we are not unmindful of the fact that the whole nation is geared up for elections and we do not propose to do anything which makes confusion worst confounded and creates a greater state of chaos which would be the result if the vital process of elections is interrupted at this juncture.

The Courts always keep in view the higher interest of Pakistan while resolving matters of national importance in accordance with the Constitution and law. National interests must take precedence over private interests and individual rights. The forthcoming elections are at hand and the people of Pakistan must be allowed to choose their representatives for the National Assembly on party basis, a right which is guaranteed to them under the Constitution.

The writ jurisdiction is discretionary in nature and even if the Court finds that a party has a good case, it may refrain from giving him the relief if greater harm is likely to be caused thereby than the one sought to be remedied. It is well settled that individual interest must be subordinated to the collective good. Therefore, we refrain from granting consequential reliefs, inter alia, the restoration of the National Assembly and the dissolved Federal Cabinet."

16. So far as the ouster clause provided under Section 236 of Elections Act, 2017, we have no hesitation in our mind to hold that it cannot taken away our constitutional jurisdiction. In this regard, we are also fortified by the dictum laid down in the case of **Mrs.Shahida Zahir Abbasi & others v/s. President of Pakistan & others (PLD 1996 S.C. 632)**, in which the apex court held that a provision barring jurisdiction of courts contained in a sub-constitutional enactment, however, expressly and widely worded, cannot affect or taken away jurisdiction of superior courts conferred on them under the Constitution. Likewise, the apex court in the case of **Federation of Pakistan and another vs. Malik Ghulam Mustafa Khar (PLD 1989 S.C. 26)**, held that there is a presumption against the ouster of jurisdiction of the superior courts and any law which has the effect of denying access to them has to be narrowly construed for

the reason that these are the fora created by people for obtaining relief from oppression and redress for the infringement of their rights. Where the jurisdiction of the courts to judicially review any executive act has been competently taken away, then the court will not be able to assert its jurisdiction to do so under any circumstances but this must depend upon the nature of the jurisdiction sought to be ousted and the nature and extent of the ouster itself. If the language used is such that it leaves no room for doubt as to the intention of the Legislature to oust the jurisdiction of the Courts in all circumstances, then that will have to be given effect and even acts performed without jurisdiction or mala fides will not be open to judicial scrutiny. But the courts having the right to interpret the law will in each given case decide the precise nature of the ouster clause and the extent to which the jurisdiction of the courts has been ousted, keeping in mind the principles consistently affirmed by all courts that provisions seeking to oust the jurisdiction of superior courts are to be construed strictly with a pronounced leaning against ouster.

17. In summing-up, we have no reluctance or disinclination in our minds to hold that ECP in order to decide population criteria has evolved a formula with the variation of 10% plus-minus but at the same time, a criteria or modality was also required to deal with the quota and benchmark of seat allocation to particular area/districts. The proviso under challenge only bring to life and comprehends a distinction that fraction of more than 0.5 may be counted as one seat which does not in any way disregard or transgress the provisions of Act. Neither the proviso seems to us ultra vires the provisions

of Elections Act 2017 nor it looks like that the Rule making authority inserted the proviso with mala fide intention nor the realm of the proviso seems to have travelled beyond the provisions of Elections Act 2017 or in conflict with or in derogation but it is only a practical solution to first determine population under a workable formula then allocation of seats which has been applied by ECP across the board.

18. As a result of above discussion, the aforesaid constitution petitions are dismissed.

Karachi:-
Dated.10.7.2018

Judge

Judge