JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No.3120 of 2022
Fakhar-e-Azam Wazir
Versus
Election Commission of Pakistan and others

Dates of Hearing:	13.02.2023, 14.02.2023 and 15.02.2023.
Petitioners by:	Pir Hameed Ullah Shah and Mr. Muhammad Umair Baloch, Advocates for the petitioner in W.P. No.3120/2022. Mr. Shazib Jaffer, Advocate for the petitioner in W.P. No.3122/2022. Dr. Babar Awan and Mr. Abdullah Babar Awan, Advocates for the petitioner in W.P. No.3157/2022. Mr. Inayat ullah Khan, Advocate for the petitioner in W.P. No.3266/2022. M/s Naeem Bukhari and M. Imad Khan, Advocates for the interveners / applicants in C.M. Nos.4753/2022, 4755/2022 and 4757/2022.
Respondents by:	Mr. Saad Hassan, Advocate along with M/s Aziz Bahadar, Regional Election Commissioner (Hazara Division), Shahid Iqbal, ADG (ER), Bushra Rasheed Ch., Sr. Law Officer and Zaigham Anees, Law Officer, E.C.P. Mr. Imran Feroze Malik, Advocate for respondents No.6 and 13 in W.P. No.3120/2022, respondents No.4 and 6 in W.P. No.3122/2022, respondent No.4 in W.P. No.3157/2022 and respondents No.4 and 7 in W.P. No.3266/2022. Mr. Sher Afzal Khan Marwat and Ch. Usama Tariq, Advocates for respondent No.10 in W.P. No.3120/2022, W.P. No.3122/2022 and for respondent No.11 in W.P. No.3266/2022. Respondent No.15 in W.P. No.3120/2022 and respondent No.13 in W.P. No.3266/2022 in person.

MIANGUL HASSAN AURANGZEB, J:- Through this judgment, I propose to decide writ petition Nos.3120/2022, 3122/2022, 3157/2022 and 3266/2022, since they all arise from the order dated 06.07.2022 passed by the Election Commission of Pakistan (**"E.C.P."**) whereby the

UNCERTIFIED COPY

objections filed by different objectors to the preliminary report of the Delimitation Committee published vide notification dated 31.05.2022 with respect to the Provincial Assembly constituencies PK-99 (Bannu-I) and PK-100 (Bannu-II), were partly allowed.

Writ Petition No.3120/2022 titled "Fakhar-e-Azam Wazir Vs. Election Commission of Pakistan etc.":-

2. The petitioner made a representation against the preliminary report of the Delimitation Committee because the difference in the population in the constituencies PK-99 (Bannu-I) and PK-100 (Bannu-II) was 26,256 whereas his proposal was to exclude PCs Ghoriwala and Kot Pasha both having population of 37,087 from constituency PK-99 (Bannu-I) and include them in the constituency PK-100 (Bannu-II). The petitioner's case was that if his proposal was accepted, the difference in the population of the said two constituencies would be reduced to 2,628. The E.C.P. did not accede to the said representation of the petitioner and interfered with the preliminary report of the Delimitation Committee which resulted in the difference in the population between constituency PK-99 (Bannu-I) and constituency PK-100 (Bannu-II) to be raised from 26,256 to more than 34,000/-. This, according to the petitioner, is in violation of Rule 10(5) of the Election Rules, 2017 (**"the 2017 Rules"**) which requires the delimitation of the constituencies to be carried out in a manner so that the population among the constituencies of an Assembly shall remain as close as may be practicable to the quota.

Writ petition No.3122/2022 titled "Malik Riaz Khan Vs. Election Commission of Pakistan etc.":-

3. The petitioner did not file any representation against the preliminary report of the Delimitation Committee regarding Provincial Assembly constituency PK-100 (Bannu-II) before the E.C.P. since he was satisfied with the said report. The petitioner is aggrieved by the order dated 06.07.2022 of the E.C.P. which has interfered with the said report. The petitioner's grievance is that while interfering with the preliminary report of the Delimitation Committee, the E.C.P. did not pay heed to the requirements of Rule 10(5) of the 2017 Rules which requires the delimitation of the constituencies to be carried out in a manner so that the population among the constituencies of an

UNCERTIFIED COPY

Assembly shall remain as close as may be practicable to the quota. The petitioner's case is that as a result of the order of the E.C.P., the difference in the population of constituencies PK-99 (Bannu-I) and PK-100 (Bannu-II) is more than 34,000.

Writ Petition No.3157/2022 titled "Malik Shah Muhammad Wazir Vs. Election Commission of Pakistan etc.":-

4. The petitioner was elected as a member of the Provincial Assembly of Khyber Pakhtunkhwa from erstwhile constituency PK-89 (Bannu-I) in the general elections of 2018. The preliminary report of the Delimitation Committee with respect to the four Provincial Assembly constituencies in District Bannu was to the satisfaction of the petitioner. The petitioner is aggrieved by the interference made by the E.C.P. with the said report with respect to the said constituencies. The petitioner asserts that the alteration in the boundaries of the constituencies is the result of gerrymandering and pre-poll rigging by the E.C.P. The petitioner further asserts that the E.C.P.'s impugned order dated 06.07.2022 is in violation of Section 20 of the Elections Act, 2017 (**"the 2017 Act"**) and violates the fundamental rights of the voters in the said constituencies. The E.C.P., while passing the said order, has not taken into consideration (i) distribution of population in geographically compact areas, (ii) physical features, (iii) existing boundaries of administrative units, and (iv) facilities of communication and public convenience etc. The petitioner further asserts that it is not obligatory for the E.C.P. to ensure that the variation in population of the constituencies does not exceed 10 percent, and that the impugned order passed by the E.C.P. is devoid of reasons.

Writ Petition No.3266/2022 titled "Malik Adnan Yousaf Vs. Election Commission of Pakistan etc.":-

5. The petitioner is a resident and registered voter at union council of Khawaja Mad Mandan, District Bannu and is the nephew of the former member of the Provincial Assembly from constituency PK-100 (Bannu-II). The petitioner supports the preliminary report of the Delimitation Committee in which, according to the petitioner, the union councils, *mouzajat* and villages particularly the union councils of Khawaja Mad Qanoongo Halqa in Tehsil Bannu as well as Sabo Khel and Fatehkhel Kausar were kept intact in PK-100 (Bannu-II). Since the

UNCERTIFIED COPY

petitioner was satisfied with the preliminary report of the Delimitation Committee, he did not file any objection before the E.C.P. The petitioner's case is that his family members have been elected from the area which, as per the said report, were part of PK-100 (Bannu-II), and that the union councils of Khawaja Mad Qanoongo Halqa, Sabo Khel and Fatehkhel Kausar were a part of one and the same provincial assembly constituency since the creation of Pakistan. The petitioner asserts that by virtue of the impugned order of the E.C.P., the said union councils have been split up which is contrary to the mandate of Section 20 of the 2017 Act read with Rule 10 of the 2017 Rules. The petitioner wants the E.C.P.'s order dated 06.07.2022 to be set-aside on the ground that Patwar Circle ("PC") Khawaja Mad of Tehsil Bannu has been taken out from PK-100 (Bannu-II) and included in PK-99 (Bannu-I). Likewise PC Kausar Fatehkhel has also been excluded from PK-100 (Bannu-II) and included in PK-99 (Bannu-I). PC Sabokhel has been excluded from PK-100 (Bannu-II) and included in PK-101 (Bannu-III). It has been prayed that the impugned order of the E.C.P. be set-aside and the matter be remanded to the E.C.P. for a decision afresh.

6. The position taken by the E.C.P. is that Article 218(3) of the Constitution gives the mandate to E.C.P. to organize and conduct the elections 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. Article 222(b) of the Constitution makes it E.C.P.'s obligation to delimit the constituencies which is a foundational step towards holding elections in a free, fair and honest manner. It was asserted that the delimitation of constituencies is to be based not only on the geographical location but also on the basis of population in each constituency; and that a matter regarding delimitation entails a factual inquiry which cannot be conducted by the High Court in exercise of the jurisdiction under Article 199 of the Constitution. Although the written comments to all the petitions filed by the E.C.P. are general in nature regarding the petitioners' objections to the E.C.P.'s order dated 06.07.2022, the position taken by the E.C.P. is that *"the inclusion of the Patwar Circle Fateh Khel Kausar (23,562) in the constituency PK-100 is not possible due to its non-existent of direct contiguity with PK-100 as in-between*

UNCERTIFIED COPY

lies PC Khawaja Mad (13,630) in the PK-99, wherefrom, there is no objection to be taken out from the PK-99. Similarly, together with Patwar Circle Sabo Khel Khattak (18,448) from PK-102, the inclusion of population of 42,010 (Fateh Khel Kausar and Sabo Khel) in PK-100, it total population would swell from 286,219 to 328,229, whereas, the highest limit for provincial assembly constituency in the District Bannu is 317,673."

7. I have heard the contentions of the learned counsel for the petitioners, the interveners as well as the E.C.P. and have perused the record with their able assistance.

8. Article 222(b) of the Constitution provides that subject to the Constitution, the Parliament may by law provide for the delimitation of constituencies by the E.C.P. Chapter-III of the 2017 Act deals with the delimitation of constituencies. Section 17(1) of the 2017 Act gives the mandate for the delimitation of constituencies for the elections of the National Assembly and each Provincial Assembly to the E.C.P. in accordance with the provisions of the Constitution, the 2017 Act, and the 2017 Rules. Section 20 of the 2017 Act, to which reference has been made herein above, sets out the essential principles of delimitation. The first factor which the E.C.P. has to have regard to while delimiting constituencies is the distribution of population in geographically compact areas.

9. In exercise of the powers conferred to Section 239 of the 2017 Act, the E.C.P. made the 2017 Rules. Chapter-III whereof provides for delimitation of constituencies. Rule 8(3) of the said Rules provides that the E.C.P. shall divide the total population of a Province by the number of general seats in the Provincial Assembly to determine quota per seat in that Assembly whereas Rule 8(4) of the 2017 Rules provides that the E.C.P. 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.

10. Rule 9 empowers the E.C.P. to constitute a Delimitation Committee consisting of not less than three officers of the E.C.P. to prepare draft proposal for delimitation of constituencies of National Assembly and Provincial Assemblies. Rule 10(1) requires a Delimitation Committee to obtain from the Pakistan Bureau of Statistics (**"P.B.S."**),

UNCERTIFIED COPY

population data of the last census officially published along with relevant maps, etc. Rule 10(2) requires the delimitation committee to obtain District maps along with description duly authenticated by P.B.S. or the District Head of the Revenue Department, prepared on a uniform scale as may be determined by the E.C.P. indicating therein details of all administrative and revenue units in the District to the level of a PC as well as prominent geographical and physical features such as rivers, mountains or any other information as may be determined by the E.C.P. or required by the Delimitation Committee. In preparing the proposals for delimitation of the constituencies, Rule 10(3) requires the Delimitation Committee to follow the principles of delimitation as laid down in Section 20 of the 2017 Act, the procedure given in Chapter-III of the 2017 Rules and the guidelines provided by the E.C.P. from time to time. Rule 10(4) provides that the constituency for an Assembly shall not ordinarily extend to more than one district except in exceptional circumstances for reasons to be recorded by the Delimitation Committee, provided that a PC shall be the basic unit for delimitation and it shall not be broken under any circumstances.

11. Since Rule 10(3) requires the Delimitation Committee to follow the principles of delimitation laid down in Section 20 of the 2017 Act, the procedure given in Chapter-III of the 2017 Rules and the guidelines provided by the E.C.P. from time to time, the E.C.P. cannot interfere with the draft proposals or a preliminary report of a Delimitation Committee unless the said Committee, while preparing the draft proposals for delimitation of constituencies, has violated the principles of delimitation laid down in Section 20 *ibid* or has not followed the procedure given in Chapter-III of the 2017 Rules or has not followed the guidelines provided by the E.C.P. from time to time.

12. Essentially, the petitioners in writ petitions No.3122 and 3266/2022 seek (i) the exclusion of PC Sabukhel Khattak (having a population of 18,448) from PK-101 (Bannu-III) and its inclusion in PK-100 (Bannu-II), and (ii) the exclusion of PC Fatehkhel Kausar (having a population of 23,562) from PK-99 (Bannu-I) and its inclusion in PK-100 (Bannu-II). The petitioners in writ petitions No.3157 and 3120/2022 seek the withdrawal of E.C.P.'s order dated 06.07.2022 and the restoration of the preliminary report of the Delimitation Committee.

UNCERTIFIED COPY

They are also aggrieved by the splitting up of the Qanoongo Halqa of Khawaja Mad.

13. It is not disputed that the Qanoongo Halqa Khawaja Mad comprises of Patwar Halqas (also called) Khawaja Mad, Fateh Khel Kausar, Ismail Khani, Tughul Khel, Ismail Khel, Kala Khel Masti Khan and Mira Khel.

14. As per the final delimitation pursuant to the impugned order dated 06.07.2022 passed by the E.C.P., Patwar Halqas Khawaja Mad and Fateh Khel Kausar (which are part of the Qanoongo Halqa Khawaja Mad) have been made a part of PK-99 (Bannu-I). The Patwar Halqa Khawaja Mad (included in PK-99 (Bannu-I)) has eight PCs whereas the Patwar Halqa Fateh Khel Kausar (included in PK-99 (Bannu-I)) has seven PCs. It is an admitted position that none of the PCs of Patwar Halqas Khawaja Mad and Fateh Khel Kausar, included in PK-99 (Bannu-I), have been split or broken.

15. Five Patwar Halqas of the Qanoongo Halqa Khawaja Mad have been included in PK-100 (Bannu-II). These Patwar Halqas are Ismail Khani, Tughul Khel, Ismail Khel, Kala Khel Masti Khan and Mira Khel. All these Patwar Halqas have eighteen PCs. It is an admitted position that none of the PCs of the Patwar Halqa Khawaja Mad, included in PK-100 (Bannu-II), have been split or broken.

16. The total population of District Bannu including the former frontier region of Wazir Sub-Division is 1,210,183. There are four Provincial Assembly constituencies in District Bannu. The mean population for each of the four constituencies would be 302,546. Indeed, it is not practically possible for each of the provincial assembly constituency to have exactly the same population. When carrying out the delimitation of constituencies, it ought to be borne in mind that a PC shall be the basic unit for delimitation and shall not be broken under any circumstances. This is the explicit mandate of the first proviso to Rule 10(4) of the 2017 Rules. In the preliminary report of the Delimitation Committee dated 31.05.2022, it is an admitted position that the proviso to Rule 10(4) had not been violated. What caused the E.C.P. to interfere with and alter the preliminary report of the Delimitation Committee is to be determined.

UNCERTIFIED COPY

17. Perusal of E.C.P.'s order dated 06.07.2022 shows that out of four provincial assembly constituencies in District Bannu, the densely populated PK-102 exceeded the upper limit by 2,265. PK-102 (Bannu-II) was delimited such that its population was marginally higher than the upper limit of 317,673 whereas the population of PK-100 was on the lower side by 899 which surpassed the 10 percent population variation range. The E.C.P. interfered with the preliminary report of the Delimitation Committee on the basis of Section 20 of the 2017 Act so that the population variation in the provincial assembly constituencies in District Bannu is reduced.

18. Section 20(1) of the 2017 Act provides that 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. Section 20(3) provides that as far as possible, variation in population of constituencies of an assembly shall not ordinarily exceed 10 percent whereas Section 20(4) provides that if the limit of 10 percent under Section 20(3) is exceeded in an exceptional case, the E.C.P. shall record reason thereof in the delimitation order.

19. Since Section 20 of the 2017 Act permits 10 percent variation between the population of the constituencies, the E.C.P. takes the mean population as a mid point and the population range for all constituencies to be delimited is taken as 5 percent lower limit and 5 percent upper limit from the mean population of a District in order to stay within the limit of 10 percent. This is done in order to ensure that the variation between the delimited constituencies would remain within the overall limit of 10 percent variation as long as the range so determined is practicable to be observed in combination with principles of delimitation.

20. As per the report submitted by the E.C.P. for District Bannu, the upper and lower population limit was worked out such that it range between 287,418 and 317,673. In the preliminary report of the Delimitation Committee, the population range for PK-102 was 11.66 percent which was marginally beyond the 10 percent range of

UNCERTIFIED COPY

variation. After the E.C.P. passed the impugned order dated 06.07.2022, a corrigendum thereto was issued subsequently whereby an arithmetical error in the calculation of the population of PCs Khawaja Mad and Fateh Khel Kausr was corrected. Earlier, in the order dated 06.07.2022, the population of the said two PCs was shown to be 37,192 whereas in the corrigendum this was corrected to 33,632. For the purposes of clarity, the population of the four constituencies in District Bannu, as per the preliminary report of the Delimitation Committee and the final determination made by the E.C.P. pursuant to the impugned order dated 06.07.2022 and corrigendum thereto, is given herein below:-

Constituency-wise population as per preliminary report of Delimitation Committee.

Constituencies	Constituency Population	Lowest Constituency	Net Variation	Variation in Percentage
PK-99 Bannu-I	312,775	286,519	26,256	9.16%
PK-100 Bannu-II	286,519	286,519	0	0.00%
PK-101 Bannu-III	290,951	286,519	4,432	1.55%
PK-102 Bannu-IV	319,938	286,519	33,419	11.66%

Constituency-wise population as per final determination made by the E.C.P. pursuant to impugned order dated 06.07.2022 and corrigendum thereto.

Constituencies	Constituency Population	Lowest Constituency	Net Variation	Variation in Percentage
PK-99 Bannu-I	316,984	287,922	29,062	9.17%
PK-100 Bannu-II	287,922	287,922	0	0.00%
PK-101 Bannu-III	311,256	287,922	21,477	6.94%
PK-102 Bannu-IV	294,021	287,922	8,130	2.75%
Total Pop.	1,210,183			

21. Although Section 20(3) of the 2017 Act requires the variation in population of the constituencies of an Assembly not to exceed 10 percent. The employment of the terms *"as far as possible"* and *"ordinarily"* in the said sub-section implies that it is not mandatory for the variation in the population of the constituencies to remain within the limit of 10 percent. Section 20(4) of the 2017 Act permits the variation in the population beyond 10 percent but only in exceptional cases and for reasons to be recorded in the delimitation order.

22. In the case at hand, there was a slight variation in the population of PK-102 as compared to the other three constituencies in District

UNCERTIFIED COPY

Bannu. The variation in the population has been explained by the E.C.P. in paragraph 11 of the impugned order dated 06.07.2022. It is this variation in the population that caused the E.C.P. to interfere with the preliminary report of the Delimitation Committee and such interference caused an alteration in the boundaries of the other constituencies in the District. The alteration in the boundaries of the other constituencies has not violated any provision of Chapter-III of the 2017 Rules or any provision of the 2017 Act. Indeed, the Qanoongo Halqa of Khawaja Mad straddles over PK-99 (Bannu-I) and PK-100 (Bannu-II), the Patwar Halqa of Khawaja Mad is entirely located in PK-99 (Bannu-I). The PC Khawaja Mad is also entirely located in PK-99 (Bannu-I). The Patwar Halqa of Sabokhel Khattak has been made a part of PK-101 (Bannu-III).

23. The proviso to Rule 10(4) of the 2017 Rules bars the breaking of a PC but not of a Patwar Halqa or a Qanoongo Halqa. While interfering with the preliminary report of the Delimitation Committee, the E.C.P. has not broken any PC in any of the Patwar Halqas or Qanoongo Halqas in District Bannu. The map of the delimited constituencies in District Bannu pursuant to the order of the E.C.P. shows that the four constituencies are in compact geographical blocks.

24. Since I do not find the impugned order dated 06.07.2022 of the E.C.P. to be in violation of any of the provisions of the 2017 Act or the 2017 Rules, there is no reason for me to interfere with the same.

25. Interference with the preliminary report of a Delimitation Committee or an order of the E.C.P. cannot be made at the instance of former elected representatives on the ground that the new delimitation would make his or her winning prospects bleak in the elections or that an area where he or she was popular is no longer a part of the constituency from which he or she wants to contest the elections. Delimitation of constituencies have to be carried strictly in accordance with the provisions of Chapter-III in the 2017 Act as well as Chapter-III of the 2017 Rules. Boundaries of electoral constituencies cannot be altered at the whims of politicians. The mere fact that an applicant before the E.C.P. or a petitioner before this Court aggrieved by the delimitation has remained an elected representative in the past is of no

UNCERTIFIED COPY

consequence unless he makes out a case of a clear violation of the said law in the process of delimitation.

26. In the petitions at hand, the petitioners are seeking the issuance of a writ of *certiorari,* which is not a writ of right, but one of discretion. Its object is to curb excess of jurisdiction, and to keep inferior Courts and Tribunals within their bounds. The High Court, while judicially reviewing the proceedings and judgments of the inferior Courts and Tribunals, cannot substitute its own decision with that of such inferior Courts or Tribunals. It lies where the inferior Court or Tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of law which they was meant to administer. It is also issued when the inferior Court or Tribunal acts illegally in exercise of its jurisdiction. For instance, when it decides without giving any opportunity to the parties to be heard or violates the principles of natural justice. The High Court, while issuing a writ of *certiorari,* acts in exercise of a supervisory and not appellate jurisdiction. The High Court will not judicially review findings of fact reached by an inferior Court or a Tribunal unless there is a manifest error apparent on the face of the proceedings, or where such findings are based on disregard of the provisions of law. The essential prerequisites for issuing a writ of *certiorari* do not appear to be satisfied in the cases at hand.

27. In view of the above, all these petitions are dismissed. No costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 02.03.2023.

(JUDGE)

Ahtesham*

UNCERTIFIED COPY