Pakistan's Qazi Court and Who is Afraid of the Cricket Bat

Prohibition of the Cricket Bat as an Electoral Symbol

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In a fundamental misunderstanding of classical Islamic law, legendary sociologist Max Weber conceptualised it as 'Qadi justice' quintessentially characterized as an Islamic judge "sitting under a tree" handing out informal and irrational decisions. Irrational in the sense that the judge was free to make any decision they desired without the constraints of formal rules, precedents and legal considerations.

Weber may have been incorrect in his characterization of Islamic law, but the Qazi Court of Pakistan appears to fit that mould. Electoral democracy in Pakistan will now be haunted by the irrational decisions of the current Supreme Court of Pakistan led by Justice Qazi Faez Isa (September 2023 – Present). In several decisions, the Qazi Court effectively condoned the unconstitutional delay in elections, suppression of the Pakistan Tehreek-e-Insaf (PTI) of Imran Khan's election campaign, and turned a blind eye towards a campaign of repression by the military-backed establishment. However, the unkindest cut of them all to Pakistan's democracy and the legitimacy of the elections was the Qazi Court's decision denying the PTI its electoral symbol: the cricket bat.

The Context: Imran Khan's PTI Party and the Importance of Electoral Symbols

Much delayed, disrupted and highly disputed elections have been finally held on February 8, 2024. The people of Pakistan must be commended, especially the supporters of PTI who displayed immense commitment, coordination and courage to cast their votes in the face of political repression and voter suppression. Their mandate is now being stolen, and the only path through this quagmire is *via* the courts. Expecting the Qazi-led judiciary to provide some relief and help clean up the mess is a big ask, however. After all, it was the Qazi Court that provided the architecture for blatant pre- and post-poll rigging that is currently underway.

In the run-up to Pakistan's stifled elections, when Imran Khan was languishing in jail on trumped-up charges, his party structure had been dismantled through a spate of politically motivated cases. A three-member bench of the Qazi Court, headed by the Chief Justice, deprived the PTI of its electoral symbol, the cricket bat, for not conducting fair and transparent intra-party elections. In a country of more than 240 million, with nearly 129 million registered voters, only 58% meet the minimum requirement to be classified as literate. For those who cannot read the ballot paper, the pictorial symbol is the only way to determine who they can and want to vote for. This judgment provided legal cover to a biased Election Commission of Pakistan (ECP), which undertook a systematic campaign of voter suppression by assigning different symbols to PTI candidates.

Worse still, the judgment enabled the ECP to classify the PTI's candidates as 'independent'. This was specifically designed to leave those PTI-backed – supposedly independent – open to coercive pressure from the military or lucrative financial incentives from rival political parties to switch sides once they were elected. Euphemistically referred to as 'horse-trading', the market for elected PTI members is now in full sway. Furthermore, the judgment has deliberately left another issue unanswered. Will the PTI's elected caucus be treated as a party in the allocation of reserved seats for women and minorities as required by

the Constitution, which can only be allocated from lists of nominations to registered political parties. Candidates for reserved seats are nominated by each political party prior to the election, and the seats are allotted to each party in the same proportion as their winning candidates. The supposedly independently elected members of PTI have now joined a religious political party, but the outcome remains unclear.

The Form over the Substance

The best that could be said in defence of the decision in the *PTI election symbol* case is that unlike Weber's pejorative depiction of Qazi justice under the tree, this court has been a stickler for form (legal rules and procedure) over substantive justice. After all, Justice Qazi portrays himself as an iconoclastic and highly legalistic judge who cares more for the black letter of law than ethereal logics such as the spirit of the constitution or the precedents of the Supreme Court. However, the court's reasoning in its detailed judgment betrays such glaring gaps and contradictions of form that such a good faith assessment requires a willing suspension of disbelief.

The detailed judgment issued before the elections refers to a lot of law, but for academics, lawyers and law students it is not worth a read. If it had been written by a second-year law student, it would get a pass mark for identifying many of the relevant legal issues and attempting to address them. For an apex court with a constitutional jurisdiction, the marking rubric demands a fail.

Take, as just one example, the highly technical-sounding argument that the Peshawar High Court, whose decision in favour of the PTI was being appealed by the ECP, lacked jurisdiction. The Qazi Court deemed this as forum shopping since other petitions related to PTI's intra-party elections were pending before other High Courts. The judgment cites a precedent which, by the court's admission, shows that the Peshawar High Court had concurrent jurisdiction with the other High Courts. "This concurrent jurisdiction is, however, subject to the *rule of propriety* according to which a High Court having jurisdiction in a matter if has exercised such jurisdiction, the other High Court which has also jurisdiction in the matter may restrain from exercising its jurisdiction." Note, it is propriety not hard constitutional law or jurisprudence that demanded a self-denial of the jurisdiction by the Peshawar High Court when a similar case was pending before the Lahore High Court. Furthermore, the Peshawar High Court may, should, could, in its own discretion, deny such jurisdiction, which it didn't.

Interestingly enough, the judgment itself highlights in considerable detail and bold font several petitions that had been filed by the PTI over the course of the controversy over its' intra-party elections. The first case defending PTI's June 2022 elections, which had been nullified by the ECP, was pending before the Lahore High Court. The second case was about the nullification of PTI's subsequent intra-party elections held in Peshawar in December 2023, filed before the Peshawar High Court through different petitioners. Forget the rest of the petitions for the moment. These are two different causes of actions arising out of two separate decisions of the ECP, which could have been, and were, entertained by separate High Courts. The forum shopping fallacy is glaring.

Feigned Propriety Instead of Constitutional Principles

More notably, the judgment is not worth a read for what is not in it. Short of writing an imagined alternate judgment for the court, an interesting new methodology in comparative constitutional law academic circles, one needs to highlight just a few omissions. Amid all the talk of democracy, which was used to justify an expansive reading of the bare and rather technical provisions of the Elections Act, there was no reference to constitutional provisions and precedents that militate against the banning of a political party in such a casual manner. Article 17(2) of the Constitution, the freedom of association provision, states that "where the Federal Government declares that any political party has been formed or is operating in a manner prejudicial to the sovereignty or integrity of Pakistan, the Federal Government shall, within fifteen days of such declaration, refer the matter to the Supreme Court whose decision on such reference shall be final." No such declaration was made, nor a refer-

ence filed before the Qazi Court. Nonetheless, the Qazi Court effectively de-registered the PTI without a glance at the text of the Constitution.

There was also no attempt to seriously engage with the entrenched jurisprudence on freedom of association and the significance of electoral symbols. The Supreme Court of Pakistan has firmly established since the Benazir Bhutto case, dating as far back as 1989, that the electoral symbol essentially belongs to the voter as an element of their freedom of association, and not just to the concerned political party, its officials, or registered members. However, for the Qazi Court, the sanctity of ordinary legislation easily trumped provisions of the Constitution and the precedents of Pakistan's constitutional courts.

If propriety is the gold standard for the Qazi Court, live streaming and TV coverage of the court's proceedings, a novelty introduced by the incumbent Chief Justice, have betrayed an utter lack of it in cases concerning the PTI. Arguably, the biggest failing of the Qazi Court, which is now fully evident and a matter of historical record even in its early days, is lack of consistency. Of course, judges and courts have different judicial approaches and methods. What is not defensible, however, is the same court or a judge adopting different approaches and methods in different cases. It is the flip-flop between changing approaches, such as the broad reading of the constitution in some cases or a pedantic reading of ordinary legislation in defiance of established constitutional principles in other cases. The *PTI election symbol* case raises serious questions of judicial bias, prejudice and/or incompetence.

The *PTI election symbol* judgment paid so much homage to democracy that anyone living in Pakistan or having any interest in its politics should have rejoiced at the courage of the court and its stance on ensuring free and fair elections. It doesn't seem like anyone was fooled, though. People voted in large numbers despite confusion over the symbols allotted to PTI members and defeated one key aspect of the strategy behind the denial of the cricket bat symbol to the party.

The Qazi Court's Tattered Robes

With the post-poll rigging on display, Pakistan's February 8 elections have been deprived of any remaining façade of legitimacy. The country's most popular political party has effectively been deregistered and will now be denied its established mandate. The not-so-proverbial horses of independent candidate trading have bolted, and the allocation of reserved seats for women and minority candidates remains unresolved. A whole host of petitions challenging rigging in specific constituencies will meander through the judicial system while the weak and delegitimized government will be formed.

The emperor of law has been paraded, and the tattered robes are for all to see. The worst 'managed' (euphemism for rigged) elections in Pakistan's recent history are not the Qazi Court's making, but it has willingly played its part. History will judge later, but the epitaph of the Qazi Court and the Generals' election of 2024 has already been etched in stone.

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