**Fair Elections: Impartial Reforms Needed**

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A fair election to parliament (National Assembly & Senate), provincial assemblies and even local governments has always been a major concern for the public. Largely, because the sole body tasked with organising and holding free, fair and transparent elections—Election Commission of Pakistan—is overburdened. Our national stance has always been that “centralised” elections are more “fair” unlike the federal elections held in the US. There, more than 10,000 “entities” are responsible for holding elections as they believe “decentralised” elections cannot be “rigged.” Even in India, election to the municipalities (local governments) is organised by the State Election Commission, not the Election Commission of India. Whatever the theory – elections must not be rigged, period. How a vote is cast and counted or an election result consolidated is just one of the numerous factors behind holding a “fair” election. For example, in Georgia, the US, Election Integrity Act, 2021 was passed that, amongst other things, imposed a ban on providing water or food to voters standing in line to vote. We may be a bit far away from such fair and balanced if not humanly “perfect” electoral laws. But the bar needs to be set at a minimum (if not higher) for what is known as “fair election.” The present amendment to the Election Act, 2017, cannot be an exception.

Two amendments have been made: the Election (Second Amendment) Act, 2021, which deals with the “right of overseas Pakistanis” to cast a vote in general or bye-elections and the use of Electronic Voting Machines in an election. Both need an expert and technical analysis but are not the subject matter of this article. However, the Election (Amend) Act, 2021 ought to be reconsidered for numerous reasons, some of which are discussed here.

Property in section 2(i) is amended to include “accounts receivable.” This had been discussed in Second Panama Case by Supreme Court i.e. the salary not withdrawn but was receivable and its “declaration” as an “asset” was mandatory. Accounts Receivable are financial and taxation terms. For assets declaration, in nomination forms during an election, assets should only be confined to “property” that is held by the candidate. This would avoid unnecessary litigation and confusion.

When the victory margin is less than 0.5 per cent in the US, a recount through machines is required by the law

Another provision (Section 8) is amended to restrict the powers of the election commission to “review an order of the Returning Officer,” only before the “consolidation of results.” With that in effect, the ECP would become functus officio to review orders of RO. This could be applied in a discriminatory manner; leading to “inconsistent consequences.” Let the Commission, in its own wisdom, decide “what order ought to be reviewed” regardless of the time frame for this purpose otherwise there is a cutoff date when the matter goes to the tribunal from its domain.

For the first time, delimitation principles have been amended to limit the constituencies on the basis of “enrolled voters” rather than population. The constitution has allocated a number of constituencies on the basis of the population to each province. Meanwhile, the population is a basic unit for this purpose because it is that population (people) that is to be represented in parliament, not voters. A variation in the population of constituencies ordinarily does not exceed ten per cent. The amendment would direct the redrawing of constituencies based on registered voters and variation in constituencies not exceeding five per cent of registered voters. This is not an unknown feature of delimitation though as in the UK, registered voters (now, about 73,000) make up a parliamentary constituency. There is one more aspect of concern: “a right of appeal” to the Supreme Court against the final delimitation of the Commission. For two important reasons, this needs to be recalled. One, there would be more than one thousand constituencies and one could just guess or expect about one thousand appeals before the SC. This would overburden it or make the hearing of appeals almost nugatory. I have personally experienced this as I am a counsel in Seven Appeals before the SC—all related to summary dismissal of election petitions by election tribunals. Those have been clubbed with about sixty appeals and so far, not taken up for a final hearing. What to talk of a thousand appeals!

Secondly, even in India, there is no right of appeal against the decision of the Delimitation Commission in the matter of final delimitation of constituencies. The law rather says it “cannot be called in question in any court.” This is even though there, seats in parliament (Lok Sabha) have been allocated on the basis of the 1971 census and by constitutional amendment, the number of seats is not to be increased till 2026.

Believe it or not, a bizarre addition is also being talked about regarding the appointment of Presiding Officers, Assistant Presiding Officers and Polling Staff or Section 53 of the Election Act, 2017 that “no official working within the respective constituency or Tehsil shall be appointed as polling staff for that constituency or tehsil.” Its consequences could be too grave, especially where the whole district (like Haripur and Chitral in KPK) is one constituency and in Balochistan, where even two districts combine to constitute one constituency (like Musa Khail-Cum-Sherani). With this amendment, where will the polling staff come from?

The provisions relating to “recounting of votes” (Section 95) is being amended, which is a good step that still needs improvement. It is good that the amendment was introduced to get rid of a 10,000 votes difference for recounting votes and only confined to a percentage of difference in the victory margin. But still, a five per cent victory margin is too high. In almost half of the constituencies, the victory margin was almost about five per cent. I would suggest it should be reduced to 0.5 or one per cent. And the selection of “one or more polling stations” to recount should be substituted with few polling stations or the whole constituency. I may add that in the US when the victory margin is less than 0.5 per cent, a recount through machines is required by the law.

Another important provision ought to be revisited for political fairness and certainty purposes. The present law mandates that the “final priority list” for reserved seats (women or non-Muslims) once submitted by the cutoff date is not subject to change or cancellation. This is prior to election day. The bill has now introduced a provision in Section 104 that “parties shall submit final priority list of candidate within three days after declaration of general elections results.” This is unfair to political workers who work hard for a party during the election and are told afterwards, “Sorry, someone else is on the priority list.” This would obviously lead to post-election political horse-trading; something we all want to go away forever.

Lastly and most importantly, a material provision is being added to the qualification and disqualification provision (Section 231 of the Election Act, 2017). In the original constitution, there were only a few qualification and disqualification clauses. These were extensively added during the General Zia era. Simultaneously, the Representation of Peoples Act, 1976 (since repealed) was amended; leading to tremendous and almost unnecessary litigation. Keeping that in view, in the Election Act, 2017, all clauses of qualifications and disqualifications were not repeated in the statute. However, for whatever (still quite a large number) remained in the Constitution, it provided that qualification and disqualification of any candidate would be limited to what was contained in Art. 62 and 63. The date, when those Articles would apply, was stipulated to be ‘the date when nomination forms’ were filed. This has been by an analogy of Art 63 (r), which provides that “no default in the last six months on the date of filing nomination forms.” This is a few days prior to the “date of scrutiny.” Therefore, one has to be qualified (and not be disqualified) on the date of filing nomination forms. This became the subject matter of several disqualifications like that of Senator Saadia Abbasi and Senator Haroon Akhtar. They were held disqualified on the date of filing the nomination form though seemed qualified on the date of scrutiny. This is still very material in some cases now pending before High Courts. Those members (I don’t want to name them here) are not qualified “if the date is that of filing of nomination forms,” and they are qualified “if the date is that is scrutiny.” It is very good to provide in Section 231 that the date for the purpose of qualification and disqualification would be the date of scrutiny but the provisions that this should apply with are effective from 02-10-2017 (when Election Act, 2017 was enacted). Since this seems to be helping some friends, this ought to be reconsidered. Ideally, laws should not be passed, keeping the interests of “certain persons” in view.

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