politics; (2) enforcement of campaign finance laws; (3) regulation of media; (4) initiatives/programs for increased voter participation; (5) measures for eliminating bogus votes; and (6) limiting the number of constituencies that can be contested by a candidate.

The Promise Of Democracy

By Saad Rasool

Common Man Initiative
VOLUME 1

Table of Contents

Index of Authorities

Cases

Other Authorities

Introduction

For over seventy (70) years, the State and people of Pakistan have had a chequered romance with democracy. Between prolonged interludes of military intervention, and feeble decades of tainted democratic governments, the dream of a truly representative democracy (free of corrupt elements), has remained an elusive goal in Pakistan.

As the country approaches the 2018 General Elections – amidst controversy surrounding disqualification and conviction of former Prime Minister Mian Muhammad Nawaz Sharif – there is a renewed debate about the manner in which Pakistan conducts its electoral process, and the reforms that are required to ensure that the democratic paradigm accurately reflects public choice, within the contours of our constitutional framework.

In the circumstances, this paper attempts to outline the constitutional and legislative framework within which elections are conducted in Pakistan. Importantly, the paper attempts to identify gaps within the existing legal and administrative framework, which must be guarded against in order to ensure that the 'will of the people'[1] finds voice through the electoral process.

[1] *Volonté Générale,* as described in *Declaration of the Rights of Man and the Citizen* (1789), by Jean-Jacques Rousseau

The democratic promise

The intoxicating allure of 'democracy' stems from its fundamental promise that all citizens, on equal footing, have the right to participate in the governance of their affairs. That a "government of the people, by the people, for the people"[2] will extend the full measure of participation to all citizenry. That parity between the governed and their government, will be immutable. And this promise is manifested through the process of free and fair elections – where anyone can contest, and all are counted as equals.

It is imperative to clarify that Pakistan is not simply a 'democracy', in the puritanical meaning of the world. Our system of government is not merely dependent on a simple show of hands by the populi. Instead, Pakistan is a 'constitutional republic' – specifically, the Islamic Republic of Pakistan, which is governed through the Constitution of the Islamic Republic of Pakistan, 1973 (Constitution). As such, the democratic choices, in Pakistan, can only be exercised within the specified contours of constitutional command. The exercise of democratic rights cannot be done so as to violate provisions of the Constitution. A majority of the people (or their representatives), through law, cannot extinguish the fundamental rights of the minorities. Similarly, a majority of the people cannot vote for, or elect, an individual who is otherwise disqualified from being elected, under the Constitution of Pakistan. Neither can a majority, through exercise of its legislative power, pass a law that undermines the process of free and fair elections, as envisioned under the Constitution.

But can the majority, through exercise of its powers to amend the Constitution, enact such provisions that extinguish the fundamental rights of the minority, or violate Pakistan's democratic enterprise? The honourable Supreme Court of Pakistan adjudicated this question in the Constitution Petition No. 10 of 2012 titled District Party Rawalpindi and others Vs. Federation of Pakistan, etc., Constitution Petition No. 10 of 2012, while adjudicating a challenge to the 18th and 21st Constitutional Amendment. Specifically, a seventeen (17) member Bench of the August Court, through a majority judgment(11 – 06), held that the Parliament (in exercise of its power to amend the Constitution) cannot undo or alter the 'basic features' of the Constitution of Pakistan, which include, inter alia, fundamental rights, independence of judiciary, and parliamentary form of Government blended

[2] *Abraham Lincoln, Gettysburg Address, Pennsylvania, November 19th, 1863.*

with the Islamic Provisions.

Consequently, per the established jurisprudence of the honourable Supreme Court of Pakistan, the electoral choice and process must be carried out in accordance with the dictates of the Constitution.

As a result, it is important to first review the constitutional provisions relating to the electoral process, so as to define the democratic mechanism for elections in Pakistan.

Constitutional Structure

The Preamble of the Constitution (which was made a substantive part of the Constitution through insertion of Article 2-A[3]) declares that the "chosen representatives" of the "people of Pakistan" shall exercise their "power and authority" as a "sacred trust", in accordance with the "limits prescribed" by Islam. And that, within the State of Pakistan, "the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed." As such, a bare reading of the Preamble (Objectives Resolution)[4] reveals that Pakistan is a constitutional democracy, where the "chosen representative" exercise the State's power as a "sacred trust", within the prescribed limits. And the electoral process must also be structured and implemented within the same spirit.

Reinforcing this spirit, Article 4 of the Constitution ensures that "every citizen" shall be "treated in accordance with law", and Article 5 of the Constitution mandates that "loyalty to the State" and "obedience to the Constitution and law" is the "basic" and "inviolable" obligation of every citizen, or any other individual "for the time being within Pakistan".

Within this overarching constitutional command, the Parliament of Pakistan comes into existence through Article 50 of the Constitution. Specifically, the said constitutional provision stipulates that "there shall be a Majlis-e-Shoora (Parliament) of Pakistan consisting of the President and two Houses to be known respectively as the National Assembly and the Senate." Furthermore, after the 25th Constitutional Amendment, Article 51 of the Constitution specifies that "there shall be three hundred and thirty-six seats for members in the National Assembly, including seats reserved for women and non-Muslims". With the exception of the ten (10) seats "reserved for non-Muslims" (Article 50(4)), the remaining seats are allocated as under (Article 51(3)):

	General Seats	Women Seats	Total Seats
Balochistan	16	4	20
Khyber Pakhtunkhwa	45	10	55
Punjab	141	32	173
Sindh	61	14	75
Federal Capital	3	-	3
Total:	**266**	**60**	**326**

[3] Inserted through *Revival of the Constitution of 1973 Order, 1985* (P.O. No. 14 of 1985)
[4] *The Objectives Resolution,* as adopted by the Constituent Assembly of Pakistan on March 12, 1949.

Per Article 52 of the Constitution, the National Assembly "unless sooner dissolved" shall continue "for a term of five years".

Similarly, after the 25th Constitutional Amendment, the composition of the Senate i.e. "ninety-six members", and its term of "six years", is stipulated in Article 59 of the Constitution.

Per Article 106 of the Constitution, as amended by the 25th Constitutional Amendment, each of the respective provincial assemblies, elected "for a term of five years" (Article 107), consist of "general seats and seats reserved for women and non-Muslims", in the following manner:

	General Seats	Women Seats	Non-Muslim Seats	Total Seats
Balochistan	51	11	3	65
Khyber Pakhtunkhwa	115	26	4	145
Punjab	297	66	8	371
Sindh	130	29	9	168

The eligibility criteria/qualifications for being elected to the National Assembly (i.e. qualifications/disqualifications are contained in Article 62 and 63 of the Constitution). Pertinently, Article 113 of the Constitution stipulates "qualifications and disqualifications for membership of the National Assembly set out in Articles 62 and 63 shall also apply for membership of a Provincial Assembly". For convenient reference, provisions of Articles 62 and 63 of the Constitution, have been reproduced hereunder:

"62. Qualifications for membership of Majlis-e-Shoora (Parliament):
(1) A person shall not be qualified to be elected or chosen as a member of Majlis-e-Shoora (Parliament) unless-
(a) he is a citizen of Pakistan;
(b) he is, in the case of the National Assembly, not less than twenty -five years of age and is enrolled as a voter in any electoral roll in-
(i) any part of Pakistan, for election to a general seat or a seat reserved for non-Muslims; and
(ii) any area in a Province from which she seeks membership for election to a seat reserved for women.
(c) he is, in the case of Senate, not less than thirty years of age and is enrolled as a voter in any area in a Province or, as the case may be, the Federal Capital, from where he seeks membership;

(d) he is of good character and is not commonly known as one who violates Islamic Injunctions;
(e) he has adequate knowledge of Islamic teachings and practises obligatory duties prescribed by Islam as well as abstains from major sins;
(f) he is sagacious, righteous and non-profligate, honest and ameen, there being no declaration to the contrary by a court of law;
(g) he has not, after the establishment of Pakistan, worked against the integrity of the country or opposed the ideology of Pakistan.

(2) The disqualifications specified in paragraphs (d) and (e) shall not apply to a person who is a non-Muslim, but such a person shall have good moral reputation.

63. Disqualifications for membership of Majlis-e-Shoora (Parliament):
(1) A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if:-
(a) he is of unsound mind and has been so declared by a competent court; or
(b) he is an undischarged insolvent; or
(c) he ceases to be a citizen of Pakistan, or acquires the citizenship of a foreign State; or
(d) he holds an office of profit in the service of Pakistan other than an office declared by law not to disqualify its holder; or
(e) he is in the service of any statutory body or any body which is owned or controlled by the Government or in which the Government has a controlling share or interest; or
(f) being a citizen of Pakistan by virtue of section 14B of the Pakistan Citizenship Act, 1951 (II of 1951), he is for the time being disqualified under any law in force in Azad Jammu and Kashmir from being elected as a member of the Legislative Assembly of Azad Jammu and Kashmir; or
(g) he has been convicted by a court of competent jurisdiction for propagating any opinion, or acting in any manner, prejudicial to the ideology of Pakistan, or the sovereignty, integrity or security of Pakistan, or morality, or the maintenance of public order, or the integrity or independence of the judiciary of Pakistan, or which defames or brings into ridicule the judiciary or the Armed Forces of Pakistan, unless a period of five years has elapsed since his release; or
(h) he has been, on conviction for any offence involving moral turpitude, sentenced to imprisonment for a term of not less than two years, unless a

period of five years has elapsed since his release; or
(i) he has been dismissed from the service of Pakistan or service of a corporation or office set up or, controlled, by the Federal Government, Provincial Government or a Local Government on the grounds of misconduct, unless a period of five years has elapsed since his dismissal; or
(j) he has been removed or compulsorily retired from the service of Pakistan or service of a corporation or office set up or controlled by the Federal Government, Provincial Government or a Local Government on the ground of misconduct, unless a period of three years has elapsed since his removal or compulsory retirement; or
(k) he has been in the service of Pakistan or of any statutory body or any body which is owned or controlled by the Government or in which the Government has a controlling share or interest, unless a period of two years has elapsed since he ceased to be in such service; or
(l) he, whether by himself or by any person or body of persons in trust for him or for his benefit or on his account or as a member of a Hindu undivided family, has any share or interest in a contract, not being a contract between a cooperative society and Government, for the supply of goods to, or for the execution of any contract or for the performance of any service undertaken by, Government:
Provided that the disqualification under this paragraph shall not apply to a person-
(i) where the share or interest in the contract devolves on him by inheritance or succession or as a legatee, executor or administrator, until the expiration of six months after it has so devolved on him;
(ii) where the contract has been entered into by or on behalf of a public company as defined in the Companies Ordinance, 1984 (XLVII of 1984), of which he is a share-holder but is not a director holding an office of profit under the company; or
(iii) where he is a member of a Hindu undivided family and the contract has been entered into by any other member of that family in the course of carrying on a separate business in which he has no share or interest; or
Explanation:- In this Article "goods" does not include agricultural produce or commodity grown or produced by him or such goods as he is, under any directive of Government or any law for the time being in force, under a duty or obligation to supply.
(m) he holds any office of profit in the service of Pakistan other than the following offices, namely :-
(i) an office which is not whole time office remunerated either by salary or

by fee;
(ii) the office of Lumbardar, whether called by this or any other title;
(iii) the Qaumi Razakars;
(iv) any office the holder whereof, by virtue of such office, is liable to be called up for military training or military service under any law providing for the constitution or raising of a Force; or
(n) he has obtained a loan for an amount of two million rupees or more, from any bank, financial institution, cooperative society or cooperative body in his own name or in the name of his spouse or any of his dependents, which remains unpaid for more than one year from the due date, or has got such loan written off; or
(o) he or his spouse or any of his dependents has defaulted in payment of government dues and utility expenses, including telephone, electricity, gas and water charges in excess of ten thousand rupees, for over six months, at the time of filing his nomination papers; or
(p) he is for the time being disqualified from being elected or chosen as a member of the Majlis-e-Shoora (Parliament) or of a Provincial Assembly under any law for the time being in force.
Explanation: For the purposes of this paragraph "law" shall not include an Ordinance promulgated under Article 89 or Article 128.

(2) If any question arises whether a member of Majlis-e-Shoora (Parliament) has become disqualified from being a member, the Speaker or, as the case may be, the Chairman shall, unless he decides that no such question has arisen, refer the question to the Election Commission within thirty days and should he fail to do so within the aforesaid period it shall be deemed to have been referred to the Election Commission.

(3) The Election Commission shall decide the question within ninety days from its receipt or deemed to have been received and if it is of the opinion that the member has become disqualified, he shall cease to be a member and his seat shall become vacant."

It is important to point out that Article 62 and 63 of the Constitution, have been the subject of much controversy, over the past thirty years of Pakistan's politico-legal history. Amended from its original form, vide Revival of the Constitution of 1973 Order, 1985 (P.O. No. 14 of 1985) and Constitution (Eighteenth Amendment) Act, 2010, Article 62 and 63 contain provisions that prohibit, inter alia, dual nationals, defaulters (of loans or government

utilities), and convicts, from becoming members of the National or Provincial Assembly.

However, the spirit and mandate of Article 62 and 63 of the Constitution, were not applied in any meaningful way throughout the tainted democracy of the 1990s. During the 2013 General Elections, the Returning Officers were criticized and deemed controversial for enforcing the provisions of Article 62 and 63 on the basis of 'morality'[5].

Over the recent two years, leading up to 2018 General Elections, the provisions of Article 62 and 63, have assumed new and widespread importance, primarily because of the disqualification of former Prime Minister, Mian Muhammad Nawaz Sharif, and other political personalities (e.g. Jehangir Tareen) on the basis of Article 62(1)(f) (the *'Sadiq and Ameen"* clause).

A more detailed discussion on these provisions is under Section IV of this paper.

The Constitution dedicates an entire section (Part VIII) to "elections". This Part, consists of two Chapters, containing Articles 213 to 226.

Specifically, Article 213 of the Constitution declares that there *"shall be a Chief Election Commissioner"* to be *"appointed by the President"*, through a consensus between the Government and the Opposition, per the procedure stipulated in the said Constitutional provision. The said Chief Election Commissioner (CEC) along with four additional members *"one from each Province"* (Article 218) shall *"hold office for a term of five years"* from their date of appointment (Article 215).

Moreover, the Constitution empowers the Election Commission to conduct free and fair elections in Pakistan. Specifically, Article 218(3) stipulates that *"it shall be the duty of the Election Commission to organize and conduct the election 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."*

Furthermore, Article 219 of the Constitution enumerates the duties of the

[5] *As an example, Mr. Ayaz Amir, contesting from the provincial assembly seat of Chakwal, was disqualified on the basis of a reference he made in one of his articles.*

Election Commission. In particular, under the said Constitutional provision, the Election Commission, has been entrusted the "duty" of, inter alia, (a) "preparing electoral roles for election"; (b) "organizing and conducting election"; (c) "appointing election tribunals"; (d) "holding of general elections"; and (e) "performing such other functions" as may be specified through the electoral laws.

In order to ensure that the Election Commission is able to perform its duties and functions in accordance with the Constitution and the law, Article 220 of the Constitution directs that *"it shall be the duty of all executive authorities in the Federation and in the Provinces to assist"* the Election Commission.

The Constitution also includes specific provisions relating to "electoral laws and the conduct of elections". In this regard, Article 222 of the Constitution empowers the Parliament to pass legislation in regards to (a) "allocation of seats"; (b) "delimitation of constituencies"; (c) "preparation of electoral rolls"; (d) "conduct of elections and election petitions"; (e) "matters relating to corrupt practices and other offences in connection with elections"; and (f) "other matters necessary for the due constitution" of the Parliament. It is important to clarify the distinction that the Parliament only has the power to pass laws in regards to the enumerated powers; the Election Commission is still the constitutional body responsible for taking all actions, in this regard, for ensuring free and fair elections. However, it is most important to note that Article 222 of the Constitution specifically bars the Parliament to pass any law that may "have the effect of taking away or abridging any of the powers of the" Election Commission.

Also, Article 224 stipulates the time for General Elections to be "held within a period of sixty days immediately following the day on which the day on which the term of the Assembly is due to expire, unless the Assembly has been sooner dissolved, and the results of the election shall be declared not later than fourteen days before that day."

Specifically, Article 224 also provides that the caretaker Prime Minister shall be *"appointed by the President in consultation with the Prime Minister and the Leader of the Opposition in the outgoing National Assembly, and a care-taker Chief Minister shall be appointed by the Governor in consultation with the Chief Minister and the Leader of the Opposition in the outgoing Provincial Assembly."* And in case no consensus is reached *"in three days",* Article 224A of the

Constitution commands that two nominees each (by the leader of the house and the opposition) be forwarded *"to a Committee to be immediately constituted by the Speaker of the National Assembly, comprising eight members of the outgoing National Assembly, or the Senate, or both, having equal representation from the Treasury and the Opposition".* And in case such Committee also fails to reach a consensus *"within three days"*, the names of the nominees *"shall be referred to the Election Commission of Pakistan for final decision within two days."*

The purpose of this bipartisan constitutional framework is to ensure that the caretaker government, and the Election Commission, consist of individuals who have no particular party affiliations, and be independent in their conduct and discharge of responsibilities. This constitutional arrangement is also geared towards ensuring that members of the caretaker government and the Election Commission will conduct free and fair elections, in accordance with law, without fear or favour.

While the Returning Officers and Appellate Tribunals can adjudicate disputes relating to the qualifications and disqualifications of a candidate, per the information declared in the nomination papers, Article 225 of the Constitution stipulates that post-election disputes cannot be *"called in question except by an election petition presented to such tribunal and in such manner as may be determined by"* law.

Legal Framework

Within this constitutional framework, the Parliament has enacted several laws relating to conduct of elections in Pakistan.

Prior to the promulgation of the Election Act, 2017 (2017 Act), major laws for the conduct of elections to the National and Provincial Assemblies were the Representation of the People Act, 1976 (ROPA) and the Representation of the People (Conduct of Election) Rules, 1977 (1977 Rules).

Election to the Senate (Upper House) was held according to the relevant legal provisions contained in the Senate (Election) Act, 1975, the Senate (Members from Federal Capital) Order, 1985 and 1988 and the Senate (Election) Rules, 1975.

Moreover, the Electoral Rolls Act, 1974 and the Electoral Rolls Rules, 1974 dealt with preparation, annual revision, amendment and maintenance of the lists of voters and the constituencies of the National and Provincial Assemblies were demarcated in accordance with the provisions of the Delimitation of Constituencies Act, 1974.

In this regard, it is imperative to note that prior to passing of the 2017 Act, the language and spirit of Articles 62 and 63 of the Constitution were duly reflected in the provisions of ROPA and the Senate Act, as well as the relevant rules made thereunder i.e. Section 12 of ROPA required that a "declaration" be made, by each candidate, that he/she "fulfills the qualifications specified in Article 62 and is not subject to any of the disqualifications specified in Article 63 or any other law for the time being in force"; Section 99 of ROPA not only reproduced the language of Article 62 and 63 of the Constitution, but also added to these qualifications/disqualifications, ensuring that the ambit of disclosure is expanded per the developing jurisprudence of ever-increasing transparency in matters relating to public officials.

Furthermore, Section 100 of ROPA stipulated "disqualification on account of certain offences", including, inter alia, exceeding the limit of election expenses, and having been found guilty of any corrupt or illegal practice by a court of competent jurisdiction.

Pertinently, Section 107 of ROPA empowered Election Commission to "make

rules for carrying the purposes" of the said act, "with the approval of the President". Therefore, in exercise of this rule-making power, Election Commission framed the 1977 Rules. Specifically, Rule 3 of the 1977 Rules prescribed the "nomination paper" that was required to be filled by all contesting candidates for the national and provincial assemblies.

However, when civilian democracy, in its true form, returned to Pakistan after the 2008 General Elections, there was pressure on all political parties to expand the ambit of financial disclosure that is required to be made by each candidate at the time of filing for candidature.

As a result, leading up to the 2013 General Elections, fresh nomination papers were prepared by ECP, for the National and Provincial Assemblies, as well as the Senate.

In comparison to the nomination forms used in 2008 General Elections, the nomination forms for the 2013 General Elections expanded the pith and substance of disclosure that was required to be made by each candidate and parliamentarian. Nonetheless, in the aftermath of the General Elections 2013, specially the findings of Inquiry Commission, headed by the then Chief Justice Nasir-ul-Mulk, concerning the alleged rigging in the 2013 General elections, all political parties recognized the need to review and improve the legal and statutory regime governing the conduct of elections in Pakistan.

In this backdrop, the Panama Leaks (and its corresponding judicial challenge) came to light. And with it, suddenly, the national judicio-political discourse became focused on provisions relating to the qualification and disqualification of candidates/parliamentarians, as well as the corresponding disclosure requirement by such candidates and parliamentarians.

In July of 2017, Mr. Nawaz Sharif, the former Prime Minister of Pakistan (and leader of the ruling political party) was disqualified by the honourable Supreme Court of Pakistan, based on declaration (or lack thereof) made in the 2013 electoral filings. Soon thereafter, in October of 2017, the Parliament enacted a new electoral statute – the 2017 Act.

The 2017 Act was passed by the National Assembly on 2nd October, 2017. The alleged purpose of the 2017 Act was to consolidate and unify the various

elections laws, and strengthen the legislative gaps that existed in previous legal regime. To this end, the preamble of the 2017 Act stipulates that this law aims "to amend, consolidate and unify laws relating to the conduct of elections and matters connected therewith or ancillary thereto".

Importantly, Section 241 of the 2017 Act repealed the following list of electoral laws:

i. the Electoral Rolls Act, 1974 (Act No. XXI of 1974);

ii. the Delimitation of Constituencies Act, 1974 (Act No. XXXIV of 1974);

iii. the Senate (Election) Act, 1975 (Act No. LI of 1975);

iv. the Representation of the People Act, 1976 (Act No. LXXXV of 1976);

v. the Election Commission Order, 2002 (Chief Executive's Order No.1 of 2002);

vi. the Conduct of General Elections Order, 2002 (Chief Executive's Order No.7 of 2002);

vii. the Political Parties Order, 2002(Chief Executive's Order No.18 of 2002); and

viii. the Allocation of Symbols Order, 2002.

It is significant to note that Section 60 of the 2017 Act prescribes the procedure for "nomination" of a candidate for election to the National/ Provincial Assembly. Specifically, Section 60(2) stipulates that "every nomination shall be made by a separate nomination paper on Form A signed both by the proposer and the seconder and shall, on solemn affirmation made and signed by the candidate". Furthermore, the said Form A has to be accompanied by, inter alia,

i. a "declaration" that the candidate "fulfils the qualifications specified in Article 62 and is not subject to any of the disqualifications specified in Article 63";

ii. a "declaration" that the candidate "has opened an exclusive account with a scheduled bank for the purpose of election expenses";

iii. an attested copy of the candidate's National Identity Card; and

iv. a statement of the candidate's "assets and liabilities and of his spouse and dependent children as on the preceding thirtieth day of June on Form B".

Similarly, Section 110 of the 2017 Act lays down similar requirements for a candidate contesting to the Senate.

It is essential to note that Section 62(7)(a) of the 2017 Act bars the Returning Officer from asking "any question" that "has no nexus with the information supplied in the nomination paper", while scrutinizing nomination paper of a candidate.

Importantly, Section 132 of the Election Act stipulates a cap on the total amount of funds that can be expended, in any constituency, by a contesting candidate (or his supporters). Specifically, the law states that *"election expenses of a candidate shall include the expenses incurred by any person or a political party on behalf of the candidate or incurred by a political party specifically for the candidate".* And that no such expenditure can exceed: (a) *"one million and five hundred thousand rupees for election to a seat in the Senate"*; (b) *"four million rupees for election to a seat in the National Assembly"*; and (c) *"two million rupees for election to a seat in a Provincial Assembly."*

Section 137 of the 2017 Act requires that "every Member of an Assembly and Senate shall submit to the Commission", a copy of his/her "statement of assets and liabilities including assets and liabilities of his spouse and dependent children" [emphasis added], in the manner prescribed in the appended Form B.

Moreover, Section 230 of the 2017 Act requires, inter alia, the "Prime Minister, Chief Minister or a Minister or any other members of a Caretaker Governments" to submit their "statement of assets and liabilities including assets and liabilities of his spouse and dependent children" on Form B to the Commission.

Furthermore, Section 231 of the 2017 Act stipulates the qualifications and disqualifications for a person to be elected to the National and Provincial Assemblies, and simply declares these to be the same as "provided in Article 62 and 63" of the Constitution. And Section 232 stipulates that in case "a person has been convicted for any offence" under the 2017 Act, "or has been found guilty of any corrupt or illegal practice", such person shall be disqualified from being elected for a "period not exceeding five years".

It is also important to point out that Section 239 of the 2017 Act empowers Election Commission (alone) to "make rules for carrying out the purposes" of the 2017 Act, subject to "prior publication and after hearing and deciding objections or suggestions" filed within fifteen days of the publication of the said rules.

In exercise of Section 60(2) and Section 110(2) of the 2017 Act, Form A – relating to declarations to be made by a candidate/parliamentarian – has been drafted and appended to the 2017 Act. Similarly, in exercise of Section 60, Section 110 and Section 137 of the 2017 Act, "Form B" has also been appended to the 2017 Act, which requires each candidate/parliamentarian to submit a "Statement of Assets and Liabilities".

It is pertinent to mention that several important declarations/disclosures concerning nomination to the national and provincial assemblies, including those required under the Constitution, had been omitted from the nomination forms appended to the 2017 Act. Some of these include, inter alia:

i. a declaration concerning citizenship and dual nationality – as required under Article 62;

ii. a declaration concerning unpaid loan of more than two million rupees – as required under Article 63(1)(n);

iii. a declaration concerning default in payment of governmental/utilities dues – as required under Article 63(1)(o);

iv. requirement to declare NTN number, or tax records;

v. a record of pending criminal cases;

vi. a record of foreign passports;

vii. educational and professional background of the candidate;

viii. current market value of immovable property; and

ix. a declaration of 'assets and liabilities' on behalf of all "dependents" (the nomination forms required some declarations for "dependent children", which is not the same as "dependents", as required under the Article 63 of the Constitution).

As such, a writ petition titled *Habib Akram Vs. Federation of Pakistan, etc.*, bearing No. 126184/2018[6] was filed to, inter alia, challenge the missing declarations of the nomination forms appended to the 2017 Act, before the honorable Lahore High Court.

In this regard, it is imperative to note that single judge in chambers, Mrs. Justice Ayesha Malik, vide a detailed judgment dated 30th May, 2018 (Judgment), partially allowed the Petition and, inter alia, declared that the nomination forms appended to the 2017 Act, *"do not provide for mandatory information and declarations required under the Constitution and the law".*

For convenient reference, the relevant parts of the Judgment have been reproduced below:

"17. Furthermore while drafting nomination forms the lack of accessible and objective information in the public domain must be considered. In this regard it is also noted that it is not necessary that every member of the public or every voter is aware of the qualifications and disqualifications specifically enumerated in Article 62 and 63 of the Constitution. Hence by generalizing the declaration for the purposes of Article 62 and 63 of the Constitution a voter is deprived of essential information and required disclosure on the basis of which an informed decision can be made. Additionally for the purposes of raising objections and scrutinizing the nomination forms, the lack of information and declaration essentially erodes the constitutional mandate and the whole purpose of scrutiny is diluted. Parliament consists of political actors who have a keen interest in the quantity and quality of information available in the public domain. They

[6] *The author of this paper was the counsel for the Petitioner in the said case before the honorable High Court as well as the honorable Supreme Court of Pakistan.*

are also interested in the nature of the disclosure and quantity of information that is required to be made in the nomination forms. It is for this reason that the Constitution protects the rights of the voters through the ECP, to ensure that at the time of election an informed decision is made. The requirement of Article 218, casting a duty on the ECP to organize and conduct honest, just and fair elections as per law, includes the duty to ensure that all necessary and required information, disclosure and declarations are made by a candidate. While Parliament can make the laws to regulate the conduct of elections, the ultimate authority and responsibility to ensure free and fair elections is of the ECP. Hence ECP is responsible to ensure that a voter is able to make an informed decision and that the nomination forms achieve this objective.

22. Therefore with respect to the challenge of the use of the phrase "dependent children" instead of "dependent" in Sections 60, 110 and 137 of the Act, there is merit as the said Sections are in clear derogation of the constitutional mandate. Under the circumstances the words dependent children shall be read down such that it will be read to be in conformity with the constitutional requirement of Article 63(1)(n) and (o) of the Constitution."

However, hours after the said judgment was released/announced, the Election Commission issued a press release stating that it has called an emergency meeting at its secretariat, on Saturday i.e. 2nd June, 2018, to make decisions about improving Forms A and B in light of the said judgment.

Election Commission also directed returning officers across the country not to receive nomination forms on Saturday i.e. 2nd June, 2018. Moreover, the press release said that the honourable High Court's order reaffirms Election Commission's stance which was presented before the Parliamentary Committee on Electoral Reforms that the nomination form should be a part of election rules and drafted by the Election Commission.

Surprisingly, pursuant to the Judgment, the outgoing Speaker of the National Assembly as well as Election Commission, filed Civil Appeals No. 56-L & 57-L of 2018, under Article 185(3) of the Constitution, for grant of leave to appeal against the Judgment passed by the honourable Lahore High Court, Lahore.

Subsequently, on Sunday i.e. 3rd June, 2018, the honourable Supreme Court

of Pakistan suspended the Judgment and, inter alia, directed Election Commission to continue receiving the nomination forms, per 2017 Act, from 4th June till 8th June, 2018.

However, after adjudicating the merits of the Appellant's arguments, the honourable Supreme Court of Pakistan, vide its order dated 6th June, 2018, stated, inter alia, that "All candidates of the National and Provincial Assemblies shall file the said affidavit along with their Nomination Papers. Such candidates who have already filed their Nomination Papers, shall file the said Affidavit with the Returning Officers by or before 11th June, 2018". Moreover, the honourable Supreme Court of Pakistan, expressly, specified that:

> "8. It is clarified that failure to file such Affidavit before the Returning Officer would render the Nomination Papers incomplete and liable to rejection. If the Affidavit or any part thereof is found false then it shall have consequences, as contemplated by the Constitution and the law. Since the Affidavit is required to be filed in pursuance of the orders of this Court, therefore, if any false statement is made therein, it would also entail such penalty as is of filing a false affidavit before this Court."

Consequently, per a revised election schedule issued by the Election Commission on 8th June, 2018, the last day to submit nomination papers was extended from 8th June, 2018 to 11th June, 2018, however, it is clarified that the said revision has not postponed 2018 General Elections, as the same are still scheduled to take place on 25th July, 2018.

As is apparent from this constitutional and legal framework, one of the primary responsibilities of the ECP and the caretaker government is to ensure that elections take place in accordance with law.

This brings us to the issues at hand: what is the role of the Election Commission as we approach the 2018 General Elections? How will the Election Commission and the interim government ensure free and fair elections? Will Election Commission and the caretaker government be able to enforce laws concerning use of money/funds, in the electoral process? Will the Election Commission and the caretaker government be able to enforce the law concerning electoral process, in true letter and spirit? What measures will the election Commission and interim government take to

ensure that the administrative machinery of the State (i.e. civil services structure) remain neutral, despite entrenched political alliances? How will the Election Commission that only the candidates which fulfil the requirements of Article 62 and 63 contest the election and get elected through the democratic process?

Historical Issues

Despite an elaborate constitutional and legislative framework, historically, the elections in Pakistan have been plagued by controversy and allegations of electoral rigging. While the full ambit of such allegations is beyond the scope of this paper, a few recurring (and critical) issues require special attention and analysis.

Qualification and Disqualification of candidates

Constitutional provisions dealing with qualifications and disqualifications of parliamentarians existed in the 1956 Constitution (Article 45 and 78) as well as the 1962 Constitution (Article 103).

These, however, were brief in content and ascertainable in nature – dealing primarily with age, solvency, citizenship and mental capacity – leaving all else to subsequent Acts of Parliament. The same definitive model was adopted and followed in the original text of Article 62 and Article 63 in the Constitution.

However, during Gen. Zia-ul-Haq's military rule, Article 62 and 63 were amended through the Revival of the Constitution Order, 1985, adding five (05) new clauses to Article 62, and eleven (11) new clauses to Article 63. As a result, the qualifications (Article 62) were amended to include the requirements to be "of good character… not commonly known as one who violates Islamic Injunctions" (d), having "adequate knowledge of Islamic teachings… and practices obligatory duties" (e), "is sagacious, righteous and non-profligate and honest and ameen" (f), and has not been convicted of a crime involving "moral turpitude" (g). Similarly, Article 63 was amended to disqualify anyone who propagates an opinion "prejudicial to the Ideology of Pakistan" or "morality" (g), or is convicted of an offence involving "moral turpitude" (h).

The Court, however, interpreted these constitutional provisions, without the infusion of morality, declaring in numerous cases e.g. *Shahid Nabi Malik v. Muhammad Ishaq Dar*[7], that the righteous and ameen requirements were not self-executing, could not be given an "extended" meaning, and that such determination could not be made on mere allegations or popular belief.

[7] Shahid Nabi Malik v. Muhammad Ishaq Dar, 1996 MLD 295

Article 62 and 63 once again went through an iteration of amendments, during the military tenure of General Pervez Musharraf, who took over the political reigns and introduced the Legal Framework Order, 2002, tweaking the language and adding three additional provisions to the disqualification clause. The courts did not expand the ambit of these constitutional provisions (as demonstrated in *Waqas Akram v. Dr. Tahir-ul-Qadri*)[8]. Finally, these articles were once again amended through the 18th Constitutional Amendment (this time the Parliament), which removed Musharraf's imprint, but left Zia's legacy untouched.

The first attempt to interpret 'righteous' was made in the case of Muhammad Yousaf[9]. Shying away from a jurisprudential discourse on the issue, the Election Appellate Authority quoted the definition of 'righteous' from the Concise Oxford Dictionary as being someone who is 'morally right, just, upright, virtuous, law-abiding'. Using this broad and generic definition, the Appellate Court declared that a 'convict' [in a criminal case] is not 'law-abiding' and thus cannot qualify on the standard of Article 62(1)(f). Later, in the case of *Bilal Ijaz*, the Lahore High Court did little more than provide a list of dictionary meanings for the words 'sagacious', 'righteous', 'non-profligate', 'honest' and 'ameen'.[10] Ominously, in the case of *Muhammad Jamil*, the Lahore High Court, quoting the Oxford Advanced Learner's Dictionary, held that these words entailed a 'wide' meaning 'in order to ensure that the best of the best make it to these sacred Houses'. The relevant part of the judgment[11] reads as under:

"The words 'sagacious….ameen' have to be understood in the general parlance. Sagacious means 'showing good judgment and understanding'. Righteous means 'morally right and good'. Honest means 'always telling the truth, and never stealing or cheating… Not hiding the truth about something'. Ameen means honest. The meanings given above are broad and wide enough to detect and catch even the smallest of taint or blemish appearing on or attached with the name of the aspiring candidate. Framers of the Constitution have intentionally kept these qualifications wide and simple in order to ensure that the best of the best make it to these sacred houses, which in turn would guarantee progress and development of our nation." [12]

[8] *Waqas Akram v. Dr. Tahir-ul-Qadri*, PLJ 2003 SC 9
[9] Muhammad Yousaf v M Irshad Sipra 1988 CLC 2475, 2489.
[10] Bilal Ijaz v Mudassar Qayyum Nahra 2010 CLC 1962 Lahore, 1704-1705
[11] Muhammad Jamil v Amir Yar PLD 2010 Lahore 583, para 29
[12] Ibid

During all this while, and wisely so, the Supreme Court resisted the temptation to use the broad and unascertainable ambit of these provisions as a sword to threaten the disqualification of Parliamentarians. However, the jurisprudence of passion found its way into the judgments of the Iftikhar Chaudhary Court. In the challenge concerning dual nationality of the then Interior Minister's (Rehman Malik), the Court held that the Minister could not be considered 'sagacious, righteous, honest and ameen' in view of the false declaration made by him at the time of contesting the Senate election in 2008.[13]

Later, the former Prime Minister, Yousaf Raza Gillani was dismissed[14] under Article 63(1)(g), Parliamentarians were disqualified per Article 63(1)(c), and – most ominously – at numerous occasions (including Rehman Malik's disqualification and the NRO case[15]) has the Supreme Court referred to parliamentarians not being *"sagacious"* or *"ameen"* (62(1)(f)), in violation of the constitutional requirements.

In perhaps the most consequential case concerning Article 62 and 63, the honourable Supreme Court of Pakistan, on 28th July, 2017, disqualified Mian Nawaz Sharif, from being member of the National Assembly, under Article 62(1)(f) of the Constitution. Also, the honourable Court decided that NAB references be filed against the former Prime Minister, and his family members, based on material presented before the Joint Investigation Team (JIT) (which was formed pursuant to the Panama scandal) and the honourable Court itself.

Specifically, these honourable judges applied Article 62 and 63 in the narrowest possible manner (so as not to open the floodgates of 'morality', under the 'sadiq and ameen' clause), and concluded that 62(1)(f) disqualification is attracted against someone who lies on "solemn" oath. And for this purpose, instead of focusing on Prime Minister's speeches, his statement before the JIT, or even submissions before the honourable Supreme Court, this majority of the bench concluded "that having failed to disclose his un-withdrawn receivables constituting assets from Capital FZE Jebel Ali, UAE in his nomination papers filed for the General Elections held in 2013" as required by the Representation of the People Act, 1976 (ROPA),

13 Syed Mehmood Akhtar Naqvi v Federation of Pakistan Constitution Petition No. 05/2012 (short order, dated September 20, 2012), para 20 (g)
14 *Syed Mehmood Akhtar Naqvi v. Federation of Pakistan,* PLD 2012 SC 1089
15 *Dr Mobashir Hassan v Federation of Pakistan*, PLD 2010 SC 265

"and having furnished a false declaration under solemn affirmation" Mr. Muhammad Nawaz Sharif is "not honest in terms of Section 99(f) of ROPA and Article 62(1)(f) of the Constitution", and thus "he is disqualified to be a Member of the Majlis-e-Shoora (Parliament)."

Surprisingly, this interpretation of the (majority of the) honourable Court has attracted unwarranted criticism from countless quarters, including several eminent members of the legal fraternity. The question needs to be asked: has the honourable Court rendered its judgment on moral basis? Did it transform itself into a court of morality, as some people seem to be arguing? Or has it, instead, (wisely) strayed away from all moral connotation, even while interpreting and applying a very controversial provision of the Constitution?

While on the point, there is no cavil with the fact that Article 62(1)(f) – introduced by a dictator – should be repealed/amended, because it holds the possibility of becoming a tool for moral witch-hunts. But that is a choice to be made by the legislature. Till such time that the provision exists in the Constitution, can the courts simply ignore it? Can a provision of the Constitution be rendered redundant? And if not, has the honourable Court not applied it in the most amoral manner, and through a justiciable standard (that of 'lying under oath')?

The honourable Court dismissing elected Prime Ministers is not an ideal outcome in any democracy. And our politico-legal circles should openly debate such issues. But in the said case, let us place the blame where it belongs: It is the legislature, and not the judiciary, which has consistently chosen to keep Article 62(1)(f) of our Constitution, despite having had at least 13 different opportunities to amend it. In fact, when the 18th Constitutional Amendment was being drafted, a suggestion had been made by PPP that Article 62 and 63 should be amended; and this suggestion was most vociferously opposed by none other than PML(N).

It is perhaps wise to step back and evaluate the purpose and application of Article 62 and 63. There is no cavil with idea that the Constitution (and the law) must provide with qualification and disqualification standards for the Parliamentarians. The issue is whether morality, which is subjective and unquantifiable by definition, can be used as a legal yardstick? The argument of the Parliamentarians who suggest that so long as they have the confidence

of the people, and are 'elected' by them, no disqualification bar can hit them, is flawed. The Constitution provides for standards, which must be adhered to. On the other end of the spectrum, the suggestion by the 'saviors' that fluid moral standards can be used to hold people 'guilty' (and thus disqualified) is equally incorrect. The due process of law requires that no matter what the popular perceptions about any individual may be, everyone is innocent till proven guilty.

In light of these developments, a national debate has erupted as to the purpose and ambit of Article 62 and 63 of the Constitution. Were the provisions of the law to be blamed? Or was it their interpretation, instead, that was flawed? Going forward, what path must we choose to ensure that elected individuals command high integrity, without any moral (as opposed to legal) judgment against any particular individual? Also, importantly, should such judgments (though legal in nature) be passed by the Returning Officers (ROs) in exercise of their summary jurisdiction, or should such power can only be excised by Courts of plenary jurisdiction?

It is important to be mindful of the fact that the Returning Officers are employees of the government and do not perform adjudicatory functions. As such, they cannot go beyond the ambit of scrutinizing the documents presented to them, and be both judges and executioners of the candidates. This is especially so when, per several judgments of the superior Courts, it has been held that the proceedings before the Returning Officer (and the Election Tribunal) are merely 'summary' in nature, and an exhaustive appraisal of evidence cannot be undertaken in such proceedings[16]. Thus, a 'conviction' before the Returning Officer or the Election Tribunal, without following due process, amounts to violation of the right to fair trial under Article 10-A of the Constitution.

In this regard, it is important to note that the honourable Supreme Court in a case titled Imran Ahmad Khan Niazi vs. Mian Muhammad Nawaz Sharif, reported as PLD 2017 SC 265, has stated that:

> *"In the former case, the Returning Officer or any fora in the hierarchy would not reject the nomination of a person unless a court of law has given a declaration that he is not sagacious, righteous, non-profligate, honest and ameen. Even the Election Tribunal, unless in itself proceeds to give the requisite declaration on the basis of the material before it would not disqualify the returned candidate where no declaration, as mentioned above, has been given by a court of law. The expression, a court of law has not been defined in Article 62 or another provision of the Constitution but is essentially means a court of plenary jurisdiction, which has the power to record evidence and give a declaration on the basis of the evidence so recorded. Such a court would include a court exercising original, appellate or revisional jurisdiction in civil and criminal cases. But in any case a court or a forum lacking plenary jurisd*iction cannot decide questions of this nature at least when disputed".

[16] See, eg, *Illahi Bux Soomro v Aijaz Hussain Jakhrani* 2004 CLC 1060 Election Tribunal Sindh, 1074, 1079; *Haji Arshad Ali v Sardar Faisal Zaib* 2003 SCMR, 1848, 1549

Campaign finance

In Pakistan (much like other democracies of the world) the influx of money in political campaigns has robbed democracy of its most fundamental promise of equality. Despite legal safeguards built into our election laws, the flow of (often illegal) money dominates the outcome of the electoral process. And, consequently, the privilege of being elected is now limited to the select few who can 'afford' it.

In the circumstances, controlling the influence that money has over elections – or at least regulating it – is perhaps the most essential responsibility of the (de jure) stakeholder that conduct the electoral process: the caretaker government, and the Election Commission.

The idea of accountability for sources of funding (for political parties) also emanates from the Constitution itself – Article 17(3) of the Constitution – which mandates that *"every political party shall account for the source of its funds",* as prescribed by law.

Furthermore, under the 2017 Act (a successor to the Political Parties Order, 2002), each political party is required to submit an annual statement of assets and liabilities, income and expenses, as well as sources of its funds to the Election Commission. The statute further stipulates that party leader must certify that no party funds have been received from *"prohibited"* sources (which may be confiscated by the Election Commission).

For individual candidates, the 2017 Act (a successor to the Representation of People's Act, 1976) mandates that every candidate, at the time of submission

of the nomination papers, must provide a statement of "*assets and liabilities*", along with those of his/her spouse and dependents, which are open for anyone to *"inspect"*. The fact that the nomination papers appended to the 2017 Act omitted several critical disclosures has now been settled in light of the honourable Supreme Court's order dated 6th June, 2018.

Moreover, elected members are required to file a yearly statement of assets and liabilities with the ECP. And in case any such declaration is *"false in material particulars"*, the candidate can be prosecuted for *"corrupt practice"*.

Importantly, Section 132 of the 2017 Act specifically prohibits expenditure above one million and five hundred thousand rupees for election to a seat in the Senate; four million rupees for election to a seat in the National Assembly and two million rupees for election to a seat in a Provincial Assembly.

It is no secret, however, that these statutorily prescribed limits of election expenditures are not adhered to by most (if not all) candidates in the electoral process. Our political saga is replete with examples about electoral expenditures that make a mockery of campaign finance laws.

It is now widely accepted that the 2015 by-election in NA-122 alone entailed a collective candidate expenditure of over Rs. 100 million (between Aleem Khan and Ayyaz Sadiq)[17]. Regularly, party tickets are distributed amongst 'electables', who have the financial muscle to contest elections. In many ways, reducing the election to an equation of money, is the very reason that we inevitably elect the same moneyed-elite to our cathedrals of legislative power.

Making matters worse, are issues of 'purchasing votes', through financial muscle. In this regard, episodes such as the *Asghar Khan* case have lay bare the unholy alliance between political campaigns and suspect sources of money, which rots the very fabric of our democracy. This facet (of purchasing votes) was also the central controversy surrounding the recent Senate elections of 2018. In fact, the former Prime Minister of Pakistan, Mr. Shahid Khaqan Abbasi, made repeated jabs at Chairman Senate, Mr. Sadiq Sinjarani, about the alleged "sale and purchase" of votes that resulted in Mr. Sinjarani being elected Chairman of Senate.

[17] "NA-122 Election Mania Touches Peak" 9th October, 2015, Samaa Web Desk <https://www.samaa.tv/opinion/2015/10/na-122-election-mania-touches-peak/>

In the circumstances, a few questions need answering: are votes bought and sold during elections? Perhaps. Is it lawful to buy and sell votes? Absolutely not. Have elections in Pakistan become, for the most part, an equation of 'who spends the most money'? Yes. Should the influence of money, in purchase votes, be prohibited? Certainly.

But, while Prime Minister Abbasi's contention regarding Senate elections might be valid, it is pertinent to ask a few more questions: Is this the first time that the use of money, for the purpose of buying votes, in Pakistani elections, has been noticed? Have inquiries against such members of political parties (ever) been conducted? How much money was spent by Ayyaz Sadiq and Aleem Khan in the bye-elections? Was Mr. Abbasi's conscience not jolted into action then… simply because PML(N) won that seat? Would he, or for that matter any leader of a political party care to call an internal party report for the amount of money that was spent by their party members in the last General Elections? Has the previous government passed any new law, or instituted administrative measures, to ensure that such episodes no longer mar our democratic process? And why has implementation of campaign finance laws (relating to expenditure of money in the electoral process) never been a priority for the government during the past several decades of governance?

Surprisingly, combing through our jurisprudential history reveals that virtually no litigation of note has ever been brought to the courts on issues of campaign finance. The reason for this is not because all parties and candidates have only ever used legitimate sources of funding within prescribed limits, but that since members from all sides of the political divide are guilty of violating campaign finance laws, no one seems interested in raising the issue. And as a result, our political process has been reduced to a simple equation of who can spend the most money running for elections (and then recover it during the term in office to contest once again).

By transforming the election process into a capital-intensive exercise, we have given up on the ideal of allowing 'anyone' an opportunity to contest. This sad reality has systematically ostracized majority of our population from ever aspiring for political office. And we have reached this point for no other reason, but a lack of enforcement of law that already exists on our statute books.

No one can reasonably claim that sufficient legal framework for regulating campaign finance issues does not exist on our state books. Consequently, the entire responsibility (fault?) for not enforcing these provisions rests with the executive authorities: caretaker government and the Election Commission. And, precisely, this will be the biggest challenge of the caretaker regime and the Election Commission in the upcoming elections.

The Election Commission will have to take the lead in this regard. Since all administrative authorities (including members of the caretaker government) are required to work under the auspices of the Election Commission, for the purposes of conducting free and fair elections, the Election Commission must institute specific monitoring measures for overseeing the expenditure of each candidate. Special monitoring teams (in each constituency) must be deputed to observe the 'on-ground' expenditures being made.

If Election Commission's monitoring of such expenditures, in consonance with the caretaker government, results in providing justiciable proof of campaign finance laws – resulting in disqualification of candidates – it will send shockwaves throughout our democracy. It will not only enforce the applicable law, but will help extend the promise of democracy to a larger fraction of our population.

Monitoring the election process and rigging

Perhaps the most difficult, maybe even impossible, part of Election Commission's responsibility to conduct 'free and fair elections', is to monitor electoral campaigns, the expenditure by each candidate, and the conduct of administrative machinery (i.e. bureaucracy and the Civil Service), leading up to the polling day. And these responsibilities, under the Constitution and the law, rest entirely with the Election Commission and with members of the interim government across different Provinces and Federation.

Just in the 2013 General Elections there were numerous allegations (especially in the Province of Punjab and Sindh) concerning interference by the administrative machinery in the otherwise neutral electoral process. In particular, as an example during the 2013 election campaign, the then District Police Officer (DPO) for Hafizabad was caught (on video) campaigning and seeking votes for the local candidate belonging to the

Punjab ruling party – PML(N). Similar instances of bureaucratic interference were reported across other districts of Punjab as well as rural Sindh. However, no concerted measures were adopted at the time, by either the interim government of the Punjab or the Election Commission, to bring to light and punish members of the administration who played a partisan role during the electoral campaign. In fact, the largest opposition party in Punjab, (PTI), levelled serious allegations against the then Chief Minister and other members of the interim government (with the colloquial slogan of *"paintees puncture"*). While the matter was eventually investigated by the General Elections 2013 Inquiry Commission, the Election Commission did not take any concerted measures to either dispel the allegations or device a strategy to ensure that such allegations are not made during the 2018 General Elections.

It is also worth mentioning that numerous discrepancies were unearthed in regards to the actual balloting process, conducted under the auspices of the Election Commission. Specifically, in this regard, the judgment of the Election Tribunal concerning the 2013 election in NA-125 and PP-155 unearthed grave illegalities, fake votes and material violations of law (read: electoral rigging) and thus had ordered fresh elections to be held in the said constituency.

Notably, in the 80-page judgment, while discussing National Database and Regulatory Authority's (NADRA) report and recounting the details to bogus votes, unverifiable thumb impressions, casting of additional ballots, over-counting, incorrect Form 14s and incomplete Form 15s, the honourable Election Tribunal observed (and emphasized) how the Presiding Officer (PO) and the Returning Officer (RO) in NA-125 and PP-155 had not performed their responsibilities in accordance with law. However, despite such a verdict, the Election Commission or the interim government has proposed no deliberate mechanism to guard against such specific instances of electoral rigging.

Placing the blame

It is important to ask the one question that forms the basis of the aforementioned discussion: who (on an institutional level) is to be blamed for a broken (or at least skewed) electoral process. And the answer, in this regard, is simple: the Election Commission and the caretaker government.

As is apparent from the earlier discussion, the Election Commission is levied with a grave Constitutional responsibility to ensure free and fair elections in the country. In this regard, all of the administrative machinery, at the Provincial and Federal level, is placed at the disposal of the Election Commission, and works pursuant to the directions by the Election Commission, for conducting elections in Pakistan. Despite Constitutional and legislative powers, as well as support from judicial dictas[18], the Election Commission has remained ineffective (to a large extent) in monitoring the various violations of law during the electoral process.

In this regard, most pertinently, there is no mechanism in place by the Election Commission to monitor the precise expenditure done by each candidate, or his/her supporters, during the election campaign. Consequently, contesting an election has increasingly become a function of money/expenditure on part of the candidate, which frequently entails tens of millions of Rupees (especially in urban constituencies). A prime example of such (illegal) expenditures were seen during the by-election in NA-122, in which over a 100 million were spent during electoral campaigns by the contesting candidates. Not only does the Election Commission have no mechanism of monitoring (on its own) the electoral expenditure in different constituencies, it also has no defined mechanism for investigating such expenditures, in case a complaint is formally brought before them. As such, the influx of (illegally spent) money in the electoral process has, de facto, ousted a large fraction of the population from ever contesting elections, simply because they are unable to afford such exorbitant expenditure.

On the other hand, while the Election Commission may not have the manpower to monitor such expenditure in each constituency, the caretaker government has also remained entirely ineffective in this regard, despite having administrative control over the Provincial and Federal administrative

[18] Workers' Party Pakistan through Akhtar Hussain, Advocate, General Secretary and 6 others Vs. Federation of Pakistan and 2 others (PLD 2012 SC 681) and Workers' Party Pakistan through general Secretary, and 6 others Vs. Federation of Pakistan and 2 others (PLD 2013 SC 406).

machinery. The recent administrative move to transfer bureaucrats from one Province to another may help in reducing the partisan influence of bureaucracy on the upcoming General Elections, however, it does not provide a concerted mechanism for monitoring the electoral process, as is envisioned by the Constitution and the law.

It had been hoped that the 2017 Act would incorporate measures that address such problems; however, the 2017 Act makes no special provisions for monitoring such persistent violations of the electoral laws.

Reform and recommendations

In addition to some of the recommendations made earlier, a reform in the following areas will greatly benefit the cause of 'free and fair' elections.

Land reform

The promise of democracy is larger than the simple idea of 'one man one vote'. The true spirit of democracy embodies the right of equal participation in all facets of the governance structure. It entails not only the right to have an opinion, but also to have the opinion be counted; not just the right to speak, but also to be heard; not only the right to vote, but the right to be counted; and, perhaps most importantly, not only the right to elect, but also (an equal) right to have a chance of being elected.

Leading up to the 2018 General Elections, this debate – of having an equal opportunity of being elected – must take centre stage.

An appropriate place to start will be by asking the following questions: should the opportunity to contest for public office be the birth right of only the very affluent and privileged? Or should the contours of democracy be extended to incorporate in its fold, those whose voices have been muted under the weight of their unfortunate circumstances? What prohibits, or serves as an impediment for, the common (non-affluent) individual to contest for and get elected to public office?

Regardless of what side of the partisan divide one belongs to, most (if not all) people would agree that the doors of the electoral process must be opened to invite a larger fraction of the populus. And almost everyone would also concur that the greatest impediment in this regard are the forces of status quo.

The next question then becomes: what are the forces of status quo, and how can we counter them?

The answer to this relatively straightforward question, is tricky. And frequently, it is couched in slogans of 'real democracy' being possible only after the 'education of masses' and 'economic empowerment of the middle-class'. All that is true. But the pertinent issue for now is, where do we

start? What is the first step in challenging the status quo?

Answer: Land Reforms, and a breaking of the landed-*junta's* hegemony in our politics. In a country still reeling from its history of colonial rule (through a system of land revenues), hereditary power centers, and primarily an agro-based economy, the gates of democracy shall stay shut to the people at large so long as a few select families and individuals continue to own and control majority of the land.

An attempt to break this hegemony was made through Land Reform Regulation, 1972, and the Land Reforms Act, 1977, which introduced maximum caps on individual and family land-holdings. These reforms were challenged before the Federal Shariat Court (FSC) on the touchstone of being unIslamic, in the case of *Hafiz Muhammad Ameen* case[19], but the court dismissed the petition, holding that 1) the land reforms were not unIslamic, and 2) the FSC did not have jurisdiction to examine the validity of the land reforms, which were protected under Article 24 (Protection of Property Rights) and 253 (Maximum Limits as to Property) of the Constitution.

This judgment of the FSC was appealed before the Shariat Appellate Bench of the Supreme Court in the (in)famous *Qazalbash Waqf*[20] case (PLD 1990 SC 99), in which a bench comprising three judges of the honourable Supreme Court and two Ulema accepted the appeals, declaring the land reforms to be unIslamic (despite the fact that the same, in effect, nullified otherwise substantial provisions of the Constitution).

And that is how the law currently stands.

Enforcement of Campaign Finance Laws

As already discussed in some detail earlier, our legislative framework includes specific provisions (Section 132 of the Election Act, 2017) relating to the maximum amount of money that can be spent by each candidate in the electoral process.

Despite this provision of law (and similar provision in earlier laws), no mechanism has been developed by the Election Commission to monitor and

19 Hafiz Muhammad Ameen case, PLD 1981 FSC 23
20 Qazalbash Waqf case, PLD 1990 SC 99

enforce the campaign finance limits. As a result, elections continue to be an equation of money; thus ousting an overwhelming majority of our population from ever competing in it.

Any reform of the electoral process must, therefore, include specific mechanism for enforcing campaign finance provisions of the law. In this regard, the Parliament and the ECP must device specific legal procedures for electoral monitoring, and consequent disqualification of candidates who violate the campaign finance limits prescribed by law.

Regulation of Media

In the modern world, public opinions and outlook are not entirely shaped by internal convictions and passion, but instead – to a great degree – by external forces, most of which have one agenda or another. In Pakistan, particularly in respect to political allegiances and opinions, public outlook is primarily shaped by chatter on the media-waves. Allowing forces within media to form public opinion, based on subjective entrenchments and latent agendas, can effectively lead to overriding the common man's freedom of choice; the right that rests at the very heart of our democratic dispensation.

Consequently, reform must be brought in the role and responsibility of media, during the electoral process.

In this regard, it is worth mentioning that the electronic as well as print media is primarily in the business of discharging three responsibilities: i) reporting the news, as and when it happens, in a clear and dispassionate manner, ii) doing the investigative journalism, in order to unearth and bring forth the truth that might be hidden from public eye, and iii) analysis of issues and expert opinion, in order to put the news chatter in perspective. But under none of these responsibilities can justify picking partisan sides in an election cycle.

Democracy is not simply the idea that each individual walks to the polling station and casts a ballot. Imbibed in the spirit of democracy is the ideal that each vote will be casted according to the free will and conviction of the voter. And that, while the voter must have access to as much information as is possible, prior to making his or her choice, still the democratic choice will be exercised free of all external passions and prejudices. In this regard, the

media waves – which play a pivotal role in the furtherance of our national discourse – are burdened with critical responsibility during election season. Responsible journalism requires that media exercises restraint when picking sides between candidates and parties, in order to ensure that personal and entrenched vendettas of media personalities do not shape or (in many cases) override the common man's inherent choice to vote according to his own convictions.

Increasing Voter Participation

Unfortunately, a significant fraction of Pakistan's electorate does not exercise its right to vote. In the absence of adequate counter-rigging mechanisms, this provides contestants with an opportunity to use illegal and unfair means to influence the outcome of the elections. In order to rid the elections of such controversy, it is important to increase voter turnout.

In order to achieve this objective, the Election Commission must launch a nation-wide campaign of 'cast your vote', through media platforms[21], including broadcasting through national television, radio, and social media tools. There is a dire need to design this campaign, especially engaging such segments of the voters who have traditionally remained aloof from the political process. In this regard, special emphasis must be placed on the inclusion of women, rural populations and the economically underprivileged.

Eliminating Bogus Votes

In the 2013 General Elections, there were widespread reports of more than one vote being casted under the name of an individual voter. This brings into question the entire electoral process and the Election Commission's logistical capacity to conduct free and fair elections.

Such illegal practices can be prevented if each ballot paper is complimented with a receipt, both having a unique barcode so as to ensure that each casted vote can be verified (electronically) against its corresponding receipts. In this way, bogus votes can be discarded, making the entire process less vulnerable to allegations of rigging.

[21] An effective marketing plan must be made to change the perception of people who consider participation in elections useless. For this purpose, special programmes such as "Vote for my Sake", which was implemented in the United States of America, should be launched.

Maintaining Transparency and Impartiality

In order to make the electoral process more transparent, there is a need to strengthen the Election Commission's regulatory control over all stages of the process, including pre-polling, polling and post-polling. A crucial recommendation, in this regard, is to ensure that the election results are only announced once they have been finalized. This will ensure that no individual candidate can influence the the ongoing counting of votes, making the electoral process less susceptible to allegations of rigging.

Limiting the number of constituencies that can be contested by a candidate

Candidates contesting and emerging victorious from more than one constituency necessary entails the the process of by-election on the vacated seats. Voter turnout and political party interest in these by-elections is generally lower than the General Elections. Moreover, the financial and logistical costs of these by-elections are also met by the Election Commission. There is a need to prevent this unnecessary cost on the Electoral Commission. As such, there is a need to amend the relevant constitutional and legal provisions, thereby limiting the filing of candidature to one constituency only.

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