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# Corrupt Practices in Elections: Comparative Study of Judicial Approaches in India and Pakistan

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*It is an unerringly established fact that free and fair elections are the blood and soul of true democracy. It is only under credible democracy that the masses may enjoy the spectrum of certain liberties in a decent way. Freedom to live peacefully, liberty to elect and be elected, atmosphere to form unions and associations are possible only in a strong democratic set up. As the election has been stated to be an empirical demonstration of citizens' liberty and political choice<sup>1</sup>, therefore, in case, mandate of the electorate is toppled by way of high-handedness, rigging and blatant gerrymandering, the democracy, of course, will be on verge of dissipation. Through the prism of this paper, an attempt has been made to evaluate the judicial approaches in India and Pakistan for maintaining the sacrosanctity of the electoral process. Ordinarily, the technicalities are not allowed to hinder the dispensation of justice but in rendering justice, the tribunals, which are the creation of law, have to draw their powers from the statute. Admittedly, an election suit is neither an action at law nor a lis in equity rather the same is deemed to be a statutory proceeding alien to the common law. So, courts have always been hesitant in interfering in the mandate secured by the successful candidate on the premise of maintaining the purity of the electoral process but, at the same time, they have to prevent the intrusion of political sharks by violating the law or having recourse to other invidious means like corrupt practices.*

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## **A-Introduction**

As a prologue to an ideal democracy, pure and unsullied electoral process, unrighteousness in governance, inviolability of individual dignity, prevalence of rule of law, true adherence to independence of judiciary, efficient and acceptable bureaucracy, presence of credible institutions, competency and deference of those sitting at the helm of affairs and persistence of mutual coherence and cooperation amongst all the organs of the state is sine qua non<sup>2</sup>. These golden concepts are not meant to be confined to theories rather needed to be practiced and manifested in every individual's conduct<sup>3</sup>. Elimination of skulduggery from the politics is "the crucial recognised ideal" because when criminality infects all the layers of administration, there prevails a feeling that the menace is likely to eclipse the society and will pave the way to chimerical apprehension that will rule supreme and, thus, creates an irremediable fissure in the whole society<sup>4</sup>. Similarly, there is no gainsaying that criminalization in elections brings about very strange bearings on the thoughts of the present generation as it can possibly take the corruption as way of life<sup>5</sup>. Being the mightiest sovereign in any society<sup>6</sup>, it is the only law which can emancipate the humanity from the mighty clutches of criminalization. Being the basic structure of the constitution, the democracy is the product of rule of law and aims to establish an egalitarian social order<sup>7</sup> and in this context, it is the only free and fair elections which ensure healthy flourishing of democracy in the country<sup>8</sup>. Undoubtedly, the success of the democracy depends on the conformity amongst triad i.e legislature, press and the political parties, but above all the citizenry itself owes a lot to its flourishing by fulfilling their assigned duties<sup>9</sup>. Sometimes, the success of democracy also becomes contingent upon the observance of restraints by the constitutional functionaries<sup>10</sup>.

The term 'fair' means provision of equal opportunities to all persons but that doesn't mean that people with criminal credential should be allowed to enter into political arena rather people with high moral and ethical value should be infiltrated<sup>11</sup>. Perceived sanctity of the democracy can only be retained if the elections are held periodically. For the free, clean and fair elections are an elixir to the success of democracy; therefore, any attempt to illegally interfere with the electoral process entails very serious and grave repercussions<sup>12</sup>.

The constitution reposes trust in the "little master" to be incredibly cautious in choosing the rulers of the country. For this purpose, the courts, in both of the jurisdictions, have been lamenting with asseveration the faults, weaknesses and imperfections in the existing legislation and reiterating the need and importance of the ramification to be made in the extant legislative arrangements. Initially, section 123 enumerated the acts and omission which constituted major corrupt practices whereas section 124 laid down the instances which amounted to minor corrupt practices. However, in 1956 this bifurcation was done away with by deleting section 124 and some of the minor corrupt practices were retained<sup>13</sup>. As to the judicial concern about corrupt practices, there is no gainsaying that courts have been taking it with scrupulous care and caution. Election disputes have been

taken with a degree of a bit variation from private disputes inter se the private parties due to involvement of the constituency<sup>14</sup>. In such situation, the law casts upon the Tribunal a duty to vindicate the interests of the electorate and go in the depth of the amputation of corrupt practice to ascertain if the allegation has been substantiated or not<sup>15</sup>?

The People Representation Act, 1951 sets out the inventory of activities amounting to corrupt practices<sup>16</sup>. In order to establish corrupt practice; a petitioner has to prove any one or more of the following: (a) bribery; (b) undue influence; (c) appeal in the name of religion; (d) promotion of enmity or hatred between different classes of citizens on ground of religion, race, caste, community etc; (e) propagation or glorification of the practice of sati; (f) publication of any false statement in relation to the personal character of any candidate, etc reasonably calculated to prejudice the prospects of that candidate's election; (g) hiring or procuring expenditure in contravention of section 77; (h) obtaining or procuring any assistance of various categories of persons specified under sub-section(7); and (i) both capturing, whereas, section 100 (1) (b) and (d) (ii) deal with such cases. The law enjoins upon the potential litigant to file election petition within 45 days of the elections. It should not lose sight that such acts or omissions are either committed by the candidate, his election agent or by any other person with candidate's consent or his election agent's consent<sup>17</sup>. Only activity which doesn't refer to either the agent or any other person is the corrupt practice of incurring or authorizing the expenses in defiance of the People Representation Act, 1951<sup>18</sup>.

### **B- Statutory Realm Position in Pakistan**

Elections, in Pakistan, are conducted under the provisions of Election Act, 2017. But before embarking upon the examination of provisions relating to corrupt practices, it would be equally relevant and important to dilate upon the chronological back ground of the elections laws in Pakistan. Since the dawn of independence in 1947, Pakistan has been conscious of the need of fair and free elections. It was owing to this urge that provisions pertaining to morality and soundness of character of the candidates have been onto the statute books in post independence era. In this context, Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, a pre-partition enactment, was inherited from the colonial masters as the first law on the subject. First part the first schedule to the said order specified certain acts to be corrupt practices. However, due to political turmoil in the nascent state, no election could be held to any of the houses of the parliament. Resultantly, the said law remained a dead wood for more than a decade. As a result of imposition of Martial Law in 1958, the Chief Martial Law Administrator after assuming the powers of President issued Presidential Order N. 4 of 1962. Sections 51, 61 and 62 thereof dealt with corrupt practices in elections. The Order however turned out to be a short lived arrangement and was replaced by National and Provincial Assemblies (Election) Act, 1964-67. The said law enumerated the following acts to be corrupt practices<sup>19</sup>; (1) contravention of section 49 of the Act, (2) bribery, personation or undue influence (3) making or

publication of false statement attacking the personal character either of the candidate or his/her relative which adversely influencing his/her election or for the sake of promoting or procuring the election of some one else. Belief of the maker or publisher of the alleged statement or having reasons as to the truth of the statement has been coined to be an exception. Any false averment, oral or published, pertaining to the symbol of the contestant would also fall within the purview of corrupt practice. Similarly, making or publishing a false statement as to the withdrawal of a candidate was also termed to be a corrupt practice under the said law, (4) calling upon or persuading an individual either to vote or refrain from voting for a particular candidate on the ground that a specific candidate belongs to a particular race, tribe, caste, community, religion or sect, (5) for the sake of supporting a particular candidate or opposing a particular candidate, knowing make use of any conveyance in any form or shape for the purposes of transporting electors to and fro the polling venue. This restriction was, however subject to certain exceptions; (a) it would not be a corrupt practice to convey either to himself or any of the members of tribe the candidate or the conveyer came of, (b) the elector/electors conveys himself or themselves (c) convey a person to or from the polling station who might be waiting for departure without casting his vote.

After remaining in force for almost six year, the National and Provincial Assemblies (Election) Act, 1964 was replaced by the National and Provincial Assemblies (Elections) Ordinance, 1970. Like its predecessor, that Act also itemized certain acts which amounted to corrupt practice in a facsimiled fashion.

After holding ground for a bit more than ten years, the said Ordinance was repealed by the Representation of People Act, 1976. Under new arrangements, no praise worthy move could be demonstrated except with the addition of clause (d) to sub-section (3) vide which making or publishing a false statement or submitting fake details of educational credentials, assets and liabilities or liability in respect of payment of loans or adherence to party affiliation was declared to be corrupt practice<sup>20</sup>. Similarly, under subsection (4) words caste and bradari were also added. Undoubtedly, with the addition of these two words, the scope of proscribed terrains for canvassing had been enhanced under the new statute. Unlike, its predecessor, the new statute enhanced the quantum of punishment of imprisonment for corrupt practice from two years to three years and fine from one thousand rupees to five thousand rupees<sup>21</sup>.

### **Locus Standi**

Under the Indian electoral arrangements, not only the contesting candidate has the locus standi to challenge the election of the return candidate but any elector can also lodge a petition for setting aside the election. But in this scenario, one important thing as to the identity of the petitioner seems to be missing. If a person claims to have voted for the returned candidate, he would definitely lose the locus

standai and in case he claims to have voted for other than the returned candidate, he would be required to establish his locus standai.

In Pakistan, only one of the contesting candidates, in case of more than one candidate, has the locus standi to challenge the election of a returned candidate and election may be set aside in case the petitioner proves the allegations beyond any iota of doubt<sup>22</sup>.

### **C-Contents of the Petition: Position in India**

As to the election matters, the bench in India has warned the potential litigants in incisive words to be ultra cautious in leveling wild insinuation of corrupt practice<sup>23</sup>. For, casting allegations merely for the sake of satiation of political vendetta may attract the exorbitant costs. In this context, it is submitted that legal position in India is very clear<sup>24</sup>, as the provisions have not been interpreted liberally. The *raison d'être* behind court's reluctance is deference to trust and confidence reposed by the public in the victorious candidate and to save him from unnecessary humiliation in vexatious litigation.

The petitioner is obliged to narrate the material facts concisely and full description of the alleged acts constituting the corrupt practices<sup>25</sup>. Undisputedly, all those primary facts which a party has to prove for establishing its cause of action or rebuttal thereof do come within the ambit of material facts<sup>26</sup>. So, non-inclusion of any one of them would render the cause of action incomplete and entail the dismissal of the plaint because no amount of evidence, whatsoever, could heal the fundamental infirmity in the pleadings<sup>27</sup>.

In case the corrupt practices are narrated in the petition, the petitioner has to support the same by attaching an affidavit, in prescribed form, thereto but the petitioner shall not be obliged to state the allegation of corrupt practice and its particular in the affidavit<sup>28</sup>. The law, however, doesn't enjoin upon absolutely conformity with the prescribed format<sup>29</sup>. It simply lays emphasis on substantial compliance with the prescribed pattern and in case of any defect in affidavit or verification thereof, the same is rectifiable and cannot be made the basis for the dismissal of the election petition in limine<sup>30</sup>.

Truly, there is possibility of overlapping the material facts and particulars<sup>31</sup>. Albeit, the principal purpose of the material particulars is to enlighten the counterpart as to the case it has to defend, therefore, the grounds formulating the material facts and material particulars need to be stated in an elaborated fashion<sup>32</sup>. The logic behind the requirement of disclosure of material facts or corrupt practices in a concise manner is delineation of the scope, ambit and limit of the inquiry at the time of the trial of the election petition<sup>33</sup> and to save the respondent from being taken by surprise on the eve of actual trial<sup>34</sup>.

As to the right of the petitioner to amend the petition, it has been held that once a corrupt practice has been stated in the petition, the same is liable to be amended or amplified at any later stage even after the lapse of the period prescribed therefor<sup>35</sup>. In case of non disclosure of a corrupt practice in petition at the time of its

institution, no amendment would be allowed to introduce such corrupt practice, after the limitation, for the same would constitute institution of fresh petition<sup>36</sup>. The extant law envisages a couple of phrases to be included in the election petition i.e. material facts<sup>37</sup> and material particulars<sup>38</sup> pertaining to corrupt practices. Material particulars of those corrupt practices can be amended or amplified, with the permission of High Court, which has already been attributed in the petition<sup>39</sup>. Amendment, however, for the sake of inclusion of fresh/new corrupt practice is not permissible<sup>40</sup>.

It is an admitted fact that under the law, the factual matrix constituting the corrupt practice is to be adumbrated in the petition or alternately, to be incorporated by way of an amendment with the prior permission of the court but within prescribed period of limitation<sup>41</sup>. The particulars, however, demonstrating the corrupt practice alleged in the petition stand on entirely different footings<sup>42</sup>. In case there emerges some minor inconsistency between the proofs and particulars, the same is permissible provided it doesn't cause prejudice to the opposite party and reasonable opportunity has been given to it for adducing evidence in rebuttal thereof<sup>43</sup>. Similarly, omission to supply the copies of the documents annexed to the petition, whose contents have also been pleaded elaborately in the petition, doesn't amount to non-compliance with the mandate of 81(3) entailing thereby dismissal of the petition under the Act<sup>44</sup>. In such cases, the annexation of such documents has been held to the evidence of pleadings incorporated in the petition<sup>45</sup>.

Besides narrating the genesis of the elements constituting corrupt practice, the petitioner is also obliged to authenticate the petition by putting his/her signatures on it anywhere on the petition<sup>46</sup> and reveal the source of information as to the commission of corrupt practices as well<sup>47</sup>. Even the signature put by the petitioner on the affidavit attached to the petition has been held to be true authentication of the petition on the ground that petition is one document with two parts i.e petition and the affidavit<sup>48</sup>. But an affidavit accompanying the petition without having on it the endorsement of the Notary Public has been held to be in non-conformity with the statutory requirements and, thus, merits dismissal of the petition<sup>49</sup>. But, the view expressed by the court in Dr. Shipra's case could not hold the ground any longer and after nice years the same was overruled by holding that omission to mention the name, seal or stamp of the Notary in a copy which otherwise was true copy wouldn't be construed to be a defect entailing dismissal of the plaint<sup>50</sup>.

#### **D-Contents of the Petition: Position in Pakistan**

Like its predecessor, the instant law also prescribed the prerequisites of an election petition<sup>51</sup> and being mandatory in flavour, non-observance thereof would entail dismissal of the claim<sup>52</sup>. It was obligatory for the petitioner to delineate the particulars of the corrupt practice, illegal act or illegal practice allegedly committed by the victorious candidate, his agent or with connivance or consent of either of them along with full description of parties involved in the commission of the alleged corrupt practice, illegal practice or the illegal act date and venue of the its commission<sup>53</sup>. Non disclosure of attribution in a specific way i.e exact date,

time, venue, detail of the witnesses and person instrumental in the commission of such practices would result in dismissal of the petition<sup>54</sup>. So, a petition devoid of such essentials has been held to be causeless petition and was liable to be dismissed summarily by the election Tribunal on the strength of powers under the law<sup>55</sup>.

Attribution of ambiguous and blurred allegations without the elaboration of particular thereof has been held to be withholding of material evidence entailing dismissal of plaint<sup>56</sup>. It is equally relevant to reiterate that the Election Commission was not supposed to be dragged as party without attributing any allegation against it. In such situation, the petition would not merit dismissal due to non-joinder of the election commission as party<sup>57</sup>. Albeit, verification of the election petition is one of the essentials to be accounted for by the court, however, initially, non-verification of the supporting documents was not considered to be a ground for dismissal of petition<sup>58</sup>. As the supporting documents have been held to be annexure within the meaning of law, therefore, the same were subject to the stipulation of verification on oath. Non-compliance thereof would result in dismissal of the election plaint<sup>59</sup>.

But, in case, the petition was based on the information of the election agents, it was imperative to be supported by the affidavits of such agents<sup>60</sup>. Non adherence to such statutory requirement was held to be ground of dismissal of the plaint<sup>61</sup>. Similarly, oath on verification of election petition was to be attested in line with the rules and instructions framed/issued by the High Court. As the *raison d'être* behind the oath was to confront its maker with Allah and to make sure the verity of the depositions made by the deponent, therefore, it is to be made before an authorised person<sup>62</sup>. Such omissions on the part of petitioner would entail dismissal of plaint<sup>63</sup>.

### **E-Proof of Corrupt Practice: Indian Perspective**

In case of alleged corrupt practice, the aggrieved party has to prove that, as a result of corrupt practice, the results of the elections have been materially affected and it has to be done by adducing affirmative evidence<sup>64</sup>. As the issue of being materially affected had been coming in a number of cases, therefore, to streamline the issue, the apex court had devised a formula<sup>65</sup>. The court established that if votes received by the candidate whose nomination papers should have not been accepted, was lower than the difference of votes of the returned candidate and the second highest candidate, it was easy to comprehend that the results of the election had not been materially affected<sup>66</sup>. If, however, votes secured by such candidate are higher than the alleged difference, there may be several possibilities. The petitioner has to establish that votes would have been managed in such a way that the returned candidate would have been unsuccessful<sup>67</sup>.

In case the petitioner fails in setting out the full description of the alleged corrupt practice, the court should not dismiss the petition *in limine* rather the petitioner

ought to be given a chance to amend or amplify the details of the corrupt practice<sup>68</sup>. However, in case of non compliance of the direction, the charge of corrupt practice remains vague and liable to be struck out<sup>69</sup>. It is also open to the court to assess if, due to vagueness of the charge, any material prejudice has been occasioned to petitioner or not<sup>70</sup>? Albeit, the petition questioning the election of a successful candidate is, on the basis of corrupt practice, not a criminal proceeding but the same is criminal proceeding in terms of proof of the corrupt practices<sup>71</sup> with the difference that in case of criminal proceedings the accused has the right to be silent while in case of election petition, the returned candidate has to put forward his version that, for the satisfaction of the court, he has not committed the alleged corrupt practice<sup>72</sup>.

The test of being reasonably beyond doubt is to be adhered to in such proceedings<sup>73</sup>. The law also obligates the court not to vacillate rather it has to investigate the evidence with laudable amount of care for the finding on the issue of corrupt practices are likely to emblazon far-reaching consequences<sup>74</sup>. Under Indian electoral jurisdiction, admissibility of evidence procured through modern devices has been held to be admissible subject to certain precautionary measures<sup>75</sup> which are as follow:- (a) Voice should be identifiable by the recorder of the persons who are acquainted with voice (b) it should be audible and devoid of any kind of distortions (c) Accuracy should be established by the architect of the record by adducing convincing depositions (d) unintelligibility should be avoided (e) relevancy of the recorded statement should be established, and (f) recorded tap should be sealed and kept under proper custody<sup>76</sup>.

As defacement of reputation, dark political career<sup>77</sup>, disqualification and quashing the election of successful candidate would be the concomitant out come of the proof of corrupt practice, therefore, the onerous test of 'beyond any reasonable doubt' will have to be followed in case of allegation of corrupt practice<sup>78</sup>. Undoubtedly, electoral litigation is not confined to the parties to the suit rather the same has been held to encompass the entire constituency<sup>79</sup>. In this context, invidious and infirm oral deposition made by a petty chunk of community can't be allowed to sabotage the voice of majority of the electors<sup>80</sup>. So, a serious insinuation like corrupt practice is not supposed to be established by solely relying on the oral deposition, emanating from a tainted source<sup>81</sup>, unless such evidence is corroborated by independence sources<sup>82</sup>. Admittedly, recourse to the strict proof has been held to be the only accepted mechanism of proof of the corrupt practice in a catena of judicial pronouncements but in mid 80s the apex court demonstrated some flexibility. The court forbid, in case of attribution of fraud and undue influence, the extension and stretchability of the doctrine to such an extent truncating thereby the possibilities of its proof<sup>83</sup>. Such approach, the court added, was likely to debilitate the sacrosanctity of aim envisaged by the law<sup>84</sup>. At the same time, the court adumbrated various factors- respectability, nature, 'credibility and character of the depositions, improbability depicted in the case and surrounding circumstances, ineptness of the appellate court to upturn a the verdict of the trial court which had an opportunity of witnessing the character, behavior and



demeanor of the witnesses emerging before it and entirety of the effect of the entire evidence, if taken together, would be instrumental in gleaning the inference of commission of fraud or undue influence<sup>85</sup>.

### **F-Proof of Corrupt Practices: Arrangements in Pakistan**

Like India, the onus of proofing the allegation of corrupt practices or illegal practices lies on the petitioner/complainant and the same is to be proved by adducing affirmative and indubitable evidence<sup>86</sup>. As the judicial proceedings pertaining to the ascertainment of corrupt practices/illegal practices do come within the ambit of criminal proceedings, therefore, the same have to be adjudged on the touchstone of principle prescribed for the evaluation of criminal proceedings<sup>87</sup>. In case of doubt, benefit thereof is to be extended to the respondent<sup>88</sup>.

The onus of proof, under the law, lied on the shoulder of the petitioner and the evidence to adduce for the proof of corrupt practices is to be confined to the charges or the instance leveled against the respondent<sup>89</sup>. Admittedly, no hard and fast principle has been devised for the determination of acts and omissions of the contestants in the election process, therefore, there is always likelihood of doubts, for which benefit will be extended to the returned candidate<sup>90</sup>.

Being of quasi-criminal nature, the charge of corrupt practice is required to be established by adducing stringent proof<sup>91</sup>. Each and every ingredient of alleged corrupt practice so charged is to be proved affirmately by adducing direct or circumstantial evidence<sup>92</sup> and in case the Tribunal solely relies on the circumstantial evidence, it is obligated to exclude all possible hypothesis which are consistent with the corrupt practice having not been committed<sup>93</sup>. So, on these counts, evidence based on pigment of petitioner's imagination is inadmissible in such cases<sup>94</sup>. As, mere commission of the corrupt practice, is of no avail, therefore, the petitioner is obligated to prove that the alleged commission of the corrupt practice is of such a magnitude that it can reasonably be said to have contaminated the entire election<sup>95</sup>. So, in such condition, mere indulgence in the commission of corrupt practice will not, as such, render the entire election void<sup>96</sup>. Further more, notwithstanding the proof of corrupt practices, it is obligatory for the petitioner to establish the nexus of the returned candidate with commission of the alleged corrupt practice<sup>97</sup> rather the role played by the contestant or his agent in committing allegedly outlawed acts is to be proved by the petitioner<sup>98</sup>. For this purpose, the petitioner, in order to bolster his claim, needs not to rely on scanty, sketchy and feeble evidence<sup>99</sup> because the allegation doesn't cross the stage of allegation unless established through confidence inspiring evidence which withstands the rigors of cross examination<sup>100</sup>. Similarly, if the petitioner, after the attribution of allegation of corrupt practices and filing affidavits of the witnesses omits to present them for cross examination, the court would be justified in inferring that the witnesses were unfavorable to the petitioner<sup>101</sup>.

Various allegation in election petition do not constitute an integral package such as would lose its integrity by the failure of one of its part. The relief sought in such

cases can be granted on a single transaction by clause (c) of Sub-section 1 of section 72 of the Act and the mere fact that some of the allegations made in the petition are defective should not stand in the way of adjudication of other allegation properly made and substantiated with full particulars in the petition<sup>102</sup>. The Election Tribunal was, therefore, obliged to evaluate the extent to which the election of the defeated candidate was materially affected<sup>103</sup>.

### **G-Onus of Proof**

In case of allegation of corrupt practice, the onus of proof lies on the person who sets it out<sup>104</sup>. It should not loose sight that the mens rea has been held to be the integral ingredient of the offence of corrupt practice; therefore, it was imperative that the person publishing the material, whether he was the author of the alleged material or not, would have its Knowledge<sup>105</sup>. Unlike the trial of a civil suit, the onus is to be discharged not on the basis of preponderance of probability rather the same needs to be discharged beyond reasonable doubt by adducing cogent and convincing evidence<sup>106</sup>. In case, however, of adherence to doctrine of preponderance of probabilities, there is strong possibility of causing prejudice to the returned candidate who may carry a stigma of disqualification for six years<sup>107</sup>. The nature of the onus under section 123(4) is very simple. The petitioner, under the said section, has to depose that the alleged statement is not only published either by the candidate or someone else on his behalf but the same is false and a reflection on his personal antecedents as well<sup>108</sup>. The onus, in such cases, is too easy to discharge and the task can be executed by the petitioner by swearing to that effect<sup>109</sup>. If performed, it obligates the other candidate to prove<sup>110</sup>. Undoubtedly, on many occasions, it becomes too difficult to establish corrupt practice by adducing direct evidence and commission thereof has to be deduced from the established facts and circumstances but in that case, established circumstance must reasonably prove the act of committing the corrupt practice by the winning candidate himself or his agent<sup>111</sup>. In case of several instances of corrupt practices, each instance of such practices has to be proved separately and, in case of failure, all of them cannot be accepted as true on the count of volume of evidence<sup>112</sup>.

### **H-Appointment of Polling Agent**

Appointment of polling agents is another area of acute concern as a number of cases have been attracting the attention of the courts for setting aside the election of returned candidates. Election agent being an alter ego of a candidate occupies a very pivotal place in the electoral process and an act done by, with or without the consent of the candidate, an agent is deemed to have been done by the candidate. It becomes, therefore, imperative to examine various aspects of an agent.

In this context, law equips the candidate with the powers to appoint prescribed polling agents and relief agents subject to the fulfillment certain formalities prescribed by the rules<sup>113</sup>. Before his resumption of duties, the polling agent has to get an undertaking executes stating therein that he will not do anything prohibited

the law<sup>114</sup>. Similarly, no candidate or his election agent is entitled to employ in addition to or other than the persons specified under schedule VI in connection with his election<sup>115</sup>. As per schedule VI, a candidate may employ for payment in connection with the election (a) one election agent (b) one counting agent (c) one clerk and one messenger (d) one polling agent and two relief agents for each polling station and in case of more than one booth on a polling station for each of such booths, and (e) one messenger for each polling station or for each polling booth<sup>116</sup>. The fasciculus of the Explanation to section 123 (4) of the Act, indubitably enumerates the categories of the agents in an election i.e. (i) election agent, (ii) polling agent, (iii) any person who is proved to be acting, with the consent of the candidate, as his agent in the election. The agents of category (i) and (ii) need to be notified for bringing this fact in the knowledge of the statutory authorities<sup>117</sup>. The identity of such polling agents is not known to the authorities but to the opponents as well<sup>118</sup>. As to the third category, it has been held that the name of such agent needs not be notified<sup>119</sup>. He must possess, express or implied authority to act on behalf of the candidate as such<sup>120</sup>. Similarly, a person, who, under the constitution or the Act, has been disqualified from being member of the either of the Houses of the Parliament, any of the Legislatures of States or from casting vote at election, shall, till the cession of disqualification, be disqualified for being appointed as election agent<sup>121</sup>.

The question, whether a government servant can be appointed as polling agent, it has been held time and again that there was no cavil as such on such appointment provided the government servant would refrain from furthering the prospects of the election of the candidate<sup>122</sup>. In such situation, it is essential to prove not only that the government servant was appointed a polling agent but the appointment was duly made by the candidate or on his behalf.<sup>123</sup> A presumption, however, rebuttable in nature, arises under section 123(7), Explanation 2 that by appointing a government servant as polling agent, the candidate intends to procure his service to further the prospects of his elections<sup>124</sup>. In this context, the knowledge of the candidate as to the position of the agent become irrelevant as *mens rea* was not the essential element of offence of corrupt practices<sup>125</sup>. It is equally important to note that the deletion of words polling agent or counting agent from Explanation 2 to section 123(7) has curtailed the scope of corrupt practice to be committed by a candidate by appointing a Government servant as polling agent or counting agent<sup>126</sup>. So, after the said amendment, a member of the armed forces, by being agent of a candidate, doesn't deem to have assisted in furthering the possibilities of a contestant's election<sup>127</sup>.

In Pakistan, like India, law recognizes the role of election agents and the provisions do sound as to their appointments and functions in extant and preceding legislation as well. But, unlike its Indian counterpart, in Pakistan, there are two kinds of agents i.e. Election Agents and Polling Agents<sup>128</sup>. Election Agent means an agent appointed by a candidate for his election under the provision of the law and in case of his non-appointment, the candidate himself shall be deemed to be his election agent<sup>129</sup>. In case the candidate prefers to appoint someone else as his

election agent, he will have to appoint any voter of his constituency and convey to the Returning Officer the antecedents of the appointee thorough written notice<sup>130</sup>. Similarly, the law also empowers the candidate to make substitute appointment in case the appointee dies or his appointment is revoked by the candidate<sup>131</sup>.

As to the functions of election agents, the law obligates them to witness the entire proceedings. They have to witness the ballot boxes and ensure their proper sealing and depose to the Polling Officer to that extent. Incase a box is filled, new box have to be place in the presence of election agent<sup>132</sup>. The election agent is also entitled to receive authentic hard as well as soft copy of the electoral rolls. Election agents are also entitled to have an access to the polling stations<sup>133</sup>. He is also entitled to point out that a particular voter is already in possession of ballot paper<sup>134</sup>. After the election process is over, the counting process would be ushered in the presence of the election agent and he would be entitled to be present at the time of counting process<sup>135</sup>. He would also be entitled to lodge a formal request for recounting of the votes and sign the final result, obtain a copy thereof and sign each bundle of the ballot papers<sup>136</sup>. He would also be entitled to be present at the time of compilation and announcement of the final results of the constituency by the Returning Officer<sup>137</sup>.

As to the polling agents, it is submitted that their appointments rest with the contestant or his election agent and can be made by giving notice in writing to the polling Officer and may be as many in number as the candidate or his election agent wishes<sup>138</sup>. Their functions are facsimileing to that of the election agents with the only variance that their ambit of duty is confined to a particular polling station

### **Conclusion**

Pleadings are of immense importance in litigation and especially in case of election disputes, the parties are bound to couch the charges in a precise manner enabling thus the rival party to comprehend the nature of the charge in order to prepare its defence. On this count, the judicial approaches, in both of the jurisdictions, seem to be on the same page.

The courts in India have evolved certain pragmatic principles for the admissibility of the evidence recorded through mechanical device since early 70s-- a beacon light which is still lacking in electoral jurisprudence in Pakistan. Albeit, the legal principle architected by its Indian counterpart have no binding effects in Pakistan but till the emergence of such principles in Pakistan, guidance can be sought form them.

In Pakistan, an election can only be challenged by the candidate but, in India, besides the candidate, the elector has the locus standi to challenge the election as well. In this context, the position of the elector has been clarified by asseverating that it means any person who is eligible to vote irrespective of the fact whether he has cast his vote or not.

Another difference is as to forum of initiation of electoral litigation. In case of Pakistan, election petition is to be presented to Election Tribunal and appeal shall lie to the Apex Court; but in case of India, petition challenging the election is to be

lodged in High Court and appeal shall lie to the Apex Court. Indian courts have been persistently reiterating that the corrupt practice should be strictly pleaded. Another area of acute dissimilarity is canvassing on religion basis. In India solicitation of votes on the basis of religion or sects has been declared to be a corrupt practice but, on the contrary, in Pakistan, provisions do sound to the extent of sect only. As to the proof of corrupt practice, both of the jurisdictions are in line that standard of proof 'beyond an iota of doubt' is to be followed. Principle of preponderance of probabilities has not been deemed to be the guiding principle.

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