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<thead>
<tr>
<th><strong>Title</strong></th>
<th>Constitutional law and the electoral process: an overview.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Author(s)</strong></td>
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Constitutional Law And The Electoral Process:
An Overview

By

Shad Salim Faruqi
CONSTITUTIONAL LAW AND THE ELECTORAL PROCESS:
AN OVERVIEW

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It is part of the democratic assumption that government must be representative of and accountable to the overt and actual wishes of society.

This involves polling of the people's opinion either by plebiscite or referendum or, alternatively, the election by people of representatives to a central legislature.

However it must be noted that the holding of an election or a referendum does not necessarily lead to a democratically organised society. An election may be compatible with any form of government — liberal democracy, facade democracy, autocracy, oligarchy and even totalitarianism. This is because form is distinguishable from substance. Electoral form may be present but the substance may be missing. The substance, of course, is that the voter has a free and genuine choice between at least two alternatives. Only in about a third of the nations which hold regular "elections" is there a genuine competition for power. In the rest, the electoral situation is ambiguous in varying degrees.

This brief essay will examine constitutional law and the electoral process by reference to the following salient features of democratic elections:

1. Constitutional provisions for the existence, composition and tenure of legislative assemblies and their members.
2. An electoral system that translates votes into parliamentary seats.

3. An impartial machinery for delineating and revising electoral constituencies.

4. A system of universal adult franchise.

5. A fair and impartial machinery for drawing up an electoral register.


7. Legal rules for nomination of candidates.

8. Legal and conventional rules for the conduct of election campaigns.

9. Developed system of political parties

10. Competent and non-partisan administration to run the elections, supervise voting and safeguard the secrecy of the ballot.

11. An independent judiciary to adjudicate on election disputes.


(1) Existence, Nature, Composition & Tenure of Legislative Assemblies

In all countries with written Constitutions, there are provisions for the existence, composition and tenure of legislative Assemblies. There is usually provision for the maximum permissible time limit which may elapse between one session and the next, between a dissolution and a General Election and between a General Election and the summoning of the new Parliament.

There is, however, no uniformity on how many chambers a Parliament should comprise. All federal states are bicameral. But the majority of the world's unitary states are unicameral.

An overwhelmingly large number of "lower" Houses are entirely or
substantially elected directly by the electorate. Thailand, Spain, and Yugoslavia are notable exceptions. On the other hand most "upper" or federal chambers consist of appointed or indirectly elected or hereditary members.

Size of Parliaments varies according to population and territorial sizes, environmental factors and cultural heterogeneity. The Diet of Liechtenstein (with 15 members) is the smallest of the popular Chambers and the Soviet of the Union of the USSR (767) is the largest. Needless to say that the ratio of voters to Member of Parliament has significant implications for an MP's ability to represent his constituents in and outside Parliament.

The statutory length of office of a Parliament is also related to representational democracy. Elections to Parliament should not be so infrequent that they fail to reflect the opinions of the electorate nor be so frequent as to disrupt government. Almost all popular chambers have a maximum term of office of four or five years. For upper houses there is no common pattern. Members may be appointed for life (UK), retired at age 75 (Canada) or have a variable length of office (Austria). In the USA, Senators have a six-year term of office.

Can the mandate granted by the people to Parliament be revoked?

In the USA, the President cannot dissolve the Congress even in war-time. But in most Westminster democracies, Prime Ministers have the right to advise premature dissolution. In law this advice is not binding on the Head of the state but it is usually followed.
In some countries like Malaysia and India, emergency proclamations can be used to suspend or dissolve legislative assemblies at federal and state levels. In many socialist countries, individual MPs can have their mandate revoked by the electors under a system called "recall".

In most countries MPs can be expelled or suspended from Parliament for a number of reasons: expulsion from party, conviction of serious crimes, breach of parliamentary privilege or contempt of Parliament, failure to attend sessions, loss of eligibility or failure to remedy an incompatible occupation.

2. Electoral Systems

One of the major problems of electoral systems is to determine how the parliamentary seats to be allotted to the parties and candidates reflect the votes cast by the electorate. Two main types of electoral systems exist.

(a) Majority systems, with one or two ballots, in which the candidates obtaining most votes are elected. Under this simple majority or plurality system (often referred to as 'first past the post' system) only one ballot is held. Whoever obtains the largest number of votes in the single-member constituency is declared the winner no matter that he did not obtain an absolute majority of the votes cast. Some countries have improved on this system by requiring that a candidate must obtain an absolute majority of the votes cast in order to be elected at the first ballot. If no candidate obtains this absolute majority, a second ballot is held between the top two candidate and the one with the absolute majority is declared the winner.
The common feature of the various majority systems is that under them large parties are advantaged and small parties obtain only indirect and approximate representation, if at all.

(b) System of proportional representation in which the seats are divided up among the lists or parties in proportion to the number of votes obtained by them.

There are two varieties of proportional representation.

(i) The Single Transferable vote system which may also be called the Hare Scheme or the Preferential System.

(ii) The List System.

The basic characteristics of the Single Transferable Vote System are that the constituencies are large in area and they return several members (minimum three, maximum fifteen). Unlike the ordinary rule whereby a candidate securing the largest number of votes gets elected, under this system a candidate is elected only if he obtains a quota of the votes cast. The quota is determined by dividing the total number of votes cast by the number of seats to be filled. The constituency returns a number of members, but the voter has only one vote. He is, however, required to mark out his preference for different candidates by putting 1, 2, 3 etc. against the names of the candidates. At first each candidate is given all the votes in which he is marked as 1. If, on this counting, a candidate gets more votes than the quota, he is declared elected, and the excess of his votes over the quota is transferred to other candidates according to the
preference of the voters. This goes on until the required number of candidates obtain the quota to get elected.

This system was first advocated by Thomas Hare in 1859. It has been adopted in the Irish Free State, Austria, Greece and Denmark.

According to the List System each party is allowed to put up a list of candidates equal to the number of seats to be filled up. The voter gives his vote to the whole list en bloc. The total number of votes polled by each party is then divided by the quota (determined by dividing the total number of votes by the total of seats). The resulting figure will determine the number of seats each party will get. Suppose the quota is 1,000 and a particular party list gets 6,000 votes. The first six names in that list will be declared elected.

This system has been adopted with some variations in Belgium, France, Norway, Sweden and Switzerland. The main advantage of the proportional representation system is that it secures a mathematically exact representation of the electorate in the legislature. Every section of opinion is duly represented. Minorities are protected against the tyranny of the majority. The main disadvantages are that it leads to the growth of a large number of parties. When each interest can secure separate representation, it is natural for every dissenting group to jump into the political arena with the hope of securing representation. Under this system no party may secure an absolute majority in the legislature. Law-making may become difficult. Coalition governments and political instability may result. The tie between the elector and the "representative" is bound to be less
Variations of the proportional representation system exist in the limited vote plan and the cumulative system which seek to secure minority representation.

(i) **Limited Vote Plan**: Under this plan there are multi-member constituencies with at least three seats. Each voter is allowed to cast smaller number of votes than the seats to be filled. But he cannot give more than one vote to any single candidate.

(ii) **The Cumulative System**: The voter possesses as many votes as there are seats to be filled. But the voter may give all his votes to one single candidate or he may distribute them over to other candidates. In this way minority parties are given a chance of getting some representation by accumulating all the votes of its members for the party candidate.

3. **Impartial Machinery for Delineating Constituencies**

The establishment of electoral districts is based on one cardinal principle: that is that every elected member should represent an equal proportion of the population. Constituencies should be approximately equal in population so as to give reality to the principle of one person-one vote-one value. This principle is an offshoot of the constitutional rule of equality before the law. That is why in the USA weightage to rural constituencies has been held to be a violation of the equal protection clause of the Constitution.
Baker v. Carr 369 U.S. 186 (1962). However the Baker v. Carr rule does grave injustice to geographically large but sparsely populated areas where agriculture, forestry or fishing are the primary occupations. This rule gives to Parliaments a primarily urban bias. For this reason many countries including the UK and Malaysia allow rural constituencies to be smaller in population than urban constituencies. In Malaysia the rural weightage has ethnic implications as well because of the concentration of Malays in rural areas. But population patterns in Malaysia are changing and in time the ethnic significance of rural weightage will diminish.

In delineating constituencies, it is also felt desirable to ensure that electoral districts should be based on natural boundaries which follow geographical, administrative or political divisions and that the constituencies are revised at frequent intervals to accommodate population shifts.

The authority responsible for delineation of constituencies is usually an independent Election Commission whose Chairman is vested with many of the safeguards available to superior court judges. This is so in countries like Germany and the United Kingdom. In Malaysia, Australia, Canada and Malawi the Commissions report to Parliament whose decision is final. In most of the socialist bloc, Parliament plays a major role in the redrawing of boundaries.

Wherever Election Commissions are not entirely independent, gerrymandering is an unfortunate reality.
In this century the concept of universal adult suffrage has won wide acceptance. But in every country of the world a series of qualifications are provided by the Constitution and the law. Age (18 to 21), nationality (except in the UK where many categories of non-citizens are allowed to vote) and residence (except as to postal ballots) are the normal prerequisites of a right to vote. These requirements disenfranchise nearly 50% of the population.

In some countries additional qualifications must be met. In Brazil and in many Southern states of the United States (till this practice was invalidated on constitutional grounds by the courts) voters must pass a literacy test. In some countries women are excluded. In South Africa, coloured persons had no right to vote till recently.

Just as the qualifications to vote are prescribed, similarly the general disqualifications are normally woven into the law. These are of three broad types:

(1) Social and economic disqualifications. Thus undischarged bankrupts, insolvents, vagrants, prostitutes and drunkards may be barred.

(2) Criminal disqualifications. Persons convicted of electoral or other criminal offences are normally barred if, on the date the electoral register is prepared, they are detained in custody.
(3) Professional disqualifications. Members of the armed forces, police, judiciary are ineligible to vote in many countries.

5. **Electoral Register**

It is not sufficient to satisfy age and other requirements for exercising the right to vote. One's name must also appear on the electoral register. The drawing up of this register in a thorough, fair and impartial manner is, of course, of utmost importance.

In most countries of the world the register is drawn up at local level by local authorities. In others, national authorities such as Supervisor of Elections (in Fiji), the Minister of Interior (in Kuwait), the Election Commission (in Malaysia) and members of the judiciary (in Brazil) have the onerous task assigned to them. Improper refusal to register a vote may be challenged in court and may also amount to a tort in civil law.

The frequency of revisions may be continuous or annual or every two to five years or for each election.

Political parties are often allowed to help in distributing registration forms. This can, however, lead to serious abuses. In Malaysia, for example, "certain political parties moved the names and addresses of thousands of voters, particularly in Kelantan and Terengganu from one constituency to another without the voters' knowledge". (see *The Star*, 25 February 1990 and the *New Straits Times*, 16 April 1990).
6. Eligibility For Candidature

The requirements for eligibility to contest an election are generally more stringent than the requirements for voting. For example around the world the required age for electors is between 18 and 21 but for candidates, age eligibility can be from 18 to 40 being higher for upper chambers and lower for popular chambers. In Malaysia a senator must be at least forty; a member of the Dewan Rakyat (lower house) must be at least twenty-one.

Nationality and residence are common criteria for eligibility. Equally common are rules of ineligibility or incompatibility. Around the world the law seeks to ensure that candidates for parliamentary office have higher standards of moral and personal fitness than electors. The common disqualifying factors are: being of unsound mind, bankruptcy, holding an office of profit, commission of election offences or other serious criminal offences. Literacy requirements are imposed in Kuwait; moral and personal fitness in Spain. In India and in Sabah (which is a state of Malaysia) an elected representative who resigns from the party on whose ticket he won the seat, must seek a fresh mandate from the people. A seemingly contradictory rule has been introduced by a recent constitutional amendment in Malaysia. A person who resigns his membership of the House of Representatives shall, for a period of five years, be disqualified from being a member of the House.
In most countries particular categories of persons are ineligible to contest for Parliament. The list of such categories is long and varied and includes civil servants, members of the forces, members of the judiciary, public contractors, executives of public corporations, priests and peers of the House of Lords.

7. Nomination of Candidates

There are three main aspects of the nominating process which pose obstacles in the way of prospective candidates. First is the manner in which candidates are presented. The second, the support of a given number of electors. And the third, the amount of deposit which may be required from candidates or their sponsors and the conditions under which the deposit may be returned.

A few countries like Finland withhold legal recognition from individual candidates. Others make nomination of individual candidates more difficult than of party candidates.

Over half the countries do not require a candidate's nomination to be supported by electors. But in the others support of nominal or substantial number of voters is necessary.

Electoral deposits tend to put candidates who are not sponsored by political parties or back-up organisations at a disadvantage. But these deposits are necessary to discourage non-serious candidates. The returning of electoral deposits is dependent upon the candidates' achieving a certain proportion of the votes cast. This proportion ranges from one-twentieth in France to one-third in Ireland.
8. The Election Campaign

Regulation of the election campaign is now a common feature of most states. Regulation is aimed at restricting the duration of the election campaign, regulating the use of propaganda (especially broadcasting) and the control of election expenses. Of course, any limits imposed will have to be within the framework of the supreme Constitution which guarantees freedom of speech, assembly and association and there is scope for judicial review of any unconstitutional restraints.

On the other hand restraints on candidates' freedom of action are imposed by the ordinary law of the land: the law on public order, defamation, obscenity, sedition, treason, official secrets etc. In Malaysia for example, public rallies have been banned since before the 1978 General Election on the ground that acts of sabotage by the Communist Party of Malaya were expected on the 30th anniversary of the party's armed insurrection. In the period since the ban, indoor gatherings or gatherings within confined areas have been allowed - but with the prior permission of the police under the Police Act.

In most countries the duration of the campaign is limited to a set number of days. The use of propaganda is often limited by forbidding use of opinion polls, newspaper advertisements, house to house campaigns and giving of free transport, food etc. Bribery of the electorate is forbidden but government after government gets around the law by promising or delivering "development aid" just before the election. In Austria broadcasting time is distributed among political parties.
Campaign expenditure is regulated by putting ceilings on expenditure, requiring duty of disclosure, maintenance of records of contributions and filing audited statements of expenditure. In some countries like Israel and Monaco subsidies are provided to parties to meet the cost of elections.

The gallant effort of the law in this area makes some difference, of course. But the gap between theory and reality is very wide and around the world electoral battles are degenerating into struggles between cheque books.

9. Developed System of Political Parties

The constitutional right to freedom of association includes the right to form political parties. But this is not an absolute right. On grounds of national security or public order many types of parties have been banned around the world.

Some authoritarian states are one-party states but even in these states other associations and organisations like firms, industries, trade unions and religious organisations exist and together they help to create and mobilize public opinion. Indeed it is difficult to envisage a public opinion without the aid of mobilising organisations like political parties.
10. Non-Partisan Machinery to Run the Elections

All countries provide for a series of measures designed to safeguard the validity of the election. Responsibility at each polling station is in the hands of public servants (in countries that follow the example of the UK) or in the hands of elected members of local authorities in most Western European countries. In Belgium the judiciary appoints polling station authorities.

In the matter of ballot papers a contentious issue is the secrecy of the ballot paper. In most countries the law requires such secrecy. But administrative practices in many countries (among them Malaysia and Ireland) allow each counterfoil to bear a number which also appears on the ballot paper. Presiding officers write the elector's register number on the counterfoil. In McMahon v. A.G [1972] I.R 69 - an Irish case - it was held that this practice offends against the spirit of the Constitution.

All countries allow postal voting. In some even proxy voting is allowed under strict regulation.

The place of counting can be the polling centres themselves or a centralized designated area. In either case candidates' representatives are allowed to observe the counting.

There are usually clear-cut rules for recounting where the results are within one or two per cent of the total votes cast, or where the number of counted votes for all candidates do not tally with the number of ballot papers.
11. Appeals

In most countries the settlement of disputed elections is left to the judiciary. But it is not uncommon to have special election authorities (as in Bulgaria) or the Parliament itself (as in Norway) to deal with election disputes.

In another area, the superior courts can play a role to maintain the integrity of the electoral process. And that is to examine the constitutionality of electoral legislation as well as the propriety of constitutional amendments. Difficult questions may arise if, in the exercise of its amendment powers, Parliament amends the fundamental provisions relating to the Election Commission, duration of Parliament, secrecy of the ballot, or the system of representation. Suppose, by a constitutional amendment, Parliament extends its life to twenty years or gives to MPs a life-tenure! Will such an amendment fall foul of the argument in India that the "basic structure of the Constitution" cannot be amended? (Kesavananda v. Kerala (1973) SCR Supp. 1 and Indira Gandhi v. Raj Narain (1975) S.C).

12. Filling of Vacancies

The method chosen to fill vacant seats is largely determined by the type of electoral system in force.

In countries with a 'first past the post' system, vacant seats are filled by by-elections except that in Malaysia vacancies occurring within six months of the date on which Parliament would stand dissolved,
need not be filled. The Singapore Constitution gives to the government larger discretion in the matter.

In proportional representation system vacancies can be filled by a substitute or by the next-in-line candidate of the party whose member held the seat.

Conclusion

In a democracy, elections are an aspect of accountability. They also serve as forums for the discussion of public issues. They facilitate expression of public opinion and permit an exchange of influence between governors and governed. They provide legitimacy to the government. They confirm the worth and dignity of the individual. They enable peaceful and orderly change of power.

The last-mentioned role has, however, not been achieved in many societies where for historical or other reasons one party is so dominant as to preclude effective choice among alternate candidates or policies.

There is also the problem of a wide gap between the safeguards of the law and the realities on the ground.

In parliamentary systems of the Westminster type the disproportionality between votes polled and seats won creates a serious problem of legitimacy which needs to be tackled.
Perhaps voting should be made compulsory. The voting age could be reduced to 16. Automatic inclusion of eligible voters on the electoral rolls should be considered. The simple-majority rule in the legislative process should be converted to an absolute majority rule. The simple plurality system should move towards the proportional system or, at least, towards a double counting so that the winner is determined by an absolute majority of the votes polled.

What is at stake is democracy's credibility itself.