

THE 18TH AMENDMENT TO THE CONSTITUTION AND ELECTORAL REFORM IN PAKISTAN

SUMMARY

In April 2010 the two Houses of Parliament adopted the 18th Amendment of the constitution, which restored parliamentary democracy. The amendment was passed by unanimity, a result of ten months of deliberation and search for consensus by all parties in the Parliamentary Committee for Constitutional Reform. Although some stakeholders would have wished more public consultations, overall this was a remarkable achievement in a country with a long history of deeply divisive party politics.

Many electoral reform issues have been addressed in the 18th Amendment. Further reform is now needed to roll-out the changes from the 18th Amendment into primary legislation. Additional changes to election legislation are needed to ensure compliance with Pakistan's international obligations, in particular the recently ratified International Covenant on Civil and Political Rights (ICCPR).

Some crucial issues to be addressed in the reform of primary legislation include: candidacy requirements, transparency (particularly as regards election results), the neutrality of care-taker governments, election tribunals (including their timing and appointment mechanism), the electoral roll and electoral offences.

Further cross-party work on election reform is therefore needed to bolster the democratic gains made by the 18th Amendment. Political parties have consistently expressed commitment to such reforms. Now it is the time for a comprehensive modernisation of the electoral framework, to make sure that future elections will pass smoothly and that results are credible and therefore accepted without violent contestation. This will contribute to the legitimacy and stability of the elected institutions.

This parliamentary year is crucial for electoral reform, because the election administration will need time to implement legal changes well before the election date.

This Briefing Paper provides information on the background of the 18th amendment, its impact on election reform, identification of further reforms to be undertaken in primary legislation and some conclusions. This paper makes reference to Pakistan's international obligations related to elections, as well as to recommendations of domestic civil society organisations¹ and international election observation missions.² The attached annex contains a comparative table of selected legislative changes following the adoption of the 18th Amendment.

¹ Such as FAFEN and PILDAT.

² Namely the final report of the EU Election Observation Mission (EOM) of 2008 and the summary of findings of a variety of observer missions published by the Election Support Group (ESG), a forum of international entities supporting democratic elections in Pakistan.

BACKGROUND

Since independence Pakistan was mostly ruled by military leaders. No parliament ever lasted a full term. The 1973 Constitution had foreseen a parliamentary system of government and significant competences for the four provinces; however powers were later concentrated in the hands of Presidents, particularly under the periods of military rule by Zia Ul-Haq and Pervez Musharraf.

During Musharraf's rule, the two main opposition leaders signed the "Charter of Democracy" in which they committed to restore the 1973 Constitution, and to initiate reforms aimed inter alia at holding 'free and fair' elections.³

Less than a year after the resignation of President Musharraf in the context of the 2008 elections,⁴ President Zardari asked the Speaker of the National Assembly to constitute an all-party committee of both Houses of Parliament, tasked with proposing amendments to the Constitution in light of the Charter of Democracy. It was commonly understood that this was intended to rid the Constitution of distortions introduced by dictatorial leaders.

The Parliamentary Committee on Constitutional Reform (PCCR) began its work on 25 June 2009. It comprised 26 Members of Parliament from all parties. The PCCR's unanimously elected Chairman, Senator Raza Rabbani steered the committee through 77 meetings held over ten months.

The PCCR invited suggestions and proposals, and eventually received 982 submissions on different aspects of the reform. The PCCR held its meetings in-camera, judging that this would allow for frank discussion and assuming that public debate had already taken place.⁵ This procedure was criticised by some who hoped for more dialogue on such momentous reforms. In defence of the PCCR it is said that reaching all party consensus on such a sensitive reform was already challenging and that more consultation could have derailed the fragile process.

All parties participated in the work until it was completed, although naturally they did not necessarily agree on each point of the reform.⁶ Following the high-level party inclusion and involvement in the process, there was limited dissent voiced in parliamentary sittings and the 18th Amendment was passed unanimously in both the National Assembly (8 April 2010) and the Senate (15 April 2010). On 19 April 2010 President Zardari signed the Amendment, thereby relinquishing many of his own powers.

The 18th Amendment involves changes to 97 articles of the Constitution. The changes restore key features of the original 1973 Constitution, which had established a federal parliamentary system. Questionable constitutional changes made under previous Presidents were removed,

with the PCCR declaring "*the LFO [Legal Framework Order] and its subsequent amendments as being without lawful authority and of no legal effect, the 17th Amendment has been repealed.*"⁷

RESTORATION OF PARLIAMENTARY DEMOCRACY

The 18th Amendment has far-reaching implications for the future of democratic governance by restoring the parliamentary system originally envisaged by the 1973 constitution. The power of the President has been significantly reduced. Namely the notorious article 58 (2) B, allowing the President to dissolve Parliament at his discretion, has been abolished. Now the President can generally only dissolve Parliament upon the advice of the Prime Minister.⁸ Likewise, the army chiefs and the provincial governors can only be appointed upon advice of the Prime Minister.

As far as the relation of the federal state to the four provinces is concerned, the most significant change has been the abolition of the 'concurrent legislative list', which gave competencies on a range of issues to both the Federal state and the provinces. Now important matters such as social legislation, family law and criminal law will be part of the provinces' exclusive competencies.

There are concerns that these new exclusive powers will overwhelm the provinces, which are not well equipped to immediately take over responsibility from the federal state in many fields.

The provinces have also been strengthened with the transfer of some powers from the federally appointed provincial governors to the elected Chief Ministers of the provinces.

As far as the role of the judiciary is concerned, the constitution (art. 175 A) now provides for the establishment of an 8-member judicial commission, headed by the Chief Justice, but also including representatives of the executive and the lawyers' community in the nomination of judges to the Supreme Court. However, in the context of the long standing confrontation between the government and the judiciary, 175 A has been challenged in the Supreme Court.

Beyond the issue of article 175 A the decision of the Supreme Court will be relevant for the general perception of the 18th Amendment and parliament's role: If the court maintains the article, it will likely be understood as recognition of Parliament's sovereignty.

One of the key challenges to Pakistan's democratisation has been the effective inclusion of minorities in the political process. The constitutional provisions dealing with the Islamic faith remain un-changed, despite demands by minorities that the PCCR recommends the abolishment of discriminatory legislation, such as the blasphemy law.

³ Signed on 14 May 2006 by Benazir Bhutto (PPP) and Nawaz Sharif (PML-N).

⁴ 28 March 2009.

⁵ PCCR report, point 26, page 9.

⁶ The PCCR report includes comments made by members of the PCCR on their disagreement with aspects of the reform. All members made clear however that in the interest of overall reform they would accept to be overruled on these aspects.

⁷ Article 2 a of the 18th amendment bill.

⁸ With one exception that was maintained in the constitution: Cases of a non-confidence vote against the Prime Minister and no other member of the National Assembly likely to command the confidence of the majority of the members, article 58 (2).

WHAT NEXT AFTER CONSTITUTIONAL REFORM?

Primary legislation must be amended to ensure consistency and compliance with the 18th Amendment. Reform of primary legislation should also address issues that did not require constitutional reform. This was recognised by the PCCR, which made 11 recommendations to the government for legal reforms, two of which have implications for elections.

Therefore the next logical step for consolidating democratic reform is to undertake electoral reform. Considerable change to electoral legislation has been recommended by the political parties, elected representatives, civil society groups and national and international observer groups. Without such improvements of the electoral framework and its implementation, there is a risk that elections are disputed and potentially violent, that elected institutions lack legitimacy and that voters disengage from the democratic process.

Furthermore now there is an opportune time to address electoral reform, as Pakistan has ratified the ICCPR,⁹ which contains electoral obligations.

There appears to be agreement on a high-level parliamentary oversight commission comprising legislators from all political parties to ensure the full and timely implementation of the 18th Amendment. The 18th Amendment also includes provision for “*removal of difficulties*” relating to the Act within one year of its adoption by a joint sitting of the two chambers of Parliament.¹⁰

IMPACT OF THE 18TH AMENDMENT ON THE ELECTORAL FRAMEWORK

Many important points of the 18th Amendment relate to the electoral framework (see chart for a complete list). Some key reforms include:

- The Chief Election Commissioner and Election Commission Members

The amendment to article 213 of the Constitution¹¹ removes the President’s discretion to appoint the Chief Election Commissioner (CEC). Instead the Prime Minister and the Leader of the Opposition in the National Assembly forward names to a Parliamentary

⁹ The ICCPR has been ratified by Pakistan on 23 June 2010. The Pakistani Government registered a number of reservations, but they may not be valid. For more see DRI Briefing Paper No.4 ‘Pakistan’s Reservations to the International Covenant on Civil and Political Rights’, July 2010

¹⁰ The 18th amendment inserted new article 267A which states that “*If any difficulty arises in giving effect to the provisions of the Constitution (Eighteenth Amendment) Act, 2010, hereinafter in this Article referred as the Act, or for bringing the provisions of the Act into effective operation, the matter shall be laid before both Houses in a joint sitting which may by a resolution direct that the provisions of the Act shall, during such period as may be specified in the resolution, have effect, subject to such adaptations, whether by way of modification, addition or omission, as may be deemed necessary or expedient: Provided that this power shall be available for a period of one year from the commencement of the Act.*”

¹¹ PCCR amendment 77.

Committee composed of 50 percent treasury and 50 percent opposition members, which has the right to ‘hear and confirm’ these candidates.¹²

A broad consultative appointment process increases confidence in the impartiality of the election administration. Being appointed through such a process should also increase the sense of independence of the election administration. Increased independence is in line with ICCPR Article 25, with General Comment 25 stating that “*an independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws.*”¹³ Various international and domestic observer groups also recommended that the CEC and members of the Election Commission of Pakistan (ECP) be appointed on the basis of consultation.¹⁴

The amendment does not include any mechanisms to break a possible tie of the Parliamentary Committee. On the one hand this increases the onus on finding a consensus, on the other hand it risks blockage of the electoral process.

The independence of the judiciary in the electoral process and the division of powers are further strengthened through the amendment of article 218 of the Constitution,¹⁵ which now specifies that the CEC and ECP members are no longer required to be High Court Judges. Instead they must “*have been*” a judge of the High Court (from each province).

Another change is the transformation of the ECP into a collective body of five members, with the Chief Election Commissioner serving as the chairperson.¹⁶ Also the term of office of the CEC has been extended from three to five years (effective after completion of the current tenure).¹⁷ A longer tenure increases a sense of independence. However no length of tenure is specified for the other ECP members.

- The role of the President

Presidential powers to determine what elections for public offices shall be held were removed from article 218.¹⁸ Similarly article 219 of the Constitution now specifies parliamentary authority for attributing additional responsibilities to the ECP.¹⁹

¹² Given that Presidential discretion was removed, it appears that the President must appoint the candidates who are confirmed by the Parliamentary Committee.

¹³ General Comment 25, paragraph 20.

¹⁴ See 2008 EU Election Observation Mission (EOM) recommendation 7 and Election Support Group (ESG) recommendation 9. The Election Support Group (ESG), a forum of international entities supporting the strengthening of the electoral environment in Pakistan, summarised recommendations from observer groups after the 2008 elections. The ESG Summary of Electoral Reform Recommendations for Pakistan 2009.

http://www.ifespakistan.org/docs/ESG_Summary_of_Electoral_Reform_Recommendations_Pakistan_2009_v1_2009-01-23_en.pdf. Also see FAFEN (14 December 2009) “*Election Law Reform Project: Priorities for Reform to Election Laws Governing the Conduct of Elections*”.

¹⁵ PCCR amendment 80.

¹⁶ PCCR amendments 81 and 82.

¹⁷ PCCR amendment 78.

¹⁸ PCCR amendment 80.

¹⁹ “*The Commissioner shall be charged with the duty of...(e) such other functions as may be specified by an Act of Majlis- e-Shoora (Parliament).*” PCCR amendment 81.

- Local government elections

The 18th amendment introduced article 140A to the Constitution which specifies that “(2) *Elections to the local governments shall be held by the Election Commission of Pakistan*”.²⁰ This is positive because it provides for an independent body to implement local elections, ensures a degree of consistency and avoids duplication.

- Candidacy requirements

The constitution includes an extensive list of conditions for candidacy. Many of these conditions seem excessive, such as not having paid public utility bills above a certain amount or not having paid back loans beyond a certain amount to bank. Such conditions are difficult to ascertain for the election administration and they risk creating considerable controversies. Furthermore, there are many vague candidacy requirements, which cannot be objectively ascertained, such as honesty or good character. Such requirements carry the risks of un-even implementation of the law and abuse for political reasons. The UN Human Rights Committee’s General Comment 25 notes that “*any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria.*”²¹

The 18th amendment has made some improvements, namely: Some of the vague requirements, such as honesty or sagaciousness, are assumed to be met unless the opposite is stated by a court.²² ICCPR General Comment 25 states that “*Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria.*”²³ While previously conviction often resulted in life-long exclusion from candidacy, the 18th Amendment added time periods after which candidacy is permissible again. For example a candidate cannot have been convicted “*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.*” Disqualification on the basis of conviction for corrupt practices was removed.²⁴ The provision had been introduced by Musharraf’s 2002 Legal Framework Order.

Despite these improvements the far-reaching candidacy requirements remain problematic in view of their potential to trigger controversies and in hindering the right to stand for elections.

- Transparency

The 18th Amendment added article 19A to the Constitution: “*Right to information - Every citizen shall have the right to have access to information in all matters*

of public importance subject to regulation and reasonable restrictions imposed by law.”

In past elections there was criticism that crucial information was withheld, in particular polling station results.²⁵ Therefore the constitutional right to information is relevant to elections, but there should be primary legislation spelling out the implications for electoral information in greater detail.

- Loss of seat

Prior to the 18th Amendment a member of the House could be declared “*to have defected*” from the party in cases where he/she voted or abstained from voting, contrary to ‘any direction issued by the parliamentary party’, in various cases, namely: elections of the Prime Minister or Chief Minister, a vote of confidence or no-confidence and money bills. The 18th Amendment added the case of constitutional amendment bills to this list.²⁶ It also reduced the discretion of the Speaker and Chairman in this regard.²⁷ A member that is considered to have defected can be stripped of the seat by the ECP. However, it is not clear if the ECP has any discretion in its decision. The ECP’s decision can be appealed to the Supreme Court.

Generally it is troubling that political parties would have control over the seats of their members, in particular in the context of an electoral system based on single-member constituencies: In Pakistan voters elect a candidate, rather than a party. On the other hand the practice of floor-crossing has the potential to cripple the democratic process in fragile democracies and can impede the development of coherent political parties. The ECP should consider its powers as being discretionary and balance the competing interests in each individual case.

- Internal party democracy

Article 17 of the Constitution was amended to remove the constitutional requirement that “*Every political party shall, subject to law, hold intra-party elections to elect its office-bearers and party leaders.*”²⁸

While elections within parties are still legally required and regulated in the Political Parties Order 2002,²⁹ this deletion is questionable. In their defence parties argue that the constitutional requirement for intra-party elections was inserted by the Musharraf government as a means to control political parties.

²⁰ PCCR amendment 48.

²¹ General Comment 25, paragraph 15.

²² For example candidates for the Majlis-e-Shoora are now required to be “*sagacious, righteous, non-profligate, honest and ameen, there being no declaration to the contrary by a court of law;*” Constitution article 62F.

²³ General Comment 25, paragraph 15.

²⁴ PCCR amendment 21. Constitution article 63H.

²⁵ See in this context 2008 EU EOM recommendation 19 and ESG recommendations 26 and 27.

²⁶ PCCR amendment 22, Constitution article 63A.

²⁷ In cases of the Speaker or Chairman not referring the matter to the Chief Election Commissioner within two days, the PCCR added that “*it shall be deemed that he has referred*”.

²⁸ PCCR amendment 6.

²⁹ The Political Parties Order 2002, Section 11. “*Elections within a political party. - (1) The party leader and other office-bearers of every political party at the Federal, Provincial and local levels, wherever applicable, shall be elected periodically in accordance with party’s constitution through secret ballot based on a democratic and transparent system: Provided that a period, not exceeding four years, shall intervene between any two elections.*”

- Care-taker government

Article 224 of the Constitution now requires the care-taker Prime Minister to be appointed by the President “in consultation with the Prime Minister and the Leader of the Opposition in the outgoing National Assembly”.³⁰ Similarly at the provincial level, the care-taker Chief Minister is appointed by the Governor in consultation with the Chief Minister and the leader of the opposition in the provincial assembly. Consultation in the appointment process is a positive step for establishing an impartial care-taker administration in which there is confidence.

No changes were made to the right of candidates to stand for elections in more than one constituency. Many observer groups have criticised this constitutional provision, for example the Election Support Group summary notes that “the current provision results in many by-elections, [this] is both democratically and economically questionable.”³¹

ELECTORAL REFORM ISSUES FOR PRIMARY LEGISLATION

Various issues relating to the constitutional amendments need to be addressed in primary legislation. These include:

- Election tribunals

The PCCR’s second recommendation to the government called for amendments to legislation so that election petitions to tribunals are completed within 90 days. This is in line with the ICCPR obligations to provide effective remedies³² and observer recommendations which called for petitions to be dealt with in a timely manner.³³

Another important reform issue relates to the constitutional responsibility of the ECP to appoint election tribunals.³⁴ The 2008 EU EOM recommended that “Tribunals should be composed of judges, or retired judges, who are independently appointed. A consultation process should be undertaken for appointments to ensure stakeholder confidence. The President and the Chief Election Commissioner should not be involved.”³⁵ Such reform would reduce conflict-of-interest issues by strengthening the independence of the petition bodies.³⁶ It would also be in line with the ICCPR, with General Comment 25, which states that there should be “access to judicial review or other equivalent process so that electors have confidence in

the security of the ballot and the counting of the votes.”³⁷

Further reform issues related to tribunals include establishment of a clear system for complaints and appeals to the ECP and judicial channels, and broadening the category of those permitted to file election petitions.

Such reform would improve Pakistan’s compliance with article 2.3 of the ICCPR which states that “Any person whose rights or freedoms are violated shall have an effective remedy.”

- Political parties in FATA

The PCCR’s third recommendation to the government proposed that the government should take immediate steps to implement reforms in the Federally Administered Tribal Areas (FATA), including providing opportunities to the political parties to organise there.

Currently elections in FATA are held on a non-party basis, with the law preventing party candidates from running, campaigning or operating an office,³⁸ in breach of the right to freedom of association (ICCPR article 22).

- Transparency in Elections

In accordance with the 18th amendment’s strengthening of the right to information, specific legislative requirements for electoral transparency should be made, including immediate publication of polling station results at all levels and on the ECP website and granting full unfettered access for observers and party and candidate agents. This would be in line with the ICCPR with General Comment 25 emphasising the importance of independent scrutiny, stating that “...votes should be counted in the presence of the candidates or their agents. There should be independent scrutiny of the voting and counting process”.³⁹

- Election Commission of Pakistan (ECP)

In line with the 18th Amendment’s limitation of presidential powers and strengthening of the ECP’s independence, further amendments to primary legislation are needed. In particular the ECP should be given the authority to issue legally binding regulations without presidential approval and the deletion of presidential powers for “removal of difficulties”.

The current election legislation gives the CEC the power to make rules “with the approval of the President.”⁴⁰ In the Conduct of General Election Order it is currently further stipulated that “The President may make rules for carrying out the purposes of this Order.”⁴¹ The so-called “removal of difficulties” clauses,

³⁰ PCCR amendment 83.

³¹ ESG recommendation 6.

³² Article 2.3 of the ICCPR states that “All persons whose rights or freedoms are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”

³³ EU EOM recommendation 43 and ESG recommendation 32.

³⁴ Constitution article 219.

³⁵ 2008 EU EOM recommendation 44.

³⁶ Currently petitions are filed to tribunals appointed by the ECP, with only appeals going to an independent body (the Supreme Court).

³⁷ General Comment 25, paragraph 20.

³⁸ The Political Parties Order 2002 excludes FATA. Article 1(2) states that the “order extends to the whole of Pakistan, excluding Federally Administered Tribal Areas”.

³⁹ General Comment 25, paragraph 20.

⁴⁰ Election Commission Order (Section 9E), Conduct of General Election Order Section 9 (1), Political Parties Order (Section 19), Representation of People Act (Section 107), Electoral Rolls Act (Section 28).

⁴¹ Conduct of General Election Order Section 9 (1).

state that if a “*difficulty*” arises, the President may “*make such provision for the removal of the difficulty as he may deem fit.*”⁴²

In line with the 18th Amendment’s limitation of presidential powers and strengthening of the ECP’s independence, further amendments to primary legislation are needed, to give the ECP the authority to issue legally binding regulations without presidential approval and the deletion of presidential powers for “removal of difficulties”.

Other measures to strengthen ECP independence include: stipulating the length of the term of ECP members⁴³, provision for removal or resignation of ECP members⁴⁴, a requirement for the ECP to submit regular public reports⁴⁵, and the appointment of polling staff being based on an open system for nominations with opportunity for objections.⁴⁶

- **Candidacy requirements**

In accordance with the 18th amendment, primary legislation will require revision for consistency. Furthermore the ambiguous language on candidacy qualification and disqualification could be supplemented and tightened through primary legislation.

- **Electoral rolls**

In accordance with the amendment on the responsibility of the ECP to run local government elections, specific provision could be made for the ECP to be responsible for producing electoral rolls for local elections. Other electoral roll reforms suggested include making a CNIC⁴⁷ mandatory for registering as a voter (as it is a mandatory requirement for voting).⁴⁸ A further reform relates to non-discrimination in the electoral roll. Currently Ahmadi voters are legally required to be registered on a separate electoral roll, in breach of ICCPR requirements for non-discrimination (articles 2.1 and 26).

- **Care-taker government**

In accordance with the 18th amendment’s provisions on the care-taker cabinet, further specifications could be made in primary legislation, such as clearly requiring care-taker cabinets to be neutral (as was stipu-

lated in the Charter of Democracy⁴⁹). The 2008 EU EOM recommended that “*The mandate, functioning and neutrality of any future caretaker government should be more clearly defined in law. Appointment of caretaker positions should be by consensus and should be open to objection. In no circumstance should caretaker officials be involved in campaign activities.*”⁵⁰

OUTLOOK

The 18th Amendment to the Constitution includes positive electoral reforms. They will require additional reform at the level of primary legislation so that election legislation is consistent with the latter and in the spirit of the reformed Constitution.

Primary legislation is also in need of reform so that it is compliant with the electoral obligations Pakistan now has under the ICCPR. Furthermore other changes may be made to modernise the election legislation and to make it effective in providing for positive election processes.

Such reform of primary legislation also provides a natural opportunity for unifying election laws and for facilitating legal understanding and compliance. Various observer groups have recommended this⁵¹, emphasising that the process of reform should be multi-party and consultative.⁵²

Thorough reform of primary legislation follows logically to the work of the PCCR. This will provide for the changes made in the Constitution to be honoured in subordinate legislation, will enable Pakistan to meet its new international obligations under the ICCPR, and will improve electoral practice. Substantial development of the legal framework for elections would continue the work of the PCCR in strengthening democratic civilian rule.

Furthermore, electoral reform presents an opportunity to extend the success of the PCCR process. For example, public hearings and public debate on electoral reform could be undertaken by a parliamentary committee dedicated to election reform.

⁴² “If any difficulty arises in giving effect to any of the provisions of that Order, the President may make such provision for the removal of the difficulty as he may deem fit.” Election Commissioner Order (Section 9F), Conduct of General Election Order (Section 10 .1), Electoral Rolls Act (Section 28A), Delimitation of Constituencies Act (Section 10B).

⁴³ 2008 EU EOM recommendation 7: “The law should stipulate the length of the term of office of ECP members.”

⁴⁴ See FAFEN (14 December 2009) “Election Law Reform Project: Priorities for Reform to Election Laws Governing the Conduct of Elections”.

⁴⁵ 2008 EU EOM recommendation 8: “The ECP should be required to submit regular public reports and could be accountable to the National Assembly for its activities.”

⁴⁶ 2008 EU EOM recommendation 13: “The appointment of polling staff should be based on an open system for nominations with opportunity for objections. In order to increase confidence in the process, consideration should be given to appointments being open to others in addition to state employees, and the ECP budget should be adjusted accordingly.” Also ESG recommendation 18 “Electoral staff recruitment should become more open and transparent”.

⁴⁷ Computerized National Identity Card.

⁴⁸ See FAFEN (14 December 2009) “Election Law Reform Project: Priorities for Reform to Election Laws Governing the Conduct of Elections”.

⁴⁹ Charter of Democracy, points 30 and 31.

⁵⁰ 2008 EU EOM recommendation 47.

⁵¹ See ESG recommendation 1.

⁵² See for example EU EOM recommendation 2: “Election legislation, including the Constitution, should be reviewed in a consultative, participatory manner, for example through an all-party constitutional review committee.”

ABOUT DEMOCRACY REPORTING INTERNATIONAL

Democracy Reporting International (DRI) is a non-partisan, independent, not-for-profit organisation registered in Berlin, Germany. DRI promotes political participation of citizens, accountability of state bodies and the development of democratic institutions world-wide. DRI helps find local ways of promoting the universal right of citizens to participate in the political life of their country, as enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

DRI received an 18-month grant from the European Union to work with Pakistani legislatures (federal and provincial) on promoting electoral reform, as a follow-up to the EU Election Observation Missions. The grant also includes work with the media on coverage of the anticipated local elections, as well as assessments of the local elections.

DRI can support legislatures in various ways, including advice, research assistance, briefings and trainings on:

- ICCPR obligations;
- Electoral matters;
- Cross-party work and undertaking stakeholder consultations on election reform;
- Law-drafting.

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Annex – Comparative Table of Electoral Amendments after the 18th Amendment

The following table compares election related provisions of Pakistan’s Constitution before and after the 18th Amendment. Text in bold summaries the amendments.

Before the 18 th amendment	After the 18 th Amendment
<p>Article 59 – Total Number of seats for the Senate was 100, twenty two elected by each of the four provincial assemblies including four women and four technocrats per province, eight from FATA and four from the federal capital territory (total 100).</p>	<p>One seat per province is added for non-Muslims, increasing the total number of seats in the Senate to 104.</p>
<p>Article 62 - A person shall not be qualified to be elected or chosen as a member of Majlis-e-Shoora (Parliament) unless :- (f) he is sagacious, righteous and non-profligate and honest and ameen</p>	<p>Article 62, the following shall be substituted, namely: - "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:- (f) he is sagacious, righteous, non-profligate, honest and ameen, there being no declaration to the contrary by a court of law</p> <p>After the 18th amendment, a person can be declared unqualified on the basis of above-mentioned grounds only if there is a court order to that effect.</p>
<p>Article 63 - A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if:- (g) he is 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</p>	<p>Article 63 - A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if:- (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 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.</p> <p>After the 18th amendment, a person can only be disqualified as a member of Parliament on the above-mentioned grounds only if there is a court order to that effect.</p>
<p>Article 63 - A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if:- (h) he has been convicted by a court of competent jurisdiction on a charge of corrupt practice, moral turpitude or misuse of power or authority under any law for the time being in force</p>	<p>Article 63 - A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if:- (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.</p> <p>After the 18th amendment, only a conviction of more than two years for moral turpitude will be grounds for disqualification. A conviction for corrupt practices and misuse of powers will not anymore be a valid ground for disqualification.</p>
<p>Article 63 - A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if:- (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 or moral turpitude</p>	<p>Article 63 - A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if:- (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 ground of misconduct, unless a period of five years has elapsed since his dismissal.</p> <p>After the 18th amendment, a person will only be disqualified from being elected after dismissal from the government service for a period of five years after dismissal</p>

<p>Article 63 - A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if:- (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 grounds of misconduct or moral turpitude</p>	<p>and not for life.</p> <p>Article 63 - A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if:- (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.</p> <p>After the 18th amendment, a person will only be disqualified from being elected after removal or compulsory retirement from the government service for a period of 3 years and not for life.</p>
<p>Article 63 - A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if:- (l) he is found guilty of a corrupt or illegal practice under any law for the time being in force, unless a period of five years has elapsed from the date on which that order takes effect; or (m) he has been convicted under section 7 of the Political Parties Act, 1962 (III of 1962), unless a period of five years has elapsed from the date of such conviction; or (p) he has been convicted and sentenced to imprisonment for having absconded by a competent court under any law for the time being in force</p>	<p>Clauses lit. l, m and p were removed from the Article 63 of the Constitution The Political Parties Act 1962 was repealed and Political Parties Order was passed in 2002. After the abrogation of the Act, convictions under section 7 of Political Parties Act 1962 were no longer valid ground for disqualification of a candidate. Hence, the relevant clauses were removed.</p>
<p>Article 63 – (1) A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if:- (s) 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.</p>	<p>Article 63 – (1) A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if:- (p) he is for the time being disqualified from being elected or chosen as a member of a Majlis-e-Shoora (Parliament) or of 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.</p> <p>After the 18th amendment, lit. (s) becomes (p) because l, m and p clauses were deleted and an explanation has been added to the effect that a person cannot be disqualified on the basis of Ordinances issued by the President or by the Governor under Article 128 of the Constitution.</p>
<p>Article 63 – (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, within thirty days from raising of such question refer the question to the Chief Election Commissioner. (3) Where a question is referred to the Chief Election Commissioner under clause (2), he shall lay such question before the Election Commission which shall give its decision thereon not later than three months from its receipt by the Chief Election Commissioner.</p>	<p>Article 63 – (2) If any question arises whether a member of the 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.</p> <p>After the 18th amendment, any question related to the qualifications of members of the parliament will automatically be referred to ECP. Upon decision of the ECP the member is disqualified and the seat becomes vacant.</p>

<p>Article 63 A - Disqualification on grounds of defection, etc.</p> <p>(1) If a member of a Parliamentary Party composed of a single political party in a House-</p> <p>(a) resigns from membership of his political party or joins another Parliamentary Party; or</p> <p>(b) votes or abstains from voting in the House contrary to any direction issued by the Parliamentary Party to which he belongs, in relations to-</p> <p>(i) election of the Prime Minister or the Chief Minister; or</p> <p>(ii) a vote of confidence or a vote of no-confidence; or</p> <p>(iii) a Money Bill;</p> <p>he may be declared in writing by the Head of the Parliamentary Party to have defected from the political party, and the Head of the Parliamentary Party may forward a copy of the declaration to the Presiding Officer, and shall similarly forward a copy thereof to the member concerned:</p> <p>Provided that before making the declaration, the Head of the Parliamentary Party shall provide such member with an opportunity to show cause as to why such declaration may not be made against him.</p> <p>(3) Upon receipt of the declaration under clause (1), the Presiding Officer of the House shall within two days refer the declaration to the Chief Election Commissioner who shall lay the declaration before the Election Commission for its decision thereon confirming the declaration or otherwise within thirty days of its receipt by the Chief Election Commissioner.</p>	<p>Article 63 A - Disqualification on grounds of defection, etc.</p> <p>(l) If a member of a Parliamentary Party composed of a single political party in a House-</p> <p>(a) resigns from membership of his political party or joins another Parliamentary Party; or</p> <p>(b) votes or abstains from voting in the House contrary to any direction issued by the Parliamentary Party to which he belongs, in relation to-</p> <p>(i) election of the Prime Minister or the Chief Minister; or</p> <p>(ii) a vote of confidence or a vote of no-confidence; or</p> <p>(iii) a Money Bill or a Constitution (Amendment) Bill; he may be declared in writing by the Party Head to have defected from the political party, and the Party Head may forward a copy of the declaration to the Presiding Officer and the Chief Election Commissioner and shall similarly forward a copy thereof to the member concerned:</p> <p>Provided that before making the declaration, the Party Head shall provide such member with an opportunity to show cause as to why such declaration may not be made against him.</p> <p>Explanation.- "Party Head" means any person, by whatever name called, declared as such by the Party.</p> <p>(3) Upon receipt of the declaration under clause (1), the Presiding Officer of the House shall within two days refer, and in case he fails to do so it shall be deemed that he has referred, the declaration to the Chief Election Commissioner who shall lay the declaration before the Election Commission for its decision thereon confirming the declaration or otherwise within thirty days of its receipt by the Chief Election Commissioner.</p> <p>(8) Article 63A substituted as aforesaid shall come into effect from the next general elections to be held after the commencement of the Constitution (Eighteenth Amendment) Act, 2010:</p> <p>Provided that till Article 63A substituted as aforesaid comes into effect the provisions of existing Article 63A shall remain operative."</p> <p>After the 18th amendment, voting against the party line on a constitutional amendment bill by any member can be declared as defection by the head to the political party. The party head may be a non-elected person.</p>
<p>Article 140 A. Local government.</p> <p>(1) Each Province shall, by law, establish a local government system and devolve political, administrative and financial responsibility and authority to the elected representatives of the local governments.</p>	<p>140 A. Local government.</p> <p>(1) Each Province shall, by law, establish a local government system and devolve political, administrative and financial responsibility and authority to the elected representatives of the local governments.</p> <p>(2) Elections to the local government shall be held by the election commission of Pakistan.</p> <p>After the 18th Amendment, the ECP is mandated to conduct local elections.</p>
<p>Article 213. Chief Election Commissioner.</p> <p>(1) There shall be a Chief Election Commissioner (in this Part referred to as the Commissioner), who shall be appointed by the President [in his discretion.]</p> <p>(2) No person shall be appointed to be Commissioner unless he is, or has been, a Judge of the Supreme Court or is, or has been, a Judge of a High Court and is qualified under paragraph (a) of clause (2) of Article 177 to be appointed a Judge of the Supreme Court.</p> <p>(3) The Commissioner shall have such powers and functions as are conferred on him by the Constitution</p>	<p>Article 213, Chief Election Commissioner.</p> <p>(i) In clause (1), the words "in his discretion" shall be omitted; (ii) after clause (2), the following new clauses shall be inserted, namely:- "(2A). The Prime Minister shall in consultation with the Leader of the Opposition in the National Assembly, forward three names for appointment of the Commissioner to a Parliamentary Committee for hearing and confirmation of any one person.</p> <p>(2B) The Parliamentary Committee to be constituted by the Speaker shall comprise fifty percent members from</p>

<p>and law.</p>	<p>the Treasury Benches and fifty percent from the Opposition Parties, based on their strength in Majlis-e-Shoora (Parliament), to be nominated by the respective Parliamentary Leaders: Provided that in case there is no consensus between the Prime Minister and the Leader of the Opposition, each shall forward separate lists to the Parliamentary Committee for consideration which may confirm any one name: Provided further that the total strength of the Parliamentary Committee shall not exceed twelve members out of which one-third shall be from the Senate: Provided also that when the National Assembly is dissolved and a vacancy occurs in the office of the Chief Election Commissioner, the Parliamentary Committee shall, comprise the members from the Senate only and the foregoing provisions of this clause shall, mutatis mutandis, apply."</p> <p>After the 18th Amendment, the Prime Minister will recommend three names for the appointment of the CEC, in consultation with the Leader of Opposition in the National Assembly. Subsequently, a 12 member Parliamentary committee comprising MNAs and Senators from the ruling and opposition parties, nominated by the Speaker, will select one candidate.</p>
<p>Article 215. Term of office of Commissioner (1) The Commissioner shall, subject to this Article, hold office for a term of three years from the day he enters upon his office: Provided that the National Assembly may by resolution extend the term of the Commissioner by a period not exceeding one year.</p> <p>(2) The Commissioner shall not be removed from office except in the manner prescribed in Article 209 for the removal from office of a Judge and, in the application of the Article for the purposes of this clause, any reference in that Article to a Judge shall be construed as a reference to the Commissioner.</p> <p>(3) The Commissioner may, by writing under his hand addressed to the President, resign his office.</p>	<p>Article 215. Term of office of Commissioner In clause (1), (i) for the word "three" the word "five" shall be substituted and thereafter the following proviso shall be inserted, namely: - "Provided that the aforesaid amendment shall be effective after the expiry of current tenure of the present incumbent; and (ii) the existing proviso shall be omitted.</p> <p>After the 18th Amendment, the tenure of the Chief Election Commissioner will be five years instead of three, however, this will only become effective after the retirement of the incumbent.</p>
<p>Article 216. Commissioner not to hold office of profit. (1) The Commissioner shall not, (a) hold any other office of profit in the service of Pakistan; or (b) occupy any other position carrying the right to remuneration for the rendering of services.</p> <p>(2) A person who has held office as Commissioner shall not hold any office of profit in the service of Pakistan before the expiration of two years after he has ceased to hold that office: Provided that (a) this clause shall not be construed as preventing a person who was a Judge of the Supreme Court or of a High Court immediately before his appointment as Commissioner from resuming his duties as such Judge on the expiration of his term as Commissioner; and (b) a person who has held office as Commissioner may, with the concurrence of both Houses, be reappointed to that office before the expiration of two years after he has ceased to hold that office.</p>	<p>Article 216. Commissioner not to hold office of profit. in clause (2), in the provision, - (i) in paragraph (a), for the semicolon and the word "and" a full stop shall be substituted (ii) paragraph (b) shall be omitted.</p> <p>After the 18th Amendment, the power of the Parliament to reappoint the CEC before two years have expired after he/she ceased holding that office has been struck off.</p>
<p>Article 218. Election Commission. (1) For the purpose of election to both Houses of Majlis-e-Shoora (Parliament), Provincial Assemblies and for election of such other public offices as may be specified by law or until such law is made by the Majlis-e-Shoora (Parliament) by Order of the President, a per-</p>	<p>Article 218. Election Commission. for clause(l), the following shall be substituted, namely:- "(1) For the purpose of election to both Houses of Majlis-e-Shoora (Parliament), Provincial Assemblies and for election to such other public offices as may be specified by law, a permanent Election Commission shall be</p>

<p>manent Election Commission shall be constituted in accordance with this Article.</p> <p>(2) The Election Commission shall consist of,</p> <p>(a) the Commissioner who shall be Chairman of the Commission; and</p> <p>(b) [four] members each of whom shall be a Judge of a High Court [from each Province] appointed by the President after consultation with the Chief Justice of the High Court concerned and with the Commissioner.</p> <p>(3) It shall be the duty of the Election Commission constituted in relation to an election 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.</p>	<p>constituted in accordance with this Article."; (ii) for clause (2), the following shall be substituted, namely:- "</p> <p>(2) The Election Commission shall consist of.- (a) The Commissioner who shall be the Chairman of the Commission; and (b) four members, each of whom has been a Judge of a High Court from each Province, appointed by the President in the manner provided for appointment of the Commissioner in clauses (2A) and (2B) of Article 213."</p> <p>After the 18th Amendment, four members, one from each province, form the election commission. The appointment procedure will be the same as for the Chief Election Commissioner. The full time members will be the retired judges of the apex courts, instead of sitting judges appointed to the Commission.</p>
<p>Article 219. Duties of Commissioner.</p> <p>The Commissioner shall be charged with the duty of,</p> <p>(a) Preparing electoral rolls for election to the National Assembly and the Provincial Assemblies, and revising such rolls annually,</p> <p>(b) organizing and conducting election to the Senate or to fill casual vacancies in a House or a Provincial Assembly; and</p> <p>(c) appointing Election Tribunals.</p>	<p>Article 219. Duties of Commissioner.</p> <p>for the word "Commissioner" the word "Commission" shall be substituted; and (ii) in paragraph (c), for the full stop at the end a semi colon shall be substituted and after paragraph (c) amended as aforesaid, the following new paragraphs shall be added; namely:- (d) the holding of general elections to the National Assembly, Provincial Assemblies and the local governments; and (e) such other functions as may be specified by an Act of Majlis-e-Shoora (Parliament).</p> <p>After the 18th Amendment, the key powers exercised by the CEC, including preparation and revision of electoral rolls, conduct of elections and appointment of tribunals, will be exercised by the entire Commission. The Commission becomes responsible for holding elections to the National Assembly, Provincial Assemblies and the local governments.</p>
<p>Article 221. Officers and servants.</p> <p>Until [Majlis-e-Shoora (Parliament)] by law otherwise provides, the Commissioner may, with the approval of the President, make rules providing for the appointment by the Commissioner of officers and servants to be employed in connection with the functions of the Commissioner or an Election Commission and for their terms and conditions of employment.</p>	<p>Article 221. Officers and servants.</p> <p>the word "Commissioner" occurring for the first and second time, the words, "Election Commission" shall be substituted and the words "Commissioner or an" shall be omitted.</p> <p>After the 18th Amendment, the full commission will be responsible for appointment and regulation of service conditions of the employees of the election commission instead of only the CEC.</p>
<p>Article 224. Time of election and by-election.</p> <p>(1) A general election to the National Assembly or a Provincial Assembly shall be held within a period of sixty days immediately [following] 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 Provided that on dissolution of an Assembly on completion of its term, the President, in his discretion, or, as the case may be, the Governor, in his discretion but with the previous approval of the President, shall appoint a care-taker Cabinet.</p> <p>(2) When the National Assembly or a Provincial Assembly is dissolved, a general election to the Assembly shall be held within a period of ninety days after the dissolution, and the results of the election shall be declared not later than fourteen days after the conclusion of the polls.</p> <p>(3) An election to fill the seats in the Senate which are to become vacant on the expiration of the term of the members of the Senate shall be held not earlier than thirty days immediately preceding the day on which the</p>	<p>Article 224. Time of election and by-election.</p> <p>(i) for clause (1), the following shall be substituted, namely:- "(1) A general election to the National Assembly or a Provincial Assembly shall be held within a period of sixty days immediately following 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."; (ii) after clause (1) substituted as the aforesaid, the following new clauses shall be inserted, namely:- "(1A) On dissolution of the Assembly on completion of its term, or in case it is dissolved under Article 58 or Article 112, the President, or the Governor, as the case may be, shall appoint a care-taker Cabinet: Provided that the care-taker Prime Minister shall be selected 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: .</p>

<p>vacancies are due to occur.</p> <p>(4) When, except by dissolution of the National Assembly or a Provincial Assembly, a [general] seat in any such Assembly has become vacant not later than one hundred and twenty days before the term of that Assembly is due to expire, an election to fill the seat shall be held within sixty days from the occurrence of the vacancy.</p> <p>(5) When a seat in the Senate has become vacant, an election to fill the seat shall be held within thirty days from the occurrence of the vacancy.</p> <p>(6) When a seat reserved for women or non-Muslims in the National Assembly or a Provincial Assembly falls vacant, for death, resignation or disqualification of a member, it shall be filled by the next person in order of precedence from the party list of the candidates submitted to the Election Commission for the last general election by the political party whose member has vacated such seat.</p> <p>(7) When a care-taker Cabinet is appointed, on dissolution of the National Assembly under Article 58 or a Provincial Assembly under Article 112, or on dissolution of any such Assembly on completion of its term, the Prime Minister or, as the case may be, the Chief Minister of the care-taker Cabinet shall not be eligible to contest the immediately following election of such Assembly.]</p>	<p>Provided further that the Members of the Federal and Provincial care-taker Cabinets shall be appointed on the advice of the caretaker Prime Minister or the care-taker Chief Minister, as the case may be.</p> <p>(IB) Members of the care-taker Cabinets including the caretaker Prime Minister and the care-taker Chief Minister and their immediate family members shall not be eligible to contest the immediately following elections to such Assemblies". Explanation.- In this clause "immediate family members" means spouse and children.</p> <p>(iii) after clause (5) the following new clause shall be inserted and shall be deemed always to have been so inserted with effect from the 21st day of August, 2002, namely:- "(6) When a seat reserved for women or non-Muslims in the National Assembly or a Provincial Assembly falls vacant, on account of death, resignation or disqualification of a member, it shall be filled by the next person in order of precedence from the party list of the candidates to be submitted to the Election Commission by the political party whose member has vacated such seat."</p> <p>After the 18th Amendment, in case of dissolution of the Assembly or end of tenure, a caretaker cabinet will be nominated by the President in consultation with the Prime Minister and the Leader of the Opposition. The same procedure applies to the Governor of Provinces. The care-taker Prime Minister, Chief Minister, the cabinet itself and their immediate family members will not be eligible to contest in the elections.</p>
<p>Article 226. Elections to be secret ballot. All elections under the Constitution shall be by secret ballot.</p>	<p>Article 226. Elections to be by secret ballot. the following shall be substituted, namely:- "226. Election by secret ballot- All elections under the Constitution, other than those of the Prime Minister and the Chief Minister, shall be by secret ballot."</p>