

THE 22ND AMENDMENT TO THE CONSTITUTION: The beginning of much needed electoral reforms in Pakistan?

INTRODUCTION AND SUMMARY OF KEY REFORMS

The 22nd amendment to the Constitution of Pakistan, passed unanimously by the National Assembly, introduces important positive electoral reforms to address long-standing problems which caused structural weaknesses in the functioning of the Election Commission of Pakistan (ECP) and its head, the Chief Election Commissioner (CEC).¹ To become law, the amendment requires approval by two-thirds of the Senate within 90 days of the bill's introduction.

Until now only former judges could be appointed as the ECP's CEC and members, resulting in a somewhat uniform skill-set for an institution whose challenges are not only of legal nature but it has to deal with political, logistical, managerial and communication questions as well. Reliance on the judiciary was compounded in periods of the CEC's absence, during which judges from the Supreme Court were appointed as acting Chiefs. This arrangement put the ECP under ad-hoc leadership from the judicial branch and it also blurred the separation of power between the executive and the judiciary. Without clearly defined timeframes for the appointment of the CEC or ECP members, the ECP also suffered from inconsistent leadership. Within approximately 17 months (August 2013 to December 2014), the ECP operated under three different Acting Chiefs, which undermined its effective functioning. To address these issues, the 22nd amendment provides not only for judges but former civil servants and 'technocrats'² to be appointed as the ECP members or CEC and it sets deadlines for posts to be filled. Positively, the amendment also broadens the ECP's role in the conduct of local

elections, by empowering it to delimit electoral constituencies. Delimitation issues have caused severe delays to local elections in the past. Many of the proposed amendments in the bill reflect the long standing demands of political parties and joint recommendations from civil society, international community and domestic and international observers groups, including the European Union's Election Observation Mission to Pakistan's 2013 general election as well as DRI's suggestions.³

With four members of the ECP set to retire in June 2016, the timing of the Constitutional amendment is apt. New members will urgently need to be appointed in order to continue the ECP's operations under a proper legal leadership. If passed by the Senate of Pakistan in time, the new ECP members would be appointed under the new criteria allowing for a commission with more diverse skills and capacity.

The 22nd amendment is an important step forward in strengthening Pakistan's electoral framework. However, there are other crucial electoral reforms that must be enacted at least one year before the 2018 elections to allow the ECP sufficient time for preparations as per the new legal framework. These reforms include ensuring complete transparency in electoral processes (particularly requiring full public disclosure of results data and giving observers full access to all electoral processes); an effective complaint mechanism; and stronger accountability of the ECP and returning officers and polling staff. The reforms should also address the effective participation of women, minorities and persons with disabilities. A stronger and more transparent electoral framework will pave the way for improved electoral processes, thereby increasing the chances for political stability in the country and reducing the likelihood of political tensions, as seen after the 2013 General Election.

¹ On 19 May 2016; for full text of the amendment please visit: http://na.gov.pk/uploads/documents/1463653975_684.pdf

² Civil servant is defined as a person who has worked as civil servant for 22 years under Federal or Provincial Government and has retired in BPS-22 grade; whereas 'technocrat' is defined as a person who has completed 16 years of education, as recognised by Higher Education Commission, and has at least 20 years of experience including records of achievements at national or international levels.

³ See DRI's report: http://democracy-reporting.org/files/dri-pk_pakistan_election_laws_and_international_standards.pdf

KEY REFORMS INTRODUCED

1. Appointment of the CEC and ECP members was opened beyond judges to former civil servants and ‘technocrats’: Until now only judges could be appointed as the CEC or ECP members. Given that the organisation of elections poses a formidable management challenge requiring many different skills, many observers, advocacy organisations, political parties and members of the international community recommended that a more varied mix of professional backgrounds would suit the ECP. Now former judges,⁴ former civil servants⁵ or ‘technocrats’⁶ can be appointed as the CEC and members of the ECP. Additionally, the bill caps the upper age limit at 68 years for the CEC and 65 years for the members. No lower age limit is defined. No posts are reserved for women or minorities.

2. Continuity of the ECP ensured through staggered retirement of the ECP members: In the past all ECP members retired together, resulting in a sudden loss of experience. According to the amendment, retirement of ECP members will be staggered, bringing more continuity of experiences and skills into the Commission. Two members would retire every two and a half years. In the case of members appointed for the first term after the enactment of the amendment, the first two members to retire will be decided through the drawing of lots.⁷

3. Vacant posts of the CEC and members to be filled within 45 days: Defining the time-frame helps establish clarity and certainty. This also ensures that future appointments will not be subject to the delays seen in the past. After the resignation of CEC Justice Fakhruddin G. Ebrahim in July 2013, the appointment of a new CEC was delayed for over one and a half years. During this period, the ECP operated under three different

Acting CECs which affected the swift functioning of ECP’s work, until a new CEC was appointed in December 2014. To address this problem, the amendment requires that any vacancy, whether for the CEC or a member, will be filled within 45 days. The procedure to appoint the CEC and the members remains same as before.

ECP’s CECs since 2012

- Justice Fakhruddin G. Ebrahim - 20 July 20, 2012–31 July 2013)
- Justice Tassaduq Hussain Jilani (Acting) - 17 August 2013 – 30 November 2013,
- Justice Nasir-ul-Mulk (Acting) - 30 November 2013 – 02 July 2014,
- Justice Anwar Zaheer Jamali (Acting) - 03 July 2014 – 05 December 2014
- Sardar Muhammad Raza Khan – 6 December 2014 to till date

4. An Acting CEC will be chosen from within the ECP members: Previously, the position of the CEC was filled by a judge from the Supreme Court in the event the CEC’s post fell vacant or he/she was absent from work. This structurally weakened the independence of the ECP as it put the ECP under an ad-hoc leadership and blurred judicial and executive lines. With this amendment, the ECP member who is most senior in age would serve as the Acting CEC.

5. ECP powers related to local governments expanded: In almost all four provinces the delimitation of constituencies raised controversies in the recent local elections. Higher Courts postponed all 2013-14 local elections in Sindh and Punjab and subsequently there were more delays in many constituencies. Following a Supreme Court direction, the federal parliament and provincial assemblies of Sindh and Punjab gave the ECP powers to delimit constituencies for local elections. However, the Constitution did not explicitly give the ECP responsibility to delimit electoral constituencies for local governments. To clarify this, the amendment adds delimitation as an ECP function and also gives the ECP power to prepare electoral rolls for local government elections. These are helpful additions to give the ECP a clear mandate on these issues.

6. Sweeping powers given to the federal parliament to legislate on local government elections: The bill gives the federal parliament sweeping powers to legislate on all electoral “matters necessary for the due constitution” of

⁴ A former judge of Supreme Court and former judges of a High Court are eligible for the appointment as the CEC and members respectively, see Section 4.i and 8 of the amendment bill which requires changes in Articles 213 and 218 of the Constitution

⁵ A person who has worked as civil servant for 22 years under Federal or Provincial Government and has retired in BPS-22 grade, see Explanation 1 in Section 4.i of the amendment bill which requires change in Article 213 of the Constitution.

⁶ A person who has completed 16 years of education, as recognised by Higher Education Commission, and has at least 20 years of experience including records of achievements at national or international levels, see Explanation 2 in Section 4.i of the amendment bill which requires change in Article 213 of the Constitution.

⁷ The bill stipulates that a member who is appointed to fill in a sudden vacancy shall only act as member for the period remaining from the term of his/her predecessor and will not have full five year term.

the local governments.⁸ This means that the parliament can legislate on any aspect of the local elections, such as: the electoral system, candidate criteria, polling processes, result tabulation and compilation, complaint mechanisms and campaign rules. As the ECP, a federal body, is tasked to conduct local elections, some federal legislation to properly define and clarify the ECP's roles and responsibilities with regards to the conduct of local elections is inevitable.⁹ However, some electoral aspects are better suited for the provinces to define, as they use different local government structures and electoral systems. For example, the province of Khyber-Pakhtunkhwa requires seven ballots at Village/Neighbourhood Council level and follows a mix of plurality and single non-transferable systems. These impact the polling procedures as well as counting and tabulation. Further definition is therefore warranted to clearly establish what electoral aspects are defined by the federal parliament and which ones are deferred to the provinces.¹⁰ Else, this provision may complicate the holding of the future local elections. Also, since local government is predominately a provincial subject, such broad powers of the federal parliament could become controversial with the provinces in view of their increased autonomy.

NEXT STEPS IN THE LEGISLATIVE PROCESS

To be enacted, the amendment must be passed in the Senate of Pakistan with at least a two-thirds majority within 90 days of the bill being tabled in the Senate.¹¹ In case the bill is not passed by the Senate in the stipulated time, it has to be introduced during a joint sitting of the both houses.

⁸ See Section 11.ii of the amendment bill which requires change in Article 222.(f) of the Constitution of Pakistan.

⁹ For example, the Supreme Court had ordered the federal and provincial governments to give ECP powers to delimit local councils; additionally the ECP also needed some powers regarding other electoral processes such as electoral rolls.

¹⁰ Reportedly, the Parliamentary Committee on Electoral Reforms intends to further define powers of ECP with regards to conduct of local elections, these broader powers will ensure that federal parliament has the constitutional backing to enact such powers as local government is predominately a provincial subject. Additionally, this is also required because a local government system has been introduced in Islamabad over which only federal parliament has the legislative power.

¹¹ The 90 days limit will start from the day when the bill is introduced in the Senate. See Rule 154 of the Chapter 15 of the Rules of Business of the National Assembly. The National Assembly has to transmit approved bills to the Senate within 90 days of their approval from the National Assembly.

The swift enactment of the bill is important for the appointment of new ECP members – needed so that the ECP is legally composed. This will assist the ECP in continuing electoral preparations and build on some of its recent positive initiatives for testing and developing electoral practices¹² before the 2018 federal and provincial elections.

ABOUT DRI

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.

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¹² See DRI's reports here: <http://democracy-reporting.org/news/latest-news/seminars-on-eam-findings-in-pakistan-held.html>