



## Democracy & Governance Panel

### Proposals for Constitutional Amendments

The Democracy and Governance Panel met on July 24, 2009 at Islamabad at the invitation of PILDAT and formulated the following proposals for constitutional amendments after detailed deliberations. These proposals are summed up below for the consideration of the Parliamentary Committee on Constitutional Reforms. The following persons (listed in alphabetical order) attended the meeting in their personal capacity:

1. Mr. Babar Sattar, Advocate
2. Dr. Ijaz Shafi Gilani, Chairman Gallup Pakistan
3. Mr. Ilahi Bukhsh Soomro, former Speaker National Assembly of Pakistan
4. Mr. Javed Jabbar, former Senator and Federal Minister for Information and Media Development
5. Mr. Mujib ur Rehman Shami, Editor Daily Pakistan
6. Mr. Sartaj Aziz, Vice Chancellor, Beaconhouse National University / former Federal Minister for Foreign Affairs / for Finance
7. Mr. Shahid Hamid, Senior Advocate Supreme Court; former Governor of the Punjab
8. Ms. Sherry Rehman, MNA and former Federal Minister for Information and Broadcasting
9. Mr. Ahmed Bilal Mehboob, Executive Director, PILDAT

### Proposals:

1. **Focus should be on repealing the 17<sup>th</sup> Constitutional Amendment in the first phase:** The panel recommended that the Parliamentary Committee may undertake the constitutional amendments in two phases. In view of the fact that the two largest parties have already agreed in principle on repealing the 17<sup>th</sup> amendment except certain parts and a general consensus exists in the country on the subject, the 18<sup>th</sup> Constitutional Amendment Bill be introduced in the Parliament focussing just on repealing certain parts of the 17<sup>th</sup> Amendment. An effort should be made to pass the bill at the earliest. Simultaneously, the committee should work on a 19<sup>th</sup> Constitutional Amendment Bill which should consist of all other

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constitutional amendments. This bill should also be introduced in the Parliament as soon as the necessary consensus is reached on the contents of the bill. The panel, therefore, formulated its proposals on the amendments relating to the Legal Framework Order 2002 and the 17<sup>th</sup> Constitutional Amendment only at this stage. The proposals are presented in the following paragraphs. Another view was that though it would be desirable if the initial focus was on repeal of the undesirable features of the 17<sup>th</sup> Amendment, yet the main emphasis should be on arriving at a broad based consensus on all required amendments including those relating to Provincial autonomy.

2. **Formation of Political Parties -Article 17:** Article 17 deals with the fundamental right of freedom of association. The amendments made in this Article by the 17<sup>th</sup> Amendment to the effect inter alia that no political party shall promote sectarianism, ethnicity, regional hatred or animosity and that all political parties shall hold intra-party elections, are in the public interest and should be retained.
3. **Musharraf-specific clauses - Article 41, Clauses (7), (8) and (9):** These clauses are Musharraf specific. They relate to his assumption of office as Chief Executive, the referendum held by him, his election in 2002, etc and now have no utility whatsoever, and should be omitted.
4. **Composition of the National Assembly - Article 51:** Article 51 relates to the composition of the National Assembly, the increase in its membership to 342, the reduction in the voting age to 18 years, the reservation of seats for non-Muslims in the National Assembly, the procedure for election of women and non-Muslims on reserved seats, etc. All these amendments should be retained. Parliament may, at some later stage, consider further amendments that make it easier to re-allocate seats to the Provinces and the Federal Areas after each census.
5. **President's power to dissolve National Assembly - Article 58(2)(b):** Article 58(2)(b) relating to the discretionary power of the President to dissolve the National Assembly should be omitted. A suggestion was mooted that the provision could possibly be retained subject to the condition that in case the Supreme Court struck down the President's dissolution order the erring President would have to automatically lose his office, and that this would be a very salutary check on any motivated exercise of presidential power but this suggestion was dropped.

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6. **Membership of Senate - Article 59:** Article 59 relates to the increase in the membership of Senate to 100, allocation of the 100 seats between the Provinces and the Federal Areas and related matters. All these (amended) provisions should be retained. As per existing law the electorate for the 8 FATA Senators comprises the 12 MNAs from FATA! This law requires review before the next Senate elections. During the course of such review Parliament may also consider afresh the manner of electing the other 92 Senators.
7. **Qualifications and Disqualifications for membership of the Parliament - Articles 62 and 63:** Articles 62 and 63 relate to qualifications and disqualifications for membership of Parliament and the Provincial Assemblies. It was agreed that the changes made in these Articles through the 17<sup>th</sup> Amendment were arbitrary and unreasonable and should be reversed/omitted.
8. **Defection from a political party - Article 63-A:** Article 63-A relates to disqualification on ground of defection. It was agreed that the change made through the 17<sup>th</sup> Amendment were an improvement on the original provision and should be retained. However, in order to remove the lacuna which has enabled Speakers to avoid making references to the Election Commission on the ground that there is no definition of the term “head of a parliamentary party” in Article 63-A the following definition should be added in clause (7):-

“Head of a Parliamentary Party means the person elected as its head by members of parliamentary party within 7 days of the first session of the House after elections.”
9. **Mediation Committee of Senate and National Assembly - Articles 70, 71, 73 and 75:** Articles 70, 71, 73 and 75 relate to introduction and passing of all bills, the working of the mediation committee in case of disagreement between the Senate and the National Assembly, the procedure with respect to money bills and the President’s assent to bills. The changes brought about through the 17<sup>th</sup> Amendment should be retained.
10. **Appointment of Provincial Governors - Article 101:** Article 101 relates to method for appointment of the Provincial Governors. The history of this provision is that the original Constitution provided for such appointments on the advice of the Prime Minister. Zia-ul-Haq’s Order 14 of 1985

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- empowered the President to make the appointments in his discretion. Under the 8<sup>th</sup> Amendment the appointments were to be made after consultation with the Prime Minister. The 13<sup>th</sup> Amendment of 1997 revived the original 1973 position. The 17<sup>th</sup> Amendment has revived the 8<sup>th</sup> Amendment i.e. appointments to be made by the President after consultation with the Prime Minister. After much discussion it was agreed to recommend that the change made through the 17<sup>th</sup> Amendment be reversed and the position as per 13<sup>th</sup> Amendment be restored. A minority view was that the appointments should be made by the President with the concurrence of the Prime Minister.
- 11. Composition of the Provincial Assemblies - Article 106:** Article 106 relates to composition of the four Provincial Assemblies, the reservation of seats for women and non-Muslims in these assemblies, the reduction in voting age from 21 to 18 years, etc. The changes brought about through the 17<sup>th</sup> Amendment should be retained.
- 12. Governor's power to dissolve a Provincial Assembly - Article 112(2)(b):** Article 112(2)(b) relates to the discretionary power of the Governor to dissolve the Provincial Assembly if the Government of the Province cannot be carried out in accordance with the Constitution. It was noted that the Governor cannot exercise this power without the approval of the President which approval is to be given on the advice of the Prime Minister. The majority view was that it was an anti-democratic provision and should be omitted. The minority view was that the provision needed to be retained in the interest of the security and integrity of the Federation.
- 13. Local Government System - Article 140-A:** Article 140-A prescribes that 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 Government. This provision should be retained.
- 14. Judiciary - Articles 179, 193, 199, 203C and 209:** Articles 179, 193, 199, 203C and 209 relate to the retiring age of the Superior Court Judges, the jurisdiction of the High Courts, the emoluments of Federal Shariat Court Judges and the Supreme Judicial Council. The changes made by the 17<sup>th</sup> Amendment should be retained except that the minimum age for appointment of a Judge to the High Courts should be reduced from 45 to 40 years.

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**15. Appointment of the Chief Election Commissioner - Article 213:** Article 213 was not amended/changed by the 17th Amendment Nonetheless as this Article provides for the appointment of the Chief Election Commissioner by the President in his discretion, it was decided to recommend that the words “in his discretion” should be omitted and substituted by the words “after consultation with the Prime Minister, the Chief Justice of Pakistan and the Leader of the Opposition in the National Assembly.”

**16. Composition of the Election Commission - Article 218:** Article 218 deals with the composition of the Election Commission. It was agreed that the increase in the number of Commissioners from 2 to 4, one from each Province, was desirable and this change, along with the further change that there is to be a permanent Election Commission, should be retained.

**17. Schedule of National Assembly Election - Article 224:** Article 224 deals with the time of election and bye-elections. It was agreed to recommend as under:

i. The re-substitution of the word “preceding” for the word “following” in clause (1). It was noted that the 17<sup>th</sup> Amendment change enabled Musharraf to claim re-election by the same Assemblies which elected him originally.

ii. The proviso to clause (1) which empowers the President and the Governors to appoint Caretaker Cabinets in their discretion should be omitted and substituted by the following:

“Provided that simultaneously with the announcement of the dates for elections, the President shall in consultation with the out-going Prime Minister and the out-going Leader of the Opposition in the National Assembly, appoint a care-taker Prime Minister and the President shall appoint care-taker Federal Ministers in accordance with the advice of the Care-taker Prime Minister, and the Governor shall, with the previous approval of the President, appoint a Care-taker Chief Minister and the Governor shall appoint care-taker Provincial Ministers in accordance with the advice of the Care-taker Chief Minister.

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iii. The changes in clauses (4) and (6) were clarificatory/desirable and should be retained.

iv. Clause (7) presently bars only the Caretaker Prime Minister and the Care-taker Chief Ministers from being candidates for election which they are supervising. This bar should also apply to all members of their Cabinets.

**18. Appointment of Service Chiefs - Article 243:** Article 243 relates to the appointment of Service Chiefs including the all important appointment of the Chief of Army Staff. Under the original Article the appointments were to be made on the advice of the Prime Minister. Through Zia-ul-Haq's Order 14 of 1985, as validated by the 8<sup>th</sup> Amendment the President was empowered to make these appointments in his discretion. The 13<sup>th</sup> Amendment of 1997 restored the original provision. Under Pervez Musharraf's Legal Framework Order 2002 the President regained the power to make these appointments in his discretion. The 17<sup>th</sup> Amendment resulted in the present compromise whereby the appointments are to be made by the President in consultation with the Prime Minister. After much discussion the majority view was that the appointments should be made on the advice of the Prime Minister. Minority view was that the appointments should be made by the President with the concurrence of the Prime Minister.

**19. Definition of 'Consultation' - Article 260:** Article 260 is the definition clause. 17<sup>th</sup> Amendment has added a definition of consultation to the effect that consultations are not binding on the President. It was agreed that this definition should be omitted. It was noted that constitutional consultation means that the consultees come to a consensus/agreement.

**20. Sixth and Seventh Schedules - Article 268:** The Sixth Schedule read with Article 268(2) protects 35 laws from alteration/repeal/ amendment except with the previous sanction of the President. 10 of these 35 laws have been added to the Sixth Schedule through the 17<sup>th</sup> Amendment There is also a list of 10 laws in the Seventh Schedule which cannot be amended except in the manner provided for amendment of the Constitution. It was agreed to recommend that the whole of the Sixth Schedule along with Article 268(2) and the whole of the Seventh Schedule along with Article 270A(6) should

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be omitted as there was no reasonable basis for protecting any of these laws from the normal process of Parliamentary scrutiny and legislation.

- 21. Validation of laws passed during Gen. Musharraf's military rule - Articles 270AA, 270B and 270C:** Articles 270AA, 270B and 270C relate to validation and affirmation of laws passed during the period of Pervez Musharraf's military rule, the elections to the National and the Provincial Assemblies in 2002 and the oath administered to the Superior Court Judges in the year 2000. No change was required to be made in the provisions set out in the 17<sup>th</sup> Amendment in these matters.