



BACKGROUND PAPER

June 2005

Free, Fair &
Credible **ELECTIONS**
in Pakistan

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First Published: June 2005
ISBN: 969-558-0099-2

Typeset in Swis721 Cn BT
Printed by: Son Printers, Lahore

Published by



With Support From



British High Commission, Islamabad



Commonwealth Secretariat, London



European Union, Delegation of the European Commission to Pakistan

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PILDAT
BACKGROUND PAPER
FREE, FAIR AND CREDIBLE ELECTIONS IN PAKISTAN

CONTENTS

Acronyms and Abbreviations

Foreword

1.	Introduction	06
2.	The Electoral System in Pakistan	06
	2.1 The Legal Framework	06
	2.2 The Election Commission	06
3.	Voter Turn-out	07
4.	Overview of Previous Elections in Pakistan	08
	4.1 Allegations of Pre-poll Rigging in the 2002 Elections	09
	4.2 Allegations of Pre-poll Rigging in Previous Elections	09
5.	Comparison of Election Commissions and Election Practices of Selected South Asian Countries	10
	5.1 A Comparison of Constitutional Provisions Regarding the Election Commissions	10
	5.2 Independence of the Four Election Commissions in Practice	12
	5.3 Is Caretaker Government during Elections the Answer? A Case Study of Bangladesh	15
6.	Need for Election Monitoring	17
7.	Conclusion	17

Tables

Table 1: Voter Turnout in Pakistan

Table 2: Comparison of Voter Turnout in Selected South Asian Countries

Table 3: Historical Voter Turnout in Selected South Asian Countries

PILDAT
BACKGROUND PAPER
FREE, FAIR AND CREDIBLE ELECTIONS IN PAKISTAN

ABBREVIATIONS AND ACRONYMS

BNP	Bangladesh National Party
ECP	Election Commission of Pakistan
FEMA	Fair Election Monitoring Alliance
GHQ	Pakistan Army's General Headquarters
HRCP	Human Rights Commission of Pakistan
IJI	Islami Jamhoori Ittehad
ISI	Inter-Services Intelligence
LFO	Legal Framework Order
MFFE	Movement for Free and Fair Elections
MI	Military Intelligence
MMA	Muttahidda Majlis-e-Amal
MQM	Muttahidda Qaumi Movement
NCA	National Command Authority
NRB	National Reconstruction Bureau
NWFP	North West Frontier Province
PAFFREL	People's Action for Free and Fair Elections
PML	Pakistan Muslim League
PML-N	Pakistan Muslim League-Nawaz
PML-Q	Pakistan Muslim League-Quaid-i-Azam
PPP	Pakistan Peoples Party

PILDAT
BACKGROUND PAPER
FREE, FAIR AND CREDIBLE ELECTIONS IN PAKISTAN

FOREWORD

Free and fair elections are a fundamental pre-requisite for democracy. They play a significant role in nation building as everybody has one equally counted vote regardless of sex, caste, tribe, minority etc. In countries where the election process is flawed, the political leadership lacks legitimacy. This is often a source of political instability. Elections in Pakistan, unfortunately, have been marred with controversy and mistrust. Therefore, it is imperative that concerted efforts are undertaken to establish a credible and fair election system.

The objective of this background paper is to contribute to the prevalent debate on how to ensure free, fair and credible elections in Pakistan. The intention is not to criticise, but to highlight issues that require immediate attention of concerned stakeholders. PILDAT hopes that the paper will provide the necessary background information for public representatives, government and civil society to play a more proactive role in electoral reforms and election monitoring.

PILDAT would like to acknowledge the European Union, the Delegation of the European Commission to Pakistan, the British High Commission, Islamabad, and the Commonwealth Secretariat, London, for their support in producing the background paper. Views expressed in this paper are not necessarily shared by the supporters.

PILDAT and its team of researchers have made every effort to ensure the accuracy of the contents of this paper and do not accept responsibility for any omission and error, as it is not deliberate.

Islamabad
June 2005

PILDAT
BACKGROUND PAPER
FREE, FAIR AND CREDIBLE ELECTIONS IN PAKISTAN

1. Introduction

In a democracy, the authority of a government is derived solely from the consent of the people. Elections are the mechanism through which this consent is given. Pakistan, unfortunately, has been unable to establish the necessary conditions for free and fair elections. With the exception of the general election in 1970, every election result has been contested by opposing parties and civil society.

Countries that fail to hold fair elections, fail to establish sustainable democratic systems and often face political breakdowns. Recent incidents in Togo, Kyrgyzstan, Ukraine, Georgia and Ethiopia, where governments formed as a result of rigged elections faced mass unrest, are manifestations of the public's discontent and impatience with electoral malpractice.

The holding of free and fair elections in Pakistan calls for institutional reforms as well as active participation of civil society. With the next elections in Pakistan scheduled for 2007 or even earlier, it is imperative that a debate on electoral reforms is initiated. The fundamental objective of this paper is to promote such a debate and help form a national consensus on the issue. The first part of the paper presents an overview of Pakistan's electoral system and experiences, with specific reference to the role of the Election Commission. The second part compares the Election Commissions and experiences of Pakistan, India, Sri Lanka and Bangladesh, with the view to derive lessons for Pakistan. The final section provides recommendations for improving the conduct of elections.

2. The Electoral System in Pakistan

2.1 The Legal Framework

Between 1947 and 1956, elections were held in the four provinces in Pakistan on the basis of adult franchise under the Government of India Act, 1935. Pakistan's first Constitution was adopted in 1956, and it provided for direct elections based on adult franchise. However, the constitution was abrogated in 1958 before elections could be held. The 1962 Constitution prescribed for elections with

only limited participation. Elections were based on an indirect system through an electoral college of "basic democrats", who were elected on a non-party basis. The first direct general elections in Pakistan were held in 1970. Elections were subsequently held in 1977, 1985, 1988, 1990, 1993, 1997 and 2002.

The framework for holding and regulating elections is provided in the Constitution and election laws. Major laws for the conduct of elections to the National and Provincial Assemblies are derived from the Representation of the People Act, 1976 and the Representation of the People (Conduct of Election) Rules, 1975.

In addition, the current framework for holding and regulating elections is also derived from the following election laws¹:

1. The Conduct of General Elections Order, 2002
2. The Political Parties Order, 2002
3. The Political Parties Rules, 2002
4. The Election Commission Order, 2002
5. The Allocation of Symbols Order, 2002
6. The Electoral Rolls Act, 1974
7. The Delimitation of Constituencies Act, 1974
8. The National Assembly and Provincial Assemblies allocation of reserved seats for women and non-muslims (Procedure) Rules, 2002

2.2 The Election Commission

The Constitution prescribes the establishment of a permanent Election Commission "for the purpose of election to both Houses of 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 Parliament by order of the President"². The Commission's mandate is to "organise and conduct 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"³. The Election Commission consists of a Chief Election Commissioner and four Election

1. Election Commission of Pakistan

2. Article 218 (1). The article was amended by the Legal Framework Order. The original 1973 Constitution stated, "for the purpose of each general election to the National Assembly and to a Provincial Assembly, an Election Commission should be constituted in accordance with this article".

3. Article 218(3), Constitution of Pakistan

PILDAT
BACKGROUND PAPER
FREE, FAIR AND CREDIBLE ELECTIONS IN PAKISTAN

Commissioners. All the executive authorities in the Federation and in the provinces are constitutionally duty bound to assist the Chief Election Commissioner (CEC) and the Election Commission in the discharge of his or its functions. The Chief Election Commissioner is appointed by the President “at his discretion”.⁴ According to the constitution, “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 to be appointed a Judge of the Supreme Court”.⁵ The CEC is appointed for three years. Each of the four election commissioners is appointed by the President after consultation with the Chief Justice of the High Court concerned and with the Commissioner. They are required to be sitting judges from the High Courts of the four provinces. The Constitution vests the following responsibilities with the Commissioner⁶ :

- 1) Preparing electoral rolls for election to the National Assembly and the Provincial Assemblies, and revising such rolls annually
- 2) Organising and conducting election to the Senate or to fill vacancies in a House or a Provincial Assembly; and
- 3) Appointing Election Tribunals

In principle, the Election Commission of Pakistan is empowered with financial and administrative autonomy. Constitutionally, the Commissioner's tenure is secure for three years (the National Assembly may by resolution extend the term of the Commissioner by a period not exceeding one year). According to article 215(2) he/she can not be removed from office except in the manner provided for the removal of a judge in the Constitution, i.e. through the Supreme Judicial Council. The Constitution further prescribes that “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” (article 216(2)). The Parliament has been granted the power to legislate procedures for holding elections, but cannot legislate to either abridge or take away powers of the Commission or the Commissioner granted by the Constitution. The Supreme Court of Pakistan in its judgement in Election

Commission of Pakistan v. Javed Hashmi held that in election matters the Election Tribunals appointed by the Chief Election Commissioner have exclusive jurisdiction and the jurisdiction of all courts in such matters was excluded. The Supreme Court of Pakistan has consistently followed this judgement.

3. Voter Turnout

A successful democracy is predicated upon citizens who participate in the political life of a country. Participation of any kind, whether it is through direct involvement in politics, through institutions of civil society, or voting, is an important condition for sustainable democracy. Voter turnout is therefore an important measure of a country's participation level or interest in the political system.

In Pakistan, voter turnout was the highest during the first general elections (see table 1). Subsequently, voter

Table 1: Voter Turn-out in Pakistan

Year	Voter Turn-out
1970	63.0 %
1977	55.0 %
1985	52.9 %
1988	43.1 %
1990	45.5 %
1993	40.3 %
1997	35.2 %
2002	41.8 %

Source: General Election Reprt, 2002, Election Commission of Pakistan

participation experienced a downward trend until 1997 when only 35 percent of the registered voters participated. Voter turnout improved slightly to 41.8 percent in 2002. In order to put Pakistan's experience in perspective, voter turnout in the last general elections in Pakistan, India, Bangladesh and Sri Lanka is given in table 2. As evident from the table, turnout in Pakistan was considerably lower

4. "At his discretion" added to Article 213(1) by Presidential Order 14 of 1985, at the time of restoration of the Constitution by the military government of General Zia-ul-Haq and later passed by the Parliament as part of the 8th amendment to the Constitution

5. Article 213(2)

6. Article 219

Table 2: Comparison of Voter Turnout in Selected South Asian Countries

Country	Voter Turn-out
Bangladesh	75.6 % (2001)
India	57.7 % (2004)
Pakistan	41.8 % (2002)
Sri Lanka	71.9 % (2004)

Sources: Election Commission of India, Election Commission of Bangladesh, Department of Elections Sri Lanka, and International IDEA

than in the other three countries.

Table 3 presents voter turnout rates for the four countries based on the statistics for all elections held between 1945

Table 3: Historical Voter Turnout in Selected South Asian Countries

Country	Voter Turn-out
Bangladesh	58.2. %
India	59.4 %
Pakistan	45.3 %
Sri Lanka	74.3 %

Source: Voter Turnout since 1945: A Global Report International IDEA

and 2001. According to the statistics compiled by IDEA (International Institute for Democracy and Electoral Assistance), Pakistan ranks at no. 164 in terms of voter turnout, out of the 169 countries surveyed. Sri Lanka ranks at 79, India at 141 and Bangladesh at 143.

Although an important measure of participation, low voter turnout does not necessarily reflect a weak political system. Many developed democracies have been experiencing downward trends in voter participation. The United States,

for example, had a turnout of 47 percent in the Presidential election of 1996, and 51 percent in 2000 (voter turnout increased dramatically during the 2004 elections to 60 percent)⁷. In the U.K., turnout peaked in 1950 (82 percent), but the long-term trend in voter participation has been downwards. The recent general elections in 2005 experienced voter participation of 61 percent⁸. Various factors are held responsible for low turnout. These include voter apathy, lack of trust of politicians, and perceived lack of difference between the policies of different political parties.

4. Overview of Previous Elections in Pakistan

More important than voter turnout is the credibility and legitimacy of elections. In Pakistan, elections have always been marred with mistrust and controversy. Accusations of rigging in the 1977 elections against PPP led to widespread rioting and eventually take-over by General Zia-ul-Haq. Between 1988 and 1999, governments were dismissed with alarming regularity while intelligence agencies and the military brazenly interfered in politics. Elections of 1988 and 1990 were marked by controversies of ISI involvement in the electoral process. Although elections in 1993 and 1997 were relatively less controversial and declared free and fair by international observers, political parties who lost insisted there had been electoral interference.

The Army was accused of engineering the election outcome in 2002 in order to favour the Pro-Musharraf PML (Q). According to the South Asian Non-governmental Election Observer Mission Report,⁹ changes introduced in the legal structure “constrained the holding of free and fair elections”. The report states that degree qualification requirements and delimitation of constituencies led to controversial decisions which undermined the credibility of the elections. The report also notes allegations of transfers of government officials after the election process had begun, presence of district nazims and other army personnel inside polling stations, incomplete voters' lists, stamping of ballot papers by the polling staff after polling had closed and interference in vote counting to favour pro-government candidates. In a report released on October 12, 2002, the Human Rights Commission of Pakistan (HRCP)¹⁰ reported that polling stations were seized by police officers

7. <http://www.fairvote.org>

8. <http://news.bbc.co.uk>

9. *Pakistan Election 2002: South Asian Non-Governmental Election Observer Mission Report*, International Centre for Ethnic Studies, Sri Lanka

10. [Http://www.hrcp.cjb.net](http://www.hrcp.cjb.net)

PILDAT
BACKGROUND PAPER
FREE, FAIR AND CREDIBLE ELECTIONS IN PAKISTAN

and ballot papers were stamped by them, ballots were stolen, fake I.D cards were in circulation, and polling stations were changed at the last minute. Similarly, the European Union Election Observation Mission¹¹ also reported interference in the electoral process. The Mission expressed concerns over the lack of independence of the Election Commission, restrictions on nominations of candidates, equality of access to the state media, inconsistencies in qualification of candidates, controversial delimitation of constituencies, harassment of PPP candidates and supporters, misuse of state resources, and bulk transfers of public officials after the election process had begun.

4.1 Allegations of Pre-poll Rigging in the 2002 Elections

In a statement on pre-poll rigging, the Human Rights Commission of Pakistan stated “Pre-poll rigging has, to a considerable extent, been completed through the putting in place of constitutional amendments announced by the National Reconstruction Bureau. The chief aim of these reforms appears to be to deprive the new Parliament of power and instead concentrate decision-making authority chiefly in the hands of an un-elected President.”¹² The statement further asserts that “rules put in place which restrict political parties in their choice of leadership, and the often blatant intervention in their working, are further manifestations of the arrogant manner in which the rights of citizens to elect their representatives is being undermined”. It alleges that the military regime, through various forms of co-option and coercion, carved out the PML-Q from the PML-N. The statement notes harassment of politicians, misuse of the media and administrative interference as further examples of pre-poll electoral manipulation.

According to the South Asian Non-governmental Election Observer Mission Report, the government had taken legislative and administrative measures to deprive leading politicians/political parties to participate in elections, and that political parties and candidates were not sufficiently free in the conduct of their election campaigns and in holding public meetings.

The report of the European Union Election Observation Mission states that the Legal Framework provisions regarding restrictions placed on the nomination of candidates and the institutionalisation of the Army in the governance of the country reflected “unjustified interference”¹³ in the electoral process. The Report states that specific qualification requirements were imposed as part of a government strategy to disqualify certain politicians. According to the mission, the obligation on candidates to prove that they had not previously defaulted on bank loans, had not had bank loans written off or did not have unpaid utility bills was used to disqualify candidates by design.

Freedom House¹⁴ reported that throughout 2002, the Military government openly supported PML-Q, as a way of off-setting the PPP and other factions of the Pakistan Muslim League. The report states that Constitutional amendments announced in July and August restricted the ability of opposition parties to contest the October elections and gave Musharraf effective control over the Parliament.

4.2 Allegations of Pre-poll Rigging in Previous Elections

Elections of 1988, 1990, 1993 and 1997 were marred by controversies of pre-poll electoral manipulation. Former Chief of Army Staff, General Aslam Beg admitted that the Islami Jamhoori Ittehad (IJI) had been created by the ISI. In an interview to Herald, he stated, “The Army, perhaps, would not have allowed the transfer of power to Benazir Bhutto. There is a strong feeling in the army that Zulfikar Ali Bhutto was responsible for the East Pakistan debacle and that he maligned the Army. So, to ensure that power was smoothly transferred to Benazir Bhutto and democracy was restored, the IJI was formed by the ISI. This was done with the clear knowledge that it wouldn't stop the PPP from forming the government”¹⁵. The Director General of ISI at the time, General Hamid Gul, later also admitted that the ISI had been responsible for the formation of IJI and for its success in the 1988 elections¹⁶. In 1996, a petition was filed by Air Marshal (Retd.) Asghar Khan in the Supreme Court of Pakistan against the COAS General (Retd.) Mirza

11. *Pakistan National and Provincial Assembly Election, 10 October 2002*, European Union Election Observation Mission Final Report

12. <http://www.hrcpelectoralwatch.org>

13. *Pakistan National and Provincial Assembly Election, 10 October 2002*, European Union Election Observation Mission Final Report

14. Freedom House is a non-profit organization working to promote human rights and democracy through research, advocacy, training and institutional strengthening

15. The Herald, October 2000

16. M. Ashgar Khan, *We've learnt nothing from History, Pakistan: Politics and Military Power*, Oxford University Press, 2005

PILDAT
BACKGROUND PAPER
FREE, FAIR AND CREDIBLE ELECTIONS IN PAKISTAN

Mohammad Aslam Beg, the former ISI Chief, Lt General (Retd.) Asad Durrani and Younis Habib of Habib and Mehran Banks, accusing the ISI of disbursing public money prior to the elections in 1990 for political purposes. During the hearing of the Supreme Court case, General Naseerullah Babar filed an affidavit recording that Rs.140 million was collected by the ISI from Younis Habib at the instance of General Beg, the then COAS. In an affidavit, General Asad Durrani, confirmed that the ISI had provided 'logistic support' for the disbursement of donations made by certain 'businessmen of Karachi' to the IJI election campaign of 1990, and that the operation had the blessings of the COAS and the government¹⁷. The affidavit contained names of all the persons the money had been disbursed to.

Although the elections of 1993 and 1997 had been declared free and fair by international observers, political parties that lost were not satisfied with the results. In a report to the European Union Election Observer Mission, Ms. Benazir Bhutto, while expressing her reservations about the fairness of elections, alleged that the 1997 elections had been rigged. Elaborating on the methods of rigging she said, "Eyewitness evidence from previous rigged elections informs us that a list is formed of the candidates, names of the 'winning' candidates are then ticked off by military headquarters as well as the President. Virtual votes are then cast for those candidates usually from marginal seats but also from others".¹⁸ Similarly, PML-N leader, Chaudhry Shujaat Hussain alleged that Ministers of the caretaker regime prior to elections in 1993 were involved in pre-election rigging¹⁹.

In his book "*We've learnt nothing from History, Pakistan; Politics and Military Power*", M. Asghar Khan describes first-hand experiences of attempted electoral manipulation during the 1970 elections. He narrates an incident when he was offered money by Agha Mohammad Ali, President Yahya Khan's brother and Director of the Intelligence Bureau, as campaign contribution. In another instance, he relates a conversation in which the Secretary of the Election Commission admitted that election results were routed to the Commission through the GHQ. When confronted, the Chief of Army Staff responded by saying that the Army was playing only a monitoring role. According to M. Asghar

Khan, there are numerous examples of electoral manipulation that demonstrate the fallacy of elections in Pakistan.

Repeated allegations of rigging demonstrate that Pakistan has been unable to create the necessary conditions for free and fair elections. Part of the responsibility goes to repeated military interventions and the consequent weakening of state institutions. Frequent interruptions in the democratic process have undermined the credibility of elections, elected governments as well as the Election Commission.

5. Comparison of Election Commissions and Election Practices of Selected South Asian Countries

This section seeks to examine election practices in Pakistan, India, Bangladesh and Sri Lanka with specific reference to constitutional provisions regarding their respective Election Commissions, independence of the Election Commissions, and acceptance of election results. The objective is to draw lessons for Pakistan where possible.

5.1 A Comparison of Constitutional Provisions Regarding the Election Commissions

According to the Constitution of Pakistan, it is the duty of the Election Commission to organize and conduct elections and to ensure that elections are carried out "honestly, justly, fairly and in accordance with law and that corrupt practices are guarded against".²⁰ Article 324 (1) of the Indian Constitution prescribes that the "superintendence, direction and control of the electoral rolls for, and the conduct of all elections to Parliament and to the Legislature of every state and of elections to the office of the President and Vice President shall be vested in the Election Commission." Similarly, the responsibility of organizing and holding elections in Bangladesh are vested with the Election Commission²¹. The Commission is responsible for conducting elections for the President and members of Parliament, establishing constituency boundaries and preparing electoral rolls. In Sri Lanka, the recently passed

17. *We never learn from History*, Ardeshir Cowasjee, Dawn, August 11, 2002

18. *Benazir apprises Cushman of rigging in elections past*, Daily Times, December 9, 2002

19. *Shujaat accuses caretakers of pre-poll rigging*, The Muslim, October 14, 1993

20. Article 218(3)

21. Article 118 (1)

PILDAT
BACKGROUND PAPER
FREE, FAIR AND CREDIBLE ELECTIONS IN PAKISTAN

17th Amendment (2002), provided for the establishment of an Election Commission vested with the responsibility to conduct elections²². The Commission is entrusted with the responsibility of organising and conducting elections to the Parliament, provincial councils, local authorities and the office of the President, as well as preparing and maintaining registers of electors.

The Election Commission in Pakistan consists of the Chief Election Commissioner (CEC), and four Election Commissioners. The CEC is appointed by the President. Each of the four Election Commissioners is appointed by the President after consultations with the Chief Justice of the High Court concerned and the CEC. The CEC can be a person, who is, or has been, a judge of the Supreme Court or is, or has been a judge of a High Court and is qualified to be appointed as a judge of the Supreme Court. The term of the Chief Election Commissioner is three years from the day he enters upon office. The National Assembly may by resolution extend the term of the Commissioner by a period not exceeding one year.

According to the Indian Constitution, the “Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix”²³. The appointments of the Chief Election Commissioner and Election Commissioners are made by the President, however the Constitution states that this is “subject to the provisions of any law made in that behalf by the Parliament”. The Constitution does not fix the tenure for the Chief Election Commissioner and the Election Commissioners,²⁴ neither does it provide criteria for eligibility.

The Constitution of Bangladesh provides for an Election Commission consisting of a Chief Election Commissioner and “such number of other Election Commissioners, if any,

as the President from time to time direct”²⁵. The appointment of the Chief Election Commissioner and Election Commissioners are made by the President subject to any law passed by the Parliament, as the case is in India. The tenure of an Election Commissioner is five years.

According to the Constitution of Sri Lanka, the Election Commission consists of five members, appointed by the President on the recommendation of the Constitutional Council²⁶. A Commissioner can be selected “from amongst persons who have distinguished themselves in any profession or in the fields of administration or education”²⁷. The President is required to appoint one member as Chairman, upon the recommendation of the Constitutional Council. The term of an Election Commissioner is five years from the date of appointment.

The Constitution of Pakistan is the only one amongst those reviewed that requires the Chief Election Commissioner to be an acting or retired judge. The Constitutions of Bangladesh and India do not provide any criteria for eligibility. The Constitution of Sri Lanka states that the Commissioner may be someone who has distinguished himself in any profession.

The Constitutions of Bangladesh and India stipulate that the State is obligated to make available to the Election Commissioner or to a Regional Commissioner such staff as may be necessary for the discharge of its functions. According to the Constitution of Pakistan, “it shall be the duty of all executive authorities in the Federation and in the Provinces to assist the Commissioner and the Election Commission in the discharge of his or their functions”²⁸.

The 17th Amendment to the Constitution of Sri Lanka states that “it shall be the duty of all authorities of the State charged with the enforcement of such (election) laws, to co-operate with the Commission.” The Constitution vests the

22. Prior to the amendment, the constitution vested the responsibility of holding elections with the Commissioner of Elections who was appointed by the President.

23. Article 324 (2). On October 1, 1993, the President of India, in exercise of his powers conferred by the Constitution, ordered that there will be two Election Commissioners (other than the CEC)

24. The Chief Election Commissioner and Election Commissioner Conditions of Service Order, 1993 fixed the terms of service at six years, or up to the age of 65 years, whichever is earlier.

25. Article 118 (1)

26. The Constitutional Council was also established through the 17th Amendment. It consists of the following members: 1) the Prime Minister; 2) the Speaker; 3) the Leader of Opposition; 4) one person appointed by the President; 5) five persons appointed by the President, on the nomination of both the Prime Minister, the Leader of the Opposition; 6) one person nominated upon agreement by the majority of the Members of Parliament belonging to political parties or independent groups other than the respective political parties or independent groups to which the Prime Minister and the Leader of the Opposition belongs and appointed by the President. The Speaker is the Chairman of the Council.

27. Article 103 (1)

28. Article 220

PILDAT
BACKGROUND PAPER
FREE, FAIR AND CREDIBLE ELECTIONS IN PAKISTAN

Commissioner of Elections with the responsibility to secure the enforcement of electoral laws and to deploy police officers on Election Day. The Amendment goes into considerable detail regarding the powers of the Commission. These include the power to: (i) prohibit the use of any movable or immovable property belonging to the State or any public corporation by any candidate or by the State for the purpose of promoting or preventing the election of a candidate; (ii) appoint, in the case of violation of guidelines issued by the Commission, a “competent authority” to manage the affairs of the Sri Lankan Broadcasting Corporation or Rupavahini Corporation (a Television Network) relating to all political broadcasts until the conclusion of the elections; and (iii) deploy police officers and facilities made available to the Commission to ensure the conduct of free and fair elections (the constitution makes it obligatory for the Inspector General of Police to provide facilities and police officers; and every police officer made available to the Commission is directed to act under the supervision and control of the Commission).

The constitutions of all four states provide specific provisions to secure the independence of their respective Election Commissions. They prescribe that an Election Commissioner can not be removed from office except in the manner provided for the removal of a judge. The Indian Constitution adds that the “conditions of his service shall not be varied to his disadvantage after his appointment”²⁹. The Constitution of Pakistan stipulates that “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” (article 216(2))³⁰. Furthermore, the Parliament can not legislate to either abridge or take away powers of the Commission or the Commissioner granted by the Constitution. Going beyond the two year restriction in Pakistan, the Constitution of Bangladesh states that a person who has held office as Chief Election Commissioner would not be eligible for appointment in the service of the Republic. The Constitution also clearly states that “the Election Commission shall be independent in the exercise of its functions and subject only

to this Constitution and any other law”³¹. The Constitutions of India and Bangladesh stipulate that the President shall select the Chief Election Commissioner and other Election Commissioners, subject to any law made by the Parliament in that regard. The Constitution of Sri Lanka secures the independence of the Election Commissioners by stipulating that their appointments by the President be made on recommendation by the Constitutional Council. In Pakistan, the President has the right to select the Chief Election Commissioner “in his discretion”.

5.2 Independence of the Four Election Commissions in Practice

India

In practice, the independence of an Election Commission depends on the extent to which it is able to invoke the powers vested in it. Amartya Sen, Development Economist and Nobel Laureate, has argued that if India takes stock of its achievements, the holding of free, fair and credible elections in the face of tremendous odds will be at the top of the list. The Election Commission of India has played a critical role in the success of electoral democracy in the country. The powers and functions of the Commission are drawn from the Constitution as well as Acts of Parliament such as Representation of People Act, 1950, Presidential and Vice-Presidential Act, 1952, Government of Union Territories Act, 1963, Government of National Capital Authority of Delhi Act, 1991, and the Rules and Orders under them³². The Commission is not dependent on the government for funding; its expenses are derived from the Consolidated Fund of India.

The independence of the Indian Election Commission has been built over time. There are clauses in the Constitution that provide a broad measure of empowerment to the Election Commission to supervise, direct and control the electoral process³³. T.N. Seshan was the first Election Commissioner to enforce the Commission's constitutional mandate. In doing so, he transformed the position and authority of the Commission in the Indian political system.

29. Article 324 (5)

30. 216 (2) (a) Provided that the clause does not prevent a person who was a judge of the Supreme Court or a High Court from resuming his duties upon expiration from his term as Chief Election Commissioner, 216 (2) (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.

31. Article 118 (4)

32. Transparency International Country Study Report - India, 2003

33. Article 324

PILDAT
BACKGROUND PAPER
FREE, FAIR AND CREDIBLE ELECTIONS IN PAKISTAN

According to article 324 (6), the Election Commission is vested with the power to seek and secure the services of officials of the central or state governments for the conduct of elections. During the elections to the state of Tripura in 1994, Mr. Seshan observed widespread incidents of non-compliance and bias by government officials. As a result, he postponed the elections and ordered disciplinary action against the officers. The government, when it came to power, dismissed the charges. Similarly, he demanded explanations from senior officials in the ministries of Welfare and Urban Development for neglecting their duties in the Presidential elections of 1992. The situation resulted in an open conflict between the Cabinet Secretary and T.N. Seshan. Upon the government's refusal to act in a decisive manner, Mr. Seshan suspended all electoral activity indefinitely. According to Mr. Seshan, "the Government was trying to throttle the Commission and reduce it to a mockery of its Constitutional position".³⁴ He moved the matter to the Supreme Court, which in its interim order confirmed the Commission's constitutional right to choose the dates for elections and reiterated its constitutional authority to oversee free and fair elections.

T.N. Seshan's successor, Manohar Singh Gill, introduced another set of wide-ranging reforms to strengthen the Commission's role in the electoral system. These included computerization of electoral rolls, inclusion of voter's parentage on the list to make identification of false voters easier, registration of party constitutions with the Election Commission and introduction of Electronic Voting Machines (EVMs).

The courts have consistently held that, subject to the provisions of the Constitution, the Election Commission is fully competent to take any decisions with respect to the conduct of elections. The Supreme Court of India has held that where the enacted laws are silent or make insufficient provisions to deal with a given situation in the conduct of elections, the Election Commission has residuary powers under the Constitution to act in an appropriate manner. A recent validation of the Election Commission's powers was made through a Supreme Court ruling regarding elections in Gujrat. After the State Assembly was dissolved in July 2002, the Chief Minister asked for fresh polls to be

organised. Members of the Election Commission visited Gujrat and decided that conditions in the State were not conducive to immediate elections. The decision led to a dispute between the State government and the Election Commission. The Supreme Court of India upheld the decision of the Election Commission³⁵.

The credibility of India's electoral system was evident from the ease at which governments changed after the elections in May 2004. Despite the unexpected results, no one questioned the integrity of the elections. Upon hearing the results of the elections, Prime Minister Atal Behari Vajpayee said that he had accepted the people's verdict. He said "my party and alliance may have lost but India has won".³⁶

Bangladesh

Bangladesh's political history is marked by confrontational politics, boycotts, strikes, and accusations of electoral rigging. In 1996, the Parliament passed an amendment to the constitution which provided for setting up a temporary caretaker government to oversee elections (for details, see section 5.3). Article 58 D (2) of the constitution prescribes that the "non-partisan Caretaker Government shall give to the Election Commission all possible aid and assistance that may be required for holding the general election of members of parliament peacefully, fairly and impartially". Bangladesh has had two general elections since the constitutional amendment in 1996 (June 1996 and October 2001). According to Transparency International, this transition has enhanced the credibility of the electoral process in Bangladesh. The report confirms that in 2001, a non-party caretaker government administered the country for three months preceding elections and oversaw the conduct of peaceful and fair elections. According to the European Election Observer Mission Report on the general elections in 2001, "the Election Commission carried out its duties in an objective way, even though it was working under pressure from certain political parties". The elections of 1996 were also considered to be free and fair by both domestic and international observers³⁷. Political parties, however, disputed the results of both the elections. In 1996, the Bangladesh National Party (BNP) accused the Awami League of vote rigging. In 2001, the Awami League accused

34. T.N. Seshan, *The Degeneration of India*, Penguin Books, 1995

35. <http://news.bbc.co.uk>

36. <http://hindustantimes.com>

37. *Bangladesh Parliamentary Elections, 1 October 2001*, European Union Election Observation Mission Final Report

PILDAT
BACKGROUND PAPER
FREE, FAIR AND CREDIBLE ELECTIONS IN PAKISTAN

BNP of rigging the election.

Although the ability of the Election Commission to conduct free and fair elections has been recognized by international observers with respect to the most recent elections, its credibility has often been questioned by political parties. During the 2001 elections, Election Commission members were accused by political parties of partisanship. Bangladesh has had nine Election Commissioners until now, out of which six have had to resign due to accusations of partisanship by political parties. Although Mr. M.A Syed (Chief Election Commissioner from May 2000 to May 2005) completed his tenure, his appointment as Chief Election Commissioner was not without opposition. His nomination was contested on the grounds that political parties had not been consulted in the selection process. Similarly, Awami League, rejected the appointment of the current Chief Election Commissioner, Justice M.A. Aziz, stating the government did not respect their demand to make the appointment on the basis of consensus.

Sri Lanka

Although the 17th Constitutional Amendment provides for the establishment of an independent Election Commission, it has not yet been created. Until it is constituted, the person holding the office of the Commissioner of Elections exercises and performs the powers and functions of the Commission³⁸. The European Union Election Observation Mission Report on the elections in 2004 states:

“Despite the fact that 17th Amendment to the Constitution has not been fully implemented, the Commissioner of Elections has been able to exercise some of the powers vested in him by this amendment compared to previous elections. Strengthened by these powers and his already established commitment to conducting a “free and fair election” the Commissioner of Elections earned the respect of Sri Lanka's diverse political community. His consensual approach and the way he involved representatives of the political parties instilled confidence in and respect for the election administration”.

Since the Election Commission had not been set up, the Supreme Court ruled that some of the powers vested in this body could be used at this election by the existing Commissioner. Under this ruling, the Election Commissioner was empowered to annul the poll at any station where the poll could not be conducted in accordance with the election law. He was also empowered to call for a fresh election in any polling station where there were major violations of election laws³⁹.

According to the report on Parliamentary Election, 2004 by the People's Action for Free and Fair Elections (PAFFREL) and the Movement for Free and Fair Elections (MFFE), the 2004 General Election was the most peaceful and the freest Sri Lanka has undertaken in recent history. The European Union Election Observation Mission reported that previous missions had witnessed major violence and serious electoral abuse in the 2000 and 2001 elections. The Mission concluded that the 2004 elections were largely conducted in a democratic manner, apart from the incidents in the North and East.

Pakistan

The independence of the Election Commission and the Chief Election Commissioner of Pakistan has been questioned repeatedly by political parties, the media, political analysts and election observers. The Commission has often been accused of allowing the government to interfere with the election process and not taking necessary action against incidents and complaints of rigging. For example, in an interim report on the elections in 2002, the HRCP specifically noted that the Election Commission failed to take notice of complaints regarding the seizure of a polling station by a police officer in Sanghar who threw the polling staff out and proceeded to stamp ballot papers himself. The EUEOM report on elections in 2002 expressed serious reservations regarding the independence of the Election Commission. According to the report, “one of the more worrying developments was the ECP's failure to curb the authorities' misuse of state resources in favour of political parties, in particular, but not exclusively, for the PML (Q)”. The report claims that the “the failure by the ECP to protect an area clearly within its mandate from interference by state authorities cast serious doubts over

38. Article 27 of the 17th Amendment

39. Final Report on the Parliamentary Election - 2004, People's Action for Free and Fair Elections and the Movement for Free and Fair Elections, Sri Lanka

PILDAT
BACKGROUND PAPER
FREE, FAIR AND CREDIBLE ELECTIONS IN PAKISTAN

the ECP's independence.”

Various other incidents have adversely affected the credibility of the Election Commission as an independent institution. In the 2002 elections, the Election Commission issued a notification barring active Ministers from contesting without resigning from their offices⁴⁰. The notification was withdrawn on July 8, 2004 to allow Mr. Shaukat Aziz to retain his Ministerial office and run for the National Assembly. The nomination of Chief Justice Irshad Hassan Khan as Chief Election Commissioner after he had legitimized Musharraf's coup in 1999 was perceived as a sign that the President had obliged Irshad Hassan Khan for his favourable ruling. The nomination was also seen as a move to ensure the compliance of the Election Commission. The controversial presidential referendum in 2002 raised further questions regarding the independence of the Chief Election Commissioner.

However, it is important to mention that the Election Commission of Pakistan took a number of positive steps to improve the electoral process for the General Elections in 2002. These efforts have been noted in all the Election Observer Reports reviewed in this Paper. The ECP undertook the following measures:

1. Published registration forms of voters
2. Circulated a draft Code of Conduct amongst political parties before it was finally issued
3. Made nomination forms available well in advance
4. Prepared detailed manuals of instructions to guide election officials
5. Issued orders to give copies of election results to party agents in the polling stations immediately following the count
6. Carried out voter education through the media
7. Issued directives against misuse of state resources, media impartiality during elections, transfers of government officials, and acceptance of papers from sitting ministers and nazims

Although these actions are commendable, the Election Commission has a long way to go before it establishes itself as an effective and independent institution. A strong pre-requisite for this transition is complete transfer of power to

civilian institutions and supremacy of the Parliament in the political system.

5.3 Is Caretaker Government during Elections the Answer? A Case Study of Bangladesh

Parliamentary democracy in Bangladesh has suffered from instability, military rule and acrimonious confrontations between the Government party and the Opposition. A civilian government was overthrown in 1975 and replaced by a military regime. In 1981 a change of military leadership took place through a coup d'etat and the new leadership continued until 1990. Parliamentary Democracy was re-established in 1991 upon the ousting of the military government by a mass movement. In February 1991, the Bangladesh National Party won a Parliamentary majority in the general elections and formed a coalition government. In March 1994, controversy over a parliamentary by-election led to an indefinite boycott of Parliament by the entire opposition. Opposition members resigned en masse from the Parliament in December 1994. The political deadlock went on for almost two years. Opposition parties boycotted the general elections held by the BNP in February 1996. Following the elections, popular pressure compelled the BNP to pass a constitutional amendment to permit elections under a caretaker government. The government dissolved the short-lived Parliament on March 30. New polls were contested by all the major parties in June 1996.

According to the constitutional amendment, a non-party caretaker government must be appointed by the President of Bangladesh within fifteen days after the Parliament is dissolved. The caretaker administration comprises a Chief Advisor, and not more than ten other advisors, all of whom must be appointed by the President. The Chief Advisor is required to be the most recently retired Chief Justice, however if not available, he may be a Chief Justice who retired before the last retired Chief Justice. If no retired Chief Justice is available or willing to hold office, he/she may be the last retired Judge of the Appellate Division. If no such individual is available, the President may, after consultation, “as far as practical”, with the major political parties, select amongst the citizens of Bangladesh, any person who is qualified to be an Advisor⁴¹. The President can appoint Advisors from among persons who are a) qualified for

40. Election Rules, 2002

41. Article 58C

PILDAT
BACKGROUND PAPER
FREE, FAIR AND CREDIBLE ELECTIONS IN PAKISTAN

election as members of parliament; (b) not members of any political party or of any organisation associated with or affiliated to any political party; (c) not, and have agreed in writing not to be, candidates for the ensuing election of members of parliament; and (d) not over seventy-two years of age.

The non-partisan caretaker government exercises the executive powers of the State and functions as an interim government. It is empowered to carry out all routine functions of the government. It is not, however, supposed to take any policy decisions, except the ones necessary to exercise ordinary operations of government. During the caretaker administration, the provisions of the Constitution requiring prime ministerial approval for presidential actions are not applied. The President can also exercise additional legislative powers during the period. When the Parliament has been dissolved, the President, if he is satisfied that circumstances exist which render immediate action necessary, can promulgate ordinances which have the force of law⁴². These ordinances must be laid before the next Parliament as soon as possible to remain effective and they cannot change the Constitution or be incompatible with it.

The fundamental responsibility of the caretaker government is to ensure fair elections. According to article 58D (2) of the Constitution, "The non-partisan Caretaker Government shall give to the Election Commission all possible aid and assistance that may be required for holding the general election of members of parliament peacefully, fairly and impartially". The caretaker government does not have the power to replace members of the Election Commission since they are appointed for a five year term and can only be removed through an impeachment procedure.

Bangladesh has had two general elections since the institution of non-partisan caretaker government was adopted in 1996. Both elections were declared free and fair by domestic and international election observers. According to FEMA - Fair Election Monitoring Alliance,⁴³ "the National Election 2001 held on 1st October was an important milestone in the consolidation of democracy in the country". However, political parties questioned the

credibility of both the elections.

The primary reason for introducing the constitutional amendment was to eliminate the mistrust and polarization that existed between leading political parties. However, as previously mentioned, the system has not been without controversy. The Awami League complained of widespread, systematic rigging during the elections in 2001. In their view, the caretaker government "encouraged and facilitated the process of rigging". It is alleged that the Chief Adviser, by transferring 13 senior officials minutes after assumption of office and prior to formation of the Advisory Council, showed his distinct bias against the Awami League⁴⁴. In a meeting with EU-EOMB, Awami League representatives stated, "we do not want a three months dictatorship". Sheikh Hasina, the party leader, personally took every opportunity to criticise the government regarding amendments to the electoral law, the deployment of Army and worsening of the Law and Order situation. In the last phase of the electoral campaign, she accused the caretaker government to be part of an alleged conspiracy organised against Awami League.

The undertaking of "controversial" administrative decisions by the caretaker government, and non-acceptance of election results by the opposition raises questions about the effectiveness of a caretaker arrangement in ensuring credible elections. With the next general election less than two years away, opposition parties have started pressing the government for electoral reforms. The government is under severe criticism for increasing the retirement age of judges. Opposition claims that the government has done so in order to ensure that Justice K. M. Hassan, previously affiliated with the BNP, takes over as Chief Advisor of the next caretaker government⁴⁵. Opposition parties and civil society organisations have proposed a number of reforms to improve the election process. These include procedural changes in the appointment of the Chief Advisor and other advisors of the caretaker government, re-allocation of powers of the President and Chief Advisor, re-fixation of the tenure of the caretaker government, and ensuring the independence of the Election Commission. The proposed reforms ask for the Commission to be established as an independent secretariat with complete administrative and

42. Article 93 (1)

43. FEMA is a non-partisan coalition of over 200 local development organizations and civic and professional bodies dedicated to promoting free and fair elections in Bangladesh

44. [Http://www.albd.org/RiggedElection/regid.htm](http://www.albd.org/RiggedElection/regid.htm)

45. [Http://www.saaq.org](http://www.saaq.org)

PILDAT
BACKGROUND PAPER
FREE, FAIR AND CREDIBLE ELECTIONS IN PAKISTAN

financial autonomy, and for the Chief Election Commissioner to be appointed after consultation with major political parties.

The Bangladeshi experiment with caretaker governments for the conduct of elections has therefore led to mixed results. It shows that conduct of elections by a non-partisan, caretaker government does not automatically lead to universal acceptance of election results. On the other hand the Indian experience shows that universal acceptance of election results is possible even under a normal party-based political government.

6. Need for Election Monitoring

Non-partisan election monitoring is essential for promoting free, fair and credible elections. In Bangladesh, the Fair Election Monitoring Alliance (FEMA) established in 1995, undertakes election monitoring, carries out voter education and advocates for electoral reforms. FEMA, which started as a coalition of over 200 local development organizations and civic and professional bodies, has since transformed itself into an association with a distinct identity and governance structure independent of the original coalition partners. It has built a countrywide network by forming local chapters at all the 64 administrative districts in the country. In the last general elections, FEMA mobilized 70,000 volunteers to serve as election observers and had 300 long term observers in the field for six weeks before polling day, covering every constituency. Similarly, People's Action for Fair and Free Elections (PAFFREL) is a non-profit coalition in Sri Lanka working to strengthen the electoral process through election monitoring and voter education. PAFFREL, along with the Movement for free and Fair Elections (MFFE) deployed 19,865 monitors to observe the elections in 2004.

In Pakistan, there is no mechanism for such large scale monitoring of elections. The Human Rights Commission of Pakistan has been observing elections in Pakistan since 1988, albeit on a much smaller scale. For the elections in 2002, HRCP deployed 1,300 observers to observe polling in 116 constituencies. Following the models of election monitoring mechanisms in the region, and in order to build confidence in the electoral process, civil society in Pakistan

needs to consider developing a more elaborate and participatory mechanism for monitoring elections. Such an effort may involve non-profit organisations as well as volunteers. Large-scale participation of society will strengthen broad-based commitment to, and ownership of, the democratic arrangements in the country. In addition, the election process which commences much before the election day, and the election itself will be more closely and comprehensively monitored if an indigenous monitoring arrangement is in place, leading to less likelihood of planned and large-scale election irregularities.

7. Recommendations

Repeated military interventions and the consequent weakening of state institutions pose a serious challenge for the prospects of democracy in Pakistan. Frequent interruptions in the democratic process have undermined the independence and effectiveness of the Parliament, Judiciary and the Election Commission. During a military regime, the COAS has complete administrative and legislative control, which enables him to manipulate the electoral process to achieve a desired result. Even under democratic arrangements, the Executive, be it a COAS or a civilian head of Government, enjoys an overwhelming influence in political processes and institutions.

Just as a strong, democratic political system is necessary for electoral integrity, fair elections can serve as an important impetus for institutionalising democracy. It is thus imperative that a wider debate on electoral reforms is initiated and the requisite institutional and procedural changes are implemented before the next general elections. PILDAT would like to offer the following recommendations to improve the conduct of elections:

- 1) The method for selecting the Chief Election Commissioner should be amended to instill greater confidence in the institution. The process may be amended to make it obligatory for the President to nominate the CEC based on a consensus with all major political parties.
- 2) Article 216(2) should be amended to make it illegal for a Chief Election Commissioner (CEC) to hold any office of profit in the service of Pakistan

PILDAT
BACKGROUND PAPER
FREE, FAIR AND CREDIBLE ELECTIONS IN PAKISTAN

- after he retires as CEC (the condition of two years should be removed).
- 3) Members of the judiciary should not be qualified to hold an office of profit before the expiry of 3 years after their retirement. This may guard against the possibility of an acting judge ruling in favour of the government in the hope of securing his/her appointment as CEC and consequently, prevent the appointment of a pro-government candidate.
 - 4) The qualification to become a Chief Election Commissioner should not be limited to members of the judiciary. The Election Commissioners including the CEC in India are drawn from the Civil Service. According to the Sri Lankan Constitution, a Commissioner can be selected "from amongst persons who have distinguished themselves in any profession or in the fields of administration or education".
 - 5) The Election Commission should randomly select ballot papers from each constituency after the election and match the thumb impressions on the ballot papers with those in NADRA records to identify false voting and discourage the practice of voter impersonation.
 - 6) Electronic Voting Machines and other forms of modern technology should be introduced to ensure accuracy and efficiency of the electoral process.
 - 7) The number of polling stations should be increased manifold to ensure easy access to each voter. Long distances encourage the use of offering transport as an incentive, which discriminates against candidates with limited resources.
 - 8) The laws regarding spending restrictions should be strictly enforced.
 - 9) Progressive election results should be posted on the Election Commission website as they are received from each polling station in real time. This practice should be guaranteed by law.
 - 10) The ECP should appoint inspectors to observe the election and check violations of electoral law. In order to ensure the independence of inspectors, they should be officers of a provincial service
- from a province other than where they are appointed to observe the election.
- 11) The Election Commission should organize frequent consultations with political parties in order to enhance their confidence in the Commission.
 - 12) The Army, Navy, Air Force acts and laws relating to ISI, MI and other intelligence agencies should expressly prohibit the participation of their personnel in any election-related activity except one which is expressly authorized by the competent authority with the permission of the Election Commission. The presiding officers, returning officers, provincial election commissions and the staff of the Election Commission as well as those deployed to work under it should be expressly prohibited from sharing election results before their declaration with any person or entity other than the authorities so identified in the election laws for this purpose.
 - 13) Political parties should state their positions on electoral reforms, reach a broad-based consensus and initiate lobbying efforts with the government.
 - 14) A civil society based domestic monitoring group should be established.

The above mentioned list is by no means exhaustive. In order to achieve sustainable democracy in Pakistan, we need to carry out deep and far-reaching political reforms. The fundamental priority for Pakistan is to allow democratic institutions to develop and take their rightful place in the political system. Until such time, democracy will remain susceptible to breakdowns and interventions. Currently, the most effective reform would be for the government, including the security apparatus of the state, to demonstrate the will to hold free and fair elections. Without the political will of decision-makers, all reforms will remain cosmetic.



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