

Chapter 2

The Legal Framework and Preparations for the Elections

The Constitution

Basic Structure

(a) The President and the National Assembly

The Constitution of the Islamic Republic of Pakistan (1973) provides a federal structure of government for the four provinces of Balochistan, the North-West Frontier Province, the Punjab and Sindh, the Federally Administered Tribal Areas and the Islamabad Capital Territory. It is cast in an essentially parliamentary form but various amendments since 1973 have introduced elements of a presidential system.

The President is the Head of State. He is elected for a five-year term by an electoral college consisting of the members of both Houses of the National Assembly and the members of the Provincial Assemblies.

The Federal Majlis-e-Shoora (Parliament) consists of the President and two Houses, the National Assembly and the Senate. There is a Provincial Assembly and Governor for each of the four provinces. The National Assembly and the Provincial Assemblies are elected 'by direct and free vote'. The National Assembly consists of 207 Muslim members and ten non-Muslim seats. A similar pattern of representation applies to the Provincial Assemblies. The 87-member Senate is indirectly elected, for a six-year term, by the elected members of the Provincial Assemblies.

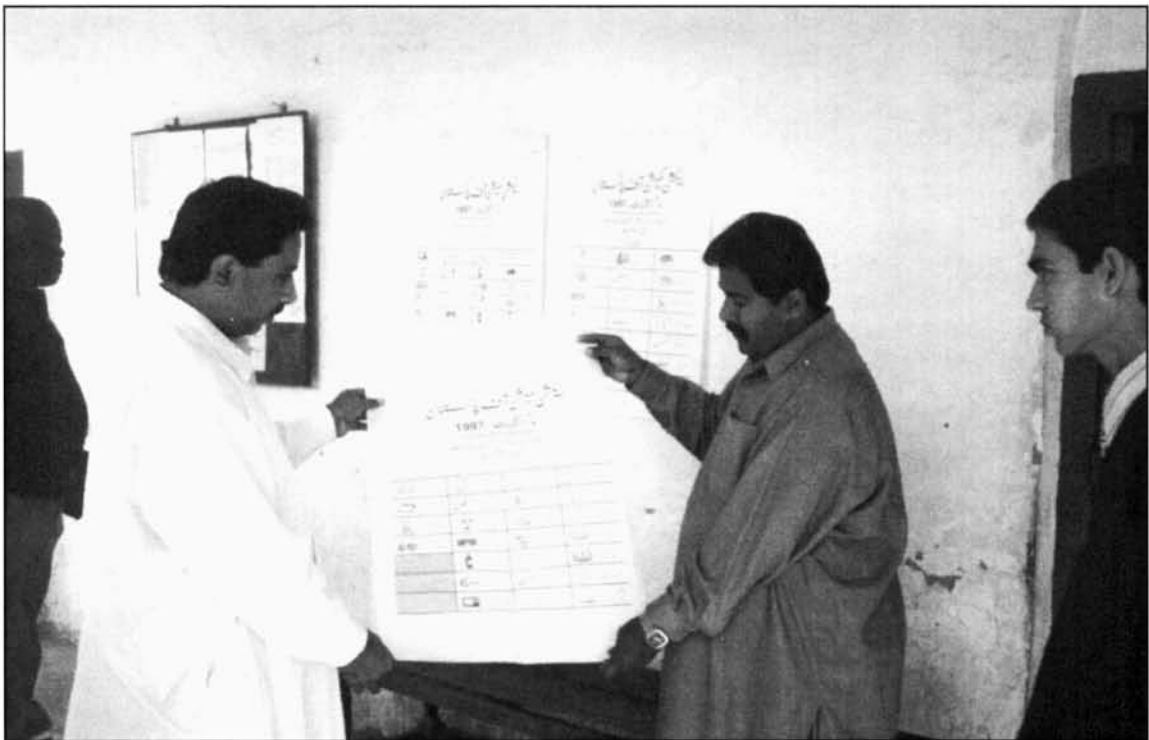
The Constitution provides for a system of Cabinet government, headed by a Prime Minister (in the National Assembly) and Chief Ministers (in the Provincial Assemblies).

The President (the Governor in the case of the Provincial Cabinets) may appoint as Prime Minister (or Chief Minister in the Provinces) the person 'who in his opinion is most likely to command the confidence of the majority of the members'. Provincial Governors are appointed by the President after consultation with the Prime Minister and hold office 'during the pleasure of the President'. A Prime Minister ceases to hold office if a vote of no-confidence is passed against her/him. A similar provision applies to Chief Ministers.

The standard parliamentary convention for dissolution of the National Assembly and Provincial Assemblies, under which the President dissolves the House at the request of the Prime Minister, is provided for. He must set an election date within 90 days. His actions in this case are not justiciable. But the President (and the Governors) enjoys the significant additional power to dissolve the Assembly 'in his discretion where, in his opinion ... a situation has arisen in which the Government ... cannot be carried on in accordance with the ... Constitution and an appeal to the electorate is necessary' (Articles 58(2)(b) and 112(b)).

This power has been used at both national and provincial level. Action under this power is justiciable and has been subjected to interpretation by the Supreme Court and the High Courts. Such a dissolution requires the President to set up a caretaker government. The exact meaning of 'a situation in which the Government cannot be carried out in accordance with the Constitution' is not defined and has been variously interpreted by the courts.

The Caretaker Government's functions are not elaborated in the Constitution. The Supreme Court has, however, approved a statement of a High Court that they cannot 'take undue advantage of their position either for themselves or for their political parties. They have to be impartial to everybody, including their rivals or opponents in the political parties ... Neutrality, impartiality, detachment and devotion to duty to carry on day to day affairs ... are the *sine qua non* of a Caretaker Cabinet.' It asserted that 'the primary function (of a Caretaker Government) was to hold elections and carry on day to day administration'.



Promoting awareness ... the Election Commission conducted an extensive voter education exercise. Here posters are displayed in Sukkur, Sindh Province, to familiarise voters with the candidates' and parties' symbols on the ballot papers

Another significant Constitutional power of the President, relevant to the parliamentary character of the system, is Article 89. This gives the President the power to legislate by Ordinance. Thus the Assembly is not the unique maker of primary legislation. The President has to initiate and pass laws, albeit temporary laws. This he can do 'if he is satisfied that circumstances exist which render it necessary to take immediate action'. Such an Ordinance made during a period of electoral Caretaker Government must be laid before the newly elected Parliament and if it is not approved by the National Assembly it is automatically repealed after four months from its promulgation. This power is available at any time when the Assembly is not in session, and has been frequently relied on by elected governments to make laws. The fact that Ordinances may be repeatedly re-enacted by the President has meant that the Assembly can in effect be bypassed.

(b) The Courts

The Constitution established a Supreme Court of Pakistan, a High Court for each province and the Federal Shariat Court. The Supreme Court has both original and appellate jurisdiction. The Court's original jurisdiction has been held to include the hearing of petitions relating to the presidential dissolution of the National Assembly as part of its power to consider a matter involving 'a question of public importance with reference to the enforcement of any of the fundamental rights' protected by the Constitution. The High Courts have a comparable jurisdiction with regard to the Provincial Assemblies.

The Federal Shariat Court is concerned with examining, at its own instance or on a petition of a Government or a citizen, 'whether or not any law or provision of any law is repugnant to the injunctions of Islam'. If any law is held to be so repugnant the Constitution provides that it shall 'cease to have effect ... on the day on which the decision of the court takes effect'. The relevant Government responsible for the law shall take steps 'to bring such law ... into conformity with the injunctions of Islam'. The Constitution is excluded from this jurisdiction.

Electoral Provisions

(a) Franchise and Representation

The National and Provincial Assemblies are directly elected bodies. The franchise is enjoyed by adult citizens who are 21 years old and have been registered. For the 1997 elections, for the first time, the Caretaker Government extended the franchise for the seats in the Federally Administered Tribal Areas to all adults. A provision for 20 indirectly elected reserved seats for women lapsed before the 1993 elections. A provision for the special minority seats for non-Muslims was introduced in 1975 and they are elected on a national constituency basis. Thus non-Muslim voters do not participate in the constituency elections for Muslim MPs.

The seats for Muslim voters in the four provinces are distributed on a proportional basis. The delimitation of constituencies within provinces, which are set by statute for each, is based upon the population figures in the last ten-yearly census. The last national census was in 1981.

(b) Qualification and Disqualification of Candidates

The Constitution in Articles 62 and 63 provides elaborate standards to be met by candidates for election to Parliament, including moral and religious grounds. It also provides for the disqualification of candidates on grounds of conflict of interest, conviction for corruption or 'any offence which in the opinion of the Chief Election Officer involves moral turpitude'. The Chief Election Officer is also empowered to decide whether a sitting member has become so disqualified. Equivalent provisions apply to the Provincial Assemblies. These provisions are further operationalised by The Representation of the People Act.

(c) The Chief Election Commissioner and the Election Commission

The Election Commission is established by the Constitution (Article 218). It is not a permanent body, but is constituted 'for the purpose of each general election to the National Assembly and ... Provincial Assembly'. It consists of the Chief Election Commissioner and two High Court judges, appointed as Commissioners by the President. The Commission's duty is 'to organise 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 the law and that corrupt practices are guarded against.'

The Chief Election Commissioner is appointed by the President in his discretion and has to be a serving or retired Supreme Court judge. The Chief Election Commissioner has the same security of tenure as a judge. His term of office is three years, but may be extended for one year by the National Assembly. The Chief Election Commissioner's duties include preparing the electoral rolls for the Assemblies, revising them annually and appointing Election Tribunals.

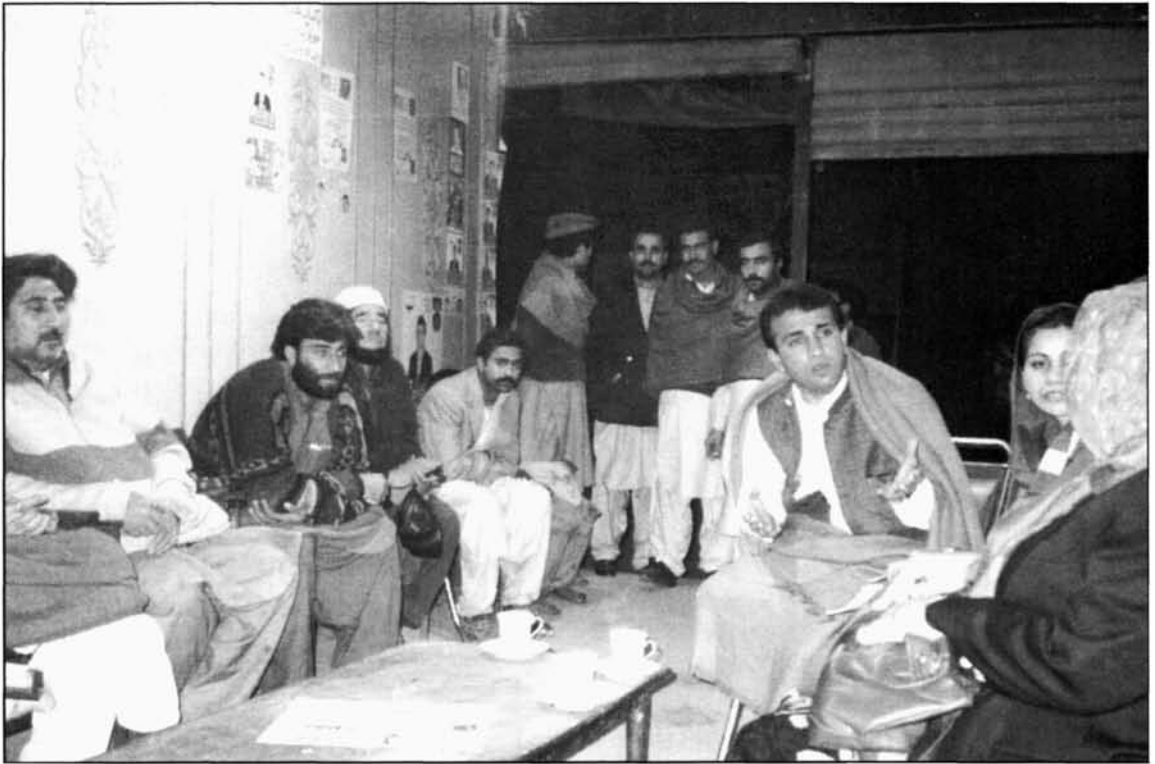
In June 1995, the Federal Government directed the Chief Election Commissioner to prepare fresh electoral rolls for the entire country, and in October 1995 the Chief Election Commissioner announced that the Commission would do so. This was challenged in the Supreme Court on the grounds that the Government's direction was an unconstitutional interference with the independence of the Commission, and that the Electoral Rolls Act and the Constitution did not authorise the creation of a fresh nationwide roll but only the revision of the existing roll. This challenge was upheld by the Supreme Court.

Article 202 of the Constitution requires all federal and provincial authorities to assist the Commission in the discharge of its functions.

(d) Miscellaneous Provisions

Candidates may contest for more than one seat, but must resign from all but one seat if they are elected.

Elections must be held within 60 days of an Assembly running its full term or 90 days from its dissolution by the President. The results of the elections must be announced within 14 days of polling. Disputed elections may be challenged by petition to an Election Tribunal.



For information ... Commonwealth Observers deployed to the provinces five days before election day so that they could observe final preparations for the elections and meet the parties and others at local level. Here Senator Habibshah Osman (right, with headscarf) listens to a Tehrik-e-Insaf candidate in the North-West Frontier Province

Electoral Laws

(a) The Representation of the People Act

The primary source of electoral legislation apart from the Constitution, is The Representation of the People Act, 1976. This has been significantly amended by Ordinances of the 1997 Caretaker Government. Many of them reflect reforms called for by small political parties and concerned groups in civil society.

The Act enlarges upon the electoral provisions of the Constitution which imposes on the Election Commission the duty to manage the elections. It sets out the powers which enable the Commission to appoint Returning and Presiding Officers and polling officers from among the federal, provincial and local authorities. Returning Officers are appointed from judicial staff.

The rules for nomination as a candidate have always been important and they were strengthened by the Caretaker Government. Candidates must make various declarations, now including an affirmation by the candidate relating *inter alia* to his financial affairs. An Ordinance of 5 December 1996 introduced significant amendments to the nomination process. From a general declaration that the candidate is not disqualified from being elected, the law has been changed to require a 'solemn affirmation' by the candidate. This affirmation relates to several matters, including information and assurances regarding the assets and debts of the candidate and the candidate's family. It includes specific undertakings regarding party affiliation. Not only must the declaration claim that no unpaid loan from 'any' bank is outstanding, but also that no loan has been 'written off' and that no tax, rent or utility payments are in default.

The candidate must give an assurance that during the life of the Assembly he will not change his party affiliation without the consent of the party leader or stand for re-election.

Transparency is enhanced by a new provision which makes these declarations available to the public. It makes the submission of a false declaration or statement a ground for the Returning Officer to reject the nomination. Candidates may avoid rejection by repaying loans,

etc., before rejection. The law also provides that an appeal to the Election Tribunal against rejection on these grounds will succeed if the candidate proves that he has paid. A Tribunal dealing with an appeal and having information from any source of such financial default, can call upon the candidate to justify why his nomination should not be rejected. Thus, financial rectitude has become a central concern of the law with regard to the election of representatives of the people. It has been extended to sitting MPs, who must now make annual declarations of their assets and liabilities or face suspension.

The Election Commission will publish each October the names of those who fail to submit the statement and shall direct that the member ceases to function until submission is made. Filing a false statement is categorised as a corrupt practice and is punishable by imprisonment or a fine.

The law provides standard arrangements for party symbols, polling agents, polling times, controls at polling stations, ballot boxes, voting procedures, tendered and challenged votes and postal ballots. Postal ballots are limited to state officials who are not able to vote in their electoral area, and there is no provision for a postal vote for other voters who will be absent from their polling area.

Election expenses are limited by law. The recent Ordinance had doubled the allowance to one million rupees for a National Assembly candidate. Returns of these expenses must be made to the Commission, with supportive documentation, within 30 days of the publication of the election result and are open to public inspection.

Election disputes are dealt with, on the basis of petitions filed by candidates with the Election Commission, within 45 days of the publication of results. The Commission must pass petitions on to an Election Tribunal. Decisions on petitions must be made within six months of submission.

The normal range of electoral offences and penalties are provided for corrupt practices, personation, double voting, intimidation and violation of secrecy. Penalties are in the form of fines or imprisonment.

An important provision relating to voting procedures, introduced in 1985, is the requirement that a ballot paper will only be issued to registered voters with a valid National Identity Card. This document is issued not by the Election Commission, but by the Ministry of the Interior. The polling process as well as the count is done in the presence of polling agents appointed by the candidates. Such agents are entitled to challenge allegedly unqualified voters. The law also sets out the procedure at the count, and for the return and consolidation of results from Presiding Officers to the Returning Officers. The result at each polling station must now, in terms of amendments introduced by Ordinance, be published by posting it so that the public will know the unofficial result at the end of the count.

The 1996 Ordinance amended the Act significantly with regard to the campaign. This was again in response to suggestions from some political parties and civil society organisations concerned with excessive spending and the advantage it gave to large parties and rich candidates. This has effectively reduced the cost of the campaign by imposing a ban on campaign publicity in the form of posters, banners, flags, 'wall-chalking' and the use of mobile loudspeakers. The same Ordinance permitted printed or broadcast political advertising campaigns, up to a cost of 30 million rupees accountable to the Commission.

By an Ordinance promulgated on 31 January 1997 the President amended the Act by providing that no official declaration of results for a candidate would be made until the candidate had submitted a return of electoral expenses. Likewise, no official publication in the Gazette would be made until a Returning Officer had informed the Commission.

Section 64, dealing with the powers of the Election Tribunal, was amended to enable an Election Tribunal to prevent an elected member whose election has been 'called in question from sitting until a decision of any election petition has been made'. In addition the Election Tribunal is empowered – 'on the basis of any material coming to its knowledge from any source' that a returned candidate is a defaulter on loans, taxes or utility charges or has submitted a false declaration regarding the payment of utility charges – to call upon such candidate to show cause why his election should not be declared void. If it is satisfied that the candidate is a defaulter or has made a false declaration, the Election Tribunal may make an Order declaring the election of the candidate to be void or declaring it to be void and declaring 'any other contesting candidate to have been duly elected'.

The Election Tribunal is also empowered on the basis of such information, if it finds reasonable grounds for believing a candidate is a defaulter or has made a false or incorrect declaration, to direct that the result for that candidate shall not be published in the Official Gazette. Any Order under this provision can only be made after the candidate has been heard.

(b) The Delimitation of Constituencies Act, 1974

This Act empowers the Election Commission to conduct the delimitation of constituencies for the National and Provincial Assemblies in accordance with the Constitution. The number of Muslim seats for each province in the National Assembly is fixed by the Act: North-West Frontier 26, Punjab 115, Sindh 46 and Balochistan 11; in addition, there are eight Muslim seats for the Federally Administered Tribal Areas and one for the Federal Capital. The Act makes no provision to change this allocation of seats. The delimitation principles to be applied are that each seat should, 'as far as may be', represent an equal number of voters. The Commission should also seek to achieve representation of compact geographical areas using existing administrative boundaries considering communications, public convenience and the homogeneity of the constituency.

The public may make representations on proposed delimitations and has a right to be heard. There is no appeal against the Commission's final decision on delimitation.

(c) The Political Parties Act, 1962

The Constitution prohibits anyone from standing at an election on behalf of a political party unless it has been permitted by an Act of the National Assembly. This Act provides for this. It prohibits the formation of parties on certain grounds and authorises the Government to dissolve parties. The Act was not extended to the Federally Administered Tribal Areas, where universal franchise was granted for the first time for the 1997 elections, and thus all candidates there contested as independents.

Other Relevant Legislation

(a) The Accountability (Ehtesab) Ordinance, 1996

The Ordinance was enacted in mid-November 1996 'to provide for effective measures for prosecution and speedy disposal of cases involving corruption'. The definition of corruption is wide and includes not only improper official favours and the possession of unreasonable wealth, but also 'rigging of elections'. The Ordinance is aimed at official corruption and covers the highest officials (Presidents and Prime Ministers) as well as senior bureaucrats. The sanctions provided include fines, imprisonment, confiscation of property and the power to disqualify convicted persons from candidacy under Article 63 of the Constitution and, in the case of convicted MPs, from sitting.

It establishes the Ehtesab (Accountability) Commission under a Commissioner who must be a judge. The Commissioner can take action on the basis of references from government, complaints from the public or on his own accord. If he finds a *prima facie* case he must submit the matter to the High Court for trial. All cases must be dealt with on a day by day basis and disposed of within 60 days. An amendment to the Ordinance of 17 January 1997 restricts the granting of bail to an official charged under this law and sets bail, if it is granted, to at least twice the sum involved in the charge.

(b) Extraordinary Gazette No. 4-1/97 establishing a Council for Defence and National Security

This direction was given by the President and the Caretaker Government under Articles 90 and 99 of the Constitution. It directed the amendment of the government's Rules of Business and established the Council for Defence and National Security 'to aid and advise the Government'.

Preparations for the Elections

Voter Registration

The electoral register for the 1997 general election was based on that used for the 1993 elections, as updated. The law requires annual revisions. The extension of the universal franchise to the Federally Administered Tribal Areas for the first time by the Caretaker Government required the urgent registration of voters there. This resulted in the registration of 1.6 million voters.

In 1995, the then Government initiated a nationwide re-registration. For this exercise, the Election Commission hired some 200,000 people who went door-to-door drawing up a fresh list of voters. They were preceded by a large publicity campaign explaining the reasons for the registration exercise and urging co-operation. Unfortunately, before the exercise could be completed, an objection to it was lodged in the Supreme Court and a stay obtained against its completion, on the ground that the roll could only be revised and never done afresh. Election Commission officials told us that the re-registration would need another four to six months of work for the exercise to be completed. The matter was still before the court when the 1997 elections were held.

Shortly after the President dismissed the Government and dissolved the National Assembly on 5 November 1996, the Election Commission invited members of the public who were eligible to vote to check that their names were on the rolls, apply to add their names to the roll or to amend any particulars, or lodge objections to the presence on the rolls of any person listed therein. The rolls were displayed at district level at the offices of the Assistant Election Commissioner. Once again, the Election Commission mounted a major publicity exercise in the newspapers, TV and radio urging people to come forward. As the closing date for this exercise was 15 December 1996, the Election Commission kept its offices open for three Fridays so that people could inspect the rolls on their days off from work. At the end of this exercise, the supplementary lists were sent to the Returning Officers for copying and distribution to Presiding Officers. Many voters were unaware of the need to register or to re-register. It was not possible to provide electoral registers for the tribal areas.

We were unable to obtain from the Election Commission figures as to how many people were added or removed from the rolls in the November-December 1996 exercise, but for the 1997 elections the rolls stood at 56,573,956 voters as against 52,326,021 for the 1993 elections.

This inability to provide statistics indicated another fundamental weakness – that there was no consolidated electoral roll either at national or constituency level. This made it almost physically impossible to cross-check across districts or constituencies for multiple registrations, giving political parties cause for further complaint.

Election Commission officials said that during the November-December 1996 exercise, a person had to prove residential eligibility to vote in that particular area and to sign a form swearing that he or she was not registered to vote anywhere else. Given that the elections were only weeks away, there was no time to even post an amended roll and call for objections, let alone attempt cross-checking with other districts or constituencies. We were told that in this case, the Election Commission hoped that the signing of the form itself would be a deterrent.

Voter Education and Training of Officials

The Election Commission conducted an extensive voter education exercise after the date for the elections was announced. Through radio, television, the print media, education posters and brochures, it mounted an aggressive campaign to educate new voters on how to cast their ballot and especially encouraged women to vote. It did so by buying advertising space in newspapers and similar spots on TV and radio. It also produced a video entitled *How to Cast a Vote*, which was shown regularly on TV.

The Human Rights Commission of Pakistan (HRCP) and other NGOs also involved themselves in voter education. The HRCP also made a special effort to encourage women voters, by distributing pamphlets, buying TV and radio advertising time and going from door to door in the Federally Administered Tribal Areas, often at risk to themselves from men hostile

to the idea of giving women the vote. NGOs involved in the enhancement of women's rights were also very active in encouraging women to vote.

The Election Commission also undertook the training of election officials and polling agents and the provision of educational programmes. To facilitate their work, it published several reference manuals and guidebooks for all election officials.

Other Arrangements

There would be 36,451 polling stations for the 1997 general election. Each station would consist of up to four polling booths – each booth in effect a mini polling station, with a ballot box, officials, private area for marking the ballot and so on. Altogether there would be 131,649 booths. Voters would be able to cast their ballot only at the specific polling station to which they were assigned. Ballots would be counted as spoilt if:

- voters did not use the rubber stamp provided;
- the stamp was placed outside the space provided for it;
- more than one space was stamped;
- it was not clear for which candidate the voter had voted.

The number of voters per polling station would be in the range of 1,200 to 1,600. Of the total number of registered voters (56,573,956), 1,547,632 would be non-Muslims (who would vote separately for the 'minorities' candidates).

There would be 6,011 candidates contesting the National and Provincial Assembly elections. Of these, 1,863 (896 of them independents) would contest the National Assembly elections, yielding an average of some eight candidates contesting each National Assembly seat. Nominations closed on 21 December 1996, after which there was a period for objections and some candidates withdrew. The revised list of candidates was published on 9 January 1997.

Voting would be by the first-past-the-post system. Constituencies would vary considerably in size – the largest constituency would have some five times as many electors as the smallest (447,547 compared with 86,301).

SUGGESTION: That the Government of Pakistan may wish to consider the urgent need to hold a census at the earliest opportunity, to enable constituency demarcation to be brought fully up to date.