

STATUS OF PAKISTAN'S ELECTION DISPUTE RESOLUTION  
MECHANISMS

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# ELECTION DISPUTE RESOLUTION

## ANALYSIS OF PAKISTAN'S MECHANISMS PRIOR TO THE 2013 PARLIAMENTARY ELECTIONS

### EXECUTIVE SUMMARY

Pakistan's next parliamentary elections are due in spring 2013. This is the first time that in the country's history that the National Assembly and Provincial Assemblies will complete their constitutional five years term without the military's umbrella.

The Election Commission of Pakistan (ECP) and the electoral process will be under considerable scrutiny as there is widespread public interest in the election process and politics. Pakistan's vibrant print and electronic media is giving extensive coverage to issues related to elections.

These elections are not only supposed to be genuine and credible but should also be perceived by the electorate to be legitimate. A vital part of any election which makes the process credible is the opportunity for contesting candidates and citizens to seek resolution of complaints and disputes related to electoral process. Fairness, transparency and legitimacy of elections largely depend on a country's effective Election Dispute Resolution (EDR) processes.

Pakistan's legal framework does not provide an adequate framework for effective EDR mechanisms in line with international commitments. Existing EDR mechanisms are not very effective. These are notable for weaknesses including excessive delay or little, if any, remedy. Such fundamental weaknesses fall well-outside Pakistan's international commitments. The resolution of complaints and disputes at any stage of elections often go unresolved or are left to uncertain and slow adjudicative resolution.

In recent years modest efforts have been made, including amendments in the electoral laws, to

review and correct weaknesses in the current dispute resolution system. However, these changes have not made much a difference as many elections related cases remained pending in courts.

The solution to provide more effective and fair electoral dispute resolution mechanisms includes, over the long-run, revision of the primary electoral legal framework, and a fundamental shift to administrative first instance adjudication by ECP administered or affiliated processes.

Given the short timeframe leading up to the 2013 elections, the Election Commission of Pakistan (ECP) should take steps to develop written, predetermined procedures and standards for the first instance handling, processing, decision-making, and subsequent appeal of all challenges, complaints and disputes for all categories of disputes and stages of the election cycle with a mechanism for a timely appeal process of the first instance decisions.

The paper studies gaps and deficiencies associated with the submission, intake/receipt, handling, processing and investigation and adjudication of electoral challenges, complaints, and disputes in Pakistan.<sup>1</sup> The paper will also provide an overview and analysis of the current EDR mechanisms in light of international electoral standards, Pakistan's constitutional and international obligations and the recommendations formulated by the European Union Election Observation Mission 2008 (EU EOM 2008).

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<sup>1</sup> This paper uses three specific terms, challenges, complaints and disputes. Each is distinguishable due to the likely review of each requires different juridical theory, however, the terms "complaints" or "disputes" may be used when describing normative concepts throughout the paper.

## INTRODUCTION

The absence of an effective system to resolve election disputes presents a fundamental challenge to genuine elections. Without a system to challenge the validity of results or the actions of election officials, there is increased risk of an outcome which is not representative of the will of the people as well as a threat to stability and reduced trust in the election process.

Pakistan's international commitments require that it has an effective and fair election dispute resolution mechanism. 2(3)(a) of the International Covenant on Civil and Political Rights (ICCPR) which sets out fundamental rights such as the right to vote and be elected at genuine periodic elections,<sup>2</sup> requires Pakistan, as a State Party to the covenant, to ensure an effective remedy for breach of those rights.

In 2008, the European Union Election Observation Mission (EU EOM) and others<sup>3</sup> observed that "the existing [dispute resolution] framework fails to provide an effective mechanism for the remedy of violations of electoral rights" resolution of electoral disputes in past elections.

General elections are due to take place imminently. Unfortunately, virtually no reforms were implemented in the resolutions of electoral disputes since 2008.

While there is no fixed model of an effective election dispute resolution mechanism, any system which meets international standards will display key features. It will be accessible to every individual or political party and ensure the prompt and effective resolution of disputes by an independent and impartial authority.<sup>4</sup>

The right to an effective remedy for violation of rights is also enshrined in the Universal Declaration of Human Rights, Art. 8<sup>5</sup>; ICCPR Art. 2, and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Art. 5.<sup>6</sup>

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<sup>2</sup> ICCPR, Article 25

<sup>3</sup> See also, findings of IFES, Election Tribunal Monitoring Project, IFES (January 2009) including its Annex compiling recommendations by political parties and members of civil society.

<sup>4</sup> See Declaration on Criteria for Free and Fair Elections, paragraph 9, adopted by the Inter-Parliamentary Council, of which Pakistan is a member, in 1994 which reaffirms and builds on the ICCPR.

<sup>5</sup> UDHR Art. 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

<sup>6</sup> ICERD Art. 5 is about equality before the law which besides others include the right to equal treatment before the tribunals and all other organs administering justice; and political rights, in particular the right to

General Comment No. 25<sup>7</sup> of the Human Rights Committee at Paragraph 20 further notes that, "[t]here should be ... access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes". ICCPR, Article 14 states that all persons shall be equal before the courts and tribunals.

ICCPR's General Comment No. 31, Paragraphs 15-17 further states that remedies must be provided expeditiously. A remedy that is granted too late is of little remedial benefit. In order for a remedy to be effective, it is necessary that it be timely. The timeliness of a dispute resolution mechanism in an electoral setting reinforces the fairness and legitimacy of the entire democratic process.

Currently, the system for resolution of election related disputes in Pakistan is rooted partly in law and partly in informal practices developed by the Election Commission of Pakistan (ECP). The legal basis of EDR has several gaps and does not provide for effective resolution of disputes at key stages of the electoral process. Formal dispute resolution mechanisms are contained in the Constitution and the Representation of the People Act (ROPA), 1976. Informal mechanisms are derived from the ECP's practices and are highly informal, often providing no effective remedy<sup>8</sup>. A lack of clear rules defining formal complaints mechanisms for all stages of the election as well as shortcomings in the administrative practice result in uncertainty and ambiguity, as well as confusion for stakeholders.

To be in line with international commitments and practice, an EDR framework must be rooted in law, ideally primary legislation, or Act of parliament, it must provide for an appeal from decisions of the first instance forum. Broadly, EDR mechanisms should have clear demarcation of the levels of authority and jurisdictions between courts and electoral bodies. These mechanisms should be accessible to every individual and political party and be prompt within the timeframe of the election. The process should not be costly. It should be transparent and easy to follow having specified forms and clear deadlines.

participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage. Pakistan ratified ICERD in September 1966.

<sup>7</sup> General Comments are authoritative interpretations of the provisions of human rights treaties provided by the treaty bodies which oversee the treaties' implementation. The Human Rights Committee is the treaty body responsible for the ICCPR.

<sup>8</sup> Where complaint mechanisms derive from ECP practice, no specific protocol and procedure for their resolution exists, or they lack a formal forum for consistent, predictable handling and disposition procedures are not publicly available.

It is fundamental that a mechanism for prompt and transparent disposition of pre-poll and polling day complaints include predetermined regulations and procedures. These should provide not only the composition of the body, but also the scope of the body's authority, standards for determining when further investigation must be conducted, and protocol for conducting further investigation.<sup>9</sup>

## 1. ELECTORAL DISPUTE RESOLUTION IN PAKISTAN'S LEGAL FRAMEWORK

Pakistan's current electoral laws fail to provide a sound legal basis for effective EDR in key elements of the electoral process including the campaign, voter registration and boundary delimitation. They do cover some phases of the process. They allow for complaints against candidate nomination papers. Any person can challenge the eligibility of candidates to run for office. The Returning Officers (Ros) received and review nomination papers before being rejected or accepted. An acceptance or rejection may be challenged by filing an appeal to an Appellate Tribunal. An Appellate Tribunal consists of two or three judges of the high court, nominated by the Election Commission with approval of the President of Pakistan. Appeal against decisions of the Appellate Tribunals can be filed in the Supreme Court.

At the post-result stage, the constitution<sup>10</sup> and ROPA provide that election results can be challenged only in one adjudicatory entity, an Election Tribunal. An Election Tribunal consists of a judge of the high court or legally can also of a person who qualifies to be a judge of the high court. The procedure for challenging election results via this avenue is set

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<sup>9</sup> A separate, independent constitutional election management body, like the ECP, is intended to be politically separated and sufficiently shielded from outside interference. Due to this constitutional placement, the ECP likely possesses significant authority to issue regulations implementing the primary legislation, including adjudicating issues that are within its expertise. The authority of the ECP to act independently, however, is hampered by interpretation of the legal framework.

Officials within ECP and other Pakistani legal observers have historically interpreted the ROPA, §107 as limiting critical modern regulatory authority. ROPA §107 allows the promulgation of rules however "with the approval of the president." This conditionality acts as a limitation ECP authority and, perhaps most importantly, its independence, to promulgate permanent, predetermined regulations and rules that have the binding effect of law. In practicality, this means that to administer and conduct elections ECP must exercise their expertise.

Such a limitation is an on-going and serious weakness especially related to election dispute resolution. Predetermined, written procedures for the resolution of complaints and disputes are fundamental to effective and fair remedy. In this context, therefore it is recommended that §ROPA 107 to revised to eliminate the phrase "with the approval of the president."

<sup>10</sup> Article 225 of the Constitution of Pakistan states that "no election to a House or a Provincial Assembly shall be called in question except by an election petition presented to such tribunal and in such manner as may be determined by Act of the Parliament".

down by the Representation of the People Act<sup>11</sup> and the Civil Procedure Code. Election Tribunals are further provided for in the Representation of the People Act with substantial connection to the ECP.<sup>12</sup>

The 2008 EUEOM noted weaknesses and deficiencies in resolving challenges to election results by the constitutionally mandated authority, Election Tribunals.

Numerous stakeholders report that resolution of post-election challenges brought before Election Tribunals are wrought with delay, rendering formal EDR mechanisms ineffective. For instance, a 2008 study of Election Tribunals found that the mechanisms for resolving election contests by Election Tribunals are "*marked by substantial delays at all levels ... [and] often provide uneven adjudicatory processes and practices to parties, and are often marked by chronic delay.*"<sup>13</sup>

The study further notes that the Provincial High Courts' administration of Election Tribunals and the use of sitting High Court judges, while each is performing their full-time high court duties – and the legal mandated use of the unmodified Civil Procedure Code – leads to substantial delays in trial proceeding that undermine any opportunity to effectively resolve a dispute in the statutorily prescribed period of 4 months (120 days).<sup>14</sup>

During the period between polling day and the announcement of official results, the law<sup>15</sup> provides that the ECP may receive a request for recount. The law also allows for a complaint, or application, to be filed during this period to declare the poll void on account of grave illegalities or violation of the provisions of the Act.

The right to file applications and request a recount is restricted to candidates and their polling agents only. An application to declare a poll void under section 103AA of ROPA requires the ECP to hold a summary proceeding to determine whether "grave illegalities" and "violation of the provisions" of the Act occurred during the election.<sup>16</sup> Once a

<sup>11</sup> Sections 54 to 77 of the ROPA and ECP notification of March 16, 1985

<sup>12</sup> See generally ROPA §§ 52-76.

<sup>13</sup> IFES, Election Tribunal Monitoring Project, Final Report, Jan. 2009.

<sup>14</sup> Of the 265 election petitions heard by Election Tribunals, only 12 were disposed of six months after the election. See IFES Report 2009.

<sup>15</sup> Section 38 (5) (b) of ROPA, 1976

<sup>16</sup> The Commission may order re-polling under Section 27 of the Representation of the People Act, 1976 (ROPA). Any person aggrieved by the count of votes may ask the Election Commission for recount under section 39(6) (b). Complaints/Applications for declaring the poll void, on account of grave illegalities or violation of the provisions of ROPA, can be filed before the ECP under section 103AA.

determination by the Commission is made the applicant may appeal this determination to the Supreme Court.

In 2008 the European Union Election Observation Mission (EUEOM) Report recommended that, “the category of those permitted to file election petitions should be expanded, to include political parties, civil society organisations and voters.” Fundamentally, the EUEOM raises serious concerns about the availability of an effective remedy providing first instance review for stakeholders to challenge the ECP’s decisions or actions (or other government agency decisions and actions related to elections).

There are no publically notified regulations or procedures to provide guidance for applicants to challenge ECP actions regarding voter registration, delimitation of constituencies, or establishment of polling stations. The electoral laws should provide legal basis for these procedures.

In addition to the limited number of express mechanisms provided in the electoral law, a provision in the constitution<sup>17</sup> provides for a challenge by “any aggrieved party” to alleged violations of their fundamental rights. This is done with what is commonly called a *writ petition*.

A writ petition is an important constitutional remedy designed to protect citizens’ fundamental rights. However, the filing of a writ petition is legally nuanced and invokes either the Supreme Court<sup>18</sup> or a High Court’s<sup>19</sup> jurisdiction on a legal matter. The citizens, candidates or other seeking the Supreme Court or a High Court’s intervention must show that court has authority to hear such a matter in the first place and that remedy for that dispute may not be found somewhere else.

The lack of adequate provision for effective remedy in primary legislation results in over-reliance on the constitutional writ petition which cannot provide all the necessary elements for effective remedy in an election disputes such as timeliness. Filing a writ petition is also an expensive process.

Resources of these higher courts will also be stretched unnecessarily thin when other adjudicatory bodies could not in theory deal with a large number of cases. A clear hierarchical appellate procedure to handle election-related complaints is

critical to ensuring impartiality and effectiveness.<sup>20</sup> An application to the Supreme Court using the constitutional provision removes the possibility of appeal to a higher court.

In the absence of other forums, writ petitions provide effective remedy, stakeholders are more likely turn to the writ petition as the only method of seeking redress for certain electoral rights.

Mechanisms for appeal should ensure that the appeal of a first instance decision is not a re-trial of the facts, but reviews the first instance adjudicatory decision-makers to ensure, among other things, that the law was applied correctly and the decision was not made with bias or undue influence.

## 2. INFORMAL DISPUTE RESOLUTION MECHANISMS

Since 2008, in light of various domestic and international reports and recommendations for improvement in dispute resolution processes, the ECP conducted a number of modest activities and steps to improve dispute resolution mechanisms at various stages of the forthcoming elections

Nevertheless, while the ECP has reviewed these deficiencies, few, if any, substantial changes have been implemented to fully meet international commitments. Therefore, weakness persists ahead of the 2013 parliamentary elections.

In 2010, as part of the ECP’s Strategic Plan 2010-2014, the ECP developed and publicly set forth numerous goals related to electoral administration, including EDR. The plan included timelines for implementation.<sup>21</sup>

The ECP Strategic Plan admits that the ECP receives “the major bulk of complaints” during the pre-poll period and “no exact statistics” were collected or are available for complaints received at different entry points by ECP. However, the ECP placed blame for this weakness on the “flawed system of complaint resolution.”<sup>22</sup>

Thus, the ECP recognized and recommended improvements to the pre-poll complaint mechanisms. Included in the ECP December 2010 recommendation was the establishment of District

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<sup>17</sup> Article 199

<sup>18</sup> Pakistan Constitution, Art. 184(3).

<sup>19</sup> Pakistan Constitution, Art. 199.

<sup>20</sup> Any primary legislation should clarify which decisions are final and under what conditions.

<sup>21</sup> See Five Year Strategic Plan 2010-2014, Election Commission of Pakistan, May 2010.

<sup>22</sup> See ECP Strategic Plan at 66.

Enquiry Committees to receive, inquire and dispose of pre-poll complaints. Two years later, the ECP attempted to implement this program through the Monitoring Teams, which are discussed in detail below. This falls short of creating an effective remedy because there are no predetermined protocols or standards for measuring the effectiveness of the monitoring teams' work. In addition, the ECP reported that the Commission was taking a number of steps toward the improvement of software database for tracking complaints. But without notifying the public in a transparent way, merely tracking these complaints without mechanisms to hear and resolve them falls short of good practice.

In June 2012, the Supreme Court of Pakistan declared<sup>23</sup> that the ECP must implement arrangements to ensure that the election is conducted "honestly, justly, fairly." The Court's broad review and directive implicated matters related to the resolution of challenges to the ECP's actions and decisions as well as resolution of electoral disputes. The Court broadly determined that the ECP is empowered to check not just illegal action relating to the election,<sup>24</sup> but is also empowered to take pre-emptive measures to ensure that the spirit of democracy and "fairness, justness and honesty" of elections is fully safeguarded. In addition, the Court reviewed the Election Tribunal's ability to resolve challenges to election results. The Court instructed the ECP to take "corrective measures."

In November 2012, the ECP reported that in response to the Supreme Court's directions,<sup>25</sup> it developed a pilot field project,<sup>26</sup> called Monitoring Teams. Monitoring Teams were tested during by-elections in July 2012. These teams were developed to monitor the election process, including campaign expenditures<sup>27</sup>, and observance of Code of Conduct

by contesting candidates, political parties, and to report to the Provincial Election Commissioner concerned on daily basis. Public notifications create each by-election monitoring team; however, no regulations or procedures provide for a monitoring team's authority generally. This is also the case with activities or standards for evaluating whether electoral laws or the code of conduct were violated, or precisely under which protocol monitoring teams would perform their work.<sup>28</sup> Thus, if the monitoring teams reviewed complaints related to a by-election, the remedy provided was non-existent, unknown or weak, at best.<sup>29</sup>

The ECP has also developed various informal dispute handling mechanisms. Details are contained in the 2008 ECP Complaints Handbook.<sup>30</sup>

The Handbook<sup>31</sup> states that the ECP receives complaints related to the campaign "at any point in the organizational structure" for alleged violations of the law during the pre-poll period.<sup>32</sup> Any person can file this type of pre-poll complaint if they believe that an electoral offence has been committed. Complaints can be filed in many different formats including letters, faxes, phone calls, emails, and a complaint form made available by the ECP.<sup>33</sup> While the ECP states that complaints are assessed and recommendations are made as to its disposition,

<sup>28</sup> See Comment related to ECP Monitoring Teams by Free and Fair Election Network, available at [http://www.fafen.org/site/v5/detail-gross\\_violations\\_of\\_ecp%E2%80%99s\\_new\\_code\\_of\\_conduct\\_marks\\_na-151\\_by-election!856](http://www.fafen.org/site/v5/detail-gross_violations_of_ecp%E2%80%99s_new_code_of_conduct_marks_na-151_by-election!856) (questioning the level of training of monitoring teams).

<sup>29</sup> The ECP reports that these monitoring teams have been used consistently in by-elections since mid-2012. Monitoring teams were composed of two election officials and one professional cameraman. Anecdotally, monitoring teams only report alleged violations to the Provincial Election Commission. Moreover, reports indicate that no provincial commissioner took punitive action for alleged violations. Stakeholders report that no monitoring team submitted reports related to its activities to the ECP nor did the ECP compile a report about the monitoring teams' activities. One possible exception was when Ms. Wheeda Shah reportedly slapped two election officials, and the ECP, under pressure from the Supreme Court, declared the poll results null and void, but also disqualified Ms. Shah for two years from contesting polls. See *The Nation*, CEC Disqualifies Wheeda Shah 4 Nov 2012, available at, <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/islamabad/04-Nov-2012/cec-disqualifies-waheeda-shah-for-two-years>

<sup>30</sup> See also, ECP Election Dispute Resolution Pamphlet 2008 (March 2008) (ECP produced this pamphlet for the media to improve reporting on the topic).

<sup>31</sup> The Complaints Handbook 2008 was developed with the assistance of IFES and has no binding effect of law, but provides the only detailed, public description for the handling of complaints and disputes outside of the Representation of the People Act.

<sup>32</sup> In January 2008, ECP implemented a phone call in program to accept complaints.

<sup>33</sup> No public statistics exist that tracked the number of pre-poll and polling day complaints or the number of those that were resolved. One expert reported that ECP received over 200 complaints in leading up to the February 2008 election, but the disposition of those complaints was unknown. See ECP Report on Dispute Resolution (Nov. 2009).

<sup>23</sup> See *Workers Party v. Federation of Pakistan* (PLD 2012 SC 87).

<sup>24</sup> See *Workers Party v. Federation* (ECP is empowered to check illegal actions including (violating the limits set for campaign finance, etc.) or corrupt practices (bribery, etc.), but is also empowered to review all election activities, including rallies and marches, use of loud speakers).

<sup>25</sup> See, e.g., No. F.8(15)/2012-Cord. (providing notification pursuant to the Supreme Court's order to appoint the Monitoring Team, to monitor the process of by-election).

<sup>26</sup> ECP's monitoring teams were first used in June-July 2012 in by-polls for NA-151 Multan IV. During the same time period the ECP announced a new code of conduct. See ECP, Press Release, 28 June 2012, available at <http://www.ecp.gov.pk/ViewPressReleaseNotific.aspx?ID=1631&TypeID=1>, (making this announcement).

<sup>27</sup> While there are fairly specific provisions in the primary legislation providing for political finance, no regulations or procedures have been promulgated to implement the primary legislation and fill in the gaps and ambiguities.

standards or protocols are not publicly available about the procedures used to make such determinations.

Furthermore, no appeal process for these determinations has been made available to the public, notwithstanding the existing constitutional remedy.

On polling day, the Handbook states that complaints may be filed with election officials or the matter may be reported to the concerned police station to register a case against the alleged violators of the penal code.<sup>34</sup> Penal code violations include attacks on or capturing the polling station or polling booth; causes or attempts to cause any injury or loss of public property at the polling station; exhibits or uses weapons or makes aerial firing; disturbs the polling proceeding or causes to harass the electors to leave the polling station without voting forcibly; snatches or attempts to snatch the ballot boxes or ballot papers etc; kidnaps or attempts to kidnap the Presiding Officer; or any act at the polling station which is punishable under the Penal Code. These are criminal offences and are heard and treated as such by regular courts under relevant sections of the penal code. No official procedure exists for the resolution of these complaints.

The protocol about cooperation between the ECP and law enforcement officials on disputes and complaints related to electoral activities is also not formalised. Again there is no available mechanism for the public to appeal these decisions.

The ECP has taken few, if any, other practical steps to clarify or resolve weakness in other areas. While several provisions for revision of the electoral law have been discussed by the ECP and parliament, no proposal currently clarifies the forums, forum authority, or appeals mechanisms at all phases of the election.

### 3. OPTIONS FOR IMPROVEMENT AND REFORM

The development of EDR mechanisms which fully meet Pakistan's international commitments should clearly define the following:

- Type of first instance forum: judicial or administrative;
- Procedures for submission and handling;

- Standards for conduct of further investigation as well as protocol for inter-agency cooperation;
- Adjudicatory procedures with clear deadlines for each type of submission' ;
- Who bears the burden of proof;
- Authority of the forum to prescribe remedy or penalty including financial, remedial, corrective, punitive or criminal;
- Forum or forums for appeal<sup>35</sup>.

#### *a) Developing an effective system for challenges to administrative decisions or actions taken by the ECP*

In 2008, EUEOM observed that “a clear structure should be established so that complaints are first filed administratively to the ECP and upon exhaustion or dissatisfaction; complaints may then appeal to the courts.” The 2008 EU Report further stated that, “Protocols should be developed with other state agencies to clarify roles and responsibilities in the complaints process, particularly in regards to investigations”.

The EUEOM further noted that: “For complaints relating to election results, the ECP should clarify re-counts and re-polls wherever necessary in order to speedily address alleged problems in an efficient manner (...). The ECP should clarify in advance grounds for re-counting and re-polling.”

In order to develop a complaint and dispute resolution mechanism during the pre-poll period and on polling day that provides effective and fair remedy according to Pakistan's international obligations, there could be a complaints process during the pre-poll and polling day phases of the election provided by ECP's proposed Monitoring Teams or District Complaint Committees.

It would not be enough that district bodies to resolve complaints merely exist. Each district body resolving first instance complaints would have to operate within an administrative framework that is predetermined and has binding effect of law through regulation and procedures. The regulation and procedure must provide a protocol for the submission and handling of complaints. A regulation must specify the entry points where complaints may be lodged and it is preferable in international practice to afford convenient and accessible access to those seeking to submit a complaint. Such a

<sup>34</sup> The standards of review for investigation and adjudication of these matters is unknown.

<sup>35</sup> amount of deference given by an appellate forum in reviewing a decision of a lower body

regulation will include provisions for the tracking of these complaints, specific requirements of the form and content of a complaint, and the specificity of evidence required. Such a procedure must also be disseminated with sufficient time to allow for public education.<sup>36</sup>

Moreover, the regulation and procedures must identify the decision-maker(s) and the limits of remedial powers; the regulation should specify the body's interaction with law enforcement<sup>37</sup> and other agencies in requesting assistance, and protocol for obtaining information about alleged electoral crimes and other violations of the penal code, which are possessed or discovered by the district bodies.<sup>38</sup> In addition, the regulation and procedure must provide a specific forum or forums for the appeal of any and all decisions of the district body either to the Provincial Election Commission, the ECP, or to a court.

### *b) Election Tribunals: Improving the Resolution of Election Contests*

The weight of anecdotal and empirical evidence indicates that Election Tribunals are ineffective and fall far short of Pakistan's international commitments. This combination of evidence and procedural delay due to trial procedure seriously undermine the legitimacy of election results.

Pakistan's courts are overburdened and cases which run to years are not uncommon. This in itself presents a significant challenge to meeting international commitments as a fully functioning judicial system is a pre-requisite for ensuring effective and fair EDR. Many of Pakistan's practitioners of civil litigation report that courts have the authority to make efforts in the interest of justice to speed up civil litigation—whether such action requires political/judicial will or training via workshop and seminars on international practices for resolving election contests may require consideration. Such judicial action could be helpful ahead of the 2013 elections as part of efforts to ensure effective and fair remedy in election contests.

The 2008 EUEOM recommended that efforts should be made to improve the timeliness in order to provide the possibility of effective remedy. The EUEOM Report specifically stated: *“A review should be made of the current timetable, with consideration given to reducing the timeframes involved for petitions, in order to avoid returned candidates losing their seats after a prolonged period in office. The timetable for election petitions challenging election results should be strictly adhered to. Court rules should be amended accordingly, and tribunals and courts should be resourced appropriately.”*

In October 2009, parliament amended the electoral law<sup>39</sup> to prevent parties involved in cases before Election Tribunals from seeking “adjournments” or requests for more time merely to prepare their case. The parliament believed that banning adjournments would resolve the historic delays in the disposition of the election contests. However, cases remain pending from 2008 even after the amendment, well beyond the statutorily mandated four (4) months for disposition. A 2009 IFES report expressed concern that the Civil Procedure Code's protocol and the culture of litigation practice before the courts create procedural circumstances that will never enable an Election Tribunal to dispose of an election contest within four months.<sup>40</sup> Court practitioners report that inherent inefficiencies in trial practice persist.

It is recommended that the ECP continues to act independently by taking steps to implement administrative and policy reforms through the engagement of and cooperation with the judiciary. The ECP may issue guidance for modifying trial practice for Election Tribunals before High Courts.<sup>41</sup>

It is recommended that Election Tribunals use their authority to streamline the trial practice to resolve disputes within the statutory timeframe of four months<sup>42</sup>. Such discretionary judicial action should be taken until such time that express revision of the electoral law can provide for modification of the civil procedure code<sup>43</sup>. This will ensure that court delays do not undermine effective remedy within an

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<sup>36</sup> See generally ICCPR Comment 25.

<sup>37</sup> ROPA provides for the authority of the police to arrest alleged violators of the penal code and electoral law, but EDR principles require an articulation through formal predetermined processes to clarify the ambiguity and under what circumstances and conditions will law enforcement cooperate with the ECP's agents.

<sup>38</sup> It is a critical yet underappreciated aspect of electoral dispute resolution processes that distinctions be drawn between electoral violations and illegal act/penal code violations (categories of complaints described above) due to level of due process required under both Pakistan's Constitution and international law when violations are criminal in nature.

<sup>39</sup> [http://www.na.gov.pk/uploads/documents/1302131269\\_591.pdf](http://www.na.gov.pk/uploads/documents/1302131269_591.pdf)

<sup>40</sup> See IFES Report at 58.

<sup>41</sup> Such a notification has been issued by the ECP in the past.

<sup>42</sup> Section 67 (1A) ROPA, 1976

<sup>43</sup> Primary legislation modifying or effecting the application of the Civil Procedure Code is not without precedent in Pakistan. See, e.g., Fiscal Responsibility and Debt Limitation Act, Act. VI (2005) (Section 10 prescribes the submission of statements by government officials in civil proceeding against the government that would otherwise require more extensive procedural machinations under the Code of Civil Procedure).

electoral setting. Any changes to the primary legislation in addition to modifications to trial practice for resolving election contests should also include specific appellate procedures, including a standard for reviewing decision of Election Tribunals.

The expansion of jurisdiction and authority (enshrined in Constitution Art. 225, "Election Tribunal") for quick disposals of election petitions would require either a constitutional amendment or a broader, more novel, interpretation of both primary legislation and the ECP's authority to expand the Election Tribunals' authority beyond its current, specific role.

#### 4. CONCLUSION:

##### THE CREATION OF AN ADJUDICATORY BODY WITHIN THE ECP WITH BROAD JURISDICTION

It is recommended that<sup>44</sup>, the ECP uses its authority to lay down procedures for receipt and processing of complaints at various stages of the election cycle. The Election Commission should also improve the existing procedures for handling of election petitions including widening the category of those entitled to file petitions<sup>45</sup>.

It is further recommended that an adjudicatory forum is created and empowered to hear direct first instance challenges to the ECP and other government decisions and actions related to electoral activities at all stages of the electoral process. Such a first instance forum could create an alternative, effective remedy for the first instance review with a possibility to appeal to a higher judicial authority for review.

Such an undertaking would require that a combination of primary legislation and administrative regulations create either a local or centralized forum. Such a forum should/could be authorized to develop procedures that provide for the receipt and handling of complaints. In this regard, the ECP should also therefore continue with renewed energy its dialogue with parliament on the revision of electoral laws with a view to ensuring a sound legal basis for effective and fair EDR mechanisms at any stage of the process.

In addition, such a forum would be authorized to conduct inquiries related to the challenges, complaints and disputes – upon a predetermined standard – and make decisions regarding the validity of claims by dismissing or issuing a remedy. The forum may be authorized to hear and decide criminal cases; however, if such authority were not granted to this body, primary legislation or administrative regulations must establish predetermined procedures for the interaction between this electoral adjudicatory body and law enforcement and prosecutorial authorities.

An effective and fair dispute resolution process is made up of written, predetermined protocol and procedures that s implement a process that is transparent, impartial, and timely, providing remedies based on commonly adopted standards and processes. Whether steps taken in the coming months will create effective and fair remedy in compliance with Pakistan's international commitments and conform to international practice will depend on the ability of the ECP to implement a series of protocols that are standardized and evenly applied during the pre-poll phase.

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<sup>44</sup> ECP's notification for trial of election petitions issued on March 16, 1985

<sup>45</sup> Recommendation No. 45 EUEOM Report 2008

# ELECTION DISPUTE RESOLUTION IN PAKISTAN

CATEGORIES OF CHALLENGES, COMPLAINTS AND DISPUTES ARISING IN ELECTIONS	CURRENT STATUS IN PAKISTAN	RECOMMENDATIONS
APPEALS AGAINST ADMINISTRATIVE DECISIONS TAKEN BY THE ECP	→ NO LEGALLY BINDING PROTOCOL OR PROCESS IS PROVIDED FOR SUBJECT APPEAL, EXCEPT FOR APPEALS OF DECISIONS RELATED TO CANDIDATE NOMINATION.	CREATION OF A FIRST INSTANCE ELECTION ADJUDICATORY BODY WITH BROAD JURISDICTION (UNDER THE ECP'S AUTHORITY OR INDEPENDENT) TO ADJUDICATE ALL CATEGORIES OF ELECTORAL DISPUTES IN THE FIRST INSTANCE WITH THE OPTION OF JUDICIAL APPEAL. THIS BODY MUST BE RULED BY AN ADMINISTRATIVE FRAMEWORK THAT REGULATES HOW IT WILL RECEIVE, HEAR, INVESTIGATE AND RESOLVE COMPLAINTS.
APPEALS AGAINST VIOLATIONS OF THE RIGHT TO VOTE OR STAND AS A CANDIDATE	→ THE WRIT PETITION IS THE ONLY METHOD TO SEEK REDRESS AS THERE IS NO ADJUDICATORY FORUM EMPOWERED TO HEAR DIRECT FIRST INSTANCE CHALLENGES TO THE ECP OR OTHER GOVERNMENT DECISIONS.	
COMPLAINTS AGAINST VIOLATIONS DURING ELECTION CAMPAIGNS	→ THERE IS NO ADMINISTRATIVE FRAMEWORK FOR THE DISTRICT BODIES (DB) THAT WILL RESOLVE FIRST INSTANCE COMPLAINTS.	
COMPLAINTS AGAINST VIOLATIONS ON POLLING DAY INCLUDING PENAL CODE VIOLATIONS	→ COMPLAINTS ARE FILED WITH ELECTION OFFICIALS OR THE MATTER IS REPORTED TO THE POLICE FOR THE REGISTRATION OF A CASE. HOWEVER, THERE IS NO KNOWN PROTOCOL FOR RESOLUTION OF THESE COMPLAINTS OR FOR COOPERATION WITH THE ECP AND LAW ENFORCEMENT OFFICIALS.	
ELECTION PETITIONS	→ ELECTION TRIBUNALS (ET) ARE CONSTITUTIONALLY MANDATED TO RESOLVE ELECTION CONTESTS, BUT THEY ARE INEFFECTIVE AND KEEP CASES PENDING FOR YEARS.	THE ECP SHOULD TAKE STEPS TO IMPLEMENT ADMINISTRATIVE REFORMS TO IMPROVE THE PRACTICE OF ET.

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