

IFES Pakistan Post-Election Community-Based Mediation and Adjudication Program:

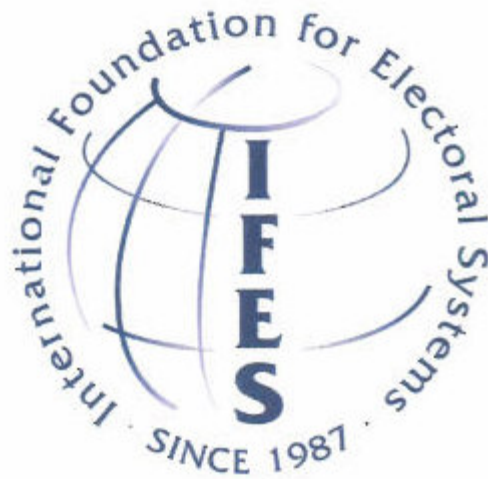
Election Tribunal Monitoring Project Phases One and Two
February – November 2008

DRL Award No. S-LMAQM-07-GR-215



EXECUTIVE SUMMARY BOOKLET TO THE FINAL REPORT





Building the
Foundation of Democracy

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Peter D. Lepsch, Esq.

*Contributors:
Grant Kippen
Ronan McDermott*

This Final Report is the result of a first-of-its-kind study conducted by the International Foundation for Electoral Systems (IFES) to research Pakistan’s post-election adjudicatory mechanisms, known as Election Tribunals, for resolving challenges to election results. The project was funded primarily by the United States Department of State, Bureau of Democracy, Human Rights and Labor (DRL) and in part by the United States Agency for International Development (USAID), which enabled greater legal analysis and enhanced data review during Phase One (February to June 2008). The overall project funding also provided the opportunity for further interaction and capacity building with the Election Commission of Pakistan (ECP), as it examines options for the reform of its election dispute resolution mechanisms in addition to building the Commission’s capacity to implement administrative remedies to increase effectiveness and transparency of electoral dispute mechanisms.

The views expressed in this Final Report are those of IFES, and are not necessarily those of U.S. State Department, USAID or the U.S. Government.

The project was led by IFES consultant Peter D. Lepsch, Esq. with the assistance of Grant Kippen, Complaint Adjudication Advisor, and supported by IFES Pakistan including former Country Director, Dr. Staffan Darnolf; current Country Director Peter Erben; Deputy Country Director, Katherine S. Vittum; Logistics Coordinators Aysha Shujaat and Murtaza Noonari; financial staff Ferhan Frederick and Sunil Moses; administrative staff Muhammad Irfan Latif; and Research Assistant, Zafar Ahmad Malik. Six Pakistani attorneys served as Election Tribunal monitors for the project: Sohail Ahmed Ansari, Lala Hassan Pathan, Iqbal Ahmad Khan, Syed Ghufuran Ullah Shah, Asif “Ali” Raza Mir, and Hafiz Mohammad Saleem. Ronan McDermott with IFES Pakistan developed the database that was crucial to the production of the findings and analysis for this project.

IFES is grateful for the support of DRL and USAID as well as for the frank and invaluable discussions it had with numerous stakeholders. Special thanks are extended to all officials at the ECP, the Provincial Election Commissions (PECs), and the four provincial High Courts and their respective Chief Justices for their generous assistance in providing the information that makes this report possible. In addition, many thanks are also extended to all candidates, former candidates, lawyers, retired judges, and members of civil society organizations who agreed to be interviewed in preparation for this study as well as provided written and oral comments and/or recommendations for reform.

—January 2009

The International Foundation for Electoral Systems (IFES) is the world’s premiere election assistance organization, providing countries with technical advice and tools to run democratic elections. IFES is an international, nonpartisan democracy development organization that works to give people a voice in the way they are governed. Since its founding in 1987, IFES has worked in more than 100 countries.

SUMMARY OF THE FINDINGS AND RECOMMENDATIONS OF THE FINAL REPORT OF THE IFES ELECTION TRIBUNAL MONITORING PROJECT

FEBRUARY TO NOVEMBER 2008

The Purpose of this Study

The objective of the project was to study and measure Pakistan's post election dispute resolution mechanisms, known as Election Tribunals. The project's design was grounded on two critical international standards: The right to an effective remedy, and the right to a fair and public hearing. All adjudicatory remedies, especially electoral remedies, must be effective and they must be public and fair in order to meet these standards. Without these basic elements, public confidence in election processes and election results will be diminished.

Despite the generally positive perception of the February 2008 elections, deficiencies continue to linger. As the final report of the 2008 European Union Observation Mission noted, "overall [electoral] process fell short of a number of international standards for genuine democratic elections." One of the processes that failed to meet international standards was the formal adjudication of challenges related to disputed election results, referred to in the law as Election Tribunals. Rather than offering effective and timely redress Election Tribunals were perceived to be lengthy and often subject to procedural delays—some organic and others contrived by participants in the process—often lasting well beyond the statutorily mandated period for resolution.

The Study's Findings

The project's findings indicate that Pakistan's Election Tribunal mechanisms are marked by substantial delays at all levels. No one administrative protocol, governmental entity, or group is solely responsible but each contributes a role to the deficiencies; all of which inhibit the ability of Election Tribunals to serve as an effective remedy to resolving challenges under the currently existing legal scheme. As currently implemented, Election Tribunals often provide uneven adjudicatory processes and practices to parties, and are often marked by chronic delay.

The causes of these delays range from the large number of ECP officials who are responsible for reviewing, approving, and forwarding petitions to the Tribunals, to the excessive numbers and competing caseloads of judges and, also the substantial administrative protocols in place at the court management level. Moreover, the Election Tribunal process would appear to offer a unique insight into the broader challenges facing Pakistan's justice system generally, and much of the discussion around Election Tribunals could help to inform the debate on those larger systemic issues. Highlights of the project's findings include:

- Based on empirical evidence and observations by IFES, over 90-percent of the Election Petitions filed were not resolved within the statutorily prescribed timeframe of four months. In fact, only four election petitions were completed within the statutory prescribed timeframe for resolution;

- Consistent with anecdotal perceptions, considerable delays in the Election Tribunal process resulted from current the current trial procedure rules and traditional trial practice;
- Notice requirements and customary adjournment practice currently function as built-in delay mechanisms, which is exacerbated by the potential for corruption and the use of these procedures as dilatory tactics;
- The Election Tribunal process as administered by ECP and Pakistan’s judiciary illustrates broad and fundamental challenges to the efficient and effective functioning and professionalism of governmental agents and the justice sector, including the potential influence of corruption and politics;
- The lack of robust day-to-day scheduling, as an indicia of national prioritization of Election Tribunal hearings, impairs candidates’ due process rights and their right to timely redress, which is critical to effective and legitimate election dispute resolution processes; and
- The magnitude of these delays seriously impacts the credibility of the ECP and raises questions regarding the legitimacy of the election results generally.

International Standards and Guiding Principles for Election Adjudication

This Final Report endeavored to place post-election adjudicatory processes in the context of international standards. Two specific international standards are relevant and essential to providing solid electoral dispute resolution mechanisms: The right to an effective remedy¹ and the right to a fair and public hearing².

These standards arise not only from nation-state practice but these standards arise from international commitments made by nearly all the world’s nation-states. Moreover, these standards derive from international instruments to which the Islamic Republic of Pakistan has made known either its agreement in principle or its binding commitment. In short, these international commitments provide for the right to have one’s challenge to elections results heard publicly and expeditiously by an impartial tribunal including equal access to judicial proceedings and equality of treatment. If a remedy falls short of these essential elements it is deficient.

Furthermore, these two standards are fundamental to dispute adjudication because each directly relates to public confidence in an electoral management body and election results and in turn the legitimacy of a representative government. A fair and public hearing must be expeditious but also impartial, providing for equal access and equal treatment to similarly situated parties. The right to a fair and public hearing, coupled with the right to an effective remedy, ensures an adequate means of redress for the violation of an individual’s rights. Thus, it is not surprising that these two well-known international standards are guided by a number of fundamental principles that inform effective electoral dispute resolution mechanisms; all

¹ Article 8 of the Universal Declaration of Human Rights (UDHR), Article 2 of the International Covenant on Civil and Political Rights (ICCPR), and Article 5 of Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

² Article 10 of the UDHR and Article 14 of the ICCPR

proposals for reform should reinforce not only these international standards but these guiding principles. These principles include:

- Independence and impartiality in the establishment of Election Tribunal
- Accountability and transparency
- Integrity and professionalism

Therefore, dispute resolution mechanisms should be crafted to adhere to international standards and their accompanying principles to ensure effective, timely, and fair dispute remedies. These guiding principles inform stakeholders and decision-makers that procedural mechanisms are more than just timely and public on their face. These mechanisms must be independent, impartial, accountable, transparent, and professional.

In short, independent and impartial adjudicatory mechanisms reinforce a nation's commitment and fulfill international obligations of effective, fair and timely remedy to post-election disputes. Transparent dispute resolution mechanisms further build confidence in the electoral process and legitimacy of the election results.

Moreover, all participants involved in dispute resolution processes should strive to ensure that the integrity and professionalism of the process is protected. In this context, administrative officials, courts, judges and lawyers must strive collectively to improve the integrity and professionalism of the process through better training, and ensure that the process follows not only the letter of the law but also the spirit. Finally, adjudicatory processes for challenges to election results must also provide procedural mechanisms that are timely and public.

Guidance and Suggestions for Pakistani Stakeholders and Decision-Makers

The study finds that current administrative processing does not provide effective remedy for resolution of election disputes. It would appear that the administrative processing of the Election Tribunal creates an atmosphere of soft expectations, potential corruption and apathy that makes it unlikely that the tribunal proceedings are providing equal treatment to Petitioners, thus denying a fair and effective remedy under international commitments and standards. Under the current law IFES suggests and recommends a number of steps and changes to administrative protocols that do not require changes to the statute:

1. Reduce the number of individuals administratively processing Election Petitions
2. Streamline all file channel mechanisms and processes to ensure that all Election Petitions receive identical treatment
3. Remove or harmonize and streamline the use of the PEC in the referral of the Election Petition to the Election Tribunal
4. Engage the judiciary and stakeholders formally as well as devise and implement administrative protocols that provide for the equal treatment of Election Petitions
5. Engage the judiciary formally as well as devise and agree to prioritization plan for effectively and fairly resolving disputes within the statutory timeframe

Furthermore, while IFES could not substantiate the numerous allegations made about the Election Tribunal process the frequency and numbers of diverse sources would suggest the

possibility of such illegal acts taking place within Pakistan's courts. In order to address these allegations IFES suggests that the ECP engage all stakeholders, including the Pakistan judiciary, to solicit input and study when and under what circumstances corruption occurs. Once this input has been received the focus should shift to designing and implementing an action plan to elevate its effectiveness, timeliness and fairness for resolving election disputes.

Moreover, IFES suggests reviewing trial practice procedure to ensure that Pakistan is meeting its international obligations of providing fair, timely, and effective hearings for resolving disputes to democratic elections. Specifically, IFES suggests that judges presiding over future Election Tribunals rigorously use both Code of Civil Procedure, 1908 (commonly referred to as the CPC) rules and their inherent authority to reduce the influence of nonessential parties on the process and improve the efficiency of the service of notices to all respondents. IFES also suggests that a multi-agency and joint stakeholder review of trial practice and procedure should be undertaken in an effort to provide fair, timely and effective hearings for electoral disputes.

Finally, IFES suggests that under the current election law ECP continue to act independently by taking steps and implement administrative and policy reforms by engaging the judiciary. Doing so will enable agreed upon protocol that will provide effective remedy in future elections in the event that legislative reforms remain pending. These efforts must result in action plans that implement the current law and ensure Pakistan's post-election dispute resolution mechanisms provide timely, fair and effective remedy.

STAKEHOLDER COMMENTS

A consensus of stakeholder groups that provided comment on the issue of electoral dispute resolution processes to IFES indicates that Election Tribunals are not only important but should be resolved within the statutorily mandated timeframe. Some call for administrative changes that could be made by the High Court or through ECP regulations while others would require a legislative change through political compromise. The vast majority of comments and recommendations IFES received focus on resolving the delays in the processing and trial of Election Tribunals. IFES solicited and received written and oral comments from members of Pakistani civil society and other stakeholders. All stakeholder comments and recommendations received are published in the Annex to the Final Project Report in their entirety. A number of these comments are listed as follows:

Commentators suggested a separate adjudicatory body for Election Petitions:

- “Tribunals should be ... permanent and independent” consisting utilizing retired judges.
- Creation of a permanent tribunal under the supreme courts

Suggestions for reducing delays:

- Duration for resolution should be shortened
- “Cases should be given 3 month statutory period for decision”
- All cases should be concluded within 9 months
- Tribunals should take a decision in a set period and penalties attached if for parties causing delay
- “Election Tribunal should be established in the District where the problems arise”
- The maximum number of cases an appointed judge should be assigned is 8 if judges maintain current court scheduling
- Reduce the petition registration period from 45 days to 30 days
- All election petitions filed with the Chief Election Commissioner (CEC) must be forwarded to the courts within 8 days
- The file channel should be made simple with “help and assistance of judicial authorities”

Suggested reforms to an Election Tribunal trial practice:

- Improvement of “summoning system of the respondent because long time spent in intimation of both parties.”
- Notices should be immediately published in newspapers as to effectively serve notice to respondents and respondent’s failure to appear should result in adverse result against respondent
- The use of adjournments should be made unavailable in the trial of Election Tribunals and no more than a day of delay between hearings.
- Lawyers must ensure that in absence of senior advocate that junior’s name is on the record in order to enable argument in Senior lawyer’s absence
- Evidence of witnesses should be accepted by affidavit
- Election Petition should be proceeded as a summary trial
- There should be a gap of no more than 7 days between two hearings
- Hearing should take place day to day and Judges assigned Election Tribunals must continue hearing day to day including traditional court vacations

On specific reforms related to judges in the process:

- Judge assigned Election Tribunals should be relieved of other cases only handling Election Petitions during a specified period and cases should be heard on a day to day basis.
- Retired High Court judges should be hired to handle cases in the allotted statutory four month period.
- Judges appointed as Election Tribunal judges should be provided training on election law and procedure.
- “District judge[s] ...should be empowered to arrange recounting and decide the case within one week” when counting of ballots are in dispute.”

Other suggestions:

- Reforms should be considered to eliminate frivolous challenges by candidates that merely file challenges to “disturb winning candidates.”
- Information about the procedures and function of Tribunals should be published and available in electronic media.