**Elections and the courts**

BY A H M E D B I L A L M E H B00 B 2022-02-17

IT was very heartening to see the Supreme Court putting its foot down and refusing to interfere in the schedule of the second phase of KP local government election fixed by the ECP for March 31.

While rejecting the plea of the provincial government for postponing the election, one of the honourable judges on the two-member bench aptly observed that if issuing the election schedule is not the prerogative of the ECP, then this institution should be closed down.

Earlier, the Peshawar High Court had accepted the KP government petition against the ECP and postponed the election, suspending the ECP notification which had set Feb 27 as the second phase of the KP local government (LG) election.

Barely a week ago, the ECP was not so lucky at the Islamabad High Court which reversed the ECP decision to disqualify Umar Amin Gandapur, the PTI candidate for mayorship of Dera Ismail Khan city in the by-election, for violating the election code of conduct. This was one of many appeals pending before the courts against ECP decisions for the first phase of the KP LG polls. Litigation against ECP decisions is not limited to LG elections. In fact, a far larger number of cases against the ECP`s decisions come before the superior courts duringthe generalelecdons.

Despite its uniquely independent status guaranteed by the Constitution, the ECP and its officials have previously had a dif ficult time in the superior courts. Whether it was judicial activism or `encroachment of one institution in the domain of the other`, as put by former chief justice Asif Saeed Khosa in his January 2019 speech proposing an inter-institutional dialogue, the independence and working of the ECP seemed to have been interfered with in the past.

Back in 2012, then chief justice of Pakistan If tikhar Chaudhry, while heading a Supreme Court bench, had unilaterally set an unrealistic deadline for finalising fresh electoral rolls and sought a personal explanation from ECP officials at frequent hearings regarding the delay in achieving the deadline.The ECP secretary at the time, Ishtiaq Ahmed, faced so much wrath that he wrote to then prime minister Yousuf Raza Gilani over what he felt was undue court interference in the affairs of the commission. He warned in his letter that `Attempts by one institution to encroach upon the domains of other state institutions, in violation of clearly defined roles laid down in the Constitution, will only lead to disruption in the democratic system and chaos in society` and offered his resignation.

The court did scold the secretary for writing the letter but stopped short of passing a coercive order against him. The electoral rolls were hurriedly put together with questionable accuracy.

In his tenure, chief justice Saqib Nisar pushed the ECP to make arrangements for overseas Pakistanis to vote from their respective places of residence abroad before the 2018 generalelecdon.

Several attempts were made to explain the technical dif ficulties involved in providing this extraordinary facility to around eight million overseas Pakistanis scattered in 130 countries but the apex court insisted the ECP make arrangements.

The ECP had to sign an agreement with Nadra involving a substantial fee to design an internetbased voting system for overseas Pakistanis. Later, the court directed the ECP to constitute a task force of experts to facilitate the process. It somewhat eased the pressure when the task force unanimously refused to endorse the system designed by Nadra and almost all political parties invited by the then chief justice to give their views advised against putting an untested system of overseas Pakistanis` voting into practice in the 2018 general election.

There appears to be a contrast when it comes to the involvement of the judiciary in the electoral process and disputes in India, where the election commission is widely credited with conducting free and fair elections accepted by almost all political parties and the public at large. Unlike Pakistan where we have the provision of appellate tribunals, the Indian electoral system does not allow for an appeal against the decision of Returning Of ficers.In fact, the Indian supreme court has consistently refused to entertain challenges against the election commission and its officers during electoral processes, starting from the schedule announcement till the announcement of results. It has strictly applied Article 329 (b) of the Indian constitution which states that `No election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition... .

The Indian court enunciated its position from the time of the first general election in 1951-52 that the electoral process once started cannot be interfered with by courts at any intermediary stage till its culmination in the declaration of result. This view is still held sacrosanct and has been reiterated time and again in innumerable cases. In one celebrated case, the Indian apex court held that `Article 329 (b) is a blanket ban on litigative challenges to electoral steps taken by the Election Commission and its officers for carrying forward the process of election to its culmination in the formal declaration of the result`.

Pakistan`s Constitution carries a similar provision in Article 225 which 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 ... Parliament`. A deeper study may lead to conclusive findings but an apparent and arguable impression is that Pakistani courts did not apply this provision as strictly as was required in view of the independent status of the ECP.

With this backdrop, the Supreme Court judgement of Feb 14 sanctifying the ECP schedule for the second phase of KP LG election should be welcomed as it possibly heralds a trend for strict enforcement of Article 225 of the Constitution.  The writer is president of the Pakistan Institute of Legislative Development And Transparency.

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