Adjudicating Election Complaints:

Afghanistan and the Perils of Unconstitutionalism

A Case Study of the Special Election Tribunal - 2010

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Case Study

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March 2014

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Acronyms

AGO	Attorney General's Office
AIHRC	Afghan Independent Human Rights Commission
ECC	Election Complaints Commission
FEFA	Free and Fair Election Foundation of Afghanistan
IAEC	Interim Afghan Electoral Commission
ICCPR	International Covenant on Civil and Political Rights
ICOIC	Independent Commission on Overseeing the Implementation of the Constitution
IEC	Independent Election Commission
IECC	Independent Election Complaints Commission
JEMB	Joint Electoral Management Body
LOJC	Law on Organisation and Jurisdiction of Courts
MP	Member of Parliament
OOACOMS	Office of Administrative Affairs and Council of Ministers Secretariat
OSCE/ODIHR	Office of Security and Cooperation for Europe/Office for Democratic Institutions and Human Rights
PECCs	Provincial Election Complaints Commissions
PR	Proportional Representation
SC	Supreme Court
SNTV	Single Non-Transferable Vote
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan

Executive Summary

The Constitution of Afghanistan guarantees the rights of its citizens to elect and be elected, and provides for the establishment of an Independent Election Commission (IEC) to administer and supervise elections in the country. However, the Constitution does not stipulate any details regarding the framework and responsibilities of the IEC, including the mechanisms for resolving election complaints. Such details should rather be legislated.

In the absence of a parliament, the 2004 and 2005 Electoral Laws were enacted through presidential decrees. However, even after the first Parliament came into being, the 2009 and 2010 Electoral Law continued to be enacted through presidential decrees, with a minimum consultation of civil society, political parties or Parliamentarians, and other relevant stakeholders.

The 2005 Electoral Law established an Election Complaints Commission (ECC) to adjudicate complaints related to the electoral process. However, the 2005 Electoral Law and its subsequent amendments contained ambiguities, lacked specific procedures, and at times, created parallel powers of adjudication between the IEC and ECC. Additionally, the temporary nature of the ECC affected its efficacy at certain stages of the electoral process. In practice, nonetheless, the ECC's impartiality and commitment was commended, despite it facing significant challenges due to a lack of resources and time.

More than the shortcomings in the legal framework or the lack of physical resources, however, the ECC was severely affected by the persistent pressure exerted by the Government during both the 2009 and 2010 elections. Government interference in the work of the ECC was pervasive in 2010. The Government sought to change the electoral results, through any means possible, including extra-constitutional measures. It used the Attorney General and the judiciary to exert enormous pressure on the IEC and ECC to alter their decisions.

When the Government could not persuade the commissions, it subsequently created a Special Election Tribunal as a counterweight to the electoral commission. The constitutional and legal grounds underlying the establishment of the Tribunal were highly contested, but the Tribunal was set up and carried out its work for nearly six months.

Eventually, a political compromise was reached, and the Tribunal was dissolved. As part of the compromise, the IEC agreed to change the final election results. Nine Parliamentarians (who had initially won the election) were removed from their seats and replaced by nine new successors. The election results were thus changed without any justification under the Constitution or electoral laws.

What occurred in the 2010 elections are symptoms of the weaknesses in how power has been divided in Afghanistan such that it imperils constitutionalism and the rule of law within the constitutional government. The ineffectiveness of Parliament as a strong oversight body, the submissiveness of the judiciary to the executive, and the powers conferred to the executive by the Constitution have all given the executive the ability to take extra-constitutional actions in many instances.

For elections to be effective in Afghanistan, the country must have respect for constitutionalism and the rule of law; a meaningful separation of power as reflected in a restrained executive, a strong Parliament, and an impartial and independent judiciary; the neutrality of electoral bodies; and finally, the empowerment of election observation organisations to serve as whistle-blowers and watchdogs.

Separation of power is on the brink of failure in Afghanistan. This failure benefits important vested interests in one branch. For this reason, institutional reform to restore the balance of power among the three arms of government is essential. However, political will must first be established to allow these reforms to take place. The people of Afghanistan will lose confidence in government institutions, including electoral bodies, if they continue to be ineffective. Ultimately, maintaining the status quo may jeopardise the achievements of the last decade in Afghanistan—most importantly, the adoption of a new Constitution and the establishment of representative institutions.

1. Introduction

It may not be incorrect to call Afghan electoral history a twenty-first century phenomenon. Although Afghanistan has experienced many elections over the past century, they have not complied with internationally recognised standards for democratic elections.

Afghanistan made its transition to democracy in 2001 following the fall of the Taliban, which led to the adoption of a new Constitution in 2004. Elections were originally part of the roadmap established in Bonn, and they were given significance in the 2004 Constitution of Afghanistan. The Constitution recognised the rights of its citizens to elect and be elected, and laid the foundations for the executive and legislature to be democratically elected through free and fair elections. Since the adoption of the Constitution, Afghanistan has had six elections: two Presidential, two Parliamentary, and two Provincial Council Elections. At the outset, as stipulated in the Constitution, efforts were made to hold the first three elections concurrently in 2004. However, given the complexities in holding the Parliamentary and Provincial Council Elections, it was agreed that they should be conducted after the Presidential Elections. For the first election, 10.5 million people registered to vote, with 80% participating in the 2004 Presidential Elections.

A Joint Electoral Management Body (JEMB), comprising the Independent Election Commission (IEC) with the support of the United Nations Assistance Mission to Afghanistan (UNAMA), administered the first three elections (Presidential, Parliamentary and Provincial Council) in 2004 and 2005. The IEC succeeded the JEMB in the next three elections. The Election Complaints Commission (ECC) was first established in 2005 and continued to oversee all subsequent elections.

Given that elections are the only way to attain legitimate power, whether in established or transitioning democracies, the electoral process is naturally prone to disputes. Amid different systems developed for the adjudication of election complaints, an independent mechanism immune from the interference and influence of the Government and other power holders is essential for countries in transition.

At its core, an election dispute resolution mechanism should translate into electoral justice, by ensuring full compliance with the relevant laws and protecting and restoring the enjoyment of electoral rights.[1] Lacking or weak electoral adjudication mechanisms not only pose serious threats to free and transparent elections, but may also create circumstances that enable different actors to interfere in the electoral process and thus endanger the rule of law and constitutionalism.

Hence, in order to adjudicate electoral complaints without jeopardising the political process, it is important that the State defines a clear legal framework in consultation with the entities involved, establishes independent election management and complaint adjudication bodies, respects the lawful decisions of such bodies, and ultimately, upholds the citizens' right to vote.

It is equally important that the legal framework distinguishes between electoral violations and electoral criminal offences, and delineates the responsibilities of the election complaints authorities and law enforcement agencies. Likewise, it is important that the election complaint authorities develop clear regulations, procedures, and guidelines for the adjudication of disputes. These bodies should engage in public outreach prior to elections and educate candidates, political parties, their agents, and election observation organisations on what constitutes an electoral violation or offence.

This paper discusses the 2010 Parliamentary Elections as a case study to analyse the current state of electoral dispute resolution mechanisms in Afghanistan. It describes the legal framework, the competence of the election management bodies, and the mechanism for the adjudication of election complaints. The paper then critically analyses the President's establishment of the

1 José de Jesúsand Henríquez and Ayman Ayoub, Electoral justice: the International IDEA handbook (Stockholm, Sweden: International IDEA, 2010).

Special Election Tribunal (hereafter, the Tribunal) in the aftermath of the elections. The paper concludes that the establishment of this Tribunal did not have any constitutional or statutory grounds. This case therefore demonstrates a misuse of power by the executive and its undue influence over the judicial branch of the state.

The paper also examines the concurrent jurisdictions of the Supreme Court (SC) and the Independent Commission for Overseeing the Implementation of Constitution (ICOIC) in interpreting the Constitution, and concludes that the actors refer interchangeably to either entity depending on whether they envisage it providing a decision in their favour. The lack of clarity concerning the jurisdiction of the two entities consequently undermines the jurisdiction of the judiciary and gives rise to a state of confusion that can easily be manipulated by the executive or other entities.

The paper concludes that after a decade of constitutional government in Afghanistan, the separation of power, independence of the judiciary, rule of law, and ultimately, constitutionalism are at risk. While many actors have vested interests in maintaining the status quo, if not brought to an end, the situation will jeopardise the achievements of the last decade in Afghanistan—most importantly, the adoption of a new Constitution and the establishment of representative institutions.

2. Methodology

The main methods used in this research were desk review and primary data collection through key informant interviews and participant observations. Different stakeholders in the elections process were interviewed for this research. It was ensured that interviewees came from different backgrounds with diverse viewpoints to ensure a balance of opinions in the article.

The key informant interviews included former and current commissioners of the IEC and Independent Election Complaints Commission (IECC), former international members of the ECC, constitutional law experts, candidates during the 2010 elections, Members of Parliament (MPs), members of the judiciary, as well as other electoral officials and legal, political, and electoral experts. It was also ensured that the views of those in favour or against the establishment of the Tribunal were both heard. A total of 27 interviews were conducted.

The criteria for selecting participants for the interview included: 1) direct involvement of the interviewee in the process as an official or candidate, 2) legal expertise, 3) political expertise, or 4) a strong knowledge of the electoral process or electoral adjudication.

Although structured questionnaires were not utilised so as to allow participants to express their views openly, some questions designed for the interviews included: 1) their understanding of election complaints adjudication in Afghanistan since 2005; 2) the effectiveness of the ECC in the past three elections in Afghanistan; 3) their views about the establishment of the Special Election Tribunal; 4) the constitutionality and legal foundations of the Tribunal; 5) the gaps in the legal framework; 6) issues arising as a result of constitutional ambiguities; and 7) their views on measures to strengthen this process in the future.

Certain factors directly or indirectly impacted the study. Among others, access to data was a challenge. The research assessed an event that took place just three years ago. The ECC is not a permanent entity, and until very recently, it did not have a secretariat or maintain an archive of its records. There was no central location for storing data, and as a result, the researcher had to use multiple sources to gain access to relevant data. The research also relied on information gathered through interviews, particularly the interviewees who were directly involved in the electoral process. It is worth mentioning that some data were not made available by certain authorities or interviewees, as the information was labelled “classified” or not considered appropriate to be used for research purposes. This was particularly the case for letters exchanged between different institutions on the research topic.

Additionally, a few interviewees did not feel comfortable to speak candidly about their experiences, as they are currently employed in positions approved by the President. Similarly, interviewees belonging to the judiciary were uncomfortable speaking about the judiciary and its shortcomings. The Head of the Special Election Tribunal avoided discussions with the team altogether, despite being contacted several times. To counterbalance this shortcoming, the researcher interviewed multiple actors directly involved in the electoral process and used official publications from the SC, ICOIC, IEC, and others, which provided critical information relevant to the events related to the topic.

3. Context: Legal Framework for Elections in Afghanistan and the State of Constitutionalism

3.1 Constitution of Afghanistan

In post-Taliban Afghanistan, the Bonn Agreement envisioned a democratic future for the country and recommended the adoption of a new Constitution. It also facilitated a framework for representative government through free and fair elections.[2] The 2004 Constitution of Afghanistan, once endorsed, emphasised the adhesion to the Universal Declaration of Human Rights (UDHR) and other international treaties.[3] The UDHR recognises the will of the people, expressed through genuine elections, as the basis of the authority of governments.[4] The International Covenant on Civil and Political Rights (ICCPR) guarantees the right of citizens to vote and to be elected through universal and equal suffrage.[5] Subsequently, the 2004 Constitution specified voting and participation in elections to be a universal right for the citizens of the country. The section below provides a brief overview of the constitutional provisions related to elections in Afghanistan.

The Constitution of Afghanistan guarantees the right of its citizens to elect and be elected and provides for the establishment of an IEC to administer and supervise elections in the country.[6] The IEC administers all elections: Presidential, Parliamentary, Provincial Council, District Council, Municipal Council, Village Council, and Mayoral Elections.[7] However, the Constitution does not stipulate any details regarding the framework and responsibilities of the IEC. It only states that the IEC is responsible for reviewing the election credentials of members of the National Assembly.[8] Thus, the Constitution left additional details, including the establishment of mechanisms to resolve election complaints, to be legislated at a later date.

The Constitution deems the period between the adoption of the Constitution and the inauguration date of the first National Assembly to be the "transitional period."[9] During this period, the Transitional State is responsible for establishing an independent election commission to regulate elections. The Constitution further provides that during the transitional period, laws relating to elections can be established by presidential decree. These decrees are to be submitted to the first National Assembly and then remain in effect until annulled by legislature.[10] However, in practice, even after the transitional period, electoral laws continued to be passed through presidential decrees rather than through legislature.

Similarly to many other constitutions, the Afghan Constitution does not provide for an electoral system; it merely specifies the right to form political parties.[11] Thus, the question of deciding on the most appropriate electoral system remains to be legislated at a later date. Such flexibility is deemed appropriate, especially in post-conflict societies, as it allows the legislature to reform the electoral system, based on how well the system functions in reality. At the outset, it was expected that the process of designing and adopting an electoral system would be inclusive, with the participation of a broad cross-section of stakeholders, including, most importantly, the political parties.

2 Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (Bonn Agreement), General provision 4, 2001.

3 Constitution of Afghanistan, Art. 7, 2004.

4 Universal Declaration of Human Rights (UDHR), Art. 21, 1948.

5 International Covenant on Civil and Political Rights (ICCPR), Art. 25, 1966.

6 Constitution of Afghanistan, Art. 33 and 156, 2004.

7 Among the seven types of elections mentioned in the Afghan Constitution, the elections for the District Council, Village Council, Municipal Council, and Mayor have not yet been held. The reasons for this are reported to be the high cost involved, as each has a different term of office. See, for example, Zekria Barakzai, 2014 Presidential and Provincial Council Elections in Afghanistan (Washington, DC: United States Institute of Peace, 2013).

8 Constitution of Afghanistan, Art. 86., 2004.

9 Constitution of Afghanistan, Art. 157, 2004.

10 Constitution of Afghanistan, Art. 159, 2004.

11 Constitution of Afghanistan, Art. 35, 2004.

However, in practice, the Government acted unilaterally and enacted a series of electoral laws in 2004 and 2010 without consulting any stakeholders. In particular, the Government decided to enact a Single Non-Transferable Vote (SNTV)[12] system in the country, despite significant opposition to such a system from political parties and civil society at large.[13]

While many other countries in the world have used the flexibility granted in the Constitution to assess different electoral systems and opt for one that strengthens democracy and establishes strong representative institutions, the same opportunity provided by the Constitution of Afghanistan was used to weaken political parties and hinder their growth. It also led to the establishment of a fragmented Afghan Parliament.

Once the first National Assembly was in office, both political parties and civil society strongly advocated a reform of the SNTV system prior to the second Parliamentary Elections. However, the Government opposed any efforts to reform the system, while disregarding the vigorous demands of political parties. As a result, the SNTV system was used again for the second Parliamentary Elections in Afghanistan and is likely to be used for the third Parliamentary Elections in 2015.

A multiparty system is desirable for Afghanistan, as it serves as the basis of democracy. The Government has argued that this will not work for Afghanistan and has thus repeatedly opposed the idea by referring to the unpleasant history of political parties in Afghanistan. Ultimately, however, Afghan democracy will not prosper in the absence of strong political parties. As the core institutions of democracy, parties should be internally democratic, well organised, and ideologically coherent in order to succeed.

3.2 Electoral laws

Electoral laws regulate the administration of elections. One of the key factors for ensuring successful elections is a strong legal framework. Such a framework is characterised by clear, general, and detailed provisions that ensure the credibility and transparency of the electoral process. This part of the study will briefly review the electoral laws that regulated elections in Afghanistan between 2004 and 2010.

Transitional election management bodies: 2004 Electoral Law

Historically, Afghanistan has had a limited experience with elections. The last general election was held decades before the 2004 elections; these elections did not meet internationally recognised standards for free and fair elections.[14]

Despite eagerly hoping to facilitate a representative democracy in Afghanistan, the international community was aware of the numerous challenges to holding elections. In line with the commitments made at the Bonn Conference, the transitional Government sought the assistance of the United Nations (UN) to establish a joint management body to administer the first round of elections in Afghanistan.

12 Under this system, voters cast one vote for a candidate in a multimember district. The candidates with the highest number of votes are declared the winners. Among its other disadvantages, the system is regarded as challenging for political parties, as multiple candidates in the same party compete for the same vote, thus splitting votes in one constituency. This may result in internal party fragmentation and discord. The system requires complex strategies to be used by political parties in both nomination and vote management, something that is least expected from weak political parties. See Andrew Reynolds, Ben Reilly and Andrew Ellis, Electoral System Design: The New International IDEA Handbook (Stockholm: International IDEA, 2008).

13 For details on the SNTV system and its implications for Parliament and the future of representative democracy in Afghanistan, see Andrew Reynolds and John Carey, "Fixing Afghanistan's Electoral System: Arguments and Options for Reform" (Kabul: Afghanistan Research and Evaluation Unit, 2012).

14 Reginald Austin, "Afghanistan: An Electoral Management Body Evolves," in Electoral Management Design: The International IDEA Handbook, ed. Allan Wall, Andrew Ellis et al., 113-17 (Stockholm: International IDEA Handbook, 2006). For the criteria of free and fair elections, see "Declaration on Criteria for Free and Fair Elections" (Paris: Inter-Parliamentary Council, 1994).

Two decrees issued in July 2003 established the Interim Afghan Electoral Commission (IAEC) and JEMB.[15] The IAEC's mandate was to advise the Government on all electoral matters and cooperate with the UNAMA to register voters for the 2004 elections.[16] The JEMB was responsible for overseeing the voter registration process.[17] Decree no. 110 issued in February 2004 amended Decree no. 40 and conferred additional authority to the JEMB to prepare, manage, convene, and oversee the election process.[18]

In May 2004, President Karzai, exercising his authority under Article 159 of the Constitution,[19] enacted the *Electoral Law, Decree No. 28* (2004) to establish the IEC and regulate the affairs of the elections.[20] The law reiterated the authorities and structure of the JEMB under Decree no. 110. The JEMB comprised 13 members, with 11 voting members and 2 non-voting members. President Karzai appointed six Afghan members, while the UN Special Representative to Afghanistan appointed five international members. The Afghan head of the Electoral Secretariat and UNAMA Electoral Advisor were the members without the right to vote.[21] In 2005, Presidential Decree no. 21 replaced the IAEC with a seven-member IEC.[22]

The Electoral Law of 2004 guaranteed the equal rights of voters and allowed all eligible citizens to cast their votes in a free, secret, universal, and direct ballot. However, given the unfavourable history of political parties in Afghanistan, the law was not designed to foster strong political parties. In particular, the law provided the SNTV system for both the Parliamentary Elections and at the provincial level, yet encouraged political parties to nominate candidates for up to 100 percent of the seats in a given province.[23] In reality, the nominees of political parties were treated as independent candidates, and it was foreseen that the system would lead Afghanistan to the election of a multitude of independent candidates and small political factions with very small shares in the overall vote.[24]

For election dispute adjudication, the 2004 Electoral Law vested power in the IEC. However, the law provided limited guidance to the IEC on its powers and procedures. The law authorised the IEC to investigate disputes arising over registration, voting, candidates, ballot counting, and awarding votes. The IEC could disqualify candidates when they failed to meet the eligibility criteria. Citizens could also challenge the nomination of candidates before the IEC.[25]

The 2004 Electoral Law enumerated electoral offences and empowered the IEC to investigate and adjudicate complaints. Complaints in polling and counting centres could be resolved within the centres, with the possibility of appeal to the provincial electoral authority or the IEC. Decisions made by the IEC were final and binding.[26] The IEC could impose sanctions on candidates or political parties if they guided or supported the enactment of electoral offences. If the IEC identified criminal infringements of the electoral law, it could refer them to law enforcement agencies.

15 Interim Afghan Electoral Commission, Decree no. 39, 2003 (SY 1382); Joint Electoral Management Body, Decree no. 40, 2003 (SY 1382).

16 Interim Afghan Electoral Commission, Decree no. 39, Preamble, 2003 (SY 1382).

17 Joint Electoral Management Body, Decree no. 40, Art. 1, 2003 (SY 1382).

18 Elements of Convening Elections during the Transitional Period, Decree no. 110, Art. 1, 2004 (SY 1383). Independent Election Commission, Decree no. 21, 2005 (SY 1384).

19 Article 159 of the Constitution of Afghanistan stipulates, "The Islamic Transitional Government of Afghanistan, during the transitional period, shall perform the following duties: 1) issuing legislative decrees relating to the elections of the President, National Assembly, local councils within six months;… 3) establishing the Independent Elections Commission…"

20 Electoral Law, Decree no. 28 (Official Gazette no. 829), 2004 (SY 1383).

21 Elements of Convening Elections during the Transitional Period, Decree no. 110, 2004 (SY1383).

22 Independent Election Commission, Decree no. 21, 2005 (SY 1384).

23 Electoral Law (Official Gazette no. 829), Art. 20, Cl. 4, Art. 22, Art. 44, 2004 (SY 1383).

24 Andrew Reynolds and Andrew Wilder, "Free, Fair or Flawed: Challenges for Legitimate Elections in Afghanistan" (Kabul: Afghanistan Research and Evaluation Unit, 2004), 14.

25 Electoral Law, Art. 12, Cl. 1, 45, 46, Cl. 2, Art. 47.

26 Electoral Law, Art. 57-58.

The provisions of the law were not sufficiently exhaustive to settle all disputes. Thus, in 2004, the JEMB approved two regulations for the adjudication of complaints, irregularities, and offences and developed procedures for the investigation of complaints, yet this occurred very late in the process.[27] As a result, election staff, candidates, and their agents had limited knowledge of the regulations.

At the end of the 2004 elections, inadequate responses to allegations of fraud and irregularities led to the formation of an Independent Expert Panel[28] to investigate the complaints lodged by candidates and reported to the JEMB. The panel strongly recommended improvements to the mechanisms of complaints adjudication.[29]

The inception of the Election Complaints Commission: 2005 Electoral Law

In light of the challenges in adjudicating election complaints during the 2004 Presidential Elections, a number of election stakeholders, including the Afghan Independent Human Rights Commission (AIHRC), the Free and Fair Election Foundation of Afghanistan (FEFA), and the European Union Observer Mission, recommended the formation of an independent body to adjudicate electoral disputes.[30] The ECC was thus the result of the 2005 amendments to the electoral law. The 2005 Electoral Law carried most of the general provisions of the earlier law on election administration and reaffirmed the role of the JEMB to conduct and supervise elections.[31]

The ECC was responsible for dealing with electoral violations and complaints. The Commission comprised two Afghans appointed by the SC and AIHRC, respectively, and three international representatives appointed by the UN Special Representative of the Secretary General in Afghanistan. The members elected one person as the Chairperson of the ECC. The law empowered the ECC to review and adjudicate complaints relating to the infringement of electoral laws and objections relating to the eligibility of candidates to stand for elections. The ECC was also mandated to develop procedures for adjudicating complaints.[32]

The ground-breaking Electoral Law of 2005 was in many ways better than its predecessor. It identified 19 separate electoral offences. The new electoral offences included: fraud in voting or vote counting; offering or receiving benefits to influence the process; changing, replacing, stealing, or destroying electoral documents without legal authorisation; interfering in the work of electoral officials; inciting or provoking other persons to commit an electoral offence; and violating provisions of the law or other legal instruments governing the electoral process.[33] Moreover, the 2005 Electoral Law gave the Commission the power to adjudicate at its own discretion any other matter deemed to be a violation, without the need for a formal complaint to be filed. This gave the Commission the authority to investigate issues at its own initiative and supervise the proper implementation of electoral laws.

Sanctions and penalties for violating electoral laws included issuing warnings, imposing fines, recounting ballots, ordering fresh elections, debarring a candidate from the list, invalidating ballots, and prohibiting violators from serving in the Commission or Secretariat for up to ten years. The decisions of the ECC were final. In the case of criminal acts, the ECC could refer the offender to the Attorney General's Office (AGO) for further investigation and prosecution.[34]

27 The two regulations were the Regulation on Complaints and Irregularities during Election and Counting Processes and the Regulation on Offences during Elections. These were adopted between 25 September and 2 October 2004.

28 The JEMB requested the UN to nominate electoral experts to serve on this panel and investigate complaints lodged by the 2004 presidential candidates.

29 "Final Report of Impartial Panel of Election Experts Concerning Afghanistan Presidential Election 2004" (Kabul: Impartial Panel of Election Experts Concerning Afghanistan Presidential Election, 2004).

30 "Final Report for Parliamentary Elections of 2005" (Kabul: Election Complaints Commission, 2006).

31 Electoral Law (Official Gazette no. 850), Art. 57, 2005 (SY 1384).

32 Electoral Law, Art. 52, Cl. 3 and 4, 2005.

33 Electoral Law, Art. 53, 2005.

34 Electoral Law, Art. 54, 2005.

The ECC received 1,100 complaints challenging the eligibility of 557 candidates prior to the 2005 elections. After the elections, it received a further 5,400 complaints. The major challenge for the Commission was adjudicating complaints that challenged the eligibility of candidates accused of war crimes or human rights violations, or those with links to illegal armed groups. However, the vetting process for the candidates was deemed unsuccessful for three reasons: "First, the legal framework established to disqualify candidates on the basis of links to armed groups was incomplete and poorly defined. Second, the institutions charged with running the process did not have the resources or the capacity. Third, the Afghan Government and the international community lacked the political will to make sure that people were vetted fairly."[35] Thus, many candidates who were accused of having links to illegal armed groups still made it to the ballot.

Nevertheless, the ECC was keen to establish a fair vetting process. However, it mainly had to rely on the SC, AGO, and Ministry of Interior to provide information. A number of cases adjudicated by the ECC were also referred to the national authorities for further investigation and appropriate action.[36] The experience of the first ECC shows that the working relationships between the ECC and other relevant authorities such as the SC and AGO were very cooperative.[37]

In general, the ECC was commended for its work. However, this was the first time in the history of Afghanistan that a dispute resolution body with an exclusive jurisdiction to address election-related complaints had been established. Expectations from the ECC were high, and the law stipulated its many responsibilities. However, the electoral law had only provided for the powers of the commission; it did not outline specific procedures for adjudicating complaints. The ECC quickly developed rules of procedure and a code of conduct, but it required additional time to train its staff.[38]

In addition, the ECC operated under significant constraints. It was an ad hoc body established shortly before the elections; thus, its performance was affected by a lack of field offices in the provinces, limited resources, and its reliance on the Provincial Election Commissions.[39] As per the law, the ECC was dissolved 30 days after certifying the results.

The 2005 Electoral Law stipulated that the JEMB would be dissolved at the end of the transitional period and its powers under the law transferred to the IEC.[40] A subsequent presidential decree amended the electoral law and allowed the JEMB to operate until the inauguration of Parliament.[41] The termination of the JEMB ended with the transitional period and led to the establishment of the IEC, an all-Afghan commission without international members to administer the second Presidential Elections for Afghanistan in 2009.

The challenge of Single Non-Transferable Vote: Reform efforts

Upon the completion of the 2005 elections, as expected, the SNTV system produced a fragmented Parliament. The political parties did not win as many seats, while the leaders of some parties received so many votes that they could bring many of their party members to the Parliament if the law were to introduce a party-based system. The Parliament was formed with 32% of the votes casted; thus, 68% of votes were counted as being in favour of losing candidates.[42] As a

35 Fatima Ayub, Antonella Deledda and Patricia Gossman, "Vetting Lessons for the 2009-10 Elections in Afghanistan" (New York: International Centre for Transitional Justice, 2009).

36 "Final Report for Parliamentary Elections of 2005."

37 This cooperation is evident in the ECC final reports for the 2005 and 2009 elections.

38 Mohammad Farid Hamidi, Pers. Comm., 2014.

39 David Ennis, "Analysis of the Electoral Legal Framework of Afghanistan: International Foundation for Electoral Systems," http://www.ifes.org/Content/Publications/White-Papers/2006/Analysis-of-the-Legal-Electoral-Framework-of-Afghanistan.aspx, 2006 (accessed 7 February 2014). See also Grant Kippen, "Elections in 2009 and 2010: Technical and Contextual Challenges to Building Democracy in Afghanistan" (Kabul: Afghanistan Research and Evaluation Unit, 2008).

40 Electoral Law, Art. 57, 2005.

41 Termination of Authorities of the Joint Electoral Management Body, Decree no. 110, Art. 1, (Official Gazette no. 874), 2006 (SY 1385).

42 Reynolds and Carey, "Fixing Afghanistan's Electoral System."

result, many felt that the new Parliament was not representative.[43] While larger parties somehow managed to divide the party vote more proportionately across geographical lines, thus allowing more members to occupy seats, many smaller parties could not win a single seat in Parliament.

In the years following the election, some MPs, mostly affiliated with political parties, decided to change the system. The IEC was also in favour of exploring different options and tried to push for a mixed SNTV-Proportional Representation (PR)—if not a pure PR system.

The Legislative Affairs Commission of the Parliament created a subcommittee on electoral law in 2007. Discontent with the wastage of votes, the committee was assigned to review past elections, study other electoral systems, and propose a system that ensured the participation of political parties. The committee reviewed various electoral systems, studied the use of each system in different settings, worked very closely with national and international experts, and consulted a cross-section of stakeholders, including Parliamentarians, political parties, legal experts, and national and international organisations that work in elections. The committee proposed a mixed system where only 100 seats would be allocated to political parties.

When the subcommittee decided to solicit opinions from the Assembly[44] on the SNTV and PR options for the coming electoral law, unexpectedly, the majority of the political party representatives in Parliament, including Hizb e Wahdat Mardom, Mahaz e Milli, Hizb e Islami, Tanzim e Dawat e Islami, Afghan Milat, and Hezb e Iqtedar e Milli, resisted the option of a mixed system.[45] Other independent MPs or those from smaller parties rejected the proposal on the basis that such a system would only allow established political parties, who had been part of the Jihad and civil wars, to dominate the Parliament.

The reason why the PR system was opposed in Parliament was not only because of the poor reputation of political parties in Afghanistan in the past. The law, if passed, would affect proportional geographic representation, and many saw their provinces losing seats. The allocation of 100 seats to political parties would mean at least 100 MPs voting to unseat themselves in the upcoming elections in favour of the political parties. Similarly, pro-government MPs followed the Government's stance and opposed the bill, thus negating the possibility of strong political parties or a strong Parliament emerging at the next election.[46] When the draft bill was completed and reached the floor for a vote, the committee came into conflict with Kuchi representatives regarding the number of allocated seats for Kuchis and their constituencies.[47] This issue became so volatile that the debate within Parliament came to a halt.

2009 Presidential Elections: The Election Complaints Commission and the challenge of fraud

The 2005 Election Law governed the Presidential Elections in 2009 with only minor amendments added to describe the consequences in the event of the death of a candidate or MP.[48] The authorities and structures of both commissions remained unaffected for the 2009 elections.

43 Saleh Mohammad Registani (Former Member of Parliament), Pers. Comm., February 2014.

44 The law was a bill initiated by the house, and according to the rules of procedure, it had to be debated in the plenary within 30 days. To ensure that the parts of the law were debated at least once within the timeline, the law was brought to the plenary to solicit opinions. It was clarified to the house that the law still required work; this was therefore not considered to be a formal vote on the system.

45 According to Registani, many of these leaders rejected the proposal because they were unaware of the process. There were consultations with the parties, but not directly among their leaders. Although they initially rejected the idea, they later unanimously supported the mixed system.

46 Registani, Pers. Comm., 2014.

47 Kuchis are the nomadic population in Afghanistan. The Constitution of 2004, Article 84, requires the President to allocate two seats to the Kuchis, out of his 34 appointments to the Mishrano Jirga (Upper House). However, the Electoral Law of 2005 reserved ten seats for the Kuchis in the Wolesi Jirga (Lower House) and created a separate national constituency for them. This was reaffirmed in the Electoral Law of 2010. For more information on the Kuchis, see Fabrizio Foschini, "The Social Wandering of the Afghan Kuchis: Changing Patterns, Perceptions and Politics of an Afghan Community" (Kabul: Afghanistan Analysts Network, 2013).

48 Amendment to Clause 3 and Addendum to Clauses 4 and 5 of Article 37 of the Electoral Law, Decree no. 119 (Official Gazette no. 847), 2004 (SY 1383).

However, in practice, the ECC faced much bigger challenges in 2009 compared to 2005. The ECC was applauded for its impartiality and commitment during the 2009 elections in reviewing the thousands of complaints received for allegations of fraud. During the review of complaints, the ECC recognised the need for an audit and recount of ballots in many polling stations. The ECC in collaboration with the IEC completed the audit, which resulted in the invalidation of a huge number of votes, particularly those cast in favour of President Karzai. The results showed that no candidate had secured more than 50% of votes, forcing a runoff election. Throughout this process, the ECC came under immense pressure from the Government. In particular, it was accused of being under the influence of foreigners. The Government provoked one of the members of the ECC[49] to resign on the same grounds. However, he subsequently re-joined the commission after few days.[50]

Re-engineering of the Election Complaints Commission: 2010 Electoral Law

The Electoral Law of 2010 to govern the Parliamentary Elections could not be passed by Parliament, because President Karzai claimed that the law could not be passed in the last year of the parliamentary term.[51] The President relied on Article 109 of the Constitution, which provides that "[p]roposals for amending elections law shall not be included in the work agenda of the National Assembly during the last year of the legislative term."[52] The President's claim was constitutionally valid. However, it also politically empowered the President to bypass Parliament and approve a new law via presidential decree to re-engineer the ECC's structure.

The law reflected the President's dissatisfaction regarding the work of the ECC during the 2009 election. The presidential decree thus introduced a general and vague article about the establishment of the ECC and concentrated the power of appointment in the President.[53] It was initially decided that all five members be Afghan. However, the condition that the AIHRC and SC should each nominate one member was removed. According to the new method, the President appointed the five members in consultation with the Speakers of the two houses of the National Assembly and the Chief Justice. He also approved the appointments of the provincial ECC members. Once the decree was passed, the President came under pressure to further amend the new appointment mechanism. He agreed with the UNAMA's proposal to have two international members in the commission and three Afghans. After the appointments were made, the Afghan members included one person nominated by the SC, but excluded any representation from the AIHRC. Unfortunately, none of the new appointments to the ECC had any prior experience in election monitoring or complaints adjudication.

One distinctive feature of this law was that it provided for the establishment of Provincial Election Complaints Commissions (PECCs) to adjudicate cases at the provincial level. Complaints adjudicated at the provincial level were subject to the review of the central commission. The PECCs were the authority of first instance for adjudicating complaints, with the ECC's decision being final. Both the central and provincial commissions were to dissolve within two months after the certification of the elections results, and their powers were to be transferred to the IEC. The ambiguity of the provisions on the transfer of power and their lack of specificity presented many challenges in practice. For example, it led to the alteration of results and created conflicts of interest within the IEC, especially in situations where the ECC had to take the final decision about offences committed by IEC staff.

49 The member who resigned was Mustafa Barakzai, nominated by the SC to the ECC in 2009.

50 Ahmad Fahim Hakim (Former Commissioner, Electoral Complaints Commission, 2009), Pers. Comm., February 2014.

51 The International Crisis Group reports that the Lower House had initially rejected the decree; "[h]owever, when the decree reached the Meshrano Jirga, where Karzai exercised considerable control, senators...generally agreed that the constitution prohibited parliament from amending, or even discussing, electoral laws in the last year of its term. The decree was thus adopted by default." See "Afghanistan's Elections Stalemate," Asia Briefing no. 117 (Kabul/ Brussels: International Crisis Group, 2011).

52 Constitution of Afghanistan, Art. 109, 2004.

53 Article 61 of the Electoral Law 2010 reads: "The President, in consultation with the Speakers of the two houses of the National Assembly and the Chief Justice of the Supreme Court, shall establish the Central and Provincial Electoral Complaints Commissions in order to address breaches, complaints and objections resulting from elections, and to manage the provincial complaints commissions and assess their decisions, at least 120 days prior to the election date."

The law listed the same items as electoral violations as its predecessor, with a few additional offences contained in the regulations and procedures of the ECC. The last item would authorise the ECC to recognise a specific action as a violation and approve it in its internal rules and procedures. The sanctions and penalties section mainly remained intact from the earlier law. "The ECC played a vital role in the elections, adjudicating 7,863 complaints and challenges, resulting in the disqualification of nearly 120 candidates and the invalidation of 344 polling stations as well as partial or full invalidation of specific candidates' votes."[54] However, the rules of procedure still lacked responses to many questions such as the criteria for invaliding votes. There also seemed to be a lack of coordination between the two commissions in defining the rules of procedure. One major issue of contention was the two commissions' different understanding of the criteria for the invalidation of votes. The IEC argued that only the fraudulent votes of a given candidate should be invalidated; however, the ECC maintained that all votes of such a candidate should be invalidated, with the candidate removed from the list of winners.

3.3 Constitutionalism and Separation of Powers in Afghanistan

Today, almost every country in the world has a constitution. Significant elements of constitutional democracy include constitutionalism and the rule of law. Constitutionalism refers to the principle by which the authority of government derives from and is limited by a body of fundamental law.[55] The objective of constitutionalism must always be to uphold the rule of law, enforce effective limitations on government powers, and protect fundamental rights.[56] Constitutionalism thus favours the rule of law as opposed to discretionary rule by public officials. It ensures the existence of a "government of law instead of will."[57] The rule of law, requires that "laws be made public, general, clear and reasonably stable, not retrospective but prospective and consistent; that laws do not demand impossible conduct... These requirements enable laws to work effectively as laws."[58]

For constitutionalism to maintain its efficacy in Afghanistan, it is important to have a distinction of governmental functions and a separation of the agencies that exercise them: in other words, the making of laws by Parliament, their execution by the executive, and their adjudication and interpretation by the judiciary. This in itself would require every executive action to gain its authority from the law and be effectively checked. However, in the case of Afghanistan as described in this paper, the powers of the various governmental branches are not strictly demarcated. The use of extra-constitutional powers by one branch—particularly, the executive—has proved to endanger the emerging constitutionalism in the country.

The division of functions and the independence of state institutions are indispensable. There should be restraints to prevent the powers of one branch from exercising the functions of another branch. Such a separation of power provides for a system of checks and balances among state institutions.

What occurred in the 2010 elections are symptoms of the weaknesses in the way that power has been separated in Afghanistan such that it imperils constitutionalism and the rule of law within the constitutional government. The ineffectiveness of Parliament as a strong oversight body and the submissiveness of the judiciary to the executive, coupled with the powers conferred to the executive by the Constitution, have given the executive the ability to take extra-constitutional actions in many instances.

54 "The 2010 Wolesi Jirga Elections in Afghanistan" (Kabul: National Democratic Institute, 2011).

55 Don E. Fehrenbacher, Constitutions and Constitutionalism in the Slaveholding South (Athens, GA: University of Georgia Press, 1989), 1

56 Abudllahi Ahmed An-Na'im, African Constitutionalism and the Role of Islam (Philadelphia: University of Pennsylvania Press, 2006), 3.

57 B. O. Nwabueze, Constitutionalism in the Emergent States, (London: C. Hurst & Company, 1973), 1.

58 Yasuo Hasebe, and Cesare Pinelli, "Chapter 1, Constitutions," in Routledge Handbook of Constitutional Law, ed. Mark V. Tushnet, Thomas Fleiner and Cheryl Saunders. (Oxon: Routledge, 2013).

A meaningful separation of powers requires legislatures to function effectively. A strong Parliament with powers of oversight is of utmost importance. Overall, the Afghan Parliament, mandated to manifest the will of the people,[59] has not often exhibited strong oversight over the actions of the President, nor has it been very objective in its oversight and decisions. In reality, the President has considerable control over legislature, in part due to the lack of skills and experience of the majority of MPs, including the current Speaker. However, Parliamentarians must seek to fulfil their obligations under the Constitution. The current constitutional powers, especially for the impeachment of the President, result in limited presidential accountability to Parliament. Nevertheless, in the long term, Afghanistan requires a strong Parliament that is able to play a crucial role in checking and balancing the powers of the executive.

The independence of the judiciary, on the other hand, is the key to a democratic society in which the rights and freedoms of citizens are protected. However, the greatest threat to judicial independence is a lack of respect for the rule of law. The UDHR, ICCPR, and the charters of all international tribunals have recognised judicial independence. The UN General Assembly endorsed through a resolution the Basic Principles on the Independence of the Judiciary.[60] The Bonn Agreement likewise emphasised the importance of judicial independence in Afghanistan.[61]

Despite the fact that the Constitution of Afghanistan labels the judiciary as an independent branch, there are very few provisions that guarantee its independence. The Constitution not only allows the President to appoint the members of the SC, subject to the vote of Parliament, but also to decide who among them will be the Chief Justice. The President further approves the appointment and dismissal of all judges in the lower courts. The judiciary is the highest judicial organ, but it cannot hear the trials of the President or his Cabinet. The judiciary's role to interpret the Constitution has been challenged because of ambiguous language inserted by the President's Office in the final moments of the drafting process.[62] The SC has the power of judicial review, but without any mechanism to enforce it. The judiciary's budget is prepared in consultation with the executive; the benefits accorded to judges are minimal and exclude shelter and security. The President endorses capital punishment and may reduce punishments or provide pardons in accordance with the law, yet he has exercised this power through decrees and in the absence of clear statutory rules.[63]

59 Constitution of Afghanistan, Art. 81, 2004.

60 On the independence of the judiciary, see "U.N. Basic Principles on the Independence of the Judiciary," http://www2. ohchr.org/english/law/indjudiciary.htm, 1985 (accessed 12 February 2014).

61 For details, see Ramin Moschtaghi, Afghanistan Court Organisation and its Compliance with the Constitution and International Law, amended 3rd ed. (Kabul: Max Planck Institute for Comparative Public Law, 2009).

62 Article 121 of the Constitution reads: "...the Supreme Court shall review the laws, legislative decrees, international treaties as well as international conventions for their compliance with the Constitution and interpret them in accordance with the law." See also John Dempsey and J. Alexander Their, Resolving the Crisis over Constitutional Interpretation in Afghanistan (Washington, DC: United States Institute of Peace, 2009).

63 See Constitution of Afghanistan, Chap. 3 "The President" and Chap. 7 "The Judiciary."

In practice, many other steps have been taken to ensure that the judiciary remains obedient to the executive. In particular, when the President initially nominated members of the judiciary, he was required to nominate judges in staggered terms of 4, 7, and 10 years. However, he used the staggered terms as a tool to influence judges. For example, the President appointed the Chief Justice, a former reliable member of his team,[64] for the four-year term. The Chief Justice, anticipating that the same administration would likely be in power when his term ended and that he would be well placed to be appointed to another prestigious position within the Government, thus remained loyal to the President. Unsurprisingly, once the Chief Justice completed his four-year term, the President in complete violation of the requirement of staggered terms, decided to keep the Chief Justice in his position as Acting Chief Justice, even though his term ended in June 2010.[65] Thus, the Chief Justice has now been in office for more than 7.5 years—3.5 years longer than his constitutionally mandated term.[66] It is worth noting that the ICOIC presented a legal opinion in which it not only affirmed the unconstitutionality of the extension of this term, but also legally challenged the "acting" positions of the Chief Justice and two other members whose terms had terminated.[67]

Thus, in Afghanistan, owing to the flaws in institutional design as well as the political constraints, the judiciary remains highly vulnerable to the undue influence of the executive.

64 According to his biography published on the SC website, Abdul Salam Azimy served as the Senior Legal Advisor to the President and the Head of the Legal and Judicial Board for the President from 2004 to 2006, before being appointed as Chief Justice. See http://supremecourt.gov.af/fa/page/616 (accessed March 2014).

65 "Reforming Afghanistan's Broken Judiciary," Asia Report no. 195 (International Crisis Group (ICG), 2010).

66 The Chief Justice began his term in June 2006 and was due to be replaced in June 2010 after completing a four-year term. The President, however, extended his term through a presidential decree, without seeking approval from Parliament.

67 "Legal Opinion on the Acting Positions of the Members of Supreme Court and Delay in Appointing and Introducing Ministers, Members of Supreme Court and Attorney General," Yearbook 1390, no. 37 (Kabul: Independent Commission on Overseeing the Implementation of the Constitution (ICOIC), 2011).

4. 2010 Parliamentary Elections

4.1 One year in crisis: Chronology of events

2010	
18 September	Parliamentary Elections take place.
23 September	Initial results are announced.
20 October	Initial list of winning candidates is announced.
24 November	Final results are announced (excluding Ghazni Province).
1 December	Final results of Ghazni Province are announced.
26 December	Special Election Tribunal is established.
2011	
19 January	The Head of the Special Election Tribunal asks for an additional month to complete investigations.
20 January	Two hundred and thirteen certified winners meet and decide to take their seats on January 23, without the inauguration by President Karzai.
26 January	Parliament is inaugurated by President Karzai.
31 January	The ECC is dissolved in accordance with the Electoral Law.
19 February	President Karzai introduces 34 senators to the Upper House.
22 March	Parliament calls the Attorney General for interpellation and then calls for his impeachment.
23 June	The Special Election Tribunal announces its final judgment.
26 June	Parliament calls the SC justices for interpellation and then calls for their impeachment.
4 August	The Appeal Court confirms the decision of the Special Election Tribunal.
10 August	The Special Election Tribunal is dissolved, and the authority of final decision is conferred to the IEC.
21 August	The IEC announces nine new winners.
3 September	The nine new Parliamentarians take their oath of office.

4.2 Overview of the 2010 Parliamentary Elections

In accordance with the provisions of the Constitution, the Parliamentary Elections were due to be held in May 2010.[68] However, the election was postponed until September—concerns over security, budget shortfalls, and logistical challenges were cited as the main reasons.[69] In the Parliamentary Elections, 2,506 candidates from 34 provinces competed for 249 seats in the Lower House of the Parliament of Afghanistan.

The fact that the 2010 Parliamentary Elections were held less than a year after the controversial Presidential Elections in 2009 was a sign of progress in the electoral history of Afghanistan. Nevertheless, the 2010 elections raised serious concerns over the immunity of the election process from the interference of government institutions. Such interference poses serious threats to the future of democracy in Afghanistan where political stability is already fragile.

The Presidential and Provincial Council Elections in 2009 had a marked impact on the country's political landscape. As Afghanistan approached the Parliamentary Elections, people viewed the process with little confidence, as the previous election had witnessed widespread fraud, government interference, corruption, abuse of power by public officials, and increased levels of security threats.

Despite the tense political environment, Afghans went to the polls to elect the new Parliament. However, the low turnout[70] on election day reflected the serious security threats in addition to people's disillusionment with the electoral process.

68 Constitution of Afghanistan, Art. 83, 2004.

69 Mark Tran, "Afghanistan Elections Postponed," The Guardian, 24 January 2010.

70 According to International IDEA, 2.1 million more votes were cast in the Parliamentary Elections in 2005 than in 2010: "Voter Turnout Data for Afghanistan," http://www.idea.int/vt/countryview.cfm?id=4 (accessed March 2014).

4.3 Electoral fraud

The Electoral Law was passed in February 2010, leaving the IEC with only seven months to prepare for the elections under the new legal framework. Although the new leadership of the IEC was commended for its efforts to improve transparency, it was noted that these improvements were made at the initiative of specific individuals and its sustainability to foster long-term institutional reform was put in doubt.[71] Additionally, despite the progress made by electoral institutions, including the IEC, the public perception of these mechanisms as being biased or incompetent persisted owing to their performance in previous elections.

In the Parliamentary Elections of 2010, there was a greater awareness of electoral processes, and as a result, the public expected that these processes would be implemented properly. The IEC responded to these expectations by reforming the existing procedures to improve the transparency of the electoral process. In fact, the IEC explained that one of the reasons for postponing the elections was the need to improve electoral procedures.[72] Reforms initiated by the IEC included the online publication of results so that even the preliminary results could be accessed by the public in a timely manner. The IEC provided candidates and political party agents with copies of the results sheets from the counting centres at the end of each day of counting.[73]

Despite these measures, the lack of security remained a concern. As a result, the IEC in collaboration with the Security Forces decided not to open more than 938 polling centres (out of 6,835) for the elections. Thus, the IEC did not send ballot papers to areas deemed to be insecure. The rationale for closing these polling centres was that ballots could be tampered with in insecure areas.[74] No alternative mechanisms were provided to allow people to vote in these locations.

The 2010 elections witnessed an unprecedented level of violence, with some incidents resulting in the fatalities of candidates, election officials, campaign workers, and voters. On election day, despite the assurances of the Security Forces, 1,300 additional centres remained closed and 91 centres were attacked. In some other centres, people in fear of the security situation did not go to the polls at all. The IEC had no control over the centres that were closed or attacked.[75] The poor security situation thus created opportunities for fraud. However, as reported by many election observation missions, other factors also significantly contributed to high levels of fraudulent activity.

> *Election day saw a high incidence of violations, fraud and irregularities reported by observers and the media. They included use of fake voter registration cards, multiple voting, ballot stuffing, underage voting and proxy voting. There were also reports of elections not taking place but results being submitted. Various observers and election commentators reported levels of attempted and actual fraud to be comparable to last year, despite improved IEC procedures. Reference has also been made to a "culture of fraud" with candidates feeling that there was no opportunity to win fairly and so justifying illegal activity.*
>
> *OSCE/ODIHR Election Support Team Report (2010)*

The FEFA had deployed 7,000 observers to the field. It verified hundreds of serious reports of election day irregularities and submitted reports and evidence to the IEC and ECC. They "submitted evidence on a total of 890 serious cases in 31 provinces to both electoral bodies. Many of these cases involved ballot-stuffing and intimidation of voters."[76]

71 "Election Support Team Report," 7 (Warsaw: Organisation for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights (OSCE/ODIHR), 2010).

72 Tran, "Afghanistan Elections Postponed."

73 Fazel Ahmad Manawi (Former Head, Independent Elections Commission, 2010), Pers. Comm., February 2014.

74 Manawi, Pers. Comm., February 2014.

75 Pers. Comm., 2014.

76 "Afghanistan Parliamentary Election Observation Mission 2010" (Kabul: Free and Fair Election Foundation of Afghanistan (FEFA), 2011).

The IEC's new measures were not sufficient to stop the fraud. Even polling centres that had not opened on election day sent jam-packed ballot boxes to counting centres. In most cases, the ballots were marked and filled in by supporters of the candidates. Common examples of fraudulent ballots included ballots that were incorrectly folded, ballots with identical markings in the same box, and boxes exceeding the IEC stipulated maximum of 600 ballot papers.

4.4 Response of the Independent Election Commission

Well aware of the incidents on election day, as an initial step, the IEC quarantined the boxes visibly containing ballots that met the predetermined criteria for suspicion of fraud. However, it could only decide whether to include or exclude them in the counting after the inspection of the boxes in the presence of observers, candidates, and political party agents.[77]

However, the implementation of the quarantine provision became highly contentious. The IEC did not clearly communicate how the process would work; thus, the procedures for inspecting, quarantining, and invalidating suspicious ballot boxes were unclear for the candidates. Candidates and political parties were particularly sensitive to the IEC's handling of the issue, as decisions made by the IEC were final and could not be the subject of an appeal.[78] Additionally, the same provisions of the Electoral Law gave authority to the IEC to deal with suspicious ballot boxes, without stipulating the role of the ECC.[79] As a result, the ECC was only given an opportunity to address the issue of whether the suspicious ballot boxes were dealt with appropriately after the completion of counting when it was required to verify the results. In effect, the Electoral Law created two competing adjudicating bodies on the issue of how to deal with suspicious ballot boxes. That is, on the one hand, at the counting stage, the IEC could unilaterally determine whether to include or exclude suspicious ballot boxes. On the other hand, once the counting had been completed, the ECC could retrospectively invalidate suspicious ballots that had been included by the IEC.

Disappointingly, the IEC went on to conduct its inspection of the quarantined ballot boxes in the absence of observers and agents.[80] The same provision for suspicious ballot boxes had been highly misused in the 2009 Presidential Elections: the IEC secretariat had initially quarantined the ballot boxes only to later include them in the counting as the initial results indicated that the number of votes cast in favour of President Karzai was lower than expected.[81] Such provisions that allow conflicting and overlapping authorities to adjudicate electoral disputes can also be highly vulnerable to manipulation by the Government.

Given that the experience of the previous elections was alarming, the relevant provisions in the electoral laws should have been reformed so as to avoid such disputes from occurring during the 2010 Parliamentary Elections. In fact, civil society groups such as the Office of Security and Cooperation for Europe (OSCE) and FEFA, which had observed and reported on the conduct of the 2009 Presidential Elections, made many pertinent recommendations.[82] However, these recommendations were overlooked and not implemented as Afghanistan went to the polls for the Parliamentary Elections in 2010.[83]

In particular, certain measures, had they been adopted, could have deterred fraud during the 2010 elections. For example, following the 2009 Presidential Elections, the absence of any systematic investigations or prosecution of the alleged suspects contributed to a culture of impunity among the perpetrators of electoral fraud. On the record, the IEC claimed that it had vetted out thousands of employees who had committed or assisted in fraud; however, it did not

77 Electoral Law (Official Gazette no. 1012), Art. 57, 2010 (SY 1389).

78 "Election Support Team Report."

79 Electoral Law, Art. 57, 2010.

80 "Afghanistan Parliamentary Election Observation Mission 2010."

81 Hakim, Pers. Comm., 2014.

82 "Islamic Republic of Afghanistan Presidential and Provincial Council Elections, Election Support Team Report" (Warsaw: Organisation for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights (OSCE/ODIHR), 2009).

83 "Afghanistan Parliamentary Election Observation Mission 2010."

publish a list or describe the mechanism used to vet its staff. Additionally, the IEC's vetting of candidates with alleged links to illegal armed groups was not done in a transparent manner. In fact, as the election progressed, many candidates with links to armed groups were allowed to stay on the ballot, which undermined the credibility of the IEC's vetting process and the overall electoral process.

Voter turnout was already low during the 2010 election, and the subsequent invalidation of 1.3 million votes forced the number of valid votes to drop significantly, leaving many candidates out of the winner's list. The IEC had completed its task and was prepared to announce the initial list of winners. Matters then rested in the hands of the ECC to adjudicate the remaining electoral complaints and certify the final election results.

4.5 Adjudication of election complaints

The ECC received nearly 6,000 complaints relating to conduct at polling booths and counting centres. The ECC categorised the complaints as follows: a) electoral complaints impacting the results of the election and requiring immediate action from the ECC; b) electoral complaints not impacting the results and to be adjudicated at a later stage; and c) complaints not meeting the requirements set forth in the ECC Rules of Procedure or non-electoral complaints.[84] The ECC's priority was thus to adjudicate complaints in category (a), which amounted to approximately 2,500 complaints.

Although the PECCs served as the authority of first instance, most of the cases, aside from those undergoing appeal, were still referred to the ECC due to intimidation of PECC staff.[85] Observer groups reported that the PECC's handling of complaints lacked both efficiency and transparency. Often decisions made by the PECC were not communicated to the affected parties. Some decisions were even said to lack any legal basis.[86] The ECC was also criticised for lacking more transparent processes for adjudicating complaints and for failing to educate the general public about the complaints process.[87]

In five different rounds, the ECC invalidated votes from 383 polling centres on the basis of complaints that revealed serious electoral violations. Following the conclusion of the elections, the ECC formally referred 413 candidates and several IEC staff members suspected of committing electoral offences to the AGO for prosecution.[88]

4.6 Declaration of initial and final results

One of the innovations in both commissions during the 2009 and 2010 elections was the use of the Internet. Both commissions had decided that in order to ensure transparency, they would publish the results, including partial results, on their websites. The IEC had also specified that all counting centres should provide a copy of the daily results sheet to the candidates, political party agents, and observers. This new requirement aimed to disseminate information in a timely fashion and facilitate transparency. However, the early sharing of information proved to be a double-edged sword. Once the initial results were released, many candidates could see that as a result of the large number of invalidated votes, the outcome of the election would not be in their favour. The Government was also concerned that votes cast in favour of many of its allies were

84 The ECC defined the categories in the following manner: Category A "complaints...that contain allegations which, if proven, would affect polling station results... These complaints were handled immediately and investigative resources were dedicated to such cases as the highest priority." Category B "complaints...that contained allegations relating to violations or offences which, if proven, did not impact on the results of an election... These were investigated by the ECC, when resources were not required for handling higher priority (A) cases." Category C "complaints...did not require further investigation because:¤[1] They are submitted more than 72 hours after the alleged violation. [2] They are incomplete or do not meet the formal requirements for complaints, as set out in the ECC Rules of Procedure... [3] They do not allege an offence related to the elections." See "Final Report for Presidential Elections 2009" (Kabul: Election Complaints Commission (ECC), 2010), 31.

85 Rafat, Pers. Comm., 2014.

86 "Election Support Team Report."

87 "Afghanistan Parliamentary Election Observation Mission 2010."

88 "Observation Mission: Parliamentary Elections 2010, Final Report," (Kabul: Democracy International (DI), 2011).

being disqualified. As a result, the adversely affected candidates, including those backed by the Government, actively sought to disrupt the remainder of the electoral process.[89]

Government interference throughout the process was pervasive. After the IEC's announcement of the initial results, the Attorney General made a public speech, claiming that the way in which the results were being announced was "embarrassing" and that he "feels uncomfortable" reporting to others on it. The ECC strongly refuted his statements and challenged the Attorney General's authority to question the elections and his depth of knowledge about the electoral processes and procedures.[90] Later, the AGO issued an indictment and sent a letter to the SC in which it accused several IEC and ECC senior officials of committing corruption and election fraud.[91] They considered it as treason and asked the SC to impose a severe penalty—capital punishment.[92]

In a meeting held in the Presidential Palace in which all stakeholders were present, President Karzai indicated his dissatisfaction with the initial results of the elections. The President further indicated that he expected the final results to be determined in consultation with the Government. The ECC and IEC stood firm against the President, insisting that they intended to discharge their responsibilities as required under the law. One stakeholder present during the meeting recounted that "The President [was] dismayed, [and] said in a sarcastic manner that if the results are not as per our will, we will send them [the prosecutors] after you."[93]

The President wished to see the disqualified votes included for several reasons. First, he was unhappy with results in Ghazni province, where all 11 seats were won by Hazaras and not a single seat by Pashtons. The electoral outcome in Ghazni was largely determined by the fact that serious security challenges prevented the majority of Pashtons from travelling to voting booths on election day. Additionally, the influence and control of the Taliban over many parts of the province made it difficult for government officials, including election officials, to carry out their work.[94] Thus, the outcome had little to do with the way in which the ECC or IEC carried out its work in Ghazni. Despite these facts, the President wanted the IEC and ECC to recount the results, make adjustments to them, or call for fresh elections in Ghazni to ensure the adequate representation of Pashtons in Parliament.[95]

Second, the President was under pressure from the powerbrokers (and their relatives) who supported him, but had lost the election. According to some, these included the brothers and close family members of the President right through to the cabinet ministers and other influential people in the Government. Validating their vote would not only satisfy these powerbrokers, but would also enlarge the President's pool of supporters in the Parliament.[96]

Third, as argued by some, the President was unwilling to allow a strong and independent parliament to emerge.[97] A strong parliament could use its constitutional powers to conduct an oversight of the executive branch, thus strengthening the checks and balances within state institutions.

89 Manawi, Pers. Comm., 2014.

90 Rafat, Pers. Comm., 2014.

91 Pers. Comm., 2014.

92 The Wall Street Journal reported: "The IEC's chairman...told a news conference in Kabul...that he has read the attorney general's letter to the Supreme Court. The letter, he said, accuses the election commissioners of treason and calls for the court to impose the death penalty on them." See Yaroslav Trofimov, "Afghan Supreme Court Asked to Void Election - Suicide Bombing Kills Six U.S. Troops in Kandahar Province," The Wall Street Journal, 12 December 2010.

93 Rafat, Pers. Comm., 2014.

94 Pamela Constable, "Afghanistan's Hazaras Gain Clout in Disputed Parliamentary Elections," Washington Post Foreign Service, 24 December 2010.

95 Pers. Comm., 2014.

96 Pers. Comm., 2014

97 Rafar, Pers. Comm., 2014.

Fourth, in an effort to overcome the shortcomings of previous elections, he wanted to prove that the authorities responsible for administering the elections were weak and incompetent. This would serve his interests by restoring some legitimacy to the flawed 2009 Presidential Elections,[98] in which 809,349 votes cast in favour of the President were invalidated[99] on grounds of serious fraud. Therefore, during the Parliamentary Elections, he wanted to prove that the electoral bodies were incapable of adjudicating complaints properly, as they had supposedly been incapable in the past election.

Therefore, in order to achieve his desired electoral results, the President decided to use the Attorney General and SC as tools to put pressure on the two commissions. However, the ECC stood firm and remained undeterred in the face of intimidation from government agencies. The ECC certified the final results, and the IEC released the results from 33 provinces as well as the Kuchi constituencies, but left out the results for Ghazni province. The results from Ghazni province were announced unaltered, a week later. In total, 24 winning candidates were disqualified.[100]

98 Rafar, Pers. Comm., 2014.

99 "Final Report for Presidential Elections 2009," 38.

100 "Election Support Team Report."

5. Special Election Tribunal

The extra-constitutional actions of the executive were evident in the aftermath of the 2010 Parliamentary Elections. Once the final election results were announced, the Government realised that their use of force and intimidation had not worked. Thus, the Government began to seek alternative means of achieving their desired electoral results. One means of overturning the certified election results was by establishing a new mechanism that could re-adjudicate the contested aspects of the election. At the outset, it was thought that such a new mechanism could take the form of a special tribunal. The Government was confident that at the least the SC would be amenable to the idea. The Government initiated consultations with different entities, including the SC, to determine the possible ways to establish such a tribunal.

The establishment of the court signified a much greater problem for Afghanistan—the use of extra-constitutional measures to further political gains at the expense of constitutional and political stability in the country. Therefore, before reviewing the formation and legal grounds for the establishment of the Special Tribunal, it is necessary to study the state of constitutionalism and separation of powers in Afghanistan.

5.1 The Supreme Court's acquiescence to the Special Tribunal

An examination of the history of the relationship between the ECC and SC reveals that the SC had never interfered in the work of the ECC, but had rather respected and supported its jurisdiction and work. Several examples clearly demonstrate the cooperative relationship between the two bodies. For example, "the Supreme Court, the Attorney General's Office and the Ministry of Interior provided background checks on criminal convictions as requested by the ECC."[101] Second, the SC made its own appointments to the ECC in the first two rounds in accordance with the Electoral Law. In 2010, when the law did not provide an opportunity to the SC to nominate a candidate, instead limiting its role to act in consultation with the President and Speakers of both houses, the SC actively participated in the process. Additionally, the President nominated a senior judge from the judiciary, who went on to be elected as the Chairman of the ECC. Third, during the 2005 Parliamentary Elections when disqualified candidates appealed to the SC, the ECC challenged the jurisdiction of the SC to hear the cases;[102] the issue was eventually resolved through informal consultations. This makes it apparent that the SC did not challenge the legal jurisdiction of the ECC to disqualify candidates, nor did it assert itself as the sole arbiter with the power to adjudicate disputes. In this case, it is unclear why in 2010 the SC decided that the ECC and its actions were unconstitutional and illegal, and that the Tribunal should adjudicate all election disputes.

During the 2010 Parliamentary Elections, it is believed that the SC had at first instance contested the idea of establishing the Tribunal.[103] When the President consulted the SC, it responded by arguing that the formation of such a tribunal was contrary to the spirit of the law and could not be justified under the Constitution. The President then sought the opinion of the ICOIC. Echoing the views of the SC, the ICOIC similarly replied that establishing a tribunal to adjudicate electoral complaints would be both unconstitutional and illegal. The President then, so it seems, tasked the SC to devise a constitutional and statutory ground for establishing the Tribunal.

Ultimately, the SC did acquiesce to the formation of the Tribunal at the request of the President. The Tribunal was formally established after the approval of the President, and the structure included five judges, four from appellate courts in Kabul and other provinces, and one judicial advisor from a SC chamber. The members took an oath of office affirming their allegiance to the Constitution and the laws of Afghanistan, and undertook to act independently and impartially in judging the cases before them.

101 "Final Report for Parliamentary Elections of 2005," 10.

102 "Election Support Team Recommendations on 2005 Parliamentary Elections" (Warsaw: Organisation for Security and Cooperation in Europe, (OSCE), 2005).

103 Ahmadzai, Pers. Comm., 2014.

5.2 Constitutional and statutory foundation

The SC presented three main constitutional grounds for the establishment of the Tribunal. In particular, the Court relied on the following three articles: Article 120 that affirms the authority of the judicial organ to consider all cases filed by real or incorporeal persons; Article 122 that does not permit any law, under any circumstances, to exclude any case or area from the jurisdiction of the judicial organ and submit it to another authority; and Article 123 that requires rules relating to the authority and proceedings of courts and matters related to judges to be regulated by law. The SC also relied on Article 50 of the *Law on Organisation and Jurisdiction of Courts* (LOJC), which allows the Court to establish other Dewans within the structure of central and district provincial primary courts, conditional on approval of the President.[104]

One day after the establishment of the Tribunal, the ICOIC held an extraordinary meeting and in an abstract review, unanimously rejected its establishment. The ICOIC's first point of contention was the term "special" attributed to the Tribunal, as the Constitution defines "Special Tribunals" as mechanisms to be used for the impeachment of the President, justices of the SC, and ministers. They upheld the authority of the SC under the LOJC to establish specialised courts, but did not find sufficient grounds for establishing the Special Election Tribunal. They argued that even if this Tribunal was created under the provision for the formation of "specialised" courts (similar to the specialised juvenile court), its authority and organisation should have been regulated by a law endorsed in advance.[105]

It is important to divert here briefly and examine how other specialised courts were established in the past. The SC, based on Article 50 of the LOJC, has to date established five special courts: the Counter-Narcotics Court, Courts of Crimes against Internal and External Security, Courts of Property Disputes, Specialised Family Court, and Specialised Juvenile Court.[106] These were established on the basis of the specific provisions of the LOJC, the LOJC and other statutes, or specific statutes with reference to the LOJC. For instance, the Commercial Courts were established based on Article 45 of the LOJC, the Juvenile Court on Article 44 of the LOJC and the Juvenile Code, and the Counter Narcotics Court on the Counter-Narcotics Law with reference to Article 50 of the LOJC. Therefore, the SC had no precedent in establishing a special court in the manner that it established the Tribunal. Additionally, there were little grounds for the SC to argue that it had never faced unique and compelling circumstances such as the 2010 Parliamentary Elections. In fact, unless provided for in a relevant statute, there are no circumstances under which the SC could establish a special tribunal.

Creating a court in the absence of a promulgated law suggests that the SC has the authority to define the organisation and jurisdiction of a new court. Under Article 95 of the Constitution, the SC can only "propose" laws to the Government relating to the regulation of the judiciary.[107] In exceptional circumstances where specialised courts have been established and not merely proposed, the SC has only done so in the context where specific laws already define the new court's jurisdiction and organisation. Thus, when the SC decided to establish the Tribunal, it went beyond merely "proposing" laws to making laws.

Furthermore, when the Law on the ICOIC 2009 was approved by Parliament, it was vetoed by the President on the grounds that it was not in conformity with the Constitution, as the powers of interpreting the Constitution were only vested in the SC. The Parliament used its overriding powers, and with a two-third majority vote reapproved the Law.[108] The President asked the SC to review the Law for constitutionality. When it was published in the *Official Gazette*, the

104 Mizan Gazette (Supreme Court Periodical), no. 147, 2010 (SY 1389).

105 "Legal Opinion on the Establishment of Special and Specialized Courts by the Supreme Court to Adjudicate Electoral Claims," No. 7 (Kabul: Independent Commission on Overseeing the Implementation of the Constitution (ICOIC), 2010). Note that the ICOIC Legal Opinions used in this research were issued in Dari and translated into English for the purpose of this research.

106 Supreme Court, http://supremecourt.gov.af/en/page/625 (accessed Feb 15, 2014)

107 Article 95 of the Constitution reads: "The proposal for drafting laws shall be made by the Government or members of the National Assembly or, in the domain of regulating the judiciary, by the Supreme Court, through the Government…"

108 Registani, Pers. Comm., 2014.

Law appeared with a ruling from the SC, indicating the reasons given by the SC regarding the Law's lack of conformity with the Constitution, in particular Article 121 that gives the power of interpretation of the Constitution to the SC.[109] However, the SC assumed the authority that it could modify the Law at its own discretion; it removed the parts that it deemed contradictory to the Constitution and provided footnotes explaining what was removed and for what reasons. This clearly violated Article 90 of the Constitution authorising only the Parliament to ratify, "modify," or abrogate laws. In this particular instance, the SC assumed the authority that it could unilaterally modify the Law and then send it to Ministry of Justice to be published. The Government was, in this case, equally in violation of the Constitution, as the Ministry of Justice had never before published a law in the *Official Gazette* with footnotes or a judicial ruling stating that a law was unconstitutional.

Viewed in this light, the aforementioned examples effectively set a precedent that allows the judiciary to encroach on the law-making powers of other governmental branches.

Additional ambiguity arises under Article 29(1)(7) of the LOJC, which gives power to the SC to propose new courts along with their judicial and administrative powers. However, creating the Tribunal under this article would violate Article 123 of the Constitution, which requires the formation, authority, and proceedings of courts to be regulated by law. Thus, even if the SC were to *propose* a new court under the LOJC, it would have to be created through the enactment of a law by another branch of government. Thus, the LOJC cannot be interpreted in a way so as to allow the SC to establish a specialised tribunal in the absence of a statute.

The sequence of correspondence between the Office of the President, ICOIC, and SC render the issue more complicated. The ICOIC in its subsequent legal opinion mentioned a letter received from the Office of Administrative Affairs and Council of Ministers Secretariat (OOACOMS). The annexes of the letter included two letters received from the SC—identically dated and numbered—asking for the approval of the Tribunal. Each letter had the directive[110] at the bottom of the page. One directive approved the establishment of a one-tier tribunal, while the other simply approved the establishment of a tribunal (without mention of how many tiers).[111]

The lack of clarity on how the Special Tribunal should be established is evident from the perspective of both the SC and the Office of the President. In its final decision, the SC did not specify whether the Tribunal should be a one-tier or three-tier tribunal. It is possible to see that the President may have wanted a one-tier tribunal so that it decisions would be final and not able to be challenged. The ICOIC considered both types of tribunals to be invalid, emphasising that a one-tier tribunal would be especially unconstitutional.

The IEC also sought the legal opinion of the ICOIC on the authority of the AGO to investigate and institute legal proceedings for electoral disputes, as well as on the legality of the establishment of the Special Election Tribunal. In interpreting Articles 156 and 86 of the Constitution, the ICOIC maintained that the IEC was authorised by the Constitution to administer and supervise all kinds of elections in Afghanistan. It maintained that "supervising" implied a control of all electoral processes in order to prevent violations of the law and ensure compliance to all electoral laws. However, the ultimate power to determine the validity of the elections would remain with the ECC.[112] It stated that the power accorded to the ECC under the Electoral Law to review election credentials gave the ECC an implicit power to review the entire process, including the voting and

109 Article 121 of the Constitution reads: "At the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law." The judiciary and Parliament interpreted this article in different manners, with the former indicating that the power of interpretation lies with the SC and the latter declining such an authority. Thus, the Parliament, while approving the ICOIC Law, conferred this authority to them.

110 In Afghanistan, as part of the administrative tradition, whenever a request is sent from one administrative office to another, the directive of actions to be taken is written at the bottom of the letter and signed by the authorised official.

111 "Legal Opinion on the Special Tribunal for Adjudication of Dissatisfied Candidates' Claims," No. 8 (Kabul: Independent Commission on Overseeing the Implementation of the Constitution (ICOIC), 2010).

112 "Legal Opinion on the Special Tribunal for Adjudication of Dissatisfied Candidates' Claims," No. 8.

counting stages. Therefore, the ICOIC upheld the finality of the ECC's decisions, and subsequently, the IEC could announce the final results of the elections.[113] However, the ICOIC noted that the IEC should distinguish between administrative and criminal violations of the law, with the latter being referred to law enforcement authorities. Nevertheless, the investigation and prosecution of criminal offences by law enforcement authorities should not prevent the IEC from announcing the final results nor the inauguration of Parliament.

The ICOIC maintained that the requirements under Article 83 of the Constitution supported the view that the ECC's decisions were final; Article 83 also provides that elections must be held 30-60 days prior to the expiration of the Parliamentary term.[114] It additionally provides that the Wolesi Jirga's session will end upon the announcement of the final results. Thus, the Constitution does not allow for a gap between the two Parliaments. The ICOIC concluded that if the decision of the ECC is not final, then the election process will not complete on time and thus violate the requirements of Article 83. The ICOIC held that losing candidates would always be inclined to challenge the election results. If the claims were heard in the normal court system, then the time required under the court procedures would make it impossible to comply with the requirements of Article 83.

Those declared winners by the IEC and ECC should thus occupy seats in the new Parliament unless or until there is a final judgment by an authoritative court to the contrary. Thus, the ICOIC's decision carefully balanced the legal rights of candidates, the jurisdiction of the courts, and the need to ensure the continuity of Parliament. Once the election results were certified and announced, the losing candidates would retain their right to contest any aspect of the election before a court of law. Additionally, law enforcement agencies could discharge their duties under the law and pursue criminal investigations. However, a pending electoral dispute or investigation could not delay the process of declaring winners or the inauguration of a new Parliament.[115]

5.3 Performance of the Tribunal

The Tribunal was established, despite vigorous objections from election administration bodies, national and international election observation organisations, most candidates, political parties, and legal experts. All stakeholders strongly questioned the legality and constitutionality of the Tribunal. The Tribunal was tasked to review the disputed election results in 33 provinces. This required it to go through a new counting process and scrutinise the quarantined ballot boxes.

The Tribunal requested the support of the IEC and ECC; however, both bodies viewed the Tribunal as their unconstitutional rival and so declined all requests for assistance. The commission members that were interviewed stated that they could see no reason why the Tribunal should be supported. As a result, they did not explain to the Tribunal the procedures under which the boxes had been quarantined, the procedures for counting votes, and other general procedures and guidelines used by the IEC or ECC as a part of the process. The Tribunal publicly criticised the lack of support from the IEC, but still did not receive any assistance from the commission.[116] The IEC and ECC found the work of the Tribunal unacceptable, especially the recounting of votes in quarantined boxes in a context that was not legally sanctioned. The Tribunal thus worked in isolation and completed its work. It requested several organisations to participate in the process as observers, but all organisations, including the FEFA, refused to be part of its work and challenged its constitutionality.[117] The Tribunal went to the 33 provinces in which complaints were received and performed a recount. After 5 months of work, it announced that 62 dissatisfied candidates had won from 27 provinces.

113 "Legal Opinion on the Special Tribunal for Adjudication of Dissatisfied Candidates' Claims," No. 8.

114 Constitution of Afghanistan, Art. 83, 2004.

115 "Legal Opinion on the Establishment of Special and Specialized Courts by the Supreme Court to Adjudicate Electoral Claims," No. 13 (Kabul: Independent Commission on Overseeing the Implementation of the Constitution (ICOIC), 2010).

116 "Special Election Tribunal Press Conference," Mizan Gazette (Supreme Court Periodical), February 2010 (SY 1389).

117 "Press Release," Free and Fair Elections Foundation of Afghanistan, 16 December 2010.

After the Tribunal completed its work, the question was raised before the SC as to whether the rulings of the Tribunal could be contested in a higher court, to which the SC responded affirmatively. The Tribunal similarly recognised the right of parties to appeal its final judgment. Eventually, an appellate court reviewed the decision of the Tribunal at the request of several dissatisfied candidates who had not benefitted from its judgment. The 62 MPs, originally declared winners by the IEC and ECC, did not contest the decision of the Tribunal, as they refused to recognise its constitutional validity.[118] The appellate court in turn upheld the original decision of the Tribunal.

5.4 Political foundation?

The crisis that arose in the aftermath of the 2010 Parliamentary Elections was not merely the result of legal ambiguities and loopholes. Questions regarding the legality and constitutionality of the Tribunal as well as the actions of the IEC and ECC were driven by a larger political battle.[119] Constitutions and laws do not make people and societies function; societies make laws function. Even the best constitutions in the world, in the absence of political will, will not be adhered to. Conversely, poorly drafted constitutions or even unwritten constitutions can function well if the political order is prepared to abide by them.[120] Once the initial election results were in, it was apparent that the political landscape would change significantly to the President's disadvantage. Dissatisfied with the existing electoral mechanisms, he set about creating a new one that would reconfigure the election results in his favour. Unfortunately, this process of executive interference reflected a broader lack of willingness among Afghanistan's political order to abide by the Constitution.

The President's arguments to establish the Tribunal began with his disagreements with the IEC on the election results from Ghazni, where all 11 seats had been won by Hazaras. However, other important factors included the failure of his supporters in the elections, his unwillingness to allow a strong Parliament to emerge, and his inclination to undermine the electoral bodies. As soon as the initial results were announced, the President insisted on holding re-elections. He emphasised that not having a Pashtun representation would undermine the fragile security situation in Ghazni. However, for the IEC and ECC, changing the results was not an option. They delayed the announcement of the final results for Ghazni by one week, but ultimately certified the initial results.[121]

The executive's interference in the election process in 2010 merely repeated a practice that had been well established in past elections. In the aftermath of the 2009 elections, the Government leaned on the IEC to prosecute candidates who had criticised it during the elections. At the outset of the 2009 Presidential Elections, candidates were required to submit to the IEC the names, registration card information, and other details of at least 10,000 persons supporting them.[122] However, the law did not require candidates to obtain a minimum of 10,000 votes during the elections from these same supporters. In the aftermath of the elections, the IEC referred candidates who had won less than 10,000 votes to the AGO, claiming that they had committed fraud prior to the elections. The AGO summoned the candidates to be investigated. However, in reality, these candidates were targeted, as they had publicly criticised the transparency of the elections, the lack of independence of the IEC, and had threatened to challenge the election results before national and international courts.[123] The action of the AGO was a clear violation of the principle of legality that prohibits the imposition of retroactive criminal sanctions.

118 Senior Official (Supreme Court of Afghanistan), Pers. Comm., February 2014.

119 Judge Johann Kriegler (Former Commissioner, Election Complaints Commission, 2010), Pers. Comm., February 2014.

120 Judge Kriegler, Pers. Comm., February 2014.

121 For a detailed account of the Ghazni votes, see Joshana Partlow, "Problems in One Province Delay Afghan Election: Re-vote Possible, Officials Say," Washington Post Foreign Service, 24 November 2010; Thomas Rutting, "Ghazni's Drama Election: It's the System," South Asia Channel, Foreign Policy, 2 December 2010.

122 Electoral Law, Art. 35, 2005.

123 Bashir Bizhan (Former Candidate and one of the candidates who had been summoned), Pers. Comm., February 2014.

At the end of every election, the IEC and ECC present a list of electoral offences and offenders to the AGO. This practice was once again followed at the end of the 2010 Parliamentary Elections. However, to date, the AGO has not reported any prosecutions after the 2005 and 2009 elections.[124] Unsurprisingly, there have been no prosecutions to date following the 2010 elections. Regrettably, the lack of legal action taken to prosecute and punish those guilty of fraud and electoral violations has only served to reinforce the deeply entrenched culture of impunity in Afghanistan.

5.5 Dissolution of the Tribunal and transfer of powers to the Independent Election Commission

Within five days, the President, under pressure from both the Afghan and international community to end his unconstitutional interference in the electoral process, dissolved the Tribunal and allowed the IEC to make the final decision.[125]

The IEC subsequently announced that it had received a presidential decree that was issued following Judicial Ruling no. 22 of the Appeal Court, which "transferred the authority for making a decision as to electoral disputes to the President and the President assigned the IEC to make the final decision in accordance with articles (33), (86) and (156) of the Constitution and articles (62), (63) and (64) of the Electoral Law and with the judicial ruling No (22),"[126] which indeed signified a transfer of authority to the President.

The language of the IEC announcement suggested that Judicial Ruling no. 22[127] of the appellate court had transferred the authority of decision making to the President. This, however, would go against all principles of judicial independence, as it would to give discretion to the executive over the decisions of the courts. It would also breach Article 129 of the Constitution requiring the enforcement of all final decisions of the courts as well as the provisions on the finality of court rulings in the LOJC.

The upshot of this conflict was a bargain between the involved entities. In essence, while it appeared that President Karzai abandoned the struggle at the last minute, he in fact compromised, partly to save face, so as to empower the IEC to make the final decision in return for some of the candidates making their way to the Parliament.

This compromise brought the constitutional crisis to an end; however, its handling demonstrates a pattern of using extra-constitutional measures by public officials, particularly the President. Initially, the President pressurised the judiciary to establish the Tribunal and devise legal grounds to justify its existence. However, after the Tribunal had completed its work, the President ordered its dissolution. When he then transferred the powers to the IEC, he required it to review the decision of the Tribunal—which had ceased to exist—when making its final decisions. None of his actions had legal basis, although they exhibit his exercise of extra-constitutional powers. Surprisingly enough, his dominance over the judiciary is so strong that when he dissolved the Tribunal and transferred powers to the IEC, the judiciary made no efforts to contest his decision.

Under this compromise, the IEC had to come up with a solution to allow some of the 62 candidates (deemed to have lost the election) to make their way to the Parliament. The IEC interpreted Article 62(7) of the Electoral Law that transferred power of the ECC to the IEC after its dissolution, such that once the ECC was dissolved, the IEC could approve, modify, and abrogate its decisions. Such an interpretation would first question the need for the existence of the ECC as an oversight body, and second, it goes against the prior clause of the same article

124 The OSCE/ODIHR Election Support Team reported this following a meeting with the Deputy Attorney General on 14 October 2010; see "Election Support Team Report."

125 For details on the dissolution of the Tribunal, see Scott Worden, "Karzai Blinks in the Afghan Election Crisis," Foreign Policy, The South Asia Channel, 10 August 2011; Rahim Faiez and Heidi Vogt, "Afghanistan Courts Cannot Change Elections: Hamid Karzai," Huffington Post, 10 August 2011.

126 "Press Release," Independent Elections Commission, 21 August 2011 http://www.iec.org.af/pdf/wolesi-pressr/pressr_deliberation_complaints_cn_wj_2010_21-Aug-2011.pdf (accessed 10 February 2014).

127 The text of Judicial Ruling no. 22 is not available for cross-referencing.

that deems the decisions of the ECC to be final. This was a clear breach of the Electoral Law by the IEC, the body that throughout this crisis emphasised the adherence to the provisions of the Electoral Law and rejected the Tribunal's review of the ECC's decisions.

Given that both commissions were subject to enormous political pressure, the IEC was confronted with a dilemma: it either had to change the electoral results, fully or partially, as the President wished, or the Special Tribunal would proceed to do so. It appears that the IEC chose the lesser of two options and succumbed to political pressure, at the cost of breaching the law.[128]

5.6 Judicial independence: A reality or myth?

The SC as the highest judicial organ in Afghanistan is, in theory, an independent branch of the State. However, judicial independence requires that judges should not merely act to serve their own self-interests or the interests of the body that has appointed them. To have an independent judiciary in practice, it is particularly important to have specific measures in place, including a rigorous selection process, defined tenure, appropriate remuneration, and control over the Court's budget. In order to be effective, these measures need to be guaranteed by the Constitution.[129]

The judiciary in Afghanistan suffers from a failure of institutional design and is highly vulnerable to undue influence from the executive. In high-stakes moments, the judiciary feels completely vulnerable to the two other branches, and in an attempt to protect itself from Parliament, it undermines its own independence and seeks support from the body that has appointed it, namely the executive.

The extent of the judiciary's partiality to the executive became very apparent in the aftermath of the 2010 election crisis. After the inauguration of Parliament, MPs had repeatedly asked for the dissolution of the Tribunal. Once the Tribunal announced its judgment and ordered the replacement of the 62 MPs, the Parliament impeached 6 members of the SC[130] and announced this on national television. Oddly, in response to the decision of the Parliament, the SC wrote in its periodical *Mizan*, "In accordance with Article 64 of the Constitution of the land and the rulings of the Islamic Shari'a, the power to dismiss judges, from a judge of the Primary Court to the Judge of Supreme Court is only vested in the authority of the President."[131]

However, the Constitution does not grant power to the President to dismiss SC judges. Article 64 of the Constitution has two clauses related to judges. Clause 12 clearly stipulates the appointment of the Chief Justice and members of the SC with the endorsement of the Wolesi Jirga. Clause 13 furthermore gives power to the President to appoint, retire, and accept the resignation and dismissal of judges. It is clear from these two sequential clauses that the judges mentioned in Clause 13 refer to those of the primary and appellate courts. This is further confirmed by Article 117, which provides for the appointment of SC justices by the President, but secures their positions from dismissal until their term is over. This article also refers to Article 127, whereby judges can only be dismissed if they are impeached by the Parliament on the grounds of accusations of a crime related to job performance or committing a crime. However, despite these provisions, the SC has interpreted the Constitution in a manner that grants the President the authority to dismiss them.

128 Judge Kriegler, Pers. Comm., 2014.

129 See Roderick A. Macdonald and Hoi Kong, "Judicial Independence as a Constitutional Virtue," in The Oxford Handbook of Comparative Constitution Law, ed. Michel Rosenfeld and Andras Sajo, 831-58 (Oxford: Oxford University Press, 2012).

130 The Parliament has only impeached six justices, because, in its opinion, the term of the Chief Justice and two other justices had already expired. The Parliament did therefore not recognise their authority.

131 Mizan Gazette (Supreme Court Periodical), no. 168, 2011 (SY 1390) available at http://supremecourt.gov.af/Content/Media/Documents/16812122011121339216553325325.pdf, (accessed 25 February 2014).

Other challenges to the judiciary: The power of interpretation

Throughout this electoral drama that took one year to resolve, it was apparent that the various entities had a different understanding of the provisions of the Constitution, without political and legal consensus over the power of interpretation.[132]

The Draft Constitution of 2004 envisaged a constitutional court for Afghanistan with the powers of interpretation. Nevertheless, due to last-minute changes by the executive, the court was removed and its authorities were provided to the judiciary. As a result, Article 121, while clearly authorising the judiciary to conduct judicial review, lacks clarity as to who has the power to interpret the Constitution in Afghanistan. Different entities have interpreted Article 121 according to their own interests. The SC's interpretation[133] of this article is that they have the sole authority to interpret the Constitution, while the Legislature[134] and ICOIC think differently. For example, an ICOIC member, affirming the ambiguity in Article 121 of the Constitution, argues that Article 157 of the Constitution allows the establishment of the ICOIC in accordance with the law. He then presents Article 94 of the Constitution that authorises the National Assembly to approve laws. Thus, he concludes this power to be constitutionally valid since the Law on Structure and Authorities of the ICOIC has been approved by Parliament and the law confers this power on the ICOIC.[135]

If under Article 121 of the Constitution, the SC has the power to determine the constitutionality of laws, how can it provide this opinion without interpreting the Constitution itself?[136] It is evident that the Parliament will not approve laws that explicitly contradict the text of the Constitution. The reason why the SC has implied its authority to interpret the Constitution is because certain legislation may be inconsistent with the constitutional provisions. In such situations, it is important that an entity like the judiciary reviews the legislation to ensure that it is interpreted in a manner consistent with the Constitution.

When Parliament approved the Law on the ICOIC, interestingly, it also gave the ICOIC the power of judicial review of the current statutes to ensure their conformity with the Constitution. This was also in clear contradiction to Article 121 of the Constitution that explicitly gives this power to the SC. Article 121 thus reads:

> *At the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law.*

Therefore, the power of the SC to interpret the Constitution and review the constitutionality of statutes should not only be respected, but should also be reinforced by amending the law on the ICOIC. The ICOIC's role could then remain to be a constitutional "whistle-blower" to ensure the conformity of the actions of different institutions to the Constitution. Where there are violations of the Constitution, it could refer violators to the SC for adjudication.

The concurrent jurisdictions of the two entities to interpret the Constitution and review legislation allow actors to refer interchangeably to either one depending on whether they envisage that it will provide a decision in their favour. The lack of clarity concerning the jurisdiction of the two entities undermines the jurisdiction of the judiciary and gives rise to a state of confusion that can easily be manipulated by the executive or other entities.

132 Scott Worden and Sylvana Q. Sinha, "Constitutional Interpretation and the Continuing Crisis in Afghanistan," Peace Brief 113 (Washington, DC: United States Institute of Peace, 2011).

133 Supreme Court Senior Official, Pers. Comm., 2014.

134 The Legislature denied the SC's power of interpretation and thus vested this power to the ICOIC through a statute.

135 Amin Ahmadi, "The Authority of Constitutional Interpretation in Afghanistan," http://icoic.gov.af/Content/files/%D9%85%D8%B1%D8%AC%D8%B9%20%D8%AA%D9%81%D8%B3%DB%8C%D8%B1%20%D9%82%D8%A7%D9%86%D9%88%D9%86%20%D8%A7%D8%B3%D8%A7%D8%B3%DB%8C.pdf (accessed March 2014).

136 Nader Nadery (Executive Director, Free and Fair Elections Foundation of Afghanistan), Pers. Comm., February 2014.

However, in the current context in Afghanistan, it is a prerequisite for the SC to have its independence, before it is to have the power of interpretation. The SC cannot be an effective body to interpret the Constitution if it continues to be compliant to the wishes of the executive. The interpretation of the Constitution at the will of the executive or capriciously by judges would give them arbitrary power, which would defeat the purpose of having a Constitution in the first place.[137]

Although unfavourable, in certain circumstances where the judiciary has not demonstrated its independence and impartiality, as seen in its decision to authorise the establishment of the Tribunal, it might be a better option to allow the ICOIC to interpret the Constitution. However, in this case, the confusion over the power of interpretation will continue to exist. Furthermore, the position taken by the ICOIC during the 2010 elections mainly reflects the resistance of certain members toward the executive and not the entire commission.[138] Therefore, like the SC, as the membership in the ICOIC changes, its level of impartiality might be at risk.

5.7 The future of electoral bodies

After the 2010 election, there was a clear need to reform the electoral laws, and in particular, the powers of the electoral bodies. After much debate and political wrangling, the Electoral Law was finally reviewed and passed by Parliament in July 2013. The Parliament also passed a separate law on the Structure, Duties and Authorities of the Independent Election Commission and the Independent Election Complaints Commission.[139] Under the latter, the Parliament tried to protect the structural integrity of the two electoral commissions and limit the President's control over the selection of members in the two commissions. The law made the ECC a permanent body, and added the word "independent" so as to further strengthen its role as an independent watchdog body.

The Law on the Structure, Duties and Authorities of the IEC and IECC introduced a "Selection Committee" (hereafter, the Committee) to receive applications from eligible candidates for the position and review their credentials. However, the Law did not require electoral experience of any kind from these candidates.[140] The Committee would then present the President with 27 nominations for the IEC and 15 nominations for the ECC, so that he could choose 9 and 5 members for each commission, respectively. For every seat in each commission, the President was given three nominees to choose from before making the appointment. The structure of the Committee included the Speakers of both houses of Parliament, Chief Justice, Head of the AIHRC, Head of the ICOIC, and a representative from civil society.

As soon as the law was passed, the IEC claimed that the Selection Committee was unconstitutional and illogical.[141] The IEC and others who opposed the Committee believed that such a mechanism encroached on the President's constitutional powers to make appointments to government institutions. While Clause 13 of Article 64 of the Constitution allows the President to appoint high-ranking officials, the Constitution does not explicitly mention his appointment of members of the IEC.

However, the proponents of the Selection Committee argued that Article 64 of the Constitution clearly stipulates that government appointments should be conducted in accordance with the law. The Constitution specifically imposes an obligation on the State to "adopt necessary measures to create a healthy administration and realise reforms in the administrative system of the country. The administration shall perform its duties with complete neutrality and in compliance with the

137 See, for example, Robert H. Bork, The Great Debate: Interpreting Our Written Constitution 43 (Washington, DC: Federalist Society, 2005).

138 Pers. Comm., Kabul, 2014

139 Law on the Structure, Duties and Authorities of the Independent Election Commission and Independent Election Complaints Commission and Electoral Law (Official Gazette no. 1112), 2013 (SY 1392).

140 Law on the Structure, Duties and Authorities of the Independent Election Commission and Independent Election Complaints Commission, Art. 7(3) and 21(3).

141 Saliha Sadat, "Selection Committee and ECC 'Unconstitutional': IEC Chief," Tolo News – Election 2014, 27 July 2013.

provisions of the laws... The citizens of Afghanistan shall be recruited by the state on the basis of ability, without any discrimination, according to the provisions of the law."[142] Additionally, the Committee's powers were limited to introducing a list of eligible candidates, while the President retained the ultimate authority to make a final decision.

The Committee's work was ineffective for three reasons. First, due to a political intrigue of the executive, the elected representative of civil society could not participate in the process.[143] While civil society organisations had nominated the chairman of the FEFA, an organisation that had monitored elections since 2004, the OOACOMS claimed that civil society had not submitted any names and proceeded to nominate its own candidate, the Head of the Transparent Election Foundation of Afghanistan,[144] a newly established organisation. Thus, the representative of civil society could only participate in the selection of IECC members, not IEC members.

Second, the law did not allow for the participation of a representative from political parties in the Committee. Ideally, political parties should have had a representative in the process, or at the very least, they should have participated as observers to ensure the transparency of the process. Third, within the Committee there was a clear tendency, among the majority of members, to nominate individuals preferred by the Government. Even if there were members who disagreed with the views of the majority with regard to specific individuals, the majority vote prevailed according to the Law.[145] It was also reported that the Committee members had met the President and discussed the final list of 27 candidates before presenting him with it.[146]

The Committee also suffered from a lack of procedures or guidelines for the selection of nominees. The enabling law of the Committee did not provide sufficient details on how it should conduct its business.[147] Thus, the final selection of nominees was made in haste and was highly criticised by civil society, as the majority of nominees were considered to be pro-palace.[148]

Although neither the selection process nor the chosen candidates are ideal, a certain degree of protection is afforded in the fact that the members of the commissions are not exclusively selected by the President. Thus, this modest reform is a large step toward ensuring the neutrality of electoral bodies. Furthermore, the powers of the ECC remain largely unchanged, with the law reiterating that the decisions of the ECC are "final" and "unalterable." This explicit provision, which prevents other entities from altering the final decisions of the ECC, guarantees the immunity of the commission from political interference in the future.

Some of the other principal features of the Law on the Structure, Duties and Authorities of the IEC and IECC 2013 include providing immunity to the members of the commissions from arrest without the decision of an authoritative court (Articles 11 and 23) and requiring the Ministry of Interior to ensure the security of the two commissions (Article 33).

The Law requires the IECC to hold open sessions allowing the participation of political parties, civil society, media, and national and international observers and agents (Article 24). It mandates the IECC to take all decisions in accordance with the Constitution, electoral laws, and other laws of the country (Article 25). The Law reiterates that the decisions of the IEC are final and unalterable (Articles 14 and 26).

142 Constitution of Afghanistan, Art. 50, 2004.

143 The Afghanistan Analysts Network reported that "civil society representatives blame the OAA for deliberately undermining the process and thus preventing the presence of a potentially critical civil society representative in the Selection Committee, as this could have been an obstacle to the smooth engineering of the final candidate list." Gran Hewad, Martine van Bijlert and Thomas Ruttig, "A Hasty Process: New Independent Election Commission Announced" (Kabul: Afghanistan Analysts Network, 2013).

144 Sadat, "Selection Committee and ECC 'Unconstitutional'."

145 Law on the Structure, Duties and Authorities of the Independent Election Commission and Independent Election Complaints Commission, Art. 8(3) and 22(3).

146 Hewad, van Bijlert and Ruttig, "A Hasty Process."

147 Nadery, Pers. Comm., 2014

148 Hewad, van Bijlert and Ruttig, "A Hasty Process."

The Electoral Law 2013 provides more details on the different electoral processes that were absent from past laws. For instance, it recognises the rights of candidates and their agents to register complaints about the quarantine boxes to the IECC and requires the IEC to develop procedures for quarantining ballot boxes (Article 57).

The Electoral Law also provides the IEC with the power to object to the decisions of the IECC if it deems its decisions to be unfair; however, the final decision would still remain with the IECC (Article 59). Chapter 13 provides further details on how to adjudicate complaints and requires the IECC to develop clear procedures on adjudicating election disputes (Articles 62 to 70). However, Article 65 allows the votes of a candidate to be invalidated only in the centre in which the violations such as fraud, abuse of power, or use of weapons have been committed by candidates or their relatives. It would be preferable, however, if a person committing such violations were disqualified from the elections to ensure that such violations do not occur in the future.

The Law demarcates the authority of the IECC as well as law enforcement and judicial agencies. It allows complaints or disputes of a criminal nature to be referred to law enforcement agencies (Article 68), thus recognising other disputes to be adjudicated solely by the IECC. Finally, the Electoral Law supersedes any contradictory provisions of other laws governing elections (Article 80).

The current Electoral Law is generally open to the operations of observers and agents during elections. However, Article 55 of the law, defining the duties of observers and agents, stipulates that they should "avoid spreading rumours and creating tensions." Such an ambiguous provision could easily be used to limit and undermine the work of observers and agents. For example, if an observer or agent challenges the actions of an electoral official at a polling centre, it could be construed as "creating tensions" and the observer or agent could be silenced by electoral officials. Therefore, a phrase such as "spreading rumours and creating tensions" should be defined in the law itself, or otherwise, in subsequent regulations and procedures.

It is also important that the Government and electoral bodies allow for the participation of election observation organisations at various levels of the electoral process. Reports by international and national observer missions such as the FEFA, NDI, OSCE, and other organisations repeatedly complained that their recommendations from previous elections were ignored. The work of these missions will not be as effective in the long term if the Government or electoral bodies fail to engage with these institutions and commit to bringing about further reforms.

6. Lessons Learned from the Elections

> The rule of law says: if you don't like what is happening, you live with it. You don't try to bend the law, abuse the Constitution, or create artificial bodies.
>
> *– Judge Kriegler, ECC member 2010*

Underlying all of the legal and constitutional battles in the 2010 Parliamentary Elections, one single fact emerged: the ruling regime did not like the election results and wanted to change the results, through any means possible, including extra-constitutional measures. It used the judiciary and exerted enormous pressure on the IEC and ECC to alter their decisions. When the regime could not persuade the commissions, it created the Tribunal as a counterweight to the electoral commission. It finally resulted in changing the election results without any justification in law.[149] The legal and constitutional battles of the Parliamentary Elections nevertheless underscore a greater political problem: the lack of respect for the Constitution and the rule of law.

For the conduct of elections to be effective in Afghanistan, the country requires respect for constitutionalism and the rule of law; a meaningful separation of power reflected in a restrained executive, a strong Parliament, and an impartial and independent judiciary; the neutrality of electoral bodies; and the empowerment of election observation organisations to serve as whistle-blowers and watchdogs.

Separation of power is on the brink of failure in Afghanistan, but because this failure benefits important vested interests in one branch, it is overlooked. Therefore, institutional reform to restore the balance of power among the three arms of government is essential. Political will must also be established to allow these reforms to take place. The people of Afghanistan will lose confidence in government institutions if they continue to be ineffective. This will affect other institutions like the election bodies, which, in practice, have been considerably effective. Public confidence in government institutions has to be restored through reforms that foster the rule of law.

Judicial independence is guaranteed by the Constitution of Afghanistan, but requires commitment by all state organs to respect and observe it. As the Afghanistan experience demonstrates, the current judiciary in the country has been affected by multiple challenges, including judicial competence, corruption, minimal benefits, and lack of financial self-sufficiency. Additionally, the interference of the executive has undermined institutional autonomy and further weakened judicial independence.

6.1 Recommendations

A prudent assessment of the success of elections or the ability of election management institutions in Afghanistan requires a better understanding of the wider political context in which the elections are held.

The process of holding elections has been slow, problematic, and marred with widespread fraud. Efforts to address these challenges by reforming the electoral process have also been marked by shortcomings. However, holding regular elections in Afghanistan has been a major achievement in itself. This has been possible mainly due to the legal framework, the efforts made by many Afghan election officials, the continuous oversight of the process by national and international observers, and the support of the international community. In view of the issues discussed in this research, the main recommendations presented in this paper are as follows.

149 Judge Kriegler, Pers. Comm., 2014.

For constitutional reform in Afghanistan

- The three branches of government should join efforts for constitutional reform in the country. The constitutional reforms should entail an amendment of the Constitution, which is vital to ensure the proper balance of power in Afghanistan. The amendment of the Constitution must ensure a stronger system of checks and balances among the three branches along with explicit mechanisms for enforcement.
- The independence of the judiciary, as a prerequisite for the rule of law, is indispensable for the future of Afghanistan. This requires constitutional reforms that strengthen the role of the judiciary as a parallel and coequal branch of the state and protect it from the undue influence of the executive. In particular, the selection process of SC justices should follow a rigorous process and should not be left to the discretion of the President alone. The term of office specified by the Constitution must be respected and observed. Judges should receive appropriate remuneration, physical security, and a decent pension after retirement. The judiciary must have budgetary and financial autonomy.
- The authorities of the SC and ICOIC must be clearly demarcated. Such a reform is particularly needed so as to bring to an end the confusion over the authority of the interpretation of the Constitution and the review of legislation. These powers of the SC should not only be respected, but also reinforced by amending Article 8 of the Law on the ICOIC. The role of the ICOIC should remain supervising the implementation of the Constitution by all entities in the country.
- However, in the interim, for Afghanistan to ensure constitutionalism, it requires the three branches to respect the functional and institutional separation of powers as outlined by the current Constitution. In particular, the executive should show self-restraint with regard to the constitutional provisions and hold itself accountable to the people and other constitutional organs of the state. On the other hand, both the judiciary and the Parliament, as two branches parallel to the executive, must fulfil their constitutional duty of providing oversight over the executive branch.

For the Government of Afghanistan

- The Afghan Government should make all efforts to ensure that the election process does not become an expedient political exercise for the ruling regimes. It has to respect the election process and the relevant laws and should accept the outcomes of elections rather than trying to sabotage or manipulate them.
- Respect for the rule of law is an essential requirement for the long-term constitutional and political stability of the country. The Government must respect the rule of law and refrain from any extra-constitutional actions.

For the electoral commissions

- The electoral laws must be approved by the Parliament and well ahead of the elections in order to allow the commissions to duly start the electoral process.
- The IEC as well as the IECC should have a good understanding of the laws and should develop procedures and guidelines for better implementing the electoral laws. The two commissions should ensure the sufficient training of their staff on all electoral laws, procedures, and guidelines well in advance of the elections.
- The commissions should jointly develop their procedures to ensure greater harmony in their work, notwithstanding each commission's independence. For example, the commissions could coordinate in developing procedures for the annulment of votes.
- Currently, both the IEC and ECC are permanent bodies. However, at the end of the term of members in the two commissions, new appointments should take place without any delay. The selection process should be more transparent and involve civil society and political party representation. To accommodate this representation, Articles 8 and 12 of the Electoral Law 2013 should be amended.

- Greater efforts should be made by both commissions to build the confidence of the people. At present, pessimism toward elections reigns. The experiences of the past few elections show the disillusionment of the people. The two commissions should engage in more public outreach and clearly explain their efforts for reform. They should also explain what measures are being taken to prevent fraud during elections.
- The IEC and ECC should closely work with candidates to raise awareness about electoral laws, but most importantly, on electoral regulations and procedures. Candidates should also be well aware of the consequences of violating laws. There is usually no communication between them. Thus, most of the time, candidates are completely unaware of the procedures being used or how the process moves forward. Establishing proper channels of communication may substantially reduce fraud, as candidates or their supporters will be better aware of the consequences of fraud and may avoid resorting to it.
- The objective of having election observation groups is to assist the electoral bodies to hold free and fair elections. This objective is achieved through the observation of the process of elections. Therefore, these groups should not only be allowed to monitor all stages of the election process, but also be heard when they raise concerns about the integrity of the process. The electoral bodies should seriously review and incorporate the comments made by these missions in their efforts to bring about reforms. Any reforms made without the involvement of these missions will not bring about desirable results.

For the judiciary

- The judiciary should make all efforts to bring reforms within the institution in order to lead it toward efficiency and independence. These reforms may include enhancing the legal competency of judges, the appointment of judges on the basis of merit, and ensuring the independence of judges and the integrity of the judicial branch in general.
- The judiciary should not undermine its own independence by allowing the executive branch to interfere in its affairs or give it instructions. Although the Constitution of Afghanistan could be reformed to ensure the independence of the judiciary, even with the current powers, the judiciary can still act firmly and remain an independent branch.
- The judiciary and the AGO as the law enforcement agency of the executive should start perusing electoral offences. The lack of proper judicial processes in the aftermath of every election supports the culture of impunity in Afghanistan and will encourage more fraud in the coming elections. It is important for the judiciary, instead of interfering in the work of the ECC, to actually bring the violators to justice.
- The authority for the adjudication of election disputes could be transferred to the judicial body in Afghanistan. However, the judiciary has to demonstrate its impartiality and independence in its work. It also has to ensure that it meets all of the preconditions for the establishment of specialised election courts in accordance with the law.

For the national and international observation missions

- National election observation missions should continue to observe the process and provide accessible information to the people. They should make all efforts to coordinate their activities so that they could expand their outreach to areas with high security threats. Past elections have shown that the chances of fraud are high in insecure areas. Therefore, the presence of observers and agents are important in such locations.
- International observation missions should continue to observe elections alongside national institutions. The related government authorities should facilitate their missions in the provinces.
- All election stakeholders should converge, assess the last ten years of elections in Afghanistan, and jointly develop a comprehensive strategy for reform. The process of elections, its legal framework, and procedures have always been finalised behind closed doors. After a decade of elections, Afghanistan is now ready for a comprehensive reform of its electoral system. There has to be strong political will for the reforms to take place.

Appendix

List of interviewees

	Name	Title
1	Shoaib Timory	Legal expert
2	Fazel Ahmad Manawi	Former Head of IEC (2010)
3	Zia Rafat	Former ECC member (2010)
4	Mohammad Farid Hameedi	Deputy of the AIHRC, former ECC Commissioner (2005)
5	Fahim Hakim	Former ECC member (2009)
6	Mohammad Amin Ahmadi	Constitutional expert and ICOIC member
7	Nader Nadery	FEFA/AIHRC
8	Judge Qazi Sayed Murad Sharifi	Former Head of ECC (2010)
9	Shah Sultan Akifi	ECC member (2010)
10	Abdullah Ahmadzai	Former CEO of IEC
11	Najla Ayubi	Former IEC member
12	Saleh Registani	Former MP
13	Ahmad Behzad	MP, against the Tribunal
14	*Anonymity requested*	Supreme Court Senior Official
15	Mir Ahmad Joyenda	Former candidate
16	Mohammad Ali Stegh	ECC, Head of Secretariat
17	Mohammad Sadeq Safi	ECC Kunduz Commissioner
18	Mohammad Ashraf	ECC Takhar Commissioner
19	Zia Begzad	ECC Samangan Commissioner
20	Mohammad Ashraf	ECC Jawzjan Commissioner
21	Dr. Ghulam Haider Alama	Constitutional lawyer
22	Bashir Bezhan	Former candidate
23	Telibert Loac	Director of Elections, NDI
24	Grant Kippen	Former Head of ECC (2005-09)
25	Judge Johann Kriegler	Former ECC member (2010)
26	Safwat Mustafa Sidqi	Former ECC member (2010)
27	Peter Lepsch	Advisor to the IECC

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