

In 2010 Afghanistan faced an unprecedented situation where despite having two bodies to address electoral irregularities, the executive created an extra-constitutional measure to adjudicate electoral complaints. Ambiguities in the legal framework and unexpected electoral results in Ghazni province prompted a large number of electoral complaints. The executive dissatisfied by the response of the electoral bodies sought to by pass them and create a Special Election Tribunal to review complaints lodged by dissatisfied candidates. The Supreme Court characteristically sided with the executive and endorsed the Tribunal allowing for the votes to be recounted in a context unregulated by the existing laws and procedures. The crisis ended after strong international and domestic pressure forced a political compromise. In 2014, few could imagine such a situation repeating itself. The Electoral Laws have been reformed, and the electoral institutions have been strengthened. However, given that once again in 2014 the votes are hotly disputed, if the hard lessons from 2010 are not learned, there is little to prevent a political and constitutional crisis from re-emerging.

The Special Elections Tribunal of 2010

The origins of the 2010 Special Election Tribunal (the Tribunal) lie in the events of the 2009 presidential election. After the first round of the 2009 election, the ECC invalidated a large number of votes that had been cast in favour of President Karzai. Once in power the President sought to re-engineer the electoral law, where he would have sole authority to appoint members of the ECC. In 2010 the ECC had been newly established and was struggling against time and inadequate physical resources to approve and implement procedures in time for the elections. In particular, the ECC worked on very short deadlines to establish and train its provincial level staff. Additionally, the Electoral Law at the time lacked clarity and vested parallel and competing adjudicating authority in both the IEC and ECC. During the counting stage the IEC could decide how votes are included or invalidated; however, once the counting had been completed the ECC had the power to retrospectively annul votes that had been included by the IEC. The law did not clarify what would happen in the event of a dispute between the two bodies.

Once the votes had been counted in the 2010 elections, it became apparent that the political landscape would change significantly to the President's disadvantage. At first instance the President sought to apply direct pressure on the electoral bodies to change the election results. To their credit, both electoral bodies stood firm and refused to bow to extreme pressure from the executive. The ECC reviewed and adjudicated all the election complaints and the IEC announced the final election results. Faced with few alternatives, the President sought to by-pass the electoral bodies by creating the Tribunal. The Supreme Court for its part complied with the wishes of the executive in finding that the establishment of the Tribunal was constitutionally valid. In contrast the ICOIC issued a blistering opinion of its own questioning all grounds the Supreme Court used to justify the validity of Tribunal.

Despite strong legal and political opposition, the Tribunal was established and carried out its work for nearly six months. In particular, finding itself isolated by the electoral bodies, and therefore receiving neither their support nor guidance, the Tribunal proceeded to re-count votes without adhering to any of the existing procedures. Ultimately strong international and domestic pressure prevailed, and a political deal was struck where the Tribunal was dissolved and the power was transferred to the IEC to determine the outcome of the electoral complaints. Critically, the international community instead of standing behind the IEC, pressured IEC officials to accept the political compromise and re-visit the original election results. The IEC finding itself in a precarious position proceeded in complete violation of electoral laws, to review the ECC's decisions (which were to be final decisions) regarding fraudulent votes. The crisis was resolved when the nine MPs who had initially won the election were unseated and replaced by nine candidates who had at first instance lost the election.

Political Implications

The events relating to the 2010 election were not merely the result of legal ambiguities, but were also driven by a larger political battle. First, in Ghazni province despite being a Pashtun majority area, all eleven seats had been secured by Hazara candidates. This prompted allegations of fraud and calls for fresh elections. Second, at the time commentators observed that the President may have also been concerned about key powerbrokers losing out and as a result he may have been concerned about the prospect of a stronger Parliament during his second term. Third, given that in 2009 the electoral bodies had invalidated a large number of votes that had been cast in favor of the President, it was argued that the President had a strong interest to see the electoral bodies discredited in the eyes of the public.

More broadly the events of the 2010 reflects a larger pattern of executive interference in the electoral process during elections. Similar to 2010, in the aftermath of the 2009 elections, the Government leaned on the IEC to prosecute candidates that had criticized it during the elections. This ability of the executive to interfere and manipulate existing procedures, is made easier by the unwillingness and inability of the Parliament and judiciary to exercise their constitutionally mandated powers to check the excesses of the executive.

Constitutional Implications

From a constitutional perspective the establishment of the Tribunal illustrates weaknesses in the separation and balance of power in the Afghan Constitution. The Constitution provides for an extraordinarily strong executive that has not been offset by a strong parliament and an independent judiciary. The episode particularly highlights weaknesses in the way the judiciary has been designed and functions in practice. A preliminary question arises as to why Afghanistan needs specialized electoral dispute resolution bodies in the first place, while many other countries have vested this authority in the judiciary. One answer offered is that the formal court system is not considered a credible mechanism to resolve electoral complaints as they are not viewed to be independent nor efficient. Therefore, in the absence of judicial independence, elections could be used as a tool by the executive to manipulate the process, and in case of parliamentary elections, also to handpick members of Parliament.

From an institutional design perspective, there are several provisions in the Constitution that undermines the judiciary's capacity to be a co-equal actor among the three branches of government. The President is granted the power to appoint justices of the Supreme Court, with approval from the Parliament. Administrative constraints such as requiring Parliamentary approval for the Supreme Court's budget and inadequate benefits afforded to judges have further undermined the Supreme Court's independence. Additionally, the balance of power is tipped in favor of the executive as a result of a constitutional provision that prevents the judiciary from hearing the trials of the President or members of Cabinet.

Critically, ambiguous language in article 121 of the Constitution grants power to the Supreme Court to conduct judicial reviews; however, does not explicitly grant the Court the authority to interpret the Constitution. In a tussle between the Parliament and the executive, the Parliament exploited this ambiguity, and passed legislation granting the ICOIC explicit authority to interpret the Constitution. At present there is no legal or political consensus over who has the power to interpret the Constitution. On the one hand, given the tendency of the current judiciary to seek refuge in the executive, it would seem precarious to grant the Supreme Court additional power to interpret the Constitution. On the other hand, the ICOIC's laudable opinions, for example in the case of the Tribunal, appear to be politically motivated and led by members of the Commission who resist the overreach of the executive.

Additionally, despite the existence of other constitutional provisions that in fact facilitate the independence of the Court they have not been implemented. Key among them are the provisions relating to the staggered terms of Supreme Court justices. In making the initial rounds of appointments, the Constitution clearly provides that Supreme Court justices should be appointed for terms of 4, 7 and 10 years respectively. In complete violation of this provision the first Chief Justice's term has been extended, and he continues to occupy the position as "Acting Chief Justice". Thus, the current Chief Justice has been in office for 3.5 years longer than his constitutionally mandated term.

Since 2010, international and domestic actors have lobbied, and to some extent succeeded in addressing gaps in the legal framework relating to elections and strengthening electoral institutions. However, little has been done to address the underlying constitutional factors that can undermine the entire electoral process.

Progress since 2010

There is agreement among stakeholders that Afghanistan is in a better place in 2014 compared to 2010. Legally the electoral framework has been strengthened, and institutionally dialogue about the electoral process has been much more "intra-Afghan" rather than being dominated by international actors. For the first time under the Constitution of 2004, the Parliament passed *The Electoral Law* and the *Law on the*

Structure, Duties and Authorities of the Independent Election Commission and Independent Complaints Commission in 2013. Under the new Electoral Law the authorities of the IEC and ECC (renamed IECC) have been better delineated. The question of parallel authorities between the IEC and IECC have been removed. The IECC is now a permanent body and has final authority to determine the validity of votes. The reforms also introduced a new appointment mechanism where the President must make appointments to the electoral bodies based on recommendations made by a ‘Selection Committee’ comprising of a range of actors including the speakers of the both houses of parliament, the Chief Justice, the head of the ICOIC and AIHRC, and a representative from civil society.

Despite these gains, weaknesses remain both in the legal framework and the way it has been implemented. For example, when it came to establishing the Selection Committee, the individual with the strongest civil society backing was ignored in favor of representative from a previously unheard of organization. Once the Committee convened, it failed to develop proper procedures for the selection of candidates and went on to short list candidates that were perceived to be both bias and lack expertise in the administration of elections. Since the final appointments were made the electoral bodies have suffered from a credibility deficit, and critically the Presidential candidates have consistently maintained that some commissioners are biased towards one of the candidates or are pro-Palace.

Conclusion

Despite gains made in the electoral dispute framework from 2010 to 2014, constitutional weaknesses that made the electoral process vulnerable to manipulation in 2010 remain. The 2014 election only serve to illustrate the underlying weaknesses of the electoral institutions. Executive interference in the electoral process, especially in the counting process has been markedly less. However, challenges relating to how to address fraudulent votes, lack of trust in electoral institutions, and the lack of outreach between electoral institutions, the candidates and other key stakeholders were evident during the 2014 elections. Following the announcement of the preliminary results of the second round of the presidential election, presidential candidate Abdullah Abdullah rejected the results and announced his withdrawal from the electoral process. In an effort to salvage the ensuing political crisis, the international community intervened proposing to conduct a 100% audit of all votes cast under the auspices of UNAMA. To date, the audit has progressed in fits and starts with constant disagreements amongst the candidates over the counting process and in particular the validation criteria. Throughout the process the IECC has been sidelined. Perhaps learning the lessons of 2010, neither the candidates nor the electoral institutions have looked to the judiciary as a venue to resolve the electoral dispute. Thus despite the gains made by reforming the legal and institutional framework, there appears to be no capacity for serious electoral disputes to be resolved within the existing legal and constitutional framework.

A key lessons learned is that electoral reform in Afghanistan needs to be a long term project that is continuously addressed between elections, rather than be rushed through close to an impending election. Given the events of the 2014 election it is likely that there will be a strong appetite for electoral reform from a new government. However, any efforts to address weaknesses in the electoral framework before the 2015 parliamentary election should be done in consultation with all relevant stakeholders. The constitutional prohibition on Parliament from amending electoral laws a year out from the elections, may mean that any reforms before the 2015 elections will have to be passed by presidential decree. However, efforts at reform especially if they are pushed through via presidential decree, should be inclusive and consultative. As electoral bodies are reformed and strengthened, equal attention must be paid to reforming the separation of power in the Constitution, and in particular strengthening the independence of the judiciary.

Recommendations

- All stakeholders should explore avenues to strengthen the Afghan judiciary. In particular, features such as selection of judges, autonomy over financial matters, implementation of constitutionally mandated term limits, and proper remuneration for judges need to be strengthened.
- All future Electoral Laws should be drafted in consultation with all relevant stakeholders including civil society, political parties, members of parliament and approved by Parliament.
- Both IEC and IECC should harmonize their procedures for example relating to the annulment of votes.
- The process for appointments to electoral bodies should be made more transparent, and there should be representation by civil society and political parties in the Selection Committee.
- There should be greater outreach by both electoral bodies among all relevant stakeholders including the candidates, the Palace, security institutions and the public to build trust and confidence in electoral institutions.

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