

**Afghanistan Research and Evaluation Unit**

**Roundtable Discussion on  
“Afghanistan’s Electoral Experiences”  
was organized by AREU  
on Wednesday 7th May 2014.**



**12 YEARS**  
OF HIGH-QUALITY  
**RESEARCH**

This discussion forms part of AREU's project titled "Afghan Constitutional Analysis and Dialogues". Funding for this research was provided by the United States Institute of Peace and the Embassy of Finland in Kabul.

At the outset of the discussion it was agreed that participants will not be identified. Therefore the content of the discussion is reported below, without any attribution to the individual participants.

## **Introductory Remarks**

During the opening remarks it was observed that stakeholders were very impressed with the first round of the 2014 Presidential election. In particular, the turn out of the people was very impressive given the poor weather, and the fragile security conditions.

It was remarked that the paper is very timely and topical. In particular, the need for research and reflection on the Afghan Constitution was emphasized. It was acknowledged that the Afghan Constitution has numerous problems both technical and practical. However, because of political sensitivities around conducting research on the Constitution it took some time to pool together the resources and establish the project. Stakeholders are very much looking forward to the paper series. The generous support of the U.S. Institute of Peace for AREU’s Constitutional Studies project was acknowledged.

It was noted that the research in this paper also reflects the fact that the electoral process has to be supported. “Quick fixes” are not the answer to Afghanistan’s electoral woes. There must be support for the process, and not just individuals.

A question was raised, is there a danger of a “quick fix” being applied in the current context? It was acknowledged, that a “quick fix” in the form of a political deal, among the top two contenders, is certainly being talked about. However, before going down that path it has to be acknowledged that such an option will have serious consequences, both politically and constitutionally. There is every risk that Afghanistan will end up with an illegitimate government, and will ultimately lose the support of the international community as well as the people. It is imperative that the achievements of the last thirteen years not be undermined. The Afghan people are yearning for a legitimate government, and they very much need the support of the international community in the form of economic, financial and security assistance.

## **Presentation of the Paper**

For Afghanistan, to have a Constitution, is itself an achievement. Afghanistan has had several Constitution’s in the past, that were never put in to effect. Previous Constitutions, including the 1964 Constitution were created by rulers, to legitimize their governments.

There have been remarkable signs of progress under each Constitution. In particular, this Constitution has been accepted by the people, state institutions and by the Government. For example, people who used to fight and kill for power, under this Constitution use legitimate ways i.e. elections to get into power. However, despite these gains, problems remain. There are contradictions, ambiguities and serious disputes about interpretation of the Constitution.

Prior to 2004 Afghanistan has had many elections but they did not meet international standards for free and fair elections. The current Constitution doesn’t provide sufficient details about election administration. The Constitution only provides for the establishment of the Independent Election Commission (IEC). The details of the electoral process are left to be regulated by statutory law. For example, many people think that the SNTV system is provided for by the Constitution. In fact it’s not.

Unfortunately, the electoral laws were enacted using executive decree. In 2010, there were various reasons why electoral laws hadn't been passed on time by the Parliament. One reason was that the Constitution prohibits the Parliament from passing or amending Electoral Laws a year out from parliamentary elections. The 2010 Electoral Law introduced a general article about the establishment of the ECC. It also concentrated the power of making appointments to the ECC in the hands of the President.

The origins of the 2010 Special Election Tribunal lies in events that took place during the 2009 presidential elections. In 2009 the ECC invalidated a large number of votes that had been cast in favor of President Karzai. The President in turn pressurized the ECC, and even threatened the individual members of the ECC. In fact, one of the members resigned under pressure, only to join the ECC later. Ultimately President Karzai became the President, even though he didn't garner 50% of the vote.

Once in power, the President re-engineered the electoral law through presidential decree. He had a constitutionally valid argument, as Parliament was prohibited from amending the Electoral Law a year before the parliamentary elections. Under the new changes, the President took on the power to appoint all members of the ECC. Initially all members of the ECC were to be Afghan. However, after some negotiations, two internationals were included in the ECC. Ultimately among the individuals appointed to the ECC, three didn't have any background in election adjudication or a legal background at all.

The parliamentary elections of 2010 were marked with a high degree of violence. Many polling centers were not opened because of insecurity. Both IEC and ECC invalidated a huge number of votes due to fraud.

In Ghazni all eleven seats were won by Hazaaras. The President was unhappy with this outcome. The real reason for the outcome was that in Pashto areas, people couldn't come out to vote as the security situation was very poor. The President was also concerned about key powerbrokers losing out. Commentators also speculated that the President didn't want a strong Parliament to emerge, as that would enable parliament to exercise its constitutional powers and provide a counterweight to executive action. Additionally, there was a sense that the President wanted the election bodies to appear incompetent in the eyes of the public.

The President wanted the election bodies to determine the final result in consultation with his office. However, both the IEC and ECC stood up very strongly and withstood the pressure from the executive.

As a result, the President sought to create an alternative mechanism in the form of the Special Election Tribunal. Leading up to the establishment of the Tribunal there was consultation between the Supreme Court, IEC and ECC. Many dissatisfied candidates had visited the Attorney General and complained about the electoral process and outcome.

The Supreme Court used three constitutional grounds and one statutory ground to establish the Tribunal:

1. Article 120: A duty to consider all cases brought before the Court by real or incorporeal persons.
2. Article 122: No law under any circumstances can exclude jurisdiction of the judiciary and submit it to another authority.

3. Article 123: Rules relating to the authority and proceedings of courts and matters related to judges are to be regulated by law.
4. Law on the Organization and Jurisdiction of Courts: Allows the Supreme Court to establish other Dewans.

The day after the Tribunal was established, the Independent Commission for overseeing the Constitution (ICOIC) questioned the constitutional and legal validity of the Tribunal. ICOIC held that the Constitution exhaustively predefines the term “special court”. Thus, there can be no grounds for establishing a new type of special court that is outside of what is defined in the Constitution.

Despite these oppositions, the Tribunal commenced work and recounted votes. It didn’t receive any support from the IEC or ECC. The re-counting of the votes was particularly problematic as it was done without adherence to the any of the rules established by the IEC and ECC. The Tribunal announced new results where 62 of the sitting MPs were replaced. The decision of the Tribunal was appealed and affirmed.

After establishing the Tribunal the President came under enormous pressure both domestically and internationally. Ultimately he struck a deal to dissolve the court and transfer power to the IEC. Interestingly, once the Tribunal was dissolved, the judiciary accepted the decision of the executive without any qualms.

During the work of the Tribunal the Parliament impeached members of the judiciary. In response, all the Supreme Court had to say in its periodical journal was that only the President has the power to dismiss members of the Court. This is not in fact the case. The President does not have power to dismiss judges of the Supreme Court. The fact that the Supreme Court believes this - goes to illustrate the judiciary’s submissiveness.

Once the power was transferred to the IEC, it overrode the authority of the ECC. The IEC’s conduct was illegal. As a result of the political deal that was struck nine new MPs (who had initially won the election) were removed from their seats and replaced by nine new candidates.

The case of the Tribunal illustrates weaknesses in both the separation of power, and balance of power between institutions. The judiciary in Afghanistan takes refuge with the executive whenever they feel threatened by the Parliament.

## Recommendations

- Independence of the Judiciary has been undermined as a co-equal branch of government. This is illustrated in the way judges are selected. The Constitution provides for staggered appointments so that every few years you get new judges. If you look at the current Chief Justice, he has been serving in his position for three and a half years beyond his constitutionally mandated term. A mechanism needs to be developed to strengthen the selection process for judges. One example might be to establish a selection committee.
- The Supreme Court should be given greater autonomy on budgetary and financial issues.
- The ambiguous language in article 121, and the way it has been interpreted has further undermined the Supreme Court. It is essential that as a court with the power of judicial review, the Supreme Court also has the power to interpret the Constitution.

- Afghan institutions and actors need to respect the electoral process, and not intervene whenever they want. Even electoral bodies need to comply with the law. During the 2013 elections the IEC changed the legal requirement of 100,000 voter registration cards to 70,000. There was no justification under law for them to change this requirement.
- Electoral laws need to be passed by Parliament. Under the latest Electoral Law there is a new mechanism for appointment of members of the IEC and ECC. That in itself is a step forward; however, no one was happy with the actual appointments that have been made.
- There needs to be greater training provided to staff, and these matters need to be addressed well before the elections. For example, the ECC only established its provincial offices less than two months before the 2014 elections. Many of those individuals that worked for the ECC in the most recent elections, at the provincial level, had no legal background or experience in working on electoral issues. As a result there was a lack of coordination in the enforcement of laws and procedures. For example, in Herat they invalidated 100,000 votes, but this was challenged in Kabul.
- There needs to be greater transparency in how the electoral bodies function. One improvement in the 2014 elections was that IEC meetings were open to the media and representatives from the candidates. However, actual review of complaints were behind closed doors.
- It's too early to conclude whether the electoral process of 2014 is going well or not. There is a high possibility of a political deal being struck and a coalition being formed. The Constitution doesn't allow for coalitions. The Electoral Law puts an obligation on the candidates to participate in the electoral process through to the run offs. It would have been better if the electoral law had been amended with the 2009 experience in mind - so that the Constitution clearly outlines the legality or consequence of what happens when a candidate withdraws.

## Discussion

The discussion began with the observation that “the world must seem very disappointing to lawyers”. There was a positive and appreciative response to the presentation. The discussion centered on three themes a) comments on what happened in 2010; b) comments concerning the 2014 elections; and c) specific comments concerning the role of the international community

## Comments relating to the 2010 Elections and the Tribunal

### The need for an additional electoral body

It's interesting to ask the question why did Afghanistan have to have an electoral dispute adjudication body at all? It's because the judiciary is not viewed as up to the task. The formal court system is not deemed transparent enough by political players. Additionally, courts are not time sensitive. Therefore a decision was taken to create a body to adjudicate electoral disputes. In the specific case of the Tribunal, it was created because of ambiguities contained in the electoral law. In particular, there was a question about whether the decisions of the IEC and ECC could be appealed?

Unlike in 2014, in 2010 there were no provisions about IEC’s decisions being invalidated. So in 2010 political players could go to the Attorney General or the Court system. The ECC had similar challenges, it was a nascent organization that was established three months ahead of polling day - they lacked the proper process to adjudicate electoral disputes.

Faced with these circumstances, as the presentation pointed out, there was the election outcome in Ghazni. Electorally there was no solution to the outcome in Ghazni. And for the reasons mentioned during the presentation, there was a desire to re-address that outcome.

### **Role of the electoral bodies**

The presentation was correct in asserting that after the political deal was struck, and the Tribunal was dissolved, the IEC’s subsequent conduct was illegal. When the IEC was asked to find a political solution - IEC was in a [a limited capacity] in a position to protect the votes that had already been cast. It was left with “the best or safest illegal option”. IEC decided not to get in to the details of candidate x got y votes, and then attempt to change those numbers. In particular, the IEC didn’t touch the Ghazni votes. Instead the IEC reviewed the ECC decisions regarding fraudulent votes. At the time there was a legal ambiguity as to whether this was permissible. Where the ECC didn’t have sufficient grounds to invalidate votes for certain candidates, the IEC reviewed those decisions, and allowed for those votes to be counted.

In the aftermath of the 2010 elections there were many reports from observer organizations including FEFA, AIHRC, and others that included good recommendations, and were ignored. Their recommendations need to be taken into account when reforming the electoral process. The international community can play a role in making sure they are implemented.

### **Role of the international community**

The international community is “in between a rock and a hard place” when it comes to Afghan elections. On the one hand the international community wants the process to be an Afghan process and Afghan led. On the other hand the international community finances the process. This creates a conflict of interest. There is a strong will to create a distance, but on the other hand there is a financial and moral obligation to get involved. The international community has an obligation to the tax payers and policy makers in their home countries. Their involvement unfortunately has both a financial impact and a political impact.

In 2010, the case of voter registration was epitomic of the difficult place that the international community can find itself in. They could on the one hand step aside, and let Afghans find a solution to the problem of voter registration. Unfortunately, the solution they presented was a very expensive solution. Ultimately a rift was created between the donors and the Afghan electoral institutions. The Executive made the final decision creating a rift between the electoral bodies and the donors.

Providing electoral assistance in Afghanistan has been a learning experience for the international community as well. This is the first time that certain international stakeholders are dealing daily and continuously on electoral issues, between elections. One of the major successes was the 2014 Election law. It is no secret that the law

was passed - 80% because of international pressure. It was an important moment for constitutional government and democracy in Afghanistan. It was also one of the first times that the legislature triumphed over the executive.

There are important lessons to be learnt from 2010 about the role of the international community. Initially the IEC did enjoy a lot of support from the international community. However once the Tribunal was set up, in order to reach a political compromise the IEC came under severe international pressure to change the election results. IEC was withstanding the pressure from the outside, what forced the IEC into the corner was the international community. Applying pressure directly from the Palace didn't work. Instead the Palace went through the international community. That's how they cut [the IEC's] wings. This point was emphasized that the international community didn't always take the high road.

Today there is a much stronger consensus among the international community. Having said that it is important to acknowledge that there is of course no monolithic international community. The EU, UN, and Americans largely agree on their priorities for the elections much more so than in 2009 and in 2010. Among the donors they see eye to eye electoral issues.

It was acknowledged that in 2014 the role of the international community was much less politicized. All the candidates are now acceptable to western donors, and there is no longer a big preference for one candidate over the other. This attitude may have been different had different candidates been at the top after the first round of elections.

Looking to Afghanistan's future elections, it is very important that a new funding mechanism be developed, as the international community can't be expected to fund the full contribution of future elections.

## **Comments relating to the 2014 elections**

People are swinging between optimism and pessimism about their expectations regarding the 2014 elections. Atmosphere in 2014 is different to 2009, 2010. There was a general acknowledgment that times had changed, several participants stated that they would be very surprised if another Tribunal could be set up. It was acknowledged that the 2014 discussion around electoral processes is much more intra-Afghan rather than international and Afghan. That is much more healthy.

In particular, from a legal perspective Afghanistan is in a better place. Electoral laws was approved within the time frame. That marks significant progress. Pressure from the international community and the work of the IEC was very important in getting the laws passed. However, as the presentation indicated, the appointment of certain commissioners was a disappointment. As a result there is a perception among candidates that the electoral bodies are run by people who are partial to the President. Unfortunately civil society actors were not let on board as envisaged by the new mechanism.

There are serious concerns about the way election results are being reported in 2014. Even as of the date of the presentation, no information has been made available on a breakdown of results by polling centers. Announcement of results, without any breakdown by polling centers is not results. In order to raise complaints about the electoral process, there needs to be greater information made available about how the votes were cast. It's unclear why there is a change in the way results are being reported now. One explanation could be that the success of previous electoral bodies was because of the expertise and capacity of specific individuals, not the institutions themselves.

Interestingly some candidates are unaware of the significance of this omission and have failed to question it. Others have accused the international community of being too hands off.

On the specific point raised during the presentation on the IEC’s decision to ‘illegally’ change the voter registration card requirement - one participant explained that the IEC decided to reduce the 100,000 voter card registration requirement to 70,000 because only one candidate would have been able to fulfill the 100,000 requirement.

In response, another participant interjected and explained that it is not in fact impossible to get 100,000 vote registration cards. The problem is with the IEC’s voter registration database. The database contains more than 30% duplicate records. Therefore, the IEC will allow for a 30% error, as their database is not completely accurate.

One participant pointed out that there are inconsistent goals and expectations of electoral bodies. For example, the IEC tried to identify all the polling centers by the due date, and didn’t add additional polling centers after the deadline was passed. IEC maintained this position, thinking they would have the support of the international community. However, very much late in the game 300 polling centers were added, potentially creating 1,000,000 million more votes. Yet, little was said about these decisions.

Complaints and concerns about election bodies need to start as they are carrying out their work. In the past, as was the case in 2014, as the IEC is carrying out its work there were no complaints. However, once the elections are held, and results start coming in the allegations and complaints also start. Its better if the election institutions are given recommendations and concerns as they are rolling out their work. Reaction to results alone need to be avoided.

In talking about the Constitutional implications, one participant pointed out that there is a need to acknowledge that there is a difference between formal rules and political realities. If the rules are not in line with political realities, then it is very unlikely that rules will be followed. At times, those enforcing the rules, take liberties within the rules to take clear political decisions. This means that political pressure will build up, and political pressure can create bitter results. A pipe will break, and someone will have to fix it. However there is no repair manual. Even in the current context, Afghanistan is very close to that point of rupture. If certain elements of counting replicates in the second round then Afghanistan will face a third bitter situation.

Question was raised where will the “pipe break”? Can anything be done even now?

Stakeholders were satisfied with the electoral process up until December, this included the nomination process. December onwards international community was uncomfortable with the process. It was envisaged that the international community would be sitting on the side of the Afghan institutions and giving advice, discussing and mediating. This was not the case. International community was presented with the practicalities of the vote as a fait accompli. In particular, two aspects of the process 1) triggers for fraud and 2) publication of results by polling results were troubling. Votes from certain provinces came in packages that should have set off the fraud triggers. However, if the fraud triggers were set off, a much bigger discussion with the candidates would have been required. Now that results have been announced, stakeholders are still waiting for results broken down by polling centers. Electoral officials have promised this information, however stakeholders fear that officials neither have the clout or the capacity to provide this information.

There needs to be greater outreach between the actors. This might be enough to help the repair process. IEC is doing better in terms of outreach to the candidates and creating trust in the process. The ECC is in a complete disconnection with candidates. As Afghanistan moves forward, the importance of generating trust among key players, can't be emphasized enough, and that includes the security institutions, the palace, candidates, and electoral bodies.

One participant added that the IEC and candidates (including their two VPs) had a two hour meeting in the Palace two days ago chaired by the President. It is unclear if the meeting was a success. The President had praised the electoral institutions for maintaining transparency. However, representatives from one candidate had challenged the transcript of the meeting.

As the elections proceed to the second round there is a risk that there will be an "ethnicisation" of the election. This would not be good for the future of the country. Candidates need to be encouraged to campaign with their teams, instead of their just vice presidents.

A question was raised, would it be appropriate to change the electoral law next year, i.e. a year before the Parliamentary elections, when the Parliament is prohibited from doing so, through executive decree? The answer was given no it wouldn't be appropriate. It has to be remembered that previous efforts at changing the electoral law through executive decree didn't bode well for the substance of the law. These things also set precedents. For example, if you look at what happened after the first round in 2009 that has set a precedent for the present and possibly future elections. Bad precedents when repeated doesn't improve the situation. That is why we have to be conscious of incidents like changing the requirement from 100,000 voter registration cards to 70,000 - this is per se illegal. We have to be conscious what setting these precedents says about rule of law in Afghanistan?

The reform of the electoral process needs to be a long term project. The idea of convincing policy makers to pursue electoral reform from very early on, i.e. years out from the next election is like trying to "sell pensions to teenagers" - but that is what is necessary for the electoral health of the country. The next round of electoral reforms should start now.



Research  
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**Afghanistan Research and Evaluation Unit**

Hs. 144, 3rd street on the left from Charahi  
Haji Yacoub toward Charahi Shaheed,  
First block on the right Shahr-i-Naw  
Kabul, Afghanistan

Phone: +93 (0) 799 608 548

Email: [areu@areu.org.af](mailto:areu@areu.org.af)

Website: [www.areu.org.af](http://www.areu.org.af)

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