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د افغانستان د آزاد او عادلانه ټولټاکنو موسسه
موسسه انتخابات آزاد و عادلانه افغانستان
Free & Fair Election Forum of Afghanistan organization

FEFA's Proposal on the Electoral Complaints Commission as a Permanent Institution in the Country's Electoral System

The Free and Fair Election Forum of Afghanistan (FEFA) is a civil institution that observes the elections process in the country and plays its role in the reform of the electoral system through cooperation with legislative authorities, particularly the parliament.

The Judicial and Justice Affairs Committee of the lower house of the Afghan parliament, the *Wolesi Jirga*, convened a deliberation on Election Complaint Commission on (August 7, 2012) and planned to develop a proposal on the Electoral Complaints Commission (ECC), attach it to the draft Law on the Structure and Mandate of the Independent Election Commission (IEC), and present it to the plenary session of the *Wolesi Jirga*.

Welcoming efforts by the Judicial and Justice Affairs Committee of the *Wolesi Jirga* for strengthening the country's electoral system, FEFA submits its proposal to the Committee on making the ECC a permanent institution. We hope that our proposal will receive the due attention of the honorable members of the Committee.

FEFA would like to draw the attention of the Judicial and Justice Affairs Committee in particular and the *Wolesi Jirga* in general to several fundamental points that should be taken into account in the assessment of its proposal:

FEFA believes that turning the ECC into a permanent institution within Afghanistan's electoral system requires a political agreement among the country's political leaders, whose support is needed for making the ECC a permanent institution.

Firstly, it is better to develop and enact a new separate law on the ECC in consultation with civil society, political parties, and experts, in which all aspects related to the structure, duties, and mandate of the ECC should be debated transparently and in detail. That is because the incorporation of the ECC within the draft Law on the Structure and Mandate of the IEC is likely to cause concerns. These concerns are as follows:

The Law on the Structure and Mandate of the IEC has been enacted pursuant to Article 156 of the Constitution, while the constitutional basis for the ECC can be Articles 33 and 83. In addition, establishing the ECC as a permanent institution within the Law on the Structure and Mandate of the IEC can expose the ECC to the influence of the IEC and thus reduce its credibility.

Secondly, FEFA believes that legislative authorities -- based on lessons learned in the past four elections-- should make serious amendments in the structure, duties, and mandate of the ECC in both cases, whether the ECC becomes an independent and permanent institution as per a separate law or whether it is created through the addition of a chapter or section within the draft Law on the Structure and Mandate of the IEC.

To support efforts in this area, FEFA presents the following proposal:



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- The conditions and selection procedure of the ECC members should be determined in a way that it guarantees their impartiality and professionalism. In this respect, the model mentioned in FEFA's proposal on the draft Law on the Structure and Mandate of the IEC can be used for the ECC as well.
- The presence of foreign experts, though necessary and important for strengthening the technical capacity of the ECC, can be problematic due to sensitivity in some political decision-making circles, particularly if such experts are involved as members of the ECC. Additionally, the presence of foreign commissioners is not compatible with the permanent status of the ECC. The solution, therefore, is to secure their employment in the central ECC as advisors and experts in order to facilitate the technical work of the ECC.
- The problem of budget, which is always considered a challenge in the creation of permanent institutions in the country, should be considered in the establishment of a permanent ECC. In order to reduce budgetary requirements, the structure of the ECC can be determined in such a way that the ECC incurs the least expenditure in the period between two electoral cycles. Hence, it is necessary to only have the central ECC and its commissioners and a limited number of executive staff as permanent institution and the continuation of the work of provincial ECCs should be needs-based as determined by the central ECC.
- Regarding the issue of appeal, which is a civil principle in any justice process, the structure and mandate of the ECC can be regulated in such a way that it minimizes error in the ECC decisions. In this scheme, the provincial ECCs should be recognized as the first-instance authorities to address complaints, subject to appeal to or review by the central ECC. With regard to sensitive cases, the provincial ECCs should refer such cases to the management board of the central ECC, where the management board will act as the first-instance authority and the central ECC as the appellate authority.
- In order to, on the one hand, create a strong rationale for the continuation of the ECC work and, on the other hand, respond to inadequacies arising out of the lack of continuation of the ECC work in the past, it is necessary to stipulate special duties and mandate for the central ECC in the new proposal, in addition to its common mandate. For example:
 - Formulation and implementation of a national awareness-raising program on the political rights of citizens in the electoral process and on ways to address complaints and challenges related to these rights are a significant issue that requires the formulation and implementation of awareness-raising programs before the commencement of the elections process.



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- o And/or monitoring the implementation by responsible authorities of the ECC decisions, because the implementation by other organizations of some ECC decisions is time-consuming and it is necessary for the ECC to monitor the implementation of its decisions after the announcement of electoral results. The monitoring activities in this regard will also block opportunity for interference of other judiciary powers in Electoral affairs.
- o Similarly, addressing those electoral complaints that do not affect electoral results, but need to be accurately addressed after the elections. These are, for example, complaints against the IEC& ECC staff or other officials.
- o Or the mandate to address cases arising out of financial corruption in elections, which normally occur or disclose after the announcement of electoral results. It is necessary to address these cases through the ECC and not through normal justice institutions.

FEFA's Proposal on the Electoral Complaints Commission as a Permanent Institution

Chapter...

The Establishment of the Electoral Complaints Commission

Article...

An Electoral Complaints Commission (ECC) shall be established in the form of a central authority to address challenges, complaints, and offenses related to electoral affairs in the country.

The central ECC may establish provincial or regional ECCs in the country.

The Composition of the Central ECC

Article...

The central Electoral Complaints Commission, hereinafter referred to as the central ECC, shall be composed of nine members, who are appointed for three years.

The ECC shall have a management board composed of the ECC chair, deputy chair, and secretary, who are elected by the ECC commissioners for three years.

In addition to regulating affairs related to the ECC meetings, the ECC management board shall also serve as the first-instance authority to address specific challenges, complaints, and offense that are referred to it.



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Nomination of Candidates for Membership in the Central ECC

Article...

1. Candidates for membership in the central ECC, including 27 men and women, shall be nominated by academic councils, public institutions of higher education and academic research, and civil society organizations that work in the field of elections in Afghanistan.
2. Qualified candidates shall be nominated by the institutions mentioned in Paragraph 1 of this Article according to a quota scheme to be regulated in a separate regulation.
3. Of candidates mentioned in Paragraph 1 of this Article, nine men and women, who are most qualified and appropriate in areas such as education, positive track record, and impartiality in their previous decision-making, should be shortlisted and chosen by the Selection Committee and then proposed to the President for approval.

Selection Committee

Article...

1. The Selection Committee shall comprise:

1. Chair of the Independent Commission for Monitoring the Implementation of the Constitution as head of the Committee,
2. First deputy speakers of the lower and upper houses of the National Assembly as members,
3. A Supreme Court member to be elected by the High Council of the Supreme Court as member,
4. An Afghanistan Independent Human Rights Commission member to be elected by the Commission as member,
5. The Attorney-General as member, and
6. The Minister of Women's Affairs as member.

2. The Selection Committee shall grade all candidates mentioned in Paragraph 1 of Article... of this Law, taking into account the requirements and criteria mentioned in Article 74 and Paragraph 3 of Article... of this Law, and propose the most qualified candidates to the President.



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Approval of the Appointment of Candidates

Article...

1. Of all nominated candidates, nine candidates shall, upon the President's approval, be appointed as the ECC commissioners for three years.
2. If the President does not agree to approve one or several of the candidates nominated by the Selection Committee, the Committee shall nominate other candidate(s) from the remaining candidates in the graded list to the President. This process may continue till the twentieth-grade candidate.

Loss of Membership

Article...

1. An ECC commissioner shall lose his/her membership under the following circumstances:
 1. Death,
 2. Resignation,
 3. Affliction with a hard-to-cure and chronic disease that obstructs the performance of duties,
 4. Continued absenteeism for over 20 working days without legal justifiable reasons, and
 5. Violation of provisions mentioned in Paragraphs 1, 5, and 6 of Article... of this Law.
2. If circumstances mentioned in Paragraph 1 of this Article occur, the Selection Committee shall nominate other candidate(s) from the remaining candidates in the graded list to the President.
3. The ECC members may also be re-nominated by the organizations mentioned in Article... of this Law in the next appointment cycles.

Requirements for Membership in the Central ECC

Article...

Members of the central ECC shall fulfill the following requirements:

1. Afghan nationality,
2. Higher education at least at BA level in law, political science, and/or Islamic jurisprudence,



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3. At least five years of work experience in such areas as teaching, academic research, political affairs, and/or judicial and justice affairs,
4. At least 30 years of age and at most 75 years of age,
5. Lack of conviction for crime and/or deprivation of civil rights as a result of verdicts by competent courts, and
6. Lack of record of membership in political parties at least two years prior to membership.

The Administrative Mandate of the Central ECC

Article...

The central ECC shall have the following administrative mandate:

1. Determining the composition and appointing members of provincial or regional ECCs in the country,
2. Determining the work periods of provincial or regional ECCs,
3. Making decisions on the continuation of the work of provincial or regional ECCs,
4. Nominating the Director of the Secretariat of the central ECC based on the consent of the majority of the commissioners to the President for approval,
5. Approving the organizational structure and budget of the central, provincial, or regional ECCs,
6. Implementing the budget of the central, provincial, or regional ECCs,
7. Approving administrative appointments in grade 3 and above,
8. Enacting bylaws, procedures, and instructions in accordance with the provisions of this Law, the Electoral Law, and the Law on Civil Servants in order to implement the provisions of this laws, and
9. Employing domestic and foreign advisors in the ECC technical and professional departments.

The Monitoring Mandate of the Central ECC

Article...

1. The central ECC shall have the following monitoring mandate and duties:

1. Addressing electoral challenges, complaints, and offenses at the appellate level,
2. Addressing issues related to the elections promptly, whether specific challenges have been made or complaints lodged,
3. Investigating challenges related to partiality of the electoral staff and lack of transparency in the recruitment of the ECC temporary staff in the center and provinces,
4. Formulating and implementing national awareness-raising programs on the ways to address electoral challenges and complaints,
5. Monitoring the implementation by responsible authorities of the ECC decisions, and



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6. Adopting decisions on disciplinary and punitive measures in response to offenses by the ECC officers and staff.
2. The ECC decisions on electoral challenges, complaints, and offenses are final, unless otherwise explicitly specified in the Electoral Law.
3. Ways to address and investigate electoral challenges, complaints, and offenses shall be regulated in a separate procedure.
4. The central ECC may refer electoral complaints and offenses of a criminal nature to justice institutions after investigation by the relevant electoral department.

Provincial ECCs

Article...

The provincial ECCs shall be composed of three to five members, depending on the population and grade of the provinces in question.

The Mandate and Duties of Provincial ECCs

Article...

1. The provincial ECCs shall have the following mandate and duties:
 1. Leading the provincial ECC secretariat,
 2. Controlling budgetary expenditure of provincial ECCs and reporting to the central ECC,
 3. Investigating and adjudicating electoral challenges, complaints, and offenses in the first instance,
 4. Monitoring the elections process from the beginning to the announcement of final electoral results by the central ECC,
 5. Other mandate and duties as determined in the relevant bylaws, instructions, and procedures.
2. If a provincial ECC shall not deem it expedient to decide a specific issue due to convincing and justifiable reasons, it shall refer the issue to the management board of the central ECC.