presents a FREE program

International Standards for Ensuring Free and Credible Elections

Thursday, November 13, 2014 | 10:00 am to 12:30 pm

American Bar Association
Ruth Bader Ginsburg Conference Room, 4th Floor
1050 Connecticut Avenue, NW, Washington, DC 20036

The focus of the program will be the resolution of post-election disputes and the conduct of audits and recounts. The recent presidential elections in Afghanistan have highlighted the need for the development of universal standards in post-election and provide a starting point for the discussion of standards.

Moderator:
John Hardin Young
Chair, Standing Committee on Election Law
Washington, DC

Speakers:
Jeffrey Carlson
Director, Electoral Education & Integrity Practice Area, Creative Associates
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Senior Global Advisor, International Foundation for Electoral Systems
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Research Fellow, International Foundation for Electoral Systems
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Jed Ober
Director of Programs, Democracy International, Inc.
Bethesda, MD

**Please RSVP to jinny.choi@americanbar.org if you would like to attend**
Program materials can be downloaded at:

http://www.americanbar.org/content/dam/aba/administrative/election_law/13nov2014_int_election_stds_program_materials.pdf
Jeffrey Carlson
*Director, Electoral Education & Integrity Practice Area, Creative Associates*

Jeffrey Carlson possesses nearly 20 years of international elections experience, working in over 30 countries with Creative Associates International (Creative), the International Foundation for Electoral Systems (IFES), and the OSCE Parliamentary Assembly. Mr. Carlson currently serves as Director for Creative’s Electoral Education and Integrity Practice Area, which designs, manages, and implements election-related programming. Prior to 2009, Mr. Carlson served as Chief of Party for IFES in Egypt, where he worked closely with the Egyptian government and local academic and civil society implementing partners. Before working in Egypt, he managed IFES’s global initiatives on political finance and public ethics. These initiatives supported efforts by policy makers, governmental regulators, political parties, civil society, media, and academics to develop more transparent, accountable, and credible systems of political integrity. In addition to managing other election-related and civic education programs, Mr. Carlson has written and contributed to the ACE Electoral Knowledge Network and several electoral and political integrity publications. Mr. Carlson has a master’s degree in Public Policy from the University of Maryland in College Park, Maryland, and a B.A. in International Studies from the University of Washington in Seattle, Washington.

Dr. Staffan Darnolf
*Director of Program Development and Innovation, IFES*

Staffan Darnolf has 20 years of experience as a scholar and practitioner in the field of democratization and electoral processes. He specializes in electoral reform in emerging democracies and post-conflict societies and has published books, articles and chapters in peer-reviewed scholarly journals throughout his career. Darnolf has been engaged as an elections expert in over 20 countries. Most recently, he served as IFES Senior Global Electoral Adviser and led IFES’ office in Zimbabwe (2010-2013), where he served as a senior adviser on electoral issues concerning the drafting of the new constitution, the constitutional referendum and electoral management processes. Darnolf holds a Ph.D. in political science with a focus on elections in emerging democracies from Goteborg University in Sweden as well as a bachelor’s degree in public administration.

Andrew McCoy
*Research Fellow, International Foundation for Electoral Systems*

Andrew McCoy is a recent graduate of the Marshal Wythe School of Law at the College of William and Mary. While earning his law degree he also obtained a Master’s in Public Policy from the Thomas Jefferson Program in Public Policy at the College of William and Mary. He obtained a B.A. in both Political Science and Psychology from Knox College. He has previously worked on a project for the American Bar Association’s Standing Committee on Election Law. Currently, he works as a Legislative Analyst.

Jed Ober
*Director of Programs, Democracy International*

Jed Ober is the Director of Programs at Democracy International, which he joined in mid-2009. He is responsible for overseeing the implementation of DI’s overseas programs including management of headquarters based program staff and providing technical and managerial guidance to DI’s overseas staff. In 2010, he served as DI’s Chief of Staff in Kabul for an election observation mission to
Afghanistan’s last parliamentary elections. During 2009 he served as Logistics Coordinator based in Kabul for DI’s observation of the country’s presidential and provincial council elections and was principally responsible for preparing DI’s reports on the election process and related issues. He has been interviewed and quoted by numerous media organizations and has appeared on both radio and television commenting on democracy and governance developments in Afghanistan.

Before joining DI, Mr. Ober worked as a Legislative Assistant at the Project on Middle East Democracy and as a consultant for the Women’s Campaign Forum. As part of his graduate study, he conducted public opinion research in the West Bank that examined correlations between the political perceptions of Palestinians and support for armed resistance. In 2007, Mr. Ober worked in the public relations office at An-Najah National University in the West Bank city of Nablus. He also has extensive experience working on U.S. elections for Democratic candidates. He most recently worked on the delegate relations team for Secretary of State Hillary Clinton’s presidential campaign and on the political floor team at the 2008 Democratic National Convention.

Mr. Ober received an M.P.P. in 2009 from the Georgetown Public Policy Institute, where he focused on political strategy and the politics of the Middle East. He earned a B.A. from the University of Colorado, where he double majored in international affairs and economics. He is proficient in German.

**John Hardin Young**

*Chair, Standing Committee on Election Law*

Mr. Young is a national and international expert on election administration and the establishment of election management bodies, pre-election practices, Election Day conduct, the prevention of electoral fraud, and the resolution of electoral disputes, challenges and recounts. He has involved in electoral resolution in the Philippines, Armenia, Turkey, Mexico, Afghanistan and in developing preventive electoral mediation programs in Nigeria. He has also participated in rule of law programs in Poland, Turkey, Ireland, Japan, Georgia and the United States.

He is a former member of the American Bar Association Board of Governors, Chair of the Evaluation Subcommittee of the Board’s Program and Planning Committee where he developed the Association’s first comprehensive program evaluation system; Chair of the Board Non-Dues Revenue Committee; a former Chair of the Section of Administrative Law & Regulatory Practice; editor and contributor to *INTERNATIONAL ELECTION PRINCIPLES; DEMOCRACY AND THE RULE OF LAW* (ABA Press fall 2008). He is the author of several articles involving elections published in Campaigns & Elections on Election Day monitoring and complaints resolution, and is a co-author of “Lessons Learned from the 2000 and 2004 Presidential Elections”, in *AMERICA VOTES!* (ABA PRESS 2008), “Defining Population for Redistricting” in *AMERICA VOTES!* (2 ed. ABA PRESS 2011), and “Alternative Dispute Resolution Mechanisms” in *GUARDE* (IFES 2011).

As counsel to Sandler Reiff Lamb Rosenstein & Birkenstock, P.C., Mr. Young concentrates on significant election law issues, administrative law, litigation, dispute resolution, and technology counseling. He also serves as a pro-bono attorney with the National Veterans Legal Service Program representing veterans before the Court of Appeals for Veterans Claims.

He is a member of the bars of the District of Columbia, Virginia and Pennsylvania. He holds law degrees from the Universities of Virginia and Oxford.
HOME SWEET HOME

REAL ESTATE ISSUES AFFECTING THE ELDERLY

Home Is Where the Heart Is ★ Shared Housing ★ Preserving the Primary Residence ★ Reverse Mortgages
Phantom of the Foreclosure Crisis ★ Out West: Unique Real Property Rights ★ Experience at Work
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Statement of Editorial Purpose
Experience is the magazine of the ABA Senior Lawyers Division. Our audiences are older attorneys specializing in any area of the law, as well as elder law practitioners of any age. Our articles focus on elder law, broadly defined. We also publish articles on other topics of interest, including those related to politics, history, culture, travel, and the arts.

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Experience at Work

Editor’s Note: Two articles inaugurate “Experience at Work,” a column that will appear from time to time to provide a glimpse into the kinds of meaningful, fulfilling, and specialized work that is particularly the province of experienced lawyers. Jack Young filed his dispatch from Kabul, Afghanistan, where, under the auspices of the United Nations Development Programme (UNDP), he is an International Foundation for Electoral Systems (IFES) advisor monitoring the Afghan presidential election. Judge Francis Larkin met General William Suter in the halls of the U.S. Supreme Court to interview him about his “second season of service”—as clerk of the Court from 1990–2013. The interview begins on page 38.

Progress in Democracy and the Rule of Law
Evolving Election Standards and the Recent Elections in Afghanistan

By John Hardin “Jack” Young

This article is derived from Mr. Young’s May 1, 2014, Law Day Speech to the Albuquerque Bar Association. A fuller version of the article containing all citations to legal authority is available at http://www.americanbar.org/content/dam/aba/administrative/election_law/young_law_day_speech.pdf.

As someone who has focused his career on administrative law and regulatory practice, I have also acted as counsel to political campaigns involved with recounts, contests, and electoral processes (which is different from campaign finance, the bread and butter of many political practice lawyers). I have represented candidates running for the offices of everything from sheriff to president (including presidential candidate Al Gore) and one of the major national parties. In 2009, I began doing more work abroad, advising election management bodies on the electoral dispute resolution process. The modalities ultimately chosen to resolve disputes—whether independent administrative agencies, quasi-judicial institutions, or courts—all require a fidelity to the rule of law. Some of the underlying principles are covered in this article.

The Evolution of Voting Rights and Electoral Reform

Democracy and the guarantee of voting rights is an evolutionary process. The U.S. Constitution, for example, does not expressly provide for the right to vote or for how it is to be exercised. Article I, Section 2, does provide that the rules for voting for the U.S. House of
Representatives are to be determined by the state legislatures. Direct election of senators was not required until passage of the Seventh Amendment in 1913. It was not until 1920 that the Nineteenth Amendment granted women the right to vote. One person–one vote was not recognized until Baker v. Carr (1962) and Reynolds v. Sims (1964), which addressed vital redistricting issues. Minority rights were not effectively addressed until the Voting Rights Act of 1965. Most recently, in 2013, the Voting Rights Act’s preclearance provisions, or at least the formula for determining who was required to seek preclearance of voting changes, was struck down in Shelby County v. Holder.

In the last century, and at the start of this century, electoral reform in the United States has been one of reacting to real and perceived abuses. In 1907, Congress enacted section 610 of the Criminal Code (later codified in Title 18) to outlaw campaign contributions by national banks and corporations. Section 610 was motivated by the dual concerns of undue influence over elections exercised by corporate donations and the belief that stockholder funds should not be used for political purposes. In 2010, however, in Citizens United v. Federal Election Commission, the Supreme Court held that corporations could use corporate funds to support political activities. In 1971, Congress enacted the Federal Election Campaign Act and amended it from time to time to address limitations on campaign contributions and expenditures, in part as a reaction to the Watergate scandals. These limitations were considered by the Supreme Court this spring in McCutcheon v. Federal Election Commission, which held that aggregate campaign contribution limits were unconstitutional. And let’s not forget the 2000 presidential recount in Florida and the resulting decision by the Supreme Court in Bush v. Gore, which gave rise to an explosion in post-election litigation, articles, and textbooks and the ongoing debate about the best way to approach redistricting.

The Rule of Law as the Foundation for Elections

At the heart of the democratic process is the rule of law. The rule of law is a condition precedent for the existence of democratic institutions. Elections that produce governments that operate outside the rule of law—examples of which we see daily on the news—do not represent democratic progress. Like other processes under the rule of law, elections—before, during, and after election day—must be governed by predictable rules derived from established principles for determining election outcomes and decided by independent arbiters regardless of the identity of the party. These rules should be established prior to, and thus outside of, the factors at play in a particular election, as we learned in the Court’s decision in Bush v. Gore. Applying predictable, rule-based decision making that is subject to review ensures that the election resolution process is reliable, trustworthy, and faithful to the actual voting record. These concepts are based on what Professors H.L.A. Hart and Lon Fuller recognize as the foundations for the rule of law. See Lon L. Fuller, The Morality of Law (rev. ed. 1969) (requirements for legal order); H.L.A. Hart, The Concept of Law (1961) (“rules of recognition”).

The Universal Declaration of Human Rights (UDHR) provides that the right to genuine elections gives rise to four fundamental rights relating to the resolution of electoral complaints. These are rights to: (i) transparent and open procedures, (ii) a timely decision, (iii) an impartial arbiter, and (iv) remedies that are measured and enforceable. These general requirements are important because electoral complaints occur against short timelines and, in many situations, a poorly run election results in chaos and violence and threatens the stability of government and the state.

My experience in advising election management bodies worldwide is that democracy and the rule of law matter to citizens struggling to build a better life, whether in post-conflict countries or those emerging as self-sustaining democratic societies. Democracy around the world is important to those directly involved and is a matter of America’s critical interest in ensuring peace and human rights.

For those countries seeking to develop democratic societies, one of the basic international commitments is the
International Covenant on Civil and Political Rights (ICCPR), which secures the right “to vote in genuine elections.” The ICCPR builds on the rights set forth in the Universal Declaration of Human Rights.

Article 25 of the ICCPR, to which most countries are signatories, provides:

Every citizen shall have the right and opportunity, without any of the distinctions mentioned in article 2 [relating to discrimination] and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors . . . .

The UN Committee on Human Rights General Comment 25.4 to Article 25 further provides: “Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria.” Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination operates to similar effect and provides for “the right to participate in elections—to vote and stand for election—on the basis of universal and equal suffrage.” These rights are particularly important for the empowerment of women and restorative electoral justice for the disenfranchised.

These rights are enforceable through Article 8 of the UDHR, which provides that “[e]veryone has the right to an effective remedy.” An effective remedy is of paramount importance to the electoral dispute resolution process. The right to a remedy for violations of human rights is itself a human right, while sanctions against those who infringe the provisions of the electoral law are implicitly required in any effective system of implementation.

The integrity of the system requires not only that such issues be dealt with by an independent and impartial authority, such as the electoral commission or the courts, but also that decisions be reached in a timely manner in order that the outcome of elections not be delayed. As with other aspects of the electoral process, the availability of such procedures must be open and known to the electorate and the parties.

Concurrent with the right to an effective remedy is the right to a fair and public hearing. See UDHR art. 10; ICCPR art. 14. The right to a public hearing includes the right to an impartial tribunal, equal access, expeditious consideration, and equality of arms. The hearing may be held before a competent administrative agency or a court, or in certain circumstances relating to the seating of representatives, by a legislative committee. Under international standards, there must be an ability to appeal a decision of the first instance body of the factual findings, usually under “clearly erroneous” or “clear error” standards, and legal issues through de novo review.

Fair and Open Processes for Resolving Disputes

Complaints about the electoral process and the outcome of an election exist in all electoral systems. They come from individual citizens, nonpartisan organizations, political parties, and candidates. Complaints rarely arise out of the actions of international monitors and observing organizations. Resolution should promote corrective action consistent with the goals of a free, fair, and credible election. In cases of fraud or intentional administrative malfeasance, the complaint process should result in punitive remedies.

There is tension between the desire to have all complaints raised as they occur and the need to ensure the perception of fair elections. We want to encourage the reporting of all incidents—no matter how small or large—so they can be timely addressed. But the very fact that questions are raised is seen by some domestic and international observers as indicative of “bad” elections and by losing candidates as a source for claiming the winner has not been legitimately elected.

I suggest that, particularly on election day, we not fixate over the number of incidents reported, but instead that we focus on the incidents substantiated and the impact of those not addressed. In many cases, including that of the recent U.S. presidential election, there are a large number of incidents, but few, if any, affect the outcome. That is not to say by any
means that the U.S. election was perfect, as we saw long lines at the polls, which discourages voting. However, there are other concerns. When a voter encounters a problem at the polls, if it is not resolved, an important part of the election process is put into question: trust—that all votes will be counted and the election will be fair. Recurring problems creating a loss of trust and confidence can decrease participation by leading voters to feel as if their votes don’t matter.

Presenting and trying election-law-related cases have become an issue. Recently, Judge Richard Posner commented on the difficulty in determining the record upon which to make a decision. See RICHARD A. POSNER, REFLECTIONS ON JUDGING 84–85 (2013). Despite the controversy over whether Judge Posner was disavowing an earlier decision on voter identification laws or was misunderstood in his self-evident acknowledgement that complex election cases need empirical support. See Ed Whelan, More on Judge Posner’s (Now Disavowed?) Mea Culpa on Voter ID Laws, NAT’L REV. ONLINE (Oct. 28, 2013), http://www.national-review.com/bench-memos/362352/more-judge-posners-now-disavowed-mea-culpa-voter-id-laws-ed-whelan, the point is that judicial decisions affect the political “rules of the game.” There is a major need for lawyers trying electoral cases to develop a full-summed record with empirical data. The Supreme Court’s decision in Bush v. Gore might have come out differently if it had been fully understood by the majority that ultimately a universal standard would be provided by Florida’s Second Circuit Judge Terry Lewis after hearing all challenges.

If lawyers are not prepared to present empirical and social scientific data on important political issues, the indicia of a fair hearing are missing and review is virtually impossible. A process not based on a full understanding of the facts and the political environment fails to meet basic rule-of-law conditions.

The 2014 Presidential Elections in Afghanistan
Recent elections around the world show that democratic principles are gaining acceptance. In Nigeria, the Philippines, Armenia, Georgia, and other countries, elected civil governments are following previously elected governments. The succession of one civil government by another popularly elected may, in certain countries, portend the end of the cycle of military coups interrupting progress toward elected democracies.

Under the 2001 Bonn Agreement (officially, the “Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions”), the Islamic Republic of Afghanistan began the process of developing a democratically elected government. The country had not had an operating national government since 1979, and the Bonn Agreement provided for an interim government led by Hamid Karzai, later elected in 2005 and 2009. Under the Afghanistan Constitution, Karzai was limited to two terms. His current term ended May 22, 2014.

In July 2013, in preparation for the 2014 presidential election, the Afghan National Assembly adopted an Electoral Law. Before 2014, the electoral laws had been issued as presidential decrees. The National Assembly also established a Structural Law, which provided the operational basis for the Independent Electoral Commission (IEC), created in Article 156 of the Constitution, and for a permanent Independent Electoral Complaints Commission (IECC). The year 2014 marked the first time the entire election process was entirely Afghan run and managed. Prior elections had involved international participants in the process.

The elections were held April 5 for president and for provincial council, with eight presidential candidates and over 2,000 provincial councils certified to run for office. The total voting population is difficult to determine due to conflict conditions and population movements, but, of an estimated 13 million voters, more than seven million went to the polls. Thirty-six percent were women. Commentators and the media viewed the election as generally successful.

The 2014 Afghan elections were a significant improvement over prior elections. Turnout was 50 percent higher than in the last presidential election. Voting processes generally worked. Detected incidents of fraud and malpractice were
fewer. In 2009, 1.2 million fraudulent votes were found. In 2014, the number was determined to be 375,000, and electoral disputes by election officials were timely resolved. Ballot stuffing appears still to be a problem. Problems also remain as to the transparency of the counting and complaints resolution process. The IECC mitigated many transparency issues by holding five days of open public hearings for the presidential candidates. These hearings were precedent-setting for Afghanistan. After the first round, two presidential candidates remained for a second run-off round held June 14, since no candidate reached the required 50-percent-plus-one. Afghan law mandates a first-past-the-post majority winner based on voters casting single, nontransferable votes, as is common to U.S. elections Provincial candidate certification was delayed due to the workload involved in resolving presidential complaints, the sheer number of provincial complaints, and the need for recounts in the provincial council races.

As of this writing, run-off results for president were being tallied and reviewed, with the apparently losing candidate threatening to boycott the counting process. The new president will take office in early August. At the conclusion of election day for the second round, the UN Secretary-General’s Special Representative (SGSR) for Afghanistan, Ján Kubiš, said: “With the same determination, resilience, and courage the world saw in the first round of elections, the people of Afghanistan today once again decided to take their destiny in their own hands and demonstrate their desire for a peaceful, prosperous, and united Afghanistan.” Mr. Kubiš praised the competence and dedication of the Afghan National Security Forces in enabling voting to take place without any major disruption, even at the cost, sometimes, of their own lives. On the post-election tallying and resolving electoral disputes, the SGSR declared that “The IEC and IECC now have a critical responsibility to tally the votes in a transparent and accountable manner, resolve complaints consistently and efficiently, and to transparently release the results.” Despite Mr. Kubiš’s laudatory assessment, electoral violence remains a critical problem: on election day for the run-off, there were at least 46 deaths, two IEC staff killed, and six injured, with over 150 incidents of other violence. During the campaign period, one of the candidate’s convoys was attacked, and 16 were killed.

The ultimate test for any democratic process is its sustainability. Afghanistan has made progress despite continued conflict waged by the Taliban and continued electoral violence. Recent elections are moving in the right direction. Hopefully, the progress made will continue. Efforts are already underway for National Assembly races to be conducted in spring 2015.

**Conclusion**

Progress is being made here and abroad. There will be setbacks. In meeting the needs for reform in the protection of voting rights and the resolution of disputes, analytic tools must be developed. Greater use of social- and political-science tools for measuring fraud and administrative malpractice is needed. The International Foundation for Electoral Systems has developed a first-of-its-kind methodology for measuring fraud, malpractice, and systemic manipulation. Similarly, we must continue to seek better ways to create and use remedies for electoral abuses and violations and to measure their effectiveness. Much has been accomplished to nurture the democratic electoral process, but much remains to be done to ensure that democratic progress, as currently seen in Afghanistan, is sustained. Throughout the world, accomplishing the goal of free, fair, credible, and independent elections is a real possibility. In the end, “every vote matters.”

The ultimate test for any democratic process is its sustainability.
Experience at Work

Editor’s Note: Last issue, we inaugurated “Experience at Work,” a column designed to highlight the work of experienced lawyers who have honed their expertise over many years, and Jack Young wrote “Progress in Democracy and the Rule of Law: Evolving Election Standards and the Recent Elections in Afghanistan.” The results of the 2014 presidential elections in Afghanistan, held April 5, were not final by the time our Summer issue of Experience was published. Jack has continued his work as a Senior Global Election Dispute Resolution Advisor in Afghanistan for the International Foundation for Electoral Systems, and so we asked him to provide a follow-up article.

The Afghanistan Presidential Election Comes to Final Political Solution

By John Hardin “Jack” Young

In my last article, I explored the international standards for fair elections against the backdrop of the first round of the Afghan presidential election and the conclusion of the voting on the second round. Those standards are based on the rule of law as expressed in the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights, which protect the fundamental rights to vote and to be elected to office. The election of the president of the Islamic Republic of Afghanistan was significant because it was the first civilian transfer of power. The first round of the election was generally peaceful and without significant allegations of fraud, but it did not produce a candidate who received a majority (50% + 1 vote). The result was a second round election between the two leading candidates—Abdullah Abdullah and Ashraf Ghani Ahmadzai.

The presidential election did not end with the balloting in the second round. The two candidates remained locked in a series of challenges, complicated by the disclosure of allegations that the chief executive of the Independent Electoral Commission appeared to have been involved in a conspiracy to commit electoral fraud. The result was deadlock which was only broken when Secretary of State John Kerry intervened to suggest that the candidates agree to a nationwide audit of all 22,000-plus polling station ballot boxes. This agreement was reached on July 12, 2014. It would take until September 19, 2014, for the process to conclude when the two candidates agreed share power. On September 29, 2014, Dr. Ghani was inaugurated as president. Dr. Abdallah was appointed chief executive officer; a position not provided for in the Afghan Constitution.

Following the second round, approximately 2,576 complaints were presented to the Independent Electoral Complaints Commission. Significantly, Abdullah’s team only filed a limited number of these complaints (664). He later charged that the results were unreliable because of massive fraud in the voting, including results in particular polling centers that exceeded the population of that center.

The candidates were deadlocked until Secretary Kerry brokered a deal on July 12 that would result in a UN-supervised, nation-wide audit. At the time, the candidates agreed to abide by the outcome. The sparring over the standards for the audit, however, prevented the audit from being fully realized. The audit was an on-again-off-again affair. The candidates, particularly Dr. Abdullah, argued over the standards to be used. This debate was not dissimilar to the debate over standards for reviewing punch cards in the Florida 2000 Bush/Gore dispute.
The lack of finality in the results not only impacted the results of the presidential election, but the relationship between the United States and Afghanistan. President Karzai had refused to sign a bilateral security agreement that would secure the continuous presence of American troops in Afghanistan. Both candidates had agreed that, upon election, they would sign the Bilateral Security Agreement with the United States.

Throughout July and August, President Karzai would announce that the results would be announced soon and a new president inaugurated. The inauguration did not occur until late September.

During the audit, the UN was never able to satisfactorily secure the agreement and participation of the candidates in the audit process. The main objector was Dr. Abdullah. This was understandable to many observers of the process because there was a perception that Dr. Abdullah was behind in the total vote count. A rubric of post-election dispute resolution is that the candidate who is behind in the tally needs to expand the scope of any audit/recount and not agree to standards that could restrict the scope of the review. The perceived leading candidate, conversely, wants the audit to be restricted to mimic the election-day tally.

Dr. Abdullah was never able to prove a case for the large-scale invalidation of ballots. His only political option was, thus, to walk away from the audit if he was not ready to concede the election, which he was not going to do. Throughout the summer of 2014, Dr. Abdullah either withdrew from the audit process or threatened to do so. At first, the UN-facilitated audit was stopped until Dr. Abdullah could be cajoled into rejoining by changing the audit criteria. After a series of “walk outs” on August 27, Dr. Abdullah for the last time removed all his observers from the audit. In response, the UN asked Dr. Ghani to remove his observers voluntarily to erase any criticism that the audit was continuing with the participation of only one candidate. The remaining observers were domestic and international observers who had been recruited in numbers not seen since the influx of lawyers in the fall of 2000 in Florida.

In the end, the Independent Electoral Commission validated the vast majority of the results reported on election day, a small number of polling station reports being invalidated or requiring a recount to determine the results.

On September 27, 2014, Dr. Ghani was inaugurated as president. Dr. Abdullah was appointed, by agreement with Dr. Ghani, chief executive. President Ghani immediately signed the Bilateral Security Agreement with the United States. The final election results were never announced.

The 2014 Afghan experience, like the 2000 Florida experience, involved the nonviolent transfer of civil authority. In both elections, the process was hampered by the lack of clear and predetermined standards for questioned ballots. In Afghanistan, the audit standards were contentious and never fully agreed upon by the candidates. In 2000, the U.S. Supreme Court found that the failure to adopt and apply standards prior to the November election was fatal to the challenge by Vice-President Gore. The lesson learned is that the resolution of post-election disputes requires the adoption of pre-election comprehensive standards that neutral decision makers can apply to resolve electoral disputes without regard to the identity of the parties.
KEY POINTS IN DEVELOPING AN ELECTORAL AUDIT FRAMEWORK

Jeffrey Carlson
Director
Electoral Education and Integrity
Creative Associates International
What Can an Electoral Audit Do?

- Qualitative rather than quantitative
- Can bring technical and political closure to a disputed election
- Can reveal and address the tactics, timing, locations, and perpetrators of electoral crimes
- Can be a tool for spoilers to prolong the certification process and blame corruption in the system
# Electoral Audit Stakeholders

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**International Stakeholders**

- Inter-governmental Organizations (IGOs)
- Non-Governmental Organizations (NGOs)
- Media Organizations
Key Audit Considerations

Audit Diagnostics
Parameters
Procedural Framework
Preventing Conflict
Observation Framework
Audit Venue
Strategic Communications
Audit Diagnostics

- Conduct Pre-Audit Test
- Identify Measures of Voter Intent
- Analyze Types of Legal Violations
- Understand Range of Potential Perpetrators
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• Electoral audits can
  – Expose electoral malpractice
  – Identify ways to combat such malpractice
  – Serve as catalysts for informed future electoral reform and accountability
Thank you
INTERNATIONAL STANDARDS IN ELECTORAL AUDITS
AND THE AFGHAN ELECTION

Andrew McCoy
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EXECUTIVE SUMMARY

No international standards have been developed or articulated for the conduct of electoral audits. This is due to two factors. First, electoral audits are take two similar but distinct forms: administrative audits or adjudicative audits. Both have the same practical effects, though they differ in procedural processes, goals, and scope, leading to confusion among practitioners. Second, electoral audits are a very specific issue that is largely subsumed by the broader category of Electoral Dispute Resolution (EDR).

Eight general standards have been articulated for EDR systems: 1) a right to redress; 2) clear standards and procedures; 3) an impartial and informed arbiter; 4) judicially expedited decisions; 5) established burdens of proof and standards of evidence; 6) availability of meaningful and effective remedies; 7) effective education of stakeholders; and 8) a public perception of legitimacy. A quick review of these standards will demonstrate the significant overlap among these standards (i.e. clear standards and procedures includes those related to burdens of proof, and the existence of both demonstrates at least a minimal right to redress). Different nations will meet these standards in various ways, as the standards themselves allow for the incorporation of country specific historical and cultural practices.

The importance of these standards can be illustrated by the 2014 Afghan Presidential election. The preliminary election took place on April 5, though the failure by any candidate to reach the required 50% threshold triggered a run-off, which was held on June 14. During both the preliminary and run-off elections, the Independent Election Commission (IEC) and the Electoral Complaints Commission (ECC) demonstrated notable deficiencies in the EDR process. Neither commission adequately educated the public or political parties about the EDR process or the requirements for filing a complaint. The members of both organizations were perceived as biased by an unacceptable portion of the public and, the decisions issued by both the IEC and the ECC failed to provide sufficient substantive reasoning.

Most troubling, neither the IEC nor the ECC published its final regulations for determining I AN IS ballot validity until after the counting process for the preliminary election had already begun. This necessitated an ad hoc procedure throughout the counting process and prevented the IEC from making determinations in a timely manner. Similarly, after the run-off election neither the IEC nor the ECC implemented pre-established procedures. Poorly drafted and insufficiently supported complaints by Abdullah were not left in the jurisdiction of the ECC. Instead, international actors negotiated a process that allowed a subversion of the EDR process and required the promulgation of new procedures and standards for determining ballot validity. This unreasonably delayed the EDR process and created significant problems.

Moving forward, the Electoral Law should be amended to provide the parliament with greater authority in the appointment of IEC and ECC commissioners. Both the IEC and ECC should cooperate when drafting regulations in areas of shared jurisdiction, and both organizations must adhere to the timetables for promulgation set forth in the electoral law. A more comprehensive voter education campaign is advisable, as are rules that clarify the standards of evidence that will be used in the EDR process.
INTRODUCTION

On April 5, 2014, Afghans cast more than 6.5 million ballots to select their next president.\(^1\) None of the eight candidates crossed the necessary 50% threshold, necessitating a run-off election.\(^2\) Allegations of fraud were voiced after the election, and over 2,000 complaints were filed.\(^3\) Ultimately, 86 polling stations were disqualified, creating an atmosphere of mistrust. A run-off election was held on June 14, 2014 with almost 8 million ballots cast. Preliminary results showed a victory for Ashraf Ghani by a wide margin.

Following the release of the preliminary results, Abdullah Abdullah publicly criticized the IEC and alleged that they were complicit in industrial scale fraud.\(^4\) To avert a potential political crisis, U.S. Secretary of State John Kerry mediated the dispute in private and helped to develop a mutually acceptable audit framework.\(^5\) Several alterations were made to the audit framework during the planning stages, and several standards were amended during the audit itself.\(^6\) Abdullah threatened to withdraw from the audit process several times, causing delays.\(^7\) The process was finally completed in mid-September and Ashraf Ghani was declared the winner on September 19, 2014.\(^8\)

The serious problems that occurred during the Afghan election had their roots in numerous deficiencies throughout the electoral period. However, the deficiencies related to the EDR system are a useful illustration of the importance of adhering to international standards for electoral audits. International audit standards are meant to ensure a well organized and well regarded audit process.

There is no specific literature base specifically dealing with international audit standards. This lack of a research base is largely due to confusion concerning the distinction between administrative and adjudicative audits and the subsumption of this issue by EDR. Through a review of the EDR literature eight basic standards may be identified. Though these standards apply to the entire EDR process, they are also relevant to the audit process because it is a part of the EDR process.

A review of the Afghan election demonstrates serious deficiencies in the EDR process with regard to international standards. The most serious deficiency was the failure of either the IEC or

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\(^4\) Id.


\(^6\) Id.

\(^7\) Donati, Jessica and Hamid Shalizi, Afghan candidate threatens to pull out of election process, August 26, 2014, available at http://www.reuters.com/article/2014/08/26/us-afghanistan-election-idUSKBN0GQ0LH20140826

\(^8\) Id.
the ECC to promulgate standards and regulations prior to the election. Despite a legislative mandate that all regulations be published at least 90 days prior to the election, standards related to ballot validity were not published until 12 days after the preliminary election and several days after ballot tabulation had begun.  

The IEC has also had difficulty dispelling a perception of partisanship, largely because of the connection its members have to Hamid Karzai, who wields the sole authority to appoint commissioners, tainting them with a perceived bias towards Karzai. Sufficient voter education, predetermined standards, proper vetting of employees, and accountability for the commissioners would go a long way towards reversing this perception.

Unfortunately, the majority of the IEC’s voter education efforts have focused on the registration process while neglecting the EDR process and the voting process. The late determination of standards and the firing of thousands of IEC employees due to demonstrated interference in the electoral process also hindered the IEC’s effectiveness. It appears that the commissioners themselves did refrain from partisan activities.

Afghanistan’s EDR system would benefit from adhering to international standards. Changes to the Electoral Law should provide the parliament with more oversight in the appointment process for the IEC. The IEC and the ECC must cooperate when drafting regulations in areas of joint authority, such as the invalidation of ballots, and must publish all regulations well in advance of any election. Finally, a voter education program that focuses on the voting process and the EDR process would help Afghans to better understand the electoral process and would engender more confidence in the legitimacy of elections.

INTERNATIONAL STANDARDS

Audits and recounts are rarely discussed in international reports outside of analyses about electoral dispute resolution (EDR) systems. As a result, international standards generally relate to the EDR system rather than the specific audit and recount processes. These standards must take into account a wide variety of processes; therefore, technical advice must take into account political and historical contexts while being grounded in a distinct electoral system. To sufficiently account for this need, EDR standards take the appearance of general principles governing the electoral management body (EMB) and electoral dispute resolution body (EDRB).

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9 Electoral Law, Art. 79 (2013); Regulation on Cancelation and Invalidation of the Votes as a Result of the Audit and Investigation, 4/17/2014.
11 European Union Election Assessment Team, note 1, supra, at 4.
12 European Union Election Assessment Team, note 1, supra, at 5.
14 IFES, note 13, supra, at 11, 16.
An initial clarification of terms is necessary in discussing the issue of audits. Recounts are a form of electoral dispute resolution, usually triggered by a challenge to the results or by an automatic threshold. A recount does not generally require allegations of irregularities during the election. Audits, on the other hand, can describe two separate processes. An audit to verify results and election procedures should be undertaken by the EMB after an election. Audits of this kind are within the jurisdiction of the EMB and merely ensure compliance with established procedures. An audit may also be initiated in response to an electoral challenge. Audits of this kind will likely be more focused, more in depth, and related to altering the number of valid ballots. This audit is within the jurisdiction of the EDRB and final determinations on ballot validity would rest with this body.

The International Foundation for Electoral Systems (IFES) has identified seven (7) international principles:

1) A right of redress for election complaints and disputes;
2) A clearly defined regimen of election standards and procedures;
3) An impartial and informed arbiter;
4) A system that judicially expedites decisions;
5) Established burdens of proof and standards of evidence;
6) Availability of meaningful and effective remedies;
7) Effective education of stakeholders.\textsuperscript{15}

In addition, the people must perceive the laws, procedures, and actors involved in the audit or recount as legitimate and unbiased.\textsuperscript{16} The vast majority of audit and recount reviews focus on the success or failure of the EMB or EDRB in obtaining one or more of these goals.

\textit{Redress}

The legal right to challenge election results is essential to ensure the integrity of the electoral process.\textsuperscript{17} The transparent adjudication of electoral irregularities can increase public confidence in elections, provide the victor with the legitimacy necessary to govern, and prevent violence.\textsuperscript{18} An adequate right of redress requires transparency, consistency, accessibility, and prompt adjudication by an impartial authority.\textsuperscript{19} An effective right of redress should be clearly codified in the legal framework and actively supported by the state through civic education.\textsuperscript{20}

\textsuperscript{15} Id., at 16.
\textsuperscript{19} IFES, note 14, supra, at 19-20 (2011); Declaration on the Criteria for Free and Fair Elections, paragraph 4.9, unanimously adopted by the Inter-Parliamentary Council at its 154\textsuperscript{th} session (Paris, 26 March 1994).
\textsuperscript{20} I-IDEA, note 13, supra; IFES, note 13, supra, at 119.
Standards and Procedures

Legislative action, augmented by a regulatory framework, is necessary to ensure consistency in the EDR system. The legal framework for the EDR system should clearly define the scope of review, available remedies, procedures for initiating and adjudicating complaints, and who may apply for relief. The legal framework should also allow the parties to participate in an open hearing and require the public release of EDRB decisions in order to increase the credibility of the EDRB and knowledge of the EDR system.

The legal framework should specify the bodies responsible for assessing the integrity of the electoral system and, when necessary for implementing electoral reforms. A proliferation of adjudicatory authorities with overlapping authorities not only leads to confusion among the challengers about where to file complaints, but can also lead to jurisdictional splits. In the event that more than one body has adjudicatory authority, it is imperative that the legal framework clearly identify the specific subject matter jurisdiction and processes of each body to prevent confusion.

Lastly, it is essential that all rules, policies, regulations, and other aspects of the legal framework be enacted and published in a reasonable time period prior to the election. Failure to properly codify the electoral or EDR process sufficiently in advance of an election requires the use of ad hoc procedures to deal with issues as they occur. The use of these ad hoc procedures can damage the legitimacy of the entire process by creating a perception that the process is driven by political desires rather than a desire for impartial results. Specifically regarding the EDR process, ad hoc procedures can create a perception that the EDR process is uninterested in justice or potentially rigged.

Impartial Arbiter

22 Human Rights and Elections, note 17, supra, at 28, paragraph 113-114.
24 Human Rights and Elections, note 17, supra at 139.
26 IFES, note 14, supra, at 24
EDRBs must be properly insulated, politically and financially, from external and internal pressures. The appointment of EDRB and EMB members to sufficiently compensated, permanent positions can reduce these pressures, though proper oversight of the appointment is necessary. Legal and regulatory restrictions that hold EDRB and EMB employees accountable are necessary to combat corruption and incompetence.

The EDRB members must have sufficient technical skill and knowledge to be able to adequately understand and adjudicate electoral issues. The range of technical skills that are necessary to adequately adjudicating electoral complaints makes a support staff and adequate training programs essential for the EDRB and its members. Proper screening, accountability, and the competitive recruitment of support staff is advisable to ensure competence and ethical behavior. A right of appeal should be available to either party in order to ensure that the EDRB acted properly in adjudicating the dispute.

**Expedited decisions**

Delays in the EDR process may lead to crises if the continuity or legitimacy of government cannot be assured. Leaving the office empty for a sustained time deprives the polity of representation and provides the loser with an opportunity to prevent the victor from governing. Provisionally seating the preliminary winner ensures representation; however, it could cast doubt on the legitimacy of actions taken during the EDR period by the preliminary winner. Accelerated time limits on the adjudication process can alleviate these issues by providing a final resolution without stalling the government or installing an interim regime.

The EDR process must ensure that an individual’s due process rights are protected, though an accelerated timeline may require an abbreviated hearing. Balancing the need for a due process against the need for an accelerated hearing is easier when the legal framework sets clear

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30 IFES, note 14, supra, at 44.


33 Vickery, Chad, note 23, supra, at 10.

34 IFES, note 14, supra, at 47-50.

35 Id. at 71.


timelines for the filing of electoral complaints. Generally, the need for a functioning governing body and administrative concerns about the legitimacy of the law weigh in favor of a prompt and final resolution, even if the results are imperfect.

**Burdens of Proof**

Fair burdens of proof and standards of evidence should be established prior to the election so that the parties will have notice and a reasonable understanding of the procedures and requirements of the EDR process. Consistency in the standards and procedures is necessary because the use of ad hoc or shifting standards will call into question the fairness, impartiality, and credibility of the EDRB. While the burden is generally placed on the party initiating the complaint because of a presumption of regularity, when there is an entrenched ruling authority or a complaint is lodged against the EMB, it may be appropriate to reverse the burden.

An electoral challenge can involve administrative irregularities or criminal wrongdoing. Administrative challenges should be within the jurisdiction of the EDRB and allow for solely civil remedies. This can include civil penalties for intentional interference with the electoral process, though it will generally result in non-personal remedies such as audits, recounts, or re-polling. Civil remedies are generally granted upon a preponderance of the evidence or clear and convincing evidence standard. The preponderance of the evidence standard, usually applied to civil claims, could create undue certainty about the electoral system. Use of the clear and convincing standard appears to sufficiently balance the need to prevent undue uncertainty and the need to allow meritorious claims to succeed without undue hardship.

Criminal challenges should be provided to the appropriate criminal justice office (i.e. Attorney General) and should be treated as any other criminal offence. As criminal penalties result in some form of personal deprivation, a high standard of evidence is necessary to ensure that deprivation is not ordered upon a minor showing of proof. Therefore, criminal claims should require proof beyond a reasonable doubt, though this is too stringent a standard for EDR systems that are civil in nature.

To ensure that the correct burden of proof is used and that the appropriate adjudicatory body is involved, it is essential that the legal framework clearly distinguish between administrative and criminal infractions. There may be some overlap, as actions such as ballot stuffing or vote tampering could carry both administrative and criminal remedies. Where overlap does exist, the

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41 IFES, note 14, supra, at 51.
43 Vickery, Chad, note 23, supra, at 12.
44 Id.
45 Weinberg, Barry H., The Resolution of Election Disputes: Legal Principles that Control Election Challenges 16 (2d ed. 2008).
46 Hueffner, Steven F., note 42, supra at 314 (2007).
legal framework must clearly delimit the authority of adjudicatory bodies to ensure that administrative bodies do not attempt to implement criminal remedies and vice versa.

Remedies

The EDRB must have the authority to provide an adequate remedy that negates the harm of the violation or ensures that it will not occur again.⁴⁹ Depending on the alleged violation, appropriate remedies may include total or partial recounts, the invalidation of individual ballots, the imposition of sanctions, or even the nullification of an election.⁵⁰ The mere existence of these remedies is insufficient. Without an appropriate enforcement mechanism, the EDR system cannot demonstrate the existence of effective remedies.⁵¹

Education of Stakeholders

Civic education programs can encourage participation in the democratic process and are necessary to ensure the effective use of an individual’s right to participate in the electoral process.⁵² Programs aimed at the general public should describe the electoral process from registration through the adjudication of electoral disputes in a form the average voter will understand and absorb.⁵³ An effective education program will also assure the public of the integrity of the electoral process.

Political parties need education on their role in the electoral and EDR processes because of their importance in governing and establishing legitimacy.⁵⁴ Parties should also be encouraged to adopt internal codes of conduct and use internal discipline when necessary.⁵⁵

Arbitrators, lawyers, and election officials should receive training in the EDR process to ensure they adequately understand their technical role and obligations.⁵⁶ Training and education should focus on the electoral laws and regulations as well as the EDR procedures. This will ensure a smooth adjudicatory process concerned with specific violations of electoral laws.

The media has an important role in shedding light on irregularities or flaws in the electoral system; however, they also have a responsibility to avoid fueling electoral complaints, or

⁵⁰ I-IDEA, note 13, supra; IFES, note 13, supra, at 170-171.
⁵² Inter-Parliamentary Council, note 21, supra, pt. 4, § 1, C.P. 330.
⁵⁴ SADC, note 39, supra.
⁵⁵ SADC, note 39, supra.
⁵⁶ Vickery, Chad, note 23, supra at 21.
becoming the object of a complaint itself. The media should be trained in how to appropriately cover electoral disputes in a fair and accurate way.

Perception

Public perceptions of electoral integrity have a direct effect on perceptions of political legitimacy. It is important to distinguish the perception of integrity from the actual integrity of the process because political parties, the media, or authority figures can cast doubt on the legitimacy of elections. Perceptions of corruption or fraud, in the electoral process or the government generally, do not depend on the existence of actual fraud or corruption. Ultimately, this issue rests with governing officials, though the EMB and the EDRB can discourage candidates from making unfounded allegations and undermining the legitimacy of the electoral system.

AFGHANISTAN 2014

Legal Framework

Independent Elections Commission

The 2004 constitution recognizes the right of every citizen to elect and be elected, though conditions on exercising this right are to be governed by the electoral law. The election laws must be ratified by both the House of the People and the House Elders and endorsed by the president. The Independent Elections Commission (IEC) was established to “administer and supervise every kind of elections” in accordance with the elections law. This includes monitoring the training of electoral staff, recruiting temporary electoral staff for elections, determining the election schedule, and announcing the official election results. The IEC is also responsible for ensuring proper stakeholder education and fair media access for political actors.

Members of the IEC are appointed solely by the president, though candidates must be vetted by the Selection Committee first. Members of the IEC are barred from joining or acting as a

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63 Id. at Art. 94.
64 Id. Art. 156 (2004).
66 Id. Art. 3.
member of a political party during their incumbency and may be removed for cause. Members of the IEC, public employees, and individuals charged with administering the law are also barred from running for an elected position unless they first resign from their current position.

**Independent Elections Complaint Commission**

The ECC is responsible for adjudicating electoral complaints and taking remedial action where necessary. This authority is limited to civil and administrative matters, though the commission may refer criminal complaints to the Attorney General’s Office. Initial complaints are filed with a provincial complaints commissions for investigation and may be reviewed by the Central Complainants Commission. In certain cases the ECC may initiate an investigation without receiving a complaint.

Members of the ECC are appointed by the president and face similar restraints on political activity as members of the IEC.

**Complaint Adjudication Process**

Complaints may be filed at the provincial complaints commission office prior to Election Day. On Election Day, a complaint may be filed at the central office or in the polling station or center where the complained of action occurred. Any person may file a challenge against the eligibility of individual candidates within 48 hours after the announcement of the preliminary candidate list. Any person may also file an objection against the preliminary list of candidates within two weeks after the publication of the list. A candidate or his/her agent may file a complaint during voting, counting, or within 48 hours after the Election Day.

Complainants must provide identification, evidentiary proof, the identity of the respondent, and a clearly written complaint form identifying the relevant violation of the Electoral Law. The recognized standard of evidence in 2009 was “clear and convincing,” though it is unclear if this standard remains in effect. If the claims are proven to be false, the complainant shall be punished according to the provisions of the Election Law.

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67 Id. Arts. 7, 10, 21, 28.
68 Electoral Law, Art. 19, 15/5/1392.
70 Electoral Law, Art. 62, 15/5/1392.
71 Id. Art. 62 (1).
75 Electoral Law, Art. 63, 5/15/1392; Procedure on Filing and Adjudicating Electoral Challenges and Complaints, Art. 11.
76 Procedure on Filing and Adjudicating Electoral Challenges and Complaints, Art. 6.
78 Procedure on Filing and Adjudicating Electoral Challenges and Complaints, Art. 8.
After the initial filing, the provincial complaint commission must finalize and publish the results of its investigation within 10 days after the Election Day. A candidate then has 72 hours to file a written objection to the Central Complaint Commission if he/she is not satisfied with the result. The Central Commission is required to re-investigate and must adjudicate the complaint within one month after the Election Day. All meetings related to the adjudication of complaints are open to the public.

Remedies

In the event of a tie among candidates, the law specifies that the candidate who meets the highest criteria shall be selected. The criteria to be considered are: 1) the level of education; 2) academic rank; 3) work experience in the governmental and non-governmental organizations; 4) having honorary insignia, medal and title. The law does not specify who is responsible for making the determination as to which candidate has the highest qualifications.

As a result of complaint adjudication, either the IEC or the ECC may order a recount of votes in specific polling centers prior to the certification or an election, invalidate certain ballots, or impose cash fines. Upon “justifiable” complaints or visible signs of fraud, the IEC is required to quarantine ballot boxes and conduct an investigation in the presence of stakeholders and issue a determination as to whether the ballots in the quarantined boxes should be counted. A candidate may challenge this determination by filing a complaint with the ECC within 24 hours. The ECC then must address the complaint within 48 hours and make a final determination.

Individual ballots may be invalidated during the initial count of votes when the ballot lacks an official stamp, reveals the identity of the voter, contains additional writing or a signature, does not have the appearance of the original ballot distributed by the IEC, is torn in a way that obscure the selected candidate, or is not clearly marked. It appears that new regulations are promulgated prior to each election, though substantial differences are not apparent. Ballots may also be invalidated by the ECC when there is evidence of coercion or fraud.

All of the ballots for a single candidate may be invalidated when there is evidence of the use of force or bribery, the collective use of the voting cards in the absence of the owners’ of the cards, or the taking of possession of a ballot box by a candidate or his/her immediate relatives. These appear to be harsh sanctions leveled at clear instances of illicit activity.

Allegations of fraud are the responsibility of the ECC, though it is required to refer criminal cases to the judicial bodies. The Electoral Law articulates 31 separate actions which constitute fraud, though it appears that this may be considered an exhaustive list because there are no statements granting the ECC discretion in identifying additional actions as fraudulent. If the ECC determines that fraud was committed, then the perpetrator will be subject to a cash fine set

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79 Electoral Law, Art. 63, 5/15/1392
80 Procedure on Filing and Adjudicating Electoral Challenges and Complaints, Art. 24
81 Vote Counting Regulation, Art. 6, 10/12/2013.
82 Regulation on Assessment of Validity of Votes, Art. 5, 4/10/2014
83 Electoral Law, Art. 65, 15/5/1392
84 Id. Art. 68.
by statute and the candidate associated with the perpetrator will have all votes in the relevant polling stations and centers allocated to him/her invalidated.85

Relevant History

In 2007, Karzai appointed one of his supporters as the head of the IEC without any oversight from the National Assembly or the Wolesi Jirga.86 The appointee publicly criticized several of the candidates in the 2009 election and made his support for Karzai’s re-election well known.87 Partly in response, the Wolesi Jirga attempted to change the electoral law in order to ensure that IEC appointments be approved by the parliament.88 Karzai vetoed this change and retained the sole authority to appoint IEC members.89 Problems with funding during this period also hindered the IEC’s ability to recruit and retain top talent, making mistakes in successive elections more likely.90

For the 2009 election, the IEC established a predetermined numerical trigger that would automatically quarantine ballot boxes based on the suspicion of fraud.91 A substantial number of polling stations reached this trigger, leading the IEC to change its predetermined triggers after the election but prior to the audit.92 The ECC eventually ordered a full audit, but the IEC opted for an audit based on a statistical sample which had been suggested by international experts.93 Broad allegations of fraud involving IEC officials were also lodged in 2009.94

In 2010, Karzai unilaterally made changes to the Electoral Law during a parliamentary recess in order to remove the international members of the ECC.95 These changes created a perception of partisanship for the IEC during the 2010 election, with multiple candidates accusing the IEC and the ECC of fraud and vote manipulation.96 These complaints ultimately led to indictments against the IEC spokesman and ECC commissioner on charges of corruption and electoral fraud.97 The Supreme Court eventually established a special tribunal to adjudicate electoral complaints, though the impartiality and authority of this tribunal were immediately called into question.98

In 2013, the electoral law was amended to make the ECC a permanent body, though its scope remains the same. The ECC performed admirably.99

85 Id. Art. 69.
87 Id. at 9-10.
89 Id.
90 Id. at 11.
91 Id. at 44.
92 Id.
93 Id.
95 Koskinas, Ioannis, note 10, supra
96 International Crisis Group, note 86, supra, at 10.
97 Id.
98 Id. at 10-11.
99 European Union Election Assessment Team, note 1, supra, at 3.
2014 Presidential Election Audit

On April 5, 2014, Afghan citizens cast a ballot for one of eight presidential candidates and elected provincial council representatives. Voter education was intensive, with over 600 television and radio pieces in the week before the election; however, insufficient emphasis was placed on educating voters about the voting process.100 Potential fraud and an insecure environment were prevalent concerns in the lead up to the election.101 Observers in Kabul reported that voter turnout was high, though there was some concern when security at one polling station initially refused to allow observers to enter and was apparently told not to let UNAMA enter the station.102 No candidate received more than 50% of the vote, triggering a run-off between Abdullah Abdullah and Ashraf Ghani, receiving 45% and 31.56% of the initial votes, respectively.103

The April 5 election led to the filing of 2,133 complaints, the vast majority of which were filed during the complaints filing period after election day.104 The ECC handled complaints well and conducted well handled investigations and public hearings which ultimately led to a recommendation to invalidate 86 polling centers.105 While the IEC accepted these recommendations, there was notable inconsistency in communications between the ECC and the IEC, leading to confusion over which polling centers were at issue.106

The IEC and the ECC are obliged to enact and publish separate regulations, procedures, and guidelines 90 days prior to election day.107 The IEC promulgated a number of regulations in compliance with the law. However, the IEC did not publish any regulation authorizing the invalidation of ballots as the result of an audit until April 17, 2014.108 This was 12 days after election day and only 3 days prior to the end of the vote tabulation period.109 As a result, there was no clear and consistent criteria on the invalidation of ballots prior to the review of ballots. The late adoption of decisions and regulations in the lead up to the run-off election may have been due in part to the need to address issues related to the preliminary election.110 These were agreed upon through joint meetings between the commissions regarding the quarantine and invalidation processes.111

100 Id. at 4.
101 Id. at 5.
103 2014 Election Results, note 2, supra.
104 European Union Election Assessment Team Afghanistan, note 1, supra, at 4.
105 Id.
106 European Union Election Assessment Team Afghanistan, note 1, supra, at 4.
107 Electoral Law, Art. 79 (2013)
108 Regulation on Cancelation and Invalidation of the Votes as a Result of the Audit and Investigation, 4/17/2014.
110 European Union Election Assessment Team Afghanistan, note 1, supra, 4.
111 Id.
On April 17, 2014, the IEC promulgated a regulation identifying the criteria which it would use to cancel or invalidate votes as a result of an audit.\textsuperscript{112} The cancellation of the votes of one candidate would be allowed only where:

1) the candidate or a first degree relative took possession of the electoral materials by force and deprived others from using them;
2) fire arms or other weapons were used to gain a benefit or disrupt the electoral process;
3) evidence of bribery exists; or
4) the voting cards of other persons are used collectively, in the absence of the holders of the cards.\textsuperscript{113}

These criteria are almost identical to those enumerated in the Electoral Law:

Individual ballots, or larger numbers of ballots, could be invalidated in the event that the IEC found one of fourteen separate criteria had been met. The relevant criteria were:

1) Marking of one hundred ballot papers with one marker;
2) Unfolded ballot papers in favor of a candidate;
3) Ballot papers marked in favor of a candidate, but not torn off from the stub;
4) similar or identical tick marks on the ballot papers, with 1\% of tolerance;
5) An unsealed or intentionally damaged ballot box;
6) When allegations of coercion or fraud are found to be true;
7) Markings contrary to the regulations of the IEC;
8) Lack of a verification stamp;
9) Interference in the electoral process;
10) Where the female polling stations have casted more votes than the male polling stations, beyond established limits;
11) Falsification of the result form;
12) Entry of the results on any paper other than the results form prepared by the IEC;
13) Evidence that the votes of withdrawn candidates have been added in favor of another candidate;
14) Any other instances that the IEC counts as fraud.\textsuperscript{114}

A run-off election between Ashraf Ghani and Abdullah Abdullah was held on June 14, 2014. In the preliminary election, Mr. Abdullah received the highest vote count, garnering about 45\% of votes. In the run-off, almost 2 million more votes were cast, the vast majority of which went to Mr. Ghani. The election resulted in the filing of 275 complaints related to election day.\textsuperscript{115} These complaints were not investigated because the audit largely preempted the adjudicatory process. Additionally, 5,388 IEC staff were blacklisted for misconduct and another 440 were blacklisted for underperformance.\textsuperscript{116}

\textsuperscript{112} Regulation on Cancelation and Invalidation of the Votes as a Result of the Audit and Investigation, Art. 2, 4/17/2014.
\textsuperscript{113} Id.
\textsuperscript{114} Id. at Art. 3.
\textsuperscript{115} European Union Election Assessment Team Afghanistan, note 1, supra, at 4.
\textsuperscript{116} European Union Election Assessment Team Afghanistan, note 1, supra, at 5.
Despite the higher voter turnout reported for the run-off election, observers in Kabul reported seeing very few lines and mostly empty polling stations. The noted inconsistencies occurred and the observers noted that security appeared lacking in at least one polling station. The most worrying occurrence was the accusation of fraud leveled by the Kabul Chief of Police against the Secretary General of the IEC. Allegedly, the Secretary General was caught trying to smuggle ballots out of IEC headquarters with his son and two bodyguards. It also appears that more than 100% of registered voters cast a ballot in Khost, Paktia, and Paktika.

After the election, Mr. Abdullah called for an end to the vote counting because of “huge fraud,” and demanded that the electoral results be investigated. It appears that Mr. Abdullah addressed his concerns directly to the IEC instead of properly filing a complaint with the ECC. The demand of an audit in the absence of a complaint before the ECC appears to be extralegal.

Mr. Abdullah initially threatened to boycott the entire election process, leading international actors to mediate a negotiation between the candidates that resulted in the framework for an audit. Initially, 299 polling stations were audited, though this number was increased to 1,930. On July 12, 2014, both candidates agreed to a technical framework for an audit of every ballot cast. Despite initial agreement, the audit process was halted several times due to conflicts over the audit process itself. Neither the IEC nor the ECC took part in these negotiations, nor has the ECC held any hearing or released any evidence related to Mr. Abdullah’s claims.

On June 12, 2014, the IEC clarified the procedures for investigating issues related to an audit, recount, or invalidation of ballots for the presidential run-off election. Part of this determination was an 11 point audit checklist meant to standardize the review of ballot boxes. Ballots could be invalidated only when they had not been separated from the stub, lacked a confirmation stamp, or were not marked in accordance with procedure.

On June 19, 2014, ordered the quarantine of ballots from two polling centers. Subsequently, the IEC nullified the ballots from two polling centers, ordered the audit or recount of three polling centers, and found an employee had tampered with a result form. None of the polling centers invalidated by the IEC were listed in the decisions submitted from the ECC, and no mention was made of where the complaints originated.

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117 Bose, Srinjoy, note 102, supra.
118 Id.
119 Id.
120 Id.
121 Id.
122 Ahmed, Azam & Matthew Rosenberg, note 3, supra.
125 Manner of investigating the issues related to recount, audit and invalidation of votes as a result of audit and all other issues related to tallying results for June 14, 2014 presidential run-off election, IEC Decision 1393-20.
126 Reports of fraud received along with TEBs of two polling centers, IEC Decision 1393-21
127 Investigating TEBs having problems, IEC Decision 1393-22; Reviewing reports of ballot audit and recount of some polling centers in Balkh and Paktika provinces, IEC Decision 1393-23.
Ballot boxes may be quarantined and investigated only when justifiable complaints or visible signs of fraud exist.\textsuperscript{128} The electoral law does not define the term “justifiable complaints,” nor does it specify which commission has the authority to determine whether a complaint is justifiable. Neither the IEC nor the ECC issued any findings or clarification concerning the reasons for quarantining ballot boxes and, considering the scant evidence that was produced by either candidate, it is difficult to determine how these complaints were deemed justifiable.\textsuperscript{129}

On June 29, 2014, the IEC ordered an audit of all polling stations that recorded more than 599 votes.\textsuperscript{130} As a result of the audit, approximately 12,000 ballots were invalidated.\textsuperscript{131} The audit, while narrower audit than Mr. Abdullah demanded, still circumvented the established EDR process.\textsuperscript{132} The candidates later reached a negotiated agreement supported by external actors, though without input from either the IEC or ECC, that defined the procedure for conducting a more extensive audit.\textsuperscript{133}

The initial agreement called for an audit of 6,000 polling stations.\textsuperscript{134} Mr. Abdullah later sought to increase the extent of the audit, first to 8,000, then to 11,000 polling stations.\textsuperscript{135} The candidates ultimately agreed to an audit of 100\% of the polling stations in the presence of national and international observers.\textsuperscript{136} The agreement included a technical framework for conducting the audit as well as a 16 point checklist developed with the aid of the UN.\textsuperscript{137}

The IEC identified the audit criteria, which would determine whether a ballot box would be subjected to a recount.\textsuperscript{138} The campaign teams were also given the authority to identify 6,000 ballot boxes for special scrutiny.\textsuperscript{139} Notably, these new criteria differ from the criteria set out on June 12 and allow for additional changes.

\begin{itemize}
  \item \textsuperscript{128} Electoral Law, Art. 58
  \item \textsuperscript{129} Biljert, Martin van & Kate Clark, Elections 2014 (35): A delay, an audit and a change of tone, Afghanistan Analysts Network, July 3, 2014; Suroush, Qayoom, Elections (40): The ECC open sessions on election day complaints, Afghanistan Analysts Network, July 17, 2014.
  \item \textsuperscript{130} Audit of all polling stations in which 599 or 600 ballots have been used, IEC Decision 1393-24
  \item \textsuperscript{131} Harrison-Graham, Emma, Afghan president candidate hints at parallel government, The Guardian, July 8, 2014; Review of the audit results of 1930 polling stations, IEC Decision 1393-26.
  \item \textsuperscript{132} Id.
  \item \textsuperscript{133} Clark, Kate & Qayoom Suroush, Elections 2014 (41): Audit started, rules as yet unclear, Afghanistan Analysts Network, July 17, 2014. Outside of the complaint adjudication process, the IEC also gave into pressure from the candidates in administering the run-off election. In response to the candidates’ complaints, the IEC amended the list of polling stations to increase the total number. It also allowed the candidates’ agents more access during the casting and counting processes and allowed each candidate to obtain a carbon copy of the count results sheet. Biljert, Martin van, Elections (28): Last minute procedural changes to pacify candidates complaints, Afghanistan Analysts Network, June 13, 2014.
  \item \textsuperscript{134} Neuman, Scott, note 124, supra.
  \item \textsuperscript{135} Id.
  \item \textsuperscript{136} 100\% audit of the votes in all polling stations of presidential run-off election, IEC Decision 1393-27.
  \item \textsuperscript{137} Audit and Recount Procedure: 2014 Presidential Run-Off Elections, 6-10.
  \item \textsuperscript{138} Criteria for recount and nullification of votes for audit of all run-off election polling stations, IEC Decision 1393-33.
  \item \textsuperscript{139} Decision-making on audit and recount results of run-off election ballot boxes, IEC Decision 1393-37
\end{itemize}
The agreement did not identify the invalidation criteria, delaying discussion of this contentious issue until after the audit had begun. The agreement to clarify the invalidation criteria at a later date has led to inconsistency, as criteria have been added to the checklist or changed as late as August 3. The failure to fully agree on the invalidation criteria ultimately led Mr. Abdullah to withdraw from the audit process and announce that he would not accept the results of the election.

The July 12 technical framework includes a 16 point audit checklist meant to provide a clear procedure for examining ballot boxes and election materials in a uniform way. In addition to the audit checklist, the IEC issued a decision identifying the criteria for recounting and nullifying votes as a result of the audit. This decision identified 8 instances that would lead to a recount of a ballot box. It also enumerated conditions for the nullification of ballots and ballot boxes that were different than those identified in the April 17 regulation. It is unclear what effect this framework has on the April 17 regulation.

Mr. Abdullah also boycotted the initial audit before returning in August. After the audit, Mr. Abdullah again threatened to boycott the process unless the IEC accepted his demands to widen the criteria for invalidating ballots. One of his spokesmen went further, warning that Abdullah’s supporters would not recognize any future government as legitimate unless Abdullah’s demands were met. Abdullah ultimately withdrew his support for the election process. In response, the IEC requested that Mr. Ghani withdraw his observers as well so that no candidate could claim to have a disadvantage of representation during the invalidation process.

AFGHAN AUDIT BY INTERNATIONAL STANDARDS

The Afghan audit has demonstrated that, while the legal framework for EDR is well grounded, more improvements are needed to bring the system up to international standards. For the purposes of comparing Afghanistan’s EDR system to the international standards, the IEC should be viewed as the EMB while the ECC should be viewed as the EDRB.

Before discussing the successes and deficiencies regarding the 2014 audit, it is necessary to clarify what is meant by “audit.” An audit of an election can be undertaken administratively by the EMB or through an adjudicatory process undertaken by the EDRB. The practical results are

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140 Clark, Kate & Qayoom Suroosh, Elections 2014 (41), note 133, supra.
142 Koskinas, Ioannis, note 10, supra.
144 Criteria for recount and nullification of votes for audit of all run-off election polling stations, Decision 33-1393.
146 Donati, Jessica and Hamid Shalizi, note 7, supra.
147 Id.
similar with regard to the audited ballots, as both processes seek to ensure that the counted ballots are, in fact, valid. However, the scope, purpose, and process of the audit will differ depending upon its characterization.

Administrative audits are undertaken by the EMB prior to the certification of the results. The purpose is to ensure that ballots cast during the election were valid and to verify the preliminary results. The scope of this audit is likely to be larger as it is meant to ensure that all ballots cast were valid and that the election process was adhered to. The scope and purpose of an administrative audit separate it from the EDR process. Therefore, an administrative audit should generally occur regardless of electoral challenges filed by the candidates.

An adjudicatory audit should be undertaken by the EDRB after the generation of preliminary results. The purpose of an adjudicatory audit is to determine whether specified ballots, or ballots from specified polling stations, should be invalidated because of an identified irregularity. The scope of the audit will be circumscribed by the specific allegations contained in the complaint, as there is no justification to review ballots that have not been alleged through the EDR process to be invalid. An adjudicatory audit should not be undertaken in the absence of a judicial ruling by the EDRB that substantiates a complainant’s claims.

Successes

Every citizen has a right of redress under the Afghan Electoral Law. All citizens may challenge the eligibility of a candidate, the entire list of candidates, or any infringement or violation of a political right. Only candidates may challenge the actual outcome of an election, ensuring that only the most motivated complainant brings the issue before the ECC. The electoral law have overlapping authority with regard to initiating audits and invalidating ballots. Beyond this issue, the electoral law clearly defines the authority, jurisdiction, and remedies available to each commission.

The electoral law, augmented by ECC regulations, clearly defines the procedures for filing and adjudicating an electoral dispute. Both commissions make decisions in open meetings and release decisions to the public. The regulations and statutes are publicly available, as are a number of explanatory documents meant to aid public understanding.

The IEC and the ECC are independent administrative bodies meant to operate outside of the political process. While members of each commission are appointed solely by the president, the executive committees are determined through internal elections. Members are also barred from taking part in partisan political activities or holding secondary employment.

An expedited adjudicatory timeframe is required by the electoral and structural laws. Final ECC decisions must be announced and published no later than one month after election day. In exceptional circumstances the IEC may challenge an ECC determination as unfair within 24 hours. The ECC must then consider this challenge and issue a final determination in an unspecified time frame.
Various remedies are available through the EDR process, including recounts, audits, the invalidation of ballots, the invalidation of polling stations, the disqualification of candidates, and monetary sanctions. Ballots may also be selectively invalidated where evidence of violence, interference, or bribery at the polls establishes vote tampering by one candidate. Lastly, a person filing frivolous or unsubstantiated complaints may be sanctioned, fined, or referred for criminal prosecution.

The IEC is expressly obligated to plan civic education and public outreach campaigns at the national level. Numerous publications related to the registration process have been produced, though it is unclear how many of these publications were distributed or where they were distributed to. No publications on the voting process are available through the IEC website and no schedule or description of outreach activities has been provided by the IEC.

**Continuing Issues**

**Clarity of Standards and Procedures**

The electoral law distinguishes between election administration and adjudication, though it does create overlapping jurisdiction during the post-election period. The IEC is responsible for certifying a winner.\(^{149}\) The certification of a winner would seem to require the authority to regulate the counting of votes, though this is not expressly provided for, it likely falls under the authority to execute “other duties and authorities mentioned in the election law.”\(^{150}\) This language, as well as Article 59 of the electoral law, grants the IEC the authority to order a recount when the counting process is challenged.\(^{151}\) In the absence of clearly defined and predetermined standards for determining ballot validity, the tabulation process became largely ad hoc. This was the cornerstone of complaints lodged against the IEC, as Abdullah focused largely on the perceived bias of the IEC and alleged complicity by the IEC in fraudulent activity. This allegation would have been difficult to sustain had the IEC developed and published clear and consistent standards prior to the election.

The ECC is responsible for adjudicating electoral disputes and is specifically authorized to decide on re-polling or re-counting the votes prior to the certification of results.\(^{152}\) The provisions for invalidating ballots, Article 65, are included under Chapter 13 of the electoral law, which deals specifically with Electoral Infringement and Violation.\(^{153}\) This would seem to establish the ECC as the body authorized to invalidate ballots. However, after Mr. Abdullah’s withdrawal from the electoral process, the ECC demonstrated significant disagreement over its authority to adjudicate the accepted complaints.\(^{154}\)

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\(^{151}\) Electoral Law, Art. 59, 5/15/1392


\(^{153}\) Electoral Law, Art. 65, 5/15/1392

\(^{154}\) Suroush, Qayoom, Elections (40), note 129, *supra*. 
Prior to the audit, the ECC was investigating 2,576 complaints pertaining to the first round election. The ECC subsequently accepted 376 complaints related to the run-off election for investigation, all of which have been suspended pending the completion of the audit process, which will also be the basis for additional complaints. The ECC provided its own observers for the audit process and will adjudicate complaints against IEC decisions within 48 hours of their announcement. The ECC has not ordered recounts related to the run-off election, though it has submitted orders to invalidate all or part of 62 separate polling centers. It is unclear whether the ECC has the authority to suspend accepted complaints, whether its invalidation order impacts the audit, or what will be done with the accepted complaints now that the IEC has completed an audit and invalidated ballots.

The electoral law and the regulations of the IEC and the ECC fail to specify the burden of proof or the standard of evidence which will be applied to electoral complaints. The IEC procedure for processing a complaint includes an investigation and review by technical experts, but it also requires that the complainant produce evidence during the initial complaint. It also appears that the ECC does not conduct a hearing, but instead reads a record produced by its investigative and technical staff.

**Adjudication Process**

The members of the IEC and the ECC are appointed by the sole authority of the president. While the Selection Committee does have the authority to narrow the range of candidates the president may appoint, it cannot prevent the appointment of any individual candidate. This has created issues concerning the commissions’ impartiality and credibility, as demonstrated by Karzai’s 2007 appointment of the IEC chairperson.

Neither commission was able to ensure that the EDR process was adhered to, allowing external actors to dictate the procedures for the post-election period. The use of ad hoc procedures and standards promulgated by political candidates and international actors damages the credibility of the commissions by undermining their authority. Inconsistency also creates incentives for future candidates to attempt to alter the statutory process to one that is more beneficial to the challenger and prevents the public from understanding the EDR system.

The ECC cannot “delay adjudication of the complaints” for more than one month after election day. The statute is unclear on whether this requires the ECC to issue a final determination within one month of election day or merely requires that the adjudication process begin within one month of election day. This deadline cannot be met because of the election timetable. The timetable provides an unreasonably short time period for issuing a final determination and does not allow for sufficient investigation.

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155 ECC complainants Audit and adjudication plan, 1 (2014)
156 *Id.* at 3
158 Electoral Law, Art. 63
The audit process instituted by the IEC ensure that the ECC could not meet its statutory deadline. The extensive audit and numerous delays due to a failure to agree on criteria has prevented the audit from proceeding quickly.\(^{160}\) These delays were overcome, but only at the cost of new changes to the audit agreement which subjected about 20% of the ballot to a “special audit.”\(^{161}\) Since the ECC has announced that it would not act on complaints related to the run-off election until the completion of the audit, it cannot meet its required deadline.

**Education**

The IEC is obligated to conduct civic education and outreach events in order to ensure that voters, candidates, and other stakeholders understand the registration and electoral process. The IEC scheduled mock polling stations throughout the country prior to the 2009 elections.\(^{162}\) Unfortunately, there is very little information about civic education events prior to the 2014 election, though several non-governmental organizations have received grants from international foundations to conduct civic education events.\(^{163}\)

In 2004, less than one quarter of the electorate was aware that citizens would cast a secret ballot in private.\(^{164}\) Almost 60% of the electorate was unsure whether the election would be free and fair, though this was most pronounced among less educated males, the illiterate, and those without radio exposure.\(^{165}\) Voters were more informed when discussing the characteristics of democracies and the personal impact a democracy might have on them, though less than one third of electorate believed that all political parties, even unpopular ones, should be able to hold meetings in their communities.\(^{166}\)

In 2013, only 17% of the electorate believed their community was well-informed about the election, and a significant proportion desired more information about the voting process.\(^{167}\) As a result of the 2005 election, the ECC handled a significant number of complaints, though the vast majority did not deal with electoral offences or included insufficient documentation.\(^{168}\) The lack of sufficient information concerning the ECC process has continued, with 77% of the electorate reporting that they were unfamiliar with the role of the ECC.\(^{169}\)

While the IEC engaged in significant voter education in the lead up to both the preliminary and run-off election, they largely failed to provide sufficient information.\(^{170}\) The limited number of educators and the narrow scope of the education efforts, which were largely focused on registration and mobilization, have failed to provide information about the EDR process.\(^{171}\)

\(^{160}\) Biljert, Martin van, Elections 2014 (45), note 141, supra.

\(^{161}\) Id.

\(^{162}\) Civic education to boost voter turnout in Afghanistan, UNDP, August 14, 2009.


\(^{165}\) Id. at 35.

\(^{166}\) Id. at 54-58, 62.

\(^{167}\) A Survey of Public Perception on Elections and Civic Education: Afghanistan, 3, 14, April, 2013

\(^{168}\) International Crisis Group, note 86, supra at 25.

\(^{169}\) Id. at 14.

\(^{170}\) European Union Election Assessment Team, note 1, supra, 4.

\(^{171}\) Id. at 5.
Perceptions

The electorate holds contrasting views of the electoral system and the government. Majorities supported the presidency and various ministries in 2013, though only half believed that prior elections were legitimate.\(^{172}\) This inconsistency was also prevalent in 2004, when 77\% of the electorate believed that elections would make a difference in their lives, while only 33\% believed they had any influence on the government.\(^{173}\)

Mr. Abdullah’s allegations of fraud focused on corruption at the IEC and ECC and called for an investigation of the IEC and the dismissal of the IEC’s deputy.\(^{174}\) Both the IEC and the international community dismissed the need for an investigation and implored the Abdullah camp to wait for the completion of the IEC audit.\(^{175}\) Conflicts over the alleged partisanship in the IEC has led to violence between electoral teams.\(^{176}\) Public trust in the impartiality of the IEC is also very low.\(^{177}\)

The effect of fraudulent activity by electoral workers remains unclear. While a significant number of poll workers were charged with fraud during the preliminary election, the IEC took immediate steps to fire, identify, and blacklist all 3,300 individuals prior to the run-off election.\(^{178}\) The sheer number of employees involved in the fraud, which impacted 550 polling stations, could lead to the perception that the IEC is not up to the task of fairly administering the election. This is especially true considering that perceptions of widespread fraud have damaged the legitimacy of prior elections in the minds of the electorate.\(^{179}\) However, the swift and decisive action by the IEC in response to these charges may enhance its image.

It should also be noted that the unity government agreed to by the candidates as a result of the audit process would necessarily change the structure of the government laid out in the Constitution.\(^{180}\) This could denigrate the roll of voters in the electoral process by essentially nullifying the results in favor of accommodating the loser.\(^{181}\) It would also reward threats to undermine or delegitimize the established government, which could create perverse incentives.\(^{182}\)

\(^{172}\) A Survey of Public Perception, note 167, supra at 2-3.

\(^{173}\) Voter Education Planning Survey, note 164, supra at 39, 64.


\(^{175}\) Koskinas, Ioannis, note 10, supra.


\(^{177}\) Koskinas, Ioannis, note 10, supra.


\(^{179}\) A Survey of Public Perception, note 167, supra 3.


\(^{181}\) Koskinas, Ioannis, note 10, supra.

\(^{182}\) Harrison-Graham, Emma, note 131, supra.
The ECC has followed the appropriate procedure in adjudicating complaints from the first round election, though it has provided insufficient scrutiny or transparency during its open sessions. The open sessions themselves were described as very formalistic, with little investigation or fact finding. Due to lack of resources and poor planning the IEC has been unable to combat its reputation through effective operations.

**RECOMMENDATIONS**

**Standards**

The authority and jurisdiction of the IEC and the ECC during the post-election period needs to be clarified so that process can be completed quickly in a consistent manner. The ambiguity in the electoral law was demonstrated during an ECC meeting which devoted an hour to arguments about whether the IEC was authorized to invalidate polling stations and ballots. Both the IEC and the ECC promulgated separate and inconsistent criteria for invalidating ballots.

Overlapping authority is necessary to ensure that the commissions fulfill their respective functions. Both commissions need the authority to invalidate ballots, though this authority should be exercised at separate times. To ensure consistency in these overlapping areas, the commissions should jointly develop their procedures to ensure greater coordination in their work.

The burden of proof upon each complainant should be clarified. In prior elections, the standard of evidence was the clear and convincing standard. This standard has not be codified in the statutory framework, nor has the meaning of “clear and convincing” been adequately described to provide citizens sufficient information about the quality and quantity of evidence they will need to provide when filing a complaint.

It should be noted that all of the above recommendations rest on an underlying recommendation that both the IEC and the ECC develop and publish standards well in advance of the election. The legal framework for the electoral process mandates that all regulations and rules be adopted and published at least 90 days prior to the election. This timetable was complied with for the majority of regulations applicable to the 2014 election; however, the standards related to ballot validity were not promulgated until after the tabulation period had begun. This inconsistency is unacceptable and the commissions should strive to comply with the legislatively mandated timetable.

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183 On July 9, the ECC addressed 911 complaints during one hour and one half session. Suroush, Qayoom, Elections (40), note 129, supra.

184 Suroush, Qayoom, Elections (40), note 129, supra.

185 International Crisis Group, note 86, supra at 10.

186 Elections 2014: Déjà vu – Abdullah pulls out; process continues, UNAMA, Evening Media Monitoring, August 30, 2014

Adjudication Process

The electoral law should establish some check on the president’s authority to appoint members of the IEC and the ECC to ensure the commissions are properly insulated from political pressure. Currently, the president’s authority provides too much influence over potential appointees and could undermine the public’s perception of impartiality and credibility.

The commissions should work to increase the transparency of their decisions. While both commissions hold open sessions and publish their decisions, neither organization has provided sufficient information to create a clear legal rationale for their determinations. The open sessions have also been an insufficient forum for a complete and thorough hearing of the issues before the commissions, leading to formulaic hearings that provide insufficient clarity.

The commissions should coordinate their post-election actions to ensure electoral disputes are quickly and properly resolved. A coordinated approach requires a coordinated process for invalidating ballots and conducting audits after a complaint has been filed with the ECC. This will prevent the IEC from auditing polling centers and invalidating ballots that are the subject of accepted complaint. The IEC should treat complaints submitted to it as electoral complaints and create a process from forwarding them to the ECC. In order to successfully achieve this coordination the commissions must begin developing regulations and procedures well in advance of the election so that final rules can be adopted by the legislatively mandated deadline.

Education

Only 28% of the population is literate, making reliance on written publications an ineffective form of civic education. Similarly, reliance on the website to disseminate information is misplaced as only 3% of the Afghan people have access to a proper internet connection. Currently, all of the publications identified by the IEC pertain solely to the registration process. While this is valuable information, more emphasis should be placed on civic education concerning the voting process and bolstering democratic values. The commissions should engage in joint civic education about the EDR process.

Civic education events should take place face-to-face where possible, though radio programs should also be heavily used. Current NGOs could be expanded, especially in areas where NGOs have greater presence and familiarity than the IEC.

Perception

The 2014 audit was initiated prior to the adjudication of any electoral complaints, the framework was largely created without input by either the IEC or the ECC, and the criteria have been

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188 Elections 2014: Déjà vu, note 186, supra.
189 Surouch, Qayoom, Elections (40), note 129, supra.
191 Sajad, Only 3 percent Afghans have proper access to internet, Khaama Press, Jan 16, 2013
Electoral complaints were also resolved in 2009 through apparently extralegal means when the IEC cancelled a run-off election after Mr. Abdullah withdrew from the race; a decision which was not based on any specific law or regulation.\footnote{Elections 2014: Déjà vu, note 186, \textit{supra}.}

The negotiated audit and unity government could undermine the authority and credibility of both commissions. It also devalues the role of the voters by undermining the electoral results themselves. Negotiating ad hoc and extralegal solutions could undermine the electoral process and incentivize fraud or frivolous challenges in the future. The involvement of international actors is beneficial where there is a legitimate concern about the credibility of the independent commissions, this involvement should be focused on reforms to the organizations.

Both the IEC and the ECC should work to more thoroughly vet the temporary employees that will administer the elections.\footnote{National Democratic Institute, note 88, \textit{supra} at 52-53.} The most common forms of fraud discovered in the elections already held were ballot stuffing and fraudulent vote counting. Both require some level of complicity from IEC temporary staff. Working to ensure the integrity of these temporary employees could significantly lower the number of fraudulent votes.

Regarding public challenges to the commissions or threats to disregard the results of an election, the commissions would do well to remind the candidates, of the words of Judge Kriegler, a member of the ECC in 2010: “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.”\footnote{Afghanistan Research and Evaluation Unit, note 187, \textit{supra} at 32.}

**CONCLUSION**

There is a dearth of literature focusing on the international standards for election audits. The lack of attention can be explained by two main factors. The first is the lack of specificity for the term “audit,” which can refer either to an administrative or adjudicative audit, each of which requires different standards and procedures. The use of a more specific term could alleviate this issue and allow for a greater focus on international standards. The second factor is the subsumption of audits by the larger issue of electoral dispute resolution. This second factor is illustrative of the first in that EDR generally focuses on the adjudicative mechanisms of the post-election period, though administrative audits are cited as a potential EDR mechanism. The main issue appears to be a confusion of the effects (i.e. verifying the validity of ballots cast) with the intention and procedures (i.e. EDR vs. ensuring compliance with regulations in the absence of a dispute).

The most frequently mentioned standards fall into eight general categories:

1. A right of redress for election complaints and disputes;
2. A clearly defined regimen of election standards and procedures;
3. An impartial and informed arbiter;
4. A system that judicially expedites decisions;
5. Established burdens of proof and standards of evidence;
6. A system that judicially expedites decisions;
7. Established burdens of proof and standards of evidence;
8. A system that judicially expedites decisions;
9. Established burdens of proof and standards of evidence;
6) Availability of meaningful and effective remedies;
7) Effective education of stakeholders;
8) Public perception of legitimacy.

These categories are not mutually exclusive and many facets of the EDR process can fulfill multiple standards. There are no mandated paths to fulfilling these standards because they must fit within a nation’s particular political and historical cultures in order to ensure that they are acceptable.

The 2014 Afghan election demonstrated the importance of the international standards. The EDR system in Afghanistan failed to promulgate clear standards and procedures prior to the election, to ensure consistent application of standards throughout the EDR process, to sufficiently expedite decisions, to establish consistent and predetermined burdens of proof and standards of evidence, to effectively educate stakeholders, or to ensure that the public perceived the EDR process as legitimate and unbiased. There were also questions concerning the impartiality of the arbiter, though this was in part due to confusion over which body was responsible for adjudicating the issues. Involvement by international actors may have prevented domestic unrest, but it did not help to correct the deficiencies identified in the EDR process.

Moving forward, the IEC and the ECC must coordinate the development of regulations relating to the EDR process and the standards for determining ballot validity prior to the next election. The announcement of regulations prior to the election is already required by the Electoral Law, therefore, compliance with this law is essential. Complying with the Electoral Law and ensuring that standards remain consistent throughout the electoral process will increase the accountability of the IEC and the ECC, which would increase the perception of legitimacy. Lastly, the IEC must increase its voter education efforts to ensure that citizens, candidates, and parties are well acquainted with the EDR process. This will help to improve confidence in the electoral process and will also increase accountability by making ad hoc deviations from the legal framework easier to identify.