Election Crimes in Afghanistan:
Law and Practice

Kakar Advocates Law Firm LLC
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Foreword

This research paper was written in the weeks before the October 2018 Wolesi Jirga elections in Afghanistan, but as the authors observe in their introductory materials, the challenges and failures associated with election crime prosecution have broader implications for perceptions of integrity in the upcoming presidential polls (delayed from April to September 2019). Failure to prosecute and enforce punishment for crimes, and even further to publicize any successful examples of criminals being held to account, will mean there is little to deter fraud, bribery, and other crimes in this next election cycle. Set amidst fledgling peace talks, the next elections will bring a new executive to power who will have significant power in shaping negotiations with the Taliban – so there are high stakes in the outcome of the vote. Allegations of corruption and criminal activity could have a de-stabilizing affect, potentially setting the stage for violent protest. We are releasing this paper at this time given its continued salience for guiding practitioners and policy makers in strengthening of criminal justice processes for election crimes in the upcoming polls.

While some concerns flagged in this document were not as much an obstacle to successful prosecution as anticipated (e.g., thin definitions of election crimes in Articles 422-435 of the Penal Code), and while general practice has clarified that at a provincial level election crimes cases are heard in public security dewans, other points raised by the memo authors have become extremely salient in the past months. In February 2019, the Commissioners for the Independent Election Commission and Electoral Complaints Commission were dismissed by President Ashraf Ghani for corruption related to the 2018 election – and months later, following indictment, the matter of which court holds responsibility for these cases remains unresolved – with the Anti-Corruption Justice Center claiming election crimes (and other crimes defined by Chapter 6 of the Penal Code) fall out of their jurisdiction despite a Supreme Court Decision to the contrary.

We hope this paper will serve as a useful tool for understanding Afghanistan’s relatively new and untested legal framework for handling of election crimes, as well as provide impetus for further discussion about necessary reforms or coordination amongst relevant agencies. To the readers, please note that presidential elections have been rescheduled since this paper was finalized, and excuse mentions of an April election date. To our partners at Kakar Advocates, thank you for your tireless work on this initiative.

The INPROL Team

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Election Crimes in Afghanistan: Law and Practice

1. Introduction

1.1 Background

Although Afghanistan has enthusiastically embraced democracy since the fall of the Taliban in 2001, the last two presidential elections (2009 and 2014) and the last parliamentary election (2010) were marked by allegations of widespread vote-rigging, fraud, intimidation, and other irregularities. The two presidential elections led to political crises, with the 2014 situation resolved only by international intervention that led to the current National Unity Government structure. Although some steps were taken in response to claims, such as removal of some ballots from consideration, a major criticism has been the Government’s failure to prosecute individuals for participation in alleged election crimes.

A new parliamentary election, originally slated for October 2016, was rescheduled for October 2018. The election is long overdue, as the constitutionally mandated terms of the members of the Wolesi Jirga, the Lower House of Parliament, technically expired in June 2015.

Against this historical background, there were fears that this election may be plagued by the same allegations of impropriety that stained the previous elections. However, several institutional safeguards were put in place in the intervening years that provide some promise of an improved election process. There is a legal framework, which includes a newly-enacted Penal Code that contains a section on election crimes that supplants the corresponding section of the September 2016 Elections Law. There are governmental bodies, such as the Independent Election Commission (IEC), the Electoral Complaints Commission (ECC), and the Attorney General’s Office (AGO), who have authority to oversee the elections and to investigate and prosecute election crimes. In addition, non-governmental observers such as the Transparent Election Foundation of Afghanistan (TEFA) and the Free and Fair Election Forum of Afghanistan (FEFA) are committed to ensuring that election crimes are held to a minimum (although they may have had fewer resources for the October election than in previous elections).

The introduction of biometrics, albeit at the last stages of election preparation, promised to provide an additional safeguard against fraud and other election crimes. However, given the extremely late introduction of the scanners (less than a week before the election), there were justifiable concerns as to whether the devices could be distributed and poll workers adequately trained in time.

The parliamentary elections are of particular interest to the country and the international community as they are viewed as a test of Afghanistan’s readiness to conduct its next presidential election in April 2019. The new legal landscape provides an opportunity to introduce a new deterrent to election crimes in the 2019 presidential election if the perpetrators of such acts in the 2018 parliamentary elections are held accountable. However, investigation reveals that, shortly before election day, uncertainty remained among key stakeholders as to
the proper process and procedures for the reporting, investigation, and prosecution of election crimes, as well as uncertainty as to the crimes themselves.

1.2 Objectives
This study first looks at the legal framework surrounding elections in Afghanistan, and attempts to identify gaps or shortcomings in the law. It then proceeds to examine whether and how well the legal framework is being implemented by the relevant organizations. Although the paper is released after the October election was held, the study focuses on the period just prior to the election, and analyzes the preparedness of the key actors.

Specific objectives of the study are to gauge the organizations’ understanding of the election crimes and processes for the investigation and prosecution of the crimes; the resources that the various organizations have at their disposal to enforce the law; the degree to which the organizations are working together toward a common goal; and the general preparedness of the country for the election. Finally, the study makes specific recommendations for improvements.

1.3 Methodology
This study was undertaken in two phases in order to effectively utilize both primary and secondary sources of information. The first phase consisted of a comprehensive desk review of relevant information. The findings of the desk review then informed the second phase of qualitative research, which consisted primarily of a series of stakeholder interviews.

The literature review included a thorough review of publicly-available resources. This research included not only sources such as the Constitution of Afghanistan and the Elections Law, but also the newly-enacted Penal Code and recent bylaws adopted by the IEC and procedures promulgated by the ECC. A search was also undertaken of relevant studies and analyses of election crimes in previous elections in Afghanistan.

Following the desk review, interviews were conducted with the governmental and non-governmental organizations charged with significant roles in the upcoming election process. Government entities that were consulted include the AGO, the Supreme Court, the Ministry of Justice (MoJ), the IEC, the ECC, and the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC). Two election monitoring organizations, TEFA and FEFA, as well as a current Member of Parliament, also were consulted.

2. Elections and Election Crimes Legal Framework
The cornerstone of any democratic society is the right of the people to choose their leaders. The Constitution of Afghanistan ensures in numerous articles that sovereignty remains with the people. In addition to the Constitution, there is an Election Law, a newly-enacted Penal Code, regulations, bylaws and procedures promulgated by the IEC and the ECC, and other authorities that form the legal framework for elections and election crimes.

2.1 Elections
The right of citizens to vote and to run for office is embodied in Article 33 of the Constitution, which provides that the “citizens of Afghanistan shall have the right to elect and be elected,”
and “the conditions of exercising this right shall be regulated by law.” The Constitution specifies seven elections: presidential, parliamentary, provincial council, district council, village council, municipal council and mayor. However, since 2004, the Government has only succeeded in holding presidential (2004, 2009 and 2014), parliamentary (2005 and 2010), and provincial council (2005, 2009 and 2014) elections.

Article 156 of the Constitution states that “the Independent Elections Commission shall be established to administer and supervise every kind of elections as well as refer to general public opinion of the people in accordance with the provisions of the law.” Additionally, a number of election-related laws have been enacted since the adoption of the Constitution in 2004, including several Election Laws (2005, 2010, 2013, 2015, March 2016, and September 2016); and the Law on the Organization and Authorities of the IEC and ECC (2013, 2015, and March 2016). Thus, almost every election has been held under a new set of rules.

The September 2016 Election Law—the current law—replaced both the March 2016 Election Law and the Law on Organizational Structure and Authorities of the IEC and ECC. The objectives of this law are regulating the presidential, parliamentary, provincial council, district council, village council, mayor, and municipal council elections; allowing for free, general, secret, direct, fair and transparent elections; regulating requirements and qualifications of the voters and candidates; determining the electoral constituencies; regulating affairs related to the structure, duties, authorities and manner of operations of the IEC and ECC; and providing means to address objections and complaints arising from electoral negligence, violations and crimes.

Under the Election Law, the IEC has broad authority and duties, including approval of election procedures; overseeing voter registration and maintenance of the voter list; approval of the election calendar; holding public awareness campaigns; regulating access to media; designating registration, polling, and counting centers; certifying the list of candidates; issuing accreditation letters to election observers and monitors; and announcing the final election results.

Unlike the IEC, which draws its authority from the Constitution, the ECC was created by the Election Law. The ECC is established for the purposes of addressing objections and complaints arising from negligence, violations, and crimes related to elections. The Central and Provincial Complaint Commissions (EEC and PEEC) have the authorities of addressing objections regarding the qualifications of the candidates; addressing complaints arising from the electoral violations; issuing advice, warnings and orders of corrective action to persons or organizations committing violations; imposing cash fines; issuing orders of recount of votes in specific polling centers prior to announcement of the election results; and invalidating the ballot papers not fulfilling the necessary requirements. A significant power conferred on the ECC in Article 97 of the September 2016 Election Law is the authority to investigate election crimes.

Many politicians, civil society members, and citizens are supportive of the ECC’s oversight role, which led to the disqualification of at least 35 candidates prior to the October election. However, some commentators, including current members of Parliament, contend that their
disqualification is unconstitutional, and the eliminated candidates should have the right to appeal to the courts.

2.2 Election Crimes

2.2.1 Election Law

The Election Law classifies the electoral offences into negligence, electoral violations, and crimes. Negligence and electoral violations include more minor offenses (such as campaigning outside of the campaign period) and are dealt with by the ECC pursuant to Articles 96 and 97 of the Election Law. The election crimes—more serious offenses—were set forth in Article 99.1 of the Law, which also gave the IEC authority to set punishments for election crimes. However, as discussed below, Article 99 of the Election Law has been nullified in its entirety and replaced by a list of election crimes in the 2018 Penal Code.

Previous election laws did not specify election crimes. Election officials could refer general crimes, such as fraud or assault, to the prosecuting authorities, but they would not have designated election crimes (and, thus, it is nearly impossible to determine whether there were any prosecutions of persons committing crimes that interfered with the electoral process). Under the current system, the election crimes defined in the Penal Code are investigated initially by the ECC and subsequently prosecuted by the AGO.

2.2.2 Penal Code

The new Penal Code was endorsed by the Afghanistan Cabinet on March 2, 2017, and signed by the President on March 4, 2017.1 The law is considered a major achievement in terms of modernizing the country’s criminal justice system. The Penal Code consolidates criminal provisions from over 30 separate laws into a comprehensive criminal code consistent with key international standards.

During interviews for this report, the Penal Code was praised for providing a comprehensive list of election crimes. However, the law also was criticized for not effectively criminalizing offenses committed by the high officials of the IEC and ECC, and the employees of the ECC, including but not limited to criminal negligence in the performance of their duties. Regardless of the pros and cons of the Penal Code, one fact that emerged through the interview process is that as the entire code is over 1,000 pages in length, it has not been fully reviewed or understood by many persons in the organizations responsible for its implementation and enforcement.

The Penal Code lists 13 election crimes (Articles 422-435) under the provisions of the Administrative and Financial Corruption Chapter. By enactment of the new Penal Code, Article 99 of the Election Law, including the list of election crimes, was nullified (Penal Code, Article 916). The Penal Code also sets the prescribed punishments, which range from short-term (six months to one year) and medium-term (one year to five years) imprisonment. The EEC’s

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1 In Afghanistan, a law may be passed by presidential decree when Parliament is not in session, and the law becomes enforceable upon publication in the Official Gazette. However, the law must subsequently be ratified by the Parliament, who may reject or amend the law. The Penal Code was passed by presidential decree and is enforceable, but Parliament has yet to act upon it.
previous authority—in the September 2016 Election Law—to issue punishments for election crimes has been nullified, and the only prosecuting authority is the AGO.

The Penal Code considers the following acts as election crimes:

1- Misuse of Equipment and Signs to Cause Intimidation

Misuse of military equipment and signs to cause intimidation is described as an election crime based on the Penal Code, Article 422:

“A military official, including Afghan National Police, Afghan National Army, and National Directorate of Security, who misuses military equipment and signs for the purpose of intimidating or influencing a voter, candidate, supervisor or observer in favor of or against a candidate shall be sentenced to short-term imprisonment. If the perpetrator of these acts is not a military official, he/she shall be sentenced to maximum short-term imprisonment.”

2- Receiving or Paying Bribes or Threatening or Defaming

The Penal Code stipulates that if a governmental or non-governmental official receives or pays a bribe with the aim of influencing the election process, this act will be deemed a crime (Penal Code, Article 423(1)). In addition, attempting to influence the election by threatening or defaming a voter, candidate, observer, member of the media, or employee of the IEC is considered a crime (Penal Code, Article 423(2)). The penalty for any of these acts is medium-term imprisonment.

3- Concealing Ballots

If a person purposefully conceals the ballots or the results sheet, he or she is guilty of an election crime and shall be sentenced to medium imprisonment up to three years (Penal Code, Article 424).

4- Changing the Election Documents or Receiving Improper Assistance

Article 425 of the Penal Code states that a person who commits one of the following acts shall be sentenced to imprisonment of up to three years:

- Relocating, transferring, or acquiring election documents contrary to the provisions of the law;
- Receiving funds from illegal sources;
- Receiving or accepting financial assistance in cash or in kind from foreign citizens or foreign countries or from political agencies of foreign countries situated in Afghanistan; or
- Changing the number of counted votes on the result sheet in a way that it does not match the votes in the ballot box.
5- Interference with Software or Hardware System

Whenever a person intends to interfere with the software or hardware system of ballot collection centers without having any legal permit, this act is considered an election crime (Penal Code, Article 426). The punishment for this crime is imprisonment of more than three years.

6- Violence for the Purpose of Disrupting Election Process

The election is a free, general, fair, secret, direct and transparent process. No one is allowed to disrupt this process for their desired purposes. Anyone who attempts to disrupt or disturb security in the process of the election by resort to violence commits an election crime (Penal Code, Article 427). Offenders shall be sentenced to imprisonment of up to two years.

7- Theft or Destruction of Ballots and Sensitive Election Materials

The Penal Code penalizes theft or destruction of ballots and sensitive election materials in Article 428. A perpetrator shall be sentenced to the medium-term imprisonment.

8- Using Forged Documents

Whenever a candidate uses forged documents to be registered on the candidate’s list, his or her actions constitute an election crime under Article 429 of the Penal Code. The punishment is medium-term imprisonment.

9- Voting in the Absence of a Person

A vote is the will of a person, exercised directly for the purpose of the election of his or her preferred candidate. No one is allowed to use the ballot of another person in his or her absence. If anyone does use the ballot of a person in his/her absence, he or she has committed an election crime and will be punished by short-term imprisonment (Penal Code, Article 430).

10- Buying and Selling Votes

Similar to voting in absence of a person, no one is allowed to buy and sell votes during the election process pursuant to Article 431 of the Penal Code. A person who buys or sells votes shall be sentenced to imprisonment of up to three years.

11- Altering or Changing Documents, Increasing or Decreasing Votes

Altering or changing election documents including the registration book, result sheet and ballots, or increasing or decreasing a candidate’s votes are election crimes pursuant to Article 432 of the Penal Code. A person who commits this crime shall be sentenced to medium-term imprisonment.

12- Failure to Process Objections and Complaints
The objections and complaints shall be processed accordingly in the Central Electoral Complaints Commission or its provincial offices. A person who conceals a registered objection or complaint and does not process it timely commits an election crime and shall be sentenced to short-term imprisonment (Penal Code, Article 433).

13- Failure to Report an Offense or Preventing the Presence of a Supervisor, Observer or the Media

When an official of the IEC conceals or fails to report a violation in a polling station, or prevents a supervisor, observer, or member of the media from observing the voting process, an election crime has been committed pursuant to Article 434 of the Penal Code. A perpetrator shall be sentenced to imprisonment of up to three years.

2.2.3 Significance of the Penal Code

All of the crimes in Article 99 of the Election Law are included in the Penal Code, although some of the offenses have been consolidated so that fewer crimes are enumerated in the Penal Code. The Penal Code does not add any new election crimes. Perhaps one of the most significant developments is that the election crimes are now more visible, as the new Penal Code was released with much fanfare. Additionally, as the Penal Code is far less likely to undergo major amendments in the near future (as opposed to the Election Law, which seems to undergo regular amendments), a degree of stability is added. Although it appears that many persons in the legal system have not developed the requisite level of familiarity with the Penal Code (which is over 1,000 pages in length), that problem should resolve itself over time.

Although the Penal Code is generally hailed as an achievement, concerns have been raised regarding the adequacy of how the election crimes are defined. The Penal Code offers little guidance on how to interpret the crimes, which presents a significant challenge to prosecutors who are tasked with enforcing them for the first time, as well as to judges who must interpret them.

As an example, Article 431 of the Penal Code makes it a crime to buy and sell votes. There is no further explanation of what constitutes buying or selling a vote. The AGO has raised the question of whether buying or selling a national ID card would constitute an election offense. If the act were done after the election, it would not be an election crime. If it is done several days before an election, does the law allow an inference to be drawn that it is for the purposes of selling a vote? Is further proof necessary? Since all crimes in Afghanistan require an element of intent, it would be far easier for a prosecutor to prosecute the case under a law that prohibits using another person’s ID card than to attempt to prove an election crime.

2.2.4 Gaps in the Legal Framework

While the legal framework provides a relatively high degree of guidance, observers have noted gaps in the structure. Some of the gaps noted during the course of the study include:

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2 Penal Code, Articles 27 and 38.
1. To what degree are candidates to be held responsible for the actions of their campaign workers? This question—particularly relevant in cases where the candidate was unaware of offenses being committed by his or her staff—is unanswered.

2. To what extent should high officials of the IEC or ECC be held criminally responsible for intentional or negligent conduct by staff? In the current Penal Code, there appears to be no criminal liability in such cases.

3. What are the procedures and timeline for the resolution of alleged election crimes? While the law should not be expected to fill in every detail, the current framework leaves almost all steps to the discretion of the relevant authorities.

4. Which court has jurisdiction to hear election crime cases? Many interviewees assumed cases would go to the primary criminal court, but the primary public security court was also mentioned. A number of observers have suggested a special elections crime court would be appropriate. In any event, the legal framework does not provide an answer.

5. Perhaps most significantly, are the election crimes sufficiently well-defined to allow for prosecution? No election crime prosecutions have been reported, but it is difficult to assess whether this is the result of prosecutorial indifference or the fact that prosecutors do not feel comfortable interpreting the law.

6. Can the AGO investigate and prosecute an election crime without referral from the ECC? This could potentially create confusion, for example, where the ECC investigates a candidate and finds no evidence of a crime, but the AGO, on its own initiative, prosecutes the candidate for an election crime. There is need for clarification in this regard.

2.3 Overseeing Elections and the Election Process

Overseeing the election process to ensure a free and fair process is critical to any democracy. In Afghanistan, numerous entities share responsibility for this oversight, from the executive branch to independent commissions and election monitoring organizations.

2.3.1 The President, the ICOIC and the Supreme Court

Under Article 64(1) of the Constitution, “the President has the authority to supervise the implementation of the Constitution.” The President thus has a role in ensuring that citizens are allowed to exercise their right to vote and to run for office without any discrimination or restrictions. He also has the authority to oversee the implementation of Article 156, which empowers the IEC to administer and supervise the elections.

The Independent Commission for Overseeing the Implementation of the Constitution has no direct role regarding oversight of the election process, but has the authority to oversee the implementation of the Constitution. The ICOIC, accordingly, can render an opinion if requested by the President, Parliament, Supreme Court, Civil Services Commission or Independent Human Rights Commission, including an opinion regarding election crimes to the extent a constitutional concern is raised.
The Supreme Court similarly has no direct role in the election process, but has broad review authorities, including the power and responsibility to review general questions of law (not limited to constitutional issues). The Supreme Court also maintains oversight over the preliminary courts (and presumably would oversee any special court established to handle election crimes).

2.3.2 IEC and ECC

The IEC, in addition to administrating elections, has the authority to supervise all types of elections in the country pursuant to the Constitution and Election Law, including supervising the elections, monitoring the IEC’s Secretariat and provincial offices, monitoring the voter registration process, preparing and updating the voters list, and monitoring the recruitment of the staff of the IEC’s Secretariat and provincial offices. The IEC appears in national and international media to provide information to the public regarding the election process in order to ensure the transparency of the process.

The ECC was created by the Election Law “for the purpose of addressing objections and complaints arising from negligence, violations and identification of crimes related to elections.” Article 30 of the Election Law states that the ECC can address objections and complaints; issue advice, warnings and order corrective action; impose cash fines; issue an order of recount of votes; and invalidate the ballot papers not fulfilling the necessary requirements. However, as noted above, some of the ECC’s authority was curtailed by the new Penal Code.

The ECC trains and appoints temporary staff in polling stations all around the country on election day to ensure the transparency of the process. An ECC staff member reported, prior to the election he believed the ECC was adequately resourced to deal with the expected volume of complaints. In addition, the Election Law requires the Central Complaints Commission to establish Provincial Complaints Commissions one month before the candidates’ registration.

2.3.3 The Attorney General’s Office

The Attorney General’s Office is an independent organ working under the executive branch of the government. Its roles and responsibilities are set forth in the Law on Structure and Authority of the Attorney General’s Office. Under this law, the AGO has broad responsibilities relating to the investigation of crimes, determining whether enough evidence of a crime exists to merit the filing of a criminal case, and conducting the prosecution of criminal cases. Now that the election crimes have been integrated into the new Penal Code, there is little doubt that the prosecution of those crimes is within the authority of the AGO. Shortly before the election, an AGO representative conceded that the office had not finalized its preparations for handling election crime cases, although it was working on its planning as a priority.

2.3.4 Non-Governmental Election Monitoring Organizations

The IEC may issue accreditation letters to persons or organizations seeking to observe the elections on behalf of a candidate or on a broader basis; FEFA and TEFA were both granted observer status for the election. FEFA has numerous provincial coordinators, long-term observers in many districts, and will have about 1,000 volunteer observers available for the
upcoming election. FEFA’s mandate is to ensure transparency of the election, and thus it tries to identify election violations and crimes in order to preserve the integrity of the election process.

Similarly, TEFA’s objective is to strengthen and ensure transparency and fairness in electoral proceedings. It observed the electoral process in 2009, 2010 and 2014, and has approximately 9,700 volunteer observers nationwide to oversee the upcoming election. Both FEFA and TEFA provide some training to their volunteers, although the training necessarily takes place in a short time frame.

In addition to TEFA and FEFA, there are numerous other local and international NGOs and civil society organizations involved in election-related activities that will be closely watching the election process. While outside scrutiny has its benefits, the role that election observers can play is limited. For example, TEFA and FEFA report receiving numerous reports from the public regarding election violations, but all these organizations can do is submit a report to the ECC; they have no part in the investigation process.

2.3.5 Media

According to the Election Law, the media has the right to observe the election process and report their findings. The mass media covering the elections process in Afghanistan is regulated by the Mass Media Law, Election Law and a bylaw issued by the IEC to regulate media activity throughout the elections process in Afghanistan.

In accordance with Article 1 of the IEC’s Media Bylaw, the media are able to cover election-related matters during the course of the elections process, and may report suspected violations to the ECC. As with other election observers, however, the media has no role in the process beyond submitting a complaint.

2.4 Procedure for Investigation and Prosecution of Election Crimes

2.4.1 Constitution

The Constitution of Afghanistan does not set out any procedure for investigation of election crimes. Article 156 designates the IEC as the administrative and supervisory body for elections, but is silent regarding the procedure for investigation and prosecution of election crimes.

Article 122 of the Constitution states that “No law shall, under any circumstances, exclude any case or area from the jurisdiction of the judicial organ as defined in this chapter and submit it to another authority.” Thus, it is the courts that have jurisdiction over all cases, and this authority shall not be transferred to any other entity. Nothing in the Constitution suggests that election crime cases should be treated differently from other cases.

Nevertheless, before the enactment of the new Penal Code, there were serious debates as to whether the ECC or the courts had jurisdiction over election crimes. As the new Penal Code includes election crimes, it becomes even more apparent that election crimes should be treated as other crimes and are within the jurisdiction of the courts. However, no further guidance can be discerned from the Constitution regarding the investigation and prosecution of those crimes.
2.4.2 Election Law and ECC Procedures

Chapter 15 of the Election Law addresses electoral objections and complaints. The Law authorizes the Central Complaint Commission and its provincial commissions to address the issues that fall within the scope of their authorities “in case of existence of any objection or complaint and even in absence of any objection or complaint.” It can be inferred from this article that complaints and objections can be filed by the public or may be made by the ECC itself (even in absence of an objection or complaint).

The Election Law distinguishes between election violations and election crimes. The ECC is vested with full authority over the violations, and can issue final decisions, including issuing fines and invalidating ballots. With respect to election crimes, however, the ECC’s authority has been diminished by the Penal Code. The ECC now has the authority only to conduct an investigation and identify crimes, and must refer the matter to the relevant authorities (the AGO) for prosecution.

To address complaints and objections, the ECC has adopted a Procedure for Pursuing Electoral Objections and Complaints. The procedure starts with the filing and submission of an Objection and Complaint Form to the ECC. It is necessary that while filing the complaint, the complainant should write the complaint explicitly and clearly, to the best of his or her knowledge. The subject of the complaint is granted the right to be made aware of the complaint and to defend any claims against him or her by providing evidence to the ECC.

In accordance with the Election Law and Procedure for Pursuing Electoral Objections and Complaints, the candidates or their representatives, monitors, observers or employees of the ECC and IEC can “file their complaints during voting, counting and/or within two working days after the Election Day either in provinces or in center.” Complaints may be submitted to the Provincial Complaint Commissions, Central Complaint Commissions, polling stations (on election day) and online.

After the complaints are filed at one of these locations, the complaints are sent for review and analysis. There are two teams for this task, the review team and the analysis team. The review team is assigned to make a distinction between types of offenses (negligence, violation or crime) and prioritizes the complaints for analysis. The analysis team investigates and makes a determination as to whether an offense has been committed.

While the procedure appears sound, questions have been raised regarding the capacity of the members of the review and analysis teams to process all of the complaints efficiently and correctly. There appear to be no written criteria for distinguishing violations from crimes, no guidelines for investigating the offenses, and no objective standards for identifying election crimes. Election observers have complained that the ECC would not reveal the status of complaints that had been submitted earlier.

2.4.4 Procedures at the AGO

The ECC and AGO entered into a Memorandum of Understanding (MoU) for the purpose of identifying the roles of the ECC and AGO with regards to the investigation and prosecution of
election crimes. However, the MoU is a high-level document that does not add guidelines for how the parties are to proceed in their respective tasks. The MoU merely acknowledges that the ECC has the duty to review complaints and distinguish violations from crimes. With respect to potential election crimes, the ECC will investigate and, if evidence of a crime is detected, the ECC send the case to the AGO for further procedures.

At this point, there is no clear line between the investigation conducted by the ECC and the AGO’s procedures. The AGO may conduct any investigation it deems necessary, which may or may not include repeating steps taken by the ECC. The AGO representative disclosed that the AGO does not have special procedures for investigating and evaluating election crimes, as distinct from its procedures in other matters.

In anticipation of the election, the AGO established a special committee to deal with election crimes. While this represents a positive step, it appears that the special committee was not yet fully implemented, as its composition and scope of responsibilities were not finalized within the week prior to the election.

The AGO also reports having some difficulty with the Penal Code, as some of the crimes are vague and lack definitions and explanations that would aid in preparing a prosecution. It appears that there have been cases that might have been election crimes, but were prosecuted as ordinary fraud crimes instead.

### 2.4.5 Court Procedures

The court process in criminal cases is managed by the Criminal Procedural Code. This law regulates reporting crimes, investigation, hearings, witnesses, evidence, verdicts, and appeals, as well as other procedural issues regarding criminal cases. Nothing in the Constitution, Election Law, Penal Code, Criminal Procedure Code or other authority suggests a different procedure for election crimes.

Most criminal cases are initiated by the AGO after thorough investigation. The majority of criminal matters are brought before the primary criminal court, although in certain circumstances the case may be submitted to the primary public security court. The public security court has jurisdiction over cases that involve the public welfare, though this is a broad term that is not defined. The public security court primarily handles cases involving terrorism, though its mandate is not limited to those cases and some interviewees opined that election crimes may affect the public welfare.

With respect to venue, the AGO representative indicated that election crimes would be referred from the EEC to the AGO headquarters in Kabul for evaluation. However, the cases would follow normal procedure, which is that the file would be sent to the local office where the crime allegedly was committed for further investigation and prosecution.

Courts have broad discretion in handling matters before them. Courts typically set a number of preliminary hearings and may issue inquiry letters to other governmental offices, private organizations, or individuals to obtain additional information. As general rule, case management is inefficient and cases may take years to be resolved.
During the interview process, a number of issues emerged. The first is that there is no clear consensus on which court has jurisdiction over election crimes. Many interviewees simply said the “regular” or “primary” court has jurisdiction (presumably referring to the primary criminal court). However, it appears that the AGO is not certain on this point, and it is possible that the proper court is the primary public security court. A number of interviewees expressed the opinion that a special court may be created for the election crimes; however, that procedure was implemented by the previous administration and met with public disapproval and a split opinion from the Supreme Court and the ICOIC as to the constitutionality of the process.

3. Conclusions and Recommendations

3.1 Conclusions

With a presidential election scheduled for April 2019, the October 2018 election and its aftermath will be closely watched by the international community. In the months leading up the election, it was apparent that the authorities were working strenuously to prepare. However, while there is some cause for optimism, there are still gaps to be filled, particularly in light of the facts that (1) it is anticipated that there may be a large number of election crimes reported, and (2) these are political crimes which may require different treatment than other crimes that prosecutors routinely handle.

Interviewees almost unanimously opined that the inclusion of election crimes in the new Penal Code will make it easier to prevent the crimes from taking place. Although the September 2016 Election Law contained a very similar list of crimes, that fact seems to not be widely known (unsurprisingly, given the number of times the Election Law has been amended). Now that the election crimes have been codified in the Penal Code, they appear to be more accessible. Although lawyers and judges may need additional time to become fully familiar with the Penal Code, there seems to be general awareness that a set of election crimes exists and is set forth in the Penal Code.

There is a clear understanding of the roles of the ECC and the AGO with respect to jurisdiction over election crimes, with the ECC having authority to investigate and identify crimes and the AGO having authority to prosecute the offenders (although there is some duplication of efforts as the AGO will conduct its own investigation). However, there is a lack of clear understanding of how these organizations should perform their functions as guidelines for investigating, evaluating and prosecuting election crimes do not exist (or have not been made public). There are also concerns about the system’s ability to handle the high volume of complaints that are likely to arise in any election.

Questions have been raised as to whether the Penal Code is sufficiently detailed to allow prosecution of the election crimes. There is some evidence that the AGO is prosecuting potential election crimes under other laws because the Penal Code is not understood. It is perhaps too early to draw conclusions on this point, but it is a subject for further discussion.

Finally, a clear mechanism for resolving election crime cases needs to be developed. There must be consensus as to the proper court, and a process that allows election crimes to be resolved in a timely manner.
3.2 Recommendations

1. The ECC and IEC, in coordination with the Supreme Court, AGO and the Ministry of Interior, need to clarify the mechanism and procedure for handling election crimes from beginning to end.

   The procedures for reporting, investigation and prosecution of election crimes must be clearly defined by the ECC, IEC and other relevant actors, including the Supreme Court, and the AGO. The UN and other relevant national and international organizations could provide technical support in developing the procedure.

   The procedure should be agreed and understood by all parties, and should cover the complaint process from beginning to end. Specific recommendations include:

   A. To develop a clear procedure and guideline for distinguishing an election crime from election violation. The legal framework is clear, as violations are listed in Article 98 of the Elections Law, while the crimes are now set forth in Articles 422-35 of the Penal Code. However, the distinction must be clear among the relevant authorities, and must be communicated to the public so that the different levels of seriousness, different procedures, and different penalties are understood.

   B. To establish clear and accessible means for persons and organizations to submit complaints. The complaint form must be readily available at polling stations, voter registration centers, and other offices (perhaps including at certain NGOs, such as TEFA and FEFA). Polling centers and other locations should have sealed, stamped boxes where complaints may be deposited anonymously. Particularly in rural areas, there should be a confidential process by which illiterate citizens may submit a complaint.

   C. To specify the procedure and timeline for prosecution of election crimes. It is apparent that the EEC and the AGO are coordinating their efforts well, and the separate but complementary roles of those organizations has been memorialized in a memorandum of understanding. However, the process of developing an investigation into a prosecution is less clear. There seems to be no clear timeline, no set criteria for when to prosecute, and even uncertainty as to which court would have jurisdiction to hear the case. The lack of clarity is reflected in the fact that there have been few, if any, prosecutions of elections crimes to date.

   D. Training on the Penal Code for prosecutors, judges, EEC investigators and attorneys is needed. All stakeholders must come to a common understanding of what constitutes an election crime.

2. The procedure dealing with election crimes must be formally announced and publicized.
Upon finalization, the procedure should be published, distributed and publicized through various media channels, including television, radio, and internet. The ECC and IEC must also embark on a focused civic awareness program on the procedure for handling election crimes. Candidates, TEFA, FEFA and other civic organizations and political parties can play a pivotal role in dissemination of information regarding the procedure.

3. The institutions tasked with handling election crimes must establish ad-hoc units in order to better train their relevant staff in Kabul and in provinces to deal with what is expected to be a large number of reports of election crimes.

The creation of the ad-hoc units in the relevant institutions are critical as the general staff members in these organizations do not seem to be fully aware of their obligations under the law. These units will be more manageably trained, before elections, about their obligations under the new law and the procedures related to election crimes. The relevant units must also clarify the roles of their provincial offices and share the necessary information, including the laws and procedures with them. Special attention should be given to training the staff of the ECC and IEC so that they can detect, report, and process election crimes.

4. There must be consensus as the proper venue for prosecuting election crimes.

There is no reason for uncertainty as to the proper court. The Supreme Court has oversight over the primary courts and can designate the proper division. Alternatively, the Supreme may establish a new (perhaps temporary) primary court for election crimes.

5. The relevant institutions including the ECC, IEC and the police must take preventive measures against election crimes.

The named institutions, with the assistance of TEFA and FEFA and other civic organizations and political parties, must conduct a national campaign to highlight the seriousness of election crimes and the risk of corresponding severe punishments with the aim of dissuading those who might consider committing such crimes. The national campaign should seek the support of influential national and local civic leaders as well as candidates and political actors, who should unequivocally call on their supporters to not engage in election crimes. Use of billboards, brochures, television, radio, and social media should be made in strengthening the campaign nationwide.