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Free and Fair Election Foundation of Afghanistan's Analysis on the Amendment of the Electoral Law

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In countries where the political system is based on democratic foundations, the electoral law is one of the most important laws. Usually these laws are characterised by provisions in order to lay the ground work to ensure the real and fair representation of people in the system on the one hand and also to practically guarantee the transparency of the election process on the other hand. Thus far in other countries electoral laws are always being reformed in line with consideration of current issues and public participation concerns.

Afghanistan is one of those countries that are newly experiencing democracy and it is necessary to seriously monitor legislative reform in this area.

The latest action by the government in order to amend the electoral law shows the same intention, but as mentioned above, any sort of measures to introduce reform must be considered seriously in order to achieve the objectives aimed for.

FEFA as a national observer organization on elections welcomes any measures that strengthen the credibility of the election process in the country. The organization is also willing to share its position through an analysis on the amendments brought to the Electoral Law (based on decision number (45) dated 24/11/1388 which is ratified by the Ministerial Council and signed by the President) with other national and international organizations working on electoral affairs.

It is worth mentioning that the analysis of other issues amended in this law needs more time, but the amendments that can be reviewed urgently in this law are as follows:

Over all the language of the law is simpler and more explanation is given on many elements that were briefly mentioned in the previous law.

Other elements related to election of provincial councils, village councils and municipalities which were mentioned briefly are better explained in the new law. Also provisions about the interference of governmental organisations did not exist in the previous law and these have now been included which is a positive point.

Candidature conditions:

Article 43, Sub article 2, Para 5: Candidates must provide a list consisted of names and card numbers of voters to verify his/her candidature. For presidential candidates 100,000; for Wolesi Jirga (lower house) 1000; and for provincial candidates, based on census 200 - 600 names and card numbers are required.

The increase of cards that candidates must provide as a condition of candidature can be viewed as a positive point, but it can also be viewed as problematic, because there is still a lack of strong political parties in the country and obtaining the requisite 100 000 cards may be difficult for candidates and could lead to corruption.

To oblige presidential candidates to provide a monetary guarantee of up to 2,500,000 two million and five hundred Afghanis, which can not be refunded if they do not win 10% of the vote, is concerning. This is at a time when assessments by some organisations including that of the Afghan Independent Human Rights Commission on the economic and social situation of Afghans in the current year (1388) which shows that approximately 42% of the people are living under the poverty line.

There are concerns that in the absence of strong political parties which could provide 100,000 voter registration cards including 2,500,000 monetary guarantee and other electoral costs, candidates will themselves have to provide the additional costs. So it is clear that given the current economic situation the majority of Afghan people who are eligible and want to candidate him/herself will not be able to, due to not being able to afford such costs.

Electoral Complaints Commission:

Article 61, Item 1: To address the violations, objections and complaints arising from elections and the administration of Provincial Commissions for Electoral Complaints and assessment of their decisions, the central and provincial commissions for electoral complaints must be established at least (120) days prior to the election day by the president, upon consultation with the presidents of both houses and Chief Justice of the Supreme Court.

Since a transparent, autonomous and accountable mechanism is a must to address the objections and electoral complaints in the election process, other reforms should be implemented, such as those guaranteeing the professional and impartial performance of this commission during the process.

Clarity regarding the date of establishment of the commission 120 days prior is viewed as a positive point. The establishment of the commission prior to the start of the election process provides this commission with an indispensable chance to appoint sufficient and professional staff before the work is practically commenced, and to establish its provincial offices prior to the commencement of (complaints process). Also the indispensable chance for raising awareness about the role and method of the

commission's performance can be effective and beneficial for increasing the public's confidence.

The concern is that there is no clarity about the structure of this commission, additionally there is no clarity on the appointment of members of this commission in this law and there are possibilities that the members will be appointed by the president and they might not be able to remain impartial in the face of interferences of government organizations and powerful candidates.

On the other hand, the lack of special criteria for members of the commission raises concern that those who are appointed to this commission may be ineligible, and could not guarantee the professional conduct of the commission during the process.

The mandate of central and provincial complaint commissions:

Article 62, Clause (5) of this article: Provincial Electoral Complaints Commissions are the first authority to address electoral complaints. In exceptional cases the Central Electoral Complaints Commission can act as the first authority to address the electoral complaints.

Clause (6): the decisions of Central Electoral Complaints Commission regarding addressing of the complaints and objections that are addressed are final.

The word exception in Clause 5 can be controversial because states of exception should be clearly described in the law.

Article 62 Clause 7: the Central and Provincial Commissions for Electoral Complaints, after the confirmation of the result of the election, will complete their work within a maximum time of two months, and after dissolution of their authority will be transferred to the central commission.

Election postponement or delay:

Article 65, Clause 1: in case the security situation or any unexpected state prevents the conducting of the election or damages the legality of the electoral process, the IEC, based on methodology confirmed in Clause 1 of this article, can postpone the election from its certain date till the problem is resolved and the situation is improved.

The authority of the IEC in postponing the date of the election can be contradictory to clearly expressed provisions of the Afghan Constitution Article 62 and Article 83, because in these two articles the date of conducting the election is clearly stipulated in the Constitution.

Allocation of seats to female candidates:

Article 29, Clause 3: in case there are not enough female candidates listed to occupy the seat or seats allocated to female candidates in a certain constituency, the IEC, based on the methodology confirmed in Clause 1 of this article, will take measures not to leave the allocated seats vacant.

The amendments in this regard are contrary to Paragraph 3, Clause 5 of Article 29 of the previous law, that in the absence of female candidates in the list of female candidates the seat/s allocated to female candidates were left vacant.

In the new law, the IEC has the authority that in the absence of female candidates to occupy the vacant seat/s of female candidates the vacant seat/s shall be awarded to male candidates, which itself can cause some concerns that may impose indirect restrictions on the presence of female candidates in the electoral process, given the present security and cultural situation. It may even cause the powerful male candidates in electoral constituencies to threaten female candidates and forcibly dissuade them from taking part in the election process.