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# Democracy and the Rule of Law in Afghanistan: A Cautionary Tale

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## INTRODUCTION

Democracy and the rule of law share a robust and symbiotic nexus.<sup>1</sup> The rule of law is central to democracy as a system of governance and to democratization as a process.<sup>2</sup> Adherence to the rule of law reflects respect for the will of the people as the legitimate source of authority.<sup>3</sup> As such, upholding the rule of law protects against arbitrariness and abuse of power.<sup>4</sup> Similarly, the erosion of the rule of law poses one of the most insidious threats to both settled and nascent democracies.<sup>5</sup> Disregard for the rule of law corrodes the legitimacy of power holders whose authority emanates from the law, and ultimately that of the undergirding system of governance.<sup>6</sup>

While the rule of law in most legal traditions may seem an amorphous concept, scholars and practitioners largely agree on a *sine qua non* condition: the enforcement of legal constraints on government power.<sup>7</sup> Limiting government authority may take various forms, but a fundamental mechanism is the separation of powers doctrine whereby the executive branch is checked and balanced by the legislature and the judiciary.<sup>8</sup> An ineffective separation of powers will imperil democracy, which rests in part on compliance with the tenets of the rule of law.<sup>9</sup> Chronically-weakened institutions can lead to democratic decay and the breakdown of state order.<sup>10</sup> The causes of such deep-seated institutional frailties include the manipulation of constitutional order, an autocratic executive, and a dysfunctional legislature.<sup>11</sup>

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Democratization is often a nonlinear and fragile process.<sup>12</sup> This is especially the case in conflict-affected and divided societies with strong autocratic traditions such as Afghanistan. In such contexts, adherence to the rule of law is vital for the stability and even survival of nascent democracies.<sup>13</sup> Following the Taliban's ouster in 2001, Afghanistan began its difficult transition toward democratic governance. The 2004 Constitution marked an important milestone by establishing a democratically-modeled separation of powers.

This article argues that the viability of Afghanistan's democratization hinged, in key part, on institutional compliance with the rule of law. Put differently, Afghanistan's recent authoritarian reversion—as evinced by the Taliban's resurgence to power—was preceded by “constitutional retrogression,” particularly via systematic assault on the rule of law.<sup>14</sup> By examining the roles of the legislature and presidency, this article contends that the nascent Constitution's flawed separation of powers—in tandem with rampant executive overreach and a deficient electoral system—eroded key democratic norms and, thereby, diminished the legitimacy of the underlying regime. This mounting legitimacy deficit, paired with associated governance woes, emboldened and empowered opposition groups including the Taliban. In adopting this relatively narrow focus, the article acknowledges the broad array of issues germane to democratization, including the international community's role in state-building efforts in Afghanistan.<sup>15</sup> A detailed assessment of those myriad issues, however, is beyond the scope of this paper.

This article proceeds in three parts. First, it provides an overview of the separation of powers under Afghanistan's 2004 Constitution. Next, it examines how certain institutional deficiencies, coupled with relentless executive encroachment on legislative authority, dealt major blows to the rule of law and democratization in Afghanistan. Finally, the article discusses the pernicious impact of the Single Non-Transferable Vote (SNTV) system on the legislature and thus on the checks and balances system.

#### SEPARATION OF POWERS UNDER THE 2004 CONSTITUTION

Afghanistan's history is largely characterized by political turmoil and authoritarianism. Strong legislatures and independent courts—critical pillars of democracy and the rule of law—have been effectively nonexistent. In the absence of mechanisms for checks and balances, Afghan rulers have governed as *de jure* and *de facto* autocrats.<sup>16</sup>

The Taliban's fall in 2001 and the ensuing twenty-year period provided

an unprecedented opportunity to build democratic institutions and move toward a society embedded with the rule of law. The 2004 Constitution was the foundation of Afghanistan's new political and legal order. In a bid to constrain unbridled government authority, the new Constitution established a separation of powers system among the executive, legislative, and judicial branches of the state.<sup>17</sup>

Notwithstanding Afghanistan's experience with totalitarianism, the 2004 Constitution created a very powerful executive. Whereas the 1964 Constitution divided the authorities of the king and the prime minister, the 2004 Constitution (hereafter the "Constitution") effectively combined the powers of both and concentrated them in the presidency.<sup>18</sup> The President, as the head of the executive branch, was responsible, *inter alia*, for overseeing the implementation of the Constitution, determining the country's national policy, appointing high-level officials such as cabinet ministers, and serving as the commander-in-chief of the armed forces.<sup>19</sup> The executive was also tasked with enforcing laws and court judgments, maintaining public order, preparing the state budget and protecting public wealth, devising and implementing development programs, and reporting progress to the National Assembly (Parliament).<sup>20</sup>

The executive's authorities also extended to legislative and judicial spheres. The President held—and frequently deployed—the power to make laws via legislative decrees.<sup>21</sup> Indeed, most laws were promulgated through presidential decrees rather than parliamentary acts. Moreover, besides determining national policy, the President could veto legislation passed by the Parliament,<sup>22</sup> and appoint one-third of the legislature's upper chamber.<sup>23</sup> The President also wielded influence in the judicial realm by appointing justices of the Supreme Court, appointing lower court judges, and approving sentences of capital punishment.<sup>24</sup>

Reflecting the vital role of the legislature in Afghanistan's fledgling democracy, the Constitution designated the Parliament as the highest legislative organ mandated to "manifest the will of its people as well as represent the entire nation."<sup>25</sup> The powers of the Parliament, which was bicameral,<sup>26</sup> included ratifying and abrogating laws, approving the state budget, endorsing development programs, ratifying international treaties and agreements, and approving or rejecting high-level appointments such as ministers and Supreme Court justices.<sup>27</sup> Moreover, the Parliament could remove an incumbent minister through a no-confidence vote.<sup>28</sup>

The Constitution envisaged the judiciary to function as an independent organ of the state. Afghan judges were appointed by the President.<sup>29</sup> The judiciary was generally empowered to adjudicate all cases,<sup>30</sup> and had

the authority to review laws and international instruments for compliance with the Constitution.<sup>31</sup> Notwithstanding, the bench was afflicted with substantial deficiencies which severely undermined its capacity to act as a

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check or balance on the other branches of government.<sup>32</sup>

The Constitution's separation of powers system was deeply flawed. It set up a constitutional order that was firmly tilted in favor of the executive. The President exploited this imbalance of power and increasingly encroached upon legislative authority and judicial independence.<sup>33</sup> In other words, this

structural design helped pave the way for "constitutional retrogression" by, in part, dismantling the interbranch checks.<sup>34</sup>

#### EXECUTIVE OVERREACH AND THE LEGISLATURE

Aside from institutional design flaws,<sup>35</sup> rampant executive overreach undermined the legislature and consequently dealt major blows to the rule of law and democracy in Afghanistan.<sup>36</sup> This section will illustrate how the President actively compromised the Parliament's authority in myriad ways. This included unduly issuing legislative decrees, flouting the Parliament's summonses and rejection of senior executive officials, bypassing the legislature's oversight over public finance, and exploiting the judiciary and the *loya jirga* (a traditional grand assembly mechanism) to undercut lawmakers.

The Constitution granted the President the authority to issue legislative decrees. That power, however, was to be deployed only during parliamentary recess, and "in case of an immediate need."<sup>37</sup> Additionally, such decrees were required to be tabled before Parliament within thirty days of convening its first session.<sup>38</sup> If rejected by the legislature, the decrees would become void.<sup>39</sup> These conditions, however, proved ineffective in practice as a fragmented Parliament rarely acted cohesively to review such decrees.<sup>40</sup> Recognizing these realities, the executive routinely exploited its emergency legislative competence, often in defiance of the "immediate need" clause and the thirty-day window requirement, to trespass on the Parliament's turf and further its own political agenda.<sup>41</sup>

The President's audacious abuse of his legislative power led to allegations of surreptitiously manipulating laws for self-serving reasons. One example was the reported manipulation of the Anti-Corruption Law,

whereby the President sought to increase his influence over the anti-graft commission.<sup>42</sup> The President's tendency to wield undue sway extended to other anti-corruption bodies, such as the Supreme Audit Office,<sup>43</sup> the Ombudsperson's Office,<sup>44</sup> and even the national courts.<sup>45</sup> The government's unwillingness to curb institutional corruption and abide by the rule of law was one of its inherent flaws.

Moreover, the executive increasingly disregarded the Parliament's constitutional role in the appointment and questioning of high-level executive officials. In violation of the Constitution, President Ghani routinely kept ministers and senior officials .....  
 whose appointments were rejected by Parliament as "acting" heads of key government organs during his presidency.<sup>46</sup>

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Reflecting the executive's disdain for the Constitution, even President Ghani's wife openly bullied the legislature by vowing that rejected nominees would remain in their positions regardless of the lawmakers' oversight powers.<sup>47</sup> The continued work of these caretaker senior officials violated the law and cast doubt over the administration's legitimacy.<sup>48</sup> In addition, the executive increasingly ignored parliamentary summonses which further hampered the Parliament's ability to check the executive.<sup>49</sup>

The executive also regularly sought to bypass the Parliament's oversight over public finance matters. For example, in 2020, President Ghani stealthily issued a decree to dismember the Ministry of Finance and transfer its critical functions (concerning revenue, customs, and treasury and budget) to independent units reporting to his own office.<sup>50</sup> Besides the questionable legality of such a ploy, Ghani's decree risked further centralizing—not curbing—corruption.<sup>51</sup> Only after Ghani's scheme was exposed, and following pressure by the U.S. State Department,<sup>52</sup> the President was forced to rescind his original order.<sup>53</sup>

The U.S. government's seemingly effective pressure in this particular matter reflected the international community's overarching influence over state-building efforts in Afghanistan. Indeed, while the executive was *de jure* accountable to the legislature, it was arguably *de facto* beholden to foreign donors—as a rentier state.<sup>54</sup> The Parliament's lack of the power of the purse in practice diminished its leverage over the government.<sup>55</sup> The executive's behavior at times epitomized the Persian proverb, "*har kas naan dahad farman dahad*" (whoever gives the bread issues the order).

The Ministry of Finance ploy was part of a broader strategy to circumvent parliamentary scrutiny of the government's handling of public funds. Even as President Ghani had to backtrack from the planned evisceration of the Ministry of Finance, reports emerged that he had issued a similar executive decree with respect to the Ministry of Mines and Petroleum.<sup>56</sup> Pursuant to Ghani's decree, the ministry's powers over mining contracts and revenues were to be transferred to other agencies in order to effectively evade oversight.<sup>57</sup> Such legally dubious tactics drew the ire of lawmakers who criticized Ghani for seeking to covertly move the revenue-generating sectors under the presidential palace's exclusive control.<sup>58</sup> Furthermore, the government frequently engaged in other troubling practices such as expanding the use of discretionary and emergency funds which bypassed the regular budgetary process and controls.<sup>59</sup>

The executive also regularly exploited the Supreme Court to strongarm the Parliament. For example, the top court repeatedly rubberstamped the President's encroachment on the legislature's lawmaking power via dubious constitutional interpretation.<sup>60</sup> Moreover, the Supreme Court held that the Parliament's no-confidence votes against certain ministers were unconstitutional.<sup>61</sup> In addition, in 2020, at President Ghani's behest, the chief justice reportedly signed off on a questionable financial transfer from the central bank to the Ministry of Finance, which appeared to circumvent parliamentary scrutiny over public finance.<sup>62</sup> Simply put, the top court rarely failed to appease the President in the latter's disputes with the legislature.

Another presidential tactic for undermining parliamentary authority was the *loya jirga* mechanism. Besides designating the Parliament as "the highest legislative organ" that "manifest[ed] the will of its people as well

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..... as represent[ed] the entire nation,"<sup>63</sup> the Constitution created the *loya jirga* as a parallel body that served as "the highest manifestation of the will of the people."<sup>64</sup> While the *loya jirga* never met its constitutional requirements in practice,<sup>65</sup> that did not deter the President from deploying "consultative" *jirgas*—gatherings that were effectively hand-picked by the executive—to pursue its own political agenda in defiance of the Parliament. For example, in 2020, President Ghani convened such a gathering to sanction the likely unlawful release of Taliban prisoners.<sup>66</sup> The Parliament deemed Ghani's assembly as an "illegal" gambit to bypass the elected legislature on such a critical issue.<sup>67</sup>

Executive overreach vis-à-vis the legislature took an array of other forms as well. A decree by President Ghani in 2017, for instance, required lawmakers to report their assets to his office in the executive branch—rather than to an independent body.<sup>68</sup> Such an order was at odds with international norms, sowed conflicts of interest, and blurred the separation of powers.<sup>69</sup> Additionally, besides improperly intervening in the last parliamentary polls,<sup>70</sup> the President even fired a senator for challenging a strong Ghani loyalist for the senate speaker position.<sup>71</sup>

In short, the Constitution's deficient separation of powers created an unduly powerful executive and a concomitantly weak legislature. This flawed checks and balances system further emboldened the President to increasingly encroach on parliamentary prerogatives and, consequently, eroded the rule of law and democratic norms in Afghanistan.

### A FLAWED ELECTORAL SYSTEM

Besides the Constitution's deficient separation of powers and rampant executive overreach in practice, other factors also impeded institutionalizing the rule of law. As such, a core foundational problem plaguing the Afghan Parliament was the underlying electoral system. Apart from other electoral challenges such as security constraints, graft and fraud, and inadequate civic education,<sup>72</sup> the method used to elect members of Parliament—the Single Non-Transferable Vote (SNTV)—was a key obstacle in developing a strong legislature.<sup>73</sup>

In 2004, President Karzai rejected the United Nation's proposal for a list proportional representation (PR) system for parliamentary elections.<sup>74</sup> Instead, the 2004 electoral law, which was promulgated via presidential decree, established the SNTV system.<sup>75</sup> Karzai's decision was driven, in key part, by a strategy to hinder the growth of parties—and an effective Parliament—as potential sources of political opposition.<sup>76</sup>

A robust legislature, a benchmark of vibrant democracy, requires effective political parties.<sup>77</sup> Under the SNTV system, each voter casts a single vote for a single candidate, and the candidates with the most votes win the seats allocated per province.<sup>78</sup> The SNTV system, however, is deeply incompatible with the development of political parties and thus robust democratic institutions. That is why this model is rarely used in legislative elections among democracies worldwide.<sup>79</sup>

In the case of Afghanistan, SNTV incentivized political individualism as securing a parliamentary seat required maximizing one's own votes. By the same token, the system punished cooperation among would-

be allies and hence stymied the development of meaningful coalitions.<sup>80</sup> As with the Constitution's weak checks and balances system, the adoption of the SNTV model further bolstered an already powerful executive by limiting organized opposition. Indeed, in the case of Afghanistan's post-2004 politico-legal system, undermining political competition was one of the key instruments of constitutional retrogression and democratic decay.<sup>81</sup>

The SNTV had disastrous consequences for democratic representation and parliamentary authority. As expected, the system impeded the growth of political coalitions. In the 2010 elections, for instance, approximately only ten percent of the 2,600 candidates were linked to parties. The electoral scheme produced an Afghan legislature beset by fragmentation, instability, clientelism, and personality politics.<sup>82</sup>

The lack of a stable party system prevented the Parliament from effectively fulfilling its mandate to serve as a check and balance on other branches. For example, the fragmented and unstable legislature did not enact most statutes; rather, it was the President that promulgated most laws via legislative decrees. Moreover, the absence of stable political parties with clear policy platforms and the dizzying array of candidates resulted in Afghans often voting along ethnic lines.<sup>83</sup> More specifically, analyses of recent legislative and presidential elections reveal that ethnic voting preferences were the most significant dynamic in Afghanistan's electoral process.<sup>84</sup> In an already deeply divided society, the SNTV exacerbated tensions among the main ethnic groups. Such heightened ethnic fragmentation, in turn, further weakened the lawmakers' ability to act in unison to curb executive abuse of power. Moreover, the deepening ethnic polarization further debilitated the democratization process as the citizenry increasingly showed preference for ethnic rather than shared national interests.<sup>85</sup>

Besides retarding the development of a party system and thus a strong legislature, the SNTV system ensured that most of the ballots cast did not result in actual popular representation. With numerous candidates on the ballot, the overwhelming majority of votes were essentially "wasted" on candidates who lost. In the 2005 parliamentary elections, only thirty-two percent of votes were cast for winning candidates—rendering two-thirds of the votes as effectively irrelevant.<sup>86</sup> The 2010 polls met a similar fate with most votes cast for candidates who did not win any seats.<sup>87</sup> (In Iraq's 2005 elections, by contrast, only five percent of the votes were "wasted."<sup>88</sup>) In the end, the votes of most Afghans did not count. Instead, the Parliament reflected a minority of the ballots cast, leaving most of the electorate feeling excluded.

This pervasive feeling of exclusion, coupled with widespread electoral fraud and the legislature's inability to serve as an effective counterweight to



the other branches, further sapped the public's faith in governing institutions.<sup>89</sup> This erosion of confidence was evidenced by dwindling participation in subsequent parliamentary and presidential polls.<sup>90</sup> The mounting disenchantment with the country's increasingly dysfunctional institutions, and related deteriorating economic and security conditions, imperiled the legitimacy of the wider political order established under the 2004 Constitution—and played into the hands of the insurgency.<sup>91</sup>

## CONCLUSION

Democratic transitions are invariably variegated and fraught with obstacles. As the case of Afghanistan has shown, the threat of a precipitous and full-blown authoritarian reversion can be intricately tied to, and exacerbated by, constitutional retrogression via systematic violations of the rule of law.<sup>92</sup> Indeed, a democracy “in the midst of [such] retrogression may not realize its predicament until matters are already beyond redress.”<sup>93</sup> Safeguarding democracy thus requires utmost vigilance and constant endeavor driven by fidelity to core principles such as supremacy of the law.<sup>94</sup>

The Taliban's ouster in 2001 presented a historic opportunity to break away from Afghanistan's despotic past and transition toward democratic governance. That opportunity, however, was squandered. The 2004 Constitution produced a flawed separation of powers system that unduly aggregated authority in the presidency. Moreover, rampant executive overreach increasingly undermined a Parliament that was further stymied by a deficient electoral system. While not the only factor, the ensuing degradation of the rule of law and democratic institutions impeded effective governance and sapped the regime's legitimacy—conditions which opposition groups exploited methodically. With the Taliban back in power, Afghanistan's autocratic reversion serves as a cautionary tale on the perils of rule of law decay. *f*

## ENDNOTES

- 1 Human Rights Council Resolution 19/36, April 19, 2012; *see also* Human Rights Council, *Study on common challenges facing States in their efforts to secure democracy and the rule of law from a human rights perspective*, para. 84, U.N. Doc. A/HRC/22/29 (Dec. 17, 2012): “Democracy [...] and the rule of law are interdependent and mutually reinforcing. They enjoy a symbiotic relationship within a system of governance. The weakening of one endangers the enjoyment or even the existence of the other [...].”
- 2 HRC, *Study*, para. 24 (noting that “the principles of the rule of law [...] are inseparable from those of a functioning democratic order”).
- 3 *Ibid.*, para. 26.

- 4 Ibid., para. 26.
- 5 HRC Resolution 19/36; For an in-depth discussion of the causes of democratic decay, see also Aziz Huq and Tom Ginsburg, “How to Lose a Constitutional Democracy,” *UCLA Law Review* 65 (78) (January 2018), examining “authoritarian reversion” and “constitutional retrogression” as two broad modal paths of democratic degradation.
- 6 HRC, *Study*, para. 20.
- 7 Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004): 91-113; Broadly speaking, there are “thin” and “thick” conceptualizations of the rule of law. “Thin” accounts of the rule of law entail fewer components while “thick” formulations encompass greater political, social, and economic elements. Three critical themes of the rule of law include legal limitations on government, formal legality, and the principle of “rule of law, not man.”
- 8 See HRC Resolution 19/36, para. 16 (urging States to promote the rule of law and democracy by, *inter alia*, upholding the separation of powers); HRC, *Study*, para. 47 (transitioning toward democracy requires, in part, that “[t]he principle of separation of powers between the legislative, executive and judicial branches [...] be codified constitutionally and implemented effectively”); and Aziz Huq and Tom Ginsburg, “How to Lose,” 125: “it remains the case that legislatures and constitutional courts have the capacity to play a restraining function, slowing the centralization of state authority and the closing of democratic space.”
- 9 HRC, *Study*, para 29.
- 10 Ibid. para. 30.
- 11 Ibid.
- 12 HRC Resolution 19/36, para. 11.
- 13 Ibid.
- 14 Huq and Ginsburg, “How to Lose,” 83; Huq and Ginsburg define *authoritarian reversion* as “a wholesale, rapid collapse into authoritarianism.” *Constitutional retrogression* refers to “incremental but ultimately still substantial, decay in three basic predicates of democracy—competitive elections, liberal rights to speech and association, and the rule of law.”
- 15 The international community, led by the United States, played a significant role in the democratization process particularly given Afghanistan’s substantial dependence on foreign assistance ever since the 2001 Bonn process. For an examination of external actors’ influence in this regard, see, e.g., Astri Suhrke, “Democratization of a Dependent State: The Case of Afghanistan,” *Chr. Michelsen Institute*, 2007.
- 16 For a discussion of Afghanistan’s historically weak rule of law culture, see Mehdi J. Hakimi, “Rule of Law from the Ground Up: Legal Curriculum Reform in Afghanistan,” *California Law Review Online* 11 (249) (July 2020): 254–58.
- 17 For a detailed analysis of the separation of powers under the 2004 Constitution, see Kristina Alekseyeva et al., *An Introduction to the Laws of Afghanistan* (Stanford: Afghanistan Legal Education Project, Stanford Law School, 2017): 102–29; see also “Separation of Powers under the Afghan Constitution: A Case Study,” *Afghanistan Research and Evaluation Unit*, March 2015.
- 18 Alekseyeva et al., *An Introduction*, 115.
- 19 *Qanoon Asasi Jomhori Islami Afghanistan* [Constitution of the Islamic Rep. of Afghanistan], art. 64.
- 20 Ibid., art. 75.
- 21 Ibid., art. 79.
- 22 Ibid., art. 94. The Parliament could override the presidential veto if two-thirds of members of the lower chamber voted in favor of the law.
- 23 Ibid., art. 84(3).

- 24 For a discussion of the interplay between the judiciary and the executive in Afghanistan, see Mehdi J. Hakimi, “The Judiciary and the Rule of Law in Afghanistan,” *Judicature* 105 (24) (2021).
- 25 Constitution of Afghanistan, art. 81.
- 26 *Ibid.*, art. 82.
- 27 *Ibid.*, arts. 90-91.
- 28 *Ibid.*, art. 92.
- 29 *Ibid.*, arts. 64(12), 132.
- 30 *Ibid.*, arts. 120, 122.
- 31 *Ibid.*, art. 121.
- 32 Hakimi, “Judiciary and the Rule of Law.”
- 33 Notwithstanding the flawed interbranch checks that favored the presidency, the Parliament and the judiciary were also afflicted by other limitations that further undermined their capacity to discharge their respective constitutional mandates properly. This article, however, focuses principally on the issue of executive overreach (*vis-à-vis* the legislature) in light of the substantially more pronounced role of the presidency in the degradation of the rule of law and democratic norms in Afghanistan.
- 34 Huq and Ginsburg, “How to Lose,” 118, 123; Undermining interbranch checks is a key mechanism of constitutional retrogression.
- 35 As discussed throughout this article, these institutional design flaws included, *inter alia*, the Constitution’s problematic separation of powers which created an unduly powerful presidency and concomitantly weak legislature and judiciary, the *loya jirga* (grand assembly) mechanism, and the SNTV electoral system.
- 36 The discussion of institutional deficiencies and executive overreach in this article is intended to be illustrative rather than exhaustive.
- 37 Constitution of Afghanistan, art. 79.
- 38 *Ibid.* Moreover, the legislative decree power could not be used in “matters related to budget and financial affairs.”
- 39 *Ibid.*
- 40 Afghanistan Research and Evaluation Unit, “Separation of Powers,” 9, 13. A more robust institutional check on executive power would have been, for instance, requiring subsequent approval of the decrees by Parliament before acquiring the force of law.
- 41 *Ibid.*, 9-10. One example was President Karzai’s 2010 Electoral Decree which, to the Parliament’s chagrin, limited the authority of the electoral bodies and the candidates’ ability to challenge their disqualification. Despite the lawmakers’ objections, the President was able to impose the decree through his influence over the upper chamber of the legislature.
- 42 Tammim Hamid, “Govt Reacts To Criticism Over Amendments To Anti-Graft Law,” *TOLO News*, November 11, 2018, <https://tolonews.com/afghanistan/govt-reacts-%C2%A0criticism-over-amendments-%C2%A0anti-graft-%C2%A0law>.
- 43 United Nations Assistance Mission in Afghanistan, “Afghanistan’s Fight Against Corruption: Groundwork for Peace and Prosperity,” May 2019; In 2017, contrary to international standards and norms, amendments to the Supreme Audit Office Law shortened the General Auditor’s term and retained the President’s appointment power.
- 44 UN Assistance Mission, “Fighting Corruption,” 20-21, 60-61. The Ombudsperson’s Office, which was created via presidential decree in 2018 to investigate complaints involving high-ranking government officials, was beset by various concerns, including the location of the Ombudsperson’s Office (housed in the Presidential Palace within the Office of the Chief of Staff of the President), which cast doubt over its independence, the proscription against investigating complaints involving the President, the requirement to report to the President, and the Office’s continued operation without

- a proper legal basis (the Office's draft law was rejected twice and criticized by various stakeholders including the civil society for, *inter alia*, failing to safeguard the body's independence and neutrality). In February 2021, the Ombudsperson's Office was merged with the Anti-Corruption Commission.
- 45 Hakimi, "Judiciary and the Rule of Law."
- 46 Massoud Ansar, "Too Many Temporary, Acting Ministers in Govt: MPs," *TOLO News*, January 15, 2020, <https://tolonews.com/afghanistan/too-many-temporary-acting-ministers-govt-mps>.
- 47 Massoud Ansar, "Rula Ghani Accused of 'Interfering' with Parliament," *TOLO News*, December 21, 2020, <https://tolonews.com/afghanistan-168673>.
- 48 Zahra Rahimi, "Unconfirmed, Acting Ministers Lack Legal Legitimacy: Lawyers," *TOLO News*, July 17, 2020, <https://tolonews.com/afghanistan/unconfirmed-acting-ministers-lack-legal-legitimacy-lawyers>; Under Afghan law, ministers whose proposed appointments were rejected by the Parliament could only serve in a caretaker capacity for two months. This legal requirement, however, was routinely violated.
- 49 Mir Aqa Popalzai, "MPs Slam Ghani's Top Advisor for Skipping Hearing," *TOLO News*, December 2, 2019, <https://tolonews.com/afghanistan/mps-slam-ghani%E2%80%99s-top-advisor-skipping-hearing>; Khaled Nikzad, "MPs: Qayoumi Must Answer for Budget, Trip Expenses," *TOLO News*, December 8, 2019, <https://tolonews.com/afghanistan/mps-qayoumi-must-answer-budget-trip-expenses>.
- 50 William Byrd, "Dismembering Afghanistan's Ministry of Finance," *United States Institute of Peace*, March 31, 2020, <https://www.usip.org/publications/2020/03/dismembering-afghanistans-ministry-finance>.
- 51 *Ibid.* For a discussion of corruption issues plaguing Afghanistan, see UN Assistance Mission, *Fighting Corruption*, 42-43.
- 52 Mir Haidar Shah Omid, "US Welcomes Reversal of Ghani MoF Decree," *TOLO News*, April 7, 2020, <https://tolonews.com/business/us-welcomes-reversal-ghani-mof-decree>.
- 53 Rohullah Arman, "Ghani Rescinds Order to Divide Finance Ministry," *TOLO News*, April 6, 2020, <https://tolonews.com/business/ghani-rescinds-order-divide-finance-ministry>.
- 54 See Astri Suhrke, "Democratization of a Dependent State: The Case of Afghanistan," *Chr. Michelsen Institute* (2007): 14 (arguing that since "the primary lines of accountability stretch[ed] to donors rather than the parliament, the executive branch itself had few incentives – and probably some *disincentives* – to strengthen the legislative branch.").
- 55 *Ibid.*
- 56 Omid, "US Welcomes Reversal."
- 57 *Ibid.*
- 58 *Ibid.*
- 59 UN Assistance Mission, "Fighting Corruption," 55, 57. For background on the government's controversial use of emergency funds, see Mokhtar Yasa, "91 Code scandal: how did Afghan leaders misappropriate billions of money?," *Kabul Now*, December 18, 2019, <https://kabulnow.com/2019/12/91-code-scandal-how-did-afghan-leaders-misappropriate-billions-of-money/>.
- 60 Afghanistan Research and Evaluation Unit, *Separation of Powers*, 14: "The judiciary, in almost all of the cases referred to it by the executive, issued opinions that accorded with the executive's views. This practice [...] allowed the government to implement the laws it desire[d], without the approval or disapproval of the Parliament."
- 61 *Ibid.*, 22-26 (discussing the high-profile case of the no-confidence vote against former Foreign Minister Spanta).

- 62 Khaled Nikzad, "Chief Justice Ordered Central Bank to Pay MoF: Document," *TOLO NEWS*, January 4, 2020, <https://tolonews.com/afghanistan/chief-justice-ordered-central-bank-pay-mof-documents>.
- 63 Constitution of Afghanistan, art. 81.
- 64 *Ibid.*, art. 110.
- 65 *Ibid.* Pursuant to the Constitution, a proper *loya jirga* consisted of, *inter alia*, the heads of district assemblies. District assembly elections, however, were not held in Afghanistan; see Ali Yawar Adili, "Afghanistan's 2019 elections (1): The countdown to the presidential election has kicked off," *Afghanistan Analysts Network*, January 23, 2019, <https://www.afghanistan-analysts.org/en/reports/political-landscape/afghanistans-election-conundrum-the-countdown-to-the-presidential-election-has-kicked-off/>; Anisa Shaheed, "Very Few Willing to Run for District Council Elections," *TOLO News*, June 13, 2018, <https://tolonews.com/afghanistan/very-few-willing-run-district-council-elections>.
- 66 Mehdi J. Hakimi, "The International Criminal Court's Afghan Dilemma: Complementarity and the Quest for Justice in Afghanistan," *Columbia Journal of Transnational Law* 60 (forthcoming 2022), discussing, *inter alia*, the questionable legality of releasing the Taliban prisoners. See "Afghan assembly approves Taliban prisoner release," *BBC NEWS*, August 9, 2020, <https://www.bbc.com/news/world-asia-53706638>.
- 67 Khwaja Basir Fitri, "Loya jirga illegal in Parliament presence: Rahmani," *Pajhwok News*, August 5, 2020, <https://pajhwok.com/2020/08/05/loya-jirga-illegal-parliament-presence-rahmani/>.
- 68 UN Assistance Mission, *Fighting Corruption*, 26-27. The Asset Registration and Verification Agency was housed under the Administrative Office of the President.
- 69 *Ibid.*, 27.
- 70 Mehdi Hakimi, "On the other side of the world, an even more dysfunctional election: America has a huge stake in Afghanistan's future," *N.Y. Daily News*, November 9, 2018, <https://www.nydailynews.com/opinion/ny-oped-afghan-elections-20181109-story.html>.
- 71 Massoud Ansar, "I Was Fired After Resisting Ghani's Order, Claims Senator," *TOLO News*, April 1, 2019, <https://tolonews.com/afghanistan/i-was-fired-after-resisting-ghani%E2%80%99s-order-claims-senator>.
- 72 For a general assessment of legislative elections in Afghanistan, see A. Farid Tookhy, "Legislature and Legislative Elections in Afghanistan: An Analysis," *United States Institute of Peace*, July 2020.
- 73 For a detailed analysis of Afghanistan's SNTV electoral system, see "Fixing Afghanistan's Electoral System: Arguments and Options for Reform", *Afghanistan Research and Evaluation Unit*, July 2012.
- 74 Afghanistan Research and Evaluation Unit, "Fixing Afghanistan's Electoral System: Arguments and Options for Reform", 6 and 17. A proportional representation (PR) system would have been a better alternative for Afghanistan as it would have reduced the potential for fraud and promoted a stable party system.
- 75 *Ibid.*, 6-7.
- 76 *Ibid.*, 7.
- 77 *Ibid.*, 2. Effective political parties induce governments to be responsive to the citizenry and advance democratic norms.
- 78 *Ibid.*, 3.
- 79 *Ibid.*, 6. The SNTV system, for instance, was abandoned in Japan and Taiwan.
- 80 *Ibid.*, 4.
- 81 Huq and Ginsburg, "How to Lose," 118. Political competition, which is the lifeblood

of a healthy democracy, can arise in myriad ways including in the form of parties vying for the presidency, or in the context of coalitions within the legislature. Attempts to eliminate political competition, for example via flawed electoral machinery or fraudulent polls, are inimical to democracy.

82 Ibid., 8.

83 Thomas H. Johnson, “The Illusion of Afghanistan’s Electoral Representative Democracy: The Cases of Afghan Presidential and National Legislative Elections,” *Small Wars & Insurgencies* 29 (1) (December 2017): 1.

84 Ibid. See also Meetra Qutb, “Sowing seeds of ethnic division? Afghanistan’s constitution and electoral system,” *LSE Southeast Asia Blog*, May 14, 2020, <https://blogs.lse.ac.uk/southasia/2020/05/14/long-read-sowing-seeds-of-ethnic-division-afghanistans-constitution-and-electoral-system/>.

85 National unity is correlated with the viability of democratic transitions. See HRC, *Study*, para. 44 (noting that national unity seems to be an “overriding” prerequisite of democracy).

86 Afghanistan Research and Evaluation Unit, *Fixing Afghanistan’s Electoral System*, 7.

87 Ibid.

88 Ibid.

89 The Afghan electoral processes were always tainted by extensive blunders and irregularities. See Mehdi Hakimi, “On the other side of the world, an even more dysfunctional election: America has a huge stake in Afghanistan’s future,” *N.Y. Daily News*, November 9, 2018, <https://www.nydailynews.com/opinion/ny-oped-afghan-elections-20181109-story.html> (discussing the deficiencies in the 2018 parliamentary polls).

90 Afghanistan Research and Evaluation Unit, *Fixing Afghanistan’s Electoral System*, 2. In the 2005 legislative elections, approximately 6.5 million votes were cast while in 2010, the figure had slipped to approximately 4 million. As for the presidential elections, the 2020 polls saw the lowest turnout since the Taliban were ousted in 2001: Only 1.8 million votes were cast while roughly 1 million votes were invalidated due to irregularities; See “Afghanistan presidential election: Ashraf Ghani re-elected,” *BBC News*, February 18, 2020, <https://www.bbc.com/news/world-asia-51547726>. Besides security constraints, the recurring episodes of widespread electoral fraud and the government’s disdain for the rule of law also dissuaded many Afghans from participating in the polls.

91 See HRC, *Study*, para. 37. Such popular disenchantment can pose a major social challenge to democracy.

92 For an overview of the state of the rule of law in Afghanistan prior to the Taliban takeover, see Mehdi J. Hakimi, “The Rule of Law Crisis in Afghanistan,” *Georgetown Journal of International Law* (September 2020).

93 Huq and Ginsburg, “How to Lose,” 119; The threat posed by constitutional retrogression—which corrodes democracy in incremental and piecemeal fashion—is especially grave since it does not come dressed as a wolf.

94 HRC, *Study*, para. 48. Such vigilance must be exercised not only by domestic actors and national institutions but also by international stakeholders such as foreign donors. In the Afghan context, however, the international community’s rhetoric of democratization did not always comport with the reality on the ground. See, e.g., Suhrke, “Democratization of a Dependent State,” 15 (“In a stroke of irony, the international community has promoted democratization but simultaneously created a state so dependent on external support that it deprives the critical institution of liberal democracy – the legislature – of its meaning.”).