



Constitutional Design as the Primary Cause of a Political Tragedy: A Case Study of Afghanistan's 2004 Constitution

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Abstract

Constitution making, particularly in divided countries, is a demanding business that requires flexibility and creative thinking from all sides. The 2004 Constitution of Afghanistan left in place a strong presidential system in which the presidency was the only prize worth winning. Embracing such a formula in Afghanistan as 'land of minorities' was an unrealistic move and doomed it to failure from the start. Although the Constitution recognised the principle of separation of powers, power was strongly tilted in favour of the executive. As head of the state and chairman of the government, the president exercised his authorities in all three branches simultaneously. The Constitution not only granted the president the power to appoint Kabul-based authorities, but its lack of mechanism on devolution of power to provinces also enabled him to appoint all provincial officials. The Constitution, indeed, by introducing a king in president's clothing sowed the seeds of unaccountability and made abuse of power inevitable. This paper discusses what went wrong in the Constitution that hindered the formation of a broad-based and multi-ethnic government that finally led to its collapse. The flawed constitutional design bears responsibility for president's sliding toward authoritarianism and the government's rapid collapse in August 2021.

Keywords

Afghanistan, Constitution, Constitutional Design, Centralisation, Divided Countries, Separation of Powers.

I. INTRODUCTION

After two decades of international support, the Islamic Republic of Afghanistan ended on 15 August 2021 when Ashraf Ghani fled the country and the insurgents sat

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comfortably at his desk a few hours later.¹ This paper discusses what went wrong in the 2004 Constitution of Afghanistan that in the face of unstinting international supports, hindered the formation of a broad-based, multi-ethnic, and fully representative government and why the governments that had been formed on the basis of the Constitution did not enjoy high legitimacy in the eyes of most people and the increasing popular distrust of the government even robbed it of its nominal legitimacy that finally led to its collapse into the hands of the Taliban, a far weaker insurgent group.

This paper argues that the 2004 Constitution sowed the seeds of instability and laid the foundation for formation of an exclusive government by establishing a highly centralised system. By recognising the president both as head of the state and chairman of the government simultaneously, the Constitution had granted colossal power to the president² and left in place a fragile separation of powers which was firmly tilted in favour of the executive.³ As per chapter three of the Constitution,⁴ this king with a president's face had been recognised as head of all three branches of the government and could execute authority in the executive, legislative and judicial fields. Excessive consolidation of power in one person strongly undermined 'the system of checks and balances' from the start. The system of checks and balances, indisputably, was designed to prevent one branch from becoming too powerful and abusing its power. Since the executive, particularly the president, was granted much more authority than other branches of the government, the checks and balances failed to operate effectively. The Constitution provided for a strong centralised presidency, via a dysfunctional legislature and judiciary which lacked independence—a structure that could not and did not effectively hold the executive accountable.⁵

Constitution making is a fundamental state building exercise. A well-designed constitution is critical to the success of a political system, especially in divided societies. In countries with diverse ethnic makeup, constitution is a social contract that not only defines the relationship between state and citizens but also among diverse ethnic groups.⁶ By assuaging all groups' "fear and feeling of alienation", a well-developed constitution is the best way of dealing with conflicts that emanate from social cleavages.⁷ Afghanistan is, indeed, "a country of minorities"⁸ and none of its 57

¹ Thomas F. Lynch III, 'Deconstructing the Collapse of Afghanistan National Security and Defense Forces' (2022) 52 (3) *Parameters* 37, 37; Congressional Research Service, 'U.S. Military Withdrawal and Taliban Takeover in Afghanistan: Frequently Asked Questions' (September 2021) 13. Available: <https://crsreports.congress.gov/product/pdf/R/R46879>. All links in this article have been accessed on 20 September 2022.

² Nazif Shahrani, 'The Afghan President Has More Powers Than a King' (*ALJAZEERA*, 3 January 2018): <https://www.aljazeera.com/opinions/2018/1/3/the-afghan-president-has-more-powers-than-a-king>.

³ Farid Hamidi and Aruni Jayakody, 'Separation of Powers under the Afghan Constitution: A Case Study' (2015) *AREU* 3: <https://www.baag.org.uk/sites/www.baag.org.uk/files/resources/attachments/AREU%20Seperation%20of%20Powers%20Under%20the%20Afghan%20Constitution-%20Mar2015.pdf>.

⁴ Constitution of Afghanistan, Chap 3 (3 January 2004): <https://www.refworld.org/docid/404d8a594.html>.

⁵ Omar Sadr, *The Republic and Its Enemies: The Status of the Republic in Afghanistan* (AISS 2021) 72.

Hamidi and Jayakody (n 3) 1.

⁶ Sumit Bisarya, *Constitution Building: A Global Review* (2013) (IDEA 2014) 4: <https://www.idea.int/sites/default/files/publications/constitution-building-a-global-review-2013.pdf>.

⁷ Andrew Reynolds, 'Constitution Design: Promoting Multi-Ethnic Democracy' [2007] *Harvard Int Rev* 50, 50.

⁸ Charles Santos, 'Myth of "One Afghanistan"' *Los Angeles Times* (California, 25 May 2003): <https://www.latimes.com/archives/la-xpm-2003-may-25-op-santos25-story.html>; Justin Desautels-Stein, 'Rites and Rights in Afghanistan: The Hazara and the 2004 Constitution' (2005) 29 *Fletcher Forum World Aff.* 157, 158.

ethnicities constitutes a majority of the population. It has not passed nation-building process successfully and in most cases, ethnicity has been a major factor in political decision making. In a situation like this, the 2004 Constitution of Afghanistan gave birth to a centralised, “autocratic structure of governance that the country had inherited from the nineteenth century”,⁹ in which all government officials, from a minister to a schoolteacher, were “appointed directly or indirectly by the head of the state”. According to Professor Thomas Barfield, expert on Afghanistan, building a centralised state in Afghanistan “was fatally flawed because it attempted to restore a system designed for autocrats in a land where autocracy was no longer politically sustainable”.¹⁰

In 2003 Afghanistan, in which multiple ethnic groups were competing for power, engineering the Constitution based on a winner-take-all approach was an unrealistic move.¹¹ Thus, it is safe to say that constitutional design flaws, *inter alia*, were one of the biggest factors that put the government on the verge of crisis and eventually gave way to its surprise collapse. This research by adopting an ethnic perspective would complement and extend those done by Jennifer B. Murtazashvili¹² and Dr Mujib Rahman Rahimi.¹³

This article is split into three main sections. The first section sheds light on the scope of centralisation in the 2004 Constitution both at national and provincial levels. The second section assesses the principle of separation of powers in the Constitution with an aim to show how power was distributed in favour of the executive. The third section briefly analyses how centralisation led to a ‘personal and ethnic dictatorship’ that damaged the legitimacy of Afghanistan’s government in the eyes of the people and finally resulted in its total collapse.

II. THE NATURE AND SCOPE OF CENTRALISATION IN AFGHANISTAN’S 2004 CONSTITUTION

Since the establishment of Afghanistan in 1880, all regimes adopted a highly centralised system of government in which the king or president wielded extensive political, fiscal, and administrative power with no accountability to the provinces. Overall, Afghanistan has tried different types of regimes including an absolute monarchy, a constitutional monarchy, presidential systems, ideologically Communist, Liberal, and Islamic states. Although the regimes changed in appearance, excessive centralisation remained the core aspect of all these failed regimes. Furthermore, almost

⁹ Barnett R. Rubin, ‘Is Afghanistan Ready for Peace? How Great Powers Can End the War’ *Foreign Affairs* (New York, 30 July 2018): <https://www.foreignaffairs.com/articles/afghanistan/2018-07-30/afghanistan-ready-peace>.

¹⁰ Thomas Barfield, *Afghanistan: A Cultural and Political History* [Princeton University Press 2010] 7-8; Akhilesh Pillalamarri, ‘Afghanistan’s Failed Constitution’ *Diplomat* (Washington, D.C., 12 August 2021): <https://thediplomat.com/2021/08/afghanistans-failed-constitution/>.

¹¹ Reynolds (n 7) 52; Alex Thier, ‘The Nature of the Afghan State: Centralization vs. Decentralization’ (2020) USIP 2: https://www.usip.org/sites/default/files/Afghanistan-Peace-Process_Nature-of-the-Afghan-State_Centralization-vs-Decentralization.pdf; John M. Carey and Andrew Reynolds, ‘The U.S. Helped Design Afghanistan’s Constitution. It Was Built to Fail’ *Washington Post* (Washington, D.C., 8 September 2021): <https://www.washingtonpost.com/outlook/2021/09/08/afghanistan-constitution-failure/>.

¹² Jennifer Brick Murtazashvili, ‘The Collapse of Afghanistan’ (2022) 33 *J. Democr.* 40-54.

¹³ Mujiburahman Rahimi, *Naqdi Bar Sakhtare Nezam Dar Afghanistan* [A Critique of the Structure of the Political System in Afghanistan] (Aazem 2020).

all of the regimes were dominated by one group and other ethnic groups, via various means, were deprived of meaningful participation in political life.¹⁴ In the same way, the founders of the post-2001 system embraced the awkward old governing institutions¹⁵—ones that were not suitable for power dynamics and were intrinsically likely to exacerbate ethnic division rather than creating a “broad-based, multi-ethnic, and fully representative government” on which had been agreed in 2001 Bonn Conference.¹⁶ Constitution building is the first and one of the most important components of peace-building and conflict management in divided societies.¹⁷ By allaying concerns of all groups, a well-developed constitution functions as a “pillar of interethnic harmony”.¹⁸ Constitution’s designers in countries torn apart by social cleavages like Bosnia-Herzegovina, Kosovo or Cyprus have adopted federal or quasi-federal arrangements in order to establish meaningful power-sharing managements among different ethnic groups which would make it easier for them to adhere to a common constitutional framework.¹⁹ By contrast, the 2004 Constitution of Afghanistan created an exclusive centralised presidential system in which the president had a monopoly over all powers and the local governments were left with nothing.²⁰

Centralisation versus decentralisation indicates where decisions are made within the political structure of a state, how objectives and policies are determined and in what way resources are allocated.²¹ Centralisation implies a concentration of power and resources in the central government while decentralisation refers to the transferring of decision-making powers and resources to local governments.²² Centralisation and decentralisation are relative concepts and the relative degree of centralisation is usually determined by the “hierarchy of authority” and the degree of “participation in decision-making,” as these dimensions of structure reflect the distribution of power across the entire system.²³ Literature on organisation structure, usually, measures the level of centralisation by considering both of these dimensions of centralisation. Hierarchy of authority refers to the extent to which the decision-making power is exercised at the upper levels of the system, while participation in decision-making implies the number of people involved in determining the policies.²⁴ A

¹⁴ Ibid 79; Mohammad Qadam Shah, ‘Centralization Is at the Core of Afghanistan’s Problems: Can the Taliban Learn from History?’ *Diplomat* (Washington, D.C., 24 August 2021): <https://thediplomat.com/2021/08/centralization-is-at-the-core-of-afghanistans-problems/>.

¹⁵ Murtazashvili, ‘The Collapse of Afghanistan’ (n 12) 42.

¹⁶ Mohammad Hashim Kamali, ‘References to Islam and Women in the Afghan Constitution’ (2008) 22 *Arab Law Q.* 270, 275; Carey and Reynolds (n 11).

¹⁷ Vijayashri Sripati, ‘The United Nation’s Role in Post-Conflict Constitution-Making Process: TWAIL Insight’ (2008) 10 *Int. Community Law Rev.* 411, 420; Jill Cottrell and Cecilia Bylesjö, *Public Consultation on a Draft Constitution: With particular Reference to Women in Nepal* (Creative Press 2010): <https://www.idea.int/publications/catalogue/public-consultation-draft-constitution-particular-reference-women-nepal>.

¹⁸ Reynolds (n 7) 50; Katharine Adeney, ‘Constitutional Design and the Political Salience of “Community” Identity in Afghanistan: Prospect for the Emergence of Ethnic Conflict in the Post-Taliban Era’ (2008) 48 *Asian Surv.* 535, 536.

¹⁹ Rainer Grote, ‘Separation of Powers in the New Afghan Constitution’ (2004) 64 *ZaöRV.* 897, 913.

²⁰ Jennifer Brick Murtazashvili, ‘Informal Federalism: Self-Governance and Power Sharing in Afghanistan’ (2014) 44 *Publius* 324,324; Rahimi (n 13) 220.

²¹ Rhys Andrew and others, ‘Centralization, Organizational Strategy, and Public Service Performance’ (2007) 19 *JPART.* 57, 58.

²² Mark Robinson, ‘Does Decentralisation Improve Equity and Efficiency in Public Service Delivery Provision?’ (2007) 38 *IDS Bulletin* 7, 8.

²³ Andrew and others (n 21) 58.

²⁴ Ibid

centralised state is typically identified by a high degree of hierarchical authority and low levels of participation in determining policies, whereas the opposite is true about a decentralised state.²⁵

The new Constitution was developed based on Afghanistan's 1964 Constitution.²⁶ That Constitution was the product of Afghanistan's experiment with constitutional democracy under King Mohammad Zahir Shah (1933-73). Even though it contained some democratic components, it was an authoritarian document designed merely to give citizens a little "breathing room".²⁷ It featured a king and a prime minister. Chapter three of the 2004 Constitution, however, stipulates that the president has the power to execute "authorities in the executive, legislative and judicial fields".²⁸ From this point of view, the 2004 Constitution has parted way with the 1964 Constitution as it combined the powers of the monarch and the premier into a very powerful president. Scholars have argued that by granting the president powers to exercise authorities in all three branches of government, the Constitution has sowed the monarchical seeds of the president.²⁹ Having considered it, Professor Nazif Shahrani believes that "the president of Afghanistan [was] more powerful than a king".³⁰

The biggest flaw in the 2004 Constitution is the establishment of a highly centralised unitary state in a mountainous country with a very diverse ethnic makeup where local leaders enjoyed huge popular support in their communities. The Constitution suffers from serious flaws and is responsible for a host of the problems facing Afghanistan today including the revival of the Taliban. It was informed neither by Afghanistan's ethnic makeup, nor the political realities on the ground.³¹ The Constitution had not re-established the monarchy, of course, but had instead provided the cabinet by both executive and legislative powers that was headed by a president who had control over all three branches of the government.³² By recognising the president both as head of the state and chairman of the government, while each could have been a full-time position, the Constitution wrote a recipe for "overload and exhaustion".³³ By taking a look at the president's list of authorities and discretions in the Constitution, one can easily get how centralised the system was. President's powers and authorities enshrined in the Constitution can be divided into three categories: powers and authorities that the president exercised independently, powers and authorities that the president exercised with the approval of the parliament and the authorities that he could

²⁵ Ibid.

²⁶ Paul Miller, 'What Really Went Wrong in Afghanistan' *Dispatch* (Washington, D.C., 29 January 2020): <https://thedispatch.com/p/what-really-went-wrong-in-afghanistan>.

²⁷ Murtazashvili, 'The Collapse of Afghanistan' (n 12) 43.

²⁸ Hamidi and Jayakody (n 3) 8.

²⁹ Amin Saikal and William Maley, 'The President Who Would Be King' *New York Times* (New York, 6 February 2008): <https://www.nytimes.com/2008/02/06/opinion/06saikal.html>.

³⁰ Shahrani (n 2).

³¹ Pillalamarri (n 10).

³² Barnett R. Rubin, 'Crafting a Constitution for Afghanistan' (2004) 15 *J. Democr.* 5, 8.

³³ William Maley, 'State building in Afghanistan: Challenges and Pathologies' (2013) 32 *Cent. Asian Surv.* 255, 259.

delegate.³⁴ As per the Constitution, the president could exercise the following powers independently:

- Appointing one-third of the members of the House of Elders;³⁵
- Supervising the implementation of the Constitution;³⁶
- Being the Commander in Chief of the armed forces;³⁷
- Taking necessary decisions to defend territorial integrity and preserve independence;³⁸
- Issuing presidential decrees;³⁹
- Convening the Loya Jirga;⁴⁰
- Inaugurating the sessions of National Assembly and Loya Jirga;⁴¹
- Calling for referendum;⁴²
- Accepting the resignations of vice-presidents;⁴³
- Dismissing or accepting resignation of the Ministers, the Attorney General, the Head of the Central Bank as well as the National Security Director;⁴⁴
- Appointing, retiring, and accepting the resignation and dismissal of judges, officers of the armed forces, police national security;⁴⁵
- Appointing heads of political representatives of Afghanistan to foreign states as well as international organisations;⁴⁶
- Accepting credentials of foreign political representatives in Afghanistan;⁴⁷
- Endorsing law as well as judicial decrees;⁴⁸
- Reducing and pardoning penalties;⁴⁹
- Bestowing medals, insignias as well as honorary titles;⁵⁰
- Establishing commission to improve the administration of the country;⁵¹
- Last but not least, appointing provincial governors (of which there are 34), mayors of cities, police officials, heads of provincial courts, chancellors of public universities and “even schoolteachers” across the country.⁵²

³⁴ Hamidi and Jayakody (n 3) 9.

³⁵ Constitution of Afghanistan, 84.

³⁶ Ibid 64(1).

³⁷ Ibid 64(2).

³⁸ Ibid 64(5).

³⁹ When Parliament is in recess and case of “immediate need,” the president can issue legislative decrees. The decrees are to be presented to the National Assembly within 30 days of it reconvening and can become void if the National Assembly reject it (Constitution of Afghanistan, art: 79).

⁴⁰ Constitution of Afghanistan 64(7).

⁴¹ Ibid 64(9).

⁴² Ibid 65.

⁴³ Ibid 64(10).

⁴⁴ Ibid 64(11).

⁴⁵ Ibid 64(12).

⁴⁶ Ibid 64(14).

⁴⁷ Ibid 64(15).

⁴⁸ Ibid 64(16).

⁴⁹ Ibid 64(18).

⁵⁰ Ibid 64(19).

⁵¹ Ibid 64(20).

⁵² Ibid 64(12); Barfield, ‘Afghanistan’ (n 10) 8.

Besides what went above, the president was able to exercise the following powers with the approval of the National Assembly:

- Determining the fundamental lines of the policy of the country;⁵³
- Declaring war and peace;⁵⁴
- Dispatching armed forces units abroad;⁵⁵
- Proclaiming as well as terminating the state of emergency;⁵⁶
- Appointing the ministers, the Attorney General, the Head of the Central Bank, the National Security Director as well as the Head of the Red Cross;⁵⁷
- Appointing the Chief Justice of the Supreme Court as well as justices of the Supreme Court;⁵⁸
- Joining any international treaties and agreement.⁵⁹

It is safe to say that although the above-mentioned presidential authorities were subject to the approval of the National Assembly, due to a fragile separation of powers, the president exercised them single-handedly in most cases. For instance, the president overrode the House of Representatives' no-confidence votes against ministers either through reappointing them as 'acting ministers' or referring the no-confidence votes to the judiciary and marking them as unconstitutional⁶⁰ or even reappointed the same ministers to another ministries.⁶¹ On 19 December 2020, in an interview with the press with respect to the two rejected candidate ministers by the House, Rula Ghani, the first lady of Afghanistan, said, that "whether the Parliament rejected or accepted a [minister] they will stay in their position".⁶² By every standard, this was a "blatant contempt to the separation of powers and rule of law" in Afghanistan.⁶³

Besides, according to article 71 of the Constitution, the government was comprised of Ministers who worked under the chairmanship of the president. The government, *inter alia*, was entrusted with the task to execute the laws, prepares the budget, regulates financial conditions of the state⁶⁴ and devise and implement social, cultural, economic, and technological development program.⁶⁵ Since the ministers were appointed and could have been dismissed by the president at any moment, they were

⁵³ Ibid 64(2).

⁵⁴ Ibid 64(4).

⁵⁵ Ibid 64(6).

⁵⁶ Ibid 64(8).

⁵⁷ Ibid 64(11).

⁵⁸ Ibid 64(12).

⁵⁹ Ibid 90(5) & 64(17).

⁶⁰ In May 2007, Minister Spanta (Foreign Affairs) and Minister Akbar (Refugees and Repatriation) were summoned before the Parliament and questioned over the mass deportation of Afghanistani refugees and workers from Iran. Both failed to survive a no-confidence vote against them. In response, the President Karzai accepted the no-confidence vote against Minister Akbar, but referred the vote against Spanta to the Supreme Court, questioning the procedure used by the Parliament to dismiss a minister via a no-confidence vote (For more info: Shamshad Pasarlay, 'Restraining Judicial Power: The Fragmented System of Judicial Review and Constitutional Interpretation in Afghanistan' (2018) 26 (2) Mich. State Int. Law Rev. 245).

⁶¹ Hamidi and Jayakody (n 3) 10.

⁶² Sadr (n 5) 70.

⁶³ Ibid.

⁶⁴ Constitution of Afghanistan 75(4).

⁶⁵ Ibid 75(5).

responsible to the president⁶⁶ and the latter, indeed, had got all ministers firmly under his thumb.

It is worth to be noted that the president of Afghanistan also took the advantage of the constitutional silence and added even more to his colossal power. For instance, the Constitution was silent on who appoints the member of the Independent Electoral Commission (IEC), the body responsible for administering and supervising elections in Afghanistan. It only stipulated that the "Islamic Transitional Government of Afghanistan shall . . . [establish] the Independent Election Commission".⁶⁷ Given the silence of the Constitution on appointing IEC members, the president issued a decree granting himself the authority to do so. To push back against this, the House of Representatives passed a law in February 2009 that required parliamentary approval of IEC members, but President Karzai vetoed the legislation and appointed the IEC members single-handedly.⁶⁸

The president was not constitutionally required to share even part of their power with his two vice presidents, first and second, who were elected together with him on the same ticket.⁶⁹ The two vice presidents had been given limited roles and did not have any decision-making powers of their own. The first vice president is merely to act as stand-in for the president in case of his impeachment, resignation, death, or an incurable illness that could hinder the performance of his duties.⁷⁰ The second vice president, on the other hand, has no constitutional role at all attached to his title, which was merely of an honorary nature.⁷¹ Given the long list of the president's powers discussed above, one can easily conclude that the terms 'president' and 'the executive' could have almost been used interchangeably in the Constitution.⁷² Thus, it goes without saying that centralised system of government monopolised power into the executive branch or simply the person of the president.⁷³ The president exercised extensive powers ranging from political, legislative, judicial, administrative to ceremonial functions.⁷⁴ The international community, indeed, re-established the "rotten political system of the authoritarian era and simply slapped a veneer of democracy on it".⁷⁵ Therefore, in view of a highly centralised structure introduced by the 2004 Constitution, the international community in reality never planted the "tree of democracy" in Afghanistan.⁷⁶ In other words, "democracy did not fail in Afghanistan; it was never even tried"⁷⁷ with any skill.

⁶⁶ Ibid 77.

⁶⁷ Ibid 159.

⁶⁸ Carol Wang, 'Rule of Law in Afghanistan: Enabling a Constitutional Framework for Local Accountability' (2014) 55 Harv. Int'l L.J. 211, 227.

⁶⁹ Constitution of Afghanistan 60.

⁷⁰ Ibid 67; Rahimi (n 13) 154.

⁷¹ Hamidi and Jayakody (n 3) 7.

⁷² Qadam Shah (n 14).

⁷³ Ibid.

⁷⁴ Kawun Kakar, Thomas Kraemer and Homayoun Raoofi, *Evolution of the Executive Branch in Afghanistan: A Look Back and Recommendations on the Way Forward* (AREU 2017) 25: <https://areu.org.af/wp-content/uploads/2017/08/1720E-Executive-Review-PN.pdf>.

⁷⁵ Murtazashvili, 'The Collapse of Afghanistan' (n 12) 45.

⁷⁶ David Loyn, 'Politics Without Parties: Afghanistan's Long Road to Democracy' (2019) 1 Asian Aff. 40, 40.

⁷⁷ Ibid.

a. *Centre-Periphery Relationships*

Despite being described as a historical achievement,⁷⁸ the Constitution did not develop a formula to manage the centre-province relations and put an end to the century-old power-sharing problem in Afghanistan. Indeed, the Constitution was not established with an “eye towards multi-ethnic democracy and minority rights”.⁷⁹ With a long history of “exclusionary states where small groups had held the majority of power over the large and diverse population”,⁸⁰ many had expected something more substantial than one platitudinous article in the Constitution. Article 137 of the Constitution stipulated: “The government, in preserving the principles of centralisation, shall transfer necessary powers (...) to local administrations in order to accelerate and improve economic, social as well as cultural matters”. That said, the Constitution was silent on three important questions: (1) how the power should have been devolved from the centre to provinces; (2) how much power should have been devolved; and (3) when the power-sharing should have taken place. Therefore, the Constitution failed to establish a functional mechanism on how, how much and when political and administrative authorities would have been devolved from the centre to the provinces. The combination of a poor separation of powers and lack of instruction on how to govern locally enabled the president to make provincial appointments single-handedly, usually as political favours, with an aim of further expanding his network of allies.⁸¹ The very visible effect of the Constitution was systemic political and administrative corruption: ‘monopoly of power plus discretion minus accountability’.⁸² This constitutional ambiguity enabled the president to stick to the principle of centrality and do not transfer the power to the provinces. In this way, the centralised nature of the administration remained largely unchanged and mechanism of devolving power to the provinces had largely gone unimplemented.⁸³

Moreover, article 140 of the Constitution required that elections should be held for district and village councils, it did not provide how the mayors plus the provincial and district governors should be selected. Due to lack of meaningful checks on president’s power, he assumed the authority to appoint mayors and governors.⁸⁴ These officials, appointed by Kabul for their loyalty to the president, were mostly Pashtuns and not from the province or the district they served, serving for indefinite periods and most of the time did not know the area and people they were given to govern. In some cases, people had resisted the appointment of non-local governors or sought for the

⁷⁸ Mohammad Hashim Kamali, ‘Afghanistan’s Constitution Ten Years On: What Are the Issues’ (2014) AREU 43: <https://www.refworld.org/docid/53fc4dd34.html>; Niaz A. Shah, ‘The Constitution of Afghanistan and Women’s Rights’ (2005) 13 Fem. Leg. Stud. 239, 244.

⁷⁹ Desautels-Stein (n 8) 164.

⁸⁰ Thier (n 11) 7.

⁸¹ Wang (n 68) 248; Qutb M, ‘Long Read: Sowing Seeds of Ethnic Division? Afghanistan’s Constitution and Electoral System’ (*The London School of Economics and Political Science*, 14 May 2020): <https://blogs.lse.ac.uk/southasia/2020/05/14/long-read-sowing-seeds-of-ethnic-division-afghanistans-constitution-and-electoral-system/>.

⁸² Qadam Shah (n 14).

⁸³ Thier (n 11) 3.; See also, Barnett R. Rubin, ‘Constitutional Issues in the Afghan Peace Negotiations: Process and Substance’ (November 2020): <https://www.usip.org/publications/2020/11/constitutional-issues-afghan-peace-negotiations-process-and-substance>.

⁸⁴ Wang (n 68) 245; Murtazashvili, ‘Informal Federalism’ (n 20) 326.

appointment of one of their own. The central government had never been able to address the popular concerns on time and provide them with satisfactory answers.⁸⁵ In cases of serious tension, the president did not remove provincial officials altogether, but rotated them from one province or district to another with no warning.⁸⁶ Therefore, provincial officials from governor and mayor to university chancellor and even school principals were appointed and backed by the central government, acted, in words of Mancur Olson, as roving bandits. According to Olson, a “roving bandit moves from place to place and plunders what he can wherever he goes. Because he will not come back to the same place, he does not care about the damage he inflicts. He will steal what he can”, regardless of its consequences.⁸⁷

Unbridled power of the president allowed him to encroach on the authority of local governments by placing provinces under almost direct rule of the central government, which according to Fareed Zakaria, a distinguished scholar, should be called “vertical usurpation”.⁸⁸ Under the Constitution, provincial governance as a layer of government was almost non-existent. Therefore, there was no provincial check on the central government, while it is widely believed that ‘multiple governments would reduce the risk of tyranny by any one of them’ and serves as a good safeguard against absolutism.⁸⁹ All in all, by acting as absolute kings, the presidents of Afghanistan had “no organic relationship with the people”.⁹⁰ If we take democracy as “being able to listen and being willing to enter into a dialogue”,⁹¹ concentration of power in one hand in Afghanistan was anti-democratic and laid the foundation for authoritarianism.

In 2003 Constitutional Loya Jirga (Constitutional Grand counsel, hereinafter, the CLJ), a strong centralised government was attractive to Karzai because it helped him to concentrate his power vis-à-vis non-Pashtun potential rivals, who were militarily very strong.⁹² Having this in mind, Pashtun delegates came out for vehemently centralised presidential system. A bloc of non-Pashtun delegates, however, strongly argued for a parliamentary system. It is important to be noted that for Pashtuns, presidentialism provided a way for one of their own—everyone knew that the first president would be Karzai, a Pashtun.⁹³ Proponents of presidentialism claimed that a strong central government would work for Afghanistan because the decades of war damaged a historically weak state, the country is divided, and local institutions are not strong enough. Thus, a strong centralised government is needed.⁹⁴

⁸⁵ Haroun Rahimi, ‘Lessons From Afghanistan’s History: How Not to Fix a Failed State’ Diplomat (Washington, D.C., 6 October 2021): <https://thediplomat.com/2021/10/lessons-from-afghanistans-history-how-not-to-fix-a-failed-state/>; see also, Barfield, ‘Afghanistan’ (n 10) 223-225.

⁸⁶ Murtazashvili, ‘Informal Federalism’ (n 20) 327.

⁸⁷ Gerard Roland, *Development Economics* (Routledge 2016) 236.

⁸⁸ Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (W.W. Norton & Company 2007) 76.

⁸⁹ Tom Ginsburg, ‘Constitutional Design for Territorially Divided Societies’ (2018) IDEA 3: <https://www.idea.int/sites/default/files/publications/constitutional-design-for-territorially-divided-societies.pdf>.

⁹⁰ Wang (n 68) 225.

⁹¹ Norberto Bobbio and Maurizio Viroli, *The Idea of the Republic* (Allan Cameron tr, Polity 2003) 7.

⁹² Murtazashvili, ‘The Collapse of Afghanistan’ (n 12) 43.

⁹³ Rubin, ‘Crafting a Constitution for Afghanistan’ (n 32) 12.

⁹⁴ Kakar, Kraemer and Raofi (n 74) 26.

On the other hand, non-Pashtuns advocated the formation of a decentralised state. The Northern Alliance made a case for parliamentary system and strongly opposed presidentialism. They had hoped that combination of a Pashtun president and a non-Pashtun prime minister (possibly a Tajik), would provide ethnic balance.⁹⁵ By the same token, Afghanistan's former president Rabbani believed that a strong presidential system does not suit Afghanistan well and leads to dictatorship.⁹⁶ The Northern Alliance argued that granting too much power to the president will give birth to a ruler not "different from the Middle East's other dictators"⁹⁷ and is a recipe for abuse of power. In fact, non-Pashtuns including Tajiks, Hazaras and Uzbeks were afraid that a powerful president may exclude them from the power. Finally, Karzai, who had an active lobbying team on the floor of the CLJ as well as supported by Khalilzad, two architects of the Constitution, rejected all these proposals and strong central presidentialism was ratified.⁹⁸ This brief account demonstrates that in divided countries like Afghanistan in which ethnic divisions is "the outstanding social feature of life"⁹⁹ how constitutions are primarily "power maps"¹⁰⁰ and constitution-making is pre-eminently a political act.¹⁰¹

III. THE FLAWED SEPARATION OF POWERS

In the pre-modern era, good and bad governments were primarily distinguished in terms of the human qualities of the two kinds of rulers, and the impacts of those qualities on the lives of their subjects. Today, however, much more importance is given to the institutions rather than human qualities.¹⁰² The reason for this U-turn is the lesson of history that "power tends to corrupt, and absolute power corrupts absolutely."¹⁰³ Public choice theory, also, begins with the assumption that public servants are the same as economic agents who seek to maximise their self-interests.¹⁰⁴ Constitutions, however, as a set of institutions are intended to overcome this problem by restricting somehow state power and providing separation of powers.¹⁰⁵

Montesquieu, believed, "power should be a check to power"¹⁰⁶ and this can be achieved by applying the principle of the separation of powers.¹⁰⁷ The purpose of this principle is to overcome a central issue of enlightened modernity: the abuse of state power.¹⁰⁸ John Locke argued, division of powers between the executive and legislature

⁹⁵ Rubin, 'Crafting a Constitution for Afghanistan' (n 32) 11.

⁹⁶ Zalmay Khalilzad, *The Envoy: From Kabul to The White House, My Journey Through a Turbulent World* (St. Martin's Press 2016) 223; Kakar, Kraemer and Raoofi (n 74) 23.

⁹⁷ Babar Shah, 'The Constitution Process in Afghanistan' (2004) 24 *Strategic Studies* 91, 105; Khalilzad, *The Envoy* (n 96) 223.

⁹⁸ Rubin, 'Crafting a Constitution for Afghanistan' (n 32) 16.

⁹⁹ Barfield, 'Afghanistan' (n 10) 18.

¹⁰⁰ Daniel J. Elazar, 'Constitution-Making: The Pre-Eminently Political Act' in Keith G. Banting and Richard Simeon (eds), *The Politics of Constitutional Change in Industrial Nations: Redesigning the State* (Palgrave MacMillan 1985) 232-248.

¹⁰¹ *Ibid.*, Jan-Erik Lane, *Constitutions and Political Theory* (2nd edn, Manchester University Press 2011) 85.

¹⁰² David Miller, *Political Philosophy: A Very Short Introduction* (Oxford University Press 2003) 5.

¹⁰³ Andrew Heywood, *Political Ideologies: An Introduction* (5th edn, Palgrave Macmillan 2012) 37.

¹⁰⁴ Francis Fukuyama, *State Building: Governance and World Order in the Twenty-First Century* (PROFILE BOOKS LTD 2005) 66.

¹⁰⁵ Jan-Erik Lane (n 101) 45.

¹⁰⁶ Heywood (n 103) 39.

¹⁰⁷ *Ibid.* 39.

¹⁰⁸ Daniel Bonilla Maldonado, 'The Conceptual Architecture of the Principle of Separation of Powers' in David Bilchitz and David Landau (eds), *The Evolution of the Separation of Powers: Between the Global North and the Global South* (Edward Elgar 2018) 145-174.

is fundamentally necessary for the preservation of personal liberty; to put the powers of both branches of government in a single hand will lead to despotism.¹⁰⁹ Montesquieu, in his magnum opus, *The Spirit of Laws*, identifies three branches of the government (legislature, executive, and judiciary) and argues for their placement in the hands of different people or bodies: "There would be an end of everything [no freedom or civil rights], were the same man, or the same body (...) to exercise those three powers".¹¹⁰

Although the concept of separation of powers had been recognised under the 2004 Constitution of Afghanistan, it suffered from serious flaws, both on paper and in practice. As per the Constitution, power was firmly tilted in favour of the executive, mainly the president, often at the expense of the legislature and the judiciary.¹¹¹ Unlike the US Constitution which clearly confines the president to his position as head of the executive, the 2004 Constitution allowed Afghanistan's president to execute 'his authorities in the executive, legislative and judiciary fields'. A cursory glance at the Constitution shows that there existed only a fragile separation of powers: the president functioned without any 'meaningful checks at the national and the subnational levels.'¹¹² Absent an independent judiciary and strong legislature, the president governed as *de facto* despot.¹¹³

a) *The legislature*

The National Assembly of the Islamic Republic of Afghanistan was "the highest legislative organ" of the state.¹¹⁴ It consisted of two houses: House of Representatives and House of Elders.¹¹⁵ Despite being described as body that manifested the will of the people and represented the entire nation, its power were severely curtailed.¹¹⁶ This section is intended to demonstrate how the Constitution had set up a weak and fragmented parliament that was not effectively capable of holding the executive accountable.

i. *Appointment of One-Third of the House of Elders' Members by the President*

As already indicated, the 2004 Constitution was based on the 1964 Constitution of the land. According to 1964 Constitution, one-third of the members of the House of Elders was appointed by the King. In the same way, the 2004 Constitution provided the president with authority to appoint one-third of the member of the House.¹¹⁷ Moreover, the speaker of the House,¹¹⁸ the fourth official in rank after the president and his two

¹⁰⁹ Jeremy Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 B.C. L. Rev. 233, 445-447.

¹¹⁰ M. DE Montesquieu, *The Complete Works of M. DE Montesquieu*, vol 1 (T. Evans 1777) 199.

¹¹¹ Hamidi and Jayakody (n 3) 6; Zalmay Nishat, Mohammad Irfani and Abdul Ahad Mohammadi, 'The Challenging Path towards Democracy in Afghanistan: An Assessment and critique of National Debates on Alternative Political Systems in Afghanistan' (2017) AISS 39: https://www.aiss.af/assets/aiss_publication/13d079276d337911a713b8eaf0ab0ddd.pdf.

¹¹² Wang (n 68) 226.

¹¹³ Mahdi J. Hakimi, 'The Judiciary and the Rule of Law in Afghanistan' (2021) 105 *Judicature*. 24, 25.; See Also, Norberto Bobbio and Maurizio Viroli (n 91) 86.

¹¹⁴ Constitution of Afghanistan 81.

¹¹⁵ *Ibid* 82.

¹¹⁶ Grote (n 19) 909.

¹¹⁷ Constitution of Afghanistan 84.

¹¹⁸ *Ibid* 68.

vice-presidents, also had been elected from those who were appointed by the president. Having that in mind, according to the 2004 Constitution, “[l]aw [was] what both houses of the National Assembly approve[d], and the president endorse[d]”.¹¹⁹ For instance, if a bill had been passed by the House of Representatives and vetoed by the House of Elders it could not be considered law. This clearly reveals how the president was able to influence the legislature and its decision-making processes by cherry picking one-third of the House of Elder’s members. In 2016, as an example, the House of Representatives rejected presidential decree on electoral reform due to the government interference in the election, two weeks later the House of Elders, which was significantly influenced by the president, approved the decree.¹²⁰

ii. *Emasculation of Political Parties*

Afghanistan’s electoral system, in September 2005, adopted the Single Non-Transferable Vote (SNTV) with provincial, rather than district multimember constituencies to elect members of parliament and provincial councils.¹²¹ The interpretations on why the SNTV system was embraced “fingered Karzai’s fear that the closed list system would benefit the charismatic non-Pashtuns”.¹²² The SNTV system was actually the product of Karzai and Khalilzad’s antipathy toward political parties guaranteed the formation of an unrepresentative parliament with no incentive to cooperation with one another.¹²³ By weakening political parties, upon which the contemporary democracies hinge,¹²⁴ SNTV system strengthened the executive even further.¹²⁵

In 2004, experts almost unanimously warned that SNTV hinders the development of stable and legitimate democratic institutions, especially in war-torn country like Afghanistan that lacked democratic experience. International election experts instead favoured Proportional Representation (PR) system and there was a scholarly consensus that in post-conflict societies with diverse ethnic makeup, PR was the best choice.¹²⁶ Moreover, SNTV system is used by almost no successful democracies nowadays. Japan and Taiwan had used it in the past century but discarded it well before Afghanistan adopted it, complaining that it fostered corruption and factionalism.¹²⁷ King Hussein of Jordan used SNTV system to contain the capacity

¹¹⁹ Constitution of Afghanistan 94.

¹²⁰ TOLONews, ‘Meshrano Jirga Approves President’s Decree on Election Reforms’ (TOLONews, 28 June 2016): <https://tolonews.com/afghanistan/meshrano-jirga-approves-presidents-decree-electoral-reforms>.

¹²¹ Murtazashvili, ‘The Collapse of Afghanistan’ (n 12) 43; David Loyn, (n 76) 41.

¹²² Adeney (n 18) 547; Sara T. Ghadiri, ‘SNTV in Afghanistan: Is There a Better Option?’ (2010) 15 Res Publica. 85, 86.

¹²³ Rubin BR, ‘Afghanistan: The Wrong Voting System’ *New York Times* (New York, 16 March 2005): <https://www.nytimes.com/2005/03/16/opinion/afghanistan-the-wrong-voting-system.html>; Geoffrey Swenson ‘Why U.S. Efforts to Promote the Rule of Law in Afghanistan Failed’ (2017) 42 Int. Secur. 114, 147-148.

¹²⁴ Cas Mudde and Cristobal Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press 2017) 50-51.

¹²⁵ Johnson TH, *The 2019 Presidential Election: A Continuation of Problematic Processes and Results* (AISS 2020) 8: https://aiss.af/assets/aiss_publication/Final_AISS_2019_election_Paper-English.pdf.

¹²⁶ Rubin BR, ‘Afghanistan: The Wrong Voting System’ (n 123); Loyn (n 76) 42.

¹²⁷ Carey and Reynolds (n 11).

of the opponent parties to mobilise voters behind a slate of candidate.¹²⁸ Karzai for the same purpose embraced the system in Afghanistan to create a “hostile environment for political parties”¹²⁹ because such parties could have put strong checks on his power through a coherent parliament and robust opposition. The decision over the parliamentary elections system once again shows the fragility of separation of powers and the immense power of Afghanistan’s president.

iii. High Threshold in Overriding President’s Veto

As previously mentioned, if a bill had been passed by both houses of the National Assembly would not have turned into law automatically, it needed to be endorsed by the president. “In case the president [rejected] what the National Assembly [had] approved, the president would send it back (...) to the House of People”.¹³⁰ In order to override the president’s veto, the approval of two-thirds of all the votes of the House of Representative was required.¹³¹ A quorum of two-third of the House of Representatives to override the president’s veto was a high threshold which in most cases was difficult to achieve. Afghanistan was among few countries where the president’s veto could be overridden only by a supermajority of the House of Representatives. In countries like Brazil, Nicaragua, Uruguay an absolute majority is required. Venezuela requires a threshold of a simple majority. Moreover, the presidents in Sri Lanka and Indonesia have no veto powers or only a simple majority is needed to override the veto.¹³² Therefore, for the president of Afghanistan, it was very easy to veto the bills he did not like, and the House of People was not coherent enough on all issues to overcome presidential veto. In addition, the Constitution’s silence on the kind of presidential veto had further empowered the president. The 2004 Constitution was not clear whether the veto was package veto or item veto, however, in practice, the president used item veto enabling him to keep his favoured items in the law while removing the unfavourable items without any need to compromise with the National Assembly. It is worth noting that in the presidential system item veto power is not so common. For example, of 23 Latin American countries, 15 constitutions do not provide the president with item vetoes.¹³³ Thus, given what has already been said, the 2004 Constitution had damaged the balance of power between the executive and legislature in favour of the former.¹³⁴

iv. Presidential Decrees

The 2004 Constitution vested strong legislative decrees authority to the president. Under article 79 of the Constitution, “in case of immediate need”, the president could

¹²⁸ Andrew Reynolds and John Carey, ‘Fixing Afghanistan’s Electoral System: Argument and Options for Reform’ (2012) AREU 6: <https://www.refworld.org/docid/5003f05a2.html>; Maley (n 33) 260.

¹²⁹ Loyn (n 76) 41.

¹³⁰ Constitution of Afghanistan 94.

¹³¹ *Ibid.*

¹³² Grote (n 19) 909; Sadr (n 5) 67.

¹³³ Mohammad Bashir Mobasher, ‘Examining Ethnic Accommodation and Coalition-Building Under Alternative Forms of Government in Afghanistan’ (2019) 2 J. of Afghan Legal Studies 169, 189-190.

¹³⁴ Grote (n 19) 909; Sadr (n 5) 67.

bring draft laws into force by decree when the parliament was not in session. However, legislative decrees were required to be presented to the parliament within thirty days of convening its first session and if rejected by the National Assembly, they became void. In practice, apart from this authority, presidents of Afghanistan had issued decrees (Farman), orders (Hokum) and verbal direction (Hidayat Shafaei). They had also established the presidential Follow up Bureau in each administrative body to implement their orders and verbal directions.¹³⁵ Although the Constitution included the legislative decree by the president as an emergency power, it was used as the “more expeditious means to pass law”.¹³⁶ Therefore, the president always tended to rule by decrees. There is no statistics on the exact number of legislative decrees by Ghani and Karzai during their tenures. This authority, indeed, empowered the presidents to bypass the parliament and make ordinance whenever they wanted.¹³⁷ For example, when Justice Adul Salam Azimi’s term ended, the president extended his term and appointed him as Acting Chief Justice, a position not provided for in the Constitution and without the approval of the parliament. To bypass the parliament, indeed, he chose to appoint the chief Justice via a presidential decree.¹³⁸ This example, out of many, displays an abuse of power by the president, and in its turn, it is a clear sign of failure of constitutional constraints.

v. *Budgetary Inability*

According to the Constitution, the Parliament was provided with authority to approve the “state budget”.¹³⁹ However, if for any reason the budget was not approved before the beginning of the new fiscal year, the budget of the previous year would have been applied. The House of representatives could not have delayed the approval of the budget for more than one month. Therefore, the parliament had limited capacity to use the approval of the budget as a means of exercising pressure on the government. The House of Representatives was not empowered, for example, as the US Congress to bring the functioning of the whole of government to a halt by refusing to approve the state budget.¹⁴⁰ In this way, the Constitution significantly had undermined the parliament’s check on the executive and left in place an unbridled president.

b. *The Judiciary*

The independence and competence of the judiciary are integral part of a functioning democracy.¹⁴¹ Even though the Constitution stipulated that the judiciary was an independent body in Afghanistan,¹⁴² due to flawed institutional design, the president

¹³⁵ Sadr (n 5) 68.

¹³⁶ Wang (n 68) 244-245.

¹³⁷ Sadr (n 5) 68-69.

¹³⁸ Hamidi and Jayakody (n 3) 17.

¹³⁹ Constitution of Afghanistan 90(3).

¹⁴⁰ Congressional Research Service, ‘Past Government Shutdowns: Key Resources’ (June 2021) 13: <https://crsreports.congress.gov/product/pdf/R/R41759>.

¹⁴¹ Bisarya (n 6) 38.

¹⁴² Constitution of Afghanistan 116.

enjoyed strong position in relation to the judiciary.¹⁴³ In the past two decades, the judiciary functioned as a weak organ and was “perceived to primarily serve the political will of the president”.¹⁴⁴ This section addresses how a fragile separation of powers had sacrificed the independence of the judiciary in favour of the executive.

i. Judicial Appointments and Judicial Budget

A cursory look at modern history of the judiciary in Afghanistan demonstrates that it was consistently subordinate to the executive.¹⁴⁵ The 2004 Constitution also followed the suit and provided the president with unduly role in judicial appointments. The president not only had the authority to appoint the justices of the Supreme Court but also discretion to appoint the chief justice of the Supreme Court.¹⁴⁶ The president retained significant control over the appointment and dismissal of lower court judges, which in effect gave “the president significant influence over how the entire judiciary [was] constituted”.¹⁴⁷ Not only judicial appointment to lower courts required the approval of the president, the president also enjoyed the authority to retire judges and accept the resignations and dismissal of lower court judges.¹⁴⁸ Some argue that the judicial appointments process is completely the same as those of high-level appointments in the executive.¹⁴⁹

It is important to note that unlike many democratic countries in which supreme court justices are appointed for lifetime, in Afghanistan, justices were cherry picked for a specific period: ten years.¹⁵⁰ Since they did not serve lifetime, they were dependent on the president to be given another position once their term is over. This mentality caused the judiciary to please the president in every case related to the executive.¹⁵¹ Moreover, the president also controlled financial and administrative affairs of both the courts and the prosecution offices, which was a breach of the system of checks and balances. The Constitution provided that the judiciary’s budget be prepared “in consultation with the Government, and (...) presented to the National Assembly as part of the national budget”.¹⁵² This arrangement was similar to the budgetary process envisioned for the executive and exposed the judiciary to politicisation as the presidency wielded significant control over the courts’ financial affairs.¹⁵³ Such a mechanism, on numerous occasions, enabled the presidents to use “budgetary restraints as a means of applying pressure on the Supreme Court”.¹⁵⁴

¹⁴³ Grote (n 19) 906; Swenson (n 123) 119.

¹⁴⁴ Wang (n 68) 226.

¹⁴⁵ Hamidi and Jayakody (n 3) 20.

¹⁴⁶ Constitution of Afghanistan 117.

¹⁴⁷ Hamidi and Jayakody (n 3) 16.

¹⁴⁸ Ibid 16; Hakimi (n 113) 26.

¹⁴⁹ Hakimi (n 113) 26.

¹⁵⁰ Constitution of Afghanistan 117.

¹⁵¹ Rahimi (n 13) 157.

¹⁵² Constitution of Afghanistan 125.

¹⁵³ Sadr (n 5) 72; Hakimi (n 113) 27.

¹⁵⁴ Lorenzo Delesgues, Yama Torabi, *Reconstruction National Integrity System Survey* (Integrity Watch Afghanistan 2007) 55: https://reliefweb.int/attachments/7d1637e1-fbc6-3ffd-8a85-25c4d5f456d9/B2FE48DFAF8DA8974925746A0018CC8B-Full_Report.pdf.

ii. *Judicial Review and Constitutional Interpretation*

The 2004 Constitution of Afghanistan significantly limited the Supreme Court's authority through ambiguous provisions regarding judicial review and constitutional interpretation.¹⁵⁵ Such constitutional ambiguities, indeed, helped the executive to engage in 'abusive' constitutional practices and exploit the constitutional order in an authoritarian way.¹⁵⁶ Article 121 of the Constitution stipulated that the Supreme Court shall be capable of reviewing the "laws, legislative decrees, international treaties (...) for their compliance with the Constitution and their interpretation in accordance with the law". Although this article granted the Supreme Court the authority to exercise judicial review, it was not clear enough in granting the Court the authority to interpret the Constitution's equivocal provisions. During the entire lifetime of the Constitution (2004-2021) there was no consensus on how the Constitution should be interpreted. In this regard, the Supreme Court had a tough rival: The Independent Commission for overseeing the Implementation of the Constitution (hereinafter, the Commission).¹⁵⁷ The Constitution established the Commission but did not grant the interpretation job to it explicitly. It also did not specify what powers the Commission would enjoy. This ambiguity paved the way for the president to use both institutions in pursuit of his different political objectives.¹⁵⁸ Afghanistan's president, in such climate, began to "play a strategic role, submitting simultaneous request for judicial review and constitutional interpretation to both the Supreme Court and the Commission as a means of hedging bets in case one institution offered a more favourable opinion".¹⁵⁹

For example, Karzai questioned the results of parliamentary election in 2010.¹⁶⁰ IEC accepted the fraud; however, argued that it had the power to hear and resolve electoral complaints. Karzai ignored IEC's claim and set up a Special Election Court (SEC) to settle the electoral disputes. There was no law in Afghanistan to ask for a special court to review election results. The Constitution and electoral laws had placed the authority to resolve electoral disputes in the IEC and the Independent Election complaints Commission (IECC). Once the issue of constitutionality of SEC turned into a hot topic, the Commission publicly declared its opinion that SEC was unconstitutional arguing that the IEC and the IECC had the power to settle electoral disputes. Given that the Commission declared the SEC unconstitutional, Karzai requested the Supreme Court to review the constitutionality of the SEC. Unsurprisingly, the Court ruled that the establishment of the SEC to investigate electoral disputes was constitutional.¹⁶¹ This

¹⁵⁵ Hakimi (n 113) 26.

¹⁵⁶ Pasarlay S, 'Fatal Non-Evolution: Afghanistan's 2004 Constitution and the Collapse of Political Order' (*Verfassungsblog*, 09 September 2021): <https://verfassungsblog.de/fatal-non-evolution/>.

¹⁵⁷ Constitution of Afghanistan 157.

¹⁵⁸ Pasarlay S, 'Fatal Non-Evolution' (n 156).

¹⁵⁹ Shamshad Pasarlay, 'The Limits of Constitutional Deferral: Lessons from the History of the 2004 Constitution of Afghanistan' (2018) 27 Wash. Int'l L.J. 683, 703.

¹⁶⁰ *Ibid* 704.

¹⁶¹ *Ibid* 703-704.

example, along with many others, show that the Supreme Court's approach to judicial review had made it a dangerous tool for advancing executive interests.¹⁶² The political branches accepted neither the Supreme Court nor the Commission's decisions as binding. Therefore, constitutional violations, including the president's abusive constitutional moves remained unaccounted for.¹⁶³

Furthermore, Article 121 also limited the exercise of the review power only to requests by the government and lower courts. Given that the president had got the government firmly under his thumb and made all appointments to lower courts, the president enjoyed a monopoly on who could have requested a judicial review.¹⁶⁴ Meanwhile, in neighbouring Pakistan, like many other countries, not only political parties or opposition, even at the request of ordinary citizen the laws are reviewed and shall be declared null and void if run against the accepted principles.¹⁶⁵ As per Afghanistan's Constitution, by contrast, neither the opposition nor the members of the parliament could have initiated constitutional review proceeding before the Court. The lack of standing afforded to anyone politically opposed to the president was unduly restrictive and the monopoly on request for judicial review by the executive had significantly weakened the capacity of the judiciary to function as a check on the president.¹⁶⁶

iii. Lack of Jurisdiction in Certain Cases

The 2004 Constitution further undermined the judiciary by curtailing its jurisdiction in certain cases, including those involving ministers¹⁶⁷ and military personnel, which were supposed to be solved by tribunals overseen by the executive.¹⁶⁸ This encouraged the executive to flout the rules applicable to the security forces and cabinet members. In early 2021, for instance, 42 civilians engaged in a peaceful protest in the Behsud district of Maidan Wardak Province were killed and wounded by security forces led by Allahdad Fedae. ¹⁶⁹ No tribunal was established to hear the case and someday later, Fedae was appointed as the police chief of Laghman Province. This event angered the public that perpetrators were never investigated, and the executive's abuse of power could not have been meaningfully checked.¹⁷⁰

It is also important to note that decisions of the courts are final; however, the president was granted the power to reduce and pardon penalties and provide final approval for cases involving capital punishment.¹⁷¹ Absent any statutory guidelines, the presidents in Afghanistan exercised this power solely at their discretion. In a case, the three perpetrators allegedly with connection to Karzai were pardoned after being found

¹⁶² Ghizaal Haress, *Judicial Review in Afghanistan: A Flawed Practice* (AREU 2017) 4: <https://www.refworld.org/docid/59ad1c874.html>.

¹⁶³ Pasarlay S, 'Fatal Non-Evolution' (n 156).

¹⁶⁴ Hamidi and Jayakody (n 3) 18.

¹⁶⁵ Kamali, 'Afghanistan's Constitution Ten Years On' (n 78) 4.

¹⁶⁶ Grote (n 19) 911; Hamidi and Jayakody (n 3) 18.

¹⁶⁷ Constitution of Afghanistan 78.

¹⁶⁸ *Ibid* 122.

¹⁶⁹ Hakimi (n 113) 27.

¹⁷⁰ *Ibid*.

¹⁷¹ Constitution of Afghanistan 129 and 64(18).

guilty of gang raping their victim in Samangan province. This was criticised as not only undermining the finality of court decisions, but also violated the fundamental rights and rule of law.¹⁷² Ghani also misused this power on several occasions. For instance, in 2019, Khalilullah Ferozi, ex-CEO of Kabul Bank, who was convicted of fraud in the bank's scandal was released by Ghani's decree. The decree stated that Ferozi would be released due to his poor health condition. The investigation, later, concluded that Ferozi's release was illegal, and he should have either been held in the prison or hospital. The release of Ferozi a few months before the presidential election suggested that there had been a deal between Ferozi and Ghani.¹⁷³ Although the investigation team declared the executive decisions illegal, the Supreme Court kept silent and uttered no word. Considering what went above, there is almost a consensus among scholars that fragile separation of powers granted only nominal independence to the judiciary. The judiciary, particularly the Supreme Court, was a servile body, essentially functioning as an extension of the executive.¹⁷⁴

IV. A DEMOCRACY WITHOUT DEMOCRATS

When the US invaded Afghanistan in 2001, it faced a deeply divided country in which every ethnic and religious group had their own experience from years of internecine conflicts on which allegiances had been formed. Rather than recognising the diversities on the ground and designing a political system that could have included all groups, the international community lobbied by western-educated Pashtun elites, set up a highly centralised system.¹⁷⁵ Despite the popular insistence on a power-sharing mechanism in which all groups would have felt included,¹⁷⁶ the international community re-established the old political system that Afghanistan inherited from its authoritarian past and the people were not given the opportunity to design something new based on new realities. By so doing, among other things, "norms of self-governance which characterised most parts of the country" were ignored with abandon.¹⁷⁷

Pashtun elites historically have been resistant to the idea of sharing power with other ethnic groups in Afghanistan. After 2001, their reluctance of adapting to changes brought about by years of civil war was obvious in the CLJ. Pashtun elites believed that a strong central government was necessary to prevent regional division and disintegration of the country. They rejected the idea of local governance, labelling those who advocated "regional autonomy and less presidential power as tools of the warlords

¹⁷² Hamidi and Jayakody (n 3) 19.

¹⁷³ Sadr (n 5) 73.

¹⁷⁴ International Federation for Human Rights, 'Human Rights at a Crossroads: The Need for a Right-Centred Approach to Peace and Reconciliation in Afghanistan' (May 2012) 27: https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/AFG/INT_CCPR_NGO_AFG_105_7910_E.pdf; Sayed Ziafatuallah Saeedi, 'How Afghanistan's Judiciary Lost Its Independence' Diplomat (Washington, D.C., 05 June 2019): <https://thediplomat.com/2019/06/how-afghanistans-judiciary-lost-its-independence/>.

¹⁷⁵ Murtazashvili, 'The Collapse of Afghanistan' (n 12) 42.

¹⁷⁶ At a referendum held by Constitutional Drafting Commission in 2003, 75 percent of people had voted for a parliamentary system (power be shared between the president and the premier). Constitutional drafters with regards to the background and efficiency of parliamentary system in the country were also proponents of a parliamentary system. For more refer to: Zalmay Nishat, Irfani and Mohammadi (111) 14.

¹⁷⁷ Ibid; Carey and Reynolds (n 11); Alexander Their, 'The Making of A Constitution in Afghanistan' (2003) LSE 12: http://eprints.lse.ac.uk/28380/1/Thier_LSEFO_version.pdf.

or of ethnic blocs.”¹⁷⁸ While devolving a reasonable amount of political authority to provinces and redressing the imbalance between national and local governance was not a step “towards Afghanistan’s disintegration [as Pashtun elites argued] but a way to avoid it.”¹⁷⁹ Such a reform by building interethnic trust among different groups who favoured some degree of autonomy¹⁸⁰ could have solved the dilemma that was standing in the way of nation-building for centuries in Afghanistan. In 2001, indeed, no leader of any political stripe or ethnicity was eager to break the country into smaller parts. Although they disagreed about how the country should be organized, they all proclaimed their support for the integrity of Afghanistan.¹⁸¹ In recent years, however, due to continued policy of marginalisation of non-Pashtuns, some secessionist ideas took shape among non-Pashtun major ethnic groups.¹⁸² Nowadays, By the 2021 collapse of the government and the brutal oppression of non-Pashtuns by the Taliban, the idea of disintegration has turned into a strong discourse to non-Pashtuns.¹⁸³ If the devolution of power from the center to provinces, which was vaguely enshrined in article 137, had been implemented, political participation would have been very high in provinces and no group would have felt excluded from power. The popular Sense of being involved in politics and participation in political decision-making not only could have reinforced the government’s legitimacy, but also undermined the insurgent groups. By contrast, the central government by enjoying unbridled power invested most of its efforts and energy in micromanaging provincial affairs in favour one ethnic group that caused public anger and distanced the people from the government over time.

During Karzai administration, the government had, to some extent, multi-ethnic composition, however, this was not codified and existed only “at the whim of the sitting president.” There was no constitutional guarantee that made the president to share power with other groups to maintain that “balancing act”.¹⁸⁴ This danger loomed larger and lack of meaningful constitutional checks on the president’s power became clearer when Ghani took the office in 2014. Enjoying immense power, made Ghani “increasingly paranoid” over time, which led him to expel non-Pashtuns from the government and trusted only a few people, of ethnic Pashtun, around him in the presidential palace.¹⁸⁵ In an interview with TOLONews in August 2019, Ashraf Ghani was challenged due to the nonrepresentative makeup of his team. The journalist showed photos of his different meetings with foreign delegates displaying that his team members were entirely of Pashtun elites. Even one non-Pashtun was not present in his circle. As the interview was

¹⁷⁸ Thomas Barfield, ‘Afghanistan’s Ethnic Puzzle: Decentralizing Power Before the U.S. Withdrawal’ (2011) 90 (5) *Foreign Aff.* 54, 62.

¹⁷⁹ Ibid 55; Hamidullah Qeyam, ‘Ethnicization of Politics in Afghanistan’ (MA thesis, University of Texas 2012) 47.

¹⁸⁰ Amin Saikal, *Modern Afghanistan: A History of Struggle and Survival* [I.B. Tauris & Co Ltd 2004] 206.

¹⁸¹ Barfield, ‘Afghanistan’ (n 10) 8.

¹⁸² Ahmad Zaki Poyanda, ‘Afghanistan and the Risk of Disintegration’ *Payam Aftab* (Kabul, 9 July 2018): <https://www.payam-aftab.com/fa/article/81813/%D8%A7%D9%81%D8%BA%D8%A7%D9%86%D8%B3%D8%AA%D8%A7%D9%86-%D8%AE%D8%B7%D8%B1-%D8%AA%D8%AC%D8%B2%DB%8C%D9%87>

¹⁸³ Barfield, ‘Afghanistan’s Ethnic Puzzle’ (n 178) 63; Mohammad Moheq, ‘The Taliban and the Politics of Expedition: Why Drive Afghanistan toward Disintegration’ *8am* (Kabul, 14 September 2022): <https://8am.af/taliban-and-campaign-policy-why-are-they-pushing-afghanistan-towards-disintegration/>.

¹⁸⁴ Reynolds (n 7) 52.

¹⁸⁵ Murtazashvili, ‘The Collapse of Afghanistan’ (n 12) 50.

being broadcasted live, Ghani faltered and angrily attacked the journalist saying twice “what is your problem.” Since he did not have an answer, Ghani tried to cover up the issue by pressuring the journalist.¹⁸⁶ By this time, indeed, the significance of ethnic belongings was crystal clear. As it had already been clearly argued by non-Pashtuns representatives in CLJ in 2003, strong presidentialism had led to “personal and ethnic dictatorship” in Afghanistan.¹⁸⁷ The 2004 Constitution, indeed, had given birth to a political system that not only could have created a unifying umbrella to cover all people so that no group felt left behind, but by putting one ethnic group above other ones even further deepened ethnic cleavages.¹⁸⁸

During his final years in power, Ghani limited his inner circle to only two Pashtun advisors, chief of staff Fazel Fazly and national-security advisor Hamdullah Mohib. The people who were suffering from an unfriendly government, satirically, called this small clique the “Republic of Three”.¹⁸⁹ Thus, having in mind the two dimensions of centralisation, it goes without saying that the 2004 Constitution of Afghanistan had produced a highly centralised system of government in which terms such as ‘Republic’ and ‘democracy’ were mere misnomers.

The reasons why Ghani’s government fell surprisingly in the hand of a far weaker insurgent group are multiple and interwoven. First, it is widely argued that the government collapsed because it had lost legitimacy in the eyes of the people and they had every reason to consider it illegitimate.¹⁹⁰ Ghani who had become the president under an agreement requiring him to share power with other political elites, free from constitutional constraints, chose a policy of ultra-centralisation and side-lined non-Pashtun elites. Concentration of power in a small circle of his confidants in Kabul and ignoring popular voice coupled with controversial presidential election, reinforced the public distrust of the government and fatally “undermined its legitimacy”.¹⁹¹ A comparison of presidential elections turnouts might be useful here to gauge the government’s legitimacy after the US intervention. At early years of the intervention, the public support of the government was very high. Many citizens of Afghanistan were excited about participating in political processes in 2004, but over time, public participation lost momentum. On the first presidential election that was held in 2004, for instance, the turnout was over 70 percent, while in 2019 only 20 percent voted in presidential election.¹⁹² Although insecurity was to partially blame in 2019, but the very low number of voters is a clear indication of “people’s declining trust in the system and its ability to produce effective results”.¹⁹³

¹⁸⁶ Lotfullah Najafizada, ‘Exclusive Interview with President Ashraf Ghani’ (22 August 2019): <https://www.youtube.com/watch?v=ov-FliDh7w0&t=2906s>.

¹⁸⁷ Rubin, ‘Crafting a Constitution for Afghanistan’ (n 32) 12.

¹⁸⁸ Barfield, ‘Afghanistan’s Ethnic Puzzle’ (n 178) 55.

¹⁸⁹ Murtazashvili, ‘The Collapse of Afghanistan’ (n 12) 50.

¹⁹⁰ Ibid 41.

¹⁹¹ Pasarlay S, ‘Fatal Non-Evolution’ (n 156).

¹⁹² Gul Maqsood Sabit, ‘Ending the War Won’t Solve Afghanistan’s Governance Problem’ *Diplomat* (Washington, D.C., 23 January 2020): <https://thediplomat.com/2020/01/ending-the-war-wont-solve-afghanistans-governance-problem/>.

¹⁹³ Yaqub Ibrahim, ‘What Kind of Government Do Afghans Want?’ *Diplomat* (Washington, D.C., 5 February 2020): <https://thediplomat.com/2020/02/what-kind-of-government-do-afghans-want/>.

Second, the intemperate rule of Ghani (2014-21) accelerated government collapse. Ghani who had only a “narrow base of support, micromanaged both the economy and the state” and discriminated against non-Pashtuns.¹⁹⁴ In 2017, a leaked memo from inside the presidential administration “appeared to show government jobs being awarded with an eye to keeping control in the hands of Pashtuns”.¹⁹⁵ Non-Pashtuns, the memo added, “should be appointed symbolically so that people think every ethnicity is represented here”.¹⁹⁶ Such discriminatory moves against non-Pashtuns, who believed, the memo was only the tip of the iceberg and centralisation has always been a recipe for Pashtunisation of Afghanistan,¹⁹⁷ dealt Ghani’s legitimacy another death blow and widened the gap between the people and Ghani’s regime. Many had expected that as a western-educated erudite, who has a doctorate in anthropology and had worked for the World Bank, Ghani would run the country as a technocrat. Yet he behaved in an authoritarian and discriminatory way.¹⁹⁸ The poorly designed Constitution of 2004 had provided the president with the power that he could almost do whatever he wanted and such uncontrolled manoeuvres, among other factors such as the Doha Talks, finally played a considerable role in the collapse of Ghani’s regime.¹⁹⁹

Finally, the continued process of weakening the Northern Alliance who were natural enemies of the Taliban played a major role in the survival of the Taliban and the collapse of the government. After 2004, Pashtun elites along with the international community planned to “break the back” of the Northern Alliance.²⁰⁰ Although the Northern Alliance helped the international community to defeat the Taliban in 2001,²⁰¹ they had been being pushed to the side-lines after 2004 and were never given the power they expected. As the Northern Alliance became weaker, more districts in the “north fell to the Taliban forces”.²⁰² Furthermore, by marginalising the Northern Alliance, the gap between Pashtun elites who monopolised power and the Northern Alliance leaders, some of whom were from democratic perspective very strong due to having huge popular base of support,²⁰³ widened. When in the last days of his presidency, Ghani called upon the Northern Alliance to fight the Taliban, they were not eager to put their lives on the line to save Ghani’s regime. If the Constitution was engineered in way that shared powers among different groups at national and provincial levels that all elites felt included and had the government been considered legitimate by the people, the Taliban, a far weaker insurgent group, “would not have had a fighting chance inside of

¹⁹⁴ Murtazashvili, ‘The Collapse of Afghanistan’ (n 12) 41.

¹⁹⁵ Reuters, ‘Leaked Memo Fuels Accusations of Ethnic Bias in Afghan Government’ (Reuters, 21 September 2017): <https://www.reuters.com/article/us-afghanistan-politics-idUSKCN1BW15U>.

¹⁹⁶ Ibid.

¹⁹⁷ Santos (n 8).

¹⁹⁸ Murtazashvili, ‘The Collapse of Afghanistan’ (n 12) 41-42.

¹⁹⁹ Pillalamarri (n 10).

²⁰⁰ Khalilzad, The Envoy (n 96) 226.

²⁰¹ Kathy Gannon, ‘AP Interview: Afghan Warlords Slams Govt, Quick US Goodbye’ AP News (New York, 9 July 2021): <https://apnews.com/article/joe-biden-middle-east-ab1a73500ff11f6d650f562a462f5bfe>.

²⁰² Murtazashvili, ‘The Collapse of Afghanistan’ (n 12) 50.

²⁰³ Eltaf Najafizada and Archana Chaudhary, ‘How Ashraf Ghani went from Afghanistan’s president to villain hiding in UAE’ The Seattle Times (Washington, 18 August 2021): <https://www.seattletimes.com/nation-world/how-afghanistans-ghani-went-from-president-to-villain-hiding-in-uae/>.

Afghanistan".²⁰⁴ In other words, had the Constitution not established a highly centralised system and given way to the formation of a broad-based, multi-ethnic, fully representative, and accountable government, the fire of insurgency would never have been lit.²⁰⁵

V. CONCLUSION

Knowing what went wrong in Afghanistan is of essential importance for both people of the country and the international community. Firstly, it helps us to understand Afghanistan's future trajectory and secondly, gives us insight to avoid repeating the fatal blunders were made after 2001. The 2004 Constitution was drafted and ratified in haste and did not match the ethnic and political realities on the ground. The Constitution designed a 'centralised, autocratic structure of governance'. In the absence of meaningful separation of powers and strong checks on the president, he enjoyed unbridled powers and discretions. The 'awkward Constitution', ignoring the ethnic and cultural diversity of the country, enabled the president to appoint all officials single-handedly. The appointments, with an eye to keep control in the hands of one specific ethnic group, were usually made as political favour, further extended the president's network of allies. The appointment was not confined to Kabul-based authorities, president also cherry picked all provincial officials, from governors and mayors to public universities chancellors and even schoolteachers.

The Constitution, indeed, created an exclusionary centralised presidential system in which the president could be held accountable neither by the parliament nor the people directly. The president who was constitutionally head of all three branches of the government could exercise authority in the executive, legislative and judicial fields simultaneously. In the absence of significant accountability mechanism coupled with granting colossal power to the president, the Constitution sowed the seeds of systemic corruption and made the abuse of power almost inevitable. It is widely held that Afghanistan's president much more resembled a king rather than the head of a democratic republic. By the monopoly of power in the few hands, the terms 'republic' and 'democracy', like many other terms, had been evacuated of their meaning or significance in Afghanistan.

The constitutional making process was heavily dominated by Karzai and Khalilzad. Karzai, who was widely believed to be the next president of Afghanistan along with his Pashtun western-educated circle strongly argued for a strong presidential system to control the country single-handedly and marginalise his non-Pashtun rivals. The United States also preferred such a system because it was assumed that a strong central government might expedite nation building and create unity of command, making it easier to monitor its mission in Afghanistan and coordinate with one central player rather than being involved with many actors. Therefore it is safe to say, the United

²⁰⁴ Murtazashvili, 'The Collapse of Afghanistan' (n 12) 42.

²⁰⁵ Ibid.

States sacrificed efficiency on the altar of simplicity. The flawed constitutional design blocked the path to the formation of a broad-based, multi-ethnic, fully representative, and accountable government. This exclusive design, *inter alia*, was a major element that eroded the government's legitimacy in the eyes of the people and finally led to its rapid collapse.