



Nuovi Autoritarismi e Democrazie:
Diritto, Istituzioni, Società

Centralism in the 2004 Constitution of Afghanistan

*Abdullah Shafae**

Abstract

[It.] Nel corso della sua storia, l'Afghanistan non ha avuto un sistema di separazione dei poteri con pesi e contrappesi. Anche la costituzione del 2004, che fu redatta in un contesto politico relativamente aperto, non riuscì a stabilire tale sistema. Concedeva al presidente eccessivi poteri esecutivi, legislativi e giudiziari, concentrando di fatto il potere nel ramo esecutivo. Questo centralismo favorì tendenze autocratiche. Il presidente interveniva nelle questioni legislative, aggirando i requisiti costituzionali e indebolendo il controllo legislativo. Allo stesso modo, l'eccessivo potere del presidente minava l'indipendenza del potere giudiziario, trasformandolo in uno strumento per perseguire i suoi interessi. La combinazione dei poteri esecutivo, legislativo e giudiziario del presidente, unita alla debolezza delle istituzioni di controllo, ha portato a un centralismo incontrollato. Questa concentrazione di potere ha indebolito lo stato di diritto, alimentato la corruzione, esacerbato gli squilibri di ricchezza e di potere ed eroso la fiducia dei cittadini nel governo. Ma soprattutto, il centralismo ha esacerbato le tensioni etniche nel paese. Il presente contributo, basato sull'esperienza dell'autore con la Commissione di Supervisione Costituzionale in Afghanistan, utilizza un approccio descrittivo e analitico. Sostiene la necessità di decentralizzare il potere in qualsiasi futura costituzione, al fine di stabilire un sistema di governo moderno e stabile in Afghanistan.

[En.] Throughout its history, Afghanistan has lacked a system of separation of powers with checks and balances. Even the 2004 constitution, which was drafted in a relatively open political environment, fell short of establishing such a system. It granted the president excessive executive, legislative, and judicial powers, effectively concentrating power in the executive branch. This centralism fostered autocratic tendencies. The President intervened in legislative matters, bypassing constitutional requirements and weakening legislative oversight. Similarly, the president's excessive power undermined the independence of the judiciary system, turning it into a tool to pursue his interests. The combined executive, legislative, and judicial powers of the president, coupled with weak oversight institutions, led to unchecked centralism. This concentration of power weakened the rule of law, fueled corruption, exacerbated wealth and power imbalances, and eroded public trust in the government. More importantly, this centralism exacerbated ethnic tensions in the country. The present contribution, informed by the author's experience with the Constitutional Oversight Commission in Afghanistan, follows a descriptive and analytical approach. It

* Abdullah Shafae holds a doctorate in private law; he was a professor at Ibn Sina University in Kabul and a member of the Independent Commission for Monitoring the Implementation of the Constitution. He has published various articles and books on Afghan law. He is currently a visiting researcher at the University of Milan and University of Padua. The article was peer-reviewed by the Editorial Board. Member of the Editorial Staff that oversaw the text: Edoardo Maria Landoni.

argues that there is a need for decentralizing power in any future constitution in order to establish a modern and stable governance system in Afghanistan.

Parole Chiave: Afghanistan – Costituzione – Centralismo – Stato di diritto – Pesi e contrappesi.

Keywords: Afghanistan – Constitution – Centralism – Rule of Law – Checks and Balances.

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1. Introduction

The 2001 United States-led international intervention in Afghanistan produced the establishment of a new political system in the country. Despite significant investments during the following two decades of international presence, few experts and analysts thought that the system would collapse on August 15, 2021. Several factors contributed to the collapse, marking the umpteenth failed attempt at building a stable modern government. This contribution, which is predominantly based on the author's firsthand experience within the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC), focuses on one key factor: the excessive power granted to the president by the 2004 Constitution, although this does not rule out the role played by other factors. This article examines the flaws within the Afghan Constitution's power structure, especially the issue of centralization, and its impact on the rule of law, and it is structured as follows. First, it gives an overview of the historical and political context of centralism in Afghanistan. This section explores the historical and political dynamics of centralism in Afghanistan. Second, centralism in the 2004 Constitution is analyzed by focusing on the president's legislative powers, the authority over the judiciary, and his executive power. Third, a case study is presented: the president's interference in the ICOIC. This section analyzes how president Ashraf Ghani used his power to interfere in the Independent Commission for Overseeing the Implementation of the Constitution, which was set up in 2010. Fourth, the article looks at the impact of centralism on the rule of law. This section examines how the concentration of power in the presidency affected the rule of law in Afghanistan. The concluding section draws conclusions to argue for decentralization in any future constitution-making.

2. Historical and Political Context of Centralism

Contemporary Afghanistan has gone through bloody wars and internal conflicts, which have hampered the development of a cohesive national identity. A key obstacle to the formation of a unified national identity has been the attempt to establish Pashtun hegemony and marginalize other ethnic groups. Over the past three centuries, Pashtun leaders have been at the helm of power. They actively pursued Pashtun interests while marginalizing other ethnic groups. One glaring example was the rule of Abdul Rahman in the late 19th century. He killed more than 62 percent of ethnic Hazaras and subjected them to dispossession and enslavement. Abdul Rahman gave Hazaras' fertile lands to fellow Pashtuns, and enslaved women and children, who were later sold in domestic and international markets¹. Abdul Rahman's rule epitomizes the extreme measures taken to establish Pashtun dominance in Afghanistan's history. Abdul Rahman also promoted religious extremism to mobilize the Sunni majority against the Hazaras, who were Shiites. This action institutionalized religious and ethnic hatred in Afghan society. Pashtun nationalist policies by governments in the 20th century further obstructed the formation of a national identity, as they concentrated power in the hands of the Pashtuns². Pashtun-dominated governments have consistently employed centralism and religious extremism as tools, which many scholars attribute to be the legacy of Abdul Rahman. These tactics have acted like a double-edged sword, undermining the modern state. Together with fundamentalism, Pashtun monopoly of power has been an important obstacle to the formation of a national identity and the participation of other ethnic groups in power.

In 2001, under the support of the international community, the interim government was first established under the presidency of Hamid Karzai³, and in 2004, the new

¹ For more studies about Hazara history and Hazara genocide see the cited bibliography at: R.D. MacCHesney and M.M. Khorrami (ed.), *The History of Afghanistan*, Brill, 2003; *Hazara Genocide in Afghanistan (1892-1901)*, in *Bolaq*, 2022, <https://www.bolaq.org/2022/05/hazara-genocide-in-afghanistan-1892-1901/>; Hazara Research Collective, *International Relations and Defence Committee: The UK and Afghanistan, Call for Evidence*, 2020, <https://committees.parliament.uk/writtenevidence/11165/pdf>.

² The term "Afghan" or "Oghan" is believed to be derived from the Pashto word for "cry". The Pashtun rulers have historically wielded significant influence in shaping Afghanistan. This influence is evident in the fact that they changed the country's name to Afghanistan, the currency to Afghani, the national anthem to Pashto (replacing Persian as the administrative and official language), as well as rewriting the official history of the country. The Taliban as Pashtun rulers of the country also destroyed Buddha statues of Bamiyan in 2001. Provide date. With the rise of the Taliban, the destruction of ancient monuments in Afghanistan has intensified. Washington reported that the Taliban were destroying ancient monuments with bulldozers, see: S. Sharma, *Afghanistan archaeological sites dating back to 1000 BC plundered under Taliban rule*, in *Independent*, 2024, <https://www.independent.co.uk/asia/south-asia/afghanista-taliban-archaeological-historical-sites-b2500425.html>.

³ In June 2002, a Loya Jirga, a traditional Afghan parliament, elected Karzai as head of the transitional government. In January 2004, a new Constitution was passed and it called for the direct

Constitution was approved. In the text, citizen's rights, human rights, women's rights, equality of Afghanistan's ethnic groups were guaranteed and discrimination and injustice were negated. Six kinds of elections were envisaged⁴, and the legitimacy of the government was considered to be based on the people's vote⁵. The government structure was based on the separation of powers. This Constitution raised many hopes at first. Ghani was elected as president thanks to the support of the United States and allied countries in the 2019 elections, which were widely considered controversial and fraudulent, with the aim of preserving Pashtun rule. The participation of the people in the elections was low and there was a large amount of fraud⁶. This is the reason why the results, which were announced after a relatively long time, were not accepted by the opposition, including Abdullah, the main rival of president Ashraf Ghani in the election. Assuming the necessity of maintaining Pashtun hegemony⁷, the international community supported a strong presidential system and inadvertently perpetuated a flawed political tradition⁸. This

election of the president. Later that year, Karzai won the presidential election and was sworn in. In 2009, Karzai ran again and remained in office for a second term until 2014: *Hamid Karzai*, Encyclopedia Britannica, 2024. See *Hamid Karzai*, in *Britannica*, <https://www.britannica.com/biography/Hamid-Karzai>.

⁴ Six types of elections were foreseen in the Constitution: presidential elections (Article 61), parliamentary elections (Article 83), provincial council elections (Article 138), district council elections (Article 140), village council elections (Article 140) and Municipality (Article 141). In addition, in Article 65 of the Constitution, referring to the general votes of the Afghan people (referendum) on important political, social and economic issues is considered one of the powers of the president.

⁵ Article 4 of the Constitution stated: «National sovereignty in Afghanistan belongs to the nation, which exercises it directly or through its representatives».

⁶ Although the Election Commission did not accept the presence of international observers to ensure the transparency of the elections, the media and the Afghan Analysts Network, which was a foreign organization, reported: «Although it was supposed to be conducted using biometric devices, 300,000 votes from one million and eight hundred thousand votes were taken without being registered in the biometric machine». Abdullah Abdullah wanted to cancel the votes without biometrics, which was opposed by the president Ghani. See more details in A.Y. Adeli, *Afghanistan's 2019 Elections (26): A Q&A about the ongoing election stalemate*, in *Relief Web*, 2019. <https://reliefweb.int/report/afghanistan/afghanistan-s-2019-elections-26-qa-about-ongoing-election-stalemate>.

⁷ Influenced by the tradition of the need to continue centralizing power and maintaining Pashtun hegemony, the international community supported a strong presidential system and inadvertently perpetuated a flawed political tradition. This historical tradition more or less existed in other government institutions. For example, when Mr. Hashemzai was dismissed from the chairmanship of the ICOIC, we consulted with my colleagues in the commission to replace him. My colleague Dr. Abdul Raouf Heravi, who was a Pashtun from Herat, considered himself worthy of the commission's chairmanship in a meeting based solely on the tradition that the presidency is the right of the Pashtuns. This was while others like Mrs. Ghezal Hares wanted to run for this post based on her work experience and competence. In response to Dr. Heravi, I said: «These rusty traditions are not valid in a constitutional monitoring institution. As a Hazara, I will be a candidate for this position based on my ability and competence also to fight against such outdated and worthless customs».

⁸ Based on this historical tradition that power should be concentrated in the hands of the Pashtuns, Dr. Ahadi, the head of the Afghan National Party and a minister in the cabinet of Ashraf Ghani and Hamid Karzai, in an article published in the journal of the University of California in 1995, described

overlooked the potential for such a winner-take-all centralized system to exacerbate existing ethnic tensions and serve as a source of corruption and discrimination.

3. Centralism in the Constitution of Afghanistan

In total, Afghanistan has experienced eight constitutions in the last century⁹. While the initial three constitutions were formulated during the era of the monarchy, the Constitution of Mohammad Zahir Shah (1963) notably curtailed the king's powers, prioritized citizen's rights and freedoms, endorsed electoral processes, and introduced partial separation of powers while initiating legal reforms. This marked a pivotal step towards modernizing civil and criminal laws. However, the advent of Daud Khan's coup ushered in an autocratic republic, eradicating the constitutional monarchy and concentrating power without any division of powers. Subsequent constitutions, such as those under Babrak Karmal (1980) and Dr. Najibullah (1987 and 1990), underscored the dominance of Soviet-aligned factions (Khalq and Parcham), resulting in centralized power with little separation of powers. Though Dr. Najibullah's 1990 Constitution aimed at decentralization to some extent, its implementation ceased following the collapse of his regime. The 2004 Constitution represented a notable improvement over its predecessors, particularly in terms of enhancing the separation of powers and reducing centralization. However, vestiges of past centralism still influenced the 2004 Constitution's structure.

While the 2004 Afghan Constitution enshrined a separation of powers in principle, in practice the executive branch, led by the president, held immense power and authority. Article 64 of the Constitution designated the president as the head of government and granted them extensive executive powers. These powers extended beyond managing the executive branch or leading the government, and allowed the president to intervene and influence other branches. The president exploited these authorities to interfere in legislative processes, control the judiciary, and make the Constitutional Oversight Commission ineffective. As a result, a genuine separation of powers was absent within Afghanistan's constitutional framework. The president's influence extended beyond the executive sphere, impacting both legislative and judicial domains. These distinct qualifications warranted separate scrutiny.

the fall of Dr. Najibullah's government and the emergence of Burhanuddin Rabbani's government as the decline of Pashtun power in Afghanistan and considered it more important than the fall of communism. See the article: A.H. Ahady, *The Decline of the Pashtuns in Afghanistan*, in *Asian Survey*, No. 7, 1995, 621-634.

⁹ Constitution of 1923 by Amanullah Khan; Constitution of 1931 by Nader Shah; Constitution of 1964 by Zahir Shah; Constitution of 1977 by Dawood Khan; Constitution of 1980 by Babrak Carmel; Constitutions of 1987 and 1990 by Najibullah and Constitution of the Islamic Republic of 2004 by Hamid Karzai.

3.1 *The Legislative Powers of the President*

The parliamentary, presidential, and provincial council elections were administered and overseen by the Independent Election Commission and the Electoral Complaints commission¹⁰. However, the members of these election management bodies were appointed and dismissed by the president¹¹. Additionally, the responsibility for inaugurating the annual sessions of the parliament rested with the president¹². Furthermore, the president could intervene in legislative matters and veto the legislation passed by the parliament through various means. The Constitution granted the president the authority to issue legislative decrees during parliamentary recess, for urgent matters, and in non-financial and budgetary matters¹³. However, Ghani abused this power by issuing decrees outside of these limitations. For example, during the parliamentary recesses, he issued presidential decrees on non-urgent matters and even amended existing laws. In fact, the number of presidential legislative decrees was equivalent to the number of laws passed by the parliament. In many cases, president Ghani chose not to sign legislative acts passed by the parliament.

Secondly, as stipulated in Article 84 of the Constitution, members of the Senate are elected in three ways: one third are appointed by the president; another third is composed by some members of the provincial councils (who are elected by themselves) and the remaining third are the members of the district councils who are also elected by the district councils as members of the Senate¹⁴. However, since the district council elections were never held, in order to ensure that the seats related to the district council in the Senate were not vacant, the Supreme Court ruled in 2005 that the provincial councils should send two representatives to the Senate instead of one representative. In 2010, president Karzai issued a decree and allowed the provincial councils to send two representatives to the Senate. In 2014, president Ghani said that he will call district council elections, and until then, the Senate should continue its work with two-thirds of its members (the members appointed by the president and the representatives of the provincial councils), without the members of the district council. Nevertheless, the district council elections were never held. The Senate worked with only two-thirds of its composition, half of which was chosen by the president himself. This was interpreted as Ghani's attempt to control and increase his influence on the Senate¹⁵. More significantly, the president overstepped his constitutional authority by attempting to remove and

¹⁰ Art. 156, 2004 Constitution.

¹¹ Art. 14, 2019 Electoral Law.

¹² Art. 64, 2004 Constitution.

¹³ Art. 79, 2004 Constitution.

¹⁴ Art. 84, 2004 Constitution.

¹⁵ A.Y. Adili, R. Soroush, S. A. Sadat, *The Stagnation of Afghanistan's State Institutions: Case studies of the Supreme Court, Senate, provincial councils and the constitutional oversight commission*, in *Afghan Analyst Network*, 2021, <https://www.afghanistan-analysts.org/en/reports/political-landscape/the-stagnation-of-afghanistans-state-institutions-case-studies-of-the-supreme-court-senate-provincial-councils-and-the-constitutional-oversight-commission/>.

replace specific Senate members. This was exemplified by the case of Bakhtar Aminzai¹⁶. Former president Ghani admitted that he dismissed and replaced Aminzai because he competed with the incumbent Senate's chair Muslimyar for the position of chairman of the Senate¹⁷.

Thirdly, the president refrained to promulgate legislation passed by the parliament that conflicted with his personal agenda. The president invoked Article 121 of the Constitution to refer such legislation to the Supreme Judicial Council for the review of its constitutionality. However, the Supreme Judicial Council often issued judicial decrees aligning with the president's directives, effectively nullifying specific sections of some laws in contravention of constitutional principles. A case in point is the Law of the Independent Commission for Overseeing the Implementation of the Constitution, which was passed by the parliament based on a simple majority. President Hamid Karzai declined to endorse it and sent it back to the parliament. Subsequently, Karzai referred it to the Supreme Judicial Council, which issued judicial decision annulling certain articles of the law¹⁸. These cases demonstrate the president's abuse of authority aimed at making the competence of the legislature ineffective.

Fourthly, there was a significant reduction in the parliament's oversight powers. A key mechanism through which the parliament exercised its oversight was establishing special commissions to investigate government's actions¹⁹. For example, when the parliament formed a commission to investigate the sale of land near the Kabul's airport in 2017 to Alkozay company, a financial supporter of Ashraf Ghani in 2014 elections, the commission considered the sale illegal and canceled the sale contract. However, the president's office sent several letters to the Commission for Overseeing the Implementation of the Constitution, asking it to rule against the parliament's decision. While the Commission refused to rule on the issue, this instance highlighted Karzai's attempt to undermine parliamentary oversight through unconventional methods.

Fifthly, the president deliberately undermined the parliament's oversight authority over cabinet ministers. In several instances, ministers who were impeached or the target of a vote of no confidence by the parliament, were reappointed as acting ministers for extended periods, so violating the Law on Acting Ministers and Officials, which limits the acting period to two months. As per constitutional principles, a minister who loses the parliament's vote of confidence

¹⁶ Bakhtar Aminzai, son of Muhammad Amin, was born in 1968 in the village of Dawolatzei of Paktia province. He was a member of the Senate during the republican system, but he was illegally expelled from the Senate by Ashraf Ghani in 2019. He is now the head of an organization called National Peace Jirga, see: *I Was Fired After Resisting Ghani's Order, Claims Senator*, in *Tolo News*, April 1, 2019, <https://tolonews.com/afghanistan/i-was-fired-after-resisting-ghani's-order-claims-senator>; *Aminzai, Bakhtar*, in *Afghan Biographies*, 2013, https://www.afghan-bios.info/index.php?option=com_afghanbios&id=166&task=view&total=5051&start=516&Itemid=2.

¹⁷ The report of Ashraf Ghani's speech about the removal of Bakhtar Aminzai because he was a candidate for the presidency of the Senate. See: <https://www.youtube.com/watch?v=hDIjEsCJJ1A>.

¹⁸ R. S. Moschtaghi, *Constitutional law in Afghanistan*, Max Planck Institute, 2008, 35.

¹⁹ Art. 89, 2004 Constitution.

loses legitimacy and cannot continue to serve as an acting minister. The Law explicitly states as follows: «If a ministerial candidate fails to secure a vote of confidence from the House of Representatives, or if a minister is disqualified during their tenure by the House of Representatives, they cannot be appointed as the acting minister of the same ministry or department»²⁰. The parliament's vote of no confidence to a minister or the rejection of a ministerial candidate signifies that the individual is not fit to lead the ministry.

Specifically, Article 5 of the Law regulating the supervision of ministries and government departments was repeatedly violated²¹. This was evident in cases involving the ministry of Mines and Petroleum, the Ministry of Foreign Affairs, and the ministry of Information and Culture. For instance, the nominee for the ministry of Mines and Petroleum continued leading the ministry for several months after failing to secure a vote of confidence from the House of Representatives. Moreover, the minister of Information and Culture resigned on October 19, 2015, and subsequently, the ministry was run by an acting minister for an extended period. Similarly, the minister of Foreign Affairs continued to hold office despite losing the confidence of the House of Representatives on October 21, 2015. An additional complication arose when the presidency contested the House of Representatives' decision of expressing a vote of no confidence to the Minister of Foreign Affairs. The presidential palace deemed it unjustified and referred the matter to the Supreme Court for review. However, the Supreme Judicial Council declined to issue a decision on this matter²².

3.2 Presidential Competences in the Judiciary

According to the Constitution, the president appointed the members of the Supreme Judicial Council and presented them to parliament for a vote of endorsement²³. It was customary for both presidents to appoint individuals aligned with his policies to this crucial judiciary position. Additionally, all judges were appointed by the president after successfully completing training courses and examinations. Furthermore, the president had the authority to sign off on matters related to judges' dismissal, resignation and retirement, as stipulated in the act governing the formation and jurisdiction of the judiciary²⁴. Leaving these matters to the discretion of the president paved the way for the interference of the executive in the judiciary. This practice also led to prolonged processes, and jeopardized judicial autonomy. In many instances, the court verdicts were nullified by the

²⁰ The 2013 Law Regulating the Supervision of Ministries and Government Departments, Official Gazette No. 1168.

²¹ *Ibidem*.

²² Independent Commission Overseeing the Implementation of the Constitution, *Legal Advice regarding the acting roles of the Ministers of Information and Culture, Mines and Petroleum, Ministry of Foreign Affairs*, May 20, 2018.

²³ Art. 117, 2004 Constitution.

²⁴ Art. 64(13), 132, 133, 2004 Constitution; Art. 5, Law Governing the Formation and Jurisdiction of the Judiciary.

president. The Constitution required the president's signature to execute death sentences issued by the courts²⁵. Nevertheless, the president refused to sign death sentences without giving a reason. Moreover, the president had the authority to pardon and reduce the punishment of prisoners, as enshrined in the Criminal Procedure Law. However, certain conditions in the law prevented amnesty or mitigation for some crimes²⁶. While the armed opponents of the government were being tried on the charges of terrorist acts based on the laws of Afghanistan, Ghani violated these laws and the judicial orders issued by the courts, and released thousands of Taliban prisoners in a political deal²⁷. Ghani also released Khalilullah Firuzi, who was sentenced to prison for embezzlement²⁸.

As per the Constitution, the Judiciary holds the authority to address all grievances of individuals and make judgments based on law provisions. Surprisingly, as documented by Supreme Judicial Council Case No. 150-75 (5/11/2013), the Secretariat of the Supreme Council barred the Supreme Court from adjudicating employment claims related to capacity building for results (CBR). This ban contradicted Article 51 of the Constitution, which granted anyone affected by administrative actions the right to appeal to the courts. Furthermore, Article 120 mandated the judiciary to address all claims. This deviation from the judiciary's core duty - to ensure justice and uphold the constitution - raised concerns. The Afghan Constitution granted excessive powers to the head of the executive branch, which paved the way for potential abuse, interference, and dominance over the other branches. Consequently, the president's judicial authority and his illegal actions and influence severely undermined the independence of the judiciary and hindered its ability to fulfill its duties, which were to provide justice and resolve conflicts.

3.3 The Executive Authority of the President

While the Constitution granted the president inherent authority to lead the executive branch, this power was not absolute²⁹. The president's exercise of authority had to comply with the law, a principle that was repeatedly disregarded by the presidents Ghani and Karzai.

²⁵ Art. 129, 2004 Constitution.

²⁶ Art. 352, 2014 Afghanistan Criminal Procedure Law.

²⁷ *Ashraf Ghani ordered the release of five thousand Taliban prisoners*, in *BBC news*, March 10, 2020, <https://www.bbc.com/persian/afghanistan-51828117>.

²⁸ *Khalilullah Ferozi was released from prison based on Ashraf Ghani's order*, in *Hasht-e Sobh*, August 14, 2019, <https://8am.media/fa/khalilullah-firozi-was-released-from-prison-on-ashraf-ghanis-order/>.

²⁹ Art. 64, 2004 Constitution.

3.3.1 Creation and dissolution of governmental departments without Parliament approval (violation of Art.90)

The Constitution, at Article 90, required the approval of the House of Representatives for the creation and dissolution of government's departments. However, the President Karzai and Ghani bypassed this requirement by unilaterally establishing and dissolving departments to shield executive functions from parliamentary oversight. He created parallel institutions alongside ministries, which were solely answerable to the president. This was a political maneuver aimed at diminishing the influence of ministers affiliated with rival political factions. For instance, the president, through presidential decrees dated January 2, 2017 and October 10, 2017, merged the Department of Lands with the Ministry of Urban Development and Housing and combined the Ministries of Transportation and Public Works with the Civil Aviation Department, Railway Department, and Traffic Department with the Ministry of Interior. All these mergers bypassed the parliament in contravention of Article 90 of the Constitution. Furthermore, the creation of the Inspectorate within the administrative office of the president (as per decree number 3 dated February 22, 2017) also violated several constitutional principles. First, it violated Article 90 by bypassing parliamentary competence on the establishment of departments. Second, the placement of this inspectorate within the president's office compromised the impartiality and independence of investigative bodies. Third, it encroached upon the existing oversight roles of the Supreme Audit Office, the Chief Inspector General, and the Supreme Anti-Corruption Bureau. Finally, concentrating the powers of implementation, legislation, and inspection within one entity contradicted the principle of separation of powers and the rule of law. This move politicized the fight against corruption and was inconsistent with Articles 4, 90, and 142 of the Constitution³⁰.

3.3.2 Failure to Hold Elections on Schedule

The executive branch's failure to hold the presidential, parliamentary and provincial council elections on time severely eroded the credibility and legitimacy of the system and undermined public confidence in the democratic essence of the country's political system. Therefore, failure to hold elections on schedule, coupled with widespread fraud and lack of transparency in electoral processes, was the most critical violation of the Constitution. The elections of the House of Representatives were delayed for three years, while the Provincial Council elections were postponed for a similar period of time, and the district and Municipal Council elections were never held. Consequently, the House of Representatives, a pivotal chamber of the legislature, continued to function extra-constitutionally for a prolonged period. Furthermore, as a result of the failure to conduct Provincial Council elections, Provincial Council members served extra-constitutionally for several years.

³⁰ Art. 4, 90, and 142, 2004 Constitution.

Similarly, one-third of the Senate members who were elected by the provincial councils also served extra-constitutionally. Over three electoral cycles, both presidential and parliamentary elections were not held on schedule, as required by the constitution³¹.

3.3.3 Violation of Equality in Elections

In the 2010 parliamentary elections in Ghazni province, all the 11 successful candidates were from the Hazara ethnic group and followed the Shiite faith. No Pashtun candidate secured a seat in parliament. President Karzai sought to replace several successful Hazara candidates with unsuccessful Pashtun candidates, a move that was opposed by the Independent Election Commission. In 2018, the Independent Election Commission made a controversial decision under the influence of the presidential office to redraw the electoral boundaries of Ghazni province³². This decision was met with widespread protests. The Constitutional Oversight Commission issued a legal opinion declaring the IEC's decision as unconstitutional and discriminatory³³. The plan was ultimately not implemented due to significant public opposition.

3.3.4 Withhold the Enactment of Laws and Refusal to Send Them Back to Parliament

As regards the adoption of the laws, the Constitution and the Law of Procedure outline the process for the publication and enforcement of laws³⁴. After the approval by the parliament, the laws must be sent to the president for enactment and promulgation. In some instances, the president withheld the enactment of certain laws or refused to send them back to parliament for amendment³⁵. This was a glaring failure to respect the constitution. Therefore, if a law is approved by the parliament, it will be sent to the president for ratification. If the president considers the law to be against the constitution, he returns it to the parliament with reasons. If the parliament approves the law with a two-thirds majority, there is no need for the approval of the president, the law will be published without the president's decree. Karzai sent the law of diplomatic and consular employees of the ministry of Foreign Affairs and the law of the ICOIC to the Supreme Judicial Council, despite the parliament's approval with two-thirds of the votes. The Supreme Council

³¹ See: Free House, *Only one article out of 162 articles of the constitution has not been violated*, *Khama press*, May 7, 2016, <https://www.khaama.com/persian/archives/36743>.

³² See: Ahmad Shafā'i, *Ghazni controversy; The government's solution to balance the representation of Pashtuns and Hazaras in elections*, in *BBC Persian*, June 27, 2018, <https://www.bbc.com/persian/afghanistan-44618034>.

³³ *The collection of Legal approvals and theories of the Independent Commission for Overseeing the Implementation of the Constitution*, 2014, 205.

³⁴ *The Law on Procedures for Publishing and Enforcing Legal Documents*, 2016.

³⁵ M. Ansar, *Dozens of draft bills waiting president's approval*, in *Tolo news*, 2017, <https://tolonews.com/afghanistan/dozens-draft-bills-waiting-president's-approval>.

amended both laws according to the opinion of the president and published them in the Official Gazette³⁶. In the Diplomatic Law, the parliament considered not having foreign citizenship as a condition for the employees of the ministry of Foreign Affairs, but according to Karzai's opinion, the Supreme Court considered this condition to be against the constitution and repealed it. Also, in the ICOIC Law, the parliament had given the authority to interpret the constitution to the commission, but the Supreme Court, according to the opinion of the president and contrary to the parliament, canceled some articles of this law.

3.3.5 Violation of Fundamental Rights of Citizens

The Afghan Constitution, in chapter two, emphasized the government's responsibility to protect civil liberties and fundamental rights. This includes preventing infringement upon these rights and treating all citizens equally under the law, regardless of their ethnicity, gender, language or religions. The Constitution also called for merit-based allocation of power, wealth, and opportunities in areas like employment and education³⁷. However, the Afghan government openly and covertly engaged in discriminatory practices against its citizens. In an attempt to increase certain ethnic groups' access to universities to the detriment of others, the government implemented official quotas for university entrance examinations. For instance, a Hazara student with a score of 314 was denied admission to college of officers, while a Pashtun student from the same province with a score of 128 was accepted³⁸. Government offices favored candidates from specific ethnic groups during recruitment processes, blocking qualified applicants from different ethnic backgrounds through illegal practices. In fact, recruitment processes in the government departments often lacked transparency and were marred by with fraudulent practices. Moreover, the allocation of ten parliamentary seats to nomads was incompatible with the constitutional principle of equality. Karzai issued legislative decree and allotted ten seats to nomads, despite nomadism being solely a way of life³⁹. Similarly, Ghani's discriminatory decree earmarked 10% of land under newly constructed water dams for the Pashtun Kuchis (Nomads), while there were many other landless individuals in Afghanistan⁴⁰.

³⁶ *Law of diplomatic and consular employees of the Ministry of Foreign Affairs, Official Gazette*, n. 114, 2013.

³⁷ Art. 22, 2004 Constitution.

³⁸ A. Shafayi, *Afghans protects on Facebook yielded results; the student "whose right had been wasted" goes to university*, in *BBC Farsi*, February 20, 2019, <https://www.bbc.com/persian/afghanistan-4730356>.

³⁹ Free House, *Only one article out of 162 articles of the constitution has not been violated*, in *Khama press*, May 7, 2016, <https://www.khaama.com/persian/archives/36743>.

⁴⁰ J. Rownaq, *Ten percent of the land around dams have been given to Kuchis*, in *Etilaat Roz*, April 19, 2021, <https://www.etilaatroz.com/122325/ten-percent-of-land-around-dams-is-given-to-kuchi/>.

3.3.6 *Unconstitutional agreement*

The president Ashraf Ghani, despite ongoing violence, pursued a softer policy against terrorist groups than in the past. On March 26, 2017, he declared a unilateral ceasefire⁴¹. Additionally, the president's agreement with Islamic Party (Hezb-e Eslami)⁴² did not require them to disarm their forces or address the rights of victims of their terrorist attacks. This agreement also and led to the release of many Hezb-e Eslami prisoners⁴³. The Dand-e-Ghori deal with the government's armed opposition, transferred the control over the area as per the president's decree no 110, according to Gulab Mangal, the Minister of Borders⁴⁴. These actions demonstrate a failure to uphold the constitution and national interests, a mismanagement of the war and armed forces, an appeasement of terrorists through the release of prisoners (at the cost of casualties among armed forces), fueling ethnic and sectarian prejudices. These actions, which were rooted in the president's ethnocentric, discriminatory and autocratic tendencies, likely contributed to the country's crisis and ultimate collapse. The constitution allowed for the trial of the president on charges of national treason in such cases⁴⁵. However, the trial of the president required a two-thirds majority vote, which was not possible due to the composition of the parliament.

4. *The Independent Commission for Overseeing the Implementation of the Constitution (ICOIC)*

Democratic systems rely on checks and balances to ensure the rule of law. Such systems require a strong oversight body to monitor government performance. Without such a body, the rule of law can become difficult to ensure. Article 157 of the Constitution established the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC), as the supervisory body to oversee the

⁴¹ Ghani extended the unilateral ceasefire with the Taliban indefinitely, *BBC Farsi*, June 16, 2018, <https://www.bbc.com/persian/afghanistan-44506902>.

⁴² Hezb-e Eslami, led by Gulbuddin Hekmatyar, is an insurgent group active in Afghanistan. It is a splinter group of one of the prominent, and the most radical of the seven mujahedeen factions fighting the Soviets in the 1980s: (*Hezb-e Eslami Gulbuddin (HIG)*, *Institute for the Study of War (ISW)*): <https://www.understandingwar.org/hizb-i-islami-gulbuddin-hig>). With the fall of the Taliban and the arrival of the international community to Afghanistan, this party entered into a war with the legitimate government of Afghanistan and carried out many terrorist attacks against foreign forces and the government and people of Afghanistan; (See: *Counter Terrorism Guide*, https://www.dni.gov/nctc/groups/hezb_e_islami.html). In September 2016, an agreement was signed between the government and Hezb-e Eslami, some of its clauses violated the principles of the constitution.

⁴³ *The collection of the Legal Approvals and Opinions of the Independent Commission for Overseeing the Implementation of the Constitution*, Ch. 2, 2021.

⁴⁴ *Questioning of officials on the Dand-e-Ghori agreement/an action to create a Waziristan in Baghlan*, in *Afghan Voice Agency (AVA)*, October 3, 2015, <https://www.avapress.com/fa/news/117070/>.

⁴⁵ Art. 71, 2004 Constitution.

three branches of powers. However, the government, particularly the president, consistently attempted to undermine the role of ICOIC. The initial point of contention arose during the approval of the ICOIC act. Parliament passed the law, but the president refused to promulgate it and sent it back to parliament for amendment. Parliament re-passed the law with a two-thirds majority in accordance with the constitution, which obviated the need for presidential approval⁴⁶. President Karzai obstructed the publication of the law and forwarded it to the Supreme Council of the Judiciary for a review of its constitutionality. The judiciary, contrary to the law, amended and annulled articles of the ICOIC law through a judicial decision, which stripped the ICOIC of many critical powers right from its inception. As a result, the ICOIC's decisions were only advisory and not binding like those of a constitutional court.

In 2017, tensions between Ghani and the ICOIC escalated dramatically after six out of seven ICOIC members voted to dismiss Dr. Mohammad Qasem Hashemzai, the head of the ICOIC. He was perceived as being subservient to the president and consistently hindered the ICOIC's oversight role regarding unlawful actions by the executive branch. The conflict stemmed from a 2015 report published by the ICOIC on the anniversary of the constitution. The report revealed that the executive branch and the president were the most frequent violators of the constitution. The ICOIC members passed Resolution No. 3 on February 15, 2017, removing Hashemzai from the ICOIC's chairmanship. The ICOIC members cited Hashemzai's old and weak memory, inability to uphold the ICOIC's oversight role, establish effective communication with other entities, lead the ICOIC, and his obstruction of the ICOIC's performance of its oversight duties as the reasons for his dismissal. The ICOIC members subsequently removed Hashemzai from the ICOIC. The president intervened in support of Hashemzai and tried to reinstate him by putting pressures on the ICOIC through the Ministry of Finance and Administration to restrict their access to financial resources.

Further, on May 16, 2017, Ghani formed a committee led by Nasrullah Stanakzai, head of the Presidential Judicial Board, to review the ICOIC members' actions and performance. The committee included members from the Directorate of Combating Corruption, National Directorate of Security, the Attorney General's Office, the Supreme Audit Office, and the Joint Independent Overseeing and Evaluation Commission for Combating Administrative Corruption (MEC). This move was seen as a retaliation by Ashraf Ghani against the ICOIC members for dismissing Hashemzai and reporting constitutional violations. It aimed to find justification to dismiss and imprison ICOIC members, similar to what happened to the IEC members⁴⁷.

The committee found no evidence of wrongdoing by ICOIC members and did not submit a negative report. Despite this investigation, the Hashemzai was

⁴⁶ Art. 94, 2004 Constitution.

⁴⁷ When the members of the Independent Election Commission and Electoral Complaint Commission resisted the president's orders and intervention, they were dismissed by the president and sentenced to prison after the trial.

reinstated. However, both houses of parliament supported the ICOIC's decision to dismiss Hashemzai. This dispute between ICOIC members and Hashemzai paralyzed the ICOIC for nearly a year. A year later, second vice-president Sarwar Danesh convened a meeting between ICOIC members and Hashemzai at the behest of the president in an attempt to break the standoff. The meeting, attended by most ICOIC members, resulted in an agreement brokered by Mr. Danesh. The agreement stipulated that Hashemzai would remain in his role as the chairman for a two-month period before resigning. However, this period expired, Hashemzai refused to step down from the chairmanship as previously agreed. Vice-president Danesh, who had signed the agreement as a trustee and guarantor, held the sole copy of the agreement. After Hashemzai's refusal to resign, Ghani took possession of the agreement. Thereby Hashemzai reneged on his commitment and vice-president failed to enforce the terms of the agreement he had brokered. Since Hashemzai lacked the necessary legitimacy and acceptability for leading the ICOIC, he adopted a confrontational stance towards ICOIC members who had voted to remove him. He was backed solely by the presidential. The president's interference in the ICOIC's decisions and internal affairs weakened this crucial institution and diverted its attention from its primary responsibility of overseeing the implementation of the constitution and upholding the rule of law. As a result, the ICOIC faltered in its duty to monitor governmental actions, prevent constitutional violations.

5. Centralism and Rule of Law in Afghanistan

The 2004 constitution, in its preamble and various articles, articulates the aspiration of the people to establish a civilized, democratic, and thriving society, which cannot be achieved without the rule of law. The constitution enshrined the principle of the rule of law in various articles, including Articles 5, 50, 74, and 75. It required the government to adhere to constitutional and legal provisions⁴⁸. Any inconsistency with these provisions constituted a breach of the fundamental principles of the rule of law outlined in these constitutional articles⁴⁹. However, international institution research painted a troubling picture of the rule of law under the Islamic Republic of Afghanistan⁵⁰. Despite progress in other areas, Afghanistan's rule of law consistently declined since 2015, according to the World Justice Project's (WJP) annual assessment. This WJP evaluates eight key areas: government limitations, anti-corruption measures, transparency, fundamental rights, law enforcement, regulatory adherence, civil justice, and criminal justice. The WJP's rankings⁵¹ placed Afghanistan near the bottom. Since 2015, the country's ranking has steadily declined: 101 out of 102 (2015), 111 out of 113

⁴⁸ Art. 74 and 77, 2004 Constitution.

⁴⁹ Art. 63, 64, 66, 2004 Constitution.

⁵⁰ International institutions report such as the World Justice Project's (WJP), The United Nations Assistance Mission in Afghanistan (UNAMA) are cited in the text.

⁵¹See: *Afghanistan Overall Rule of Law Score Over Time, 2015 – 2023*: <https://worldjusticeproject.org/rule-of-law-index/country/2023/Afghanistan>.

(2016- 2018); 117 out of 126 (2019); 122 out of 128 (2020); and a dismal 134 out of 139 in 2021. This data from the GSP's evaluation reveals a decline across nearly all aspects of rule of law in Afghanistan. Reports published by Freedom House and The Economist also show a significant decline in Afghanistan's legal and governance rankings⁵². This downward trend began in 2014 when the transfer of security responsibility from international military forces to the Afghan government was completed. The transfer coincided with a shift in United States policy and decided to withdraw its forces from Afghanistan. Ashraf Ghani's presidency saw a marked acceleration in the erosion of the rule of law. Ghani's actions, including systematic violations of the constitution, interference with other branches of government, disregard of citizen rights, weakening of oversight institutions, severely undermined the country's legal framework. In order to deflect criticisms from the international community, Ghani proposed formal judicial reforms and engaged in superficial anti-corruption efforts. These actions undermined public trust in the government and contributed to the collapse of Afghanistan's legal system, and ultimately to the fall of the Republic in August 2021.

The United Nations Assistance Mission in Afghanistan (UNAMA), in a report published on February 30, 2018, stated that corruption in the Afghan government had weakened the rule of law and threatened the prospect of peace. The head of UNAMA's rule of law division said corruption undermined the legal system, fostered crime and created a culture of impunity⁵³. These researches show a decline in the rule of law indicators with simultaneous rise in centralized control, both legal and extra-legal. This suggests a strong correlation between a lack of checks and balances and erosion of the rule of law in Afghanistan.

6. Conclusion

The constitutional order established following 2001 international community US-led intervention in Afghanistan collapsed in August 2021 in the face of the Taliban's push for a military takeover. The former government, especially president Ghani, had always projected an image of good governance, fight against corruption, and uphold of the rule of law to deflect criticisms from the international community, but such claims were not backed by actions. This gap between promises and reality eroded the public confidence in the government. First Karzai and then Ghani also overshot legal boundaries set by the constitution and other ordinary laws, showing authoritarian tendencies. At the heart of Ghani's behavior there were excessive executive, legislative and judicial powers granted by the constitution. The 2004 Afghan constitution envisaged a separation of powers with independent executive, legislative, and judicial branches. However, this principle was not respected in practice. The problem was further exacerbated by a significant delay in the

⁵² 2017, *the year of the decline of democracy*, in *BBC Farsi*, February 15, 2018, <https://www.bbc.com/persian/afghanistan-43069862>.

⁵³ United Nations Assistance Mission in Afghanistan, *Annual Report on fighting against corruption in Afghanistan, 2018*, see [t: https://unmissions.org/reports-rule-law](https://unmissions.org/reports-rule-law).

establishment of The Independent Commission for Overseeing the Constitution, which was envisaged in the constitution, and its weak mandate when it was finally established. It had only an advisory role, and its legal opinions were not binding. With this centralized power structure, and the absence of a strong oversight body, the president was susceptible to abuse of power and corruption.

If there is an opportunity to approve a new constitution in the future, a robust separation of powers with a strong oversight mechanism like a Constitutional Court, must be prioritized. Unless people have a say in local governance through a decentralized power structure, Afghanistan risks perpetuating the cycle of violence and instability. Decentralization serves as a vital prerequisite for fostering stability and security in Afghanistan, yet it alone cannot ensure lasting progress. To achieve sustainable development, political engagement, and legal reform, the establishment of a robust rule of law, together with economic development, is imperative. Moreover, transcending ethnic, religious, and linguistic barriers, and mitigating conflicts requires a departure from entrenched tribal customs, notably centralism, dictatorship, and tyranny⁵⁴. Embracing new paradigms, such as democracy, the separation of powers, and federalism, is essential for fostering inclusive governance and national unity.

⁵⁴ In the tribal structure in Afghanistan, power is concentrated in the hands of the tribal chief. He enacts and executes laws and judges. Therefore, we consider centralism in the political and governmental structure of Afghanistan to be a tribal tradition, not a method dictated and taken from outside.