

COMMENTARY

The Future of Afghan Democracy

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The 2014 Afghan presidential and provincial council elections will have a critical effect on the future of Afghan democracy. At a minimum, they must be sufficiently credible to prevent severe division among elite political actors and ensure the survival of the current constitutional order. Yet there are growing expectations that the election might not merely be an elite pact between powerful figures from Afghanistan's recent past, but more fully represent popular aspirations, particularly those of the growing urban and youth population. In order for this to happen, they must also be held in accordance with the legal rules that guide them, rather than be characterized by manipulation of these rules and government interference. Despite the problems of fraud in the 2009 election, where government figures and the electoral institutions themselves were partly responsible for the significant fraud that took place, there are a number of reasons to expect that the 2014 election will be an improvement on 2009, both in terms of participation and organization. If the elections held in Afghanistan since 2001 have diminished hopes for Afghan democracy, it is partly because an electoral formalism was introduced in Afghanistan before other elements crucial to a functioning democracy—the rule of law, political parties, institutionalized governance—really existed. The 2014 elections may reveal the boundaries of an emerging democratic space in which these features are beginning to emerge and, more importantly, where their value is increasingly recognized by Afghans. If, in every political transition, the future grapples with the past, the 2014 elections in Afghanistan may be a decisive arena of that struggle.

A decade after the end of a civil war, a presidential election was held, whose outcome was severely contested. At the time of the election the country was still politically divided and physically damaged, the government was riven with corruption, and the essential questions that drove the civil war had not been fully resolved. Significant fraud and intimidation took place, especially in the south, which had been the primary arena of the war. The partisanship of the electoral administration was decried. The contested

ballot returns led to a months-long political crisis that required the creation of a special commission and delayed the inauguration of the next president. In the end, a messy political compromise was reached after much back-room dealing.

The above is a quick description of the United States presidential election of 1876 and the "Compromise of 1877" that ultimately resolved it (Woodward 1991). The parallels with the Afghan presidential election of 2009 are deliberately drawn. In some ways the resolution of the US election of 1876 was much worse than that of the Afghan election. The Republican, Rutherford B.

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Hayes, was declared the victor, although he received fewer votes than Samuel J. Tilden, the Democrat. Among the pieces of the Compromise of 1877 that resolved the election were railroad deals, infrastructure agreements, and the withdrawal of federal troops from the southern states, as well as a tacit agreement by the federal government to “wink at” the non-enforcement in the south of the constitution’s Fifteenth Amendment, extending political rights to freed slaves. It is as if the 2009 election in Afghanistan had been resolved partly by allowing the Taliban to deny women’s rights guaranteed in the 2004 constitution.

The point of this analogy is to demonstrate that bad elections do not necessarily kill democratization efforts and to remind foreigners, who are quick to throw up their hands at Afghan electoral misbehavior, that all democratization efforts have been messy and filled with uncomfortable compromises.

Afghan Electoral Minimalism

In every political transition, the future grapples with the past. This tension is particularly acute in post-conflict transitions that have a democratic element (as is true for almost all post-conflict transitions in which the United Nations is involved), because an election itself is an arena of struggle between the future and the past. Transitional elections are intended to propel a polity forward towards an increasingly stable and institutionalized democratic political structure. But elections are also designed to be *representative*, to faithfully reflect a given political and social reality. The *democratic* aspiration regarding the future grapples with the *electoral* reflection of the politics of the here and now. Over time, one force becomes stronger than the other, and either democratic processes create an opening of the political space, or the holders of power consolidate their grip and the process of “de-democratization” takes place. We have seen the latter occur in Cambodia, in Angola, and more recently in Mozambique. The two forces remain in balance in Afghanistan, but the 2009 elections were

seen by many as significantly undermining Afghanistan’s democratization.

There have been two particularly thoughtful responses to the 2009 election, which take different sides and frame differently the question of Afghanistan’s democratic future. The first one is a series of papers written by Noah Coburn and Anna Larson (2014), who argue that the 2009 election “was (and was not) a disaster”. The case for disaster was that the elections were “infamous for low turnout, fraud, and insecurity.” Media reports at the time emphasized these themes. The less-discussed case – that it was not a disaster – rests on Coburn and Larson’s (2009: 17–18) assertion that the “primary purpose of elections is to renegotiate power between key political groups in a non-violent manner” and that in 2009 “all major political groups engaged in the process of negotiating the structure of the Afghan government, even if not in a typical Western way envisioned by the international community.” The election was not a disaster because things did not fall apart.

William Maley (2009), one of the most perceptive students of modern Afghan history, took issue with this description, noting that it did not bode well for Afghanistan’s democratic future.

This interpretation of electoral processes seems almost to brush aside electoral fraud as a problem. A further study by one of these authors offered a sanguine view of the legitimacy implications of the election, based on 50 interviews in three districts of Kabul province. Perhaps this sanguine approach will ultimately be vindicated, but the fraud of 2009 highlights a deeper problem, namely the weakness of the rule of law, that makes the achievement of legitimacy through good governance somewhat unlikely.

While Maley is correct that “legitimacy through good governance” has been undermined by the lack of institutional develop-

ment and limited democratic space, the very weakness of institutions has prevented them from becoming instruments to consolidate power, as they have become in other post-conflict countries where elections have led to soft authoritarianism. Karzai's method of power management has been to balance informal power holders against each other, preventing any of them from gaining a permanent ascendancy. As long as these figures cannot combine their informal power (based on money, prestige, control of armed groups, or combinations of these factors) with formal institutional power, they cannot threaten Karzai, who can make and unmake appointments. The appointment power is not to be underestimated. Local power brokers see their own legitimacy as being determined by their access to central power, normally through the intermediation of mid-level power brokers. The fact that the president is constitutionally empowered to appoint officials down to the district level makes him not only the architect, but also the mason, of state legitimacy. The fact that someone else will soon be inheriting these powers makes the 2014 election so traumatic and so pregnant with possibility.

The minimum political function of the April 2014 presidential election is to allow a continuity of the existing political order through a peaceful transfer of power from one president to the other in accordance with the constitution—this, again, would constitute success described in the terms of Coburn and Larson. It is an election in the service of the allocation and legitimization of power. Its main purpose is to preserve the constitutional order rather than significantly advance democratization and the rule of law.

Afghanistan's democratization so far has been superficial. Progress has been made in advancing a sort of "electoralism", where the habits and procedures of voting have become a part of the political landscape, but this is a far cry from Juan Linz and Alfred Stepan's (1996: 5) definition of democracy as "the only game in town", where political actors and citizens accept that political

change can only come through the application of democratic procedures; institutions support these procedures and are shaped by it; and no significant group attempts to overthrow the system.

Afghanistan is not there yet but it might be closer than it seems. Within the non-Taliban political elite, there is no group that seeks to overthrow the democratic system. A failure of the election to deliver a result that satisfies the most important actors could, however, lead to the temptation to resort to violence. The election validates the constitution, and the constitution represents a system of rules that elites have agreed to abide by as long as those rules do not cause irreparable harm to their key interests. These processes are the main factors in explaining the political consensus among Afghanistan's non-Taliban elites.

The Constitution and the Rule of Law

Maley's critique of the Coburn and Larson's minimalist definition of electoral success is based on what he describes as a "deeper problem", namely the weakness of the rule of law. A constitutional order exists in Afghanistan in a minimal but functional form. A common point in most definitions of constitutions is that they are a fundamental law, providing a legitimate basis for all other laws, and superior in hierarchy to all other laws. A crucial part of this foundational function is that a constitution must provide rules and institutions for resolving contradictions between other laws. This foundational function explains both why they are designed to be difficult to change, and why the process of their formulation and ratification is generally laborious, requiring compromises in order to ensure the widest possible consensus among political leaders.

The basic political function of a constitution is to legitimize the allocation of power and to place limits on the exercise of those powers. In most constitutions these limits include areas where the state cannot intervene in the lives of citizens ("rights"), and limits within the government on how these

powers are used ("separation of powers"). As Maley (2009) writes, "The two constituent elements of constitutionalism are the doctrines of the *rule of law* and the *separation of powers*."

The Afghan constitution does not yet serve as the single, legitimate foundation for law in Afghanistan. Instead, a variety of legal orders co-exist, sometimes compete, sometimes mix, and sometimes perform in isolation of each other.¹ The resolution of most disputes, a key function of formal legal institutions in most countries, takes place in Afghanistan largely beyond the scope of the constitution. Neither is the constitution recognized or equipped to serve as a mechanism to adjudicate contradictions between these legal orders.

More importantly, the constitution also does not in practice limit the powers of the government in either of the two ways described above. The separation of institutional functions requires the existence of institutions. As Samuel Huntington (1968: 24) argues, "the capacity to create political institutions is the capacity to create public interests." The heavy weight of private interests, and the vast means in Afghanistan of using private means to secure them, has prevented this institutionalization.

Afghanistan's centralized political system, with immense powers granted to the presidency, combined with the political reality of autonomous power holders who have always placed the survivability of their autonomous powers over the integrity of the formal institutions they have been vested with, have undermined any separation of power based on constitutional norms. The actual separation of powers in Afghanistan consists of the play of rivalries among power brokers, with the terms of that play set by informal powers rather than constitutional rules.

Whatever its original intention, the constitution has essentially become a codification of the truce that was reached between those rival powerbrokers who attended the Bonn Conference in December of 2001. (It has often since been lamented that this

conference did not include a number of key power-brokers, an omission which has led to the ongoing conflict.) The elections stipulated in the constitution have come to serve as periodic re-affirmations of this truce, as well as a mechanism to make slight adjustments in the balance of power between its signatories.

The dilemma of the international community has always been to push for a more normatively defined process in the hopes of opening real democratic space (the failure of which is the source of Maley's disappointment), as opposed to acquiescing to the function of elections as a means of ratifying an elite pact (as Coburn and Larson argue it has successfully done).

The first election, in 2004, initially seemed to provide many voters perhaps with a real opportunity to participate in the future political destiny of their country. Over time, the perception that power brokers have been able to almost totally co-opt the electoral process has marginalized this aspiration. The logical conclusion is that the election of 2014 is necessary to preserve the continuation of the constitution, not as a document of aspiration towards democracy, nor as a template for the separation of powers, but as an accepted set of rules by which the powerful apportion power among themselves.

Elections, however, cannot serve even this basic purpose for long if there is not an element of legitimacy behind them. The legitimacy is required to render this allocation convincing to those who lose power as a result. Lip service, at least, must be paid to the formal part of democracy. In other words, it is easy enough to say that a power-broker is influential because he can reliably deliver half a million votes. But at a certain level, votes that are delivered by coercion, fraud, or co-optation will be de-legitimized. It is no doubt a measure of progress to say that the electoral rules of the game, even when they are less "democratic" than we would like them to be, are superior to allocating power than the only other known rules of the game, which are those of the use of force.

But when the means of electoral advantage begin to resemble or become indistinguishable from the coercive means of a civil war, then the electoral instrument begins to lose its power. There must be some believable democratic element to the electoral process to allow elections, and therefore the constitution, to function as a means of maintaining political order.

This is why the election of 2014 is important. It must not only be conducted in a way that preserves the constitutional order and re-ratifies the rules of the game that keep the main power-brokers from resorting to violence, but it must also justify the reasonable aspirations of political elites and voters, who authentically prefer democracy as a means of governance. Only in this way can it both preserve the existing political order in the short-term as well as the idea of democracy in the long-term. Consider for instance that The Asia Foundation (2013) annual survey of the Afghan people in 2013 found that 56% of Afghans thought the 2014 elections would make their life better, versus 15% who thought it would make it worse and 24% who thought it would make no difference.

The Emerging Democratic Space

To return to the idea of a transition as the future grappling with the past, the electoral processes need over time to not only expand the political space and lower its barriers of entry to those who do not have informal power, but also increasingly demonstrate the influence of the rule of law. In other words, if the past is characterized by the domination of informal power, and the future by a regime based on the rule of law, and if elections are the arena in which the past most obviously grapples with the future, then the future of democracy depends on the rule of law gradually prevailing over the grip of informal power—precisely the point that Maley emphasized in his comment on the 2009 election.

This was the real damage caused by the election of 2009. In the way that it was portrayed, not entirely unjustifiably, that

election was perceived as a decisive defeat for the rule of law and a clear victory for elite power holders, who were able to overwhelm the formal institutions charged with implementing a credible election. The legacy of 2009 was to implant the idea that elections and democracy were on divergent paths. In other words, that elections were a means of legitimizing the power of those who already held it by illegitimate means.

But a funny thing is happening on the way to the 2014 election. Candidates and citizens are becoming more engaged in this election, and the electoral institutions for the most part are performing well. Also, the prospect of the election and the fact of the campaign both contribute to reducing Karzai's authority. This is dangerous, because Karzai has been the center of political gravity for so long, but also full of opportunity.

The first election after a conflict offers a number of unrivaled political opportunities. At the very minimum, it legitimizes a government, hopefully resolving by peaceful means a key problem that had driven the conflict. But it also offers the opportunity to put in place a number of demonstration effects concerning the rule of law and the importance of independent institutions, and it provides an unmatched opportunity to educate the populace about participatory politics.

These opportunities are unrivaled precisely because the political stakes of an election are so important, because the nature of an election is to include as many people as possible, and because the international community tends to provide the necessary resources for the holding an election. An election therefore becomes a test of the capacity of a state. Nobody will much care if a law on private investment is not properly applied, but attention will be paid to how the electoral law is enforced. Nobody will much care if a post-war civil service commission is truly independent, but an electoral commission will attract greater scrutiny and greater leverage from the international community. Similarly, the civic education campaign around an election offers a chance

to not only inform them of their political rights, but show them how, after years of being subjects of violent forces beyond their control, they can become deciders of their own political destiny. If after all of this, the election is relatively successful, the value of the rule of law, independent public institutions, and political participation will have been demonstrated and understood.

These demonstration effects do not happen by accident. They result from a deliberate understanding of the opportunities offered by an election and deliberately building them into the election design. These opportunities were largely missed in the 2004 Afghan election.² There was then an inordinate focus on the election as an event, and insufficient focus on setting in motion a long-term process.

Still, the forces of Afghan politics have begun to set this process in motion despite the missed early opportunities. The constitutional limit on presidential terms, the gradual formation of political blocs, the lessons learned from the electoral trauma of 2009, the evident interest of voters, and generally effective support by the international community of the Afghan electoral institutions are all contributing to an election that might have an important democratic character. The most intriguing and promising aspect of the run-up to the 2014 election, and certainly its most democratic feature, is the uncertainty over who will win. Many believed that Karzai would be able to use the considerable formal power of his office as well as the authority of his person to decidedly influence the election. At the same time, the fact that, once he is out of office, he will not be able to easily honor promises that he makes, could begin to diminish his influence.

Whether this democratization process will be allowed to reach its natural conclusion depends to a great degree on Karzai. While his power to produce his desired political outcomes is decreasing, he still has power to meddle in the process to deprive others of their desired political outcomes. On this issue, more than on any other, his legacy is

in play. Karzai has few successes to show for his leadership; a fair election and a smooth handover of power are about all that is left.

Political Parties

Even if the 2014 election achieves its more maximalist objectives in terms of advancing the democratic character of Afghanistan's polity, the question will be raised of how Afghanistan can truly democratize in the absence of political parties. This question will be even more relevant as, once the presidential elections of 2014 are over, the parliamentary elections of 2015 begin to approach. Political parties are necessary in representative democracies because they clarify governing approaches, organize voters, act together in legislatures to produce promised outcomes, and rationally order inevitable political divisions that exist within any political community. Those parties that exist in Afghanistan play some but not all or even most of these functions.

Much has been made of the oddities and problems of Afghanistan's curious parliamentary voting system – the Single Non-Transferable Vote (SNTV).³ As many have pointed out, in the early days of the design of Afghanistan's system, when President Karzai was still seen by the West as Afghanistan's best bet – because he represented a democratic future while all around him were political characters who seemed to represent the worst of Afghanistan's political past – it made sense to forge a constitution where the president was strong and the parliament was weak.⁴ SNTV, which encouraged fragmentation and discouraged national party formation, seemed ideal. In addition to this, many Afghans felt that political "parties" had earned a bad name during the Afghan civil war, and their formation early in the period of Afghanistan's post-war political consolidation would be divisive. This is, to be fair, an instinct common to all political foundations. The ruler wishes to be seen as the embodiment of a new national unity, while parties, representing "opposition", can only undermine that goal. This was true as well of the

American founding, when James Madison in Federalist Paper No. 10 argued that the republic called for by the draft constitution would prevent the emergence of “factions” in the way that a pure democracy would not.

The other lesson from political history, however, is that despite the intentions and efforts of founders, political parties always emerge. There is no historical example of any functioning democracy that has not in the end produced political parties. Indeed, these are beginning to emerge in Afghanistan and Karzai, to his credit, did sign a political parties law that gives them legal effect, and the right to form parties is granted by article 35 of the constitution. Currently, parties represent political figures more than political programs, and do not have much influence either at the ballot box or in parliament, but this is perhaps normal. It will take some time before they are sufficiently organized to play these roles, and it is positive that they are emerging organically from the democratic process, rather than being forced creations. This organic quality should be a source of hope. Parties that might have been artificially created because a proportional representation system required them would probably have become far more unstable vehicles than the parties that are beginning to emerge.

Furthermore, even if SNTV is a disincentive to the creation of parties, it is not necessarily an impediment. SNTV also rewards organized, strategic voting⁵, and the best way to organize voters is through parties. It is therefore likely that, if Afghanistan’s democratic experiment is able to continue, parties will form in a natural process.

This process will be frustrated by the importance of ethnic politics, and many parties might be indistinguishable from ethnic factions, or alliances between ethnic factions, though even here the composition of presidential tickets, where the two vice presidential slots have in almost every case been filled to appeal across ethnic divides, offers some hope for more issue-oriented political formations. Nonetheless, patience is called for. At this early stage of Afghan

political modernization and democratization, ethnic groups are also interest groups. A rational fear of the future, and a legacy of past conflict, mean that ethnic solidarities are often the most reliable markers of political trust and identity. Any political system that tried to force coalitions to be formed on another basis would distort some fundamental realities.

This is, however, slowly changing. Social change in Afghanistan that is arising with significant urbanization, exposure to the outside world, the emergence of women as political actors (which *was* forced, though effectively, through the implementation of quotas for women in parliament), and the passage of time which has created a clearer distinction between politicians oriented towards a more technocratic and modern future against politicians who represent an increasingly discredited *mujahedin* past may well promote political alliances around ideas and programs more than around ethnicities or mathematical calculations of optimal combinations of “vote banks”. Again, how this conflict is resolved is best left to Afghan political actors working through the democratic framework that has been established, whose rules are understood, and that has, despite well-documented problems, ultimately proved itself when it has been needed most.

Conclusion

It is too easy to forget when criticizing Afghan democracy, which is barely ten years old, how long it took the world’s mature democracies to develop. The old democracies like the United States and the United Kingdom began with highly limited franchises that were gradually expanded in response to political pressures from increasingly organized but democratically marginalized groups. It was not until well into the 20th century that these old democracies extended the franchise to women.

It should not be surprising, then, that it is taking some time, and some teething problems, for Afghan political society to absorb the end-state modernism of their post-Bonn

electoral system. For better or for worse, the Afghan constitution and electoral system have in important ways defined the future over which this transition is grappling. The future of Afghan democracy might well depend on how well people remember the recent past and the terrible costs of not having effective rules to regulate the disposition of political power.

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Notes

¹ The estimate by experts that 80% of disputes are resolved outside of the formal system of law is a clear demonstration of this. This estimate was first presented in *Afghanistan Human Development Report 2007: Bridging Modernity and Tradition—The Rule of Law and the Search for Justice* (Kabul: CPHD, 2007).

² I describe in detail how and why this occurred in my book, *Afghanistan's Troubled Transition*.

³ See for example Andrew Reynolds, "The Curious Case of Afghanistan", *Journal of Democracy*, Vol. 17, No. 2, April 2006. In his analysis of the 2005 election, Andrew Wilder agrees that, "[p]olitical parties are also actively discouraged by President Karzai's government, which is best illustrated by the selection of a voting system that made an already difficult situation for political parties even worse. But also notes that in the end parties were more important than expected in those elections, and that importance was obscured by candidates' unwillingness to formally affiliate themselves with parties due to their negative perception. See "A House Divided? Analysing the 2005 Afghan Election" (Kabul: Afghan Research and Evaluation Unit, 2005).

⁴ As Maley wrote, "Ultimately, what the [Constitutional] Loya Jirga produced was not a constitution for all time, but a constitution for Karzai." William Maley, *Rescuing Afghanistan* (Sydney: UNSW Press, 2006), p. 46.

⁵ This has been demonstrated clearly by the Hazara communities in Afghanistan, who have used SNTV to increase their influence in parliament. Since, in SNTV, multiple candidates are elected in a constituency, the ability to divide a voting bloc among several candidates is highly rewarding, particularly when competing against groups that invest all their votes in a single candidate, thereby wasting many votes that could have been used to elect another candidate from the same group.

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