

## **How do Constitutions Succeed? An Afghan Case Study**

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Early next year, Afghanistan's post-Taliban constitution turns ten years' old. For Afghans, the anniversary brings but weak cheer. 2014 is likely to be a make-or-break year for a state already fraying under internal and external stresses. If contested elections in 2009 and 2010 are any guide, the next round of presidential and provincial polls will likely be tainted by fraud and violent vote suppression. Gridlock, not a new democratic mandate, may well ensue. At the same time, the looming US and NATO withdrawal, sure to be followed by a Taliban offensive, casts deep shadows on the state's prospects. Even now, its writ does not run far outside Kabul, with insurgents destabilizing the central provinces of Ghazni, Logar, and Wardak.<sup>1</sup> To many observers, Afghanistan is already a case study in state failure waiting to be written.

Is there then a basis for condemning the 2004 constitution, which forms the basis of that state, as a failure? We believe that the answer is more nuanced. Contra conventional wisdom, that basic law has already outlived many others. A comprehensive database of 964 constitutions entered into force over the past two-hundred years contains only 406 basic laws still in force a decade after their promulgation.<sup>2</sup> Further, it is not as if the past decade has been wholly without the trappings of democratic governance. Beyond presidential elections, Afghans twice voted for representatives to their lower house, or Wolesi Jirga, in 2005 and 2010, albeit under increasingly fraught conditions. Both elections featured some circulation of officeholders and genuine campaigns in many parts of the country. In the second round of polling in 2010, between 101 and 114 of that house's 194 representatives lost their seats.<sup>3</sup> Parliament, moreover, is no rubber stamp. It has rejected nominees for President Karzai's first and second-term cabinets, overridden his vetoes, and even compelled the president to change the Supreme Court's composition.<sup>4</sup>

Reaching a measured evaluation of Afghanistan's 2004 constitution has larger ramifications. In the quarter century before Afghanistan gained that constitution, more than 200 other new organic documents were promulgated.<sup>5</sup> Several were adopted as part of processes of reconstructing failed states or after severe conflict: examples here include Iraq, South Sudan, and, most recently, Somalia. With the Arab Spring and the prospect of radical change to Europe's basic architecture in the offing, our "era of constitution-making" shows no sign of abating. Aspirational homilies about how new constitutions can bring about the rule of law, human rights, or democracy aside, there remains a surprising dearth of tools with which to gauge the success or failure of a constitution. Are there, that is, a set of tractable metrics that capture a new constitution's mid-range goals? Such measures would aid new constitution designers as they set about making institutional choices. They would also inform decisions about when a constitution should be abandoned as having outlasted its welcome.

The Afghan constitution's imminent tenth birthday is an opportune platform not only for thinking about appropriate mid-range metrics but also for identifying appropriately chastened expectations for constitution-making. It is too easy to blame, or to praise, a country's basic law for outcomes that flow instead from exogenous forces. Today's constitutional designer is well-advised to keep in mind James Madison's famous caution that constitutional texts are but fragile

“parchment barriers” against internal political resistance or external economic or strategic shocks.<sup>6</sup> Absent some measure of what constitutions *cannot* do, any account of what constitutions *should* do is dangerously incomplete. Our aim here is to draw that line.

### **The Drafting of the Afghan Constitution**

The 2004 Constitution was a byproduct of an extraordinary international investment, motivated by American security concerns, to end Afghanistan’s decades-long civil war. In December 2001, the United Nations convened non-Taliban Afghan factions in Bonn, Germany to develop a roadmap for the reconstruction of a national government and to select a new leader—Hamid Karzai—as a substitute for the ousted Taliban.<sup>7</sup> The resulting Bonn Agreement (formally, the Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions) envisaged a Constitutional Commission tasked with producing a new draft within two years. This draft was to go before a *loya jirga*, or grand assembly, for approval. From the beginning, then, constitutional reconstruction was a central part of post-2001 international efforts to stabilize Afghanistan, as it had been in Germany and Japan, and was to be again in Iraq.

President Karzai appointed a Constitutional Commission in late 2002, but the body stumbled due to internal tensions and organizational incapacity.<sup>8</sup> Karzai then appointed a second constitutional commission in April 2003. This body sent a draft to the President’s office in September that tilted heavily toward parliamentary power. Before releasing it publicly, Karzai and his staff modified the draft to amplify presidential powers and to eliminate a constitutional court. The draft’s late publication in November 2003 left scant time for public deliberation or input.

President Karzai then convened a Constitutional Loya Jirga in December 2003.<sup>9</sup> This assembly, comprising 502 delegates from around the country, included a wide range of actors, including regional warlords, women, representatives of refugee communities, and a set of President Karzai’s appointees. After three weeks of intense deliberation, the Loya Jirga approved the Constitution on January 4, 2004, without changes. The document establishes a presidential system with a bicameral legislature and an independent supreme court. The government is also unitary, with provincial governors appointed by the center. As noted at the time, this vision of a centralized Afghan state could not have been further from the situation on the ground circa 2004.<sup>10</sup> But it was believed that conceding the reality of decentralized power would further undermine the already weak center.

While references to Islam abound, the document provides somewhat for minority rights, for example by recognizing the relevance of various languages and by allowing the application of Shiite jurisprudence for members of that community. Both the lower and upper house also have reserved seats for women. The Constitution also includes an array of human rights, and an Independent Human Rights Commission.

Expectations for the new constitution were ineluctably bound up with hopes for the new Karzai regime. Even as war with the Taliban raged, and former warlords wielded near-absolute power across the country, many were cautiously optimistic for the future. The Constitution, by

providing a legitimate basis for governance and the promise of participation, was surely a source of optimism, notwithstanding limited earlier experience with constitutionalism.

### **What Constitutions Can't Do**

Between 1923 and 2003, Afghan kings, prime ministers, and party secretariats imposed or promulgated eight constitutions.<sup>11</sup> Each one's fate was ineluctably entangled with its authors'. Afghanistan's first constitution, enacted in 1921, was part of a large packet of British-funded state-building reforms pushed by the modernizing King Amanullah. It expired in the teeth of indigenous tribal revolts against reforms (including girls' education) perceived as alien. Its 1964 successor, a template for much of today's document, collapsed when then-King Zahir Shah's cousin ousted him in a palace coup d'état and briefly established a republic in 1973. After that regime fell to the assault of a Soviet vanguard inside Afghanistan's military, President Mohammed Najibullah first promulgated (in 1987) and then set aside (in 1990) a socialist Constitution. The latter buckled after the Soviet military withdrawal, as Najibullah pivoted to a broader base of domestic support. It didn't work. Two years later, Najibullah was dead along with his regime.

No less than earlier constitutions, the successes and deficits of the 2004 document must be explained in terms of exogenous economic, geopolitical, and strategic dynamics. Even if every nation state is shaped by external forces, Afghanistan is unusual in its unmediated exposure to international tides. State formation to the west of the Durand line has been particularly detached from domestic, internal society.<sup>12</sup> Since Amanullah, governing elites have drawn on external resources provided by foreign powers in lieu of developing a legitimate state.<sup>13</sup> This "rentier" character of the Afghan state has been acutely apparent since Bonn, where the US and its allies identified Hamid Karzai as a substitute for the ousted Mullah Omar.<sup>14</sup>

External aid is both blessing and curse for constitutional survival. On the one hand, external rents and humanitarian aid enabled some reconstruction of an Afghan state apparatus shredded by civil war and the Taliban. Technical aid to parliament, the courts, and the administration—if often a bone of contention between Karzai and his foreign backers—has ensured that the institutional tools needed to turn constitutional text into reality have some substance. At the same time, foreign aid has transformed the national government into a corrupting spigot that supports crooked bureaucrats in Kabul and thuggish warlords in the periphery. Corruption in turn has been a principal driver of recruitment for the neo-Taliban insurgency.<sup>15</sup>

Another, equally important external factor is the international market for narcotics. Afghanistan presently holds 93 percent of global market share for illicit opiates.<sup>16</sup> The ensuing poppy economy generates ample tax revenue for the Taliban. The insurgency also exploits local disputes over the selective internationally-driven crop eradication efforts, and has been able to peel away local notables into its camp. At the same time, the lure of opium dollars distorts local police and courts away from their public security missions.<sup>17</sup> As much as it was the product of global forces in 2004, the Constitution now risks being the victim of geopolitical strains in 2014.

The entangling of global causes and local effects in the trajectory of Afghanistan's 2004 constitution is, to reiterate, unusual in degree but not kind. The complexity of Afghanistan's tortured relationship with geopolitics and the global economy is nevertheless a salutary caution: Constitutions do not exist outside the stream of world history. They might be *one* cause of state success or failure, but are hardly unique in this regard.

In consequence, merely gauging gross statistical outputs at the national level, such as GDP or the balance of national payments, is no sound way to assess a constitution's success. Nor is it sufficient to look at geopolitical successes and failures. Like economic indicators, these are partly the result of constitutional rules, but they are also the result of the forces that produce those rules in the first instances. Standing alone, they provide no reliable proxy for judgments on a nation's basic law.

Alternatively, might we look to the brute fact of survival as a measure of constitutional success? However appealing it might at first seem, it is not clear why endurance alone beyond a certain minimum should be a measure of constitutional success. A basic law is not adopted for its own sake. It is an instrument to achieve larger social goods.<sup>18</sup> When it ceases serving that end, we have cause to mothball it. In any case, no constitution lasts forever. The average life expectancy of constitutions promulgated since 1789 is 19 years.<sup>19</sup> Conversely, a constitution that dies after a year or two must be seen as a failure by any metric. Further, Afghanistan's experience suggests that a multiplicity of constitutions in rapid succession also bodes ill for social and economic goals. Without a decade's relative stability under the 2004 Constitution, even the marginal gains observed in Afghan women's access to employment and education, to take only one example, would have been elusive.<sup>20</sup>

### **What Constitutions Can Do**

Even if constitutions are inextricably embedded in their distinctive economic and geopolitical contexts, and even if some basic design questions have an implacably normative cast, designers of new constitutions still need some generally applicable, tractable goals to guide the complex task of institutional design. Without a menu of mid-range goals, designers do not know how to think about the expected interactions between the new institutions created under a constitution and the economic, social, and political forces whirling around a new basic law. But what should those goals be?

We propose four mid-range goals whose achievement arguably can be attributed to the constitution itself rather than exogenous circumstances. Constitutions can be assessed on the extent to which they (1) facilitate the production of public goods; (2) generate legitimacy for the state; (3) channel political conflict into formal institutions; and (4) limit the agency costs of government.

**1. Creating national public goods.** Even if aggregate measures of social welfare are implausible proxies for constitutional success, more targeted inquiry into social welfare effects might still be worthwhile. A central function of government is to produce what economists call 'public goods,' such as a free market and national defense. These nonrivalrous, nonexcludable goods would typically be underproduced if left in private hands due to free-riding. A constitution

can accordingly be more effectively judged on the narrow question whether it effectively has promotes, say defense and trade, rather than the coarser measure of economic growth.

This metric yields a mixed view of the 2004 Constitution of Afghanistan. Consider first the production of human security from internal violence and or external force. A December 2012 Defense Department report on national security forces provides a useful snapshot of current military and police capacity.<sup>21</sup> On the one hand, this Pentagon report identified an encouraging trend of growing capacity in both army and police, with 182,209 soldiers and 147,158 police in training or in the field as of September 30, 2012. This has been achieved despite high attrition rates. Moreover, the report finds those troops contributed to a reduction of insurgent violence from a 2010 peak. On the other hand, the report cautioned that only one of the Afghan National Army's (ANA) twenty-three brigades was able to operate independently without Coalition military support, despite prolonged foreign investment and training. Whether Karzai's army will prove more robust than Najibullah's thus remains a delicate question, particularly given the persisting military strength of regional powerbrokers such as Abdul Rashid Dostum and Ismail Khan.

The law-and-order picture—pivotal for the public's immediate experience of human security—is also mixed. The Pentagon finds some 35 percent of the Afghan police were either untrained or unvetted. Among trained police, there is reason to believe that poor training and corruption undermine security in ways that help the insurgency. A UN survey a year earlier, for example, found that 18% of Afghans had known of police to ask for bribes.<sup>22</sup> That survey and other recent polling, however, also report high levels of support for police.<sup>23</sup> Even if such positive sentiment persists, however, the police may be undermined by deep faults in the legal system. With tangible frustration, the Defense Department reported that suspects often are released 72 hours after arrest because of the Afghan courts' failure to institute legally required procedures. The failure to address the Afghan courts' "catastrophic state of disrepair"<sup>24</sup> means that public security both crime and private violence remains a distant goal.

Whereas the constitutional order has generated only a partial state monopoly on force, it has been largely irrelevant to that other important public good, a national free market. Afghanistan's official economy is overshadowed by illegal economies—most importantly the opiates trade, but also trafficking in women (for prostitution), and a transit-trade in goods purchased duty-free in the Gulf and smuggled into India and Pakistan. As to legal businesses, Afghanistan ranks 168th (of 185 nations) on the World Bank's scale for ease of doing business. Efforts to benefit from large stocks of copper, coal, lithium, natural gas, and precious stones have proceeded slowly, hindered by corruption and an absence of infrastructure. In consequence, while real GDP growth has been a blistering 22.5 percent in 2009-10, some 47 percent of Afghanistan's GDP in that period still came from foreign aid.<sup>25</sup> Even if the Afghan Constitution enables the creation of an effective security sector, it has not fostered the transparent, honest administrative capacity necessary to establish a durable basis for continued production of public goods. This partial success condemns Afghanistan to rentier status for the foreseeable future.

**2. Legitimizing the new state.** Our first metric focused on the material gains a constitution can enable. But guns and butter alone do not a stable, desirable state make. For a non-authoritarian state to persist, it must also possess some measure of legitimacy among the

general public (and even authoritarian states benefit from legitimation measures). In the short term, popular disaffection for the state imposes heavily costs on any state initiative. Wholly unassuaged in the long term, it may be fatally corrosive. Few states, as Max Weber observed, can survive exclusively on violence to secure compliance. Constitutions are a potent source of legitimacy either by reflecting shared normative sentiments or via participatory politics.

How then does the 2004 Afghan constitution rank in terms of public legitimacy? Afghans can point to several successful exercises in democratic governance. To begin with, the 2004 constitutional Loya Jirga is widely viewed as a success despite machinations by Karzai and his foreign backers. As noted previously, parliamentary elections in 2005 and 2010 were also vigorously contested (although the percentage of voting-age-population turnout also fell from 51.71 to 29.71 percent in the five-year interim<sup>26</sup>). The ensuing parliaments have demonstrated independence from the presidency, even at the cost of destabilizing political gridlock. Parliamentary vigor has been achieved despite Afghanistan's unusual electoral system, which impedes the development of strong political parties. Of the 2,800 candidates who sought legislative office in 2005 only 16 percent were in a party, a proportion that had fell to 10 percent in 2010.<sup>27</sup> All the same, a pro-Karzai faction (the Hizb-e-Islami) and a loose opposition (the National Coalition of Afghanistan) have emerged in the parliamentary benches.<sup>28</sup> The existence of a clear presidential term-limit, enshrined in constitutional text, provides perhaps the best test of a constitution's efficacy. Informed commentators suggest that respect for the constitutional system remains sufficiently great that mass demonstrations will greet any attempt by Karzai to game it to stay in power after his second term ends 2014.<sup>29</sup>

Recent polling identifies sustained public support for national institutions despite persistent experiences of economic hardship. On the one hand, an August 2012 Gallup poll found 71 percent of Afghans "struggling," with more than one on three reporting recent stress and fewer than one in three expressing satisfaction with their standard of living.<sup>30</sup> At the same time, 73 percent of Afghans told Asia Foundation researchers that central government was either doing a "very" or "somewhat" good job.<sup>31</sup> A remarkable percent of those surveyed said that the parliament was addressing ordinary Afghans' problems—a figure that dwarfs the approval ratings of the U.S. Congress. The same survey, however, found 32 percent of Afghans complained of corruption, and 23 percent of insecurity, suggest that on the core public good of preserving the rule of law from internal and external threats, the state has yet to consolidate itself.

Of special importance for most accounts of legitimacy is the protection of minority rights. The Constitution includes a non-discrimination clause, and for the first time in Afghan history protects the rights of Shia minority to have their own personal law applied in the Courts. The Hazara are more integrated into the national government than at any previous time in the country's history, personified by Vice-President Karim Khalili. This surely must be chalked up as a success in that the regime has acted congruently with constitutional demands.

In circumstances of great hardship and insecurity, Afghans have thus started forging a participatory democracy and a sense of ownership of the national government. This means its legislature is far more respected than its U.S. analog, and there is tolerable reason to believe that

gross enough constitutional violations would trigger public resistance. On the legitimacy metric, then, the 2004 Afghan constitution performs surprisingly well.

**3. Channeling political conflict into formal institutional channels as opposed to open violence.** Our third metric concerns the risk of internecine political violence. A democratic constitution aims to create governance institutions that act as channels for conflict between powerful stakeholders. These institutions provide political substitutes for open violence. They must diminish the risk of corrosive internal strife. No constitution, of course, can completely resolve or vitiate such conflict. But it can change the terms on which such battles are fought. In so doing, it may lower dramatically conflict's collateral costs. Key to containing and managing political conflict is mechanisms to lower the stakes of electoral loss.<sup>32</sup> If a constitution permits some stakeholders—be they political factions, members of an ethnic group, or even a single dictator—to dominate others after assuming office, those out of power lose the incentive to stay within the metes of constitutional competition. If the costs of losing in politics are too high, incumbents will respond by entrenching or otherwise refusing to vacate their offices.<sup>33</sup>

Yet the task of establishing political fora that can operate as alternatives to open conflict is not without its risks. Poorly designed parliamentary bodies can not only provide new forms of representation but also deepen extant lines of ethnic or racial division, accelerating what would otherwise have been latent conflicts.<sup>34</sup> Poorly drafted, ambiguous, or merely incomplete constitutional texts may further generate new flashpoints for conflict. The task of the constitutional designer, in short, is to fashion rules for institutionalizing extant conflict without exacerbating it or provisioning it with new tinder.

In its early years, the 2004 Afghanistan constitution proved a plausible framework for cabining and constraining the nation's turbulent and fractious ethno-political factions. Cooption through offers of cabinet positions or gubernatorial appointments replaced outright conflict, largely ending the horrific destruction of the 1990s civil war. The Karzai regime brought in controversial figures from the Tajik *Jamiat Islami* constellation, such as Vice President Mohammad Fahim and Balkh province governor Atta Mohammad Noor, and the Uzbek *Junbish Milli* party, such as Abdul Rashid Dostum. At least to date, this strategy has prevailed with international support—albeit at what some view as an intolerable price: foregoing any discussion of accountability for the extensive human-rights violations of the 1990s, in addition to augmenting the volume of corrupt rent-seeking by government officials.

The constitution's separation of powers between president and parliament likewise provides a cockpit for working out of disputes that might otherwise erupt into violent conflict. This is possible because the parliament now contains an effective opposition. By 2007, the Wolesi Jirga included an anti-Karzai bloc allied with Tajik leader Dr. Abdullah Abdullah, who would run against the president in 2009. Parliamentary opposition after both the 2005 and 2010 legislative elections has successfully blocked some of President Karzai's initiatives. In May 2006, for example, parliamentary opposition led to changes to the Supreme Court, including the ouster of the then-Chief Justice Fazl Hadi Shinwari. An attempt to remove Foreign Minister Rangin Dadgar Spanta in 2006-2007, in connection with comments he made on Afghan refugees, failed when the Supreme Court ruled in favor of Karzai's appointee, but the Court found an implied parliamentary power to remove ministers in the constitution.<sup>35</sup> In January 2010, at the

beginning of Karzai's second term, the Wolesi Jirga rejected 17 of 24 cabinet nominations. In August 2012, the legislature voted to oust Defense Minister Abdul Rahim Wardak and Interior Minister Bismillah Khan Mohammedi. Both were removed, albeit to be reappointed to different cabinet positions.

Yet such successes must be weighed against the ways in which the new constitution has created *new* flashpoints for internal conflict. Of these, the most significant is the electoral system, on which the constitutional text is largely silent. Article 83 of the Constitution envisages an electoral system to be adopted through "election laws." But no statute has ever been passed. Instead, in response to a U.N. proposal to use a provincially based proportional representation system, Karzai promulgated a 2004 decree directing the use of the Single Non-Transferable Vote (SNTV) system. As operationalized in Afghanistan, SNTV creates voters confusion, inhibits political party development, and conduces to wide swings in electoral outcomes, with candidates winning often by very small margins. The use of SNTV in the 2010 legislative elections, coupled with allegedly widespread fraud and violent voter suppression, precipitated a lengthy political crisis. Dozens of seats were contested because of small margins and large uncertainties. In the south-eastern province of Ghazni, for example, where there is a volatile mix of Hazaras and Pashtuns, no Pashtuns seemed to win, catalyzing a wave of Pashtun demonstrations.

Conflict spilled over into the judiciary when Karzai ordered the appointment by the Supreme Court of a special tribunal for election complaints. The latter was immediately challenged by the constitutionally mandated Independent Elections Commission. Parliament voted to impeach six Supreme Court justices who had voted for appointing the tribunal, but was hampered because it failed to specify any crime that had been committed. Karzai, in turn, sought to prevent the new parliament being seated. By January 2011 a tentative deal had been reached, but not before divisive ethnic politics had been injected into legislative-executive relations.<sup>36</sup>

The elections debacle is likely to be repeated in the next round of legislative elections not only due to Karzai's unwise adoption of SNTV, but also because the Constitution is ambiguous about both presidential decree power and the judiciary's role. Article 64 enumerates presidential "authorities and duties" but includes no freestanding decree authority, much less power to create a special tribunal. That omission from an otherwise comprehensive list (one that includes such trivialities as the bestowal of medals, insignias, and honorary titles) might be read to imply that no presidential decree power exists. Yet other articles, such as those permitting emergency executive rule, seem to assume decree power. Karzai has exploited the ambiguity to exercise powers that seemingly belong to the parliament in destabilizing and arguably illegal ways. Moreover, as his creation of a special electoral tribunal demonstrates, presidential influence over the judiciary allows it to be employed as device for circumventing more independent constitutional authorities.

Such conflicts over institutional power are not unusual in new democracies. Nor is there anything uniquely Afghan about ambiguous constitutional drafting compounded by self-serving interpretation. Highly political issues turn into constitutional disputes in many countries. What is unusual--and what exacerbates the conflicts that do arise--is the absence of a clear mechanism for resolving constitutional disputes in the 2004 Constitution.



This lacuna flows from textual changes made at the last minute of the drafting process. Due to eleventh-hour interventions, a constitutional court initially included in Article 146 was removed and its powers only partially assigned to the Supreme Court. The ensuing Article 121 directs that the government or courts can request the Supreme Court to review laws and treaties for compatibility with the constitution. It does not, however, explicitly give the Court a general power to “interpret” the constitution outside of this context. In addition, Article 157 speaks of a Commission for Supervision of the Implementation of the Constitution, (ICSIC), whose members are nominated by the president and approved by parliament. ICSIC’s powers are vague. Likely intended as a body to monitor passage of laws and regulations implementing the constitution, it has been glossed as an alternative locus of constitutional interpretative authority. The net result is that for the many disputes concerning the institutional allocation of constitutional powers, there is no clear resolution mechanism.

Constitutional interpretation functioned without great controversy from 2004 to 2007, with the Supreme Court acting as if it had a general power of interpretation. In 2007, however, in the aftermath of the Wolesi Jirga’s attempt to force Foreign Minister Spanta out of office, parliament took umbrage at the Supreme Court. Considering the implementing legislation to establish the ICSIC, it supplemented the latter’s power with the authority to “interpret ... the Constitution” at the request of president, Assembly, government or Supreme Court, and also with the power to review old laws for conformity with the constitution. The statute passed over Karzai’s veto. In 2008, the Supreme Court, exercising its power to “review laws for conformity with the constitution” at the request of the president, held these provisions to be unconstitutional usurpations of the Court’s power. This put Afghanistan in the difficult position of having plural bodies claiming some quantum of constitutional interpretation power. When the Supreme Court says the ICSIC does not have such power, it is of course interpreting the constitution. The ICSIC unsurprisingly contests the Court’s position, citing the lack of any explicit assignment of general interpretive power to the Supreme Court. While both no doubt need sometimes to interpret the constitution to achieve their missions, such manifestly divided and divisive a hermeneutical architecture creates the possibility of conflicting constitutional interpretations. It also exacerbates other political controversies, including ones about ministerial appointments, the special election tribunal, and impeachment.

One logical way to resolve this situation would be to pass a constitutional amendment carving a clear division of labor between the two bodies. But, paradoxically, the absence of any allocation of clear interpretive authority is again become a barrier to needful reform. The constitutional amendment process, specified in Chapter Six of the document, compels the convening of a constitutional Loya Jirga. The latter’s membership includes both houses of parliament and chairmen of both provincial and district councils. It can meet with a quorum of 50% of its members. Given prevailing Taliban-related insecurity, it has been impossible to hold district-level elections, leaving only 385 of the 789 authorizing members in office at the moment.

Again, there is a natural response to this dilemma: interpret Chapter Six to require that the denominator of purposes of the quorum requirement is the number of officers *actually* elected. Thus, a quorum would be 193 of 385, not 395 of 789. The ICSIC, however, has directed otherwise. So no amendment of the constitution is possible until district elections are held. This is in effect an impractical bar to amendment until the war is over. It is also self-defeating, given

that the various unresolved constitutional crises in Afghanistan (many of which could be resolved through clarifying amendments) are plausibly reducing the possibility of stabilizing the country so as to allow district-level elections.

In short, much of the political conflict among Afghan elites was initially channeled through political institutions. But then basic questions about those institutions and their interactions started to paralyze government's workings. Textual vagueness, self-serving interpretations, and uncompromising attitudes toward conflict clotted the effective operation of constitutional mechanisms. As a result, several pieces of critical legislation have been significantly delayed, and intra-government conflict is high, even if it has not resulted in internal violence.

**4. Limiting the agency costs of representative government.** Our final metric concerns what might be considered the flip side of the institutional settlement of political conflict. Empowering political institutions, as James Madison and others observed, creates a need to prevent those empowered from engaging in self-dealing. Agency costs come in many forms. One risk is political entrenchment. Office-holders will wish to stay in power beyond their legitimate term, and so will expend significant resources to maintain their offices. Many democratic constitutions thus provide term limits for executive office-holders, and less frequently for legislators. Another risk is fiscal corruption. Political figures may use government office to their own benefit rather than that of the public.

The Afghan Constitution seems to have done well in terms of political entrenchment, but faltered on the fiscal corruption axis. At the level of gross institutional design, Madison envisaged a government that was limited through careful structural design of legislative-executive interactions. Afghanistan's recent history of conflict between Karzai and parliament suggests some success along this dimension, such that the president is periodically checked. But we have identified costs from this interbranch tension, and it is hardly clear whether or not the collateral damage from this conflict outweighs the benefit in terms of reduced agency costs.

At a more granular level, the rate of parliamentary turnover noted above would please many Americans. There has also been circulation of cabinet officers as Karzai has juggled various factions. Further, if indeed implemented peacefully, Karzai's promise to step down in 2014 will be a significant benchmark. Karzai has formed no political party, so absent his appointment of a family member, his resignation would represent a genuine transfer of some power. Many new democratic constitutions fail at such moments. At least in this regard, we are optimistic that the long lead-up to 2014 will allow diverse political forces to position themselves for a peaceful transition.

Efforts to cabin corruption, by contrast, have failed miserably. Afghanistan remains an exceedingly poor country, so some corruption is to be expected. Yet it regularly ranks at or near the bottom of the global Transparency International list, and has declined in recent years. The government evinces little regard for the problem. To the contrary, senior officials have repeatedly interfered in efforts to investigate the Kabul Bank scandal, with Karzai selecting his own investigative committee and his Attorney General taking more than a year to begin inquiries into

the case. In 2010, moreover, Karzai closed down a prosecution of one of his closest aides by firing the Deputy Attorney General responsible for corruption.

The ensuing widespread looting of state assets to benefit politically connected has, as the Asia Foundation's recent survey found, been the perhaps the single greatest shadow on governmental legitimacy.<sup>37</sup> Similarly, one recent, intensive study of five provinces identified the "main reported drivers of conflict or insecurity were poor governance, corruption, and predatory officials."<sup>38</sup> Concern about the poor progress of the internal investigations prompted the international community to push for a new institution, the Independent Joint Anti-Corruption Monitoring and Evaluation Committee. This consists of three international figures and three Afghans, and is charged with monitoring and evaluating anti-corruption efforts. But it has too been hampered by contentious relations with the High Office of Oversight and Anti-Corruption (HOOAC), the governmental body tasked with anti-corruption efforts, and the Attorney General's Office.

It is hard to blame the Constitution's drafting for the venality of its immediate inheritors. While the HOOAC, unlike many analogous bodies around the world, lacks constitutional stature, we do not believe that this would have dented the rapacious looting by many politicians. Nevertheless, rampant corruption and related political interference with prosecutions seem to be increasing through Karzai's second term, suggesting that presidential term limits have induced a rush to pocket as much as possible before a major transition. Paradoxically, the Constitution's success in limiting political entrenchment may be exacerbating its corrosion by corruption. We find one lonely bright spot in an increasing trend toward parliamentary investigations of corruption. In August 2012, for example, the Wolesi Jirga launched an investigation into the Minister of Finance, and also called for investigations into the Acting Minister of Defense as well as the HOOAC chief. Whether this will suffice to stem the destabilizing tide of graft, though, seems unlikely.

## Conclusion

So will the Afghan Constitution endure beyond a general withdrawal of US and NATO forces? We have emphasized that mere survival was not a metric for judging success or failure. That said, any potential future failure of the Afghan state might fairly be laid at the door of its Constitution's drafters. Ranked by our four mid-range goals for constitutions, the 2004 Constitution is a genuinely mixed picture—scoring high for legitimacy and for channeling political conflict, but faring poorly because it created new loci of internecine discord while failing to generate public goods. Whether or not this proves sufficient to prevent a renewed slide into civil war, it suggests that constitutional drafters of the future have both positive and negative lessons to glean from recent Afghan experiences.

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<sup>1</sup> Giles Dorransoro, *Waiting for the Taliban in Afghanistan* (Washington, D.C.: Carnegie 2012)

<sup>2</sup> Data from the Comparative Constitutions Project on file with the authors. See generally Zachary Elkins, Tom Ginsburg and James Melton, *The Lifespan of Written Constitutions* (Cambridge University Press, 2009) (finding a predicted life expectancy of 19 years).

<sup>3</sup> Andrew Reynolds and John Carey, *Fixing Afghanistan's Election System: Arguments and Options for Reform* (Kabul: Afghanistan Research and Evaluation Unit, 2012), 8.

<sup>4</sup> Kenneth Katzman, *Afghanistan: Politics, Elections, and Government Performance* (Washington, D.C.: CRS), 8-9.

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- <sup>5</sup> Vivian Hart, *Democratic Constitution Making* (Washington, D.C.: USIP 2003), 1-2.
- <sup>6</sup> James Madison, *The Federalist No. 48*, in *The Federalist Papers* (New York: Penguin Books, 1987), p. 309. In a letter to Jefferson, Madison used the same phrase in reference to constitutional rights.
- <sup>7</sup> Aziz Z. Huq, *The Story of Hamid Karzai: The Paradoxes of State-building and Human Rights*, in *Human Rights Advocacy Stories* (New York, N.Y.: Foundation Press, 2009), 514-15.
- <sup>8</sup> J. Alexander Thier, *The Making of a Constitution in Afghanistan*, *New York Law School Law Review* 51:558-79 (2006-07)
- <sup>9</sup> See generally Thier.
- <sup>10</sup> Thier at 574.
- <sup>11</sup> International Crisis Group, *Afghanistan's Flawed Constitutional Process* (Brussels, 2003), 2-6.
- <sup>12</sup> Thomas Barfield, *Afghanistan: A Cultural and Political History* (New Haven: Yale University Press, 2010), 4-6.
- <sup>13</sup> Barnett R. Rubin, *The Fragmentation of Afghanistan* (New Haven: Yale University Press 2002), 12-15.
- <sup>14</sup> ~~2009), 514-15.~~
- <sup>15</sup> Stephen Carter and Kate Clark, *No Shortcut to Stability: Justice, Politics and Insurgency in Afghanistan* (London: Royal Institute of International Affairs, 2010), 9-10.
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- <sup>17</sup> Gretchen Peters, "The Afghan Insurgency and Organised Crime" 99-122 in *Afghanistan and the Rule of Law* (Whit Mason, ed., Cambridge University Press, 2011).
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- <sup>28</sup> Katzman, 4, 13-14.
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- <sup>30</sup> Jay Loschky, "Afghans' Outlook on Lives Remains Bleak," *Gallup.com* (Aug. 6, 2012)
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- <sup>32</sup> Rui de Figueirido and Barry Weingast, "Rationality of Fear: Political Opportunism and Ethnic Conflict" in Jack Snyder and Barbara Walter, eds., *Military Intervention in Civil Wars*. (New York: Columbia University Press, 1999).
- <sup>33</sup> Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York: Cambridge University Press, 2003)
- <sup>34</sup> Donald L. Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press: 2000).
- <sup>35</sup> Article 92 is not explicit about the consequences of a vote of confidence.
- <sup>36</sup> International Crisis Group, *Afghanistan's Elections Stalemate* (Brussels, 2011).
- <sup>37</sup> Asia Foundation, 7.
- <sup>38</sup> Paul Fishstein and Andrew Wilder, *Winning Hearts and Minds: Examining the Relationship Between Aid and Security in Afghanistan* (Medford, MA: Feinstein International Center 2012), 2.