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What Can Constitutions Do?: The Afghan Case

Aziz Huq

Tom Ginsburg

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Tom Ginsburg *is Leo Spitz Professor of International Law, Ludwig and Hilde Wolf Research Scholar, and professor of political science at the University of Chicago.* ***Aziz Huq*** *is assistant professor of law and Herbert and Marjorie Fried Teaching Scholar at the University of Chicago.*

On 26 January 2014, Afghanistan's constitution will reach its tenth anniversary. This milestone is unlikely to be marked by celebrations. Afghans will have other things on their minds, as 2014 is likely to be a make-or-break year for the regime installed by the international community after the defeat of the Taliban. Not only are all NATO combat troops due to be withdrawn this year, but on April 5 Afghans are scheduled to elect a successor to Hamid Karzai, who has served as the country's only president under the current constitution but is prohibited by its provisions from seeking a third term. If the disputed 2009 presidential and 2010 parliamentary elections are any guide, the 2014 polls could well suffer from fraud and violent vote suppression. In any case, with the Taliban having chosen to boycott, the polls are unlikely to help stabilize the military conflict. Political gridlock rather than a new democratic mandate may instead be the end result. At the same time, the looming U.S. and NATO military withdrawals—sure to be followed by a Taliban offensive—make the state's prospects for survival even more uncertain. Even now, the national government's writ does not extend far beyond Kabul, with insurgents destabilizing provinces such as Ghazni, Logar, and Wardak, and the Afghan National Army is far from self-sufficient.[1] To many eyes, Afghanistan is a case study in state failure waiting to be written.

Does this mean that the 2004 Constitution, which forms the basis of the Afghan state, should be condemned as a failure? Not necessarily. For one thing, the Afghan Constitution has already outlived many of its counterparts. Of the 964 constitutions promulgated during the last two centuries, only 406 remained in force for more than a decade.[2]

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Moreover, Afghanistan has experienced some elements of democratic governance during the last ten years. In addition to holding two previous presidential elections in 2004 and 2009, Afghans have voted for representatives to the lower house (Wolesi Jirga or House of the People) of the National Assembly in 2005 and 2010, albeit under increasingly fraught conditions. Both legislative elections resulted in some turnover and featured genuine campaigns in many parts of the country. In 2010, more than half the 194 representatives lost their seats. Parliament is no rubber stamp—it has rejected some of President Hamid Karzai's cabinet nominees, overridden his vetoes, and even compelled him to change the composition of the Supreme Court.

In the quarter-century before Afghanistan adopted the 2004 Constitution, more than two-hundred new national charters came into force across the globe.[3] Given the ongoing turbulence in many parts of the world, the present "era of constitution-making" shows no sign of abating. Despite all the aspirational homilies about how new constitutions can bring about the rule of law, human rights, and democracy, however, there is a surprising dearth of tools with which to judge the success or failure of such documents. We need a set of tractable metrics to gauge a new constitution's success at attaining certain goals. Such concepts and measures would aid in the design of new constitutions and inform decisions about when to abandon those that are ineffective.

The tenth anniversary of the Afghan Constitution provides a good opportunity to think more broadly about the appropriate midrange metrics and to identify reasonable expectations for constitutions. It is too easy to lay blame or bestow praise on a country's basic law for outcomes that it did not generate. Today's constitutional designer should keep in mind James Madison's famous caution that constitutional texts are only fragile "parchment barriers" against internal political resistance and external economic or strategic shocks.[4] Absent some measure of what constitutions *cannot* do, any account of what constitutions *can* or *should* do is dangerously incomplete. Our aim here is to start drawing that line.

The 2004 Constitution was a byproduct of an extraordinary international effort, motivated primarily by U.S. 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—to replace the ousted Taliban.[5] The resulting "Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions" (known as the Bonn Agreement) envisaged a constitutional commission tasked with producing a new draft constitution 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.

President Karzai appointed a constitutional commission in late 2002, but it soon fell victim to internal tensions and its lack of organizational capacity. He appointed a second commission in April 2003. This body crafted a document that tilted heavily toward parliamentary power. Before releasing it to the public in November 2003, however, Karzai and his staff modified the draft to amplify presidential powers and eliminate the constitutional court.

Just one month later, giving the public little time for deliberation or input, Karzai convened a constitutional *loya jirga*. The assembly of 502 delegates from around the country comprised a wide range of actors, including regional warlords, women, representatives of refugee communities, and Karzai appointees. On 4 January 2004, after three weeks of intense deliberation, the *loya jirga* approved the constitution without making any changes.

The document establishes a presidential system with a bicameral legislature and an independent supreme court. The government is not federal but unitary, with provincial governors appointed by the central government. Although this vision of a centralized Afghan state hardly reflected the reality on the ground, the document's framers seemed to believe that formally decentralizing power would further undermine the already weak center. Despite giving a central role to Islam, the constitution does provide some room for minority rights—for example, by recognizing a number of official languages and by allowing the application of Shia jurisprudence to members of that community. In addition, both the lower and upper houses have reserved seats for women. The constitution also includes an array of human-rights commitments and establishes an Independent Human Rights Commission.

The expectations for the new constitution were inextricably 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 Afghans were cautiously optimistic about a future under the new administration. The constitution, by providing a legitimate basis for governance and the promise of popular participation, fueled that optimism.

Constitutional Longevity

Between 1919, when Afghanistan won independence from British tutelage, and 1996, when the Taliban came to power, a series of constitutions were promulgated by the country's various leaders or ruling bodies. The fate of each document was entwined with that of its author. Afghanistan's first basic law, put forward by the modernizing autocrat Emir Amanullah (1919–29) and passed in 1923, sparked tribal revolts that ultimately toppled both Amanullah and the constitution. Its highly conservative 1931 successor, promulgated under a subsequent monarch,

Mohammad Nadir Shah (1929–33), was essentially ignored after his assassination in 1933. The next constitution, adopted in 1964 late in the reign of Mohammad Zahir Shah (1933–73), established a constitutional monarchy, granted numerous individual rights, and significantly broadened political space. At the same time, it produced paralyzing political gridlock and mounting frustration within ruling elites.

In 1973, the king's cousin and former prime minister, Daoud Khan, led a military coup that ousted the long-ruling monarchy and became president of a new republic. Daoud enacted a constitution in 1976, but that document proved evanescent. Two years later, the Daoud regime fell in a coup staged by a leftist faction from within the Afghan military. The new communist regime adopted a temporary constitution in 1980 that, like the regime itself, was extremely unpopular. Consequently, the new constitution was largely irrelevant beyond certain urban centers. In 1987, shortly after Mohammad Najibullah (1987–92) became president, a *loya jirga* passed yet another constitution. The Soviet withdrawal in 1989 and subsequent dissolution of the Soviet Union, however, prevented the president from securing popular support for an amended, again reformist, basic law in 1990. His government was finally forced out of power in 1992 by *mujahideen* factions as the country fell into civil war, and Najibullah himself was murdered in 1996.

Every state is partly shaped by external forces, but, as this brief history intimates, these have always played an outsized role in Afghanistan. Since Amanullah's reign, governing elites have relied on outside resources in lieu of developing a legitimate state. The successes and failures of the 2004 document must therefore be understood in light of exogenous economic, geopolitical, and strategic dynamics. Foreign assistance can be both a blessing and curse for constitutional survival. International funding and humanitarian aid facilitated 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 given the country at least some of the institutional tools needed to implement the constitution. At the same time, however, foreign assistance has been a source of corruption, enabling the national government to channel its authority through both crooked bureaucrats in Kabul and thuggish warlords on the periphery. Opposition to the resulting high rates of governmental corruption and violence has been a principal driver of recruitment for the neo-Taliban insurgency.[6]

The international narcotics market has also been a major factor. In 2012, Afghanistan supplied 75 percent of the global market for heroin, with that number expected to rise to 90 percent in 2013.[7] The poppy economy generates steady tax revenue for the Taliban, and the insurgency exploits local disputes over the internationally driven crop-eradication efforts in order to draw local notables into its camp. At

the same time, the lure of opium dollars undermines the integrity and efficacy of local police and courts.[8]

In short, just as the constitution was the product of global forces in 2004, it now risks falling victim to global political and economic tensions in 2014. The complexity of Afghanistan's relationship with geopolitics and the global economy serves as a reminder that constitutions do not exist outside the stream of world history. They may be *one* cause of state success or failure, but they are hardly the whole story.

As a result, national-level economic statistics, such as GDP or the balance of payments, are by themselves inadequate measures for assessing a constitution's success. The same is true of a country's geopolitical successes and failures. All these are the result not only of constitutional rules, but also of many other factors. On their own, they are not reliable proxies for judging a nation's basic law.

Alternatively, we could use a constitution's longevity as a measure of its success. Yet a basic law is not adopted for its own sake. It is an instrument for achieving greater social goods. When it ceases serving that end, we should scrap it. In any case, no constitution lasts forever; across the globe, the average life expectancy of those promulgated since 1789 is a mere nineteen years.[9] On the other hand, a constitution that dies after only a year or two must be deemed a failure by any metric. Furthermore, Afghanistan's history suggests that cycling through one short-lived constitution after another also bodes ill for social and economic goals. Without the decade of relative stability that Afghanistan has enjoyed under the 2004 Constitution, even the country's incremental gains—for example, in women's access to employment and education—would have been elusive.[10]

What Constitutions Can Do

Even though constitutions are inextricably embedded in their distinctive economic and geopolitical contexts and some basic design questions have an implacably normative cast, the drafters of new constitutions still need some realistically attainable goals. These goals would help to guide the complex task of institutional design so that it takes into account the expected interactions between the new institutions created under a constitution and the economic, social, and political contexts in which those institutions will operate. But what should those goals be?

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

Legitimating the new state. Our first metric focuses on the necessary political foundation for a desirable and sustainable state. For a nonauthoritarian state to persist, it must possess some measure of legitimacy among the general public. This is so even for authoritarian states, which also benefit from legitimation measures. In the short term, substantial popular disaffection and antipathy toward the state will impede government initiatives, and may ultimately prove fatal. For, as Max Weber observed, few states can survive by relying exclusively on violence to secure compliance. It is simply too costly. Constitutions—as reflections of shared values and facilitators of participatory politics—are a potent source of legitimacy that can obviate the need for coercion.

How does Afghanistan's 2004 Constitution rank in terms of public legitimacy? Afghans can point to several successful exercises in democratic governance. First, despite the machinations of Karzai and his foreign backers, the 2004 constitutional *loya jirga* is widely viewed as having been a success. As noted above, the 2005 and 2010 parliamentary elections were vigorously contested (although voter turnout fell from 51.7 percent in 2005 to 29.7 percent in 2010). Both elections produced parliaments that demonstrated independence from the presidency. Parliamentary vigor has been achieved despite Afghanistan's single nontransferable vote (SNTV) system, which impedes the development of strong political parties. Of the 2,800 candidates who sought legislative office in 2005, only 16 percent were members of a party, a proportion that fell to 10 percent in 2010. Nonetheless, a pro-Karzai faction and a loose opposition group have emerged in parliament.

Despite intense political infighting, the president and parliament managed in July 2013 to agree upon a revised electoral framework for the 2014 polls. Since the enactment of the two electoral statutes, however, Karzai has been accused of stacking one of the two election-oversight commissions, the Independent Election Complaints Commission, with his political allies. Given the continuing tensions over electoral administration, the 2014 election will be a critical test of the constitution's efficacy. One key constitutional provision is the clear two-term limit on the presidency. Popular respect for the constitutional system remains sufficiently great that mass demonstrations would be likely to erupt if Karzai, notwithstanding his commitment to step down, attempted to stay in power after his second term ends this year.[11]

Recent polling identifies sustained public support for national institutions despite persistent economic hardship. On the one hand, an August 2012 Gallup poll found 71 percent of Afghans to be "struggling," with more than one in three reporting recent stress and fewer than one in three expressing satisfaction with their standard of living.[12] On the other hand, a 2012 Asia Foundation survey found that 73 percent of Afghans considered the central government to be doing a "very good or somewhat good job." A remarkable 72 percent of respondents said that parliament was

addressing ordinary citizens' problems. At the same time, 32 percent complained of corruption and 23 percent of insecurity, suggesting that the state has yet to find firm footing.[13]

The protection of minority rights also bolsters legitimacy. Afghanistan's constitution includes a nondiscrimination clause and, for the first time in the country's history, protects the rights of the Shia minority to have Shia law applied in the courts. The predominantly Shia Hazara minority is more integrated into the national government than ever before, a success personified by Vice-President Karim Khalili.

Yet even Afghanistan's limited achievements need to be viewed in proper perspective. In circumstances of great hardship and insecurity, Afghans have begun to forge a participatory democracy and a sense of ownership of their national government. There is some reason to believe that gross constitutional violations of the political rules would trigger significant public resistance. On our first metric, that of legitimacy, then, the constitution performs surprisingly well.

Channeling political conflict through formal institutions. A democratic constitution aims to create governance institutions that channel conflict among powerful stakeholders. These political substitutes for violence diminish the risk of corrosive internal strife. While no constitution can completely eliminate political conflict, a well-designed constitution can change the terms on which political battles are fought and thereby lower the collateral costs of conflict. Key to containing and managing political conflict are mechanisms that lower the stakes of electoral defeat. If a constitution permits some stakeholders to dominate others after assuming office, those out of power lose any incentive to stay within the bounds of constitutional competition. Likewise, if the costs of losing office are too high, incumbents will respond by refusing to step down or otherwise seeking to entrench their political power.[14]

Creating effective political arenas that can operate as alternatives to open conflict is not easy. Moreover, poorly designed parliamentary bodies or electoral rules can deepen ethnic or racial divides, and possibly even revive latent conflicts. Poorly drafted, ambiguous, or merely incomplete constitutional texts may perversely generate new sources of conflict.

In its early years, the 2004 Constitution provided a useful framework for constraining conflict between the country's ethnopolitical factions. Cooptation through offers of cabinet positions or gubernatorial appointments replaced the outright violence experienced during the civil war in the 1990s. The Karzai regime brought into the ruling coalition and the cabinet controversial figures from the northern Tajik and Uzbek communities. So far, this strategy for keeping the peace has prevailed, but at a cost: It has meant forgoing any discussion of accountability for the human-rights violations that took place during the civil war and has resulted in increased rent-seeking by corrupt government officials.

The separation of presidential and parliamentary powers established by the constitution also provides an avenue for working out potentially explosive disputes. In May 2006, for example, parliamentary action led to changes to the Supreme Court, including the ouster of the chief justice. In 2007, the Wolesi Jirga voted to remove Foreign Minister Rangin Dadfar Spanta. But Karzai disputed the legality of Spanta's ouster, and the Supreme Court upheld Karzai's position. At the beginning of Karzai's second term in January 2010, the Wolesi Jirga rejected 17 of his 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, though later reappointed to different cabinet positions. This checkered record suggests that at the very least, there are some interbranch checks and balances at play.

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At the same time, the constitution has also created new flash points for internal conflict. Of these, the most significant is the electoral system, about which the constitutional text is largely silent. Article 83 envisages an electoral system adopted through "election laws." Yet initially no such statute was passed. Instead, in response to a UN proposal to use a provincially based proportional-representation system, Karzai issued a 2004 decree directing the use of the SNTV system. This relatively complex system confused voters, inhibited political-party development, and produced not only wide swings in electoral outcomes but also allowed candidates to win by very small margins. The use of the SNTV in the 2010 legislative elections, coupled with widespread fraud and violent voter suppression, precipitated a lengthy political crisis. Dozens of seats were disputed because of small margins and large uncertainties concerning fraud and the accuracy of poll results. In the southeastern province of Ghazni, for example, where there is a volatile mix of Hazaras and Pashtuns, the fact that no Pashtun candidate seemed to prevail at the polls sparked a wave of street demonstrations.

In the wake of such protests and given the poor electoral showing of his legislative allies, Karzai ordered the Supreme Court to set up a special tribunal to review complaints about the 2010 election. The constitutionally mandated Independent Election Commission (IEC), however, immediately challenged the establishment of this new tribunal, with the parliament then leaping in to impeach the six Supreme Court justices who voted in favor of the new body. Karzai, in turn, sought to prevent the new parliament from being seated. By August 2011, a tentative deal had been reached, but not before the tensions between the Karzai presidency and the parliament had been further exacerbated by divisive, eth-

nically tinged rhetoric. It was not until mid-2013, after months of fierce political conflict, that new electoral laws were finally passed. It remains to be seen whether the new framework for the 2014 elections, which retains SNTV and lowers the number of seats reserved for women, will fare any better than earlier iterations.[15]

Although much of the political conflict among Afghan elites was initially channeled through political institutions, basic questions about those institutions and their interactions have begun to paralyze government.

The 2010 elections debacle occured in part because the constitution is ambiguous about the president's power to issue decrees and about the judiciary's role in resolving election-related disputes. Article 64 of the constitution, which enumerates presidential "authorities and duties," does not expressly include decree authority, much less any power to create a special tribunal to resolve election disputes. 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. At the same time, other articles of the constitution, such as those permitting emergency executive rule, seem to assume some sort of executive decree power. Karzai has exploited this ambiguity in destabilizing and arguably illegal ways to exercise powers that seemingly belong to parliament. Furthermore, as his creation of a special electoral tribunal that undermined the authority of the IEC demonstrates, presidential influence over the judiciary allows the president to use the courts as a means to circumvent other, more independent constitutional bodies.

Such conflicts over institutional power are, to be sure, hardly unusual in new democracies. Nor is there anything uniquely Afghan about ambiguous constitutional wording being compounded by self-serving interpretations on the part of courts or elected officials. What is unusual—and what has exacerbated the conflicts that do arise—is the absence of a clear mechanism in the 2004 Constitution for resolving constitutional disputes. This lacuna flows from textual changes made at the last minute of the drafting process.

Due to eleventh-hour interventions, a Constitutional Court initially established in draft Article 146 was eliminated, while only some of its powers were given to the Supreme Court. Article 121 of the adopted constitution states 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 limited context. In addition, Article 157 establishes an Independent Commission for Supervi-

sion of the Implementation of the Constitution (ICSIC), whose members are nominated by the president and approved by parliament. The ICSIC's powers are poorly specified. Although probably intended as a body to monitor and facilitate the development of legislation and administrative procedures required to implement the constitution, in practice it has served as an alternative and competing locus of constitutional interpretation. The net result is that the text of the constitution has been read to contain two competing, rather than one univocal, mechanisms for resolving the many disputes that arise concerning the institutional allocation of powers under the constitution.

The consequences of this inherent conflict did not materialize immediately. From 2004 to 2007, the Supreme Court instead acted as if it had a general power of constitutional interpretation. After the Supreme Court overturned the no-confidence vote on Foreign Minister Spanta, however, parliament voted to give the ICSIC power to "interpret . . . the Constitution" at the request of the president, the parliament, the government, or the Supreme Court, as well as the power to review already-enacted laws for conformity with the constitution. Parliament passed this law over Karzai's veto. In 2008, however, the Supreme Court, at the request of the president, exercised its authority (established in Article 123) to "review laws" for "compliance with the constitution," and deemed the new powers granted to the ICSIC to be unconstitutional usurpations of the Supreme Court's authority. Not surprisingly, the ICSIC contested the Court's conclusion, citing the lack of any explicit assignment of general interpretive power to the Supreme Court in the text of the constitution. It was likely inevitable that such a manifestly divided and divisive institutional architecture would engender unnecessary conflicts over constitutional interpretation. The textual confusion also exacerbates political controversies over such issues as ministerial appointments, the special election tribunal, and impeachment.

Nevertheless, we see a logical way to resolve this perplexing and undesirable situation. This would involve passing a constitutional amendment that clearly delineates the role of each body. Somewhat ironically, the absence of any clear allocation of interpretive authority is again a barrier to needed reform. The constitutional-amendment process, specified in Chapter 6, requires the convening of a constitutional *loya jirga,* whose membership includes both houses of parliament and the chairmen of the provincial and district councils. This body can meet with a quorum of 50 percent of its members. Due to security concerns, however, it has been impossible to hold district-level elections, with the result that only 385 of the 789 authorized members are in office at the moment. One potential response to this dilemma would be to interpret Chapter 6 as requiring a quorum of 50 percent of the number of officers *actually elected*. Thus, a quorum would be 193 of 385, not 395 of 789. The ICSIC, however, has directed otherwise,

making any amendment of the constitution impossible until district elections are held. This will, in effect, bar any amendment until the war is over. Paradoxically, the various unresolved constitutional crises in Afghanistan (many of which could be dealt with through clarifying amendments) are hampering the possibility of stabilizing the country, which is necessary for holding district-level elections. And these in turn are necessary (according to the ICSIC) for passing constitutional amendments.

In short, although much of the political conflict among Afghan elites was initially channeled through political institutions, basic questions about those institutions and their interactions have begun to paralyze government. The vagueness of the constitutional text, self-serving interpretations of the constitution by the Supreme Court and the ICSIC, and uncompromising attitudes toward conflict are preventing the effective operation of constitutional mechanisms. As a result, numerous pieces of critical legislation have been significantly delayed, and intragovernmental conflict is high, even if it has not resulted in internal violence. The performance of the constitution on this metric is mixed, though hardly a total failure.

Limiting the "agency costs" of representative government. As James Madison and others have observed, the empowerment of political institutions and officials creates the need to prevent them from engaging in self-dealing. Agency costs come in many forms. One major risk is political entrenchment. Because some leaders wish to keep prolonging their stay in power and are willing to expend significant resources in order to do so, many democratic constitutions specify term limits for officeholders. The other key risk is fiscal corruption. Political figures may use government office for their personal gain rather than the public good.

The Afghan Constitution has done well in terms of limiting political entrenchment, but faltered badly with regard to fiscal corruption. Madison envisaged a government whose power was limited through the careful structural design of legislative-executive relations. As we have suggested, the recent history of conflict between Karzai and parliament suggests some success on this front, given that the president's power has been periodically checked. But there may also be stability-related costs from this interbranch tension, and it is unclear whether the collateral damage to the national political equilibrium outweighs the benefit from diminished agency costs.

At a more granular level, the rate of parliamentary turnover has been impressive, and cabinet members have also changed over the years as Karzai has juggled various factions. Furthermore, Karzai's promise to step down later this year, if indeed implemented peacefully, will be a significant benchmark. The president has formed no political party, so barring his appointment of a family member, his resignation would represent a genuine transfer of power. Many new democratic constitutions fail at such moments, yet we are cautiously optimistic that the long

lead-up to the 2014 polls could allow diverse political forces to position themselves for a peaceful transition.

Efforts to stem corruption, by contrast, have failed miserably. Afghanistan remains an exceedingly poor country, so some corruption is to be expected. Yet it consistently ranks at or near the bottom of Transparency International's global Corruption Perceptions Index. The government shows little concern about the problem. On the contrary, senior officials have repeatedly interfered in efforts to investigate the Kabul Bank scandal, which led to a run on that bank in 2010. Not only did Karzai himself select the members of the investigative committee but his attorney general took more than a year to begin inquiries into the case, and the resulting prosecutions and penalties have been decried as too weak to be effective. That same year, Karzai shut down the prosecution of one of his closest aides by firing the deputy attorney general who was leading anticorruption efforts.

The widespread looting of state assets to benefit the politically connected has cast perhaps the single greatest shadow on governmental legitimacy. Similarly, one intensive study of five provinces concluded that the "main reported drivers of conflict or insecurity were poor governance, corruption, and predatory officials."[16] 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 body, which consists of three international members and three Afghans, is charged with monitoring and evaluating anticorruption efforts. Its contentious relations with the attorney general's office and the High Office of Oversight and Anti-Corruption (HOOAC), the governmental body tasked with anticorruption efforts, have hampered the committee's activities, though.

Although the HOOAC, unlike many analogous bodies around the world, lacks constitutional stature, we do not believe that constitutionalizing it would have made a difference. Nevertheless, rampant corruption and related political interference with prosecutions seem to have increased during Karzai's second term, suggesting that presidential term limits have induced a rush to pocket as much as possible before a transfer of power. Paradoxically, the constitution's success in limiting political entrenchment may be exacerbating the country's corrosion by corruption. We find one lonely bright spot—a growing trend toward parliamentary investigations into corruption. In August 2012, for example, the Wolesi Jirga launched an investigation into the activities of the minister of finance, the acting minister of defense, and the chief of the HOOAC. It seems unlikely, though, that these investigations will be able to stem the destabilizing tide of graft.

Creating national public goods. Ultimately, a constitution prevails if it puts the country's people in a better material position. In this regard, a

central function of any scheme of government is to produce what economists call "public goods"—a free market, national defense, and a regulatory environment in which development can flourish. These nonrivalrous, nonexcludable goods would typically be underproduced if left to private hands. Judgments about this metric, to be sure, are contingent on a state's starting point: The level of welfare gains that the divided and troubled Afghan government can be expected to deliver are far below what was expected, for example, of the government of a newly reunified Germany. A useful gauge of a new government's ability to foster national public goods, therefore, must be sensitive to local contingencies and opportunities.

Afghanistan has actually experienced some startling if underreported successes in the past decade: Life expectancy has increased by twenty years since 2002, to age 62; school enrollments are up eightfold; GDP is up fourfold; and government revenue collection from taxes and customs has risen on average 20 percent a year since 2002. To what degree can such aggregate measures of social welfare be attributed to any constitutional scheme? Perhaps the best that can be said of the constitution is that by providing a legitimate government capable of interacting with international donors, it has facilitated the transfer of hundreds of billions of dollars in development assistance, and that this in turn has yielded some social and economic gains.

Whether those gains will be sustained, however, is unclear. Afghanistan's official economy is overshadowed by its illegal counterpart—most notably, the opiates trade, but also trafficking in women and a transit-trade in goods purchased duty-free in the Gulf and smuggled into India and Pakistan. As for legal businesses, Afghanistan ranks 168th out 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 ponderously, hindered by corruption and an absence of infrastructure. The Afghan Constitution has not fostered the transparent, honest administrative capacity necessary to establish a durable basis for continuing the production of public goods.

Another important public good is human security, and here the record remains decidedly mixed. A December 2012 U.S. Department of Defense report on the Afghan national security forces noted a growing capacity in both the army and police despite high attrition rates: As of 30 September 2012, the report found that 182,209 soldiers and 147,158 police were in training or in the field, and they helped to reduce insurgent violence from its 2010 peak.[17] The report cautioned, however, that only one of the Afghan National Army's 23 brigades was able to operate without military support from the international coalition. Whether Karzai's army will prove more robust than Najibullah's did thus remains an open question, particularly given the persistent military strength of regional powerbrokers such as Abdul Rashid Dostum and Ismail Khan.

Progress on the rule of law has also been mixed. Roughly 35 percent

of the Afghan police are either untrained or unvetted. Moreover, corruption and the poor quality of training are believed to be undermining security in ways that help the insurgency. A 2011 UN survey, for example, found that 18 percent of Afghans knew which police officers would be likely to accept bribes.[18] That survey and other recent polling, however, also report high levels of public support for the police.[19] If the police force is a major problem, the legal system is no less so. The Defense Department reported that suspects often are released 72 hours after arrest because of the courts' failure to follow legally required procedures. The Afghan courts' "catastrophic state of disrepair"[20] means that public security remains a distant goal. In short, the constitutional order has generated only a partial state monopoly on violence.

No one expected Kabul to resemble Stockholm or Oslo a decade after adopting a new constitution. Yet even when measured against more realistic expectations, the constitution has not been terribly successful in terms of fostering those national public goods that were within reach. Had a better scheme of governance emerged, with less corruption being tolerated each year and more attention being given each year to the material welfare of the country, the public would surely be better off than it is now. At the same time, the constitution did facilitate sufficient stability to induce foreigners to fund a partial reconstruction of the Afghan state.

So will the Afghan Constitution endure? We have emphasized that mere survival is not a metric for judging success. Nonetheless, future failure of the Afghan state might fairly be laid at the door of its constitution's drafters. Based on our four midrange goals, the 2004 Constitution presents a genuinely mixed picture. Although it performed well in terms of legitimacy and decently in terms of channeling political conflict, it also needlessly fostered new sources of internal discord and failed to produce the crucial public good of human security. The key success of the constitution, in retrospect, was the creation of a government just legitimate enough to extract resources from the rest of the world. Whether or not this proves sufficient to prevent a renewed slide into civil war, it does suggest that constitution drafters of the future have both positive and negative lessons to learn from Afghanistan's recent experiences.

NOTES

1. Inspector General, U.S. Department of Defense, "Assessment of U.S. Efforts to Develop Afghan National Security Forces Command, Control and Coordination System," 22 March 2013, available at *www.dodig.mil/pubs/documents/DODIG-2013-058.pdf.*

2. Data from the Comparative Constitutions Project on file with the authors. See generally Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (New York: Cambridge University Press, 2009).

3. Vivien Hart, "Democratic Constitution Making," Special Report No. 107, U.S. Institute of Peace, 13 July 2003.

4. James Madison, *The Federalist No. 48*, in *The Federalist Papers* (New York: Penguin Books, 1987), 309.

5. Aziz Z. Huq, "The Story of Hamid Karzai: The Paradoxes of State-Building and Human Rights," in Deena R. Hurwitz and Margaret L. Satterthwaite, eds., *Human Rights Advocacy Stories* (New York: Foundation Press, 2009), 514–15.

6. Stephen Carter and Kate Clark, *No Shortcut to Stability: Justice, Politics and Insurgency in Afghanistan* (London: Royal Institute of International Affairs, 2010), 9–10.

7. Rod Nordland, "Production of Opium by Afghans Is Up Again," *New York Times*, 15 April 2013, A8.

8. Gretchen Peters, "The Afghan Insurgency and Organised Crime," in Whit Mason, ed., *The Rule of Law in Afghanistan: Missing in Inaction* (Cambridge: Cambridge University Press, 2011), 99–122.

9. Elkins, Ginsburg, and Melton, *Endurance of National Constitutions,* 140.

10. UN Assistance Mission to Afghanistan, *Still a Long Way to Go* (Kabul: UNAMA, 2012). Nearly 20 percent of Afghans enrolled in higher education are women, and the number of girls enrolled in primary education has doubled in the past four years. See the World Bank's *Education in Afghanistan: Achieving Results in a Difficult Environment* (2013).

11. Scott Smith and Andrew Wilder, "Lost in Transition: A Political Strategy for Afghanistan," *ForeignPolicy.com*, 22 May 2012.

12. Jay Loschky, "Afghans' Outlook on Lives Remains Bleak," *Gallup.com,* 6 August 2012.

13. Asia Foundation, "Afghanistan in 2012: A Survey of the Afghan People," November 2012, 85, 7–8.

14. Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York: Cambridge University Press, 2003).

15. Jed Ober, "Afghanistan's New Election Law," *ForeignPolicy.com*, 6 August 2013, available at *http://afpak.foreignpolicy.com/posts/2013/08/06/afghanistans_new_election_laws.*

16. Paul Fishstein and Andrew Wilder, *Winning Hearts and Minds: Examining the Relationship Between Aid and Security in Afghanistan* (Medford, Mass.: Feinstein International Center, 2012), 2.

17. U.S. Department of Defense, *Report on Progress Toward Security and Stability in Afghanistan* (December 2012), available at *www.defense.gov/news/1230_Report_final.pdf.*

18. UN Development Programme, *Police Perception Survey—2011: The Afghan Perspective* (Kabul: UNDP, 2011).

19. Asia Foundation, "Afghanistan in 2012," 7.

20. International Crisis Group, "Reforming Afghanistan's Broken Judiciary," *ICG Asia Report,* No. 195, 17 November 2010.