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THE AFGHAN CONSTITUTION AND PEACEBUILDING IN AFGHANISTAN

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Summary

- The Constitution developed in 2004 was designed to both increase the reach of the central government into areas that historically resisted central control and to give the international peacebuilding mission a clear focal point for coordination and cooperation on development and counterinsurgency. This resulted in a centralized system that, rather than reduce the power of local parochial networks, incorporated them and allowed them to use the central government as a resource.
- The peacebuilding mission that led to the current system was unusual in that the NATO/ISAF coalition had to divide its duties between counterinsurgency and development of institutions alongside civilian UN agencies. The incoherence of the implementation of the peacebuilding efforts contributed to the incoherence of Afghan rule of law and democracy development.
- However, it is actors within the Afghan government that exploited gaps and powers within the Constitution to further empower the executive branch over other branches of government. This contributed to a climate of impunity and raised the stakes of presidential elections over others, leading to fraught results where international intervention is always needed to broker a winner. This situation overall contributes to Afghans feeling unrepresented by their government.

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- It is recommended that constitutional amendments be considered to better balance the powers of the different branches of government and to reduce the centralization of power in order to better account for the realities of the country.

Following the September 11th 2001 attack on the World Trade Center in New York and the Pentagon in Washington that killed almost 3,000 American citizens, the United States (US) and its North Atlantic Treaty Organization (NATO) allies launched a military operation in Afghanistan under the doctrine of counterinsurgency. Operation Enduring Freedom was aimed at toppling the Taliban regime that had given sanctuary to al-Qaeda leaders and dismantling al-Qaeda in Afghanistan. NATO, in reaction to the attack on American soil, initiated its mutual defense mechanism in solidarity. The international community justified the continued operation in Afghanistan based on the premise that underdevelopment in Afghanistan, its unstable economy, undemocratic political regime, wide-spread poverty, malnutrition, and absence of public health and education systems provided the perfect breeding ground for violent extremism and hence could cause further global security concerns (and even a second 9/11).

Henceforth, the intervention was rationalized on the basis of liberal peacebuilding with the assumption that peace is an outcome of liberal democracy, market based economic reforms and the formation of institutions associated with democratic states.² Therefore, the international community became increasingly involved in a state-building and democratic peace agenda in addition to countering insurgency. To evaluate the democratization process in particular within the broader framework of the peacebuilding mission in Afghanistan, this study provides a special focus on the 2004 Constitution. As will be seen, the Constitution is a product of both Afghan and international politics. The intention was to create a Constitution that could provide the framework for a new democracy in the country, though concerns over ensuring stability also played a role during discussions over the ideal structure of the new government (in particular, the shift towards a unitary form of governance). To evaluate its role in

2. Dodge, Toby. "Intervention and dreams of exogenous statebuilding: the application of Liberal Peacebuilding in Afghanistan and Iraq." *Review of International Studies*, Vol. 39 Issue 5 (Intervention and the Ordering of the Modern World), December 2013. Pp: 1189-1212

achieving the peacebuilding goals of both the international community and the new Afghan Republic, three constitutional functions will be looked at in particular: the separation of the powers of government with clear checks and balances within government structures, the establishment of rule of law which can protect individual civil and human rights, and the establishment of a mechanism for peaceful transfer of power through elections. It will be shown that the Constitution's over-centralization of power in the executive branch paradoxically contributed to creating brittle institutions that lack the accountability mechanisms of other democratic countries. The result is that the international peacebuilding coalition, particularly in the case of Afghan elections, has to help fill the gaps left by the Constitution.

Afghanistan and the Hybrid "Fifth Generation" of Peacebuilding

The practice of international peacekeeping is divided by Dr. Kai Michael Kenkel (whose works focus particularly on Latin American peacekeeping) into subsequent distinct generations that eventually produce the concept of peacebuilding.

"First-generation" peace operations or "traditional peacekeeping" consists of the UN serving as an impartial buffer between aggressive forces at the request of the host nations. UN troops are lightly armed and operate under the understanding that they are restricted in their use of force. Kenkel emphasizes that the sovereignty of nations was considered a step above human rights in importance when considering the launch of such operations.³

"Second-generation" peace operations entailed the addition of civilian tasks to first generation peacekeeping. This became increasingly popular at the end of the Cold War when internal conflicts necessitated increased humanitarian supply missions, most famously during the famines in Africa.⁴ It also includes active UN action towards making peace but without increasing UN troops' ability to use force. Thus, while missions like Bosnia in the early 90s had this civilian component, Blue Helmets were still famously helpless to prevent their own capture by Bosnian Serb forces.

3. Kenkel, Kai Michael. "Five Generations of Peace Operations: From the "Thin Blue Line" to "Painting a Country Blue." *Revista Brasileira de Política Internacional*, Vol. 56, No. 1. 2013. Pp: 122-143

4. *Ibid.*

After the triple disasters of Rwanda, Bosnia, and Somalia, the idea that national sovereignty must be held above human rights hit a wall. This led to creating a new international civilian capacity to administer state functions during transitional periods, applied in places like Timor-Leste and Kosovo.⁵ This “third generation” of peacekeeping was more permissive of the use of force and disengaging with notions of “impartiality” that diverged from reality (especially after cases like Rwanda where it was clear one side was morally in the wrong and therefore “impartiality” meant aiding wrong doers). The Kosovo and Timor-Leste missions allowed UN peace enforcement missions to make greater use of force to allow for civilian components to carry out their tasks.

The “fourth generation” is also heavily influenced by the growing influence of the “democratic peace” hypotheses which argued that liberal democracies did not go to war amongst themselves. This hypothesis was also in play in the early 2000s, as seen in interventions like Afghanistan. “Peacebuilding” came into being as a way not just to achieve the elimination of violence, but conflict resolution— creating institutions and socio-economic conditions conducive to a long-term peace.⁶ The result is that in recent years, it became difficult to distinguish “peacebuilding” from “state building” (originally a subset of peacebuilding). While it is tempting to put Afghanistan in this category, Kenkel actually classifies the Afghanistan mission as part of a fifth generation “hybrid mission” where NATO (and specifically the United States) use their own military force to create an environment conducive for peacebuilding which is then shouldered by both the coalition forces and the international community (the UN itself opted for a “light footprint” strategy).

If democracy was the way to create a more peaceful and stable society, it followed that the peacebuilding mission needed a country with a democratic framework. The Constitution paved the road for the establishment of a presidential democratic system in Afghanistan. However, the “hybrid” mission of the coalition forces was hybrid in another way: since it was originally intended as a counterinsurgency mission, the coalition was not solely focused on creating suitable grounds for civilian actors to undertake

5. Kenkel, Kai Michael. “Five Generations of Peace Operations: From the “Thin Blue Line” to “Painting a Country Blue.” *Revista Brasileira de Política Internacional*, Vol. 56, No. 1. 2013. Pp: 122-143

6. *Ibid.*

the peacebuilding mission. The government that came to power in 2004 was largely composed of members of the transitional government (2002-2004) led by President Hamid Karzai, a leader chosen for his ability to create consensus among warlord factions. This suited the coalition since these factions were in fact allies against the Taliban. Since the peacebuilding role of the different coalition members was being undertaken at the same time as the war, the war and historical instability of the country ended up entering the calculus of involving everyone in the process of designing the Afghan government.

The Framework of the Government

A constitution has several important functions. It will be looked to as a clear delineation of the scope and limitations of government and the rights of the governed, while providing clear mechanisms through which the constitution can be altered as societally accepted principles evolve.⁷ Constitutionalism as an idea usually provides that there are clear delineations between executive, legislative, and judicial power and that there are limits on those powers through the protection of civil rights.⁸ This is especially true of the Constitutionalism that evolved during the revolutions of the 18th century which eventually became a foundation for current constitutions worldwide. A judiciary and legislature independent of the executive along with defined and protected civil rights, usually including freedom of expression, association, due process of law, and individual equality before the law among other things, are considered crucial building blocks of liberal democracy.

The 2004 Constitution of Afghanistan is regarded as a progressive document intended to combine liberal democratic norms with Afghanistan's local norms and history (chiefly its Islamic character and its previous Constitution from 1964). However, it did not produce a well-functioning democracy as it is remarkably ill-suited to the realities of the country's politics. The Afghan members of the interim government and their international partners favored a centralized unitary state out of the understanding it would a) give Kabul

7. "Constitutionalism." Stanford Encyclopedia of Philosophy, 2017. <https://plato.stanford.edu/entries/constitutionalism/#ConMinRicSen>

8. Ibid.

more institutional control over the rural periphery which historically proved difficult to govern and b) allow the international community a singular body with which to coordinate counterterrorism and development (as opposed to a multiplicity of local bodies).⁹ State centralization was intended to induce citizens of different backgrounds, interests, and ethnicities to coordinate their demands in the direction of more general-interest public goods and away from parochial transfers. An analysis produced by the Middle East Institute opined that what ended up actually happening was that the parochial networks instead worked to secure strong links within the centralized system and were able to increasingly leverage their ability to destabilize it from the inside.¹⁰ Far from resenting centralized power, many local power holders instead see the government (and its international donors) as a resource that is important to have access to and do not necessarily resent its presence. Carol Wang, writing on rule of law in Afghanistan after a career traveling extensively through the country, remarks that these issues can find their origin in the framework of the government. She chiefly identifies the imbalance of power between the stronger executive on the one hand and the weaker judiciary and legislative branches on the other hand. This framework is further weakened when combined with the lack of direction for local governance.¹¹

This executive power is particularly clear when it comes to political appointments. Under Article 64, the president appoints all cabinet ministers, the attorney general, the head of the Central Bank, the National Security director, judges, officers of the armed forces, police, and national security as well as other high ranking officials.¹² With the Constitution vesting so much power in the presidency, parliament's attempts to reject presidential

9. Wang, Carol. "Rule of Law in Afghanistan: Enabling a Constitutional Framework for Local Accountability." *Harvard International Law Journal*, Vol 55, No. 1, Winter 2014, 2014. Pp: 211-250 <https://harvardilj.org/wp-content/uploads/sites/15/Wang.pdf>

10. Schetter, Conrad, and Rainer Glassner. "The Peripheralization of the Center: "Warlordism" in Afghanistan." Middle East Institute, April 19, 2012. <https://www.mei.edu/publications/peripheralization-center-warlordism-afghanistan>

11. Wang, Carol. "Rule of Law in Afghanistan: Enabling a Constitutional Framework for Local Accountability." *Harvard International Law Journal*, Vol 55, No. 1, Winter 2014, 2014. Pp: 211-250 <https://harvardilj.org/wp-content/uploads/sites/15/Wang.pdf>

12. Dodge, Toby. "Intervention and dreams of exogenous statebuilding: the application of Liberal Peacebuilding in Afghanistan and Iraq." *Review of International Studies*, Vol. 39 Issue 5 (Intervention and the Ordering of the Modern World), December 2013. Pp: 1189-1212

picks have often been overridden.¹³ The legislature's lawmaking power, meanwhile, is challenged by the President's ability to draft laws by decree without legislative approval if the National Assembly is not in session. As for the judiciary, the executive's power over appointments is seen to weaken its independence as a separate branch.¹⁴ As a result, the winner of presidential elections really does take all.

Rule of Law

Rule of law (a principle of governance that crosscuts with a government's civil rights obligations) was deemed essential to enable peace and security. The three main rule of law structures — the Ministry of Justice, the Supreme Court, and the Attorney General's office — were the highest in priority in the reconstruction efforts in law and justice. The international community divided rule of law development among themselves to put in place institutions like the civilian police force, the army, a Judicial Reform Commission (JRC), and the development of Afghanistan Independent Human Rights Commission (AIHRC).¹⁵ This is where Kenkel's "fifth generation hybrid model" can be useful to understand what happened in Afghanistan — rather than the UN's peacekeeping and civilian forces taking full control of the situation, the UN's various civilian arms worked on smaller-scale projects among the different members of the NATO/ISAF coalition who played the role of securing an environment conducive to peacebuilding. In the case of justice, it was Italy's role to support both the JRC and the Afghan transitional government in setting up the judicial system. In reality, there was little coordination among these groups. There was also a significant amount of US involvement. For instance, the interim code of criminal procedure for instance was developed by Italian officials and American military lawyers with little input from Afghan justice institutions. In the United States Institute of Peace's 2004 Special Report describing the situation, it was observed that there was little political urgency or funding going into setting up the judicial system.¹⁶ The JRC was not getting

13. Wang, Carol. "Rule of Law in Afghanistan: Enabling a Constitutional Framework for Local Accountability." *Harvard International Law Journal*, Vol 55, No. 1, Winter 2014, 2014. Pp: 226. <https://harvardilj.org/wp-content/uploads/sites/15/Wang.pdf>

14. *Ibid.* P 226.

15. "Special Report 117: Establishing the Rule of Law in Afghanistan." United States Institute of Peace, March 2004. <https://www.usip.org/sites/default/files/sr117.pdf>

16. *Ibid.* P 117.

much funding from the UNDP while the Ministry of Justice, Supreme Court, and Attorney General's office were seen to have fractious relationships with each other to say nothing of the difficult relationship between the JRC and Italy. The German mission to train a civilian police force to enforce rule of law was itself facing steep challenges often as a result of competition with the military objectives of the NATO coalition. As a result, rule of law was off to a difficult start in Afghanistan in a period where the lower levels of violence could have provided an ideal environment for it to take off.

Constitutional flaws ensured rule of law would continue to be weak as insecurity increased again after 2005. First of all, the Constitution does not include meaningful checks and balances to ensure accountability at the national level. Instead, as Carol Wang notes, it has concentrated power in the executive branch, "creating a patronage system that sinks from the top down into local communities."¹⁷ She continues to say that international pressure has been the primary and most visible means of holding powerbrokers accountable, "which is itself counterproductive to an Afghanistan that is independent and legitimate in the eyes of its own people." Moreover, the failure of the Constitution to introduce meaningful checks and balances on executive power has facilitated a climate of impunity where the law cannot bring power holders to justice.¹⁸ This reality impedes the success of all other rule of law objectives. If power-holders can arbitrarily exert their will, there are no stable and clear universal means of resolving disputes and grievances, no clear way to protect fundamental rights and punish human rights violations, and thus no basis for trust in the government. Recent polls would seem to bear out this connection. A Gallup poll of Afghan respondents as recent as 2019 revealed a widespread lack of trust in government institutions with general satisfaction at 36% and a 91% belief that government is corrupt.¹⁹ In a 2019 World Justice Project General Population Poll, it was found that only 19% of Afghans believed a government officer would be prosecuted if caught in a hypothetical act of

17. Wang, Carol. "Rule of Law in Afghanistan: Enabling a Constitutional Framework for Local Accountability." *Harvard International Law Journal*, Vol 55, No. 1, Winter 2014, 2014. Pp: 211. <https://harvardilj.org/wp-content/uploads/sites/15/Wang.pdf>

18. *Ibid.* P 225.

19. Bikus, Zach. "Inside Afghanistan: Stability in Institutions Remains Elusive." Gallup, September 4, 2019. <https://news.gallup.com/poll/266252/inside-afghanistan-stability-institutions-remains-elusive.aspx>

government fund embezzlement.²⁰ In that same report, judges were the authority most likely to be suspected of corruption by Afghan respondents with 59% of Afghan respondents believing most or all judges were involved in corrupt practices.

Flaws in Elections and Representation

Elections have been fraudulent and have regularly required international monitoring. Afghanistan depends on United States support in particular to conclude its elections because its Constitution is remarkably ill-suited to the realities of its politics.²¹ The Constitution never gave clear directives on how to appoint members of the government's Independent Electoral Commission (IEC) — the body that organizes and supervises all elections in the country. This allowed President Karzai to pass a decree giving him the authority over such appointments.²² A parliamentary attempt to gain authority over the process was vetoed in 2009. However, Article 61 of the Electoral Law allowed the international community a competing oversight body— the Electoral Complaint Commission (ECC) — whose members would be appointed by the United Nations Special Representative of the Secretary General (SRSG), the head of UNAMA), the AIHRC, and the Afghan Supreme Court. The ECC audit process was successful at identifying instances of election fraud.²³ Even so, direct US intervention was required for the presidential elections of 2004, 2009, 2014, and 2019 in order to pressure close competitors to withdraw so one candidate could win the election and negotiate extraconstitutional solutions to calm political tensions.²⁴ All of these facts could possibly be behind why Gallup recorded only 19% of Afghan respondents having confidence in the honesty of elections in their own country in 2019.²⁵

20. "The Rule of Law in Afghanistan: Key Findings from 2019." World Justice Project, 2020. <https://worldjusticeproject.org/sites/default/files/documents/Final-Afghanistan-Report-2019.pdf>

21. Jarrett Blanc, Afghanistan's Elections disputes reflect its constitution's flaws, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, 2020.

22. Wang, Carol. "Rule of Law in Afghanistan: Enabling a Constitutional Framework for Local Accountability." *Harvard International Law Journal*, Vol 55, No. 1, Winter 2014, 2014. Pp: 227. <https://harvardilj.org/wp-content/uploads/sites/15/Wang.pdf>

23. Wang, Carol. "Rule of Law in Afghanistan: Enabling a Constitutional Framework for Local Accountability." *Harvard International Law Journal*, Vol 55, No. 1, Winter 2014, 2014. P 226. <https://harvardilj.org/wp-content/uploads/sites/15/Wang.pdf>

24. *Ibid.*

25. Bikus, Zach. "Inside Afghanistan: Stability in Institutions Remains Elusive." Gallup, September 4, 2019. <https://news.gallup.com/poll/266252/inside-afghanistan-stability-institutions-remains-elusive.aspx>

Elections for parliament are equally difficult. The Constitution, by choosing the single non-transferable vote electoral system, hinders the formation of collective party interests and leads to fractured voting patterns, severing voters' ties to their elected representatives.²⁶ The 2010 elections demonstrated the way the Constitution hinders the formation of political parties and the ability of public opinion to be reflected in elections results.²⁷ In addition, UNAMA Head Kai Eide had to intervene to protect the UN's role in the ECC as parliament was unable to prevent the President from decreeing increased authority over the ECC.²⁸

The power the Constitution gives to the executive proves once again to be a major hindrance which requires the international participants of the peacebuilding mission to constantly dedicate resources each election to fill in gaps left by the Constitutional framework of the government.

Conclusion

Looking at these three critical features of the 2004 Constitution, it is clear that much remains to be accomplished on the path to democratization. Part of the blame lies with the hybrid mission format of the peacebuilders—coalition members wanted stability as quickly as possible to prioritize counterinsurgency and so showed favor to a centralized system that overemphasized the executive branch. Furthermore, the strong UN peacebuilding structure seen in Timor-Leste and Kosovo were not pursued and civilian peacebuilding forces had to work in an underfunded and piecemeal way alongside the dual missions of the coalition forces. The consequences for the rule of law structures were amply demonstrated by the lack of coordination of these different actors when setting up the justice system. However, it was Afghan actors that exploited gaps and weaknesses in the 2004 constitutional document in order to further skew the imbalances between government branches. The result is a broad disillusionment among

26. Dodge, Toby. "Intervention and dreams of exogenous statebuilding: the application of Liberal Peacebuilding in Afghanistan and Iraq." *Review of International Studies*, Vol. 39 Issue 5 (Intervention and the Ordering of the Modern World), December 2013. Pp. 1189-1212

27. *Ibid.*

28. Wang, Carol. "Rule of Law in Afghanistan: Enabling a Constitutional Framework for Local Accountability." *Harvard International Law Journal*, Vol 55, No. 1, Winter 2014, 2014. P. 230. <https://harvardilj.org/wp-content/uploads/sites/15/Wang.pdf>

Afghans with the government they currently have which is noticeably different from the theoretical form of constitutional liberal democracy.

Policy Recommendations

- The constitution proposes a democratic system of governance but at the same time says in Article 60 that “The President shall be the head of state of the Islamic Republic of Afghanistan, executing his authorities in the executive, legislative and judiciary fields in accordance with the provisions of this Constitution.” This contradicts a basic notion of democracy which is that it requires meaningful checks and balances between branches of government. An amendment within the constitution, particularly to change the presidential power of law by decree and over appointments, would help improve the balance between the three branches.
- A federal government which shared power with regional governments could be more efficient than the current unitary system when considering the context of Afghanistan. This would reduce the strength of parochial networks currently using the central government as a resource and increase the ability of citizens to participate in tailoring policies that suit the differing needs of their respective provinces.
- The election law should be amended and ratified by the Afghan Parliament in order to curb the rise of tensions similar to what was seen in all past elections. The power of appointment to the IEC should be shared between government branches and international monitoring on the ECC should continue for as long as fraud persists as an issue.