

Rule of Law in Afghanistan: Enabling a Constitutional Framework for Local Accountability

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Rule of law practitioners have defined rule of law as a way to achieve several objectives. Three commonly cited objectives are that rule of law should: 1. hold the governing powers accountable and limit official arbitrariness; 2. allow people to plan their affairs with reasonable confidence through open, clear, and stable rules where the state monopolizes the use of violence in the resolution of disputes; and 3. protect fundamental rights such as those embodied by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention Against Torture.

This note provides a case study of Afghanistan to highlight that international efforts to promote rule of law in conflict societies must foremost ensure the first rule of law objective. A failure of accountability impedes the success of all other rule of law objectives. If power-holders can arbitrarily exert their will, people cannot predictably order their affairs and realize the second rule of law objective.¹ In a culture of impunity, human rights violations at the uppermost—and the most visible, standard-setting levels—go unpunished, upsetting the third rule of law objective.

The current constitutional framework in Afghanistan has not introduced meaningful checks and balances to ensure accountability at the national level. Instead, it has concentrated power in the executive branch, creating a patronage system that sinks from the top down into local communities. 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.²

Despite this top-down weight of the Constitution, fledgling bottom-up checks on power-holders have been realized by a national program not explicitly focused on establishing rule of law, but rather primarily aimed at building infrastructure projects and enabling community governance. This program, known as the National Solidarity Program (“NSP”), features a streamlined central financial management system that also decentralizes significant program and budget authority to local elected councils. The program has achieved measurable successes in ensuring that councils transparently manage their budgets and that community members hold their elected officials accountable for misuse of budgetary and project authority. However, recent efforts to bring NSP’s elected councils into the Constitution’s framework of centralized governance threaten the very characteristic that explains the program’s ability to achieve this accountability—the independence to manage locally administered budgets and elections.

This note aims to show that future efforts at building rule of law in a transitioning conflict society should enable, within the constitution, local advantages that ensure accountability. These enabling provisions must be in place early: Afghanistan demonstrates the exceeding difficulty of pivoting from a highly centralized government to a decentralized one. Power has amassed in institutions and individuals that now will not readily relinquish authority.

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1. See THE FEDERALIST NO. 47 (James Madison) (“The accumulation of all powers, legislative, executive and judiciary, in the same hands . . . may be justly pronounced the very definition of tyranny.”).

2. See Astri Suhrke, *When More is Less: Aiding Statebuilding in Afghanistan* 3–9 (Fundación para las Relaciones Internacionales y el Diálogo Exterior [FRIDE], Working Note No. 26, 2006).

INTRODUCTION

Twelve years into the United States' longest war, the United States is in the process of withdrawing from Afghanistan. Policymakers, journalists, and academics have set forth a steady flow of criticism over the amount spent and the lives lost in the efforts to rebuild the country. This is particularly true with respect to a cornerstone of the international community's efforts in Afghanistan: building rule of law. To date, international experts, aid workers, policymakers, and military personnel have inspected Afghan prisons, trained police and judges, planned elections, and rewritten laws.³ The U.S. Agency for International Development ("USAID") has worked on police reform, the U.S. Institute of Peace ("USIP") has explored linkages between the formal and informal justice sectors, and the U.S. Army Judge Advocates have built and staffed prisons, prosecutors' offices, judges, and courts. Yet despite these intense efforts, establishing rule of law is viewed in the shadow of "significant" missteps.⁴ The last presidential election in 2009 saw systematic and widespread fraud and ballot stuffing;⁵ the country's largest financial institution, Kabul Bank, allowed Afghanistan's president and his allies to siphon funds towards "poppy palaces" in Kabul and Dubai;⁶ and the public continues to perceive the judiciary as the most corrupt government actor after the police.⁷ How has so much diligence met with so much disappointment?

This note seeks to identify the structural weaknesses and contradictions in rule of law efforts in Afghanistan to explain the challenges and also illuminate unacknowledged successes.

It will situate the efforts to promote rule of law in Afghanistan in the context of rule of law promotion in other transitioning crisis societies. It will acknowledge the international community's increasing emphasis on a written constitution as a "blueprint for governance" in times of transition.⁸ It will also provide a brief overview of Afghanistan's legal traditions and the international community's efforts promoting rule of law in the country to date.

3. See generally William Maley, *The Rule of Law and Weight of Politics*, in *THE RULE OF LAW IN AFGHANISTAN, MISSING IN INACTION* 61, 61–78 (Whit Mason ed., 2011).

4. See The American Institute of Afghanistan Studies, Conference, Sept. 23–24, 2010, *Rule of Law in Afghanistan* [hereinafter American Institute of Afghanistan Studies].

5. See generally *The 2009 Presidential and Provincial Council Elections in Afghanistan*, NAT'L DEMOCRATIC INST. (2010), available at http://www.ndi.org/files/Elections_in_Afghanistan_2009.pdf.

6. Matthew Rosenberg, *Audit Says Kabul Bank Began as 'Ponzi Scheme'*, N.Y. TIMES (Nov. 26, 2012), available at <http://www.nytimes.com/2012/11/27/world/asia/kabul-bank-audit-details-extent-of-fraud.html?pagewanted=all>.

7. See American Institute of Afghanistan Studies, *supra* note 4, at 5; Daphne Eviator, *U.S. Must Aid Afghan Judicial System*, POLITICO (Mar. 13, 2012, 9:38 PM), <http://www.politico.com/news/stories/0312/73938.html>.

8. See Maley, *supra* note 3, at 85.

Next, the note will analyze the most damaging criticism of rule of law in Afghanistan today—that of corruption and of the impunity wielded by power-holders, especially at the national level. It will demonstrate how this corruption resulted from an overly centralized 2004 Constitution that failed to introduce meaningful checks and balances at the national level.

The note will then analyze the progress in achieving transparency and accountability within a development program that is not traditionally identified as a “rule of law” initiative. Instead, the program’s focus on enabling community members to build infrastructure projects through a streamlined national budget structure, local elections, and its promotion of local budget autonomy has successfully advanced the very rule of law objective that has failed at the national level.

Finally, the note will provide a case study of the process of implementing the Constitution’s provisions on village governance to demonstrate how a centralized Constitution threatens the sustainability of decentralization’s successes at achieving rule of law.

The note concludes that rule of law efforts to promote accountability enjoy advantages uniquely at the local level through local elections and budget autonomy. Future efforts at drafting constitutions and promoting rule of law should seek to enable these advantages.

I. RULE OF LAW PROMOTION IN TRANSITIONING SOCIETIES

Since President Woodrow Wilson called on the American people to make the world safe for democracy, the United States has sought to promote rule of law abroad.⁹ These rule-of-law efforts have increasingly been part of ambitious international projects in transitioning societies emerging from war and violent conflict.¹⁰ While policymakers and practitioners appear to agree that rule of law is necessary for the rebuilding of a post-conflict and post-intervention society, they do not agree on one definition for rule of law.¹¹ Rather, rule of law is a concept that encompasses a multitude of objectives, coalescing around the following frequently cited objectives:

1. Hold the governing powers accountable and guard against official arbitrariness;¹²

9. William P. Alford, *Exporting “The Pursuit of Happiness,”* 113 HARV. L. REV. 1677, 1682 (2000) (reviewing THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* (1999)).

10. Maley, *supra* note 3, at 61.

11. *Id.* at 62.

12. *See id.* at 78 (quoting Thomas Fuller, “Be you never so high, the law is above you.”); *see also* ALBERT VENN DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 192 (London, MacMillan & Co. 1893) (stating that rule of law ensured “the equal subjection of all classes to the ordinary law of the land”); Richard Fallon, *The Rule of Law as a Concept in International Discourse*, 97 COLUM. L. REV. 7, 7–8 (1997) (writing that “rule of law should guarantee against at least some types of official arbitrariness”); Joseph Raz, *The Rule of Law and its Virtue*, 93 LAW Q. REV. 195, 210 (1977) (stating that the independence of the judiciary must be guaranteed, and courts should have review powers

2. Allow people to plan their affairs with reasonable confidence through open, clear, and stable rules where the state monopolizes the use of violence in the resolution of disputes;¹³ and
3. Protect principles of natural justice, such as those embodied by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention Against Torture.¹⁴

These objectives are found in the international community's efforts to promote rule of law in the last few decades. USAID in El Salvador and Guatemala began rule of law programs to facilitate economic and democratic development.¹⁵ This reflected the law and development focus in the 1970s and 1980s aimed at reforming commercial, regulatory, and banking legislation.¹⁶

By the mid-1990s, further humanitarian and security concerns motivated rule of law reform. In Bosnia, Rwanda, Kosovo, East Timor, and Sierra Leone, rebuilding legal institutions, restoring functioning governments, and providing accountability for abuses and war crimes were the primary means to prevent mass atrocities and restore peace and stability.¹⁷

In Afghanistan, as in Iraq, the September 11th attacks pressed yet another rationale for rule of law reform: global security. The belief that extremists thrive in political vacuums, where rule of law was absent, helped motivate the military interventions in Iraq and Afghanistan.¹⁸

over the implementation of the other principle); Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 31, 36 (Thomas Carothers, ed., 2006); *RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES* 5 (2011) ("[T]he state is itself bound by law and does not act arbitrarily.").

13. See MICHAEL J. TREBILCOCK & RONALD JOEL DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS* 21 (2008) (quoting Joseph Raz, "(1) All laws should be prospective, open and clear. (2) Laws should be relatively stable. (3) The making of particular laws . . . should be guided by open, stable, clear and general rules."); see also Fallon, *supra* note 12, at 8 ("Rule of law should allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions."); *RULE OF LAW HANDBOOK*, *supra* note 12, at 3 ("[T]he law can be readily determined and is stable enough to allow individuals to plan their affairs.").

14. Kleinfeld, *supra* note 12, at 35 (observing that the rule of law should uphold human rights); Maley, *supra* note 3, at 63 (stating that "principles of natural justice must be observed"); *RULE OF LAW HANDBOOK*, *supra* note 12, at 3 (noting, "the state protects basic human rights and fundamental freedoms").

15. Alford, *supra* note 9, at 1687; *USAID in El Salvador: A Long Lasting Alliance*, USAID (Nov. 16, 2013, 9:34 AM EST), <http://www.usaid.gov/el-salvador/history>.

16. Kirsti Samuels, *Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt* 5 (Social Development Note No. 37 2006).

17. Suhrke, *supra* note 2, at 2.

18. See Frederick Kagan, *Al Qaeda Allies Remain Strong*, N.Y. TIMES (Apr. 3, 2012) available at <http://www.nytimes.com/roomfordebate/2012/04/03/should-the-us-leave-afghanistan-now/al-qaeda-allies-remain-to-be-defeated-in-the-east>.

Rule of law assistance has also shifted from specific bilateral aid assistance to an increasingly internationally coordinated effort to accomplish partial or complete administration of a crisis society.¹⁹ From Kosovo and East Timor to Afghanistan and Iraq, promoting rule of law has involved nearly “whole-sale appropriation by outsiders of key internal governance tasks.”²⁰ This administration of internal governance includes overseeing the process of creating a “blueprint for post-conflict governance” through written constitutions.²¹ For transitioning societies, the process of coming together to write a constitution may serve as an important channel towards achieving conflict resolution and national reconciliation,²² as well as establishing sustainable state institutions.²³ Written constitutions provide “critical steps” interveners and local partners expect to take to move a state from the shock of military intervention to self-government.²⁴

International efforts have increasingly supported constitution-making, at least partially because a written constitution is perceived as a tangible achievement that can be accomplished within a certain time frame.²⁵ Accordingly, there has been an unprecedented constitution-building “bloom” that has accompanied the last decades’ societal transitions: in Eastern Europe, Asia, Indonesia, Pakistan, Nepal, Mongolia, Thailand, and Myanmar. In Africa, 23 out of 52 states wrote constitutions after transitioning from conflict.²⁶ In Iraq, as in Afghanistan, the international community came together to support the re-writing of the countries’ constitutions in the context of the global war on terror.

Yet even as they are increasingly utilized, these constitutions have also been criticized as cosmetic or unrealistic fictions.²⁷ Despite increasing international support and financial assistance, the track record for rule of law reform and constitution building is unimpressive.²⁸ In East Timor, U.N.

19. Maley, *supra* note 3, at 63.

20. JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 64 (2006).

21. *Id.* at 85.

22. Jamal Benomar, *Constitution Making and Peace Building: Lessons Learned From the Constitution-Making Processes of Post-Conflict Countries*, U.N. DEV. PROGRAMME 4 (Aug. 2003).

23. Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT’L L., 663, 664, 671 (2006).

24. STROMSETH ET AL., *supra* note 20, at 89.

25. Laurel Miller, *Designing Constitution-Making Processes: Lessons from the Past, Questions for the Future*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 601, 641 (2010).

26. *Constitution Building After Conflict: External Support to a Sovereign Process*, INTERNATIONAL IDEA 1, 8 (2011), available at <http://www.idea.int/publications/constitution-building-after-conflict/upload/CB-after-conflict.pdf>.

27. Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 219 (Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero & Steven C. Wheatley eds., 1993; see also Jonathan Morrow, *Deconstituting Mesopotamia: Cutting a Deal on the Regionalization of Iraq*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 563, 567 (2010) (citing one of Iraqi dictator Saddam Hussein’s famous bon mots, “A constitution is written by men so that another man can tear it up.”).

28. Benomar, *supra* note 22, at 9.

peacekeepers withdrew in 2005, but by May 2006, the government's ability to maintain law and order collapsed so thoroughly the government had to declare a state of emergency and request the dispatch of a new international peacekeeping force to restore order.²⁹ A constitution that led to overwhelming victory of one party was cited as a main factor for the ensuing political turmoil.³⁰

This note provides a case study of Afghanistan to explain how these current misconceptions about the role of a written constitution should be revised.

II. BUILDING RULE OF LAW IN POST-2001 AFGHANISTAN

A. Afghanistan's Legal Traditions

Afghanistan's legal landscape has historically been occupied by three competing sources of law: local customary practice, Islamic religious law (*sharia*) and the state legal code, including the formal constitutions adopted by the state. The customary system employs common cultural and ethical standards to resolve disputes. The main institution that has traditionally operated as the mechanism of dispute settlement is the *jirga/maraca* among the Pashtuns and its approximate equivalent, the *shura*, among non-Pashtuns. These dispute-resolution institutions incorporate the prevalent local customary law, institutionalized rituals such as *nanawate*,³¹ administered by a body of village elders with established social status and reputation for piety and fairness.³²

While the customary system is unique and varies according to the community, the Islamic *sharia* code is believed to be both divinely inspired and universal.³³ The population of Afghanistan is mainly divided by their religious following into an estimated 80% of Sunnis and 19% Shi'ite.³⁴ The overwhelming majority of Sunnis in Afghanistan are followers of the Hanafi school and Afghan Shi'ite are followers of the *ja'afari* jurisprudential school.³⁵

29. STROMSETH ET AL., *supra* note 20, at 67–68.

30. Benomar, *supra* note 22, at 9.

31. *Nanawate* means “seeking forgiveness/pardon and the obligatory acceptance of a truce offer.” This practice reintegrates offenders into the community. Current criminological research suggests that “reintegrative social control” is more effective in reducing crime than the social control normally exercised by formal state institutions. See Ali Wardak, *Building a Post-war Justice System in Afghanistan*, CRIME, L. & SOC. CHANGE 319, 327 (2004).

32. *Id.*

33. See American Institute of Afghanistan Studies, *supra* note 4, at 1.

34. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK: AFGHANISTAN, <https://www.cia.gov/library/publications/the-world-factbook/geos/af.html> (last visited Nov. 16, 2013).

35. CHRIS JOHNSON ET AL., AFGHANISTAN'S POLITICAL AND CONSTITUTIONAL DEVELOPMENT 6, 26 (Jan. 2003), available at <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5888.pdf>

The formal state legal code is a relatively recent phenomenon beginning in the late 19th century. These codes, as well as the state's formal constitutions, have been at the forefront of political controversy because each of Afghanistan's successive regimes wielded them in ways to protect its power, ideology, and authority. The historical development of these codes demonstrates various attempts by the state to concentrate near total power in an executive that was never able to achieve significant control of the rural periphery. In 1885, Afghanistan's "first great centralizing ruler" Abdur Rahman adopted Afghanistan's first state code of procedure and ethics, the *Asas al-quzat* (Fundamentals for Judges).³⁶ This code established the Hanifi school of *fiqh*, or Islamic jurisprudence, which ostensibly sought to maintain Afghanistan's historic tradition of *sharia* law, but was effectively a means for the ruler to interpret law as he saw fit.³⁷

In 1919, King Amanullah made state law legally distinct from *sharia* law. He assembled the country's first constitution in 1923 and adopted new secular penal and civil codes derived from Egyptian and Turkish law.³⁸ However, his reforms were considered to be too radical, particularly his 1929 edicts on women's rights and family law that conservatives argued were in violation of *sharia* law principles.³⁹

Within a year, he was deposed and replaced by King Nadir Shah. While Nadir Shah abandoned the most controversial reforms of his predecessor, he maintained the principle of secular law with secular courts in a new constitution of 1931.⁴⁰ Although the new constitution authorized a national consultative assembly, the king maintained his strong executive powers: he could handpick deputies to the lower and upper house and veto bills passed by Parliament.⁴¹

Nadir Shah's successor, his son, Zahir Shah, further enshrined secular law in 1933 by combining *sharia* courts and state courts into a single system. Zahir Shah's 1964 Constitution proclaimed the supremacy of state law while calling for its compatibility with *sharia* principles.⁴² For the first time, the Constitution of Afghanistan and statutes created under the Constitution were legally dominant over *sharia*.⁴³ Article 69 states "only that when no such state law exists" would "the provisions of the Hanafi jurisprudence of the *Shariaat* of Islam . . . be considered as law."⁴⁴ The 1964 Constitution also introduced the concept of separation of powers with an executive, legislative,

36. See American Institute of Afghanistan Studies, *supra* note 4, at 1.

37. *Id.*

38. Kamali, *supra* note 34, at 20.

39. *Id.*

40. See generally AFG. CONST. 1931, art. 89.

41. See generally *id.* art. 7.

42. See J. Alexander Thier, *A Third Branch? (Re)establishing the Judicial System in Afghanistan*, in BUILDING STATE AND SECURITY IN AFGHANISTAN 60 (Wolfgang Danspeckgruber & Robert Finn eds., 2007).

43. *Id.*

44. AFG. CONST. 1964, art. 69.

and judicial branch.⁴⁵ The legal system envisioned by the Constitution required significant codification, and from the mid-1960s to the mid-1970s, new comprehensive codes of criminal law, criminal procedure, and civil law were assembled and passed, almost exclusively by executive decree.⁴⁶

In 1973, Mohammad Daoud Khan overthrew the king and declared Afghanistan a republic.⁴⁷ When he was assassinated a mere five years later, in 1978, the People's Democratic Party of Afghanistan ("PDPA") came to power. The PDPA, which was strongly backed by the Soviet Union, marked the "highpoint" of the supremacy of secular state law.⁴⁸ However, because the Marxist totalitarian regime was at odds with both Islam and Afghan traditions, the population rejected its judicial reforms.⁴⁹ When the Soviets withdrew from Afghanistan in 1989, and the Afghan government fell in 1992, the formal state system of justice almost completely disappeared in the turmoil of the civil war. After the Taliban proclaimed victory in 1996, the Taliban regime recognized the legitimacy of *sharia* court decisions only and dismissed the need for constitutions entirely.⁵⁰

B. Three Rule-of-law Objectives

From 1996 until 2001, the Taliban ruled with religious austerity and ferocity. The regime also provided refuge to the Al Qaeda extremist network. When nearly three thousand people from more than fifty countries were killed in the September 11th attack on the United States and U.S. counterterrorism authorities identified the perpetrators to be from the Al Qaeda forces in Afghanistan, teams of American and British Special Forces deployed to the country to remove the Taliban from power. The U.N. Security Council authorized NATO's International Security Assistance Force ("ISAF") to support the newly assembled government and provide basic security to the Afghan people.

In December 2001, the United Nations convened a meeting in Bonn, Germany to formulate the Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, or the "Bonn Agreement." Four Afghan groups participated: (1) the Northern Alliance, the group led by Ahmed Shah Massoud and Dostum that had fought against the Taliban in the 1990s and which had received the majority of U.S. military assistance leading up to and during Operation Enduring Freedom; (2) the Rome Group, formed of supports and family King Zahir Shah, who had been exiled since his overthrow in 1973; (3) the Peshawar Group,

45. Rainer Grote, *Separation of Powers in the New Afghan Constitution*, HEIDELBERG J. OF INT'L L., 897, 897 (2004).

46. Thier, *supra* note 42, at 61.

47. *Id.*

48. See American Institute of Afghanistan Studies, *supra* note 4, at 2.

49. Wardak, *supra* note 31, at 325.

50. See American Institute of Afghanistan Studies, *supra* note 4, at 2.

composed of Pashtun mujahideen, tribal and religious leaders based in Pakistan; and (4) the Cyprus Group, a mixture of factions with close ties to Iran.⁵¹ The Northern Alliance ultimately dominated the Bonn talks, claiming key positions in the new government of secretary of defense, interior, and foreign affairs, in exchange for agreeing to a relatively unaffiliated Pashtun tribal leader Hamid Karzai to be head of the interim administration.⁵²

The Bonn Agreement focused on delineating the powers of an interim government, which would be replaced by a transitional government selected by an Emergency Loya Jirga within six months. In addition, the Constitutional Loya Jirga (“CLJ”) would be convened in two years to re-write the nation’s constitution.⁵³ The agreement also established the Judicial Reform Commission (“JRC”) “to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions.”⁵⁴ The Government of Italy agreed to be the lead nation in funding the JRC’s funding activities, raising funds from other donors, and aiding the Afghan authorities to coordinate activities in the sector.⁵⁵

The Bonn Agreement focused on delineating the separation of powers in a central government, a re-writing of the nation’s constitution, and setting a timeline for the international community to support rule of law. In this way, the movement aligned with the commonly-cited objectives of rule of law as debated and written by scholars and practitioners: holding power-holders accountable through a constitution focused on promoting separation of powers and an independent judiciary, ensuring that people can plan their affairs with reasonable confidence through open, clear and stable rules, and protecting principles of natural justice.

1. *First rule of law objective: the 2004 Constitution’s failed efforts to guard against “official arbitrariness”*

In November 2002, the constitutional drafting commission was appointed by interim president Hamid Karzai and ratified by the former King Zahir. However, the commission was ineffective, disintegrating into two camps that produced two different drafts, with an eventual third draft also provided to President Karzai from the French government. In April 2003, recognizing the futility of the first commission, the Karzai government appointed an entirely new constitutional commission consisting of thirty-five members of a broader political and ethnic spectrum, which received more support from the United Nations and other international sources than the

51. Alexander Thier, *Big Tent, Small Tent: The Making of a Constitution in Afghanistan*, in *FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING* 535, 541 (Miller, ed. 2010).

52. *Id.* at 542–43.

53. Thier, *supra* note 51, at 566. See also Barnett Rubin, *Crafting a Constitution for Afghanistan*, 15 *J. OF DEMOCRACY* 5, 15 (2004).

54. Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, art. II, Dec. 5, 2001.

55. Thier, *supra* note 42, at 67–68.

previous commission.⁵⁶ The commission opened the process up to public consultation after much debate, with some in the government and in the international community arguing that the draft would be perceived as more legitimate if it was public, but others in government arguing that public debate could be destabilizing and could undermine progress in resolving sensitive issues.⁵⁷ In the end, the commission refused to release a draft of the constitution for public scrutiny, but agreed to a two-month consultation process starting in June. This process involved the commission traveling around the country soliciting feedback from people on what they wished to be incorporated in the constitution. The commission's outreach efforts were poorly tailored to "a country that [had] not seen a constitution for decades" with a largely illiterate population.⁵⁸

After the public consultation process, President Karzai released the draft constitution on November 3, five weeks before the CLJ. The CLJ comprised of 500 delegates, 344 from the district level, 64 women at the provincial level, 42 from refugee, internally displaced person ("IDP") and minority communities, and 50 people appointed by President Karzai. Due to funding, timing, security, and logistical constraints, the delegates to the CLJ elected at the district level were not chosen in general elections but rather by 15,000 community representatives from each of the 360 districts in Afghanistan's 32 provinces that had come together as a result of an informal caucus process in 2002. Each province was represented in this meeting along with a range of views.⁵⁹

The debates were most intense on the issues of presidential or parliamentary system, the national language, the role of Islam, and the degree of federalism. The first draft of the Constitution included a directly-elected president, a prime minister, a two-chamber parliament, and a constitutional court.⁶⁰ However, members of President Karzai's cabinet were "anxious to secure greater power for President Karzai and limit the possibility of alternative power centers," and eliminated the posts of Prime Minister and the constitutional court.⁶¹ The commission also ultimately agreed on this presidential system with a bicameral parliament and a Supreme Court with powers of judicial review.

This system attempted to establish separation of powers among the three branches of the central government. With respect to lawmaking, both the legislature and the executive could propose laws, which must be adopted by a majority of both houses of the legislature. In addition, the president could

56. Thier, *supra* note 51, at 544.

57. Thier, *supra* note 51, at 545.

58. Ghizaal Haress, Separation of Powers in Afghanistan: Missing the Element of "Checks and Balances," 22 (2009) (unpublished L.L.M. dissertation, The School of Oriental and African Studies, University of London) (on file with author).

59. Thier, *supra* note 51, at 547.

60. INT'L CRISIS GRP., Asia Briefing No. 29 *Afghanistan: The Constitutional Loya Jirga*, 3 (2003).

61. Thier, *supra* note 51, at 561.

exercise a veto, which could still be overridden by a two-thirds majority of the legislature. Furthermore, the Supreme Court was granted the power to review the constitutionality of laws and treaties, as well as to interpret those laws. The power to propose the budget lay with the executive, but the budget had to be approved by the lower house of parliament. With respect to appointments, the parliament also had authority to approve cabinet officials, Supreme Court justice appointees, and upper house appointees of the President.⁶²

The Afghan Constitution also created a highly centralized state with little instruction on how and when political or administrative authority would be extended into the provinces.⁶³ Article 147, Chapter 8, Article 2 states that the government, “while preserving the principle of centralism, shall delegate certain authorities to local administration units for the purpose of expediting and promoting economic, social, and cultural affairs.”⁶⁴ This provision made clear that the central government’s powers must not be easily transferred to local administrations, because the “principle” of centralism must be upheld and safeguarded.⁶⁵ To balance the appointment power, people elected consultative bodies at the provincial and district level, but the process and timeline for elections was left to be determined at a later date.⁶⁶

The constitutional process highlighted the rationale for choosing the centralized governance framework. First, the initial policy of the international community insisted on pursuing security, reconstruction, and democratization on a “light footprint” with minimum involvement and presence from international troops.⁶⁷ At Bonn, the international community preferred to work with centralized institutions, because it would be easier to coordinate with one body rather than a multiplicity of governance structures across the country. This streamlined communication was “vigorously supported” by the United States, who wanted to deal with an “obvious partner” to pursue its counterterrorism objectives.⁶⁸ This central bias was also seen in Iraq by the United States, who rejected a U.N. decentralization proposal as unsuitable on the grounds that it did not centralize petroleum power in Baghdad.⁶⁹

In addition, the international community and Afghan elites justified a central structure on the grounds that decades of war had further damaged a

62. *Id.* at 545.

63. *Id.* at 556.

64. THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, Jan. 3, 2004, art. 147 [hereinafter AFG. CONST. 2004], available at <http://www.afghanembassy.com.pl/cms/uploads/images/Constitution/The%20Constitution.pdf> (unofficial English translation).

65. AFGHANISTAN LEGAL EDUCATION PROJECT, STANFORD LAW SCHOOL (ALEP), AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF AFGHANISTAN 114 (2011).

66. See AFG. CONST. 2004, *supra* note 64, art. 139.

67. See Lakhdar Brahim, *Statebuilding in Crisis and Post-Conflict Countries*, 7TH GLOBAL FORUM ON REINVENTING GOVERNMENT 16–17 (2007).

68. See William Maley, *The Rule of Law and Weight of Politics*, in THE RULE OF LAW IN AFGHANISTAN, MISSING IN INACTION 61, 73 (Whit Mason ed., 2011).

69. Morrow, *supra* note 27, at 563, 565.

historically weak Afghan state as shown by its many iterations of unsuccessful constitutional attempts to manage the rural periphery.⁷⁰ As President Karzai advocated, “In countries where there are no strong institutions, where the remnants of conflict are still there, we need a system with one centrality, not many centers of power.”⁷¹ Federal options were seen as creating too great a danger to a fracturing of the state, a fear mistakenly magnified based on the international community’s recent experience with the Balkan civil war.⁷²

Consequently, a uniquely centralized constitution granted the executive unusually strong powers, exemplified by a presidential system without a prime minister or constitutional court and with virtually unfettered appointment authority extending to the provinces. By empowering such a strong executive, the constitution structurally challenged the first rule of law objective—ensuring that executive power-holders be accountable—from the beginning.

2. *Second rule of law objective: judicial reform and open, clear, stable rules*

In addition to advising the Constitution, efforts to build rule of law have also focused on legal reform through revising of codes and training of legal officials. The main efforts at legal reform have come from Italy, the United States, and Germany.⁷³ The United States has also contributed to the justice sector in Kabul with projects funded by USAID.⁷⁴ Its key projects included reforming the Ministry of Interior and implementing the Disarmament, Demobilization, and Reintegration (“DDR”) program, which aimed to disarm and demobilize former combatants and reintegrate them back into society in a more productive way.⁷⁵ In addition, the United States Department of Justice (“DOJ”) sent attorneys from the Drug Enforcement Administration, FBI, and the U.S. Marshals Service to serve as trainers/mentors to Afghan investigators, prosecutors, and judges at the Criminal Justice Task Force, the Central Narcotics Tribunal (“CNT”), the Major Crimes Task Force, Anti-Corruption Unit, and the Anti-Corruption Tribunal. The focus was on counternarcotics and counterterrorism: DOJ attorneys advised Afghans on how to draft a comprehensive counternarcotics law that created the CNT, and FBI personnel provided technical support and intelligence to enable offensive and defensive counter operations, review thousands of documents seized from Al Qaeda and Anti-Coalition Forces, and established a Major

70. Gretchen Birkle et al., *Toward a Political Strategy for Afghanistan*, Foreign Policy at Brookings (May 2011), available at http://www.brookings.edu/~media/research/files/notes/2011/5/afghanistan%20ohanlon/05_afghanistan_ohanlon.pdf.

71. Haress, *supra* note 58, at 24 (quoting from *Karzai Seeks Quick Accord on Afghan Constitution*, CHINA DAILY, Dec. 12, 2003).

72. Morrow, *supra* note 27, at 563, 565.

73. Thier, *supra* note 42, at 83.

74. See generally RULE OF LAW HANDBOOK, *supra* note 12.

75. *Id.* at 42–43.

Crimes Task Force that “focuses on Afghan-led investigations of corruption, kidnapping, and other serious criminal acts.”⁷⁶

The U.S. Department of Defense also supported rule of law operations as key to the department’s offensive and defensive operations, as well as its engagement of stability operations.⁷⁷ Under the U.S. Army’s counterinsurgency doctrine, military officers and Judge Advocates recognize establishing rule of law as an important component of building and strengthening democratic governments.⁷⁸ In July 2011, 39 nations of NATO and ISAF agreed to establish a parallel mission for rule of law support called the NATO Rule of Law Field Force (“ROLFF”). The mission ambitiously took on several legal reforms at the community level. It built and staffed prosecutors’ offices and courts. It trained Afghans to gather forensic evidence, conducting more than 166 trials that relied upon “explosive residue testing, fingerprint examination, or other forensic analysis in their judgments.”⁷⁹ ROLFF also recorded and registered resolutions to land disputes.⁸⁰

USIP has also undertaken significant rule of law activities in Afghanistan since 2002. It has explored ways to better link the formal and informal justice sectors, promoting accountability and good governance by implementing a national action plan on peace, justice, and reconciliation. USIP has also provided comparative research on constitutional interpretation and established an International Network to Promote the Rule of Law.⁸¹

Other actors engaged in rule of law in Afghanistan include the U.N. Assistance Mission to Afghanistan (“UNAMA”), which also supported rule of law in an advisory capacity to the government, but has no implementation responsibilities. It has supplied corrections and civilian police experts to assist the prisons and police projects.⁸² The World Bank had also supported a Judicial Sector Reform Project from 2008 to 2011, increasing management of human capital and physical infrastructure, increasing the skills of justice sector professionals, improving legal awareness, and providing support to the Afghan justice sector institutions to implement the National Justice Sector Strategy and Program.⁸³

76. *Id.* at 50.

77. *Id.* at 50–51.

78. *Id.* at 20.

79. Brigadier General Mark Martins, Remarks at Change of Command, NATO Rule of Law Field Support Mission & Rule of Law Field Force (Sept. 14, 2011).

80. Badakhshan field trip (July 2011); *see also* RULE OF LAW HANDBOOK, *supra* note 12, at 62.

81. UNITED STATES INST. OF PEACE, INTERNATIONAL NETWORK TO PROMOTE THE RULE OF LAW (INPROL), <http://www.usip.org/programs/initiatives/international-network-promote-rule-law-inprol>.

82. RULE OF LAW HANDBOOK, *supra* note 12, at 211.

83. *See* THE WORLD BANK, AFGHANISTAN JUSTICE SECTOR REFORM PROJECT (2012), <http://www.worldbank.org/projects/P107372/afghanistan-judicial-reform-project?lang=en>.

3. *Third rule of law objective: ratifying international treaties and establishing the international human rights principles*

The 2004 Constitution of Afghanistan promises in its preamble to “[ob-serve] the United Nations Charter and to [respect] the Universal Declaration of Human Rights.”⁸⁴ In addition, Article Seven specifically provides that “the state shall abide by the U.N. Charter, international treaties and international conventions that Afghanistan has ratified, and the Universal Declaration of Human Rights.”⁸⁵ The Government of Afghanistan has ratified several international human rights treaties: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention Against Torture, the Convention on the Rights of the Child, and Convention on the Elimination of All Forms of Discrimination Against Women.⁸⁶ At the latest international donor conference on Afghanistan in Tokyo, the Afghan Government and the international community declared their focus on protecting human rights, “in particular the rights of women and children.”⁸⁷

However, these human rights provisions exist alongside the Constitution. Fourteen of the Constitution’s 162 articles reference Islam, with the first four articles establishing Islam as a fundamental political, legal, and religious basis of the state.⁸⁸ Article Three of the Constitution provides that no law can be contrary to Islamic beliefs and provisions.⁸⁹ Moreover, the Constitution provides no method of resolving conflicts between international human rights law and Islamic law, such as disparities between men and women under *sharia* with regard to marriage, divorce, inheritance rights, and court testimony.⁹⁰

III. FAILURE TO RESOLVE THE FIRST RULE OF LAW OBJECTIVE AT THE NATIONAL LEVEL

Despite this range of rule of law activity in Afghanistan, on all three rule of law objectives, the international community has been strongly criticized for its progress on these efforts.⁹¹ Experts say that there has been an over-

84. AFG. CONST. 2004, *supra* note 64, preamble.

85. *Id.* art. 7.

86. Leanne M. Smith, *Implementing International Human Rights Law in Post Conflict Settings Backlash Without Buy-In: Lessons from Afghanistan*, 5 MUSLIM WORLD J. OF HUMAN RIGHTS 1, 3 (2008).

87. Tokyo Conference on Afghanistan, July 8, 2012, The Tokyo Declaration Partnership for Self-Reliance in Afghanistan, From Transition to Transformation, ¶ 3, available at http://www.mofa.go.jp/region/middle_e/afghanistan/tokyo_conference_2012/tokyo_declaration_en1.html.

88. Smith, *supra* note 86, at 4–5.

89. *Id.*

90. INT’L CRISIS GRP., AFGHANISTAN: THE CONSTITUTIONAL LOYA JIRGA 1, 6–7 (2003), available at [http://www.crisisgroup.org/~media/Files/asia/south-asia/afghanistan/B029%20Afghanistan%20The%20Constitutional%20Loya%20Jirga.pdf](http://www.crisisgroup.org/~/media/Files/asia/south-asia/afghanistan/B029%20Afghanistan%20The%20Constitutional%20Loya%20Jirga.pdf).

91. See generally American Institute of Afghanistan Studies, *supra* note 4.

emphasis on “delivery of concrete assets,” such as buildings and the number of individuals trained, driven by the perception that rule of law efforts are “technical” tasks.⁹² Such technical tasks have focused on infrastructure such as court building, standards such as higher degree qualifications, increasing staff numbers to meet needs, sorting out applicable laws, and instituting common procedures.⁹³ The most damaging critique may be that delivered from polls of the Afghan people: “people do not trust the government and the government has no organic relationship with the people.”⁹⁴

In Afghanistan, the failure of accountability impedes the success of all other rule of law objectives. If power-holders can arbitrarily exert their will, people cannot predictably order their affairs.⁹⁵ Human rights violations at the uppermost—and the most visible, standard-setting levels—go unpunished. In a culture of impunity, power-holders may be encouraged to continue aggressions, knowing they will not be made to answer for them. And, when there is no political will to enforce the law, “it does not matter how well trained the judges are or how skillfully the laws are written.”⁹⁶ Even while well-intentioned, training the police and judges and providing them with prisons or courthouses cannot be effective if the executive is not incentivized—and the community is not empowered—to demand that these officials abide by what they learned. Instead, improvements in “capacity” may only give self-interested officials more institutional tools to advance their own agendas.⁹⁷

This “climate of impunity,” where the law cannot bring politically connected officials to justice, has been facilitated by the failures of the Constitution to introduce meaningful checks and balances on executive power. Sarah Chayes, the former special advisor to the Chairman of the Joint Chief of Staff, commented that to establish rule of law, “*first* you have to not over-empower any one branch or structure of government the way we did.”⁹⁸ Thomas Carothers, an expert on international democratization support, also observed, “Rule of law reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled by the law. Respect for the law will not easily take root in systems rife with corruption and cynicism, since entrenched elites cede their traditional impunity and vested interests only under great pressure.”⁹⁹ Professor William Maley, Director of the Asia-Pacific College of Diplomacy at the Australia National University, has written,

92. RULE OF LAW HANDBOOK, *supra* note 12, at 84.

93. *Id.*

94. American Institute of Afghanistan Studies, *supra* note 4, at 5.

95. THE FEDERALIST NO. 47, *supra* note 1 (“The accumulation of all powers, legislative, executive and judiciary, in the same hands may be justly pronounced the very definition of tyranny.”).

96. American Institute of Afghanistan Studies, *supra* note 4, at 6.

97. STROMSETH ET AL., *supra* note 20, at 179.

98. E-Mail from Sarah Chayes, Special Adviser to the Chairman of the Joint Chiefs of Staff to author (Mar. 2, 2012, 8:07 AM) (“You have to do network analysis on your friends, the way we do it on the Taliban.”) (on file with author).

99. See Carothers, *supra* note 12, at 4 (adding “Rule of law should uphold human rights”).

“[t]he lack of constraint of state power . . . [is the] area of failure in the rebuilding of the rule of law that has done the most to compromise the legitimacy of the transition process.”¹⁰⁰

Removing the sense of impunity held by the powerful is the “final issue” to establishing rule of law that is so large that all others pale before it.¹⁰¹

A. *The Constitution in Practice: A Fragile Separation of Powers*

The actual interpretation and application of the Constitution demonstrates that there exists only a fragile separation of powers: the executive operates without meaningful checks at the national level or at the subnational level.¹⁰² The executive branch has largely co-opted the legislative and judiciary branches in many ways.¹⁰³ First, the Parliament is fragmented and has been unable to assert itself effectively. While the upper and lower houses have wielded their power to check ministry appointments,¹⁰⁴ President Karzai has overridden Parliament’s votes of no-confidence against ministers.¹⁰⁵ “In case of immediate need,” the President can bring draft laws into force by decree when the National Assembly is not in session, a power the President has often exercised without being required to obtain Parliament approval afterwards.¹⁰⁶

Second, the judiciary remains weak and is perceived to primarily serve the political will of the president. Experts charge that Karzai’s administration consistently “demotes, marginalizes, and reduces” payment to those “judicial actors taking on the corruption problem” and has staffed the judiciary with Karzai-appointed judges who are consistently viewed by Afghans as the most corrupt, after the police.¹⁰⁷ This is not surprising in a country where “neither practical experience nor a political ethos [supports] an independent judiciary.”¹⁰⁸ Even before the civil war in the 1990s, the country’s legal system faced a dearth of qualified personnel and inadequate budgets. The

100. Maley, *supra* note 3, at 73.

101. See American Institute of Afghanistan Studies, *supra* note 4.

102. Lalit K. Jha, *Panetta Wants Karzai Administration to Curb Graft*, PAJHWOK AFGHAN NEWS (May 5, 2012, 8:13 PM), <http://www.pajhwok.com/en/2012/05/05/panetta-wants-karzai-admin-curb-graft>.

103. See Chayes, *supra* note 98.

104. Martine van Bijlert, *Parliament Votes Off Most of Karzai’s Cabinet*, AFGHANISTAN ANALYSTS NETWORK (Jan. 2, 2010), <http://www.afghanistan-analysts.org/parliament-votes-off-most-of-karzais-cabinet> (describing Parliament’s rejection of H.E. Waris Barmak).

105. Scott Worden, *A guide to Afghan impeachment*, FOREIGN POL’Y (July 15, 2011), http://afpak.foreignpolicy.com/posts/2011/07/15/a_guide_to_afghan_impeachment. A clear example is the impeachment of H.E. Rangin Spanta, which was overridden by President Karzai. Spanta is now the head of NDS. *Id.*

106. See generally AFG. CONST. 2004, *supra* note 64, art. 79.

107. See Chayes, *supra* note 98 (“You have to do network analysis on your friends, the way we do it on the Taliban.”).

108. Thier, *supra* note 42, at 66.

Afghan system of legal education today has few faculty members with advanced formal training in Islamic law.¹⁰⁹

Third, experts also observe that there has not been “one successful prosecution” in Afghanistan based on clearly defined criteria of corruption.¹¹⁰ Those who are targeted for “corruption” may simply have failed to curry favor with the President.¹¹¹ For example, President Karzai’s dismissal of Kabul’s mayor and Attorney General Jaber Sabet showed a “high degree of personalized politics at play.”¹¹² These factors lead Afghan experts to observe that “rule of law” is but a thin veil for a political strategy.¹¹³

B. Case Study: 2009 Presidential and 2010 Parliamentary Elections

The presidential elections of 2009 and the parliamentary elections of 2010 provide a closer study of the flaws of the Constitution, as well as the inherent limitations of the international community’s efforts to facilitate rule of law.

The Constitution of Afghanistan is silent on who appoints or elects the members of the Independent Electoral Commission (“IEC”), the body that organizes and supervises all elections in the country.¹¹⁴ It states only that the “Islamic Transitional Government of Afghanistan shall . . . [establish] the Independent Elections Commission.”¹¹⁵ With the Constitution vague on who possessed the authority to appoint the IEC members, the President passed a decree giving himself the authority to do so.¹¹⁶ To push back against this, the lower house of Parliament, the Wolesi Jirga, passed a law in February 2009 that required parliamentary approval of election commissioners, but President Karzai vetoed the legislation and appointed the IEC members.¹¹⁷ Unsurprisingly, the neutrality of the IEC was called into question during elections period.¹¹⁸ Its chair, Dr. Azizullah Ludin, made decisions

109. Marvin G. Weinbaum, *Legal Elites in Afghan Society*, 12 INT’L J. MIDDLE EAST STUD. 39, 42 (1980).

110. Interview with Michael Semple, Carr Center Fellow, Harvard Kennedy School in Cambridge, Mass. (Feb. 25, 2012).

111. Liechtenstein Institute on Self-Determination (LISD) *Toward a Sovereign Afghanistan*, Oct. 20–22, 2011, http://dataspace.princeton.edu/jspui/bitstream/88435/dsp01k3569436b/2/afghsummary_2011.pdf (2011).

112. DIPALI MUKHOPADHYAY, WARLORDS, STRONGMAN GOVERNORS, AND STATE BUILDING IN AFGHANISTAN (forthcoming Jan. 2014).

113. Chayes, *supra* note 98.

114. AFG. CONST. 2004, *supra* note 64, art. 156, ch. 11; art. 6.

115. *Id.* art. 159, ch. 12; art. 2.

116. Decree by President of Islamic Republic of Afghanistan No. 23 (Feb. 17, 2010). See also Jed Ober, *King Karzai*, FOREIGN POL’Y (Jan. 30, 2012, 11:34 AM), http://afpak.foreignpolicy.com/posts/2012/01/30/king_karzai; NATIONAL DEMOCRATIC INSTITUTE, THE 2009 PRESIDENTIAL AND PROVINCIAL COUNCIL ELECTIONS IN AFGHANISTAN 10 (2010), http://www.ndi.org/files/Elections_in_Afghanistan_2009.pdf [hereinafter NDI].

117. NDI, *supra* note 116, at 11.

118. Abbas Daiyar, *Political Transition and Calls for Electoral Reform*, DAILY OUTLOOK AFGHANISTAN (May 15, 2012), http://outlookafghanistan.net/topics.php?post_id=4288.

and statements that benefited President Karzai's candidacy,¹¹⁹ for instance allowing President Karzai to use executive resources such as presidential planes in his campaigning, as well as more air time on state television and radio.¹²⁰

Article 61 of the Electoral Law also established the Electoral Complaint Commission ("ECC") to adjudicate challenges and complaints to the electoral process.¹²¹ It consisted of three internationals appointed by the head of UNAMA, the Special Representative of the Secretary General, and two Afghan commissioners, one selected by the Afghanistan Independent Human Rights Commission and one by the Supreme Court. Unlike the IEC, which both international observers and Afghans criticized as partial and biased, the ECC was more effective in monitoring election fraud.¹²² It identified 1,400 of 25,000 polling stations as fraudulent, with the most common type of fraud cited as ballot box stuffing.¹²³ The ECC also received complaints about IEC officials receiving bribes to alter the results.¹²⁴

The ECC's audit of the final results took two months. The audit was expected to drop President Karzai's 54% of the vote below 50% and thus mandate a runoff between himself and the candidate who finished second, Dr. Abdullah Abdullah.¹²⁵ U.S. and U.K. officials hurriedly convened meetings with both President Karzai and Dr. Abdullah, fearing that President Karzai would refuse to accept the results of the audit and not participate in the run off. Secretary of State John Kerry, then-chairman of the Foreign Relations Committee, met with both candidates, attracting attention from Western media. Foreign Minister Bernard Kouchner of France pressed both candidates to "respect" the ECC audit process. Other officials were also reported as "working the phones," including Secretary of State Hillary Rodham Clinton, Richard Holbrooke, Secretary of Defense Robert Gates, and Prime Minister Gordon Brown of Britain.¹²⁶ President Karzai eventually agreed to a runoff election, but two weeks later, in November 2009, Dr. Abdullah pulled out of the runoff, citing inadequate electoral institutions

119. INT'L CRISIS GROUP, *AFGHANISTAN'S ELECTION CHALLENGES* 9 (June 24, 2009), http://www.observatori.org/paises/pais_87/documentos/171_afghanistan_s_election_challenges.pdf.

120. NDI, *supra* note 116, at 10.

121. Decree by President of Islamic Republic of Afghanistan on Ratification of Electoral Law No. 43 (Aug. 16, 2010), *available at* http://www.iec.org.af/pdf/legalframework/law/electorallaw_eng.pdf?phpMyAdmin=84dcac90c9ded2016426264a0e469bc0 (unofficial English translation) (hereinafter *Presidential Decree No. 43*).

122. NDI, *supra* note 116, at 12.

123. U.S. INST. OF PEACE, *DELAYS WILL NOT IMPROVE AFGHAN ELECTIONS* 2-3 (Feb. 2, 2010), *available at* http://www.usip.org/files/resources/PB%209%20Delays%20Will%20Not%20Improve%20Afghan%20Elections_0.pdf.

124. NDI, *supra* note 116, at 47.

125. Sabrina Tavernise & Mark Landler, *Allies Press Karzai to Accept Election Audit Results*, N.Y. TIMES Oct. 18, 2009, at A14, *available at* <http://www.nytimes.com/2009/10/18/world/asia/18afghan.html>.

126. *Id.*

that could prevent the fraud in the second-round elections that had plagued the first round.¹²⁷

The irony of this flurry of foreign advice was that even while foreign officials were pressing for legitimacy—few asked: legitimacy *for whom?* The United States was concerned that a runoff would delay results. Many U.S. officials believed that the only way to maintain the good momentum in Afghanistan was to ensure that President Karzai won the presidential election while also making sure it appeared free and fair, so it would be acceptable to Karzai.¹²⁸ But less thought was given to what Afghans would accept as legitimate, and that was perhaps to have an election whose results were determined by *their* votes—not by fraudulent votes, but also not decided by foreign partners. The IEC demonstrated a lack of impartiality and independence that irreparably tainted the legitimacy of the presidential elections, but the international community's own biases also undermined its cause.¹²⁹

The Parliamentary elections in 2010 further reinforced an entrenched executive that could not be offset by international pressure without undermining Afghan legitimacy. In February of 2010, President Karzai passed a decree on the electoral law, which removed U.N. oversight of the appointment of ECC officials and instead gave him sole authority to appoint the five-member panel of the ECC.¹³⁰ The decree itself was of questionable legality—the President passed it during the *recess* of the Parliament and thus had the obligation to present the decree to Parliament within 30 days of its reconvening. When the President did, Parliament rejected the decree. But the President's office rejected the Parliament's decision, relying on Article 109 of the Constitution which states that the Parliament could not make decisions on amendments to the election law during the last year of the legislative term. Eventually, the Parliament's legislative committee concluded that, although the text of the constitution did not allow them to work on amendments to electoral law, the constitution did not prevent them from rejecting the decree either. The Wolesi Jirga rejected the law, but the upper house of Parliament, the Meshrano Jirga, decided not to act on the election decree fearing it would embarrass the President, perhaps unsurpris-

127. Chris Otton, *Karzai Declared Afghan President*, AFG. NEWS CTR. (Nov. 2, 2009), <http://www.afghanistannewscenter.com/news/2009/november/nov22009.html>.

128. Joshua Foust, *CIA Advisor Advocates Meddling in Afghanistan's Election*, REGISTAN (July 10, 2012), <http://registan.net/index.php/2012/07/10/cia-advisor-advocates-meddling-in-afghanistans-election/>.

129. DEMOCRACY INT'L, DEMOCRACY INTERNATIONAL REPORT ON 2009 PRESIDENTIAL ELECTIONS (Aug. 2010), <http://afghan2010.com/resource/democracy-international-report-2009-presidential-elections#The Politics of the Runoff Campaign>.

130. INT'L CRISIS GROUP, AFGHANISTAN'S ELECTIONS STALEMATE 6 (Feb. 23, 2011), http://www.observatori.org/paises/pais_87/documentos/B117%20Afghanistans%20Elections%20Stalemate.pdf, see also Martine van Bijlert, *Dreaming of a Pliable Parliament and a Ruling Family*, AFGHANISTAN ANALYSTS NETWORK (Feb. 24, 2010), <http://aan-afghanistan.com/index.asp?id=667>.

ingly as a third of the Meshrano Jirga's seats are not elected but rather appointed by the President.¹³¹

Although the President succeeded in usurping the right to appoint the ECC, the international community sought and received assurances that the ECC would include two international members.¹³² On March 14, 2010, after conversations with UNAMA head Kai Eide, President Karzai agreed to cede to UNAMA two "international seats" on the ECC, rather than to insist that all five ECC members be Afghans, and promised that all electoral decisions would require at least one non-Afghan ECC member concurrence.¹³³

But international pressure on Karzai again threatened to backfire. Karzai framed the 2010 election reform controversy in terms of an illegitimate international interference. The presidential spokesman explained that "with foreigners in the commission, it was not a national body, nor was it an Afghan body. So to Afghanize the process, the President changed some articles of the law."¹³⁴ This move aimed to tap into existing Afghan resentment of the international presence and to form a united front with certain members of Parliament against what some called "the plots and schemes of foreigners."¹³⁵ The international actors were stonewalled—unable to prevent "actual fraud" from happening, accused of manipulation when trying to assist, and finally blamed for spoiling the legitimacy of the elections.¹³⁶

Afghanistan's most recent presidential and parliamentary elections demonstrate that the Afghan Constitution has not created a meaningful system of checks-and-balances. International pressure has been the most visible means of holding powerbrokers accountable, a factor which weakens Afghans' perception of their government as independent and legitimate.¹³⁷ Further consequences will be seen in the 2014 presidential elections, preparation for which has already been marked by allegations that President Karzai continues to "control" the IEC.¹³⁸

131. Martine van Bijlert, *Getting Ready for the Next Election: The IEC Pushes Ahead*, AFGHANISTAN ANALYSTS NETWORK (Apr. 17, 2010), <http://aan-afghanistan.com/index.asp?id=728>.

132. *Id.*

133. KENNETH KATZMAN, CONGRESSIONAL RESEARCH SERVICES, RS 21922, AFGHANISTAN: POLITICS, ELECTIONS, AND GOVERNMENT PERFORMANCE 32–33 (2010), <http://fpc.state.gov/documents/organization/145099.pdf>.

134. *Karzai Takes Control of the Electoral Complaints Commission*, L'AGENCE FRANCE-PRESSE (Feb. 23, 2010), <http://www.france24.com/en/20100223-karzai-takes-control-electoral-complaints-commission>.

135. Martine van Bijlert, *The Electoral Law That Wasn't Amended (yet) and Fraud by Foreigners*, AFGHANISTAN ANALYSTS NETWORK (Apr. 1, 2010), <http://aan-afghanistan.com/index.asp?id=716>.

136. *Id.*

137. Suhrke, *supra* note 2, at 3–9.

138. Haseeb Maudoodi, *Abdullah Accuses Government of Controlling IEC*, TOLO NEWS (Jan. 30, 2013), www.tolonews.com/en/afghanistan/9261-abdullah-accuses-govt-of-controlling-iec.

IV. ACCOUNTABILITY THROUGH A COMMUNITY DEVELOPMENT PROGRAM

Despite official impunity enabled by the Constitution's structure of separation of powers, a development program not traditionally viewed as a "rule of law" initiative has nevertheless made progress on rule of law objectives. The media and academic reports that criticize international efforts make exception for the National Solidarity Program ("NSP").¹³⁹

A. *The National Solidarity Program and Rule of Law*

Article Thirteen of the Afghan Constitution proclaims, "The State shall formulate and implement effective programs for development of industries, growth of production, increasing of public living standards, and support to craftsmanship." Under this authorization, the Government of Afghanistan's Ministry of Rural Rehabilitation and Development ("MRRD") created the NSP in 2002. The program's goal is to develop the ability of Afghan communities to "identify, plan, manage and monitor their own development projects."¹⁴⁰ MRRD continues to be in charge of funding from the International Development Assistance of the World Bank Group, the Afghanistan Reconstruction Trust Fund, and other donors.¹⁴¹

Its operations proceed as follows: NSP contracts with an international NGO that serves as the project's "Facilitating Partner." The Facilitating Partner ("FP") introduces the program to villages and, for those villages that decide they would like to participate, the FP guides the village in the process of choosing its community development council ("CDC") by a secret ballot election.

High percentages of each community participate in these elections. In the September to December quarterly report, NSP reported that of the total number of eligible voters from the 1,344 randomly sampled communities, 68% of them participated in the process of CDC election.¹⁴²

These councils then reach consensus on community development priorities ("CDPs") through a consultation with the community. The councils

139. NSP is able to work in insecure areas where other projects cannot. See Gregory Warner, *The Schools the Taliban Won't Torch*, WASH. MONTHLY, Dec. 2007, <http://www.washingtonmonthly.com/features/2007/0712.warner.html> (reporting "[i]n a country where almost all the recent news has been bad news, the National Solidarity Program [sic], or NSP, offers a rare glimmer of hope."). A 2011 study in Faryab province confirmed the widespread dissatisfaction with post-2001 development activities, with the exceptions of "the national ring road, the provision of electricity, and the National Solidarity Program." See Geert Gompelman, *Winning Hearts and Minds? Examining the Relationship between Aid and Security in Afghanistan's Faryab Province*, FEINSTEIN INT'L CTR. 39-40 (Jan. 2011), available at <http://www.scribd.com/fullscreen/48805830>.

140. NSP FINANCIAL MANAGEMENT MANUAL 6 (2007).

141. NSP ISM AIDE MEMOIRE 1 (2011).

142. NAT'L SOLIDARITY PROGRAMME, *NSP Quarterly Report, Sept.-Dec. 2012* 12-13, available at [http://www.nspafghanistan.org/files/NSP-3rd%20Quarterly%20Report%201st%20Mizan%20to%2030th%20Qaws%201391%20\(22nd%20September%20to%2020th%20December%202012\).pdf](http://www.nspafghanistan.org/files/NSP-3rd%20Quarterly%20Report%201st%20Mizan%20to%2030th%20Qaws%201391%20(22nd%20September%20to%2020th%20December%202012).pdf).

submit these CDPs for approval by the FP and NSP program management. Once approved, NSP program management disburses a block grant to the community's bank account administered by CDC members.¹⁴³

The community manages the bank account and is required to contribute at least 10% of labor costs to build the project. These projects to date have included more than 23,000 kilometers of tertiary road; 39,000 KW of electricity; 2,074 water pumps; 331 primary schools; and 34 clinic buildings.¹⁴⁴ The CDCs have financed 56,691 community projects and completed 46,348 of those projects.¹⁴⁵

While the program does not make achieving "rule of law" its explicit objective, the program has enabled community members to hold accountable their elected CDC officials. This is the first rule of law objective realized: holding the governing powers accountable and guarding against official arbitrariness. Afghans have been able to voice objections to their elected council members and sanction misuse of power.

The program enables community members to register their complaints over project administration through several avenues. The procurement department has its own complaints handling unit as well as a program-wide Community Participatory Monitoring system to involve local communities in the monitoring of the subprojects.¹⁴⁶ The main complaint handling system, named the Grievance Handling Mechanism or the Grievance Redress Mechanism, includes a Grievance Handling Unit ("GHU") in Kabul, facilitating partners at the regional level, and field offices at the community level.¹⁴⁷ Community members may make their complaint by submitting a written complaint in a grievances box that can be accessed only by project management staff, by calling one of the four hotlines, or by reporting the grievance to the field officers and project staff.¹⁴⁸ These grievances are recorded by project staff in a grievance-handling database that creates a grievance "ID" to track the complaint to its resolution.¹⁴⁹

The type of resolution is tailored to the type of grievance.¹⁵⁰ Grievances that relate to the election are made to the project management unit's field

143. *Afghanistan National Solidarity Project: Promoting Community-Based Development*, WORLD BANK (April 2012), available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/IDA/0,contentMDK:21296643~menuPK:4752068~pagePK:51236175~piPK:437394~theSitePK:73154,00.html>.

144. Andrew Beath et al., *Winning Hearts and Minds through Development: Evidence from a Field Experiment in Afghanistan* (MIT Political Sci. Dep't Working Note No. 2011-14, 2012); see also Andrew Beath et al., *Direct Democracy and Resource Allocation: Experimental Evidence from Afghanistan* (MIT Political Sci. Dep't Research Note No. 2011, 2012).

145. NSP ISM AIDE MEMOIRE, *supra* note 141, at 43.

146. NSP OPERATIONAL MANUAL 34 (2009).

147. *Id.* at 25.

148. NSP GRIEVANCE HANDLING UNIT POLICY AND PROCEDURE 6 (2007).

149. *Id.* at 4.

150. *Id.* Cited grievances include: conflicts regarding the CDCs' accountability and transparency, the subprojects' technical design being contrary to the proposal, fraud and theft during the subproject, poor

officer.¹⁵¹ Complaints about the project's procurement affairs and engineering or technical oversight are made to the Facilitating Partner and referred to project management.¹⁵² Complaints about corruption, fraud or theft that are of amounts less than 50,000AFs (or \$1,000) are made to NSP's field offices that facilitate meetings with the elected council and community members to convince the corrupt person or group to refund the amount.¹⁵³ Disputes over amounts greater than 1,500,000AFs are referred to NSP headquarters in Kabul. In addition, complaints about social problems are first processed by the CDC, and if there is no resolution, the issue is then handled by the FP and by higher levels of authority sequentially.¹⁵⁴ Particularly intractable complaints are referred to the conflict resolution committee, which is comprised of ministry authorities.¹⁵⁵

The timeline for the resolution is also tailored to the type of grievance. The program requires disputes to be addressed within 10 official days; complaints reported to the facilitating partner are required to be processed within 26 days; and grievances reported to the program management unit must be addressed within 26 official days.¹⁵⁶

NSP has recorded about 300 grievances every quarter, and it resolves the majority of them. From March 20 to June 20, 2012, NSP's GHU received 227 grievances and resolved 174 of them. From June 21 to September 21, 2012, the GHU received 302 grievances and resolved 136 of them.¹⁵⁷ Resolutions are defined by decisions reached by community consensus, as well as by the successful enforcement of program protocol regarding fund misappropriation.

mobilization and training, infractions during the CDC election, delays in preparation of subproject and block grant disbursement, and poor quality of the construction materials. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 4–5.

154. David Post & Sanjay Agarwal, *Feedback Matters: Designing Effective Grievance Redress Mechanisms for Bank-Financed Projects*, WORLD BANK 15, available at <http://siteresources.worldbank.org/EASTASIA/PACIFICEXT/Resources/GRMP2-Final.pdf>.

155. NSP GRIEVANCE HANDLING UNIT POLICY AND PROCEDURE, *supra* note 148, at 8.

156. *Id.* at 10.

157. Some of the resolutions include the following examples: in the Altarghanak village in Behsud, Wardak, two people complained that the community-chosen project of a new road was being constructed on their private agriculture lands. To resolve the dispute, NSP facilitated a meeting of elders who convinced the complainants to donate their land for the community. However, NSP warned that "donations" are now allowed in cases where the land in question constitutes more than 10% of the owner's property, to protect "poor people [who find it] particularly difficult to reject a community's request for land donation." In another example, a financial dealer misappropriated an amount of money from the community's bank account. When the community members noticed the missing installment, they reported it to the program management office in Kabul, which stopped payments to the account to prevent further misappropriation. In addition, NSP withheld payments to the Facilitating Partner as a penalty for failure of oversight and sought formal legal prosecution of the financial dealer. NSP ISM AIDE MEMOIRE, *supra* note 141, 31–32.

Second, the program has been designed with the objective of maximizing transparency and accountability to stop corruption *ex-ante*.¹⁵⁸ NSP requires CDCs to hold “town-hall” consultations with villagers to choose the priority project, to report on the project status, and to update community members on the use of funds. Council members are also required to keep public minutes at planning meetings as well as public record/log books that record procurement activities and financial transactions, minutes of meetings, and training sessions. Compliance rates are imperfect: in May 2011, the rate of CDC compliance with these record requirements decreased to 42% from almost 88% in August 2010.¹⁵⁹ Cited reasons included factors that are difficult to control such as security and harsh weather, but other failures to comply with recording requirements included failure of program management to deliver the forms and the “absence of CDC member[s].”¹⁶⁰ Despite these challenges, NSP program staff is working to remedy the reasons for delay of project implementation, and generally the quality of documentation continues to improve.¹⁶¹ In addition to public record-keeping, communities are also required to post a public notice board in a place accessible by both men and women, that provides a detailed account of the subproject status, proposed budget, and actual expenditures.¹⁶²

B. NSP's Successes Counter Assumptions about Local Capacity and Undermine the Rationale for a Centralized Constitution

NSP's success at promoting rule of law undermines many justifications for the international community's decision not to support the budget autonomy of local governments. Namely, it calls into question the international fear that decentralization would automatically lead to capture by local elites¹⁶³ and that local governments lack the capacity to administer government programs.¹⁶⁴

First, the international community feared that local governments would be captured by local power elites who would not deliver public services to the general populace.¹⁶⁵ Yet there have been several studies of NSP documenting community members resisting strongmen who attempted to intim-

158. Dealing with Governance and Corruption Risks in Project Lending, Part 2: The Practice of Grievance Redress, Annex B 14, available at <http://siteresources.worldbank.org/EASTASIAPACIFICEXT/Resources/GRMP2-Final.pdf>.

159. NSP ISM AIDE MEMOIRE, *supra* note 141, at 58.

160. *Id.*

161. *Id.* at 59.

162. NSP OPERATIONAL MANUAL *supra* note 146, at 4; Anwar Shah, *Fiscal Decentralization in Developing and Transition Economies: Progress, Problems and the Promise* (World Bank Policy Research Working Paper 3282, April 2004).

163. Pranab Bardhan, *Decentralization of Governance and Development*, J. OF ECON. PERSPECTIVES 185, 193 (Fall 2002); see also Shah, *supra* note 162, at 3.

164. Shah, *supra* note 162, at 14.

165. Bardhan, *supra* note 163, at 202.

idate the election process.¹⁶⁶ In a 2004 study of six different districts in Kabul, Baghlan and Jawzjan provinces, covering 30 communities, elections were reported to be free from intimidation by local power-holders.¹⁶⁷ In the first large-sample quantitative randomized impact assessment of NSP from August 2007 to October 2011, which consisted of 500 villages across 10 districts in Balkh, Baghlan, Daikundi, Ghor, Hirat, and Nangarhar, NSP was found to increase villagers' reports of elite misbehavior.¹⁶⁸

Elsewhere, community development projects have also been shown to empower community members to resist intimidation. Because of the two countries' shared challenges, the Kecamatan Development Program ("KDP") in Indonesia served as the model for NSP's development in Afghanistan.

In 2001, the Indonesian government shared characteristics of today's Afghan government. It was characterized by high levels of bureaucracy and red tape, as well as multiple opportunities for rent-seeking.¹⁶⁹ There was such a history of impunity for the perpetrators that it was rarely in the interest of an individual villager to protest corruption.¹⁷⁰ The central government used local and sub-national government positions as a means of patronage and control.¹⁷¹ In 2001, Transparency International ranked Indonesia as 88th out of a survey of 91 countries for corruption.¹⁷² In 2011, Transparency International ranked Afghanistan 180th out of 182 countries for corruption.¹⁷³ Both Indonesia and Afghanistan cover areas of great geographic and cultural diversity, with the population being primarily rural.¹⁷⁴ And in both countries, political reform had primarily concentrated at the national level and the proposed decentralized reforms at the village level threatened the interests of powerful central forces.¹⁷⁵

KDP demonstrated how a community development program could nevertheless further rule of law goals in a society with pervasive corruption. Providing a viable means for its participants to file complaints, KDP successfully encouraged villagers to pursue corruption cases.¹⁷⁶ After the

166. Inger W. Boesen, *From Subjects to Citizens: Local Participation in the National Solidarity Programme* 40 (Afg. Research and Evaluation Unit (AREU) Working Note Series, 2004) available at <http://www.cmi.no/pdf/?file=/afghanistan/doc/From-Subjects-to-Citizens.pdf>.

167. *Id.*

168. Andrew Beath et al., *Randomized Impact Evaluation of Afghanistan's National Solidarity Programme: Final Report* 11, 58 (July 1, 2013), available at <http://www.nsp-ie.org/reports/finalreport.pdf>.

169. Andrea F. Woodhouse, *Village Corruption in Indonesia: Fighting Corruption in the World Bank's Kecamatan Development Program*, THE WORLD BANK 4 (Apr. 2005), [http://www.pnmp-perdesaan.or.id/downloads/Fighting%20Corruption%20in%20KDP%20\(Andrea\).pdf](http://www.pnmp-perdesaan.or.id/downloads/Fighting%20Corruption%20in%20KDP%20(Andrea).pdf).

170. *Id.* at v.

171. *Id.*

172. TRANSPARENCY INT'L, *Corruption Perceptions Index 2001*, http://www.transparency.org/research/cpi/cpi_2001.

173. *Id.*

174. Woodhouse, *supra* note 169, at 3.

175. *Id.*

176. Scott Guggenheim, *Crises and Contradictions: Understanding the Origins of a Community Development Project in Indonesia*, in THE SEARCH FOR EMPOWERMENT: SOCIAL CAPITAL AS IDEA AND PRACTICE AT

program was instituted, villagers filed more reports of abuses by officials than ever before,¹⁷⁷ growing more vocal as their confidence grew that there would be a response to their complaints.¹⁷⁸

Second, policymakers argued that decentralizing authority to local governments in Afghanistan was not feasible because there was limited human capacity at the local level. The country's education system had been dismantled by more than three decades of war: the national adult literacy rate is 28.1%, with 43.1% for men and 12.6% for women.¹⁷⁹ In rural areas, where approximately 74% of Afghans reside, there is an estimated 35% literacy rate for men and a mere 7% literacy rate for women.¹⁸⁰ Policymakers had repeatedly warned against applying Iraq's counterinsurgency lessons to Afghanistan because Afghanistan's human capacity was much more limited.¹⁸¹

But even facing such challenges, Afghan community members, both men and women, understand the principles of elections by secret ballot. NSP has been able to teach even illiterate community members to vote by ballot and, furthermore, train council members on record-keeping and financial management.¹⁸² Some of the voter education has been accomplished through freshly innovative ways: Facilitating Partners promote "peer" learning between CDCs by facilitating cross-CDC exchange visits.¹⁸³ And because communities are required to contribute cash, labor, or in-kind contributions to participate in the program, the learning is crystallized by actual participation in the program.¹⁸⁴ Thus, NSP has addressed challenges in capacity by adapting its program design, as further explained in the following section. It has demonstrated that the decentralization of power can in fact advance rule of law objectives.

C. Explaining NSP's Successes: Central Financial Administration, Local Elections, and Local Budget Autonomy

NSP's achievements of accountability at the local level rely on a few key features: Kabul-level central programmatic support, local elections and local budget autonomy.

THE WORLD BANK 26 (Anthony J. Bebbington et al. eds. 2006), available at <http://www.yale.edu/agrarianstudies/colloqnotes/22guggenheim.pdf>.

177. *Id.*

178. *Id.*

179. CENT. STATISTICS, ISLAMIC REPUBLIC OF AFG., NATIONAL RISK AND VULNERABILITY ASSESSMENT 2007-08, 65 (2009).

180. *Id.* at 66.

181. See STROMSETH ET AL., *supra* note 20, at 125 (stating "unlike Afghanistan, however, Iraq is at least a modern state, with a population [that] is largely educated, sophisticated, and urban.").

182. NSP OPERATIONAL MANUAL, *supra* note 146, at 17.

183. *Id.* at 18.

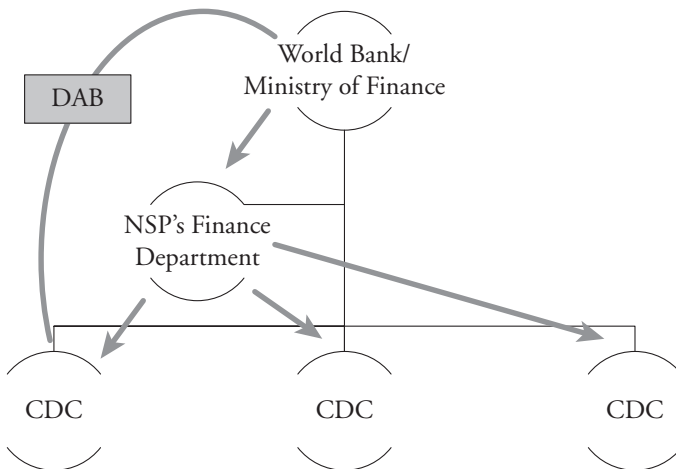
184. *Id.* at 21.

1. *Central financial program administration*

Similar to other national reconstruction programs in Afghanistan, NSP depends on international funding coordinated by the World Bank. However, NSP channels international funding through a uniquely streamlined design that takes into account the weak state administration. NSP founder Scott Guggenheim explained that Afghan government agencies are not “set up to handle large volumes of small projects or highly decentralized transactions” but can administer “simple but large” programs.¹⁸⁵ Accordingly, international partners administer funding as part of the government structure in the ways outlined below.

The program’s financial management system works to ensure accountability between the Ministry of Finance/World Bank and Kabul program staff, as well as between the communities and the program. There are two levels of monitoring of program administration, both from Kabul: the World Bank’s monitoring of Kabul program staff, and Kabul program staff’s monitoring of community councils. For the former, the Ministry of Finance and the World Bank monitor monthly financial reports on fund transfers and disbursements submitted by the program in Kabul.¹⁸⁶ For the latter, the program’s Finance Department also monitors all payments to communities to ensure that the payments are made for eligible expenditures under the grant and are supported by procurement documents and reports.¹⁸⁷ This dual monitoring ensures an extra check of accountability.

TWO LEVELS OF TOP-DOWN SUPERVISION AND DIRECT DISBURSEMENT.



185. *Unlearned Lessons from Afghanistan*, MARKET BUILDING INITIATIVE, INST. FOR STATE EFFECTIVENESS 2 (March 2011), www.effectivestates.org.

186. NSP FINANCIAL MANAGEMENT MANUAL 10 (2007).

187. *Id.* at 11.

In addition, NSP works to ensure that program management is conducted transparently with a streamlined disbursement system. Once the community's project priority proposal is approved, Kabul officers transfer the block grant directly from Da Afghanistan Bank ("DAB") to the community's bank account. NSP's system of providing funding directly to community bank accounts, rather than through provincial and district governors, limits the number of hands the funding must pass through. It streamlines financial transactions and limits the opportunities for money to be misused.¹⁸⁸

The FP plays a critical role in mobilizing community participation in the program and training the council members in the financial management and procurement accountability processes required by the program.¹⁸⁹ While employed by international NGOs, these FPs are Afghan and often from the village with which they are engaging, a factor that may lead to increased understanding, capacity-building, and ownership on the part of the communities.¹⁹⁰ For example, to convince communities to embrace women's participation in the program, the FPs brought in the use of Islamic principles and verses from the Qur'an supporting the NSP process and inclusion of women.¹⁹¹

2. Local elections

A second factor explaining NSP's success at ensuring accountability may be the program's local elections of council members. Empirical studies have demonstrated the power of CDC elections to ensure accountability. MIT political scientists conducted a randomized experiment of 250 communities spread evenly across ten districts in northern, northeastern, eastern, central, and western Afghanistan, and found that direct democratic decision-making procedures are correlated with reducing elite capture of public resources and enhancing the legitimacy of political processes.¹⁹² Specifically, their study found that CDC elections increased villagers' satisfaction, as defined by four factors: (1) whether the respondent agreed with decisions of village leadership, (2) whether the respondent attributes positive economic changes to village leadership actions, (3) whether the respondent is satisfied with the

188. INST. FOR STATE EFFECTIVENESS, *supra* note 185, at 3.

189. Palwasha Kakar, *Fine-Tuning the NSP: Discussion of Problems and Solutions with Facilitating Partners* 4 (Afghanistan Research and Evaluation Unit Working Note, 2005), available at <http://www.areas.org.af/Uploads/EditionPdfs/530E-Fine-Tuning%20the%20NSP-WP-print.pdf>.

190. The author witnessed some of these remarkable liaisons with communities. Mina Azizi led a training with CDC FPs for community members. In a small home in rural Parwan province Ms. Azizi spoke to an audience of about 15 women and defined their common challenge of poverty. She understood the challenge they faced because her family lived in Parwan, too. She explained that each of them could face this challenge by saving 50 Afghani (equivalent of 1 dollar) a month. From the savings, they could start larger collective businesses, which could bring in more money than what each of them could earn individually. Ms. Azizi spoke to them with words they could understand and the women signed up for the program that day.

191. Kakar, *supra* note 189, at 13–14.

192. Beath et al., *supra* note 144, at 18–19.

work of the village leaders, and (4) whether the respondent perceives that his family is better off than it was last year.¹⁹³ This increase in satisfaction is associated with an increase in project selection based on public preference. Satisfaction also increased even after controlling for the type of project selected, indicating that it was a result of the secret ballot election procedure itself.¹⁹⁴

Moreover, in addition to increasing satisfaction, elections improved services for the poor. Another recent randomized impact evaluation study of 500 communities by the same MIT political scientists found that when elected officials are put in charge of the food aid distribution, as opposed to general village council members, it improved the targeting of the project to the more vulnerable populations.¹⁹⁵

NSP elections are required to take place every three years.¹⁹⁶ There is thus a threat of being “voted out” of office that may discipline office holders. Because they are elected with the community members’ votes and can be voted out if they perform poorly, community councils may be more motivated to transparently manage the money in the interests of the community members.¹⁹⁷ In addition, elections for community development councils are administered in ways that are adapted to the local conditions. NSP engages with each community individually with an extended “socialization” and “mobilization” process to determine the type of elections to hold. During this process, NSP members gauge such factors as the community’s literacy rate and its security.¹⁹⁸ In the most recent quarterly evaluation of 966 randomly sampled communities, the most common methods used during the CDC election were secret ballot (73%), open election (24%) and nomination (3%).¹⁹⁹ NSP has adapted the form of the elected council to local structures of governance that are familiar with communities. As described above in the

193. *Id.* at 13.

194. *Id.* at 17.

195. Andrew Beath et al., *Do Elected Councils Improve Governance? Experimental Evidence on Local Institutions in Afghanistan* 2, 19 (MIT Political Sci. Dep’t Research Note No. 2013–24, 2013), available at <http://ssrn.com/abstract=2202563>.

196. However, re-elections do not occur regularly as required and some are even held post-program implementation. According to the June to September 2012 NSP Quarterly Report, out of 387 sampled communities 267 (69%) saw a re-election of CDCs, of the 267 communities 50 saw a re-election of the same CDC members, 54 communities saw complete replacement of councils, and 163 saw partial replacement of council members. NAT’L SOLIDARITY PROGRAMME (NSP), NSP QUARTERLY REPORT 18 (June–Sept. 2012), available at [http://www.nspafghanistan.org/files/NSP-2nd%20Quarterly%20Report%2031st%20Saratana%20to%2031st%20Sunbula%201391%20\(21nd%20June%20to%2021nd%20September%202012\).pdf](http://www.nspafghanistan.org/files/NSP-2nd%20Quarterly%20Report%2031st%20Saratana%20to%2031st%20Sunbula%201391%20(21nd%20June%20to%2021nd%20September%202012).pdf); see also NSP OPERATIONAL MANUAL, ANNEX F – HANDOVER OF MATURE CDCs 2 (2009).

197. See generally Monica Martinez-Bravo et al., *The Effects of Democratization on Public Goods and Redistribution: Evidence from China* (Nat’l Bureau of Econ. Research, Working Note No. 18101, 2012), available at http://www.econ.yale.edu/~nq3/NANCYS_Yale_Website/resources/notes/Vdem_20120506.pdf.

198. See Boesen, *supra* note 166, at 32 (citing women surveyed saying “for literate people, the ballot system is better, they can write themselves. But for illiterate people as we are, ‘open voting’ by raising hands is better.”) (emphasis omitted).

199. Beath et al., *supra* note 195, at 14.

section on traditional legal structures in Afghanistan, these local structures of governance such as the *jirga* and *shura* have historically “constituted a critical base of governance and accountability.”²⁰⁰ They provide the local public goods and adjudicate local disputes, because Afghanistan’s central government has lacked the strength and resources to provide these services in many parts of the country.²⁰¹

However, rule of law actors in Afghanistan may be susceptible to misuse of these traditional structures. As international efforts to deliver aid or implement programs have increasingly sought to use *jirgas* or *shuras*, more and more of these councils have sprung up and their membership include increasingly younger members whose social status may not yet be respected in the village.²⁰² Often the program-mandated elected village councils are also organized in addition to the traditional village governance bodies.²⁰³ Because membership of the *jirga* and *shura* has historically not been fixed and because these structures are convened as the need arises, villagers may take advantage of this flexibility to misrepresent themselves as the true elders.²⁰⁴ NSP’s *shura* therefore may not comprise of traditional local government leaders, but rather new community members who conduct meetings using the façade of the traditional procedures.²⁰⁵

3. Local budget autonomy

NSP’s local level funding structure demonstrates several characteristics that help it derive legitimacy and withstand corruption. First, council members themselves administer the community bank account and community members decide what projects to fund.²⁰⁶ In addition, community members must contribute 10% of their own costs to the project, either in cash, labor, or in-kind.²⁰⁷ In founder Scott Guggenheim’s words, the significance of NSP “wasn’t just that people got a water pump,” but that they selected a water pump and then the government gave them the tools to build it.²⁰⁸ Because the community members control the purse strings, there is a greater sense of local ownership over projects. This local ownership may

200. Andrew Beath et al., *Democratization, Division of Responsibilities and Governance Quality: Experimental Evidence on Local Institutions in Afghanistan* 5 (Jan. 17, 2013) (Working Note), available at <http://www.princeton.edu/tpe/speaker-series/speaker-series-2012-13/Enikolopov.pdf>.

201. *Id.*

202. In the author’s interview of district governor in Khost in summer 2011, the district governor cited the presence of more than 100 *shuras* in the 30 villages he oversaw. He said, “There is the NATO *shura*, the development *shura*, the security *shura*. . . .”

203. Boesen, *supra* note 166, at 23.

204. Interview with Thomas Barfield, Professor, Boston University in Boston, Mass. (Jan. 20, 2012).

205. *Id.*

206. NSP OPERATIONAL MANUAL, *supra* note 146, at 18.

207. *Id.*

208. Warner, *supra* note 139.

increase incentives for villagers to monitor project administration more closely.²⁰⁹

Second, the amounts disbursed to finance local projects were small relative to other large international infrastructure investments. Each project is developed from block grants estimated at \$30–40 per capita, or \$200 per household, up to a village maximum of \$60,000.²¹⁰ The limited amount of cash that can be allocated to any project does not create “a big target for corrupt actors to come and try and win over a piece of the project.”²¹¹ This cap on the disbursement amount is a strength of the program, enabling it to realize the first rule of law objective of holding powerholders accountable.

D. Summary of Rule of Law Advantages at the Local Level

In summary, NSP demonstrates that community members have served as an effective counter to actual and potential misuse of power by office holders *at the local level*, even while the judiciary and legislative branches have been unable to check the executive at the national level. NSP’s successes demonstrate inherent advantages local government has over the national government in ensuring the rule of law objective of accountability.

NSP’s local elections are administered in a more flexible manner adapted to the literacy and security condition of the particular location. This flexibility is often cited as facilitating the participation of more Afghans.²¹² NSP can enjoy such flexibility because CDCs are program entities and not formal government entities that must abide by national election procedure that require simultaneous elections.²¹³

Moreover, community members are better positioned to monitor local power holders’ use of the funds, because council members are situated more closely to the communities than national elected officials.²¹⁴ Put into the terms of the centralization literature, decentralization shortens accountability chains within a local government.²¹⁵ Within the same community, infor-

209. *Id.*

210. NSP ISM AIDE MEMOIRE, *supra* note 141, at 11.

211. *Successful Development in Afghanistan: National Solidarity Program*, WAR NEWS RADIO (Sept. 2011), <http://warnewsradio.org/2011/09/20/national-solidarity-program/>.

212. HAMISH NIXON, AFGHANISTAN RESEARCH AND EVALUATION UNIT, SUBNATIONAL STATE-BUILDING IN AFGHANISTAN 42 (Apr. 2008), <http://www.areu.org.af/Uploads/EditionPdfs/806E-Subnational%20State-Building-SP-print.pdf.pdf>.

213. See Presidential Decree No. 43, *supra* note 121.

214. See ROY BAHL, INT’L STUDIES PROGRAM, SCHOOL OF POLICY STUDIES, GEORGIA STATE UNIVERSITY, IMPLEMENTATION RULES FOR FISCAL DECENTRALIZATION 2, 59–75 (1999), available at <http://siteresources.worldbank.org/INTDSRE/Resources/3p.pdf> (stating that fiscal decentralization would “at once attack several of the development problems that face developing countries: revenue mobilization, innovation in economic activity, accountability of elected officials, and grassroots participation in governance.”).

215. Norio Usui, *Critical Issues of Fiscal Decentralization*, ERD TECHNICAL NOTE SERIES NO. 21 5 (Feb. 2007).

mation requirements and transaction costs are minimized and transparency and preference matching for public services are enhanced.²¹⁶

In addition, at the local level, elected council members can oversee smaller amounts of money that present less of a target for embezzlement. Studies document that national elections are subject to capture to a greater extent than at the local level on account of the larger importance of campaign funds in national elections than in local elections.²¹⁷

V. CASE STUDY: IMPLEMENTING ARTICLE 140 OF THE CONSTITUTION

Despite the international presence in Afghanistan since 2001, only in recent years has the international community turned its attention to local governance. From 2001 to 2004, the international focus was nearly entirely on Kabul. Although academics and experts²¹⁸ had emphasized the importance of inclusion of the rural population in national strategy for years, it was not until 2009 that the international community decisively shifted attention to Afghan civilians. In General Stanley McChrystal's controversial 2009 report to U.S. Secretary of Defense Robert Gates, he stated, "Our strategy cannot be focused on seizing terrain or destroying insurgent forces; our objective must be the population. . . . The population also represents a powerful actor that can and must be leveraged in this complex system."²¹⁹ Secretary Gates stated in 2010, "It is worth recalling the core grievances in Afghanistan that spawned and subsequently empowered the Taliban 20 years ago—one of those grievances was the lack of government at the local level."²²⁰

The increased international attention on subnational governance and specifically the CDCs' successes have led to government efforts to recognize CDCs not as "only" a program unit, but as the governance unit required by Article 140 of the Constitution.²²¹ Article 140 of the Constitution states, "In order to organize activities involving people and provide them with the opportunity to actively participate in the local administration, councils are set up in districts and villages in accordance with the provisions of the law."²²²

In particular, the MRRD, the ministry that oversees the NSP, believed that the legal recognition of CDCs as village councils would consolidate

216. Shah, *supra* note 162, at 25.

217. Bardhan, *supra* note 163, at 194.

218. William Maley et al., *The Nightmare Scenario in Afghanistan*, FOREIGN POL'Y (Sept. 18, 2009), http://www.foreignpolicy.com/articles/2009/09/18/the_nightmare_scenario_in_afghanistan?page=0,1.

219. COLONEL MATTHEW BRAND, USAF, GENERAL MCCHRISTAL'S STRATEGIC ASSESSMENT EVALUATING THE OPERATING ENVIRONMENT IN AFGHANISTAN IN THE SUMMER OF 2009 2 (2009), *available at* http://uploads.worldlibrary.net/uploads/pdf/20121017001329mcchrystals_strategic_assessment_pdf.

220. Secretary Robert M. Gates, Secretary of Defense, Statement at NATO Defense Ministers (Mar. 11, 2011), *available at* <http://www.defense.gov/speeches/speech.aspx?speechid=1547>.

221. Email from Hermione Youngs, Senior Advisor MRRD/NSP, to author (Jan. 27, 2011 2:55 AM EST) (on file with author).

222. AFG. CONST. 2004, *supra* note 64, art. 140.

CDCs' successes and secure a path towards more sustainable funding as an official government body.²²³ MRRD ministry officials also stated that it was important to officially recognize CDCs as a "governance" entity, in light of criticism that CDCs were "bypassing" local governance.²²⁴

With these motivations, in January 2011, an Inter-ministerial Committee, led by the Director General of the Independent Directorate of Local Governance ("IDLG") and comprising of Deputy Ministers from several government ministries, put together a proposal for the "formal approval on the present community structures in villages and districts," including the formal recognition of Community Development Councils as village councils.²²⁵ Consequently, in July 2011, the Ministry of Rural Rehabilitation put together a draft law recognizing community development councils as village councils.²²⁶ To draft the law, MRRD took leadership and convened a working group that consisted of cabinet-level Kabul institutions: the IDLG, the IEC, the Ministry of Finance, and the Civil Service Commission.²²⁷

The process of drafting the law demonstrated two things: first, the difficulty of accomplishing decentralization with an overly centralized constitution. The numbers of government entities and the process of drafting the law demonstrated how formal implementation of the Constitution posed obstacles to both the legal recognition of CDCs as village councils. Second, the process also indicated how the centralized constitution impeded the facilitation of local elections and local budget autonomy—those very factors that contribute to NSP's successes at promoting rule of law.

A. *Obstacles to Decentralization*

The Constitution's lack of a geographical definition for village councils enabled the international community to advocate several policies and laws with contradictory village delimitations. For example, Article 34 of the Electoral Law stated that the village council's seats would be allocated according to the population of each village, estimating three members for

223. Ministry of Rural Rehabilitation and Development, Working Group Meeting, "Transition to Village Councils" (July 16, 2011) (on file with author); TERMS OF REFERENCE FOR VILLAGE COUNCIL LAW (on file with author); Email from Hermione Youngs, Senior Advisor MRRD/NSP, to author (Jan. 27, 2011 2:55 AM).

224. DOUGLAS SALTMARSH & ABHILASH MEDHI, LOCAL GOVERNANCE IN AFGHANISTAN, AFGHANISTAN RESEARCH AND EVALUATION UNIT (AREU), 3 (2011), <http://www.areu.org.af/Uploads/EditionPdfs/1114E%20Local%20Governance%20in%20Afghanistan%20SP%202011.pdf>.

225. Hamyoun Hamidzada, Deputy Minister Policy, Ministry of Finance, Zakeria Barakzai, Deputy Chief of IEC Secretariat, Eng Raz Mohammad Raz, Deputy Minister, Irrigation and Construction, MAIL, Engineer Mohd Askar Falah, Deputy Chief of Geodesy and Cartography, Wais Ahmad Barmak, Deputy Minister Programmes, MRRD, Ghulam Mustafa, Planning Director, Central Statistics Office, Barna Karimi, Deputy Minister of Policy and Coordination, IDLG, Proposal Sent to H.E. President Hamid Karzai (Jan. 2011) (on file with author).

226. Ministry of Rural Rehabilitation and Development, Draft of Law on Interim Village Councils (Aug. 2011) (on file with author).

227. Email from Hermione Youngs, Senior Advisor MRRD/NSP, to author (Jan. 27, 2011 2:55 AM) (one file with author).

every 100 people.²²⁸ But if Article 5 of the CDC by-law instead took precedence, 10-30 village council members would be chosen for every 25 families.²²⁹ And the SNGP stated that the three village council members would be elected for every village with 100 to 300 inhabitants; five members for 301 to 500 inhabitants; up to a maximum of 11 members.²³⁰ The debate over this definition impeded progress on resolving other questions, such as how to sustainably fund village councils once they have been established.

In addition, the Constitution's contradictory provisions on local election procedure allowed election authorities to demand election procedures that were logistically impossible to meet. While Article 140 states, "Members of these [district and village] councils are elected by the local people through free, general, secret and direct elections for a period of three years," the Constitution also states in Article 156 that, "the Independent Electoral Commission will be established to organize and supervise any election and to hold a referendum within the country based on the provisions of the law."²³¹ If Article 156 were to take precedence, "any election" would presumably include village council elections, and the Independent Electoral Commission would be in charge of administering them. However, the Independent Electoral Commission admitted that it would not have the capacity to conduct simultaneous, national village elections until 2021 at the earliest.²³² There was no rationale set forth for why CDC elections could not proceed as before: unlike IEC election procedure, the CDC by-law allowed elections to be staggered, to take place according to the maturity and context of each village, and did not require campaigning.²³³ However, NSP's elections were not conducted according to IEC procedure, and thus, unconstitutional if applied to village councils. The flexibility of NSP's elections—an important element of its operational success—prevented the CDCs from satisfying IEC procedure and receiving legal recognition from the Constitution.

The failure of separation of powers at the central level also challenged the process of negotiating and drafting the village council law. While the Constitution emphasized that legislation by executive decree was to be only an emergency power, many actors in Kabul saw presidential decrees as the more

228. Islamic Republic of Afghanistan, Afghanistan Electoral Law (Mar. 21, 2010), *available at* <http://afghan2010.com/resource/afghanistan-electoral-law#a34>.

229. MINISTRY OF RURAL REHABILITATION AND DEVELOPMENT, ISLAMIC REPUBLIC OF AFGHANISTAN, COMMUNITY DEVELOPMENT COUNCIL BY-LAW, NATIONAL SOLIDARITY PROGRAM, Art. 9, 11 (2006) (on file with author).

230. INDEPENDENT DIRECTORATE OF LOCAL GOVERNANCE, ISLAMIC REPUBLIC OF AFGHANISTAN, SUB-NATIONAL GOVERNANCE POLICY 171 (2010).

231. AFG. CONST. 2004, *supra* note 64, art. 140, 156.

232. Lisa Handley, Subnational Governance and District Delimitation 4 (May 2011) (unpublished report for International Foundation for Electoral Systems) (on file with author).

233. COMMUNITY DEVELOPMENT COUNCIL BY-LAW, NATIONAL SOLIDARITY PROGRAM, *supra* note 229, art. 9, 11.

expeditious means to pass a law.²³⁴ Thus, the staff working on the village council legislation focused efforts on accessing the president's office. However, the Taqneen, an administrative office housed at the President's Office of Administrative Affairs with great influential power, balked at sending the law to the President for consideration, because it was lobbied not to do so by the IEC. In the end, the IEC did not approve of the draft law.

B. Challenging NSP's Success at Achieving the First Rule of Law Objective

In addition to placing several obstacles to formal legalization of CDCs as village councils, the Constitution's centralized nature threatened to undermine the factors behind NSP's success at promoting accountability: local elections and local budget autonomy.

As previously stated, Article 137 of the Constitution proclaims that "the government, *while preserving the principle of centralism*, shall . . . delegate certain authorities to local administration units for the purpose of expediting and promoting economic, social, and cultural affairs."²³⁵ The establishment of local administrations is thus not meant to encourage independence from the central government. Almost all appointments at the provincial and district level are accordingly made by the central government. While Article 140 requires district and village councils to be elected,²³⁶ the Constitution is silent on how the provincial and district governors are to be selected. Under the broad principle of centralism, the President has assumed the power of appointing these governors.

This gradual development is a *de facto* not a *de jure* state of affairs. In the early years of the administration, district administrators were "not even registered with the [national] Ministry, let alone centrally appointed."²³⁷ But by 2004, there grew a general acceptance that these district level positions would be approved by Kabul.²³⁸ Programs seeking to ensure that the appointments process is checked by merit-based procedures such as those instituted by the Independent Administrative Reform and Civil Service Commission ("IARCSC") have failed to influence the actual process.²³⁹ In addition, almost all administrative and fiscal decisions at the provincial and district level administration are made by the central government.²⁴⁰

Because they held powers to appoint provincial and district level officials, each Kabul ministry sought to also exert supervisory authority to village councils as a conduit to extend their own influence. IDLG and its subna-

234. Thier, *supra* note 51, at 555.

235. AFG. CONST. 2004, *supra* note 64, art. 137 (emphasis added).

236. *Id.* art. 140.

237. Martine van Bijlert, *Between Discipline and Discretion: Policies Surrounding Senior Subnational Appointments*, AFGHANISTAN RESEARCH AND EVALUATION UNIT 8 (May 2009), available at <http://www.arei.org.af/Uploads/EditionPdfs/923E-Subnational%20Appointments-%20BP-print.pdf>.

238. *Id.*

239. *Id.* at 12.

240. *Id.* at 3.

tional governance policy mandated that district governors, officials appointed by the executive in Kabul, must approve village councils' development plans.²⁴¹ However, MRRD resisted, cautioning that the more village councils had to report to officials who resided outside the village, the less representative the village council would be to villagers themselves. Instead, MRRD's draft law stated in Article 15 that every village council would only have the option of requesting, and not face the requirement of ensuring, that the district governor attend the council's meeting once every quarter year.²⁴² This controversy has not been resolved and was a key factor behind IDLG's refusal to approve the draft village council law.

Furthermore, in the latest iteration of village-level governance policy, the government has proposed to establish District-Level Coordination Councils ("DCCs") that will "monitor and evaluate" CDCs.²⁴³ These DCCs will be "implemented directly by the IDLG General Directorate of Local Councils, supported by MRRD," emphasizing the primary role of IDLG and secondary role of MRRD in creating and managing these DCCs.²⁴⁴ Thus, IDLG, a ministry unfamiliar to NSP operations in the villages, would have the primary supervisory responsibilities over the program, as well as the power to potentially veto the council members and the kind of projects selected by the communities. This policy will challenge the bottom-up checks on councils that ensure they act according to the needs of community members.

C. Reflections on the Constitution

The process of drafting the village council law in accordance with the Constitution raises several questions. First, it highlights the challenges at promoting rule of law resulting from a constitution that *both* authorizes an executive unchecked by a constitutional court or prime minister at the national level *and* an extensive appointment power extending to the local levels of government. In doing so, the Constitution enabled unrestrained executive power to impose top-down monitoring of community councils that could not be effectively checked. Afghan elites at the time of drafting gave the Afghan president unusually strong powers to appoint district and provincial governors "partly to compensate" for the structural weakness of the Afghan state.²⁴⁵ But NSP's achievements show that devolving authority

241. SUB-NATIONAL GOVERNANCE POLICY, *supra* note 230, at 162.

242. Draft of Law on Interim Village Councils, *supra* note 226.

243. See INDEPENDENT DIRECTORATE AND LOCAL GOVERNANCE AND MINISTRY OF RURAL REHABILITATION AND DEVELOPMENT, ISLAMIC REPUBLIC OF AFGHANISTAN, NATIONAL POLICY FOR UNIFIED DISTRICT AND VILLAGE GOVERNANCE AND DEVELOPMENT 11 (Jan. 23, 2013) (on file with author).

244. *Id.* at 8.

245. Gretchen Birkle et al., *Toward a Political Strategy for Afghanistan*, 27 BROOKINGS INST. 1, 7 (May 2011).

to local governments may not necessarily lead to elite capture that would undermine the state.²⁴⁶

Second, much of the centralized nature of the Constitution that undermines local elections and budget autonomy was an expression of the international community's own preferences to work with one government and one leader. This preference was further shown in U.S. efforts to seek out and empower certain local warlords to assist international counter-terrorism objectives.²⁴⁷ These undemocratic methods question the seriousness of the international commitment to building rule of law to achieve Wilsonian democracy. No other single policy decision by the international community, particularly by the United States, may have more clouded the determination of which ends follow exactly which means.

With respect to the village council legislation, the Constitution is neither "sham" nor irrelevant; it matters, ironically, because of its potential to endanger the progress that has been made. And it most certainly matters because it has determined the initial power centers that are difficult to shift today. The competition in the negotiations for the village council law lends the larger lesson that any devolution of power away from existing powerholders will generate resistance. It is unclear if the national government would ever readily devolve authority to local levels, especially if it has already accumulated such *de jure* power and discretion at the national levels as seen in Afghanistan. At the time of drafting the village council law, those advocating for the successful passage of the law argued that IDLG and the IEC should feel empowered by the creation and management of village councils, even if they were overseen by MRRD, because these councils would eventually be transferred to IDLG's supervision. Moreover, in the meantime, a success for Afghanistan is a success for all government ministries. But high-sounding ideals meant little to ministries vying for further power.

CONCLUSION

Rule of law has not lost its heady imperative since President Woodrow Wilson's call decades ago. Instead, it is increasingly seen as a key component for rebuilding a post-conflict society. It is also increasingly linked with a written constitution that provides the "blueprint" for post-conflict govern-

246. NSP's successes do not make a case that regional or provincial governments should be granted more autonomy; rather, its successes argue for more *local* autonomy.

247. See Ahmed Rashid, Opinion, *After 9/11: And Hate Begat Hate*, N.Y. TIMES (Sept. 11, 2011), available at http://www.nytimes.com/2011/09/11/opinion/sunday/and-hate-begat-hate.html?pagewanted=all&_r=0 ("The former Afghan warlords, whom the Taliban got rid of in the 1990s, were re-employed by the CIA. They underwent metamorphoses, like caterpillars to butterflies, from warlords into business, drug dealers, transport contractors, property magnates. But underneath the new Armani suit was the same warlord hated by the people. So Afghans blame the Americans for reviving their dormant tormentors.").

ance. In Afghanistan, economic, human rights, and global security rationales combined for perhaps the strongest imperative for rule of law reform to date. And these reforms also take place under the framework of a written constitution, the international community's post-conflict tool du jour.

A World Bank study on corruption once observed, “[t]he proper locus of morality is people, whereas corruption lies in systems. When an official steals money from a development budget, her motive may be to send her son to school. The important failure is not in her, but in the system that allows her to get away with stealing.”²⁴⁸ The Constitutional system in Afghanistan follows the logic of this observation: widespread corruption is a consequence of the governance framework as prescribed by the Constitution.

In 2001, the international community chose—consciously and deliberately—to support a highly centralized state. At the time of the 2004 Constitution's drafting, they perceived that a decentralized framework of governance would be too difficult to coordinate and too diffuse to serve as a strategic partner. They also believed that decentralization would lead to local elite capture that could fragment the ethnically-diverse country. And they neglected considering that the most effective voice to check these officials may be that offered by a rural, illiterate Afghan vote, cursorily concluding that the electorate was not sufficiently educated to administer a decentralized budget and participate in decentralized elections.

As a result, at the national level, the international community enabled a strongly centralized Constitution characterized by a weak Parliament and no independent judiciary—a structure that could not and did not effectively hold the executive accountable. In addition, the Afghan constitution also created a highly centralized state with little instruction on how and when political or administrative authority would be extended into the provinces.²⁴⁹ The combination of a weak separation of powers and lack of direction on how to govern locally has enabled Afghanistan's President Karzai to make appointments as political favors, further distributing and expanding his network.

But against this national backdrop, NSP has demonstrated the promise of local governance for advancing rule of law. At the local level, the NSP has created an incentive structure that both *ex post* penalizes misuse of power, but also *ex ante* incentivizes accountability. This structure features a simple central disbursement system, local elections, and local budget autonomy. These features allow for election procedures that are tailored to the literacy rate and security conditions of the particular locale, a flexibility that ensures more inclusive participation. In addition, these features ensure accountability through empowering ordinary citizens to choose and monitor their elected representatives.

248. Woodhouse, *supra* note 169, at 4.

249. *Id.*

But today, the Constitution of Afghanistan undermines these very strengths of local rule of law. Efforts at implementing Article 137 and 140 through the village council law demonstrate that the Constitution prevents the decentralization of power to local institutions. The Constitution's imprecision regarding the power and authority of local, district, and provincial councils further enables President Karzai to extend his appointment power to the local level, an authority the president is particularly inclined to exercise *because* his grasp on power, like those of other Afghan leaders in history, is tenuous in the provincial outreaches.²⁵⁰ Despite, or perhaps because, of his overly centralized command in Kabul, President Karzai has little actual power of his own to counter that held by militia leaders such as Abdul Rashid Dostum.²⁵¹ President Karzai thus has adopted a strategy of co-option, offering Hirat warlord Ismail Khan a ministerial position and promising Gul Agha Sherzai the provincial governorship of Kandahar.²⁵² These individuals with brutal wartime records are not Afghan citizens' best representatives for rule of law.

Rule of law is seen as the structural solution to economic development, humanitarian and security concerns in many conflict societies.²⁵³ But in Afghanistan, international misconceptions of how to promote rule of law have led to a focus on the parts: prisons, courts, and trainings.²⁵⁴ While these efforts are commendable, they are embedded within a larger governance framework that overpowers the executive to reach not only laterally through the national government but also vertically to the very lowest level of governance. The "structural solution" that rule of law promises for development, human rights, and security cannot take place if the Constitution does not hold elected officials and power-holders accountable.

250. Thier, *supra* note 51, at 572.

251. See JEROME KLASSEN & GREG ALBO, *EMPIRE'S ALLY: CANADA AND THE WAR IN AFGHANISTAN* 2003 (2013).

252. *Id.*

253. Thomas Carothers, *The Rule of Law Revival*, *FOREIGN AFF.*, Mar.–Apr. 1998 95, 85 ("One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world's troubles.")

254. STROMSETH ET AL., *supra* note 20, at 56.

