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Development Disrupted: The Case of Afghanistan Taliban 2.0 and Lessons Learned About Foreign Aid Management

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DEVELOPMENT DISRUPTED: THE CASE OF AFGHANISTAN TALIBAN 2.0 AND LESSONS LEARNED ABOUT FOREIGN AID MANAGEMENT

Mohammad Qadam Shah* & Stephen A. Rosenbaum**

ABSTRACT: In August 2021, the United States withdrawal from Afghanistan marked the end of twenty years of attempts at liberal state building and development in that country. Despite spending trillions of dollars to create a capable, functional government, the Afghan government could not last even a week without US military and financial support. After its collapse, the Taliban immediately took over Afghanistan for the second time (Taliban 2.0). This turn of events resulted in the discontinuance of foreign aid and immediate downturn of the Afghan economy. Since then, there has been debate, among other issues, over why and how the foreign aid failed, and whether and how aid (if any) should continue to flow into the country under Taliban rule. This Article argues that foreign aid from governments and non-governmental donor agencies was not the essential problem, but it was the centralized aid and public finance management system which caused systemic corruption and waste. The monopoly of authorities, discretion over resources, and lack of downward accountability promoted a top-down, unanswerable aid and public finance management system which ultimately failed the Afghan State. With the Taliban again in power, there are two main issues that challenge the flow of foreign aid, aside from its egregious human rights record. First, the international community cannot trust a regime that has not (yet) been formally recognized or proved itself a reliable recipient; and second, the authoritarian and undemocratic leadership is pursuing the same centralized approach to management of aid and public funds. While the aid would remain humanitarian in scope, there is no assurance, as was the case in the previous regime, of any sustainable prospect of peace and in-country development. Nevertheless, the international community must find a way to meet this development challenge.¹

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¹ This article is dedicated to our LESPA colleagues whose legal education and teaching philosophy have put their livelihoods, and often their lives, at-risk so long as Afghanistan remains under Taliban control.

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I. THE END OF LIBERAL STATE BUILDING

On August 30, 2021, the United States Government completely withdrew from Afghanistan, putting an end to twenty years of liberal state building² and development. After spending untold billions of dollars,³ among other goals, the US and its allies attempted to create a capable, functional government in Afghanistan. However, the results were modest to the point that the Government⁴ could not last even a week without American military and financial support. The Government collapsed, and the Taliban immediately took over the country for a second time (Taliban 2.0).⁵

The takeover disrupted the slow process of liberal state building and development. The country's relatively democratic government was replaced by a totalitarian, autocratic approach to governance.⁶ Likewise, fundamental human rights, recognized by the previous regime, were put on hold as the Taliban re-imposed their brutal, extremist views through an Islamic Emirate on the Afghan population.⁷ However, the most important effect of the Taliban takeover was the discontinuance of aid from foreign governments and international non-governmental organizations (INGOs) and other donor agencies, and immediate downturn of the economy.⁸ Since

² "Liberal state building" may be defined as a process in conflict-affected states that focuses on constructing or reconstructing the governance institutions, with the capacity to provide effective and efficient public goods, ensure security and peace, and enhance political legitimacy. ROLAND PARIS, *AT WAR'S END: BUILDING PEACE AFTER CIVIL CONFLICT* 2–8 (2004). Key to this process is a functioning infrastructure that facilitates economic growth and well-being that in turn enhances political legitimacy through free and fair elections. *Id.*

³ The Office of the Special Inspector General for Afghanistan Reconstruction (SIGAR), established in FY 2013, reports that the United States had spent \$119.74 billion between 2002 and 2017. The Office's audits cover security, development, governance and contract administration. *Office of SIGAR Fiscal Year 2019 OMB Submission* (2019) 7. Available at [https://www.sigar.mil/pdf/budget/FiscalYearBudget.pdf?SSR=1&SubSSR=5&WP=Budget%20\(PDF\)](https://www.sigar.mil/pdf/budget/FiscalYearBudget.pdf?SSR=1&SubSSR=5&WP=Budget%20(PDF)).

⁴ Officially known as the Islamic Republic of Afghanistan, the government that preceded Taliban 2.0 ruled the country from 2004 until its collapse in 2021. This presidential republic replaced interim and transitional administrations that governed the country from 2001 to 2004, following demise of the Taliban 1.0 Islamic Emirate.

⁵ Mohammad Bashir Mobasher & Mohammad Qadam Shah, *Examining the Taliban's Words, Thoughts, and Deeds, Part I: The Myth of Taliban 2.0*, *THE DIPLOMAT* (Dec. 14, 2021),

<https://thediplomat.com/2021/12/examining-the-talibans-words-thoughts-and-deeds-part-i-the-myth-of-taliban-2-0/>. Before wholesale departure of the U.S. military in 2021, an estimated three-quarters of the national budget had come from foreign grants and outside assistance amounted to about one-half of the GDP. That aid was cut off once the Taliban took power. Matthieu Aikins, *Collision Course*, *N.Y. TIMES MAGAZINE* 28, 33 (Aug. 14, 2022).

⁶ Mohammad Qadam Shah, *What Did Billion in Aid to Afghanistan Accomplish? 5 Questions Answered*, *THE CONVERSATION* (Oct. 6, 2021), <https://theconversation.com/what-did-billions-in-aid-to-afghanistan-accomplish-5-questions-answered-166804>.

⁷ Mohammad Qadam Shah, *Centralization at the Core of Afghanistan's Problems: Can the Taliban Learn from History?* *THE DIPLOMAT* (Aug. 24, 2021), <https://thediplomat.com/2021/08/centralization-is-at-the-core-of-afghanistans-problems/>.

⁸ On the eve of the American withdrawal, concerns were expressed over the country's "fledgling economy" and lost incomes. Kanika Gupta, *Afghan Economy on Verge of Collapse as US Troops Depart*, *NIKKEI ASIA* (Aug. 5, 2021), <https://asia.nikkei.com/Politics/International-relations/Afghanistan-turmoil/Afghan-economy-on-verge-of-collapse-as-US-troops-depart>.

then, there has been debate over why and how foreign aid failed in Afghanistan, and whether and how aid should continue to flow into the country under Taliban's rule. Restoration of aid is not necessarily dependent on normalization, establishment of diplomatic relations, or a moral or political endorsement of the Taliban Government. Traditionally, governmental recognition has been based on "effective control."⁹

II. SCHOLARS DISAGREE ON EFFECT OF FOREIGN AID

A major topic in the literature of development is the effectiveness of foreign aid in the process of liberal state building: Is it a blessing or a curse? These questions are not unique to the case of Afghanistan. The literature on foreign aid in conflict-affected and poor nations consistently examines these questions in different contexts.

Some scholars suggest that aid promotes economic and political development and argue that there is a positive relationship between aid and growth.¹⁰ Others assert that aid may have a negative overall impact on growth and development prospects in poor or conflict-affected countries.¹¹ Some of the negative effects include enlarged government bureaucracies, perpetuation of bad governance and corruption, soft-budget constraints, enrichment of the elite groups, or just a waste of foreign aid.¹²

Economist Jeffrey Sachs argues that development aid and intervention help countries living in extreme poverty to "get on the ladder of development."¹³

⁹ Congressional Study Group on Foreign Relations and National Security, *Recognition & The Taliban* (15th Sess.), Brookings Institution (Sept. 30, 2022), <https://www.brookings.edu/research/recognition-and-the-taliban-2/>. Essentially, this means the regime is "sufficiently established to give reasonable assurance of its permanence, and of the acquiescence of those who constitute the state in its ability to maintain itself and discharge its internal duties and its external obligations." *Id.*

¹⁰ See, e.g., Thian-Hee Yiew & Evan Lau, *Does Foreign Aid Contribute to or Impede Economic Growth?* 11(3) J. INT'L STUD. 21, 23–24 (2017); Aviral Kumar Tiwari, *Foreign Aid, FDI, Economic Freedom and Economic Growth in Asian Countries*, 11(3) GLOBAL ECONOMY J. [Art. 4] 1, 25, 26–27 (2011); and Chung-Yee Liew et al., *Aid and Per-Capita Economic Growth in Asia: A Panel Cointegration Test*, 35 ECONOMICS BULLETIN, 1693, 1694–1699 (2015).

¹¹ See e.g., WILLIAM EASTERLY, *THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* 14–35 (2006); DAMBISA MOYO, *DEAD AID: WHY AID IS NOT WORKING AND HOW THERE IS ANOTHER WAY FOR AFRICA* 40–56 (2009); ANGUS DEATON, *THE GREAT ESCAPE: HEALTH, WEALTH, AND THE ORIGINS OF INEQUALITY* 1–23, 267–325 (2015); and Ilia Murtazashvili & Jennifer Brick Murtazashvili, *The Political Economy of State Building*, 34(2) J. PUBLIC FINANCE & PUBLIC CHOICE 189, 200–207 (2019).

¹² See, e.g., Steven Radelet, 92 *A Primer on Foreign Aid* (Center for Global Development Working Paper, 1, 3 (July 2006)). Some empirical studies have shown that "aid dependence can undermine institutional quality, by weakening accountability, encouraging rent-seeking and corruption, fomenting conflict over control of aid funds, siphoning off scarce talent from the bureaucracy, and alleviating pressures to reform inefficient policies and institutions." Thierry Kangoye, *Does Aid Unpredictability Weaken Governance? New Evidence from Developing Countries*, Working Paper Series N 137, AFRICAN DEV'T BANK 7 (2011).

¹³ JEFFREY SACHS, *THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME* 250, 275 (2005). One study on the relationship between aid and GDP growth, revealed that middle-income countries tended to experience a greater impact on economic growth from foreign direct investment, whereas low-income countries were significantly affected mainly by foreign aid. Aye Mengistu Alemu & Jin-Sang Lee, *Foreign Aid on Economic Growth in Africa: A Comparison of Low and Middle-Income Countries*, 18(4) SOUTH AFRICAN J. ECONOMIC & MANAGEMENT SCI. 449,

Other economists are dubious. William Easterly writes that, irrespective of the amount, foreign aid does not work because international donors function as planners and design development interventions which disregard the “searchers,” that is the local entities and stakeholders who often have solutions for their own problems.¹⁴ Likewise, Dambisa Moyo suggests that stoppage of aid into poor countries would force them to engender their own economic plans for recovery and growth. In her view, aid recipient countries should become self-sufficient rather than rely on foreign aid indefinitely.¹⁵ Sir Angus Deaton offers a more elaborate analysis on how and why foreign aid does not result in sustainable growth and development in poor nations.¹⁶ He asserts that foreign aid corrupts recipient countries as it creates soft budget constraints, and leaders of these countries have no downward accountability to their constituents.¹⁷

In line with Deaton, international affairs specialists Ilia and Jennifer Murtazashvili argue that the effectiveness of foreign aid to facilitate political, economic, and social development depends on governance institutions, including aid management systems.¹⁸

Considering these institutions to be key to governance outcomes, some scholars, such as political scientist Kevin Morrison, focus on the transformational and stabilizing effects of foreign aid on these institutions.¹⁹ A trio of U.S. economists asserts that the aid serves to “amplify” pre-existing political arrangements, whether in a democracy—or autocracy.²⁰

In sum, foreign aid can be effective and efficient under certain conditions, when there is local participation, the existence of a sense of ownership, the need to move

460 (2015). Another study suggests that multilateral aid reduces corruption more effectively than bilateral aid and that accountability of recipient governments can be enhanced by aid donors, who can enforce strict rules and conditions and limit the discretion of public officials, which in turn lowers corruption. Rahim Quazi, Arshad Alam, & Sudhir Tandon, *Impact of Foreign Aid on Corruption: An Econometric Case Study of South Asia and East Asia*, 9(4) GLOBAL J. BUSINESS RESEARCH 17, 27 (2015).

¹⁴ EASTERLY, *supra* note 11, at 65–110. Global development specialist Steven Radelet notes that the objectives incentives, and information available to taxpayers or beneficiaries themselves may not be well aligned with those of [local] government agents. Steven Radelet, *A Primer on Foreign Aid* 12 (Center for Global Dev’t Working Paper No. 92, Jul. 2006).

¹⁵ See, MOYO, *supra* note 11, at 40–56.

¹⁶ DEATON, *supra* note 11, at 267–325.

¹⁷ Nobel Economics Prize Winner Deaton holds “particularly provocative” data-based ideas on how foreign aid “changes the relationship between a government and its people,” leaving the former less accountable. Ana Swanson, *Why Trying to Help Poor Countries May Actually Hurt Them*, WASHINGTON POST (Oct. 13, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/10/13/why-trying-to-help-poor-countries-might-actually-hurt-them/>.

¹⁸ Murtazashvili & Murtazashvili, *supra* note 11, at 200–207.

¹⁹ See, e.g., KEVIN M. MORRISON, NONTAXATION AND REPRESENTATION: THE FISCAL FOUNDATIONS OF POLITICAL STABILITY 106–122 (2014).

²⁰ Nabamita Dutta et al., *The Amplification Effect: Foreign Aid’s Impact on Political Institutions*, 66(2) KYKLOS 208, 215–218 (2013).

towards self-sufficiency, hard budget constraints, and accountability.²¹ In terms of local participation and sense of ownership, this is also reflected in the relationship between donor and grantee and the importance of candor and mutual respect in the aid objectives and achievement of those objectives.²² Donor agencies have their own recipes for reform, usually well-intentioned and well-informed, but their financial and organizational support may be influenced more by what is trending than what is warranted in the long haul.²³

These conditions, however, would not be possible without devising governance institutions that shape and influence the incentives of both the donors and recipient country elites. That said, governance institutions—especially, aid management institutions—must be designed in a way that promotes transparency, local participation, accountability, and equity.

III. DONORS FUND DEVELOPMENT AFTER FALL OF TALIBAN 1.0

After the 9/11 terrorist attacks, and the demise of the (“Taliban 1.0”) Emirate, the US led the international community in initiating a liberal state building and development process in Afghanistan. The goal consisted of preventing another colossal attack by creating and supporting a government capable of ensuring security, providing public services, and enhancing political legitimacy. International donors pledged and poured untold trillions of dollars into the country in order to lay a strong basis for sustainable political order and economic development. Some of the money went directly to the new Government and other funds went to international non-governmental organizations (INGOs) and other public institutions engaged in rule of law (ROL) or other capacity building activities.²⁴

²¹ EASTERLY, *supra* note 11, at 14–35; MOYO, *supra* note 11, at 134–143; DEATON, *supra* note 11, at 267–325; Murtazashvili & Murtazashvili, *supra* note 11, at 200–207.

²² Policy Analyst Sarah Han has offered this unvarnished advice:

“Aid, particularly in the rule of law sector, has become much more about what donors want to see happen in Afghanistan than what Afghan organizations are able to implement or even want....I wonder, when a potential aid recipient has refused to engage with the donor in planning how a particular project will be built and implemented, if the donor ever asks – ‘who wants this more, us or them?’”

Sarah Han, *Guest Blog: Working in Aid: donor rule, funding flows and awkward ‘no’s* [sic], Afghan Analysts Network (Apr. 2012), <https://www.afghanistan-analysts.org/guest-blog-working-in-aid-donor-rule-funding-flows-and-awkward-nos/>.

²³ Transitional justice specialist Elena Baylis coined the term “post-conflict justice junkies” to describe the advisors, legal officers, and other professionals who “hop[] from one post-conflict setting and institution to another.” Elena A. Baylis, *Function and Dysfunction in Post-Conflict Judicial Networks and Communities*, 47 VAN. J. TRANSNAT’L L. 625, 689 (2014).

²⁴ See, e.g., Rohullah Azizi & Charles A. Ericksen, *Legal Education Reform in Afghanistan* (2015) (unpublished paper on file with authors); Richard Grimes, *Accessing Justice and the Role of Law School Legal Clinics in a Conflict-affected Society: A Case Study of Afghanistan*, in EXPERIMENTAL LEGAL EDUCATION IN A GLOBALIZED WORLD: THE

As is typical in liberal state building processes, international donors focused on creating new, or reforming existing, governance institutions. Essential to these efforts were the massive flow of international funding, the creation of a sound aid and public finance management system, and efficient management of funds.

Consistent with advice from donors and Afghan (technocratic) elites, who asserted that the country needed a centralized governance (and public finance management) system, Afghanistan readopted its old governance system, based on a highly centralized public finance management system: first, centralization could prevent resource capture, caused by fragmentation of the state and a weak institutional link between the center and the peripheries.²⁵ Second, centralization could facilitate equal distribution of public funds that may be difficult in a system in which the local governments possess varying resources and capacities.²⁶ Third, centralization would allow conflict-affected and fragile states to implement and ensure a unified fiscal policy, given their scarce resources and capacities.²⁷ Finally, centralization could mitigate weak or non-existent administrative capacity at the local level.²⁸

IV. CENTRALIZATION IS HALLMARK OF AFGHAN PRESIDENTIAL REPUBLIC

Under this system of government, the Afghan executive branch, led by the President, maintained exclusive political, administrative, and fiscal control. Under the Islamic Republic, the President appointed all ministers, Supreme Court justices, Attorney General, Central Bank, members of independent commissions, governors, district governors, provincial heads of police, and heads of regional military corps.²⁹ The President also controlled selection and approval of procurement contracts at the central and local levels, the endorsement of laws and judicial decrees, and issuance of legislative decrees.³⁰ This centralized, unitary administration consisted of four

MIDDLE EAST & BEYOND 154–173 (Mutaz Qafisheh & Stephen A. Rosenbaum eds., 2016); and Stephen A. Rosenbaum, *A New Day: Prime Time to Advance Afghan Clinical Education*, 31(1) ASIAN J. LEGAL EDUC. 1, 16 (2016).

²⁵ Pranab K. Bardhan & Dilip Mookherjee, *Capture and Governance at Local and National Levels*, POLITICAL ECONOMY, GOVERNANCE, AND DEVELOPMENT 90(2) 1, 1–5 (2000).

²⁶ Roy W. Bahl, *Fiscal Decentralization as Development Policy*, 19 PUBLIC BUDGETING & FINANCE, 59, 63–65 (1999); Paul Smoke, *Fiscal Decentralization in Developing Countries: A Review of Current Concepts and Practice, Democracy, Governance, and Human Rights* Programme Paper No. 2, 4–11 (United Nations Research Institut. for Social Dev't, 2001).

²⁷ Rémy Prud'homme, *The Dangers of Decentralization*, 10 THE WORLD BANK RESEARCH OBSERVER 201, 205–206 (1995).

²⁸ Nematullah Bizhan et al., *Bringing the State Closer to the People: Deconcentrating Planning and Budgeting in Afghanistan*. (Afghanistan Research and Evaluation Unit) 1, 1 (2016), <https://areu.org.af/publication/1614/>.

²⁹ Constitution of 2004 of the Islamic Republic of Afghanistan, Article 64. Available at https://www.constituteproject.org/constitution/Afghanistan_2004.pdf?lang=en (May 20, 2023).

³⁰ *Id.*

levels of government: in the capital, in the provinces, and in the districts and villages. At the top of the administrative pyramid, the central government included several ministerial units. Local administrations were appointed by and responsible to the central government. Provincial councils were responsible for monitoring and overseeing activities of the local administrations, but they had no legislative authority under the Constitution.³¹ Although the Constitution stipulated the establishment of local councils at the district and village levels, local elections for members of these councils were never held.³²

In addition to political and administrative centralization, the executive branch also maintained exclusive financial authority.³³ The monopoly of fiscal power was coupled with excessive discretion over resources, lacking any accountability to the Afghan population. This power monopoly was evident in the text of the 2004 Constitution wherein the central government obtained exclusive authority in taxation, planning, budgeting (formulation, allocation, and execution), monitoring, and evaluation.³⁴

V. GOVERNMENT ADOPTS PUBLIC PLANNING AND BUDGETING PROCESSES

In accordance with the new Constitution, the Government of the Islamic Afghan Republic adopted a Public Finance and Expenditure Management Law³⁵ and a set of Financial Regulations³⁶ to regulate fiscal affairs, including the planning and budgeting processes. These legal vehicles laid out the step-by-step processes through which the central government could impose its top-down aid and public fund management system. Under pressure from international donors, Afghanistan adopted two new policies—the Provincial Development Planning Guideline (PDPG) and Provincial Budgeting Policy (PBP)—to ensure local participation, allocative and

³¹ *Id.* art. 138.

³² Ali Yawar Adili, *Afghanistan Election Conundrum (10): Failure to Hold the First Ever District Council Elections?* RELIEFWEB, Aug 18, 2018), available at <https://reliefweb.int/report/afghanistan/afghanistan-election-conundrum-10-failure-hold-first-ever-district-council>.

³³ Constitution of 2004, *supra* note 29.

³⁴ According to Article 75(4) of the 2004 Constitution, the Government had a duty to “prepare the budget, regulate financial conditions of the State, as well as protect public wealth.” Likewise, Article 95 provided that “proposals for drafting the budget and financial affairs laws shall be made only by the Government.”

³⁵ Public Finance and Expenditure Management Law, Article 2 (2005), http://www1.worldbank.org/publicsector/pe/BudgetLaws/Afghanistan%20PFEML_Engl_final.pdf (May 21, 2021). This law is no longer available on the World Bank website.

³⁶ Upon formation of a new government in 2004, and with the support of international donors, Afghanistan adopted a set of financial regulations, consisting of rules related to budget formulation, budget execution, banking arrangements and cash management, borrowing and lending, asset management, accounting and reporting, municipal finance, and control and audit. DEV. BANK OF AFGHANISTAN, <https://www.dab.gov.af/index.php/Regulations> (May 19, 2023).

productive efficiency, predictability, transparency, and equity.³⁷ These two policies, however, could only standardize the planning and budgeting processes rather than facilitate decentralization. Such exclusive authority was applicable only to the discretionary portions of the annual budget and not to projects directly funded or implemented by international donors.

In the initial stages of the planning process, local administrations were consulted about their needs and preferences for development projects through village and district councils. The Ministry of Finance (MoF) inserted these preferences in a series of budget circulars. Upon receiving the two circulars, the ministries would then submit their annual proposals to the MoF's budget department. After a hearing, the MoF proposed a national budget. Once approved by the Cabinet, the draft annual national budget was submitted to the National Assembly for approval. Once approved, the President endorsed the annual budget through a presidential decree and submitted it to the MoF for execution. The MoF then announced the approved annual budget and sent it to the budgetary units for implementation.³⁸

As is apparent from the planning and budgeting processes, the central government was the dominant actor in each and every aspect of decision-making. This, by itself, excluded the local population and local administrators from any meaningful role in decision-making. With their weak or nonexistent role in the planning and budgeting processes, localities had no chance of holding the central and local actors accountable.³⁹

VI. LOCAL PRIORITIES, EQUITY AND TRANSPARENCY FOUND LACKING IN BUDGET PROCESS

For allocative efficiency, we measured the extent to which local projects, prioritized and proposed through Provincial Development Plans (PDPs) and Budget Circulars, were funded by the central government. Figure 1 shows that the highest

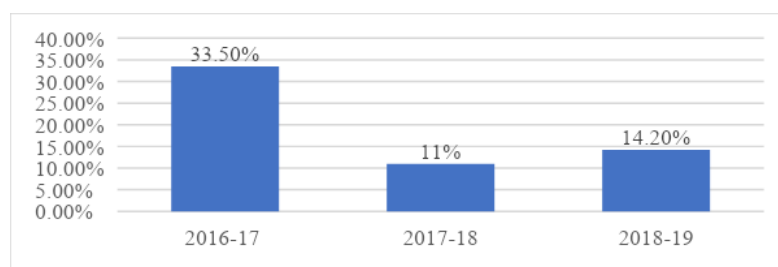
³⁷ <https://mof.gov.af/sites/default/files/2019-04/%D9%BE%D8%A7%D9%84%DB%8C%D8%B3%DB%8C%20%D8%A8%D9%88%D8%AF%D8%AC%D9%87%20%D8%B3%D8%A7%D8%B2%DB%8C%20%D9%88%D9%84%D8%A7%DB%8C%D8%AA%DB%8C.pdf>. (in the Dari language only) (May 20, 2023). This web site, which predates the takeover by Taliban 2.0, is no longer available in the English language.

³⁸ The India-based, independent, non-profit Centre for Budget and Governance Accountability (CBGA) prepared a detailed primer on the Afghan budget under the Islamic Republic. Gyana Ranjan Panda, *Information Kit on the National Budget of Afghanistan* (CBGA, 2011), <https://www.cbgaindia.org/wp-content/uploads/2016/03/Information-Kit-on-the-National-Budget-of-Afghanistan.pdf>. See also, Mohammad Qadam Shah, *Why Afghanistan is Caught in a Budget Crisis – Again*, THE DIPLOMAT (Feb. 4, 2021), <https://thediplomat.com/2021/02/why-afghanistan-is-caught-in-a-budget-crisis-again/>.

³⁹ Mohammad Qadam Shah, *The Politics of Budgetary Capture in Rentier State: Who Gets What, When and How*, 41(1) CENTRAL ASIAN SURVEY 138–140 (2022), <https://www.tandfonline.com/doi/abs/10.1080/02634937.2021.1960487?journalCode=ccas20>.

percentage (33.5%) of the local development budget occurred in FY 2016-17.⁴⁰ Meanwhile, data from the last two fiscal years of the Afghan Republic show a significant decline in the percentage of locally proposed and prioritized development projects incorporated in the national budget. One of the main reasons for such a decline is a result of the large decrease in the amount of the development budget. According to Afghanistan's national budgets, compared to FY 2016-17, the Afghanistan National Budget decreased 42% in FY 2017-18 and 31% in FY 2018-19.⁴¹

Figure 1: Percentage Share of PDPs in the National Budget



In terms of predictability, we examined whether local administrations prioritized and proposed their needed development projects based on any particular ceiling. More specifically, we examined whether the Afghan central government shared information about criteria for budget formulation and allocation. Although, in theory, the MoF was required to publish budget ceilings, there is no record that it had done so in recent years. The local administrations had been relying mostly relying on the previous year's budget, but even with that, they were not receiving adequate allocations in the next budget year. Hence, the budgeting has always been unpredictable.⁴²

Regarding transparency, we assessed whether the central government shared revenue and expenditure data, criteria for budget formulation, and allocation with the public and civil society organizations. Specifically, we examined whether the Afghan central government shared information about criteria for budget formulation and allocation. The Open Budget Survey (OBS) 2019 shows that Afghanistan's level of transparency was minimal (50%).⁴³ However, our qualitative data suggest that

⁴⁰ Ministry of Finance, Annual Budgets 2016–2019 (July 15, 2020). Upon takeover by Taliban 2.0, the previous Government's websites were suspended.

⁴¹ MINISTRY OF FINANCE, <https://www.mof.gov.af/en>. (May 21, 2021). Upon takeover by Taliban 2.0, the previous Government's websites were suspended.

⁴² Qadam Shah, *The Politics of Budgetary Capture*, *supra* note 39.

⁴³ The OBS transparency indicator measures whether governments publish on-line eight specific budget documents, including a pre-budget statement, executive branch budget proposal, enacted budget, citizen budget, in-

there were no specific criteria provided by the Afghan government which allowed local administrations to anticipate the amount of their annual budget.

In terms of equity, the Afghan Republic's central government considered political factors, such as ethnic affiliation and alignment with central government policies, political importance, and the strength and weakness of local actors. Such a strategy allowed the Government to reward friends and punish foes.⁴⁴

VII. REPUBLIC MARKED BY EXTREME MONOPOLY OF POWER AND EXCESSIVE DISCRETION

Foreign aid was not the problem in the Islamic Republic which governed between Taliban 1.0 and Taliban 2.0. Rather, it was the centralized aid and public finance management system which led to pervasive corruption and waste. In fact, foreign aid amplified the centralized administrative state, thereby undermining prospects for successful reconstruction, reinforcing an existing disconnect between government and society-at-large that have become polycentric during periods of conflict.⁴⁵ The centralized aid and public funds management facilitated the monopoly of authority and discretion over resources.⁴⁶ Moreover, a lack of downward accountability promoted a top-down, unanswerable aid and public finance management system, which ultimately failed the Afghan State.

The rationale for centralizing governance institutions—for the sake of efficiency, tackling the lack of administrative capacity by localities, and mitigating the weak link between the central and local governments—is understandable. However, as development specialist Robert Klitgaard observes, it is a recipe for systemic corruption, such that it monopolizes power, provides discretion, and inhibits downward accountability.⁴⁷

With a lack of specific rules and procedures, local planning and budgeting remained limited to creating a long list of development projects by local officials, rather than by the local population, without a standard format for highlighting goals,

year reports, mid-year review, year-end report, and audit report. See, Int'l Budget Partnership, *Open Budget Survey: Afghanistan* (2021), <https://internationalbudget.org/open-budget-survey/country-results/2021/afghanistan>.

⁴⁴ Qadam Shah, *The Politics of Budgetary Capture*, *supra* note 39, at 139–140.

⁴⁵ See, JENNIFER BRICK MURTAZASHVILI, *INFORMAL ORDER AND THE STATE IN AFGHANISTAN* (2016).

Polycentricity refers to a complex form of governance with multiple centers of decision-making, each of which operates with some degree of autonomy. Such a multi-level configuration suggests that governance arrangements with polycentric characteristics may be capable of striking a balance between centralized and fully decentralized or community-based governance. See, ELINOR OSTROM, *UNDERSTANDING INSTITUTIONAL DIVERSITY* (2005).

⁴⁶ Qadam Shah, *supra* note 39, at 138–140. See also, Qadam Shah, *Why Afghanistan is Caught in a Budgetary Crisis*, *supra* note 38.

⁴⁷ Robert Klitgaard, *Subverting corruption*, 37(2) FINANCE & DEV'T (2000), <http://www.imf.org/external/pubs/ft/fandd/2000/06/klitgaar.htm>.

objectives, outputs, outcomes, and impact.⁴⁸ In contrast, decentralized governance or polycentric governance facilitates more local participation and ownership, accountability, transparency, and equity.⁴⁹

VIII. RELATIONSHIP WITH DONORS DEMANDS COMMUNICATION, COORDINATION, AND CANDOR

After the fall of the Taliban 1.0 regime in 2001, “impressive amounts of money [were] spent in the effort to ‘restore’ or ‘develop’ Afghanistan...”⁵⁰ In rebuilding conflict-affected states, international donors often pledge huge amounts of money.⁵¹ This financial support is largely due to long-term civil conflict that typically destroys existing political and economic institutions, infrastructure, and health and education opportunities.⁵² Given the geopolitical and/or humanitarian conditions of some conflict-affected states, donors sometimes commit a long-term presence and investment. Following the United States’ lead in recent state building processes, donors tend to focus on promoting a liberal democracy, electoral politics, human rights, rule of law, and property rights.⁵³ The rationale is that countries with democratic systems are less likely to go to war against each other.⁵⁴ Inasmuch as these goals are ambitious, the results have been modest. More liberal state building efforts have failed than succeeded.⁵⁵

An essential, but arguably elusive, goal is to maintain a relationship with donors marked by candor and coordination of activities with other funders. This requires *bona fide* efforts between government entities and the various donor agencies to share information about planning, funding, program goals, objectives, outcomes, and genuine collaboration between the relevant NGOs, donor organizations, and government ministries.

While virtually every foreign government and INGO gives lip service to this operational guideline, it is honored more often in the breach. Competition for grants

⁴⁸ Development specialist Radelet notes that taxpayers or beneficiaries sometimes do not even know about local programs, cannot tell if their money is well spent, and “have limited mechanisms for penalties and rewards.” Radelet, *supra* note 12, at 12.

⁴⁹ Murtazashvili & Murtazashvili, *supra* note 11, at 200–207.

⁵⁰ Jon Eddy, *Rule of Law in Afghanistan: The Intrusion of Reality*, 17 J. INT’L COOPERATION STUD. 1,1 (2009) (citing a mix of military and civilian “reconstruction” and rule of law funding). Professor Emeritus Eddy is the former LESPA program director.

⁵¹ DAVID LAKE, *THE STATE BUILDER’S DILEMMA: ON THE LIMITS OF FOREIGN INTERVENTION* 1–22 (2016).

⁵² Derick W. Brinkerhoff, *Introduction—Governance Challenges in Fragile States: Reestablishing Security, Rebuilding Effectiveness, and Reconstituting Legitimacy*, in *GOVERNANCE IN CONFLICT-AFFECTED SOCIETIES: REBUILDING FRAGILE STATES* 1-23 (Derick Brinkerhoff ed., 2007).

⁵³ CHRISTOPHER COYNE, *AFTER WAR: THE POLITICAL ECONOMY OF EXPORTING DEMOCRACY* 1–45 (2007).

⁵⁴ FRANCIS FUKUYAMA, *STATE-BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY* 1–39 (2004).

⁵⁵ COYNE, *supra* note 53, at 1–45; LAKE, *supra* note 51, at 1–22.

amongst development and technical assistance organizations and the race for innovation and distinction breed overlap, redundancy, turf battles, waste, and an air of obfuscation and secrecy.⁵⁶ Would-be grant recipients are primed to please every prospective donor, and funders and contractors tend to operate on their own.⁵⁷ Moreover, many donor organizations are more accustomed to dictating project goals to country-based grantees and partners, than to listening or consulting. This is not to suggest that donors should maintain a hands-off attitude vis-à-vis grantees. Once the goals and objectives are agreed upon, funders should carefully oversee their execution.

The International Network to Promote the Rule of Law (INPROL), which works on rule of law reform in post-conflict and developing countries, has adopted a different approach insofar as it “shares a desire to learn and innovate together as a community in order to improve [members’] rule of law knowledge and practice.”⁵⁸ Observations gleaned from interviewees in other transitional justice settings ring true in large part for the ROL development network, leaving one to question the utility of these meetings:

Every organization was repeating the work of lots of other organizations ... There was no institutional memory, there was no coordination or no effective coordination between the various funding bodies like the UN, the US, the EU and other organizations.... I went to a lot of coordination meetings, but I didn’t notice any actual coordination going on.⁵⁹

Grantees can also become captive to donors’ formulaic RFPs and grant application components, with the requisite roundtables, workshops, policy briefings and standard menu of outputs and activities.⁶⁰ Those engaged in capacity building would do well to follow the advice of one development expert to get out of the “Project World” theme park which is a fixture of the “Development Industry.”⁶¹

It is too easy for NGOs to gravitate toward generic monitoring and evaluation templates and quantifiable outputs, when qualitative data-gathering would actually

⁵⁶ Rosenbaum, *supra* note 24, at 16. This race was described by two legal consultants as “competition between agencies in launching recognizable and fashionable projects.” Azizi & Ericksen, *supra* note 24, at 30. Other obstacles to donor coordination include differing priorities and time schedules, varying internal practices, and the costs of information exchange, all of which constitute “insufficient incentives to coordinate.” *Id.*

⁵⁷ In her case study of ROL networks, Professor Baylis describes the barriers to information exchange: “...[The] transnational community [of ROL contractors] is bifurcated between casual interactions over social and career matters and deliberate participation in formally organized on-line communities and in-person conferences to discuss work matters.” Baylis, *supra* note 23, at 667.

⁵⁸ INT’L NETWORK TO PROMOTE THE RULE OF LAW, <http://www.inprol.org/> (May 12, 2023).

⁵⁹ Baylis, *supra* note 23, at 665 (footnotes omitted).

⁶⁰ In describing the donor-NGO relationship, development aid specialist Deborah Eade writes: “We saw our [donor] role as twofold: on the one hand to provide critical accompaniment to our counterparts, and on the other to marry th[is] to the NGO’s values and criteria in a way that allowed everyone to feel comfortable in the relationship.” Deborah Eade, *Capacity Building: Who Builds Whose Capacity?*, 17 DEV’T IN PRACTICE 631 (2007).

⁶¹ *Id.* at 633.

make more sense.⁶² Grantees can spend an inordinate amount of time ticking boxes and adhering to off-the-shelf benchmarks, rather than allowing projects to develop more organically.⁶³

Projected outcomes may need to be revisited on a regular basis. While donors may seek candor in periodic narrative reports and in meeting grant deliverables,⁶⁴ they still may erect bureaucratic barriers to recalibrating objectives or outcomes in the midst of a grant cycle. These barriers do little to help a grantee readjust thematic, geographic, or demographic targets when challenges arise in carrying out a project or initiative. They also raise questions about the viability of a donor organization rigidly pre-selecting activities, institutions, or regions of the country where its funds will be applied.⁶⁵ Our quarrel is not necessarily with the donor selections so long as the distribution of resources and personnel decisions are informed by careful in-country assessment, experience, and pragmatism.

International donor organizations and country-registered NGOs must also use their influence to actively and genuinely promote long-term institutionalized autonomy, collegiality, collaboration, and networking. One commentator prescribes a “transformation of the structure around them” by “enabling the agency” of aid recipients themselves be they government actors or civil society, to “alter their status.”⁶⁶

In short, the lessons learned must be placed front and center so that consultants and team members on the ground can benefit from the years of law and development

⁶² Eade has criticized the standard practice of “having to meet reporting requirements that bore no relation to the needs and rhythms of the project...” *Id.* at 631.

⁶³ Stephen A. Rosenbaum, Britane Hubbard, Kaylee Sharp-Bauer & David Tushaus, *The Myanmar Shwe: Empowering Law Students, Teachers and the Community through Clinical Education and the Rule of Law*, 28 *IND. J. GLOB. LEGAL STUD.* 153, 214 (2021).

⁶⁴ NGO partners are not necessarily incentivized to be candid or self-critical, even amongst team members, and may be prone to adopt an “it’s all good” attitude in the face of shortcomings. *See, id.* at 215, n. 234.

⁶⁵ Eade is brutally frank in reflecting on her own experience within a donor organization: “Though at pains to establish relationships that were not predicated only on money, we and our ‘partners’ were under no illusions about the fact that it was our job to decide who should be funded to do what, for how long, and on what conditions; and to defend these decisions within our own regional team and to our managers and oversight committees in the UK.” Eade, *supra* note 60, at 631.

⁶⁶ Jonathan Liljeblad, *Transnational Support and Legal Education Reform in Developing Countries: Findings and Lessons from Burma/Myanmar*, 14 *LOYOLA UNIV. OF CHICAGO INT’L L. REV.* 133, 151 (2016). Development aid programs should therefore “serve to facilitate the capacities of aid recipients to function as autonomous actors with the ability to find or develop, possess and understand, implement or exercise decisions and actions affecting their welfare.” *Id.*

in the legal education and justice sectors.⁶⁷ It is incumbent on donors to hold their beneficiary institutions accountable for meeting the terms of a grant.⁶⁸

IX. TALIBAN 2.0 HAS UNDERMINED DEMOCRATIC GOVERNANCE

The US withdrawal from Afghanistan ended twenty years of investment and efforts for liberal state building and development in Afghanistan. This coincided with the collapse of the republican government and the Taliban's immediate takeover of Afghanistan for the second time. This was yet another disruption in the country's attempt to achieve sustainable peace, stability, and development. Between 2001 and 2020, international donors funded and supported Afghanistan's security, education, health care, governance reform, and infrastructure.⁶⁹ Taliban 2.0 ended this progress and undermined the pro-liberal democratic form of government. With the undemocratic rulers' return to power and their ultra-orthodox interpretation of Islam, suddenly the ongoing reconstruction and reform process was halted and a new challenging, unclear path started to take form in Afghanistan.⁷⁰

Tens of thousands of Afghans left their country out of fear of the Taliban's totalitarian rule.⁷¹ Among them were those who had been (Western) educated during the last twenty years and held high level government positions.⁷² This was a massive loss for the country's governance systems. With the lack of relatively capable

⁶⁷ The international community, including the United States, spent billions of dollars on rebuilding the Afghan legal and judicial system and improving ROL and governance in the two decades between Taliban 1.0 and Taliban 2.0. Mahir Hazim, *Going Back to Zero: How the Afghan Legal and Judicial System is Collapsing Under the Taliban Regime*, JURIST (Mar. 7, 2022), <https://www.jurist.org/commentary/2022/03/mahir-hazim-afghan-legal-judicial-system-collapsing-taliban-regime/>. See also, Rosenbaum, *supra* note 24, at 7–8, 16–17 (discussing lack of coordination among donors in this sector, following the fall of the first Taliban Emirate, and uncertainty of future funding).

⁶⁸ In his critique of donor expenditures in Afghanistan, one commentator observed that “substantial sums of money have been spent on various forms of physical asset support for the justice sector: new courthouses, projected new prisons, vehicles, filing cabinets, and computers...” without necessarily evaluating the utility of each expense. Eddy, *supra* note 50, at 19.

⁶⁹ Qadam Shah, *The Politics of Budgetary Capture*, *supra* note 39, at 139–140.

⁷⁰ Since the withdrawal of its troops in 2021, the United States has not recognized the Taliban or any other entity as the Government of Afghanistan, but has “shifted to a position of pragmatic engagement.” U.S. Dep’t of State, *U.S. Relations with Afghanistan*, <https://www.state.gov/u-s-relations-with-afghanistan/> (May 19, 2023). While halting reconstruction assistance immediately, the U.S. has worked with United Nations agencies and NGOs to deliver humanitarian aid. *Id.* In August 2021, the United States froze approximately \$9.5 billion in Afghan Central Bank assets. Saleha Mosin, *US Freezes Afghan Central Bank’s Assets of \$9.5bn*, BLOOMBERG/AL JAZEERA (Aug. 18, 2021), <https://www.aljazeera.com/economy/2021/8/18/us-freezes-afghan-central-banks-assets-of-9-5bn#:~:text=The%20U.S.%20has%20frozen%20nearly,an%20administration%20official%20confirmed%20Tuesda>

⁷¹ Dana Farrington, *Chaos at The Kabul Airport Reflects the Desperation Afghans are Feeling*, (Aug. 16, 2021, NATIONAL PUBLIC RADIO), <https://www.npr.org/2021/08/16/1028090002/afghanistan-airport-evacuation-taliban>

⁷² D. Parvaz, *Since the Taliban takeover, Afghans Hoping to Leave Afghanistan Have Few Ways Out* (Oct. 3, 2022, NATIONAL PUBLIC RADIO), <https://www.npr.org/2022/10/03/1121053865/afghanistan-refugees-visas>.

Afghans to run the public administration and the Taliban's exclusive, discriminatory policies, the prospects of public service delivery have not been promising.

Likewise, the Taliban gradually started to implement undemocratic and authoritarian rule by directly or indirectly violating the fundamental human rights of Afghans.⁷³ Since their takeover, among other measures, the Emirate has restricted the freedom of media and other forms of expression, banned girls and women from attending high school and university; forcefully displaced the ethnic, religious, and linguistic minorities; and imposed serious dress codes on both men and women.⁷⁴ Under the banner of Islam, the Taliban are implementing a set of fundamentalist rules that are in direct violation of international human rights norms.

In light of the above measures reimposed by Emirati decrees, the international community has been reluctant to formally recognize the Taliban as the legitimate rulers of Afghanistan.⁷⁵ In September 2021, the new leadership declared an interim government and tried to project a different image to the international community, claiming that they have modified their extremist governance approach.⁷⁶ They also opened talks with several heads of state.⁷⁷ However, the Emirate has had serious legitimacy predicaments both internally and externally. The leadership has faced various waves of protests and resistance across the country, showing nationwide resentment to their rule.⁷⁸ In March 2020, the U.N. Security Council passed a resolution, prior to the withdrawal of American and allied forces, declaring that it would neither recognize nor "support the restoration of the Islamic Emirate of Afghanistan."⁷⁹ A later resolution in August 2021 demanded an inclusive government and respect for human rights.⁸⁰ Notwithstanding a pledge to provide humanitarian aid, the Security Council has repeatedly vowed not to recognize the

⁷³ See generally, Amnesty International, *The Rule of Taliban: A Year of Violence, Impunity and False Promises*, (Aug. 2022). Available at <https://www.amnesty.org/en/documents/asa11/5914/2022/en/>.

⁷⁴ *Id.* at 11–23, 37–39.

⁷⁵ Congressional Study Group on Foreign Relations and National Security, *supra* note 9 ; Abubakar Siddique, *Unrecognized Taliban Aims to Boost Legitimacy by Wresting Control of Afghan Diplomatic Missions*, RADIO FREE EUROPE/RADIO LIBERTY, Apr. 7, 2023). Available at <https://www.rferl.org/a/afghanistan-taliban-diplomatic-missions-legitimacy/32353807.html>.

⁷⁶ Mobasher & Qadam Shah, *supra* note 5.

⁷⁷ Lorne Cook and Kirsten Grieshaber, *EU Eyes Talks with Taliban but No Plans to Recognize Them*, AP NEWS (Aug. 17, 2021), <https://apnews.com/article/europe-middle-east-immigration-migration-bc984f3596cbac1720de18ea209deb54>; Maziar Motamedi, *Afghanistan's Neighbours Gather in Tehran to Discuss Its Future*, AL JAZEERA (Oct. 27, 2021), <https://www.aljazeera.com/news/2021/10/27/afghanistans-neighbours-gather-in-tehran-to-discuss-its-future>.

⁷⁸ See, e.g., *Thousands Protest Against Taliban in Kandahar Over Evictions*, REUTERS (Sept. 14, 2021), <https://www.reuters.com/world/asia-pacific/thousands-protest-against-taliban-kandahar-over-evictions-2021-09-14/>.

⁷⁹ S.C. Res. 2513 (2020). Adopted by the Security Council at its 8742nd meeting on March 10, 2020. Available at <https://digitallibrary.un.org/record/3855892?ln=en#record-files-collapse-header>.

⁸⁰ S.C. Pres. Statement 14604/2021 (Aug. 16, 2021).

Taliban's control of Afghanistan.⁸¹ Likewise, the vast majority of UN member states have refused to recognize the Islamic Emirate, including those which have plainly or tacitly supported the Taliban.⁸² And, a number of non-hostile or neutral countries have sent humanitarian aid, including Pakistan,⁸³ China,⁸⁴ Russia,⁸⁵ Iran,⁸⁶ and Qatar.⁸⁷

On top of Afghanistan's brain drain, violation of human rights and women's rights, and the subsequent lack of recognition, the Taliban's takeover has threatened the continuity of badly needed humanitarian aid.⁸⁸ As resources have become even scarcer, the Taliban are facing a more formidable task of managing foreign aid, such that their legitimacy—like the previous government's—depends on how they can fairly and equitably distribute resources to the poorest of the poor, making sure that Afghans are able to survive and thrive. This has long been a major source of dissatisfaction, as government after government consistently has failed to provide basic goods and services to the Afghan people.

X. TALIBAN 2.0 CONSTITUTIONAL SCHEME FURTHERS CENTRALIZED, EXTREME ISLAMIST STATE

As with the previous administration, management of public funds and foreign aid is still an issue. Upon their takeover, the Taliban leadership immediately discontinued the existing political and legal order, which had contained some level of civility and democracy.⁸⁹ They suspended the Constitution of 2004, which had previously and explicitly laid the basis for an Islamic Republic. The Republic's

⁸¹ In an August 2021 statement, following an attack on the UN compound in Herat, the Security Council members recalled Resolution 2513, “reaffirmed that there is no military solution to the conflict, and declared that they do not support the restoration of the Islamic Emirate.” S.C. Pres. Statement 14592/2021 (Aug. 3, 2021).

⁸² China, Russia, Pakistan, and Turkmenistan have accredited Taliban diplomats. Sarah Zaman, *How Should Countries Engage with the Afghan Taliban?*, VOA NEWS (Dec. 30, 2022), <https://www.voanews.com/a/afghan-taliban-maintain-hardline-policies-despite-longing-for-international-recognition-/6870901.html>.

⁸³ *Pakistan Sends Seven More Trucks of Humanitarian Aid to Afghanistan*, THE EXPRESS TRIBUNE (Oct. 15, 2021), <https://tribune.com.pk/story/2324893/pakistan-sends-seven-more-trucks-of-humanitarian-aid-to-afghanistan>.

⁸⁴ *China Offers \$42 Million in Humanitarian Aid to Afghanistan as UN Warns of Women's Rights “Rollback,”* ABC NEWS (Sept. 8, 2021), <https://www.abc.net.au/news/2021-09-09/china-offers-42-million-in-humanitarian-aid-to-afghanistan/100445756>.

⁸⁵ *Russia Planning to Send Humanitarian Aid to Afghanistan - RIA [Novosti] Cites Foreign Ministry*, REUTERS (Sept. 13, 2021), <https://www.reuters.com/world/asia-pacific/russia-planning-send-humanitarian-aid-afghanistan-ria-cites-foreign-ministry-2021-09-13/>.

⁸⁶ *Iranian [sic] Sends More Humanitarian Aid to Afghanistan*, FARs [SIC] NEWS AGENCY. (Oct. 5, 2021), <https://www.farsnews.ir/en/news/14000713000395/Iranian-Sends-Mre-Hmaniarian-Aid-Afghanisan>.

⁸⁷ Ahmed Youssef, *Qatar Dispatches Humanitarian Aid to Afghanistan*, AA [ANDALU AGENCY] (Sept. 2021), <https://www.aa.com.tr/en/asia-pacific/qatar-dispatches-humanitarian-aid-to-afghanistan/2368127>.

⁸⁸ Anthony H. Cordesman, *Reshaping U.S. Aid to Afghanistan: The Challenge of Lasting Progress* (Center for Strategic & Int'l Studies, Feb. 23, 2022), <https://www.csis.org/analysis/reshaping-us-aid-afghanistan-challenge-lasting-progress>.

⁸⁹ Mobasher & Qadam Shah, *supra* note 5.

Constitution stated that no law can be in contradiction with the provisions and tenets of Islam and that, in cases where there is no definitive textual ruling, the courts would be guided by Sharia (both Hanafi and Jafari schools of Jurisprudence).⁹⁰

Despite some paradoxical, challenging provisions, the 2004 Constitution embedded both Islamic and modern progressive and democratic values, such as democracy, elections, and respect for universally recognized human rights.⁹¹ However, the Taliban disregarded all of these values and readopted their 1998 Constitution, which promotes a top-down, centralized, dictatorial, fundamentalist Islamist, and restrictive governance approach. Power is monopolized in the hands of one person—or small group of individuals—holding granted unlimited discretion. There are no provisions for accountability, local participation, or transparency.⁹² Since 99.9% of the Afghan population is Muslim,⁹³ there is no apparent objection to the Government and its laws being characterized as Islamic, nor is the international community advocating for a secular government.

The draft Constitution enshrines a highly centralized, Islamic State, headed by an *Amir ul-Momineen* or leader of the faithful (Supreme Leader), who has ultimate authority over all political, fiscal, and administrative affairs.⁹⁴ The Constitution does not specify the method of election or term limits of the Supreme Leader, but instead stipulates that the Amir must be male, Muslim, and a follower of the Hanafi School of jurisprudence.⁹⁵

The Amir has the authority to form an Islamic council and handpick its members. He can also appoint the ministers and the head of ministers (a quasi-prime minister) who together comprise the government.⁹⁶ Administratively, the Taliban Constitution introduces a top-down, centralized system where the central government controls and commands all aspects of public administration. As for the management of public funds and foreign aid, the Taliban Constitution also provides for a centralized public finance management system where the Amir himself has full authority to allocate and spend the public funds.⁹⁷

⁹⁰ Constitution of 2004, *supra* note 29, at arts. 120–121.

⁹¹ *Id.* arts. 7, 61, 138, 141 & 160. *See also*, Hazim, *supra* note 67.

⁹² At the outset of its rule, in 1998, the Islamic Emirate (Taliban 1.0) drafted and promulgated a new Constitution. The Draft Constitution, available in the Dari and Pashto languages only, was reappropriated after the takeover by Taliban 2.0 (hereafter, “Taliban Constitution”). For an English language translation of the Constitution and insider perspective on the Taliban Islamist movement, *see* ALEX STRICK VAN LISCHOTEN & FELIX KUEHN, *THE TALIBAN READER: WAR, ISLAM, AND POLITICS* 209–23 (2018). *See also*, M. Bashir Mobasher, Mohammad Qadam Shah & Shamshad Pasarlay, *The Constitution & Laws of the Taliban 1994–2001* (International Institute for Democracy & Electoral Assistance (Int’l IDEA), 2022) (Taliban legal scheme, constitutional analysis and selected translations), <https://www.idea.int/publications/catalogue/constitution-and-laws-taliban-1994-2001-hints-past-and-options-future>.

⁹³ Swedish Committee for Afghanistan, <https://swedishcommittee.org/religion/> (May 20, 2023). The majority are Sunni Muslims of the Hanafi School and about 15% are Shia Muslims (Jafaris). *Id.*

⁹⁴ Taliban Constitution, 1998, Article 52.

⁹⁵ *Id.* arts. 47 & 53.

⁹⁶ *Id.* art. 52.

⁹⁷ *Id.* arts. 15, 50(4,10) & 55(16).

Accountability, which is typically manifested through separation of powers and a mechanism of checks and balances, is non-existent in the Constitution. The Amir, in his personal capacity, leads the three branches of government through his appointment authority and control over the budget. The Emirati Constitution grants exclusive authority to the Supreme Leader to directly control legislative and judicial branches of the government.⁹⁸ Likewise, the Amir's political, fiscal, and administrative authority is unconstrained such that he can single-handedly make decisions on state affairs at the central and local levels.⁹⁹

With such dominance, the other governmental organs have no forum in which to constrain his power. The same is true of local participation and governance at the central and local levels. The local population exercises no role in decision-making.¹⁰⁰ The media, which should play an information-sharing role, are severely restricted under the Taliban Constitution¹⁰¹ and the Emirate's ordinary laws and regulations, including "eleven rules of journalism" which prohibit reports "contrary to Islam" or "distort[ed] news content."¹⁰² Under such a system of governance, the prospects of sound, fair, and equitable public funds and foreign aid management are not promising, and one can easily expect a dysfunctional and corrupt public fund and aid management system.

XI. TOP-DOWN AUTHORITARIAN REGIME STILL REQUIRES SIGNIFICANT FINANCIAL SUPPORT

What are the options moving forward? This has always been a difficult question to answer in the context of Afghanistan's complicated political, economic, social, cultural, and geopolitical dynamics. But the world is now dealing with an Afghanistan with which it cannot engage in normal diplomatic and development relationships. International donors have changed their developmental approach to embrace more humanitarian support. During the past 21 months of Taliban rule, the heavy investment in transforming Afghan society into one with a sustainable path towards peace, stability, and development has been totally disrupted.¹⁰³ The country

⁹⁸ *Id.* art. 52.

⁹⁹ *See, e.g., id.* arts. 46, 50, 52, 54, 55(5), 72 & 74.

¹⁰⁰ The Taliban Constitution does not designate any venue for local participation.

¹⁰¹ Taliban Constitution, art. 32.

¹⁰² Reporters Sans Frontières/Reporters Without Borders, *Afghanistan: "11 journalism rules" imposed by Taliban Open Way to Censorship and Arbitrary Decisions*, *RSF Warns* (Sept. 22, 2021), <https://rsf.org/en/afghanistan-11-journalism-rules-imposed-taliban-open-way-censorship-and-arbitrary-decisions-rsf>.

¹⁰³ A watershed moment was the withdrawal of longstanding humanitarian relief agencies after the Taliban expanded its ban on women's participation in society, with a decree forbidding their employment as relief workers with NGOs. *See, e.g.,* Norwegian Refugee Council, *Afghanistan: Taliban Ban on Female Workers Halts Humanitarian Work* (Jan. 10, 2023), <https://www.nrc.no/news/2023/january/afghanistan-taliban-ban-stops-humanitarian-work/>.

still needs significant support to become both technically and financially self-sufficient and independent, but the aid management approach must be reconsidered.

Foremost is the need for international donors and the Taliban to acknowledge that the continuation of the same centralized governance and public finance management system—with a taste for extremism and fundamentalism—will not facilitate development. Afghanistan's history of many failed regimes and its social, political, and cultural realities show that an exclusive, top-down, dictatorial regime will not solve its governance problem.

Considering local conditions, the Taliban should make good on their stated intentions, and open the door for other in-country stakeholders and interest groups to engage in negotiations about the nation's future. Protests in the capital, which took place shortly after the Taliban's return to power in 2021,¹⁰⁴ mobilization of a resistance front in Panjshir province,¹⁰⁵ and the retaking of three districts in Baghlan Province¹⁰⁶ all indicate that Afghans who disagree with the Taliban can and will stand up and resist. While the active fighting has been quelled, the potential remains for a disaffected populace, left with no voice of its own, and fertile ground for conflict or even civil war.

Centralization causes conflict, competition, disunity, and instability, and polycentric and power-sharing arrangements can arguably facilitate peace, cooperation, unity, and stability for Afghanistan. There are no signs, however, that the parties are positioned for such an arrangement. The international community, nonetheless, bears responsibility for encouraging the Taliban, and various Afghan interest groups, to constructively negotiate the country's future, but does it have enough leverage to pressure the Taliban and other Afghan stakeholders to focus on a political settlement?

XII. PROSPECTS FOR DEVELOPMENT AID UNDER TALIBAN 2.0

Neither the United States nor the international community could afford to support Afghanistan forever, especially when the Government was corrupt, ineffective, inefficient, and unaccountable. The U.S. departure was inevitable, but the country's "looming humanitarian disaster" was evident from the moment of the Taliban

¹⁰⁴ *Independence Day Protests Against Taliban*, DW NEWS (Aug. 19, 2021). Available at <https://www.dw.com/en/protests-against-taliban-on-afghanistans-independence-day/a-58909430>.

¹⁰⁵ Pan Tuqa Khalid, *Panjshir Resistance Says Retaliated Against Taliban Attack, Killed 7 of its Fighters*, AL ARABIYA ENGLISH (Aug. 31, 2021). <https://english.alarabiya.net/News/world/2021/08/31/Panjshir-resistance-says-retaliated-against-Taliban-attack-killed-7-of-its-fighters>.

¹⁰⁶ Ayaz Gul, *Anti-Taliban Forces Retake Three Northern Afghan Districts*, VOA NEWS (Aug. 20, 2021), https://www.voanews.com/a/south-central-asia_anti-taliban-forces-retake-three-northern-afghan-districts/6209799.html.

takeover in 2021¹⁰⁷ and the situation has only worsened.¹⁰⁸ Donor nations and INGOs cannot trust the Taliban, as there is no diplomatic arrangement that comes close to formal recognition, and there are a number of ideological and political barriers to pursuing meaningful development. Equally important, the authoritarian and undemocratic Taliban leadership is pursuing the same centralized approach to management of aid and public funds as its predecessor republican government. Even if the aid were exclusively humanitarian, there is no guarantee that it would actually reach its intended beneficiaries.

Typically, donors have some leverage to diminish the extent of corruption and waste of foreign aid through specific accountability measures and genuine communication and collaboration with local partners can enhance the effort. However, the Emirate's edicts and regulations, which are blatantly inconsistent with universal democratic and human rights norms, present an extra challenge. Yet, it is a challenge that must be met by international governmental and non-governmental organizations, with the support of developed and democratic nations whose footprint in Afghanistan cannot be easily erased.

¹⁰⁷ Aikins, *supra* note 5, at 33.

¹⁰⁸ See, e.g., Hameed Hakimi & Gareth Price, *Afghanistan: One Year of Taliban Rule* (Chatham House, Aug. 15, 2022), <https://www.chathamhouse.org/2022/08/afghanistan-one-year-taliban-rule>, and William Byrd, *One Year Later, Taliban Unable to Reverse Afghanistan's Economic Decline* (United States Institute of Peace, Aug. 8, 2022), <https://www.usip.org/publications/2022/08/one-year-later-taliban-unable-reverse-afghanistans-economic-decline>. See also, Lindsay Maizland, *Background: The Taliban in Afghanistan* (Council on Foreign Relations, Jan. 19, 2023). Available at <https://www.cfr.org/background/taliban-afghanistan>.