

H-Diplo | ISSF

Article Review 96

issforum.org

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Geoffrey Swenson. "Why U.S. Efforts to Promote the Rule of Law in Afghanistan Failed."

International Security 42:1 (Summer 2017): 114-151. DOI:

https://doi.org/10.1162/ISEC_a_00285.

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Published by ISSF on 10 April 2018

<http://tiny.cc/ISSF-AR96>

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For all their differences, Presidents Donald Trump and Barack Obama have taken remarkably similar approaches to Afghanistan. Both entered office, conducted reviews of the domestically unpopular American-led war, and ultimately decided to increase the U.S. troop numbers there while continuing to support shaky, often corrupt, Afghan government partners.

The most notable difference is the absence from Trump's approach of any discussion of the parallel "civilian surge"—an upscaling of U.S. efforts through diplomacy, development, and support of democratization and rule of law efforts. Because Trump is pulling away from these non-military approaches, this is a useful moment to consider some of the shortcomings of these earlier state building efforts. Geoffrey Swenson provides a timely review of U.S. policy on the promotion of rule of law and the potential lessons learned from programming in Afghanistan.

While there have been reviews of certain thematic aspects of the United States' rule of law programming in Afghanistan,¹ as well as a scathing 2015 report by the Special Investigator General for Afghan

¹ See for example Hamid M. Khan, "Islamic Law, Customary Law and Afghan Informal Justice," Special Report (Washington, D.C.: United States Institute of Peace, 2015), Torunn Wimpelmann, "Nexus of Knowledge and Power in Afghanistan: The Rise and Fall of the Informal Justice Assemblage," *Central Asian Survey* 32:3 (2013) and Noah Coburn, *Losing Afghanistan: An Obituary for the Intervention* (Stanford: Stanford University Press, 2016): chapter 10.

Reconstruction,² less has been done to explore how the experience of the U.S. in Afghanistan might reshape how we assess rule of law efforts in post-conflict settings. In this sense, it is useful to consider the implications of the article for more general studies of rule of law efforts around the globe.³

Unfortunately, as Swenson's assessment shows, despite hundreds of millions in aid, specifically for rule of law programming, "U.S. assistance to Afghanistan has done little to advance the rule of law in the country and, in certain instances, has been counterproductive" (116). For those familiar with the corruption of the Afghan state, the waste of contractors, and the revolving door of new U.S. approaches to Afghanistan, this conclusion is unsurprising. The article's strength comes instead from the systematic analysis of the ten main programs that the U.S. funded in the country since 2004 and how it was possible that such mistakes were made repeatedly for years, with little correction.

Swenson argues that rule of law programming struggled due primarily to the fact that American "initiatives consistently reflected a deeply flawed set of assumptions" (117). The central of these, perhaps, was that Afghanistan in 2001 (and, indeed, the thinking went, as late as 2011) was "a justice vacuum," an idea that failed to recognize that the program took place "in an ever-more crowded, highly contested and violent space" (121). This failure of the U.S. government to understand the complexity of the political context of these programs has multiple causes, some of which Swenson highlights, such as the bureaucratic inflexibility of U.S. Agency for International Development (USAID) oversight, and some of which he pays less attention to, such as the difficulty of U.S. government officials to gather useful data about the local context of programming and their strict reliance on implementing partners to give them information that was inherently biased towards the concerns of the contractors.

Because of the high levels of legal pluralism in society, the Afghan case, Swenson points out, is a particularly tricky and instructive one.⁴ Across the country, the formal judiciary both cooperates and competes with a range of informal actors, such as mullahs and tribal leaders, and is ostensibly also subject to Islamic law. Swenson outlines how U.S. programming struggled to understand and adapt to these local complexities. He suggests five potential strategies for shaping relationships between state and non-state actors in pluralistic settings: bridging, harmonization, incorporation, subsidization, and repression. U.S. programming, he demonstrates, did not select one strategy, but instead seemed to bounce from one to another, somewhat haphazardly, while attempting to negotiate the reporting demands of USAID and other funders.

² Special Inspector General for Afghanistan Reconstruction (SIGAR), "SIGAR 15-68 Audit Report: Rule of Law in Afghanistan—U.S. Agencies Lack a Strategy and Cannot Fully Determine the Effectiveness of Programs Costing More Than \$1 Billion," (Washington, D.C.: Special Inspector General for Afghanistan Reconstruction, 2015).

³ See for example Jane Stromseth, David Wippman, Rosa Brooks, *Can Might Make Rights?: Building the Rule of Law after Military Interventions* (Cambridge: Cambridge University Press, 2006), Roland Paris, *At War's End: Building Peace after Civil Conflict* (Cambridge: Cambridge University Press, 2004) and Thomas Carothers, "The Rule of Law Revival," *Foreign Affairs* 77:95 (1998).

⁴ See in particular, Thomas J. Barfield, "Informal Dispute Resolution and the Formal Legal System in Contemporary Northern Afghanistan," (Washington, DC: United States Institute of Peace, 2006) and Ali Wardak, "State and Non-State Justice Systems in Afghanistan: The Need for Synergy," *University of Pennsylvania Journal of International Law* 32 (2011).

Much of the failings here are poor planning and limited knowledge of local conditions, particularly a failure to understand the motivations and priorities of the Afghan government. Government officials were eager to take advantage of international funds coming into the country and loath to acknowledge the existence of non-state actors. While non-state actors were oftentimes willing to attempt bridging and harmonizing strategies, government officials themselves favored repression and, occasionally, incorporation.⁵ U.S. programs, and the diplomats guiding them, did little to try and reconcile these differences or change the political calculus of the situation.

It is here that the article offers the most for comparative studies of rule of law programming elsewhere, while succumbing somewhat to some of the failings of programming in Afghanistan: instead of looking at how rule of law and access to justice have shifted over the past fifteen years in Afghanistan, programming assessments remain focused strictly on the specific outcomes of U.S. programs. A more bottom-up approach to assessing rule of law might notice, for instance, that threats to accessing justice have shifted from warlords in the early 2000s, who were largely outside the government, to the current status, where a ruling elite that is both inside and outside the government tends to limit access to justice. A more locally oriented approach would look at how certain types of commercial law have made significant strides, while attempts at rooting out corruption have failed. Using Swenson's framework, state and non-state actors have, completely independently of U.S. programs and priorities, continued a historically continuous process of harmonization that has solidified elite control over aspects of the political-economy. As a result, the unstated lesson from the article is that instead of asking how to fix or refigure U.S. programming, we should be asking what the local conditions regarding rule of law are and then, how programming can support rule of law development.

For example, in the small Afghan town in which I spent time conducting research between 2006 and 2008, and still visit regularly, there was little demand among town residents for a formal judicial presence, particularly in the form of a court or local prosecutor.⁶ For the most part, small-scale disputes were resolved through local councils of elders (commonly referred to as *shuras* by most non-Pashtun Afghans) and for larger cases, people would head to one of the courts in the larger town down the road. However, the town had been abandoned after an attack by the Taliban in the late 1990s, forcing townspeople to live in Kabul or Pakistan in refugee camps. Following the U.S.-led invasion in 2001, townspeople had returned in a series of waves. This meant there were constant disputes about boundary lines and inheritance of property. As a result, there was a significant demand for an office for civil claims (*buquq* in Dari), where these cases could be registered. Later, doing work elsewhere in the country, I found other such incidents; especially among farmers, civil claims over land boundaries can deeply shape livelihoods and are a central concern for much of the country.

Yet American and other international programming almost entirely ignored this aspect of the judiciary. Focused instead with drug trafficking and prosecuting major crimes, most of the U.S. programming went to aspects of the Afghan judicial systems that were the least relevant to most Afghans. Since programming decisions were made in the Embassy and Washington, and were heavily influenced by implementing contractors, who wanted funds for programs they were best suited to run (here I think Swenson

⁵ Hamid M. Khan, "Islamic Law, Customary Law and Afghan Informal Justice," Special Report (Washington, D.C.: United States Institute of Peace, 2015).

⁶ Noah Coburn, *Bazaar Politics: Power and Pottery in an Afghan Market Town* (Stanford: Stanford University Press, 2011).

underestimates the role of contractors in shaping USAID priorities), these on-the-ground realities did little to shape how programming developed.

The lesson for future interventions is not to enter a country and attempt to build a judiciary from scratch, nor is it to ignore the rule of law—the approach that the current administration seems committed to. Instead, a more balanced approach to intervention is necessary and Swenson’s thoughtful essay is a good place to begin thinking through what this balance might look like.

Swenson’s article aptly demonstrates how both the Bush and Obama administrations failed to take into account local conditions, building programs for the rule of law contractors that wanted to see, rather than for what was needed. The current administration seems to have assumed that state-building and diplomacy should largely be removed from military efforts in Afghanistan and elsewhere. Both of these approaches are wrong.

Swenson’s critique offers a useful starting point, but until we become more thoughtful at looking at the rule of law and actual conditions on the ground, American and other Western-led attempts at intervention will continue to fall short of their goals.

Noah Coburn is a professor of anthropology at Bennington College. He is among one of the few contemporary anthropologists with years of on the ground field research experience in Afghanistan, where he spent over five years conducting research and working for the United States Institute of Peace, the Afghan Research and Evaluation Unit and Chatham House. Additionally, he has conducted field research in Kyrgyzstan, Nepal, India, Turkey, Sri Lanka and elsewhere. He is the author of three previous books, most recently, *Losing Afghanistan: An Obituary for the Intervention* (Stanford University Press, 2016).

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