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Symbolic Rule of Law Promotion

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Abstract

This paper introduces the concept of symbolic rule of law promotion, which consists of repeated enactments of policy and initiatives equated with advancing the rule of law despite no evidence suggesting actual progress. To demonstrate its existence, US rule of law promotion in Afghanistan is examined as a ‘least likely’ crucial case, from the end of President Obama’s Surge in 2014 to the Taliban’s return in 2021. During this time, Afghanistan—a major foreign policy priority—received the most US rule of law aid of any country globally. Unlike earlier attempts that sought to use rule of law policy and practice to achieve substantive goals and adapted over time, US rule of law endeavors from 2015 to 2021 were symbolic. Decisionmakers consistently pursued rule of law strategies and practitioners implemented initiatives that lacked any prospect of success. Previously unsuccessful strategies and programming were replicated alongside partnerships with disinterested, uncooperative stakeholders. More broadly, symbolic rule of law promotion has potentially significant implications for understanding the persistence of underperforming long-term rule of law efforts elsewhere. To increase the prospects of success, it shows the need to engage with non-state justice authorities, support robust accountability mechanisms, and take concerns about state legitimacy seriously.

Introduction

Transnational rule of law promotion now constitutes a multi-billion dollar enterprise and these ventures have generated sustained debate regarding their desirability, effectiveness and goals. Nevertheless, one unifying assumption exists: that international rule of law efforts invariably attempt to achieve concrete goals even if they fail to deliver those goals, or if, as some observers contend, their aims are unwise or harmful. Evidence from late-stage rule of law promotion endeavors in Afghanistan, however, contradicts this view. It demonstrates that efforts can be symbolic, whereby their primary purpose is to signal continuing support for the rule of law, rather than establishing the rule of law or any other tangible goals.

From late 2001 until August 2021, the United States officially backed the transformation of post-war Afghanistan into a democratic state bound by the rule of law. Promoting the rule of law was cast as essential for democratization, development and security. Prior to 2015, the administrations of George W. Bush (2001-2009) and Barack Obama (2009-2017) pursued voluminous, if flawed and unsuccessful, attempts to improve Afghan law and justice to achieve policy goals. President Obama's Afghan Surge (2010-2014) envisioned that substantially increasing military and civilian support would improve law and order and facilitate military gains, leading to victory over the resurgent Taliban and a stable, democratic Afghanistan. The practical results, however, were profoundly disappointing.

This paper shows that US rule of law promotion efforts in Afghanistan from 2015 to 2017 under President Obama and from 2017 to 2021 under President Donald Trump were symbolic. While post-2014 efforts sought to manage perceptions by signalling that the US had not abandoned the rule of law in Afghanistan, they no longer sought to change substantive realities on the ground. During this time, decisionmakers and practitioners alike consistently pursued legal assistance strategies that lacked any credible prospect of success and backed law and justice initiatives that did not advance the rule of law or any other concrete goals.

Previously unsuccessful strategies and programming were uncritically replicated, as were partnerships with disinterested, uncooperative Afghan stakeholders. No consideration was given to why earlier efforts failed and frequently there were even denials that they had failed. Post-Surge rule of law efforts embraced highly optimistic or even outright false assumptions and lacked credibility as policy or practice. Not only did US rule of law efforts fail from 2015 onwards, but there was no plausible vision offered of how US policy or initiatives could have succeeded. More broadly, it demonstrates that rule of law promotion – regardless of expenditure levels, duration or goals – is likely to fail without a legitimate overarching political regime and broader institutions that provide vertical and horizontal accountability.¹

Failing efforts were consistently tolerated because the political consequences of admitting failure were deemed higher than the practical consequences of supporting failing policy. Implementors continued to undertake failing programs because they had strong economic incentives to do so. This research shows the vital need to investigate the policy and actual practice of rule of law promotion efforts and how they interact with the larger socio-political environment to understand their motivations and consequences.

This article has eight major sections. The first section examines rule of law as an ideal, rule of law promotion as a policy goal and rule of law promotion as a transnational practice. Section two describes the data and methods employed. The third section outlines the theory of symbolic rule of law promotion. The fourth section explains the context of rule of law promotion in Afghanistan after 2014. Section five examines how previous US rule of law promotion initiatives and policy in Afghanistan through 2014 responded to changing circumstances and demonstrates that earlier efforts were not merely symbolic. While symbolism and managing perceptions were always important, initiatives and policies sought to

¹ Legitimacy refers to “a quality possessed by an authority, a law, or an institution that leads others to feel obligated to obey its decisions and directives voluntarily” (Tyler and Huo 2002, 102).

change the situation on the ground. Section six assesses the major US rule of law programs from 2015 to 2021 and shows they did not adapt to, or even acknowledge, earlier failures but instead kept knowingly perpetuating failing initiatives. Section seven illustrates how official US rule of law policy from 2015 to 2021 consistently claimed to advance the rule of law, but, in reality, embraced policies that had already failed and consistently lacked a credible vision for achieving its aims. Section eight discusses the research implications – most notably, that symbolic rule of law promotion precludes success in achieving policy goals beyond maintaining appearances – and offers insights for more productive international rule of law engagement based on lessons from Afghanistan.

The rule of law as an ideal, policy and practice

To understand how the rule of law promotion functioned in Afghanistan, it is necessary to understand and delineate the rule of law as a scholarly ideal, a policy goal and a program of practice.

Rule of law as an ideal

The concept of the rule of law has generated immense scholarly debate (See for example Raz 2009; Bingham 2011; Waldron 2017; Krygier 2016). Scholars have generated seemingly endless definitions as well as distinctions across both history and geography (Jensen 2003). Discourses about the rule of law, or ideas analogous to it, existed in classical Athens, ancient Rome, medieval Europe, and a wide variety of historical and contemporary societies (Tamanaha 2004).

While there will never be one universally accepted definition, the distinction between thick and thin rule of law remains helpful (Peerenboom 2002). At a minimum, the rule of law requires the law to be general, clear, stable, prospective, public and universally applicable

alongside the regulations and mechanisms necessary to adjudicate legal disputes nationwide and a sovereign government bound by the law (Tamanaha 2007). Even a minimal understanding of the rule of law demands a normative commitment among state officials (including high-level officials) to upholding the law, along with a cultural commitment to its ideals (Stromseth, Wippman, and Brooks 2006, 76). Thus, a fundamental difference exists between even thin rule of law and *rule by law*, wherein the state uses legal authority to exert control and pursue its goals but has no intent to be bound by the law itself (Ginsburg and Moustafa 2008). Thicker understandings may include various economic, cultural and political requirements, such as compliance with human rights norms, media freedom, governmental checks and balances, and separation of powers. Whatever their merits, thicker understandings are unrealistic for most post-conflict states, at least initially, because even under favorable conditions, establishing a minimal rule of law takes decades (North, Wallis, and Weingast 2009). While no state upholds rule of law ideals without fail, some states perform better than others. In this sense, a thin rule of law provides metrics against which to measure the actual behavior of states and the consequences of international rule of law promotion activities, but it is not necessarily the same as what initiatives or policies actually seek to do.

Rule of law as a policy goal

The drive to promote the rule of law as a tool of US foreign policy dates back to the law and development movement of the 1960s and 1970s. During this period, “policy makers saw the ‘rule of law’ as one of the major features that distinguished the United States from Communist nations” and “development assistance was pictured as furthering the rule of law” (Trubek and Galanter 1974, 1085–86). Over the 1970s, law and development faced growing criticism and eventually petered out.

The contemporary emphasis on promoting the rule of law in foreign policy can be traced to the mid-1980s. It started as a modest enterprise of US support for strengthening judicial administration in Latin America. Aid initially backed incremental legal reforms to bolster anti-Communist regimes. However, both the scope and scale of rule of law promotion quickly expanded. In the post-Cold War era, international rule of law support spread rapidly throughout the developing and post-Soviet world. While USAID and the World Bank were the first major donor institutions to make it a key goal, other major donors quickly followed suit (Humphreys 2010, 6; Krever 2011).

Over time, rule of law promotion has been deemed the solution for ever more foreign policy goals (van Rooij and Nicholson 2013; Magen 2009). These go far beyond the benefits that more or less germanely flow from academic notions of the rule of law, such as legal equality, promoting access to justice, ensuring government accountability, and preventing corruption and predatory abuses of private or public power. This expansive tendency has produced a “widening gap between theory and practice” and often a “disconnection between stated project goals and objectives and the actual activities supported” (Jensen and Heller 2003, 2). Policymakers have cast promoting the rule of law as fundamental to democracy, good governance, economic development, free market economics and human development. It has been cast as a crucial policy response to security issues, such as terrorism, violent extremism, organized crime and insurgency. It is also seen as fundamental to post-conflict reconstruction and state-building, along with preventing civil and international conflict. Yet, just because it is cast as a near-universal good, that does not mean that rule of law promotion is necessarily benign. As both ideology and policy, rule of law ideals underpinned attempts to legitimize and perpetuate both repression and systematic violence as well as colonial and authoritarian regimes more generally (Humphreys 2010; Lee 2024; Rajah 2012).

Rule of law as a practice

International rule of law promotion as practice tends to be construed quite narrowly. State-centered international assistance has focused on reforming legal institutions such as courts and offices for prosecutors and public defenders, rewriting laws, strengthening the legal profession, and improving access to the legal system (Jensen and Heller 2003). International rule of law programs have concentrated on state legal systems and their auxiliary institutions omitting or downplaying larger questions regarding regime type or broader elite commitment to rule of law ideals (Janse 2013). With regards to non-state justice rooted in custom, religion or tradition, international efforts have retained a legal focus, emphasizing reforming their procedures and/or substantive application of law, promoting human rights, linking state and non-state justice, and drafting legal frameworks (Swenson 2024).

Given the immense importance ascribed to rule of law as both an ideal and as a policy goal, existing literature understandably assumes that promotion efforts seek to achieve substantive ends even if they are deeply flawed in their approach, implementation, goals, or a combination thereof. Several scholars have surveyed international rule of law efforts since the 1980s and concluded that rule of law promoters generally seek beneficial outcomes for recipients even if outcomes are often disappointing or initiatives are deeply flawed, ill-conceived or counterproductive (Carothers 2003; Davis and Trebilcock 2008; Stromseth, Wippman, and Brooks 2006). Scholars advocating new approaches still stress that rule of law assistance seeks to achieve tangible goals (Golub 2003; Jensen 2003; Kleinfeld 2012). Kleinfeld, for instance, argues “The United States, Europe, and other countries are pursuing rule of law reform abroad for their own security, their desire to spread human rights and democracy, and their belief it will help economic development” (Kleinfeld 2012: 56). In certain instances, scholars have seen the primary aim of rule of law promotion as neo-liberal economic reform, security or counterinsurgency (Krever 2011; Magen 2009). Su has highlighted how, in

post-war Iraq, legal protection for religious liberty was promoted by “U.S. foreign policy in order to justify American power” (Su 2016, 138).

The official rationales behind rule of law promotion may not be the full or true motivations. States may use rule of law campaigns to pursue foreign policy goals unrelated to, or even in tension with, the rule of law as an ideal. For example, US policymakers used advancing the rule of law to justify supporting Chinese membership in the World Trade Organization (Ohnesorge 2007, 103). Other scholars criticize international legal engagement as imperialistic or neo-colonial, but still maintain that engagement seeks to achieve concrete goals, albeit goals detrimental to local populations. Chalmers, for instance, sees rule of law promotion as “racialized imperialism” (Chalmers 2019: 959). Rajah argues that rule of law rhetoric helped US officials reframe “imperial violence” in the War on Terror and the Afghanistan intervention as “the lawful delivery of national security” (Rajah 2022, 46). Examining international claims to support the rule of law from the 19th century to the present in Liberia and Sierra Leone, Sesay contends “rule of law promotion has...the underlying objectives to promote neoliberal growth, subordinate indigenous legal systems, and advancing ruling interests [that] remain the enduring legacies of legal colonialism” (2021, 17–18). Chandler maintains that international territorial administrators in Bosnia seeking “to externally impose the ‘public interest’ through imposing the ‘rule of law’ from the top-down in fact undermine[d] the creation of any genuine public consensus from the bottom-up through the political process” (Chandler 2004, 328).

In Afghanistan, widespread agreement exists that US officials envisioned a fundamentally new legal order in Afghanistan and espoused rule of law ideals. Scholars, however, have debated about the motivations, seriousness, and feasibility of such arrangements (Maley 2013; Suhrke 2011; Wardak 2004). While some important works have helped illuminate international engagement in Afghanistan after 2014 (Jamal and Maley 2023; Leach

2021; Malkasian 2021), rule of law promotion in this latter stage has received decidedly little attention relative to its importance.

Data and methods

This paper engages in inductive theory building based on US rule of law promotion efforts in Afghanistan following the logic of a least likely crucial case “that is least likely to exhibit a given outcome” (Gerring 2007, 89). It is a least likely crucial case for four reasons. First, Afghanistan received by far the most US rule of law funding over the last two decades and was subject to extensive independent monitoring, most notably from the Special Inspector General for Afghanistan Reconstruction (SIGAR). Second, Afghanistan saw a sustained high-level policy emphasis that far exceeded any other country where the United States promoted the rule of law. Third, rule of law was unambiguously linked to the major US national security project of establishing a new Afghan regime after the 9/11 terrorist attacks. Finally, US policymakers had long recognized issues of law and justice as crucial to the wider situation in Afghanistan.² Taliban justice constituted a profound threat because it sought to violently undermine state courts but also because many Afghans preferred Taliban justice (McChrystal 2009:section 2.7; US Mission Afghanistan 2010). Thus, it provides a tough test for the theory given the high-level national security interests, the immense economic and human costs, the centrality of law and justice issues, and the close scrutiny from external actors. Afghanistan is a setting where we would most expect the United States to place achieving results over symbolic posturing and least expect the knowing perpetuation of failing rule of law programs

² The underlying motives behind rule of law promotion in Afghanistan has sparked significant debate. Some scholars have posited they were genuine if deeply flawed attempts to promote the rule of law on its own terms but also to support international security, counterterrorism, and later counterinsurgency (Mason 2011a, 1; Stromseth, Wippman, and Brooks 2006, 6). Others have seen US rule of law promotion in Afghanistan as a legitimizing apparatus for militarized imperialism (Mattei and Nader 2008; Rajah 2022). This paper has a different focus. It examines whether evidence indicates the United States was pursuing rule of law promotion as a mechanism to change realities on the ground or not (whatever the nature or desirability of underlying goals).

and policies.³ These findings draw on a single case but suggest important new avenues for research highlighting the potential for, and consequences of, symbolic rule of law efforts in even the most crucial of settings.

Drawing on a process tracing approach, the paper examines the major post-Surge US rule of law initiatives from 2015 to 2021, specifically the State Department-funded Justice Sector Support Program (JSSP) and the USAID-supported Assistance for the Development of Afghan Legal Access and Transparency (ADALAT) program. It also uses process tracing to examine the overarching US rule of law strategy from 2015 to 2021 based on official, approved policy. Official policy and officially authorized US government rule of law initiatives are critically examined over time to determine if symbolic rule of law promotion exists. It examines what policies and activities were endorsed, how policy and programs responded (or did not respond) to changing circumstances, and their underlying logic of engagement. In other words, process tracing is used to “empirically establish the posited intervening variable and implications that should be true in a case if a particular explanation of that case is true” (George and Bennett 2005, 147).

Process tracing for programmatic activities and overarching rule of law policy is made possible through the existence of extensive primary and secondary sources, including from program implementers, evaluators and government agencies, such as USAID, SIGAR, the State Department and the Department of Defense (DOD), as well as other key sources such as the Islamic Republic and NATO. Over 450 primary source documents covering the entire

³Afghanistan is often compared with the Cold War intervention in Vietnam. This comparison likewise speaks to Afghanistan’s status as a least likely case. Presidents Johnson and Nixon harbored serious concerns about the South Vietnamese regime, faced criticism that bureaucracies were justifying failing policies, and saw large-scale protests. Even as hopes for a total victory dwindled, they consistently pursued policy changes and activities that sought to change the realities on the ground. During the twilight of the US intervention, President Nixon remained highly cognizant of audience costs and electoral politics (Payne 2023). Nevertheless, his administration still sought to change realities on the ground. These actions included, but were not limited to, the secret, large-scale and illegal bombing of Cambodia.

Islamic Republic were reviewed, including many sources that are no longer easily accessible to the public. These materials illuminate the strategies, activities and goals of macro-level US rule of law strategy as well as specific initiatives. Together these documents provide detailed empirical information, as funders tend to demand that implementing organisations provide precise data regarding programme activities, outcomes, political context and narrative framing, along with statements regarding overarching strategy and expected results.

Information from contractors was particularly useful for understanding what exactly was done by specific rule of law initiatives and how those activities were justified. These documents offered a rich source of information but were not taken as evidence of overarching policy. Only official US government policy documents were taken as statements of policy. Documents sometimes clearly related to law and justice activities. In other instances, documents were reviewed for reference to relevant concepts. This included references to the rule of law, law, legal, courts, justice, custom, inform, corruption, legal pluralism, judges, attorneys, judiciary, and non-state authority in their various forms. For both programs and policy, sufficient evidence exists to show and critically interrogate the assumptions regarding causality and the link between the policies pursued and specific activities undertaken to the desired goals. This makes it possible to examine justice initiatives over time and to critically inspect the ends pursued and the means selected. It also engages with relevant literature from sociolegal studies, international politics, development studies and beyond. I drew on the well-established technique of triangulation that cross-references “primary sources (interviews, published first-hand accounts; and documentary sources (published or archival), with published secondary-source information available” to determine the most plausible explanation for understanding important decisions and events (Davies 2001, 78).

This research also benefits from in-country fieldwork conducted in 2009 and 2014 when post-Surge policy and programs were being developed along with subsequent telephone

and in-person interviews outside Afghanistan.⁴ In total, over forty stakeholders participated in semi-structured interviews. These interviews combined purposive sampling in which interviewees were chosen based on their relevant knowledge and expertise and chain referral sampling that seeks suggestions for additional interviewees from respondents, which Tansey argues constitutes the ‘optimal’ approach for case studies utilizing process tracing (2007, 771). While these interviews provide important context and aid triangulation, program and policy descriptions and assessments are backed by independently verifiable documentation.

Data access

Critically examining the logic and behavior of actual US rule of law initiatives is essential for understanding rule of law promotion in theory and practice. Despite using public funds, access to information varies dramatically. USAID generally made program materials publicly available.⁵ However, when the Islamic Republic fell in August 2021, most documents relating to US involvement in Afghanistan were removed from government online archives. Still, as this research project was ongoing, copies of these documents had already been saved.

Materials on rule of law assistance funded by the State Department and the Defense Department were generally not publicly available. This poses serious challenges for researchers seeking to understand what exactly is happening on the ground. Nevertheless, by law, these entities had to generate detailed activity reports for SIGAR. SIGAR subsequently included relevant information about these programs in their quarterly reports and other documents.⁶ Despite a restrictive information environment, it was possible to systemically examine the activities undertaken, how they responded (or did not respond) to changing circumstances, and their rationales.

⁴ For more on the practicalities and challenges of conducting fieldwork in Afghanistan, see Roll and Swenson (2019) and Swenson and Roll (2020).

⁵ <https://dec.usaid.gov/dec/home/Default.aspx> (accessed August 7, 2024).

⁶ <https://www.sigar.mil/allreports/> (accessed August 7, 2024).

Symbolic rule of law promotion

I argue that symbolic rule of law promotion consists of policy and initiatives that are undertaken primarily for the sake of appearance rather than to achieve specific goals or results on the ground. I posit that rule of law promoters may knowingly pursue strategies and activities that have no realistic prospect of success or discernible impact. In other words, symbolic rule of law promotion consists of repeated enactment of policies and initiatives that are equated with advancing the rule of law, even if no evidence suggests actual progress toward tangible goals. The core focus is on upholding the perception of a continuing commitment to the rule of law. This paper demonstrates the existence of symbolic rule of law promotion and the circumstances that may give rise to it. The theory is probabilistic rather than deterministic. Decisionmakers may ultimately decide that continuing unsuccessful efforts is not worthwhile despite their symbolic value.

This does not mean that symbolic rule of law promotion completely lacks value or purpose. Many policies and initiatives are contemplated, but very few are officially authorized. Approved courses of action have both a signaling function and can convey important value judgements beyond any practical consequences (Cass 2009; Miller 2012). They also provide baselines against which to measure actual behavior and offer insights into how decisionmakers see the world and what they hope to achieve. While all rule of promotion efforts have symbolic elements, symbolic rule of law promotion is distinct in that its primary purpose is symbolism not shifting substantive realities on the ground.

Symbolic rule of law reflects domestic and international elements of rule of law promoting entities. International relations scholars have long been aware of audience costs in democratic states, wherein certain international policies and initiatives may impose domestic

audience costs on decisionmakers that can make an otherwise desirable course of action undesirable (Fearon 1994). These costs manifest in various forms, most notably negative public opinion and/or pushback from elites within or opposing the decisionmakers' governing coalition (Saunders 2015). When policymakers have intervened against an overseas enemy deemed particularly threatening, audience costs may be particularly acute. Afghanistan certainly fits the bill. The Taliban regime was deemed responsible for the 9/11 attacks by harbouring Al-Qaeda terrorists, and indicative of the profound threat posed by radical, militarized Islamic movements.⁷

Audience costs may promote escalation or de-escalation. Policymaker perceptions may not be accurate, but they are nevertheless important. Indeed, we see this dynamic playing out in Afghanistan, where, initially, Obama pledged that he would solve the growing problems in Afghanistan. At the same time, he feared an unlimited commitment and stipulated a short time frame for the Surge. Audience cost is indeterminate in and of itself. Nevertheless, perceived audience costs are essential for understanding how symbolic rule of law promotion may arise.

Beyond the purview of high-level policymakers, symbolic rule of law promotion reflects the strong economic and institutional incentives of both funding agencies and implementors to complete their program activities, claim they were successful, and justify further programming. To do otherwise risks increased scrutiny and budget cuts. Implementers that fail to produce their promised outputs jeopardize current and future contracts, company profits, and their professional livelihoods (Venugopal 2018). Implementers, whether for profit or not, need funding to survive (Cooley and Ron 2002). However, programs that do not substantially advance the rule of law face few consequences, as long as outputs are delivered and justified. This dynamic helps explain the emergence of symbolic rule of law promotion

⁷ The Cold War era US intervention in Vietnam against the perceived Communist threat offers another key example of audience costs shaping policy (Fearon 1994, 590n11; Saunders 2015).

because donor incentives overwhelmingly focus on whether the promised contract deliverables were produced, and not on overarching outcomes. As upsetting the status quo risks both individual livelihoods and organizational sustainability, funders and implementors alike have strong incentives to continue their activities and pursue future related work despite a clear lack of evidence of positive change.

Insights from the so-called practice turn in international relations are likewise helpful (Adler and Pouliot 2011). It uses what Bourbeau calls the “*complementary form*” wherein “practice is not *the* element constituting all aspects of our social world, but *an* element of it” (Bourbeau 2017, 171, italics in original). Namely certain practices have become equated with rule of law promotion. This allows implementors, donors and policymakers to make plausible claims they are promoting the rule of law...even if actual empirical evidence suggests no such progress is being made. Autesserre’s observations on international peacebuilding hold equally true for rule of law initiatives wherein ordinary activities and mundane elements produce and reproduce policies and practices. These dynamics help facilitate “the existence and continued use of ways of working that interveners view as inefficient, ineffective, or even counterproductive” (Autesserre 2014, 9).

Finally, when discussing rule of law promotion activities, it is vital to keep in mind the difference between *outputs* and *outcomes*. Conceptualizing rule of law efforts as symbolic is not to say that these initiatives do nothing. Quite the contrary. These programs often produce extensive outputs which are specific, quantifiable project deliverables that are often used to measure performance. Outcomes refer to the overarching goals sought to be achieved. Outputs, however, do not necessarily produce the desired outcomes. When a program delivers all its stipulated outputs that does not necessarily mean that it will achieve or even make progress toward desired outcomes (Carothers 2003). For example, training is an output. Creating a more just society is an outcome. Training does not ensure that a particular judge will be a better

judge, let alone that the overall justice system will be more just (Jensen 2003, 359–60). Outputs may even be counterproductive to the desired outcome (Trubek 2006, 91). Law and justice projects can deliver most or even all of their outputs, but nevertheless fail to advance the overarching goals (van Rooij and Nicholson 2013). As Springer notes in her detailed examination of aid monitoring and evaluation practices, “absent learning, development measurement may become a sort of shell industry which uses output numbers for funding legitimation without a serious intention to measure, understand, and progressively improve development projects” (Springer 2021, 11). As we shall see, this is exactly what happened with justice programming in Afghanistan.

Ultimately, symbolic rule of law promotion is most appealing when the consequences of abandoning failing efforts are seen as substantially higher than the costs of continuing failing efforts to maintain appearances. It also appeals when no clear alternative approaches exist that offer greater promise of success at acceptable economic, human and political costs. Evidence for or against the existence of symbolic rule of law promotion efforts can be found by looking at whether programs and/or policy meaningfully adapt to address past failures or explore new avenues for more effective results. If, however, actors still publicly claim to promote the rule of law despite knowing or having very good reason that they should know, their continued efforts would almost certainly not work, then those endeavors are best understood as symbolic. The theory is easily testable. If initiatives or policy changed to address new circumstances or demonstrated how existing programming was grappling with the current environment, symbolic international legal assistance would not be present. Alternatively, symbolic rule of law efforts would not be present if initiatives or policy were simply to admit they were failing or, alternatively, openly proclaim ignorance regarding the impact of what they were doing or why they were doing it (Desai 2023). Indeed, rule of law promotion in Afghanistan saw the exact opposite happen. Despite clear evidence that earlier efforts had not succeeded, rule of

law policymakers and practitioners repeatedly and openly proclaimed they knew what they were doing and that success had already been achieved or was imminent.

Both law in general and rule of law promotion possess important symbolic aspects (Přibán 2007; Humphreys 2010). Moreover, a gap almost always exists between goals and actual outcomes. This paper argues that what separates post-2014 rule of law promotion in Afghanistan from earlier endeavors was not the existence of symbolic elements or concerns about how policy and practice were perceived. These existed from the start of the intervention. Fundamentally, what made the post-2014 period distinct was that policy and practice alike now focused on signifying that the United States supported the rule of law in Afghanistan as an end in and of itself without a realistic expectation of achieving other tangible goals.

Afghanistan from 2015 to 2021 offers a paradigmatic example of symbolic rule of law promotion. The failure of the Surge caused profound disappointment with no obvious avenues to produce better outcomes. Both Obama and Trump believed that the audience costs of both meaningful escalation and effective abandonment were too high. They also saw little merit in further reforming or expanding rule of law endeavors. After the Surge, these corresponding large-scale military and civilian efforts were eliminated. Rule of law promotion now simply meant aid provision. There was no expectation of positive results, but a continued desire to maintain the pretense that the rule of law was being promoted. At the same time, implementors offered no plausible theory for how continuing activities that had already been tried and failed could produce positive changes in the future. Rule of law efforts still produced voluminous outputs and extensive claims of current or imminent progress. These efforts, however, no longer seriously attempted or expected to foster meaningful change in the overarching law and justice environment. No credible plans existed for how a strategy ostensibly designed to promote the rule of law could ever do so. Nor did policy or programs adapt in response to earlier failures.

Law, order and conflict in post-2014 Afghanistan

The post-Surge era was an exceptionally violent period that saw further deterioration of Afghan law and governance. On May 27, 2014, Obama announced the end of combat operations and the withdrawal of US forces (though some ultimately remained). In September, a new National Unity Government emerged headed by President Ashraf Ghani and Chief Executive Officer Abdullah Abdullah, his former electoral rival. The United States and Afghanistan signed a long-awaited Bilateral Security Agreement which facilitated the continued presence of international troops and large-scale aid flows. NATO International Stabilization Force (2001-2014) was replaced by Resolute Support Mission (2015-2021), a “non-combat” deployment supporting “a sovereign, secure and democratic Afghanistan” (NATO 2014).

Nevertheless, the conflict escalated. Afghanistan ranked as the world’s most violent conflict in 2020, and 2021 was even more deadly before the Taliban’s victory (Strand and Hegre 2021). Cumulatively, the Afghanistan intervention cost the United States approximately \$2.261 trillion through April 2021 (Watson Institute 2021). It also led to the deaths of approximately 241,000 people during that time, the overwhelming majority of which were Afghans (Id.). International assistance underwrote “almost 80% of the nation’s \$11 billion public expenditure programme” (Haque and Roberts 2020, 4). The United States was by far the largest contributor.

Law and disorder

By 2014, the Islamic Republic, with international support, had established a new justice system featuring hundreds of courts and related institutions and extensive legislation (Rahbari 2018; Wardak 2011). A new legal education system was also created (Swenson and Sugerman

2011). Voluminous-efforts to reform and strengthen the justice system and auxiliary institutions continued (Singh 2019). The Afghan government highlighted from 2015 to 2020 “over 482 laws and regulations have been drafted, passed or promoted” (2020, 6).

While these courts could be sites of active legal contestation (Choudhury 2017), the justice sector still continually ranked as the most corrupt state institution (Integrity Watch Afghanistan 2016; McDevitt and Adib 2018; 2021). Courts were expensive, unprofessional, predatory and generally ineffective. While ordinary people suffered, impunity became the norm for the powerful. The judiciary remained firmly under the executive’s sway. Judicial authority, already concentrated in urban areas, eroded further, even as qualified personnel and state-sanctioned institutions swelled.

Research shows earlier rule of law efforts failed for several reasons, including deeply questionable assumptions, poor strategy, a lack of state support, and a failure to meaningfully engage with longstanding sources of legitimacy, namely respecting Islam, entrenched cultural norms and providing public goods (Suhrke 2011; Wimpelmann 2013; Swenson 2017; Mason 2011b). At the same time, this research shows that until 2014, US efforts consistently evolved in the hope of achieving better results.

Legal competitors and combatants

Afghanistan has a long tradition of robust legal pluralism wherein “two or more legal systems coexist” (Merry 1988: 870). Throughout Afghan history, all legitimate state-backed legal orders were rooted in a mixture of state performance, Islam and tribal approval (Barfield 2010).⁸ Afghanistan is an overwhelmingly Islamic country. Islamic law ideals have always been extremely important. These concepts were also highly influential on state law and tribal law. Pashtunwali, a harsh, but effective non-state legal code, was also fundamental. Pashtuns,

⁸ In practice, however, the boundaries between justice systems was often porous (Choudhury 2022).

the largest ethnic group, used communal gatherings known as *jirgas* to implement and adjudicate based on the code, while *shuras* served a similar role for non-Pashtuns (Roy 1990, 35). While these legal systems often competed for influence and authority, they coexisted in relative peace for centuries. Then, in 1978, a coup toppled the regime and triggered decades of civil strife under communist and later mujahideen rule.

The first Taliban regime (1996-2001) established a brutal, but effective state legal order that successfully claimed religious authority and acquiescence from tribal justice authorities (Rashid 2001). The Islamic Republic's internationally backed legal order faced far greater challenges from non-state providers. Tribal-based legal orders tactically engaged with the state but remained deeply skeptical of it (Mason 2011b; Weigand 2022). Warlords sought autonomy, including legal autonomy, and access to valuable state and international resources (Mukhopadhyay 2014). Other entities wanted to destroy the state itself. In January 2015, the Islamic State-Khorasan Province (ISK) emerged and promised to bring Islamic law to Afghanistan (Giustozzi 2018, 33). ISK never established a territorial foothold or effective parallel judicial structures, but its presence sparked further violence and instability.

Taliban justice sought to destroy and replace the state-based legal order that they deemed illegitimate, lawless and illegal (Baczko 2023). They pledged to establish a credible, consistent legal order rooted in tribal values and Islam. Taliban justice raised profound human rights concerns, but it was coherent, accessible and effective compared to state courts (Provost 2021). In the post-Surge era, the need for the Islamic Republic to establish a viable, legitimate legal order and work constructively with tribal justice systems was more pressing than ever.

Adaptive rule of law programming and policy through 2014

Rule of programming overview

Prior to 2015, USAID, the State Department and DOD oversaw major rule of law programs in Afghanistan. Before discussing Afghanistan specifically, it is necessary to briefly discuss aid provision. The United States had long been the world's largest bilateral rule of law funder (Kleinfeld 2012). The foreign aid bureaucracy once had vast in-house knowledge and capacity. By the time of the 2001 intervention in Afghanistan, however, US assistance was almost always outsourced to external agents, chief among them for-profit contractors.

The strong preference for large for-profit contractors reflects their capacity to fulfill extensive technical requirements, handle large, complex projects, perceived ability to operate in challenging environments and robust political connections (Nagaraj 2015). While technically subject to competitive bidding, the same organizations repeatedly won rule of law contracts in Afghanistan (see Table 1). These contractors, in turn, subcontracted certain activities to other for-profit contractors and/or local or international non-governmental organizations. Outsourcing, however, does not mean disengagement. Micromanagement and voluminous regulations are hallmarks of US foreign aid. Foreign assistance must comply with extensive congressional and executive branch requirements. US government agencies generally can change or even cancel agreements.

Funder	Program	Program Acronym	Lead Implementer
Department of Defense	Rule of Law Field Force–Afghanistan (2010-2014)	ROLFF-A	Combined Joint Interagency Task Force–435
State Department	Justice Sector Support Program- Phase 1 (2005-2010)	JSSP	Pacific Architects and Engineers
State Department	Justice Sector Support Program- Phase 2 (2010-2017)	JSSP	Pacific Architects and Engineers
State Department	Justice Sector Support Program- Phase 3 (2017-2022)	JSSP	Tetra Tech
USAID	Afghanistan Rule-of-Law Project (2004-2009)	AROLP	Checchi and Company Consulting
USAID	Rule of Law Stabilization–Formal Component (2010-2014)	RLS-Formal	Tetra Tech
USAID	Rule of Law Stabilization–Informal Component (2010-2014)	RLS-Informal	Checchi and Company Consulting
USAID	Assistance for the Development of Afghan Legal Access and Transparency (2016-2022)	ADALAT	Checchi and Company Consulting

Table 1. Major rule of law promotion programs in Afghanistan, 2004-2022

USAID rule of law efforts (2004-2014)

USAID’s Afghanistan Rule of Law Program (AROLP) ran from 2004 to 2009. It focused on strengthening the judicial system through technical assistance and material support, reforming the justice system and its legislative framework, and bolstering access to justice. By 2006, AROLP sought to link state and non-state justice (Checchi and Company Consulting 2009, 33). During the Surge Era from 2010 to 2014, USAID supported two main programs: the Rule of Law Stabilization (RLS) programs, RLS-Formal and RLS-Informal. RLS-Formal focused on state institutions and largely replicated AROLP. It emphasized training, capacity building, legal education and public awareness (Leeth, Hoverter, and Tajali 2012). RLS-

Informal (2010-2014) aimed to improve non-state justice, support cooperation between legal systems, solve entrenched disputes, and “help eliminate Taliban justice and defeat the insurgency” (Checchi and Company Consulting 2012a, 3). It emphasized capacity building, “encouraging women's participation,...public outreach, and building networks of elders” (Checchi and Company Consulting 2012b, 1).

While most participants viewed activities positively and voluminous deliverables were achieved, USAID programs failed to meaningfully advance the rule of law (SIGAR 2015; Swenson 2022, 187–96). Even program implementors explicitly noted the pervasive corruption alongside “weak political support for rule of law reforms,” and “a lack of willingness among counterpart institutions to support and adopt reforms” (Tetra Tech 2014, 3). Despite these problems, “USAID nearly doubled funding” during the Surge (SIGAR 2015, 21). Neither judicial performance nor public perception of the judiciary improved.

US assistance did not cause non-state justice actors to fundamentally change their approach to state justice or increase referrals to state courts (Schueth, Naim, and Rasheed 2014). Nor could US-backed justice venues undercut Taliban influence (Baczko 2023). Aid sometimes even exacerbated local tensions and disputes (Coburn 2013).

State Department rule of law efforts (2005-2014)

The State Department's Bureau of International Narcotics and Law Enforcement Affairs (INL) oversaw the flagship Justice Sector Support Program (JSSP), with a budget exceeding \$241 million from 2005 to 2014. JSSP focused on training justice-sector officials, establishing a case-management system, and increasing state judicial capacity. By 2014, JSSP had provided extensive training and capacity-building support. A new case-management system was established in eighteen provinces. Yet, there was no evidence that it ever advanced the rule of law even after massive funding increases (SIGAR 2014; 2015; State Department 2008). Key

justice-sector institutions consistently lacked a commitment to the rule of law. JSSP itself consistently faced major management, oversight and implementation issues, including a series of “poorly designed deliverables,” that were deemed “useless” (SIGAR 2014, 5).

DOD rule of law efforts (2010-2014)

From 2010 to 2014, the DOD’s Rule of Law Field Force-Afghanistan (ROLFF-A) initiative sought “to build Afghan criminal justice capacity” and increase regime legitimacy (Stump 2010). ROLFF-A focused on improving human resources, infrastructure, public knowledge of and access to courts, and protecting legal actors (Department of Defense 2012, 75). ROLFF-A also sought to link state and non-state justice.

While much assistance mirrored other agencies, ROLFF-A employed a novel approach seeking to “establish rule-of-law green zones” (Martins 2011, 25). A “hub-and-spoke linkage between green zones in key provinces and districts” would create an effective subnational justice system (2011, 27). This vision would only succeed if state justice provision improved, which never happened. Despite the security-centric approach, US military forces generally could not protect against Taliban attacks, and their presence could even incite violence as local actors scrambled to acquire external resources.

US rule of law policy in Afghanistan through 2014

While Italy was technically the lead nation for Afghan rule of law assistance from 2002 to 2006, the United States was always the most influential actor – spending well over a billion dollars on rule of law initiatives through 2014 (SIGAR 2015). Policy during the George W. Bush Administration prioritized providing resources to establish a modern justice system that could advance the rule of law. This principle underpinned both JSSP and AROLP.

Subsidization in the pre-Surge era achieved little given the regime’s disinterest in advancing the rule of law as well as its poor strategic choices, including failing to establish

nationwide security initially, partnerships with warlords, allowing democratic governance to be undermined, and tolerating vast corruption (Rashid 2008). Within the judiciary, corruption, predation and rent extraction became normalized. These conditions helped spark a full-scale Taliban insurgency by 2006. Consequently, policymakers increasingly viewed more robust rule of law promotion and engaging with non-state justice as vital for strengthening the regime and countering the Taliban.

This period also produced the influential UNDP *Afghanistan Human Development Report*, which outlined a “hybrid” justice model that proposed allowing alternative dispute resolution forums, including jirgas and shuras, to address minor criminal incidents and civil cases (2007, 12). Afghan government stakeholders, however, firmly rejected these recommendations (Wardak 2011). Nevertheless, as US policymakers actively searched for new ways to improve the rule of law, ideas from the report underpinned several pilot programs, including the DOD-backed projects discussed above, and the 2010 draft law on non-state justice. Each initiative failed to meet its stated goals but reflected the active search to use law and justice aid to achieve goals on the ground.

President Obama took office in 2009 and subsequently authorized an “Afghanistan surge.” It provided for approximately 30,000 additional troops and a vast expansion of civilian support, including rule of law efforts. US decisionmakers were amenable to any law and justice approach that might help defeat the Taliban (US Mission Afghanistan 2010). In highly legally pluralist settings such as Afghanistan, there are five main engagement strategies between state and non-state justice actors: subsidization, bridging, harmonization, incorporation and repression (Swenson 2018). The Obama administration tried them all with decidedly meager results.

During the Surge, US policymakers supersized the previous administration's subsidization strategy. INL's funding for Afghan rule of law assistance, for example, ballooned from \$26.5 million in 2006 to \$328 million in 2010 (Wylter and Katzman 2010, 27). Yet, major funding increases failed to improve, let alone transform, the justice sector because key state institutions opposed rule of law ideals.

Harmonization efforts sought to make non-state justice operate on principles akin to an (idealized) state justice system that protects human rights and upholds the rule of law by changing the behavior of tribal and religious justice providers (US Mission Afghanistan 2010:4). US initiatives did not cause non-state justice mechanisms to meaningfully change procedurally or substantively. Harmonization failed because non-state justice actors remained wary of state courts, only a limited selection of non-state leaders could and would participate, and human rights concerns proved expendable when seen as clashing with security and counterinsurgency goals.

The United States likewise sought to bridge Afghan legal systems by linking state and non-state justice and ensuring both would be accessible as deemed appropriate (2010, 5). Yet, in practice, the state could not compel most non-state justice actors to work with state courts. The low quality of state courts meant there was very little demand for them (Checchi and Company Consulting 2014).

Incorporation envisioned "formaliz[ing] links between the two systems to maximize the[ir] benefits" and ensuring respect for human rights and state law (2014, 4). This vision underpinned the 2009 draft non-state justice policy endorsed by Afghan and international representatives and the subsequent 2010 draft law (Ministry of Justice 2010). The law was not passed, however, due to opposition from within the government.

Surge-era rule of law initiatives also embraced repression via counterinsurgency and sought to undermine or eliminate Taliban courts (Checchi and Company Consulting 2013). These efforts, however, achieved little largely because state justice remained unappealing and Taliban justice proved resilient.

Symbolic rule of law programming in Afghanistan 2015-2021

After 2014, Afghanistan remained by far the largest recipient of US law and justice aid (Government Accountability Office 2020). This section examines the two largest US-funded rule of law initiatives after 2014. It finds that neither initiative meaningfully responded to emerging realities or longstanding challenges. Policymakers, program funders and implementors knew that previous on-the-ground efforts had not advanced the rule of law. Yet, post-Surge programs largely replicated earlier, unsuccessful initiatives while claiming success.

State Department rule of law programming (2015-2021)

Consistently the largest US rule of law program, JSSP's initial phase ran from 2005 to 2010. Phase two ran from 2010 to mid-2017, with over \$286 million in funding (State Department 2017). Phase three was authorized through August 2022, with a budget exceeding \$45 million (SIGAR 2018, 142) and over 280 staffers (Tetra Tech 2021).

In the post-Surge era, JSSP embraced the same priorities, namely increasing justice sector capacity, assisting with legislative drafting, and improving case management. JSSP offered extensive training, capacity building and technical assistance to Afghan agencies. JSSP supported the drafting and socialization of new legislation, such as a new whistleblower protection law (2021). The case-management system was expanded nationwide (Ministry of Justice 2019).

JSSP trained legions of personnel, offered extensive technical assistance, and extended the case management system, but no evidence suggests it ever advanced the rule of law (SIGAR 2021c, 91). Multiple evaluations found the JSSP had no discernible impact and faced systemic quality, coordination and sustainability issues (SIGAR 2014; 2015; State Department 2008). Nevertheless, JSSP programming remained largely unchanged after 2014. The link between program outputs and overarching rule of law goals remained murky. The flagship case management system faced numerous delays and technical difficulties (SIGAR 2021b, 99). Both the Supreme Court and the Attorney General’s Office remained uncommitted to the system (SIGAR 2020, 1–3). Even when operational, case data was often incomplete, incorrect or omitted entirely. Asset theft by Afghan state officials remained a serious problem.

The State Department provided little oversight. In September 2017, for instance, a single person monitored both JSSP and the Corrections System Support Program, which were “cumulatively worth hundreds of millions [of] dollars” (State Department 2018, 10–13; SIGAR 2021c, 108). High workloads, staffing difficulties and insufficient training remained chronic issues. After over fifteen years of programming, JSSP’s overseers admitted they could “do little to assess actual outcomes” in December 2019 (SIGAR 2021c, 108).

JSSP’s record shows that technocratic solutions alone, regardless of expenditure levels, are very unlikely to produce sustainable, systemic change. The State Department, however, still cast corruption, predation and rent-seeking as aberrations perpetually on the verge of correction (footnote 691 in SIGAR 2021a:256–57). Neither State Department policymakers nor JSSP implementers ever grappled with that reality, let alone fundamentally challenged it.

USAID rule of law programming (2016-2021)

The \$68.2 million USAID-funded ADALAT program was slated to run from April 2016 until 2022. ADALAT sought to bolster the state justice system’s “effectiveness and

reach”, link state and non-state justice, and boost “citizen demand for quality legal services” (USAID 2015, 8). These goals closely replicated previous USAID-funded rule of law programs.

State justice sector initiatives included support for legislative drafting, extensive education and training, assisting twenty two district and provincial dispute resolution forums, and establishing the Court Administration System and an advisory Judicial Conference (USAID 2021). ADALAT collaborated with the Ministry of Justice’s (MOJ) Huquq Unit, to help “bridge...the formal justice sector, traditional justice providers, and Afghan communities” (USAID 2017, 26). ADALAT also implemented the Afghanistan Justice Engagement Model (JEM) in thirty two districts for 3,440 men and 2,880 women to bolster “the legality and fairness of traditional dispute resolution” and promote gender equality (Checchi and Company Consulting 2018, 2). Participants received instruction on jurisdictional boundaries and how to facilitate state intervention. It also aimed “to inspire participant self-initiative for improved justice practice” using “esteemed Afghan and Islamic law faculty, justice officials, and other respected experts... [to] explain[] relevant areas of Afghan law and its Sharia components” (2018, 2).

ADALAT largely replicated previous practice. Program designers and implementers continued to claim success, and showed little interest in reflecting on why previous efforts had achieved little (Bartz, Momand, and Swenson 2018). ADALAT sought to “combat[] corruption by empowering relevant Afghan Government agencies/institutions” (USAID 2015, 9). However, key Afghan judicial institutions still lacked a commitment to either program activities or serious reform (USAID 2020, 2). As Supreme Court Chief Justice Sayed Yousuf Halim stated bluntly, “ADALAT has not told us what they are doing and has not paid attention to our action plan” (quoted in Management Systems International 2020, 27). When Supreme

Court personnel participated, for instance, by allocating training, complaints arose that opportunities were distributed unfairly (2020, 15).

ADALAT achieved most of its stipulated targets. Yet, as ADALAT's own internal evaluation noted, the data collected could not link program outputs to broader outcomes or "objectively assess ADALAT's effectiveness in increasing access to justice" (2020, 6). Evaluators faced serious constraints, including "compromised data fidelity," severe travel limitations, reliance on secondary data, and limited qualitative data (2020, 6). Evidence for positive impacts hinged largely on testimonials from program implementors or beneficiaries creating a very high risk of pro-program bias (Camfield, Duvendack, and Palmer-Jones 2014; SIGAR 2021c). Evaluators even acknowledged, "the evidence does not support quantifying the extent to which ADALAT interventions improved the effectiveness of the justice system" or "which interventions were more or less effective" (Management Systems International 2020, 23).

As before, participating non-state justice actors were frequently not the most authoritative locally. Even allocating funds proved challenging. Programmers "found only 10 viable CSOs for the 15 TDR grants" and some grants were later canceled because recipients violated funding requirements (2020, 7). Nor could screening eliminate the economic and political distortions caused by aid. Local aid tended to exacerbate conflict rather than mitigate it (Zürcher 2017). ADALAT foresaw symbiotic collaboration between state and non-state justice, but the capricious nature of state legal institutions precluded a constructive partnership.

More broadly, ADALAT envisioned that activities such as trainings, workshops and network building could transform tribal justice and society writ large:

Recognizing the embedded nature of traditional justice within local culture, JEM aims to permanently transform that culture by transitioning both dispute resolvers and the public away from inaccurate or harmful concepts of justice and toward greater awareness of and respect for

Though an “embedded” feature of Afghan society, programmers maintained that traditional justice could permanently be changed to fully respect human rights by simply explaining that certain embedded practices and ideas were “inaccurate or harmful.” And that change could be achieved through trainings, workshops and networking activities with pre-approved collaborators.

The empirical record of international efforts to change the behavior of either state or non-state justice actors is lacking even in relatively stable, peaceful countries, let alone those racked by conflict (Isser 2011; Tamanaha 2021). These efforts had already been tried and failed in Afghanistan (Coburn 2013; Swenson 2017; Wimpelmann 2013). Once again, they did not achieve serious change, let alone a fundamental transformation.

ADALAT largely ignored the Taliban, but the insurgency severely constrained programming. Taliban rhetoric promised inexpensive, legitimate, culturally acceptable dispute resolution alongside credible threats and violence (Weigand 2022). The Taliban aimed to monopolize justice provision and, failing that, influence tribal judicial processes. Moreover, they sought to undercut state justice and dissuade Afghans from cooperating with international programs or Islamic Republic institutions. ADALAT could not solve these structural problems or ameliorate the risk of violence or death that participants faced.

Evidence overwhelmingly showed both initiatives were not achieving their desired goals. Still, donors and implementers faced strong pressures to signal success by delivering their promised outputs, spending all allocated funds, and claiming that progress was being achieved. For state justice sector programming, this meant working with major justice sector institutions. Once programming commenced, if Afghan stakeholders expressed disinterest or

even hostility, aid providers had little recourse short of reallocation or ceasing programming altogether. However, as noted above, provided that their contractually mandated outputs were delivered and justified, implementors faced few meaningful consequences if stakeholders were disinterested (or even unhelpful) or if their initiatives did not achieve their desired outcomes.

But implementor incentives alone are insufficient. Aid contracts gave the government broad discretion to demand major shifts in programming approach, changes to specific activities, or even end programming altogether, but major changes never occurred. As the next section highlights, policymakers not only knowingly tolerated, but perpetuated rule of law approaches that had no realistic chance of success.

Symbolic rule of law policy in Afghanistan, 2015-2021

Despite rhetorical differences, both the late-stage Obama Administration (2015-2017) and the Trump Administration (2017-2021) sought to largely maintain the status quo by claiming progress was being made, despite lacking a plausible policy vision for promoting rule of law-based gains in Afghanistan (Felbab-Brown 2017; Cordesman 2019). Policy, like programming, prioritized maintaining the appearance of advancing the rule of law rather than critically interrogating whether it was actually doing so. High-level policy, like on-the-ground initiatives, became symbolic.

Obama administration rule of law policy (2015-2017)

After the Surge, President Obama envisioned a complete US withdrawal after re-establishing law and order and defeating the Taliban. That did not occur. While military and civilian personnel deployment decreased as did foreign assistance, Afghanistan remained the largest theater of military operations and the biggest foreign aid recipient, including for rule of law assistance. After 2014, Obama administration officials did not seriously contemplate what

alternative approaches might be more productive (Kolenda 2019). Policymakers did not want to continue large-scale involvement that might change realities on the ground but also did not want to remove all US troops or otherwise risk an outright Taliban victory.

Nevertheless, promoting the rule of law continued to be a cornerstone of official US policy (Obama 2015). What had once been a government-wide priority became relegated to USAID. The *USAID Afghanistan Plan for Transition* (2015-2018) provided some guidance, but details were much sparser than before. Policy now emphasized continuity over change; stressing that improved public services “along with security and the equitable rule of law, will ultimately generate increased confidence in the legitimacy and effectiveness of the government and, in turn, will foster stability” (USAID 2016, 3; see also State Department and USAID 2018). Technical assistance would “build public confidence” and, eventually, “extend the writ of the formal justice sector” nationwide (USAID 2016, 21). The strategy also aimed to “improve and expand the use of case filing systems as well as personnel and budgeting processes” (2016, 21). Subsidizing the state justice sector remained the most significant strategy. New efforts closely replicated the policy rationale and practice of earlier unsuccessful attempts. Yet, policy never explained why this approach would now succeed when previous endeavors had not.

Bridging, harmonization, incorporation, subsidization and repression strategies had been tried during the Surge. None succeeded (Swenson 2017). Now all but repression strategies toward Taliban justice were attempted anew. The approach aimed to harmonize non-state justice procedures and outputs to be consistent with Afghan state courts (or more accurately how US policymakers believed they should operate) through “increase[d] legal certainty and protection of basic rights” (USAID 2016, 22). This entailed support for “traditional justice sector actors to enhance their legal knowledge and skills so that their legal decisions are consistent with Afghan and Sharia law” (2016, 21). Strategy likewise sought to “develop the

technical, organizational and management capacity of USAID civil society partners operating in the formal and traditional justice sectors” (2016, 21). Policy-backed incorporation by “promoting stronger linkages between the formal and traditional justice sectors” (2016, 21). Specifically, the US supported “administrative procedures and tools such as a case-management system and a process to receive, review and register traditional dispute cases” (2016, 21). As with state justice efforts, the policy did not articulate why these plans should succeed when nearly identical ones had already failed.

Though US policy still pictured a peaceful, prosperous Afghanistan, counterinsurgency rhetoric was discarded. Guidance did not mention the Taliban justice system’s growing power or the consequences of its violence and intimidation. Instead, a strikingly similar policy was recast as an attempt to improve the quality of justice, minimize disputes, and strengthen the relationship between state and tribal authorities (Checchi and Company Consulting 2018, 1).

The US government’s “critical assumptions” highlight the disconnect between aspirations and realities. Policy assumed the Islamic Republic “will remain committed to development initiatives and reforms” and the security situation will allow “for activity implementation and monitoring” (USAID 2016: 3). Moreover, the US presumed an ongoing “partnership with GoA [Government of Afghanistan] institutions, independent agencies, the private sector, and civil society” and that external donors and the Afghan regime “will fulfill security and civilian assistance commitments” (2016: 3). These were also key assumptions about aid itself, notably that it would work: specifically, “programs will successfully address local partners’ lack of education, experience, and limited resources” and “resources [will] not substantially decline beyond envisioned reductions nor decline in a manner that does not provide a reasonably smooth glide path” (2016, 3–4).

While aid seemed likely to continue, the Taliban insurgency showed no signs of abating. Corruption still undermined the state and bolstered the insurgency. Yet, there was no evidence that the Afghan regime took anticorruption seriously. Islamic Republic and US officials partnered with warlords and other militarized powerbrokers who opposed the rule of law and fueled popular discontent (Malejacq 2019). Despite extensive US investment, Afghan forces still performed poorly and faced a shockingly high death rate (Malkasian 2021). Security steadily worsened. This negatively impacted regime stability, along with the prospects of establishing an effective, nationwide state justice system. US policymakers faced ever greater incentives to obscure the lack of progress which encouraged misleading, unduly positive policy assessments (Whitlock 2021, 227–37; Brooks 2020, 34).

Afghanistan’s bitterly divided National Unity Government was unwilling or unable to meaningfully reduce state corruption and lawlessness. Vast sums spent promoting the rule of law yielded meager results. Justice still consistently ranked as the state’s most corrupt sector, but this did not reflect insufficient resources or knowledge. There was little reason to believe that future efforts would produce better results.

Trump administration rule of law policy (2017-2021)

Presidential candidate Trump routinely criticized involvement in Afghanistan as a monumental squandering of lives and money (Woodward 2018, 115–16). Yet, in August 2017, President Trump reaffirmed the US commitment but stressed the United States was “not nation-building again” and that America would no longer seek to advance democratic governance bound by the rule of law in Afghanistan (Trump 2017b).

Presidential rhetoric never fully aligned with actual policy. The United States remained officially committed to promoting the rule of law abroad. Trump’s National Security Strategy unambiguously declared: “The United States will use diplomacy and assistance to encourage

states to make choices that improve governance, rule of law, and sustainable development” (2017a, 38–39). The rule of law was still viewed as essential for stabilizing Afghanistan (State Department, USAID, and Department of Defense 2018). The Islamic Republic still supported the rule of law as a key goal (2016; 2020). Nevertheless, in practice, neither the Trump administration nor the Afghan government treated it as a serious concern (Whitlock 2021).

While Trump fiercely criticized Obama’s approach, policy changed very little. Once again, only USAID articulated a US rule of law strategy in Afghanistan. It prioritized subsidization of Afghan institutions to build capacity, arguing that “A well-functioning judicial system, including court administration and judicial competency, ensures attention to the rule of law and plays a vital role in addressing corruption and inhibiting a culture of impunity” (2018, 53). Problems largely stemmed from insufficient legal frameworks or inadequate, inconsistent or opaque enforcement of existing laws (2018, 53). USAID stressed that “poorly structured court administration creates opportunities for corruption when, for example, forms get misfiled, cases are delayed, or hearing dates remain unscheduled” (2018, 53). Injustice persisted because effective institutional mechanisms to address judicial corruption did not exist (2018, 53). Policy cast the absence of the rule of law as primarily a technical issue rather than a consequence of entrenched corruption and lawlessness.

Regarding non-state justice, US policy aimed to transform “traditional dispute resolution” to ensure it provided high-quality justice (2018, 53). Tribal justice would be incorporated into state law by “Aligning formal and non-formal systems and integrating decisions” (2018, 53). There was no mention that alignment and integration had already been attempted without success due to bitter divisions within the Afghan government. Moreover, guidance ignored the fact that Taliban justice frequently rivaled or exceeded the state in authority and actively sought to undermine state influence.

The new “critical assumptions” were equally problematic. The Trump Administration assumed that the status quo would continue wherein the “insurgency and poor security situation in Afghanistan will continue to restrict USAID’s mobility in-country; however, the overall percentage of insurgent-held territory will not change significantly, nor will insurgents make lasting gains in urban areas” (USAID 2018, 56). Moreover, it assumed that donor support would continue, the Afghanistan Reconstruction Trust Fund would still operate, and that World Bank monitoring would improve (2018, 56). Nevertheless, “addressing corruption will require systemic changes and raising citizen expectations” (2018, 56). Trump-era policymakers envisioned improvements as “an urban and population center-focused approach to programming will enable more effective monitoring and evaluation of USAID programs,” US “programming will open opportunities for women,” economic reforms will bolster the economy, and the “anti-corruption efforts of the [Afghan] government mitigate risks to programming” (2018, 56). Last, but not least, “Elections will be conducted and not create unrest” (2018, 56).

Some assumptions were sensible. Donor support seemed likely to continue. Combating corruption certainly required systemic changes. Others were unrealistic or demonstrably false. Anti-corruption efforts had shown no meaningful progress. Even the Afghan government’s flagship, US-funded anti-corruption program was exposed as deeply corrupt (Lawrence 2018). Despite the Trump administration’s more aggressive military posture, stability gains remained elusive complicating both implementation and monitoring. The Taliban insurgency continued to gather strength—a fact well-known to US government officials (Malkasian 2021, 411). Afghan elections had consistently sparked violence and unrest. Trump administration officials fanned the flames by signaling that the United States did not care about electoral administration or integrity (SIGAR 2021a, 149).

Trump administration policy claimed to “systematically analyze[] the potential interactions between country context and development mechanisms” in order “to best address development problems with available resources” (USAID 2018, 56). In reality, policy clung tightly to failed theories, activities and partnerships with disinterested, even antagonistic, institutional partners. US policy never addressed the major concerns repeatedly raised by evaluators and program implementors (see for example SIGAR 2015; Tetra Tech 2014).

No evidence suggests policymakers believed their efforts would produce meaningful rule of law gains. Instead, ample contemporary evidence indicated efforts would fail. As Cordesman observed, the “Trump Administration has not given any indication that it has a credible strategy—or any strategy—to deal with the critical problems in Afghan politics, governance, and economics that make it a ‘failed state’” (2017, 5). Post-Surge judicial support efforts were neither a serious attempt to create a liberal polity bound by the rule of law nor a credible effort to impose unwanted institutions and practices on their Afghan counterparts.

Ultimately, for both Obama and Trump, officially abandoning support for the rule of law in Afghanistan would be tantamount to signaling that the entire post-Bonn project had failed, and high-level policymakers risked receiving the blame for that failure. In both cases, the audience costs of doing so were deemed too high. Symbolic rule of law promotion became entrenched and routinized as failing policies and programs continued. The political consequences of admitting failure were perceived as far greater than the consequences of continuing failure (Malkasian 2021, 458–61). While dubious as policy, these political concerns proved prescient. President Biden faced scathing criticisms from pundits, political opponents, and even high-ranking military officials when the Islamic Republic collapsed shortly after announcing the withdrawal of US troops.

Implications

While US rule of law efforts proved unsuccessful through 2014, they used a broad spectrum of military, diplomatic and foreign aid initiatives, and repeatedly evolved. After the Surge, failed policies and initiatives were consistently replicated without adaptation. Policymakers and implementers were unwilling or unable to articulate how these same rule of law efforts would now achieve success or, alternatively, reform or stop them. Even as US policymakers and practitioners consistently stressed that their law and justice endeavors were successful, as sections six and seven highlight, their actual policy and initiatives demonstrate they were not.

After 2014, policymakers and practitioners could have considered whether and, if so, how they could more constructively approach deeply compromised Afghan institutions. Previous failures to improve the performance and legitimacy of the legal system, reduce judicial corruption, and develop a workable relationship between state and tribal justice forums were not interrogated. Nor were there any credible attempts to address the lack of buy-in from the Supreme Court, the MOJ, and the Attorney General's Office or chronic program management, implementation and monitoring issues. Instead, unsuccessful efforts continued because both policymakers and implementers maintained the status quo with disastrous consequences.

The US experience shows that overwhelmingly symbolic efforts will almost certainly fail. Initiatives that lack a plausible theory of change, do not respond to changing circumstances, or ignore underlying realities have little promise. Failing programs are unlikely to somehow start working. Nor are corrupt institutions and actors going to stop being corrupt simply by providing additional resources or training.

While this article focuses on Afghanistan, this concept is by no means limited to this geography or to US policy. Symbolic rule of law promotion—wherein specific policies and initiatives are equated with advancing the rule of law even when evidence overwhelmingly shows that no progress has been achieved—is relevant elsewhere. Policymakers and implementers, whatever their country of origin and wherever they are working, frequently face strong incentives to continue officially promoting the rule of law and undertaking the same type of activities, even in the face of sustained failure and disinterest by the host government. The concept of symbolic rule of law promotion has potentially significant implications for understanding the persistence of longstanding, underperforming long-term rule of law efforts in a wide array of situations and would benefit from additional research. For instance, law and justice endeavors in Iraq, Sierra Leone and Liberia certainly warrant additional research as do the rule of law promotion activities of major donor states such as the United Kingdom and Australia, and international organizations such as the World Bank and the United Nations. In 2003, the United States toppled Saddam Hussien’s regime in Iraq. Vast sums were subsequently spent on rule of law promotion (Shakes 2019). More than twenty years later, the result has been the creation of a regime decidedly disinterested in the rule of law (Mako and Edgar 2021). Post-conflict Sierra Leone and Liberia have both seen prolonged international rule of law promotion efforts. Sesay argues this has not advanced the rule of law but instead created “new legal tools for the consolidation of ruling power and protection of elite interests” (Sesay 2021, 184). Likewise, this paper highlights the need to explore other types of assistance, such as democracy promotion or civil society aid, which under certain circumstances may also be overwhelmingly symbolic. The emergence of symbolic rule of law promotion in the post-Surge era also holds important lessons regarding rule of law promotion more generally, which are discussed below.

The importance of law beyond the state

Legal orders beyond the state remained predominant during the entire Islamic Republic era. Despite the Ghani Administration's expressed renewed interest and continued US support, a workable approach to non-state justice never materialized. By 2018, a new draft non-state justice law existed (Rahbari 2018). The proposed regulations were more feasible and emphasized civil matters (Wardak 2018). Still, the new draft legislation was never passed. Just weeks before the regime's collapse, the MOJ was still discussing how best to approach jirgas and shuras (Ministry of Justice 2021). Even with extensive US backing, a functional non-state justice law never materialized.

The United States likewise never developed a coherent approach to Taliban justice or a feasible plan to address the legitimacy void at the core of the Islamic Republic's justice system. As one former high-ranking USAID official explained, "we dismissed the traditional justice system because we thought it didn't have any relevance for what we wanted to see in today's Afghanistan" (quoted in SIGAR, 2021d, p. 75). Enduring regimes throughout Afghan history have drawn legitimacy from religion, cultural norms and the provision of public goods. The Taliban recognized this reality and acted accordingly. The United States never did.

After 2014, US policy still emphasized access and capacity issues over legitimacy concerns. As ADALAT's workplan highlighted, "While it could be argued that the current legal framework provides protection of basic human rights and equality, the problem lies with its lack of implementation and enforcement. This situation creates a space for dominance of misinterpreted Sharia and customary law" (Checchi and Company Consulting 2016, 63).

In reality, tribal legal orders remained key dispute-resolution forums and generally enjoyed more legitimacy than state justice (Weigand 2022). Tribal legal institutions have long been skeptical of the state. The Islamic Republic's abysmal performance exacerbated those concerns. The relationship between the Islamic Republic and Taliban justice was even worse.

It exemplifies “combative legal pluralism” wherein state and non-state justice actors seek to “undermine, discredit, supplant, and—ideally—destroy the other” (Swenson 2018, 443). There was no justice vacuum. People used the Taliban justice system because: a) they preferred it, b) they were compelled to use it, or c) some combination thereof. The Taliban worked to undermine state justice through credible threats of violence, while simultaneously seeking to co-opt and influence the customary justice system. No US policy or program ever changed that fundamental dynamic.

The vital role of broad-based accountability

Legal order is inexorably linked to a state's political institutions. Democratic rule is necessary to establish the “electoral, societal, and horizontal accountability” foundational to the rule of law (O’Donnell 2004, 32). The Islamic Republic’s strong, directly elected presidency was decidedly ill-suited to developing the rule of law. While imperfect, President Hamid Karzai’s 2004 election enjoyed legitimacy. From 2009 onwards, presidential elections were profoundly compromised. During the 2014 election, fraud and irregularities were so rampant “one can make a very credible argument based on hard evidence that the election results were illegitimate” (Johnson 2018, 1030).

US officials never even tried to prevent another disaster in 2019 (SIGAR 2021a, 149). The presidential election was again profoundly compromised by corruption, fraud and procedural irregularities. Both Ghani and Abdullah claimed victory. Earlier rhetoric notwithstanding, US diplomats once again brokered an extraconstitutional National Unity Government, retaining Ghani as President (credited with 50.64% of the vote) and Abdullah as Chief Executive Officer. Despite the instability and loss of legitimacy triggered by earlier electoral crises, US policymakers never even tried to place Afghan democracy on a sounder foundation.

The inescapable need for legitimacy

State legal systems, and states themselves, need legitimacy to endure. In Afghanistan, three longstanding pillars of legitimacy have underpinned all reasonably effective political and legal orders: cultural affinity, Islam, and the provision of public goods, including fair and equitable dispute resolution (Dupree 1973; Barfield 2010). The US government did not seriously engage with tribalism or Islam, or otherwise help the Islamic Republic cultivate alternative forms of legitimacy. The United States focused on public service provision. Yet, decades of internationally funded law and order efforts, and support for public services more broadly, garnered precious little legitimacy for the regime and even fuelled the insurgency (McDevitt & Adib 2018:21). After 2014, the United States stopped experimenting with law and justice aid in search of potentially more effective approaches and, instead, kept perpetuating failing efforts while simultaneously refusing to acknowledge they were failing.

Conclusion

Conventional wisdom holds that international rule of law promotion aims to achieve certain tangible outcomes. However, evidence from US rule of law endeavors between 2015 and 2021 shows that rule of law promotion can be primarily symbolic. This was not always the case. The United States initially pursued varied, if flawed, attempts to use law and justice assistance to pursue on the ground policy goals. Moreover, policy and initiatives adapted over time. After 2014, however, policymakers consistently pursued rule of law strategies and practitioners implemented initiatives that lacked any prospect of success. Previously unsuccessful strategies and programming were replicated alongside partnerships with disinterested, uncooperative stakeholders. At the same time, the cost of US involvement in terms of lives and money continued at a staggering pace. The US-backed Islamic Republic was

seen as increasingly illegitimate and feckless. To avoid disaster, rule of law policy and initiatives needed to respond to the rapidly deteriorating circumstances. Yet, not only did US rule of law efforts fail from 2015 onwards, but there was no plausible vision offered for how they could have ever succeeded. Aid remained unreformed, ineffective and predicated on unrealistic assumptions even as progress was continually being claimed. After 2014, neither US nor Afghan leaders ever coherently explained how a legitimate state-sponsored legal order could emerge or took action to make it a reality. Logically, for the Afghan government to be a credible partner for peace, or even simply endure after a power-sharing agreement, it required real legitimacy. The Islamic Republic needed to offer credible law and order held in at least roughly the same esteem as Taliban justice. Beyond that, it needed to stand for some core values that the large swathes of the Afghan population were willing to fight to preserve. The regime collapsed before US troops even completed their withdrawal. In the end, pursuing symbolic rule of law promotion had very real and disastrous consequences.

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