
Introduction

WHIT MASON

Inevitably, for an ambitiously interdisciplinary book, this one is bound to be mislabelled. It may be shelved under ‘law’ or ‘international relations’ or perhaps, now that the country has become the focus of such voluminous study, under ‘Afghanistan’. Its real genre is ‘mystery’.

The mystery, involving millions of victims and at least thousands of suspects, is this.

Since the attacks of September 11, 2001, NATO and allied countries, led by the US, have considered it strategically imperative to help create a government in Afghanistan that is supported by the population and committed to not allowing terrorists to use the country as a safe haven. The richest, most powerful countries in the world have duly sacrificed hundreds of their own people’s lives and spent billions of dollars¹ to help secure Afghanistan and bring it a modicum of justice. And what, in terms of the human security and justice that is the *sine qua non* of stability, has it all achieved? The government has issued a decree granting immunity to the legions of warlords and gunmen who have tormented their own people for decades. The President’s people stuffed ballot boxes to see him re-elected in a thoroughly discredited process. Prisons are full of people who have committed no crime but are too poor to bribe their way out of trouble, while serious criminals can pay enough to avoid ever serving their sentences. Just over half of Afghans fear for their safety in their local area (Asia Foundation 2009), and many feel more secure and are more optimistic about justice prevailing in areas controlled by the Taliban, whose regime they knew and mostly loathed. The countries where the rule of law prevails have done their best to share their blessed political

1 According to the Brookings Institution’s Afghanistan Index (Livingston, Messera and O’Hanlon 2010), the Western coalition had suffered 1,709 military fatalities by April 2010; the US alone had spent over \$51 billion on its intervention.

culture, and the result has been impunity, corruption and violence on a catastrophic scale. Who – or what – dunnit?

To try to unravel this mystery, this book harnesses an unusually broad array of perspectives, experiences and disciplines. The book's sixteen contributors represent nine nationalities from four continents, five women and eleven men. The treatment is profoundly interdisciplinary, not only in that it draws experts and participant-observers from many disciplines and from no academic discipline whatsoever, but also in that the individual contributors themselves each bring more than a single disciplinary or experiential perspective to their respective questions. Kilcullen is an anthropologist and a retired Australian army colonel; Krygier and Maley studied law but bring a philosophical temperament to broad questions about society and the state; Suhrke is a political scientist and a former journalist who was in Kabul when Najibullah was president; Klonowiecka-Milart and Hartmann are experienced legal development specialists and, respectively, judge and prosecutor; Vendrell is a veteran diplomat and a constitutional lawyer; and so on. The chapters by Vendrell, Miakhel, Afghan and Smith are essentially memoirs, which complement the other chapters by relating what their authors have seen and heard themselves during many years in post-Taliban Afghanistan. The diversity of the contributors' backgrounds makes their focus and agreement on several key themes all the more compelling.

A vast conspiracy is not among the explanations any of the contributors to this book put forward for the international community's spectacular underperformance. Individual governments, much less broad international alliances, are not sufficiently coordinated to orchestrate a conspiracy. Despite the diversion of resources to Iraq, the effort made in Afghanistan has been substantial and sincere. The actual reasons for failure are deeper and more insidious than any conspiracy, for they begin in the mind.

Despite good intentions, the West's expenditure of blood and treasure has failed to give the country's people what they crave most – security, which includes protection against the arbitrary assertion of power by the state itself or by rich, well-armed or well-connected individuals or groups. Reasons for this failure overlap with those for other priorities of this and other recent would-be transformational interventions – short political and budgetary cycles, Western polities' dearth of stamina, and so on.

The international intervention has operated as if the Afghan government shared its agenda and merely lacked technical expertise and resources. As a result of this politically driven myopia, the billions the

international community has invested in the rule of law have failed to dent criminal impunity, which has been actively sustained by powerful self-interested Afghans.

But even more important than these factors, the failures of the massive investment in Afghanistan to foster security and justice – the inextricability of which has been too little understood – are grounded in the very shallow understanding of the rule of law that has animated them. Only such a misunderstanding can explain, for example, how a unit of the UN Assistance Mission in Afghanistan that has dealt with nothing beyond technocratic interventions in the court system could call itself ‘the rule of law unit’, or how a foreign government could imagine it was fostering the rule of law by building a new courthouse even while paying protection money to a private militia and backing a warlord as governor.

Early on in interventions in failing states, intervening forces typically realise that their challenge outstrips their governments’ political will and begin looking for shortcuts. The ‘breathhtakingly mechanistic’ (Carothers 2006: 21) approach that results appears to be premised on a belief that if they spend enough money on politically uncontroversial, technocratic steps to strengthen the apparatus for administering the system (or systems) of justice, this modest investment will be repaid with most of the virtues we associate with the rule of law in civil, stable societies. Or perhaps policymakers simply have no idea what else to do, and so operate as if they believed what they cannot really. This book aims to disabuse practitioners of belief in political alchemy – or convince them of the folly of operating as if they had this belief – and to develop a more nuanced, sophisticated understanding of the rule of law as a state of affairs in which people feel it makes sense for them to act within the law.

These misunderstandings and self-delusions are common to what Brian Tamanaha (2009: 29) calls ‘the rule of law enterprise’. ‘UN doctrine [reflecting prevailing practice in IGOs and Western aid agencies] . . . has consistently advanced “institution- and capacity-building” as the primary means by which the rule of law may be established or strengthened in post-conflict situations. This approach is principally one of institutional enforcement, based around state-sanctioned enforcement structures such as arrest, detention and prosecution mechanisms’ (Bull 2008: 51).

This approach derives, as Krygier notes, from understanding the rule of law as an appliance rather than a way of interacting. Policymakers find it congenial to imagine the rule of law as a collection of things that can be imported wholesale because that relieves them of the much more daunting challenge of tinkering with the myriad and nebulous arrays of

incentives people in the society have for treating one another civilly or otherwise.

Before going further, it may be helpful to clarify what is and is not meant by the ‘rule of law’ in this book. Some people who know Afghanistan protest that it has had the rule of law because it has, or has had, systems of law that claim to be authoritative. Virtually every society in the world, including the most lawless, has many laws. What is special about those lucky societies where the rule of law prevails is not that they have laws but that the laws, rather than more brutish forms of power, actually rule. As with a game of cards, you can tell if laws rule by looking at the outcomes – and, based on their perceptions of these, of the players’ willingness to continue playing; if one player wins every hand, you can assume the rules are being systematically violated, even if you have not yet determined how. Similarly, if in a dispute a weaker person has a reasonable chance of prevailing over a stronger one, and in their daily lives the weaker and stronger conduct themselves accordingly, one can assume that the rule of law is at work without knowing anything about what laws are operating.

International efforts to foster the rule of law in Afghanistan reflect the common stress on ‘laws’ rather than ‘rule’. Most investments in fostering the rule of law in Afghanistan have produced negligible progress because they have all been narrowly directed towards institutional development of the justice sector, even as other elements of the international-Afghan government partnership have acted in ways that undermine the rule of law – specifically, by supporting warlords and creating the conditions in which the narco-economy has flourished.

Another misunderstanding of the nature of justice concerns its interaction with insurgency. Lakhdar Brahimi, who was the UN Secretary-General’s Special Representative for Afghanistan during the beginning of the international intervention, expressed the view that one had to choose between peace and justice, and that peace must come first. Referring to atrocities allegedly committed during the US-backed offensive by the Northern Alliance that ended the Taliban regime, ‘Brahimi said in some cases accountability must take “second place to peace and stability. You can choose to please yourself and make statements of principle, or you can see . . . in a given moment and place what is possible”’ (Constable 2002).²

2 Nine years after thousands of Taliban were allegedly killed in shipping containers after having surrendered to Rashid Dostum (BBC 2009), a man in Kandahar, at the opposite end of the country, cited the lack of investigation of this act, much less punishment for it, as one of the reasons that he and many other Pashtuns, who make up approximately half the population and the ethnic base of the insurgency, despise the Karzai government.

Many of the essays in this book bear witness to the falseness of the supposed dichotomy between peace and justice and the rule of law on which justice is based. To suggest a trade-off between peace and the rule of law is to misunderstand what people everywhere seem to demand in exchange for the minimal support that a stable political order requires. Pascal famously wrote that ‘justice without force is powerless; force without justice is tyranny’. Nine years after the toppling of the Taliban, Afghanistan suffers from both powerless justice and tyrannical force, with virtually no evidence of the virtuous marriage of the two in the form of either enforced justice or justly applied force.

The contest between building a state in Afghanistan that is ruled by law and the forces of lawless entropy remains undecided. Since this story is not over, contributors recommend changes in approach that they believe would improve the chances that the story might yet reach a happier conclusion. While none of the contributors claims that Afghanistan could now be flourishing to the degree we might wish, all agree that the world has not even taken many of what would have been the most obvious steps had policymakers viewed Afghanistan through the eyes of the people who live there.

Overview of papers

Krygier argues that the rule of law in society is a precious value that supports a state of affairs in which interpersonal interaction can be civil, restrained, and conducted without suspicion, hostility or fear. The conventional focus on institutions, training and building is of limited value because the rule of law does not emanate primarily from judicial institutions – though they play vital roles as well – but exists in the practices, structures, perceptions and people who surround the law, and are affected by it (or not) wherever they are. All the chapters that follow will be more richly appreciated in light of this understanding.

Kilcullen argues that the provision of security – understood as safety combined with predictable order – has been the basis of many state-building processes through history, and that in conflict environments people tend to support whatever regime demonstrates the greatest capacity to influence their security.

Vendrell argues that the international community made serious mistakes even before the Bonn process (specifically refusing to hold an international conference before the fall of the Taliban), and that these mistakes are integral to the current difficulties. The ability of the Northern Alliance to wrest the lion’s share of political positions resulted in the return to

power of notorious warlords of the pre-Taliban era. The President was allowed to arrogate excessive power. On the international side, the 'carving up' of the sectors of assistance and delegation to NATO member states undermined unity of purpose in the international effort and defied coherence in planning. Due to a lack of knowledge about Afghanistan, as well as prioritising short-term security over long-term political development, the US and its allies formed inappropriate partnerships with strongmen, and created a distribution of power that was antithetical to their long-term interests and objectives.

Maley notes that the Afghan culture of subservience to power (as opposed to a culture of legality) was not well understood by the international community, and had important consequences for the implementation of the justice programme. Further, there was tension between the rule of law, which was concerned with imposing limits on the exercise of power, and state-building, which was concerned with a concentration of power. Maley argues that the failure to form a clear vision of the kind of state that the international community was trying to help generate in Afghanistan, to contemplate whether such a state was actually viable and, if so, the full range of interventions required, vitiated efforts in particular sectors. The resulting incoherence proved vulnerable to manipulation by a powerful elite in the Afghan government. Issues of justice and rule of law, which are essential to the state's legitimacy, were never made priorities before their neglect had done enormous damage to the evolving counter-insurgency/state-building effort.

Hartmann argues that the problem of corruption and impunity throughout the current government in Afghanistan, including the judiciary, prosecution and police, is both a major symptom of the absence of the rule of law and a serious impediment to establishing it. Hartmann criticises the self-interest and disorganisation of the international community, which resulted in uncoordinated and erratic strategies for reforming and caused more problems than they solved. He also highlights the symbiosis in four areas that worked to prevent establishment of the rule of law, each contributing to and nurturing the others: insecurity, narcotics, corruption, and the failure to end impunity.

Peters describes the political economy of the opium trade as contributing more directly to the security problem in Afghanistan than the international community generally realises. Drug-related corruption is severe among the Afghan national police and reaches the highest levels of officialdom. The UN Office on Drugs and Crime estimated the Taliban earns between 300 and 400 million dollars a year, and that profits from

smuggling activities could reach half a billion dollars a year in cash and commodities when the combined revenue – from kidnapping, extortion and gun-running – is included. Peters calls for pursuing the money men at the top of the pyramid, in both Afghanistan and Pakistan.

Hafvenstein argues that efforts to promote the rule of law have been undermined by the misapprehension that the insurgents play a bigger role in the drug trade than Afghan government officials. In fact, Hafvenstein says, the state-trafficker nexus is more important than the insurgent-trafficker nexus. The consequence of this reality is that individuals whom the international community expected to play leading roles in establishing the rule of law instead have compelling incentives to undermine it. Despite some positive results from poppy eradication efforts, he questions current measures of success for progress against the drug trade (poppy-free cover). He argues that eradication policies have divided communities across the southern poppy belt and driven many poor farmers to join the Taliban, and he calls for a focus on interdiction rather than eradication and a reduced emphasis on counter-narcotics operations, which drive up the value of huge stockpiles now controlled by government officials. (This exemplifies the approach based on Afghans' perceptions, which runs throughout this book.)

Schmeidl argues that international forces in Afghanistan have generally pushed a reform agenda that has alienated the rural majority both culturally and politically. Privileging individual over communal rights, according to this view, is an inappropriate model for Afghanistan, where individual rights have always been subordinated to the family and community. A balance needs to be found between individual rights and the communal interests of the Afghan people for any reform programme to be acceptable and sustainable. She identifies the tendency to look for quick fixes and the contradiction between short-term goals and the long-term nature of political-cultural change as important impediments to effective policy.

Schmeidl assesses the effectiveness and fairness of traditional, informal justice mechanisms and the formal, state-administered justice system. The majority of all disputes (especially property disputes in rural areas) are dealt with by the *jirga/shura*, and Schmeidl argues that Afghans broadly regard the system as familiar, consistent, predictable and efficient, which leads to its solutions being respected. Afghans regard the formal system, by contrast, as limited in reach and scope (it can address rights but not reconciliation), costly, inefficient, inconsistent and corrupt. On the other hand, it does offer the potential (rarely realised in

practice) for checks and balances against the inherent power imbalances and favouritism of the informal, male-dominated system. The informal system is also unable to reign in strongmen, and prioritises communal rights over those of the individual. Schmeidl recommends a collaborative, hybrid model in which the formal and informal systems complement one another.

Miakhel writes that a lesson from Afghanistan has been that the rule of law is not a luxury and justice not a side issue, and that Afghans lost faith in the peace process when they did not feel safe, whether from combat, crime or state predation. Miakhel argues that the root causes of conflict often stem from social injustice, violations of law and state officials' abuse of power. In the context of Afghanistan, addressing these root causes through establishing and supporting the rule of law and a legitimate and effective justice system is vital, given the long history of failure by its rulers to provide human security and social justice to the population, and a historical cycle of oppression and violence.

Deschamps and Roe present the findings from a multi-year project the overall objective of which was to help reduce land-related insecurity and vulnerability by strengthening the Afghan government's capacity to facilitate the resolution of land conflicts. A typology of land disputes is developed and five representative pilot cases selected for further study. The chapter establishes a framework for understanding land conflict, and investigates a variety of resolution mechanisms.

Suhrke compares state-building as a project to state-building as a historical process. After considering the role of outside pressure in the state-building experiences of Japan and Turkey, she provides clear evidence that state-building as a foreign assistance project suffers from inherent contradictions, and that these were intensified by the insurgency in Afghanistan. She identifies the contradictions in the state-building process as control versus ownership; dependency versus sustainability; dependency versus democracy; effectiveness versus legitimacy; and, a final cross-cutting contradiction, the building of the Afghan national army (ANA). The disproportionate resource allocation to the ANA while civilian institutions remain comparatively weak, its significant and nationally unsustainable size (with even greater numbers being called for to counter the insurgency), and its extreme reliance on foreign funds (raising questions of whose army it is) are important factors that undermine the international community's objectives to increase the legitimacy, control and effectiveness of the Afghan political apparatus.

Picking up on the theme of legitimacy, Stapleton argues that an effective justice sector and rule of law are integral to the legitimacy of the

state, and that elections are used as a secondary source of legitimacy. The blatant manipulation by all sides of the recent election process in Afghanistan had been damaging to ultimate rule of law objectives, and the international community's handling of the election result was considered critical in terms of its ongoing credibility. Stapleton extends the theme with a critique of provincial reconstruction teams (PRTs), which have been heavily promoted as a means of facilitating tangible results in reconstruction and development, extending the authority of the central government and thereby indirectly improving the security situation in Afghanistan. Stapleton argues that the incoherence of the broader international civil-military strategy (going as far back as the Bonn process) manifests in a diverse range of PRT models that reflect individual national priorities rather than a cohesive, mutually reinforcing strategy.

Hartmann and Klonowiecka-Milart explain how, since 2001, Afghan law has been extensively revised and amended, with heavy input from foreign jurists, including whole laws being drafted by foreigners and adopted by Afghanistan. Despite the late establishment of a mechanism for Afghan-international consultation, this process is still not used in the drafting of most laws. These laws fail to take account of Afghanistan's cultural, political and legal traditions and environments. Hartmann and Klonowiecka-Milart, both deeply involved in this process, call for a technical and quasi-political process to build support for the laws and codes being drafted, and to ensure that Afghans will regard them as their own.

The final two chapters, by Graeme Smith and Shafiullah Afghan, offer two finer grained pictures of a single key province, Kandahar. It is hard to overstate the importance of Kandahar in Afghanistan's historical imagination. It is where Ahmed Shah Durrani first conjured an independent Afghanistan in 1747, and where Islamist veterans of the anti-Soviet *jihād* formed the Taliban in the early 1990s (with considerable help from Pakistan's Inter-Services Intelligence or ISI), and where the Taliban leadership continued to hold court even after they had conquered Kabul.

Smith recalls travelling between Kabul and Kandahar in 2005, which would have been unthinkable in late 2009, illustrating the rapid deterioration of the security situation in Afghanistan. He describes personal experience of six kinds of justice at work in Kandahar, highlights linkages and cross-fertilisation between the formal and informal systems, and illustrates the huge challenges facing the credibility and capability of the formal system in particular. Smith writes that the use of torture by officials and the ill-considered use of special forces have heightened rather than ameliorated the sense of lawlessness in the province.

Smith describes opinion polling in Kandahar as ‘criminally flawed’, and argues that the international community needs to admit its ignorance of what the people of Afghanistan actually want. What could the Taliban offer that might be attractive? Smith believes that ordinary Afghans would say: foreigners out; justice; and not much else. The ‘not much else’ implies retaining the freedom to pursue illicit activity and reject modern practices.

Afghan recounts his observation that most people who fight alongside the Taliban have been driven into the insurgents’ arms by abusive state officials, police and soldiers. The West has once again supported the wrong leaders, and this has seriously undermined its credibility and the stated objectives of the intervention. Tribes that found themselves on the wrong side of government officials often felt they had little option but to join forces with the Taliban for security and protection of their livelihood. He argues that in Afghans’ eyes, legitimacy is not based on abstract preconceptions, but on the demonstrated ability to deliver the most basic necessities of social life.

These chapters make a powerful interdisciplinary assault on the status quo, the cumulative impact of which is greater than the sum of its considerable parts. Focusing such a diversity of perspectives on the mystery of why efforts in the rule of law area have yielded such poor results in Afghanistan yields benefits that could not be achieved by legal scholars specialising in rule of law promotion alone.

Two of the field’s leading lights, Thomas Carothers and Brian Tamanaha, have argued that rule of law promotion is not, in fact, a field. Tamanaha writes:

Law and development is a poorly constructed category that lacks internal coherence. Every legal system everywhere undergoes development (and regression), so there is nothing special about this; meanwhile, the multitude of countries that have been targeted for law and development projects differ radically from one another. Hence there is no uniquely unifying basis upon which to construct “a field”. Law and development work is better seen, instead, as an agglomeration of projects perpetuated by motivated actors supported by funding.

(Tamanaha 2009: 6)

Carothers agrees. There is a great deal of activity under the rule of law rubric, ‘yet it is not a field if one considers a requirement for such a designation to include a well-grounded rationale, a clear understanding of the essential problem, a proven analytic method, and an understanding of results achieved’ (Carothers 2006: 28).