

Book Reviews

Advancing the Rule of Law Abroad: Next Generation Reform

By Rachel Kleinfeld
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I was given a copy of Rachel Kleinfeld's *Advancing the Rule of Law Abroad: Next Generation Reform* just as I was in the process of trying to codify my own lessons from more than three decades of working in and around conflict countries to restore and strengthen rule of law. Since 9/11, "rule of law" has had a flavor-of-the-month feel to it, and a number of authors have weighed in on the subject. As a practitioner, however, I have found that while most of the current thinking is helpful for advancing academic dialogue and debate, very little is of practical use on the ground.

To my surprise, Kleinfeld's book turned out to be an exception. She has presented a solidly researched, common-sense analysis

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that does not gloss over the complexity of her subject. Her underlying thesis—that power structures and not institutions are the most crucial objects of change—parallels my own experience in the field. She studies the impact of what she refers to as "first-generation" reform efforts and offers the reader a "second-generation" approach for planning and implementing sustainable programs and activities that are contextually and culturally appropriate and genuinely make sense. Her book should be required reading for anyone who contemplates reforming the rule of law abroad.

In 2010, I was asked by the commander of the North Atlantic Treaty Organization (NATO) Training Mission–Afghanistan (NTM-A) to join the military mission as the first (and only, as it turned out) senior civilian rule of law advisor to the policing development mission. The NTM-A leadership at the time was concerned there was no clear vision for the future of the Afghan National Police that connected policing with rule of law. Without a vision, there could be no strategy, and the generals knew that as NTM-A's train-and-equip mission matured, that gap had to be filled.

On my arrival, I asked what I thought was a very simple question: "What do the Afghans need their police to do?" I discovered that no one had asked this of the Afghans themselves. When we finally did, the question triggered a larger effort to understand what "Afghan right" looked like and, furthermore, how NTM-A could translate that understanding into more effective Afghan-appropriate training and leader development.

This type of inclusive, Afghan-focused adjustment is what Kleinfeld would characterize as “second-generation rule of law reform.” She summarizes, saying, “Second-generation rule-of-law reform starts with the actual problems of a country and then looks at which part of the rule of law must be improved in order to address those problems. Reformers consider a society’s sociology to determine reform efforts that locals would support and to locate the best fulcrum for reform.”

She accurately points out that “first-generation reform” tends to focus on altering laws and institutions to make them look more like those in what we generally think of as “rule-of-law countries,” by which she means the United States and European countries. I saw first-generation reform thinking behind almost every rule of law program in Afghanistan, where even the governing National Priority Plan, “Justice for All,” was conceived by international donors and contained a set of milestones that the Afghan government refused to endorse.

Afghanistan may be the most prominent example of first-generation thinking in action, but it is hardly the only one. While conducting a strategic security sector reform assessment in Albania in 2009, I asked the American attorney who headed the prosecution development team why she was training Albanian prosecutors in U.S.-style adversarial techniques when Albania had a civil law system. Her answer? “Our [U.S. common law] system is better.” For 2 years, this chief of party had focused all her efforts on creating an Albanian national-level institution that mirrored the U.S. Attorney’s office in the small southern state where she had previously worked. As Kleinfeld, who also uses Albania as one of her case studies, phrases it, “Too often [reforming] laws and institutions become ends in themselves, altered toward no

clear goal other than modernity.” Rather than focusing on institutional reform for reform’s sake, she argues, second-generation reforms pay greater attention to power and cultural norms. Legal and institutional reforms then become the means to influence these more core challenges that enable adherence to the rule of law.

Kleinfeld requires her readers to do a bit of soul searching as to why we conduct rule of law reform activities at all. She presents a historical perspective on U.S.- and European-led rule of law reform efforts that contradicts some of the conventional thinking about who in our governments should be engaging in rule of law development and why. While it may not have been an intended result, her analysis challenges assumptions that largely exclude the military as a core rule of law enabler.

Viewed through the lens of history, Kleinfeld presents Western involvement in rule of law capacity-building as the evolution from a pragmatic focus on building security, through the relatively recent policy shifts toward frameworks that emphasize democracy and human rights, in order to enable economic growth. Her narrative demonstrates that until the 1980s, most rule of law development was tied to military objectives, whether as part of postconflict stabilization or to address the desire for security against a communist threat. Early practitioners in the rule of law field did not come from the civilian development community that claims ownership of the rule of law agenda today. Instead, they were soldiers, and later, in the post-Vietnam era, cops.

The tension between the goals and objectives of security-focused rule of law development, and the goals and objectives of the democracy and human rights movement, is examined in sufficient detail for the

practitioner to understand and anticipate the necessary relationships, risks, and rewards. Unfortunately, as Kleinfeld points out, current funding authorities, legal restrictions, and practitioner resistance to working with police and militaries increasingly separate security reforms from other rule of law goals, resulting in the lack of strategic thought and coordination that exists across the government today.

Kleinfeld's review of efforts to spur economic growth and market development through rule of law reform raises even more questions about why we are doing what we are doing. Using a multitude of examples both modern and historic, she reminds us that the linkage between the formal commercial aspects of the rule of law and economic development is mostly based on guesses and assumptions that remain largely unproved. She makes a compelling case that the security-focused law and order aspect of rule of law development may be central to the goal of enabling economic growth, whereas the impact of commercial and civil law reform may be negligible.

The real value of any study of rule of law development is what it offers to the practitioner in terms of planning and implementation advice, guidance, and lessons learned. In this regard, Kleinfeld is partially successful. Her practical contributions fall into four categories.

First, Kleinfeld's suggested sequencing is spot on. She starts with identification of the "real" problem, as seen by the local population. In my Afghan policing example above, for instance, when I asked members of the NATO coalition what the Afghans needed their police to do, I was told, "They need to keep the insurgents out of the battlespace." When I asked the Afghans, the answers varied depending on region, rural versus urban, acceptance

of central government authority, and the degree of tribal homogeneity. However, in general, I heard things such as "They need to talk more with their mouths and less with their weapons." Local government officials in particular saw a requirement (and desire) for the police to stop conflicts before they escalated into something that was beyond their ability to resolve. For the Afghans, first-line dispute resolution was seen as both a security imperative and a way to demonstrate that the government could respond to the immediate needs of the governed. Ironically, however, dispute resolution was not part of the basic police curriculum, and there were many in the coalition who questioned why this was a police concern at all. Instead, went the argument, we should be focusing our development efforts on strengthening the formal justice system in order to demonstrate to the Afghan people that a formal system, with which few had any experience or understanding, could address their needs.

Kleinfeld points out that first-generation reformers often talk about the need to "create" demand and tend to focus on institutions they believe need to be improved. The emphasis on creating formal justice systems to address problems that are traditionally handled informally is a good example of this tendency. Second-generation reformers, however, take a locally generated ends-based approach, and work backward to help the locals achieve sociologically appropriate capacity. Sequencing toward an ends-based result requires that a great deal of time be spent on collaborative problem identification rather than direct, quick action, and it does not deliver an immediate result. Kleinfeld illustrates the success of this approach using case studies from Indonesia, and her arguments make sense.

Second, *Advancing the Rule of Law Abroad* contains some of the best discussions on the role of power structures, politics, and culture in rule of law development of any book on the market. This is central to Kleinfeld's thesis, and she addresses the issues with confidence. Her illustrations of the linkages between power structures, power brokers, and formal and informal rule of law institutions will be useful even for novices in the field.

Kleinfeld's third contribution to actual practice is her emphasis on mainstreaming accountability, presented in terms of accountable governance rather than as some sort of discreet technical reform. As I read, I found myself reflecting on the many heated discussions that I have had over the years with military officers, diplomats, and so-called experts who argued that accountability and oversight are things that can be built into a system or institution after the recruiting, training, and equipping is complete or security is restored, and should be treated as separate lines of effort rather than as an integral part of every other program and activity. At that point, they argue, we have the so-called luxury of professionalization, and can work on the "less urgent" qualitative issues of accountability, transparency, and strict adherence to the law. In *Advancing the Rule of Law Abroad*, the theme of accountability permeates both the analysis and the approaches. Kleinfeld uses a great example from Romania to illustrate the success that can be achieved when accountability is a mainstream issue. She demonstrates that upfront, adaptable, and coordinated top-down and bottom-up approaches are not luxuries and can actually work.

Finally, Kleinfeld's analysis of lessons from legal reform is outstanding. She is highly (and rightly) critical of the current default position

among rule of law practitioners that changing a host nation's law is a necessary predicate to rule of law reform. She illustrates a series of lessons not learned in this regard, and points out that while legal change can matter, it must be deployed in conjunction with other tactics focused on and sensitive to the power structures and the culture behind them.

Kleinfeld is less successful when she attempts to craft practical lessons for the use of diplomacy. While her analysis is not necessarily wrong, it is superficial, and her conclusions are vague and somewhat contradictory. Her suggestion, for example, that "It is often preferable that rule of law programs—especially bottom-up programs—not be coordinated diplomatically, but simply consulted" contradicts an earlier conclusion that diplomacy, when it can be used successfully, is a powerful tool. It is difficult to decide whether she sees diplomacy as essential to reform or not, and getting caught up in her own discussion, she overlooks the role of military force as a diplomatic lever. As a result, she loses the opportunity to explore the positive role the military can play as a catalyst for reform and/or the guarantor of governance space in an otherwise unsecure, ungoverned environment.

Rachel Kleinfeld is an important and rational voice in the growing field of rule of law development. One hopes, based on the quality of *Advancing the Rule of Law Abroad*, that she will continue the quest to discover what works and what does not, and, more important, that her analysis will be used to guide the next generation of Western involvement in rule of law capacity-building and development abroad. [PRISM](#)