

Norms, Legitimacy and Power: Rule of Law Assistance in Authoritarian Countries

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1 Introduction

This paper examines rule of law assistance to authoritarian countries by providing a broad outline of multilateral and bilateral support to countries in Central Asia and North Africa. The main point of examination is the type and form of rule of law that is promoted. The outline of donor assistance is predominantly a formalist and an institutionalist one by looking at concrete examples of donor assistance in terms of themes, sectors and institutional support areas, while not presuming the reach of laws and institutions. Rather, the examination centres on donors and donor-client interactions.¹

While rule of law assistance seems to be increasing in volume² its role and impact in authoritarian³ countries remain unclear. A closer examination of rule of law assistance to authoritarian countries is merited for two main reasons. First, rule of law assistance is poorly understood from a political point of view and dominated by a technical legal focus – that is, legislative drafting, developing a code of ethics for judges, or enhancing the capacity of law enforcement personnel. Though technical in some parts, rule of law assistance is political in many others. The concept of the rule of law is in striking contrast to authoritarian politics since such rule seeks to control the means through which constituents can challenge and oppose the legitimacy and the exercise of power.⁴

Second, with rule of law assistance comes the potential danger of negative impact. Since much of the assistance focuses on enhancing state capacity to both control its own executive branch and bureaucracy, and to be more effective in delivering policy, the apparent danger is that an authoritarian regime becomes a more *effective* authoritarian regime.

Common characteristics shared by authoritarian regimes include, to a lesser or greater extent: centralization of power in presidential systems, weak or non-existent judicial independence, human rights abuses and restricted basic freedoms, widespread corruption, nepotism and patronage systems, elite-

1 This paper refers to donors as multilateral institutions (e.g. World Bank, UN or EU) and individual OECD members (working through their state agencies and networks, e.g. Sida, USAID or GIZ).

2 A quick search on AidData reveals an increase in projects and programmes on legislative reform, constitutional assistance, law enforcement reform etc. Source: “AidData.org”.

3 Authoritarianism in here employed in the same way as Steven Levitsky and Lucan A. Way, *Competitive Authoritarianisms: Hybrid Regimes in the Cold War*, (Cambridge: Cambridge University Press, 2010) pp. 6-7. While authoritarian regime types are always displaying degrees of complexity (single party, bureaucratic, or military authoritarianism) the single denominator of importance here is that they lack the real means of legal contestation for power and for holding power accountable. See, also, Larry Diamond, Marc F. Plattner, Yun-han Chu, and Hung-mao Tien (eds.) *Consolidating the Third Wave of Democracies: Themes and Perspectives* (Baltimore: The John Hopkins University Press, 1997) and Marina Ottaway, *Democracy Challenged* (Washington D.C., Carnegie Endowment for International Peace, 2003).

4 Though, as Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004) p. 114, observes, rule of law developed in illiberal societies and some features of rule of law are not mutually exclusive with authoritarian rule.

controlled state assets, and poor governance and social provisions. It is a paradox that authoritarian countries frequently receive rule of law assistance and an even greater one that they also request support to reform laws, regulations and institutions. That these interactions take place suggests a complex relationship between authoritarian regimes and international assistance providers. Countries like Uzbekistan, Algeria, or Morocco, for example, all receive support for judicial and law enforcement reform but are constant underachievers in international ratings on judicial independence and frequently criticised for human rights abuses by their security forces.

While donors in recent years have accumulated a wealth of experience on rule of law assistance to post-conflict and developing countries, but have less experience from authoritarian settings.⁵ The different challenges in post-conflict and authoritarian settings are important to recognise. In post-conflict countries the main threat to rule of law is often the weakness or non-existence of state institutions. In authoritarian countries the absence of institutions is typically not the source of insecurity; people are insecure because of police, courts and administrative agencies abusing the rule of law.⁶ In many authoritarian countries the function of law is to allow the government to rule and to legitimise incumbent leaders.⁷ This abuse of law presents a fundamental challenge to donors: what can be done and how should law be approached in countries where rule of law is lacking by *design* rather than by *default* and where political leaders appear to be strategic in their selective acceptance of reform issues and topics.

The first part of this paper explores briefly the concept of rule of law and rule of law assistance. This is followed by a review of multilateral and bilateral rule of law assistance to five Central Asian and five North African countries between 2002-2011. Subsequent parts examine the meaning of rule of law assistance to authoritarian countries, its role, potential impact and unintended side effects.

5 On rule of law assistance and post-conflict interventions, *see for example*, Richard Zajac Sannerholm, Frida Möller, Kristina Simion and Hanna Hallonsten, *UN Peace Operations and Rule of Law Assistance in Africa: Data Patterns and Questions for the Future*, (Stockholm, Folke Bernadotte Academy 2012), and Stephen Haggard and Lydia Tiede, *The Rule of Law in Post-conflict Settings: the Empirical Record*, *International Studies Quarterly* October 2 (2013).

6 *See, for example*, Gerard Stoudmann, *Turkmenistan, a Human Rights 'Black Hole'*, 14 *Helsinki Monitor* 117-124 (2003).

7 *See the overview of Central Asian governments and the use and abuse of law by Gerald Stabereck, A Rule of Law Agenda for Central Asia*, *Essex Human Rights Review*, Vol. 2 No. 1, 1-23.

2 Rule of Law Assistance – Means and Ends

While it is sometimes said that the rule of law means different things to different people, a central feature is the core function of minimising arbitrariness in governance and in society. Thus, rule of law has two dual purposes: to protect against illegal interference from those with power and to provide the means to have foreseeability and legal protection in society between individuals.⁸ Simply put, rule of law is the idea that society is best governed through law and, specifically for those with power to count rules and rule compliance as their stock-in-trade.⁹

Rule of law is desirable based on its own merits.¹⁰ A rule of law system is associated with different legal qualities – for instance, legal certainty, legal protection and legal equality. As such it is an ideal standard for how to best organise state-individual relations. Cannibalising on MacCormick's elaborate description on rule of law as an end goal:

Where the Rule of Law is observed, people can have reasonable certainty in advance concerning the rules and standards by which their conduct will be judged, and the requirements they must satisfy to give legal validity to their transactions. They can have reasonable security in their expectations of the conduct of others, and in particular of those holding official positions under law. They can challenge governmental actions that affect their interests by demanding a clear legal warrant by an independent judiciary.¹¹

It is clear from this narrative that rule of law requires a legal order of some complexity and depth. This also suggests that assessments on the existence or abuses of rule of law are best viewed in terms of 'less-to-more' rather than in binary terms, and that this also applies to rule of law in authoritarian countries.

Besides being desired as an end in itself, momentum for the rule of law is also driven by a strong instrumental appreciation of what can be achieved by a legal order adhering to specific principles such as legality, legal certainty, procedural fairness, separation of power and accessibility.¹² Donor policies and operational directives present rule of law as a necessary means for effectively addressing many diverse challenges – for instance, insecurity and conflict (national and international), poverty, impunity, sexual and gender based violence and threats to democracy. The rule of law is also closely associated

8 See, Martin Krygier, *Rule of Law: An Abuser's Guide* in Andrés Sajo (ed.) *Abuse: the Dark Side of Human Rights* (Utrecht, Eleven International Publishing, 2006).

9 See, Otto Kirchheimer, *The Rechtsstaat as a Magic Wall*, in Frederick S. Burin and Kurt L. Shell, (eds.) *Politics, Law, and Social Change: Selected Essays of Otto Kirchheimer*, (New York, Columbia University Press, 1969).

10 Tamanaha, *On the Rule of Law* (2004) p.3.

11 Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, (Oxford, Oxford University Press, 2005), p. 16.

12 See, for example, Resolution adopted by the UN General Assembly, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, A/RES/67/1 (30 November 2012).

with economic growth, and several studies find a strong connection between institutional qualities and development.¹³

Donors have started to move towards ends-based definitions instead of institutional descriptions and models. The most commonly referred to definition is found in the 2004 UN Secretary-General's report, *Rule of law and transitional justice in conflict and post-conflict societies*. In this report the concept is described as: "a principle of governance in which all persons, institutions and entities, public and private, including the State itself are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated."¹⁴

The UN's definition, and similar statements from other donors, is primarily normative and 'thick'. They address the question of why rule of law is important from a normative point of view with strong linkages to international human rights law and set out a sense of direction rather than specific descriptions of what the rule of law might look like. There is no international treaty on rule of law, nor any peer review systems or mechanisms that can cause tension. This provides some room for a 'margin of appreciation' or 'constructive ambiguity' when donors and recipient governments discuss cooperation and assistance, and a possibility for donors to employ the concept slightly differently depending on the expected policy challenges.¹⁵

3 Rule of Law Assistance in North Africa and Central Asia

There is a general pathology for how rule of law assistance is carried out. For the most part, donors work directly with governments and their agents and representatives. This is sometimes described as state-centred, institutional or top-down rule of law assistance.¹⁶ Another approach, often framed as an alternative, is a bottom-up approach centred on supporting civil society actors and associations in order to highlight rule of law challenges or circumventing political resistance to certain reform issues. For both top-down and bottom-up the working methods typically constitute technical advice, mentoring, capacity-building (of institutions or professional cadres), and support to constitutional, legal and regulatory drafting.

A difference between the two approaches is the way external actors engage with interlocutors. In the bottom-up approach, external actors often seek to enmesh civil society organisations in a bigger context, and to facilitate

13 See, Daniel Kaufman, Aart Kraay and Pablo Zoido-Lobato, *Governance Matters*, 1999, World Bank Policy Research Working Papers No 2196.

14 UN Secretary-General, *Rule of law and transitional justice in conflict and post-conflict societies*, S/2004/616 p. 4.

15 On how different donors refer to the rule of law, see Erik Wennerström, *The Rule of Law and the European Union* (Uppsala: Iustus, 2007) elaborating on the way EU employs the rule of law in its accession process and third party agreements. See also Rachel Kleinfeld, *Advancing the Rule of Law Abroad: Net Generation Reform* (Washington D.C.: Carnegie Endowment for International Peace, 2012), p. 10.

16 Kleinfeld, *Advancing the Rule of Law Abroad*, p. 21.

networks of cooperation between like-minded associations. Support to state institutions may have this element as well, but often with a leverage of reward or sanction.

The following sections present an overview of multilateral and bilateral rule of law assistance between 2002-2011 in five Central Asian countries (Kazakhstan, Kyrgyz Republic, Tajikistan, Turkmenistan, and Uzbekistan) and five North African countries (Algeria, Egypt, Libya, Morocco and Tunisia). All ten countries were classified as authoritarian or ‘not-free’ in international rankings such as Freedom house and the Economists Intelligence Unit during 2002-2011.

The overview is based on AidData records covering donor committed funds in six aggregated categories: (1) unspecified legal and judicial development; (2) constitutional development and legal drafting; (3) institutional strengthening of legal and judicial systems; (4) legal training and education; (5) legal advice and services; (6) law enforcement and crime prevention.¹⁷ Human rights promotion, as a specific component, is documented under a specific category in the AidData records and not explicitly included in this paper’s overview.

On the basis of these categories, a more defined taxonomy has been developed taking into account the main objective of different projects and programmes (see Table 1 and 2). There are several overlaps in this categorisation. Projects and programmes often have similar objectives and components – for instance, law enforcement reform might include human rights components and judicial reform might also have the purpose of enhancing law enforcement capacity as regards criminal investigations. In addition to overlaps, the AidData records may also contain gaps or irregularities in the reporting structure. Crude as the data in some cases may be, it nevertheless allows for a longitudinal examination of multilateral and bilateral rule of law assistance over time and between countries and regions.

3.1 *Multilateral Rule of Law Assistance*

Rule of law assistance provided by multilateral donors often takes place within large and long-term programmes. The EU, one of the main assistance providers, has large-scale programmes of cooperation that include countries in both North Africa and Central Asia but also bilateral agreements with all five Central Asian republics. There is also a regional approach in the *European Union and Central Asia: Strategy for a New Partnership*. For some of the Central Asian republics, the EU has also signed bilateral memorandums of understanding on energy and transport.¹⁸

17 AidData is based on OECD’s Creditor Reporting System. AidData records does not include: military equipment and services; military stock of debt; export credits or trade financing; loan guarantees; aid flows from non-governmental organizations; private long-term capital; loans made out of funds held in the recipient country; foreign direct investment (FDI) and unguaranteed bank lending, portfolio investment.

18 The European Union and Central Asia: The New Partnership in Action, June 2009.

For the North African countries, there is the European Neighbourhood Policy as a bilateral tool in addition to regional forms of cooperation through the *Euro-Mediterranean Partnership*, and the more recent *A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean*.¹⁹

The World Bank and UN agencies are active in both regions. The World Bank works mainly through reimbursable or non-reimbursable credits with support to rule of law in relation to economic ends, often in large-scale projects and programmes. In accordance with the Articles of Agreement of the World Bank, the bank and its officers, “shall not interfere in the political affairs of any member”,²⁰ only economic considerations shall apply. The UN has a presence in both regions through regional programmes and country offices and work on more diverse topics through its development programme, children’s fund and trust fund for democracy.

The main rule of law priorities for multilateral donors are transparency and accountability in the public sector (with the World Bank and the EC as the main donors), customs and border security, law enforcement (including regional law enforcement initiatives) and economic legal and regulatory reform. Support to civil society organisations (CSO) and media (including legal and regulatory reform to enable CSO’s to operate more freely) as well as gender justice and women’s rights, occupy the bottom two activities in terms of committed funds (and only in Tajikistan, Turkmenistan and Libya). Judicial reform is a fairly small activity based on committed funds from donors considering that lack of judicial independence is generally recognised as one of the main challenges to the enforcement of international human rights standards in both regions but specifically in Central Asia.²¹

19 Joint Communication of the European Council the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, *A Partnership for Democracy with the Southern Mediterranean*, COM (2011) 200, 2011.

20 International Bank for Reconstruction and Development, *Articles of Agreement*, as amended effective June 27 2012.

21 Stabereck, 11.

Reform areas	Donors	Countries	Committed funds (USD)
Transparency and accountability in public administration	UNDP, World Bank, European Communities	Uzbekistan, Tajikistan Kyrgyz Republic,	19 840 191
Customs and border security	European Communities UNDP	Algeria, Tajikistan	14 109 529
Law enforcement and crime prevention, security forces and criminal law reform	European Communities	Morocco Central Asia regional North of Sahara regional	8 549 323
Economic legal and regulatory reform	World Bank	Algeria	5 122 509
Judicial reform and access to justice	UNDP, European Communities	Uzbekistan, Libya, Algeria, Kazakhstan	5 051 804
Constitutional reform, including democratic reform, rules and frameworks	European Communities	Kyrgyz Republic	2 305 525
Children's rights	United Nations Children's Rights Foundation	Morocco, Kyrgyz Rep. Tajikistan, Algeria, Tunisia, Kazhakstan, Libya, Uzbekistan	2 031 238
Prisons/detentions	European Communities UNDP	Uzbekistan, Algeria	1 658 196
Legal education	Arab Fund for Economic and Social Development	Egypt	1 281 162
Transitional justice	United Nations Democracy Fund	Morocco	358 002
CSO and media support/ legal and regulatory reform	United Nations Democracy Fund	Tajikistan	185 010
Gender justice/ women's participation and access to justice	UNDP	Turkmenistan, Libya	161 411

Table 1: Multilateral organisations rule of law assistance 2002-2011 Algeria, Egypt, Kazakhstan, Kyrgyz Republic, Libya, Morocco, Tajikistan, Tunisia, Turkmenistan and Uzbekistan (Source: "AidData.org").

With the exception of the World Bank (which is somewhat restricted by its Articles and Agreements) it is noteworthy that only a small part of multilateral assistance goes toward explicit work on human rights compliance and non-state actors. Much of this may of course be integral in the programme's design. The EU, for example, holds regular bilateral human rights dialogues with Central

Asian governments though it is not clear to what extent the issues raised in the dialogues are followed up on at high-level political meetings.²²

The top-down approach of multilateral donors may be indicative of a strategy to authoritarian countries seeking to provide a sense of direction based on quiet diplomacy – that is, seeking transformation through cooperation and change through “osmosis”.²³ The approach taken by the multilateral agencies could also be interpreted from a security lens, considering that customs and law enforcement are among the top categories. Security may be viewed as an essential component for the expansion of democracy, rule of law and economic development. At the same time, security is of course also a key consideration for the EU and other multilateral organisations in relation to, for instance, Algeria and Tajikistan considering their strategic geographical position in relation to failed states.

3.2 *Bilateral Rule of Law Assistance*

In bilateral assistance, typical activities include law enforcement, customs and border security, judicial reform and access to justice and civic participation and CSO support. The state-centered approach is in line with multilateral donors support to rule of law with the significant exception of assistance to civic participation and CSO (see Table 2).

Bilateral assistance is undertaken in broad and long-term programmes, specifically by EU membership countries when there are ongoing EU initiatives. Bilateral initiatives are also often undertaken in project form and as shorter interventions aiming at quick impact through capacity-enhancement, equipment, and technical support, thus allowing bilateral assistance providers more flexibility to changing circumstances in recipient countries.

22 Directorate-General for External Policies, Evaluation of the EU’s human rights policies and engagement in Central Asia, March 2014.

23 Francesco Cavarota, Raj S. Chari, Sylvia Kritzinger and Arantza Gomez Arana, *EU External Policy-Making and the Case of Morocco: ‘Realistically’ Dealing with Authoritarianism*, *European Foreign Affairs Review* 13 (2008), 357-376, 361.

Reform areas	Countries and Committed funds (USD)									
	Algeria	Egypt	Libya	Morocco	Tunisia	Kazhakstan	Kyrgyz Rep.	Tajikistan	Turkmeni- stan	Uzbekistan
Law enforcement, customs and border security	572 549	13 985 835	774 454	15 128 718	3 443 919	8 461 816	17 325 741	48 450 390	4 240 290	2 609 134
Counter-terrorism	13 6892					1 230 000	940 000	251 134	20 000	660 000
Prisons and detentions	948 094	500 000	170 936	1 152 439		858 263	500 508	311 021		2374
Judicial reform and access to justice	1 610 004	34 986 051		6 229 022	350 966	3 168 752	16 071 671	8 701 738	382 766	1 102 151
Constitutional reform including democratic reform, rules and frameworks		410 547		115 665			866 500		632 000	
Legal reform		162 418	42 000	622 256	101 706	743 753	870 494	23 001		1 211 581
Gender justice	303 230	419 532		1 837 785	1 294 416	15 000		359 813		

Reform areas	Countries and Committed funds (USD)									
	Algeria	Egypt	Libya	Morocco	Tunisia	Kazhakstan	Kyrgyz Rep.	Tajikistan	Turkmenistan	Uzbekistan
Financial crimes and corruption	792 170	172 654		1 086 855	13 150		2 558 007			
Trafficking	272 000	33 9256	150 000		13 951	667 187	1 608 196	1 927 000	362 821	1 666 075
Human rights, international law and efforts to combat torture	632 854	13 445 506		433 017	537 530	946 773	1 296 371	175 600	738 993	3 465 582
Civic participation and CSO support, including media regulation		36 321 242		4 507 062		5 443 948	6 818 724	11 314 517	4 853 491	4 017 635
Undefined	1 276 643	6 014 258	1 181 868	3 147 608	1363	985 036	441 723	213 419	63 633	1 593 328

Table 2. DAC bilateral, during 2002-2011: Central Asia and North Africa. DAC-bilateral donors: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, Canada, United States, Japan, Korea, Australia, New Zealand (Source: "AidData.org").

The focus on law enforcement, customs and border security might be explained from a donor security perspective. Although all forms of aid may be more or less rationalised by security factors (e.g. supporting failed states to preserve the geopolitical landscape), the bilateral focus on law enforcement, customs and border issues is quite significant (Tajikistan has received 48 450 390 USD 2002-2011) and directly related to insecurity in bordering countries (e.g. Afghanistan). Enhancing the capacity of state security actors in countries such as Egypt, Tajikistan, Kazakhstan and Uzbekistan carries inherent risks of reinforcing the authoritarian regimes' capacity to maintain power and control. It is not clear to what extent donor polices are supportive of innovative approaches to mitigate such risks. On the contrary, activities carried out by bilateral donors seem to be premised on a capacity-deficit in receiving countries and not on a political deficit that effectively minimizes the chance for deeper reform.

Egypt has received substantial support in relation to judicial reform and access to justice (34 986 051 USD 2002-2011). This is reflective of the long-standing commitment to reform of Egyptian courts from donors such as the US, and also of the fact that the courts in Egypt, in comparison with other authoritarian countries, experience a higher degree of judicial independence.²⁴

Support to Egyptian courts might also be part of a donor approach based on pragmatism, default and coincidence. Authoritarian countries are generally selective and closed to external assistance, but by coincidence and default there may be windows of opportunities allowing reform. For instance, Kyrgyz Republic has received substantial support to judicial reform, law enforcement and civic participation, much of it linked to the political strife that begun in 2010 which opened the country to international assistance. The same can be said for Tajikistan, Morocco and other countries where donors have supported state institutions as well as civic participation and human rights reform when authoritarian regimes have opened up for selective reform efforts.

4 Trojan Horse or Potemkin Village

A fundamental question is what role external assistance has had in terms of impact on rule of law conditions in authoritarian countries. It might be argued that rule of law reforms are difficult to assess due to the unpredicted ways in which they integrate in local legal culture. There are scholars who argue that rule of law assistance in authoritarian countries should be viewed as creating a bridgehead and spreading of ideas in a sort of osmosis theory.²⁵ In legal theory, Gunther Teubner observes a similar pathology of external reforms, without

24 See, Tamir Moustafa, *Law and Resistance in Authoritarian States: The Judicialization of Politics in Egypt* in Ginsburg and Moustafa (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes*.

25 See, for example, Matthew Stephenson, *A Trojan Horse in China* in Carothers, *Promoting the Rule of Law Abroad*. See also, Yves Dezalay and Bryant G. Garth, *The Internationalisation of Palace Wars: Lawyers, Economists and the Contest to Transform Latin American States* (London, Chicago University Press, 2002) p. 3-4.

making any causations or predictions, when he describes ‘transplanted’ laws as legal ‘irritants’: “which triggers a whole series of new and unexpected events”.²⁶ From this perspective, expectations to see real change might be premature or change might be mainly found through unintended ‘irritations’ of the system.

At the same time, some influence could be anticipated given the duration of rule of law assistance and the amount of the funds committed – for example, judicial reform in Egypt and Kyrgyz Republic, law enforcement reform in Tajikistan, or World Bank support to transparency and accountability in Uzbekistan and Tajikistan.

Data on judicial independence from the Freedom House Nations in Transit, 2004-2013, for example, show very little change over time. At best, the ratings for judicial independence show status quo or at worst, a slowly downward trend of weaker judicial independence. For countries like Turkmenistan, the rating has stayed the same since the beginning, while many other countries, such as Kyrgyzstan, Uzbekistan and Tajikistan move from lower scores to higher after a decade.

For an overview of a broader rule of law development during the period 2002-2011, the Worldwide Governance Indicators provides a bleak picture.

Country	Indicator	2002	2004	2006	2008	2010	2012
Algeria	Rule of Law	-0.59	-0.55	-0.64	-0.70	-0.74	-0.79
Egypt	Rule of Law	0.05	0.08	-0.19	-0.08	-0.11	-0.45
Kazakhstan	Rule of Law	-1.12	-1.02	-0.96	-0.75	-0.61	-0.66
Libya	Rule of Law	-1.02	-0.81	-0.99	-0.70	-0.93	-1.14
Morocco	Rule of Law	-0.01	0.01	-0.25	-0.28	-0.15	-0.19
Kyrgyz Republic	Rule of Law	-0.75	-0.80	-1.30	-1.36	-1.28	-1.15
Tajikistan	Rule of Law	-1.16	-1.14	-1.12	-1.24	-1.17	-1.17
Turkmenistan	Rule of Law	-1.31	-1.58	-1.58	-1.40	-1.44	-1.37
Tunisia	Rule of Law	-0.03	0.14	0.20	0.13	0.12	-0.13
Uzbekistan	Rule of Law	-1.41	-1.28	-1.39	-1.09	-1.37	-1.26

Table 3: World Wide Governance Indicators, Rule of Law. (Source: Worldwide Governance Indicators, Range: -2.50 (weak) to +2.50 (strong), Worldwide Governance Indicators, www. Daniel Kaufmann, Aart Kraay and Massimo Mastuzzi, The Worldwide Governance Indicators: Methodology and Analytical Issues, World Bank Policy Research Working Papers, 5430 2010).

On the rule of law the Worldwide Governance Indicators include: (i) confidence in and abide by the rules of society, and in particular the quality of contract enforcement, (ii) property rights, (iii) the police, and the courts, as well as the likelihood of crime and violence. For most countries in North Africa or Central Asia, the ratings have remained mostly constant, with smaller changes to a weaker rule of law (with the exception of Egypt).

²⁶ Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies*, *The Modern Law Review* 61:1, 11-32 (1998) 12.

4.1 *Managed Rule of Law*

One way to describe the constitutional legal order of the authoritarian countries examined in this paper is that they have a system of ‘managed rule of law’.²⁷ They maintain a legal order displaying most of the necessary prerequisites for a rule of law system while ensuring that the full effect of rule of law is contained. Authoritarian regimes are also becoming more proactive in their attempts to mitigate pressure from bilateral and multilateral actors, and there is an element of sharing experiences and practices between peers. Methods of repression are replicated, as well as ways in which international criticism can be mitigated and defended against.²⁸ This means that the international rule of law agenda is in authoritarian countries more and more facing alternative (authoritarian) solutions to legal dilemmas.

Authoritarian countries with a managed rule of law system often make public commitments to the rule of law while disregarding or abusing central tenets of the concept in practice. Countries with managed rule of law systems also undertake a vast number of activities encouraged by rule of law projects, but with seemingly limited impact. For instance, while countries in Central Asia receive EU and bilateral support to judicial reform, law enforcement and modernization of legislation, overall rule of law development seem weak and fragmented.²⁹

Authoritarian regimes’ ability to manage rule of law and thus rule of law assistance presents a fundamental challenge to donors, specifically when, as the overview in this paper shows, most of the assistance respond to state interests and the needs of state actors. Rule of law assistance also tend to be quantifiable – that is, focusing on the number of police or judges trained rather than addressing deep-rooted structural problems.

Donor strategies are based on the assumption that their assistance is in response to an inclusive and broad-based domestic demand from a democratic legislature or similar such body of legitimacy and popular support (expressed in terms of political will and national ownership).³⁰ For rule of law interventions the ‘will’ component specifically is essential. Past practice consistently illustrates that reforms are more effective when there is a genuine

27 Borrowing the term ‘managed’ from Ivan Krastev and Stephen Holmes article, *Putinism Under Siege: An Autopsy of Managed Democracy*, *Journal of Democracy*, Vol. 23 No. 3, July 2012.

28 See, David Calingaert, *Exporting Repression*, Freedom House, March 26, 2013.

29 See, Gerald Staberock, *A Rule of Law Agenda for Central Asia*, *Essex Human Rights Review*, Vol. 2, No. 1.

30 The 2005 Paris Principles and 2008 Accra Agenda for Action are founded on the core principles of ownership, donor alignment, mutual accountability, inclusive partnerships, delivering results.

demand.³¹ It has taken some time for donors to acknowledge the political dimension of rule of law work. The UN, not always critically focused, now regularly emphasise the ‘political’ aspects of democracy and rule of law transformation: “rule of law development, like all national reforms, generates winners and losers. They are therefore political questions as well as technical ones”.³² Therefore, one of the main policy lessons for predicting successful rule of law reform is that there must be substantial buy-in from national governments, political elites, legal professionals and the civil society. Moreover, national actors should assume primary responsibility for rule of law developments to ensure alignment with national priorities and strategies.

Political will is difficult to separate from a discussion on incentives. In authoritarian states, many of which have successfully managed the pressures to reform from donors, the incentives are arguably less clear by comparison with heavy-handed UN or EU post-conflict missions. Post-conflict transitions are by many observers seen to hold a ‘window of opportunity’ for reform – for instance through negotiated peace settlements or one-sided victories.³³ Stromseth, Wippman och Brooks describe this as a chance for interveners: “to demonstrate that a new sheriff is in town and that it is no longer ‘business as usual’.”³⁴ In authoritarian states it is not always clear who the ‘sheriff in town’ is, but it almost never seems to be the external actor, and the external actor’s leverage is less direct.

Authoritarian settings and the complex political constructions in different regimes make it more difficult to have an open and direct discussion on objectives and policy returns of rule of law assistance. Lack of clear insights into political processes and power structures also suggests that rule of law interventions should not count on having too much leverage on domestic politics. In their research on transition countries, Morlino and Magen conclude: “even under conditions of the strongest forms of external intervention, processes of democratization are in reality an essentially domestic drama...”³⁵

There is a need to better understand how ‘managed’ rule of law systems in

31 The importance of political support was emphasised in the study on US rule of law programmes by Blair and Hansen in 1994. The authors note that where political will is weak (and cannot be manufactured) but where donors might be compelled to support rule of law programmes nonetheless the risk of failure must be judged high. Harry Blair and Gary Hansen, *Weighing in on the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programs*, USAID Program and Operations Assessment Report No. 7, 1994.

32 Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance, April 2008.

33 “Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict”, S/2009/304, 11 June 2009, p. 3.

34 J. Stromseth, D. Wippman & R. Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions*, Cambridge, Cambridge University Press, 2006) p. 145.

35 Leonardo Morlino and Amichai Magen, *Scope, depth and limits of external influence: conclusions*, in Morlino and Magen (eds.) *International Actors, Democratization and the Rule of Law: Anchoring Democracy?*, (New York and London, Routledge, 2009), p. 225.

authoritarian countries work and to move away from generalisations.³⁶ In authoritarian countries there is often excess in terms of laws and regulations, by-laws, decrees and ordinances.³⁷ The legal system and the public administration are employed as tools for repression but may also serve as arenas where state power can be challenged.³⁸ Ginsburg and Moustafa show, for instance, how the functions of courts in authoritarian regimes are more complex than what was previously understood.³⁹ Though courts are used as political tools they can also, paradoxically, function as: “important sites of political resistance.”⁴⁰

One way for donors to gain access to rule of law development in authoritarian settings is by situating rule of law within a broader context. In this way, constitutional reform, judicial independence and police assistance serve the objectives of fighting poverty or establishing a sound regulatory environment for economic development. This does not make rule of law apolitical, but it might lessen its political implications through a focus on means to other ends.⁴¹ A similar yet different way in which donors ‘package’ rule of law is in terms of security, as a necessary means to strengthen resilience to terrorist groups, border management and control, and to effectively fight trafficking or organised crime (all of which are threats or crimes against the state). The EU, for example, summarises security, development and energy as the three core objectives of its regional strategy for assistance to Central Asia.⁴² The EU also provides support to law enforcement and border management reform to regimes in North Africa and Central Asia and similar security rule and rule of law perspectives are found in bilateral assistance. Both of these approaches, specifically when they rely on support to state institutions to the large degree that has occurred in Central Asia and North Africa, must be guided by clear policy on how to secure reform commitments without compromising too much with rule of law objectives.

36 There is a fairly large research field on authoritarian states and specific institutional features of rule of law, i.e. judiciaries, police etc. See. A. Pereira, *Political (In) Justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina*, Pittsburgh, University of Pittsburgh Press, 2005, L. Hilbink, *Judges beyond Politics in Democracy and Dictatorship*, Cambridge, Cambridge University Press, 2007 and R. Barros, *Constitutionalism and Dictatorship*, Cambridge University Press, 2002.

37 T. Addison, *The Political Economy of the Transition from Authoritarianism*, International Center for Transitional Justice, *Research Brief 2009*, s.2.

38 See, for example, reports from Kyrgyzstan, Human Rights Watch, “Distorted Justice: Kyrgyzstan’s Flawed Investigations and Trials on the 2010 Violence”, June 2011.

39 The complexity is not unique to courts, but includes other parts of the state bureaucracy. See, Carothers, *Aiding Democracy Abroad: The Learning Curve*, Washington D.D., Carnegie Endowment for International Peace, 1999, p. 260.

40 Moustafa & Ginsburg, *Introduction: The Functions of Courts in Authoritarian Politics*, Ginsburg & Moustafa, *Rule by Law*, 2007, s. 2.

41 See, Thomas Carothers, Democracy Assistance: Political vs. Developmental, *Journal of Democracy Vol. 20*, No. 1, 2009, p. 6.

42 European Union, Regional Strategy Paper for Assistance to Central Asia for the Period 2007-2009, 2007, p. 5.

Fundamental to a discussion on incentives are cost and benefits calculations that are involved when domestic leaders accept and engage in rule of law assistance. Cost and benefits calculations are useful to frame the dynamics involved in rule of law reform, but they include a number of variables that must be appreciated as well such as the presence of viable alternatives available to domestic leaders.⁴³ It also seems plausible that political will to reform can be fragmented and specific for certain sectors (e.g. lower crime rates) while donors might see the same rule of law assistance as part of reaching an overarching objective (e.g. on democratic policing). For a more nuanced understanding it might also be important to categorise rule of law assistance in terms of high politics to low politics.

4.2 *The Dark Side of Rule of Law Assistance*

Repressive law is perhaps less terrible than lawless repression, but it can be terrible all the same.⁴⁴

The instrumental use of rule of law assistance by different donors has an inherent risk attached to it, namely that it will be used in a similar instrumental way by autocrats to dilute the main purpose of the concept. This risk is not new but was noted early on when law became part of development cooperation. The potential risk comes from the fact that authoritarian leaders are often skilled at using law in an instrumental way – for instance, to improve a principal-agent problem within a growing bureaucracy or security apparatus, allowing for better monitoring and control over government policy.⁴⁵ Thus, the large scale support to judicial reform in Kyrgyz Republic, Tajikistan, Morocco and Egypt might very well support government control over the judiciary instead of juridical checks and balances on political power.

Being aware of the political economy is important for the purpose of avoiding or mitigating negative consequences that may arise from rule of law assistance to authoritarian countries. For multilateral and bilateral support to rule of law in the ten authoritarian countries covered in this paper it is difficult to assess to what extent political analyses have formed part of decisions to engage in law enforcement, customs and border reform, prisons or counter-insurgency, as an example. At least for multilateral actors, much less of the committed funds tend to go directly to reform areas that could upset or damage relations with authoritarian countries while bilateral assistance seem to balance a potential danger of top-down rule of law assistance to state security agencies by simultaneously supporting to civil society organisations and human rights reform. This strategy has many associated risks, the most obvious being that it

43 Morlino and Magen, *A Framework for Analysis* pp. 44-47.

44 Krygier, *Marxism and the Rule of Law: Reflections After the Collapse of Communism*, Law and Social Inquiry, 1990, p. 641.

45 Carl Minzner, *China at the Tipping Point: The Turn Against Legal Reform* Journal of Democracy, Vol. 24, No. 1, (2013), p. 66.

might expose human rights organizations and individuals to the regime, and indirectly also causing more repressive policy on civil society organizations. The organisations and individuals supporting (or appearing to support) rule of law reform can come under threat if reforms are pushed too far. Beyond this risk factor is the question of impact. It is unclear how well bottom-up strategies can address structural, institutional and political rule of law challenges.

Rule of law assistance in authoritarian countries might be a double-edged sword in the sense that regimes can pick reforms that enhance their grip on powers.⁴⁶ While a number of authoritarian governments publicly embrace the rule of law agenda, the commitments seem to concern a “reductive, proceduralist conception of it. They promise citizens fairness and efficiency but steer clear of the rights element of the rule of law”⁴⁷. Similarly, Ahmed Benchemsi describes recent rule of law reforms in Morocco, involving constitutional re-drafting and referendum, as a Potemkin village with few substantial changes. According to Benchemsi’s account, the regime has ‘outfoxed’ the opposition but manages nonetheless to receive applause from Western observers, specifically the EU.⁴⁸

The question of the relationship between rule of law and human rights (or other political goods for that matter) appears as an academic discussion with highly practical concerns. In authoritarian countries, however, a thicker rule of law model linked with democracy and human rights might be suitable in order to influence institutional structures and behaviour of key actors. It is important to recognise that rule of law is not in want by default but by design in authoritarian countries. Thus, capacity-enhancement of state institutions, or formal rule adoption, is generally not the main challenge, but rather how state power is put to the test.⁴⁹ It is unclear to what extent a ‘thicker’ rule of law forms part of bilateral and multilateral assistance strategies.

David Lewis, in his review of OSCE police programmes in Central Asia, is critical of the incoherent support provided by the OSCE to national police forces. While acknowledging that modest aspects can be highlighted, such as exposing national police to international policing norms, or allowing them to discuss alternative strategies, in some cases police programmes have done more harm than good: “by providing legitimacy to authoritarian regimes and helping them to modernize repressive law enforcement agencies”.⁵⁰

Lewis also concludes that none of the modest gains from the police programmes are likely to generate any substantial change on how the police

46 Camino Kavanagh and Bruce Jones, *Shaky Foundations: An Assessment of the UN’s Rule of Law Support Agenda*, Center on International Cooperation, November 2011, p. 36.

47 Thomas Carothers, *Rule of Law Temptations*, Fletcher Forum of World Affairs, Vol. 33:1, Winter/Spring, 2009, p. 54.

48 Ahmed Benchemsi, *Morocco: Outfoxing the Opposition*, Journal of Democracy, Vol. 23, No.1 (2012) pp. 6f.

49 Kavanagh & B. Jones, *Shaky Foundations: An Assessment of the UN’s Rule of Law Support Agenda*, p. 12f.

50 David Lewis, *Reassessing the Role of OSCE Police Assistance in Central Asia*, Open Society Foundations, Occasional Paper Series, No 4., 2011, p. 51.

should operate in line with international standards on democratic policing. As long as there is disinterest, at best, or outright hostility at worst to democratic policing, programmes lacking leverage, monitoring and proper follow-up activities stand little chance of making a larger impact.⁵¹ This is an important point to consider, showing the need for proper risk assessments when engaging with authoritarian regimes.

5 Conclusion

The overview of international rule of law assistance in this paper suggests that demands for adhering to rule of law principles are not only strongly linked with security concerns, but are also broader and more diverse in terms of themes, sectors and institutional support areas, including judicial reform and access to justice, economic financial regulation and anti-corruption and constitutional and democratic norm development. Acceptance of reforms in these areas provides at least a ‘rhetorical trap’ for autocrats and they cannot be seen to abuse the law too openly. Inherent in law, in order to function as law, is the precondition that leaders must at the very least publically commit to playing by the rules.

With rare exceptions authoritarian countries are forced to (at the very least) pay lip service to the values enshrined in international human rights treaties and UN declarations, and to mask repression and violations of international law. Covering up human rights abuses and rule of law deficiencies is getting more difficult. Due to advances in communication technology and social media, violent attacks on demonstrators, and rumours of large scale corrupt business deals, cannot be kept secret and local but will become public and global.

Authoritarian regimes are also forced to comply with best practices when it comes to ‘economic rule of law’ – that is, observing the rule of law for economic enterprises in order to attract foreign investors. Credit rating agencies such as Standard and Poors, Moody’s and Fitch Group, frequently include rule of law aspects in their assessments and the ratings can seriously affect a country’s economic position and credit reputation. There are therefore different demands on authoritarian regimes on rule of law that sometimes overlap and at other times might create contradictions in terms of objectives.

Further mapping and research is needed on incentives, specifically incentives not originating from donors, in order to properly place reforms in a political context. The knowledge available to ‘outsiders’ on the past practice and actual role of judicial and administrative agencies under authoritarian rule is limited, and difficult to gauge without careful assessment undertaken in cooperation with national partners. More is known of the complete breakdown of the rule of law and the ensuing implications for judicial and administrative

51 Lewis 2011, p. 52: “it is impossible to develop democratic policing in a nondemocratic political environment. The OSCE’s police assistance programmes have tended to ignore the political contexts in which they work, preferring to focus on the technical aspects of policing”.

institutions, than of how these institutions function in constrained environments such as authoritarian regimes, where the information is limited.⁵² A better understanding of the part played by police, courts and administrative agencies in authoritarian regimes will be necessary in order to adequately meet new demands and needs, and to properly manage expectations in a reforming society.

It is clear today that rule of law assistance is a socio-political exercise yet most of the activities seem to be based on the premise of capacity-problems rather than political problems. Police agencies are supported in Uzbekistan or judiciaries in Morocco as if the problem is a lack of exposure to new norms, not the political repressive constraints against implementing new norms. Civic participation and CSO support, however, seem to include both capacity deficits of national organisations to operate independently and effectively, as well as core rule of law issues addressing political constraints.

An explanation to the rule of law attraction in authoritarian settings might be found in the flexible use of the concept. Since the rule of law is often portrayed as technical, it has the ability to disarm much of the tension surrounding human rights and democracy promotion – for instance, the rule of law can be framed as both a constitutional and a security enterprise, thus providing interlocutors the flexibility to avoid norms or issues that could be controversial and to choose issues where there are common interests such as customs, trafficking, narcotics and counter-terrorism. This sort of constructive ambiguity allows for diplomatic engagement with authoritarian regimes but with ensuing risks that controversial issues are marginalised and become the focus of parallel initiatives based on civil society engagement. Another risk is that if donors promote rule of law by providing a direction for policy while also addressing capacity deficits of state institutions, authoritarian recipients are granted greater leeway to negotiate, bargain and resist reforms without being public about it, or being held to public commitments, and are ultimately allowed to gain in terms of strengthened state capacity.

It is tempting to conclude that rule of law assistance in authoritarian countries is an unrealistic undertaking. There is weak genuine political will to commit to rule of law reforms beyond incursions into security and economic regulatory strengthening and there are few interlocutors who can pose as reform promoters. Moreover, when there are critical issues to discuss such as torture, human rights protection and gender justice this is primarily addressed through CSO support. While it might be a pragmatic and default option, there are significant risks, both for rule of law assistance generally and for those representatives from civil society engaging in more sensitive reform areas. The difference also seems to be that reform of state institutions (courts, police, customs) are based on specific problems, needs and demands. Bottom-up approaches are more general and lacking in coherence, covering many different themes and focusing on the potential of civil society to play an undefined catalytic role in bringing about change.

Policy makers and assistance providers need a better understanding of

⁵² For an overview of the role of courts in authoritarian regimes, *see* Ginsburg and Moustafa, *Rule by Law: The Politics of Courts in Authoritarian Regimes*, CUP: Cambridge.

authoritarian countries and managed rule of law, and to base assistance on sound, evidence-based policy, taking into account the incentives and conditions underlying requested or invited rule of law reform. As it now stands, many of the donor-supported projects and programmes risk being little more than nominal normative change, allowing authoritarian regimes to enhance their legitimacy, but with limited impact on how power is exercised, controlled and re-generated. At worst, donor-assisted rule of law projects can enhance both the legitimacy and the repressive capacity of authoritarian regimes.