



How to Advance the Rule of Law Abroad

RACHEL KLEINFELD

SUMMARY

Many U.S. and Western policymakers hold that helping other countries reduce corruption, diminish violence, and otherwise achieve the rule of law is essential to advancing security, democracy, and economic development worldwide. Yet despite spending billions to catalyze rule-of-law improvements, international actors have a poor record of success. To make efforts more effective, leaders should:

- **End technocratic reforms: Actions that bypass domestic politics lack impact.** The rule of law is about constraining power, both the power of the state and the power influential citizens can wield over other citizens. That means reform is fundamentally political, creating high-stakes winners and losers who will try to block improvements.
- **Use diplomacy to press governments for reforms that constrain power and empower other segments of society**—the core issue of the rule of law—rather than more peripheral legal and institutional changes. Diplomatic pressure is particularly effective during negotiations for admission to international organizations.
- **Address both popular and professional culture within legal institutions.** Reform is inherently cultural, but this arena can be difficult for international actors. They should support local agents of change who are better suited to fostering cultural shifts.
- **Provide aid to organizations with an on-the-ground local presence that can re-grant funds to small local groups** to avoid supporting only those who speak English or have good proposal writers.
- **Improve contracting and aid procedures for governance reforms to take advantage of windows of opportunity and political cycles**, including allowing flexible multiyear aid budgets supported by strategic guidance, not earmarks, and reducing multiyear planning in favor of speedy implementation and adjustment during programming. Accountability can be ensured through detailed reporting after a program, not by programming multiple years in advance with budgets that cannot respond to changes on the ground.
- **Streamline the number of U.S. government agencies involved in rule-of-law reform and increase oversight over intelligence community programs and Pentagon procurement.** U.S. government agencies must be organized to work together more effectively, and reform is needed to prevent them from inadvertently supporting corruption and power distortions that negatively impact the rule of law.

ABOUT THE AUTHOR



Rachel Kleinfeld is a senior associate in the Democracy and Rule of Law Program at the Carnegie Endowment for International Peace. She has consulted on rule-of-law reform for international organizations, U.S. government agencies, and nongovernmental institutions. Named one of the Top 40 under 40 Political Leaders in America by Time magazine, she is the founder and president of the Truman National Security Project. Kleinfeld serves on the Foreign Affairs Policy Board, which advises the secretary of state quarterly. Focusing on issues that cross national security, human security, and conflict, she speaks frequently in the media, and her publications have appeared in popular newspapers and scholarly books. Her recent book, *Advancing the Rule of Law Abroad: Next Generation Reform*, was chosen by Foreign Affairs magazine as one of the best foreign policy books of 2012.

THE PROBLEM

Improving the domestic rule of law in other countries is crucial to a host of Western foreign policy goals. The rule of law creates a relationship between a state and its citizens in which power, violence, and impunity are constrained: The government is subject to law and must rule through laws. Citizens are equal before the law, and prominent business, commercial, and political leaders are not above the law. Human rights are upheld both in legal statutes and their implementation. Citizens have access to efficient dispute resolution to prevent vigilante justice and enable commerce to flourish. And there is an acceptable level of law and order.

No country, including the United States, is perfect when it comes to rule of law. But significant security, economic development, and human rights challenges faced by the United States and other Western countries tend to stem from states where the rule of law is particularly weak. From cybertheft to insider deals that harm Western companies, trade policy is hampered by rule-of-law deficiencies abroad. Organized crime, from drug smuggling to human trafficking, thrives in countries where the rule of law can be circumvented—and then crosses borders. Corrupt police with ties to criminals spur violence throughout Mexico and Central America that spills into the United States. The Arab revolutions that upended Western policy in the Middle East were sparked by anger at sclerotic, corrupt economies and governments that abused rights with impunity.

These issues are not new, nor are they going away. The United States alone has attempted to improve the domestic rule of law within other countries for over one hundred years, since the era when it created police constabularies in multiple Latin American states to reduce civil strife in the

decades following the Mexican-American War. Modern rule-of-law-building programs began to proliferate in numbers and expenditure after the Cold War. Today, numerous nongovernmental organizations (NGOs), private and nonprofit contractors, international organizations such as the World Bank, and bilateral donors from the United Kingdom to Japan work on rule-of-law reforms. In the U.S. government, seven cabinet-level departments and 28 agencies, bureaus, and offices have worked on rule-of-law issues in over 184 countries.

The various actors and agencies have conflicting aims and strategies that often undermine one another and overwhelm small local governments. Moreover, programs frequently fail. This is not good news for efforts that are important to so many high-level foreign policy goals.

THE TOOLS

The tactics most international actors use to improve the rule of law in other countries fall into four categories:

- **Changing laws:** such as rewriting bankruptcy laws, introducing new human rights laws, and amending constitutions
- **Altering rule-of-law institutions:** building courts, providing equipment to police, and installing case management software and computers, for example
- **Creating power structures that check and balance one another:** such as improving the independence of the judiciary or helping citizen groups organize for reform
- **Building professional and popular culture that supports the rule of law:** for instance, training judges and lawyers to believe in strong, independent

dent courts or sponsoring popular television programs that denigrate corruption and support rule-of-law norms

The first generation of modern rule-of-law reforms focused on technocratic programs that altered laws and institutions to make them look like those in the West. Reformers would build new court buildings, provide police equipment, rewrite laws, and purchase computers to help judges manage their cases. But no matter how badly it appeared that these interventions were needed, reformers discovered that they rarely led to sustained rule-of-law reform.

A second generation of reformers has emerged over the past ten years, animated by some crucial insights. These reformers have determined that until power structures and culture support the rule of law, politically powerful individuals can ignore it, and laws and institutions will continue to malfunction.

Countries lack the rule of law not because they are ignorant of technical legal issues or are too poor to purchase the proper equipment. Rather, they have ill-formed governance institutions and not enough money because powerful, inimical interests within these countries are stealing state assets, underfunding necessary goods, or otherwise actively working to undermine the rule of law—and the local culture is not strong enough to stop these practices.

Culture is an important and overlooked element of the rule of law. If citizens ignore laws, then only a despotic state can uphold them. If the press and citizenry do not expect public servants to obey laws, then there will be no social pressure to keep corruption in check. Professional culture may also impede the rule of law—such as in courts where corruption is so widespread that it becomes the norm or in police agencies where passing

kickbacks to superiors is expected. Such cultural habits prevent the use of civil society and legal entities to ensure accountability.

Of course, a poor, reforming country may need money, training, or technical assistance—those problems are real. But they are the *effects* of weak rule of law, not the *causes*. Supplying these goods will not solve the underlying problem.

MAKING RULE-OF-LAW REFORM MORE SUCCESSFUL

Second-generation reform puts power and culture at the heart of the reform process. That means aid should no longer be seen as the main method to alter the rule of law in other countries. Instead, nations can use multiple tools to effect reform.

DIPLMACY

Diplomacy, which includes applying sanctions, speaking out publicly, and granting or revoking trade status, can be a strong method to force a government to change fundamental power structures. For instance, diplomacy can be used to press governments to respect the rights of NGOs to operate or of civil society to meet freely, enabling accountability.

Diplomacy can be dangerous when used to change individual laws, particularly those that are culturally fraught, as it can lead to popular backlash over “colonial” imposition or executive action that bypasses parliaments and popular will. It is also hard to maintain a tough diplomatic line over the long term in a country in which there may be multiple interests at work, meaning that diplomacy rarely lives up to its full potential.

ENMESHMENT

Enmeshment in international organizations, such as the European Union (EU), the

North Atlantic Treaty Organization (NATO), and the World Trade Organization, is a particularly powerful tool for driving governmental change. Governments are often willing to make fundamental changes to their power structures to get into organizations that they see as politically vital. For instance, countries wishing to enter NATO must allow civilian control of their militaries.

Most of the leverage is derived from diplomacy when a country is negotiating for entry into an international organization. The effects of cultural change once a state is part of an institution are lauded by theoreticians—but harder to discern in practice.

The United States too frequently supports membership in such groups as a reward rather than using the membership negotiation process to bring about fundamental reforms to power structures that would ultimately create stronger allies. For instance, the U.S. government strongly supported EU membership for Romania despite the country's weak rule-of-law institutions as a reward for Romanian assistance in the Iraq war. Romania's justice sector has been a problem for the EU since integration, but the EU now lacks leverage to address it to the degree it could have before admission.

Exchange programs are often seen as methods of soft enmeshment to change the culture and expectations of individuals. However, even popular efforts such as the U.S. International Military Education and Training program rarely yield structural reform because they are targeted at individuals, not at changing social cohorts or institutions. Officials should decide whether these programs are intended to build networks of powerful friends in other countries or to create reform; they will rarely serve both purposes well.

TOP-DOWN AID

Providing funds to other governments to affect laws and legal institutions is the most common form of rule-of-law programming and has been critiqued for years. Top-down aid has too often led to states mimicking the institutions and laws of the West while doing little to affect the rule of law. Computers are provided to countries without electricity; courthouses are built even though most people use traditional justice institutions to solve disputes; training is held on esoteric sections of law that go unused.

Top-down aid is essential to reform; it simply needs to be used as a means to achieve power and cultural change, not as an end in itself. To be effective, legal change can be used to empower other power centers; for instance, by enabling citizens to gain access to government data. Institutional reform can be used to reward reformers by giving them status-bequeathing goods while denying these to spoilers, showing those in the middle which way the winds are blowing. Funds can, ironically, be more effective when more limited: in governance reforms, aid money can attract those most wishing for some of the largesse, who elbow out legitimate reformers.

BOTTOM-UP APPROACHES

Bottom-up reforms, by definition, target power structures outside of the central government, such as businesses, religious institutions, and other citizen-led institutions. They are particularly useful because effective citizen groups can create internal pressure on the government. This can encourage recalcitrant governments to change and can maintain momentum for improvement while preventing a reforming government from tipping toward autocratic tendencies, as many do.

RECOMMENDATIONS

Success requires these different tools to work together. Too often, the United States, for instance, has put a few million dollars into a rule-of-law program through the U.S. Agency for International Development (USAID) while U.S. intelligence agencies provide undercover funds to warlords or the Pentagon offers contracts that unintentionally prop up a corrupt regime. It is no surprise that the small aid program yields few returns.

There are, however, a number of ways to improve impact.

RECOMMENDATIONS FOR INTERNATIONAL ACTORS

Focus on checking the power of influential forces. International actors should use top-down assistance, diplomacy, and enmeshment to create “horizontal” checks on power by bolstering government agencies that can balance the executive and other major power centers, such as independent courts and corruption commissions. They should use bottom-up aid and technical assistance to build “vertical” checks on power by helping citizens organize into authoritative, lasting coalitions—such as business groups, religious organizations, or advocacy NGOs—that keep the government and other influential forces in check.

Simply supporting NGOs does not create a robust civil society that can deter overweening power. Many NGOs are elite, based in capital cities, and unable to broadly mobilize society. Effective bottom-up strategies may require elite groups with specific expertise needed to alter government institutions, but they must also mobilize citizens where they are already gathered and where power resides. To understand another society at that level of detail, this work is

most effectively done by third-party organizations with a more local presence, such as the Asia Foundation or Open Society Institute, with support from external governments.

Use enmeshment in international institutions to pursue governance reforms.

When reformers have the chance to get rule-of-law criteria into an international membership process, from entering NATO to the World Trade Organization, they should use it. Leverage comes during the phase in which countries are working to join the club—once they join, leverage dissipates.

Treat exchange programs strategically.

Exchange programs target individuals and may affect individual hearts and minds. But they do not create structural change because individuals return to agency structures inimical to reform and are rarely able to change whole systems. Moreover, because the choice of attendees is often left to local governments that use the opportunity to reward cronies, these programs can send the opposite message rule-of-law reforms are trying to convey.

Making these relationship-building tools more effective would require changes in how they are administered. The host government could choose attendees to make the program serve as a reward to bequeath status on reformers or as a tool to neutralize opponents. Instead of selecting individuals, exchanges could bring together carefully selected groups of reformers that can return home en masse and create structural change. These programs could also be more useful if subsequent alumni activities built upon the initial immersion and continued to assist alumni in pursuing reform.

Streamline agencies to work together more effectively and coordinate work across the different elements of the legal system in reforming countries. If police arrest criminals but corrupt courts release them, the rule of law fails. The same is true if police cannot make arrests because of outdated laws or if laws, courts, and police function but jails serve as breeding grounds for gangs. However, in many governments and international agencies, work on police, courts, prisons, and other rule-of-law elements is siloed.

Governments and international organizations must either partner across agencies and organizations to approach reform holistically or streamline agencies. For instance, the World Bank does not engage in police reform—but if it wished to bolster the rule of law in a country, it could look for a partner who could undertake law-enforcement efforts. Meanwhile, the U.S. Congress has placed significant strictures on military training of police and has largely prevented USAID from training police, which has led to a proliferation of agencies that each have a piece of the rule-of-law puzzle but often work together poorly. Streamlining could improve impact. It would need to be accompanied by placing long-term rule-of-law improvements, often championed by USAID, ahead of short-term purported political needs that top diplomats or Pentagon officials prize.

Donor agencies and appropriators, from the World Bank to the U.S. Congress, should enable more flexible budgets, authorities, and program structures to make use of windows of opportunity. Reform is fundamentally political, so sudden events—the death of a beloved reformer, a major corruption scandal, an election—can open up windows for real change. When a

new government that has run on a clean-government platform wins, for instance, there is a moment for reform to occur.

International actors often promise support for such governments. However, a program in which money starts flowing two years into a new government's four-year term in office has sacrificed momentum and possibly the careers of some local reformers who may be blamed when international support does not arrive. Meanwhile, the spoilers who were against reform appear to be “proven” right, and cynicism sets in among the citizenry.

For reformers to make use of windows of opportunity, donor agencies must enable multiyear budgets and reduce earmarking and overplanning from headquarters. Governance reformers at USAID, for instance, waste countless hours trying to use funds for programs that are classified as “operating expenses”—a distinction that makes sense for a program distributing malaria nets but less sense when the program officers' time and technical assistance constitute one of the bigger “program” expenses.

To ensure accountability, countries and organizations offering aid can require highly detailed budget reporting after funds are spent, rather than beforehand, and engage in more rigorous measurement that looks at impact and outcome—not meaningless outputs.

RECOMMENDATIONS FOR PRACTITIONERS AND PROGRAM DESIGNERS

Start with a problem as defined by locals. To build a constituency for reform, practitioners should start with a goal that a significant number of local citizens see as a problem, not with a standard set of reforms used in other countries or a goal that only concerns legal professionals. Only by engaging on an issue that intensely bothers many

people will reformers be able to organize groups that can act as the base for political pressure.

Look for stakeholders to support efforts.

Every rule-of-law reform must have local reformers behind it who benefit from the changes and are willing to press the cause. This reality makes bottom-up reform particularly effective, since it incorporates local actors who will remain after donors leave.

Treat legal and institutional reform as tools to change power structures and culture, not as ends in themselves.

Institutional reforms can also be effectively used to affect power and culture and to build stakeholders for reform—if they are targeted with that goal in mind. For instance, providing computers to chief justices often results in unused computers gathering dust, serving as symbols of status rather than implements of work. However, offering computers to chief justices if they create an empowered, funded independent body to reduce court corruption uses institutional reform to check a source of impunity. Instead of giving study trips to the West to meet a quota, they can be distributed as perks for reformers to encourage others to follow their path, thereby creating incentives for those who want to go shopping in Europe or the United States to not obstruct reform.

Build both professional and popular culture that supports the rule of law.

While it has long been taboo to discuss altering culture, program designers and practitioners should look for the many legitimate means to do so, such as through schools that train police, lawyers, and magistrates to uphold codes of professional ethics; efforts to build rule-of-law curricula

for schoolchildren; and initiatives that encourage popular media to contribute to establishing norms around lawful activity. Using honor and shame to change behavior is also a proven way to alter culture.

Because culture is so nuanced and campaigns can backfire, outsiders are most likely to have success working through locals who understand the situation on the ground rather than imposing their own ideas.

Measure success the way a local would.

International actors have poured billions of dollars into the rule-of-law field with little attempt to measure whether their programs have had an impact. This is a waste of funds; success should be measured and rigorously tested.

Metrics, however, must be chosen correctly. Reform efforts should be judged not by the outputs of programs but by whether they actually change life on the ground for the people of the country. Locals would not base their judgment of progress on the number of police graduates or whether a transparency law changed. Rather, they would consider whether they felt safe walking alone at night, whether they would spend the time and money to take a case to court and expect justice, or whether high-profile cases of malfeasance were decided in favor of the less powerful party. Those are the types of impact metrics outside actors should use as well.

Reform metrics often have time lags, and local advocacy and cultural change can be quite slow, with punctuated windows of change. Moreover, reforms can yield tricks in the numbers: if more people believe that the police are honest and competent, they will report more crime, and crime statistics will rise for a period before declining. Measurements should take these realities into consideration.

The Carnegie Endowment for International Peace is a unique global network of policy research centers in Russia, China, Europe, the Middle East, and the United States. Our mission, dating back more than a century, is to advance the cause of peace through analysis and development of fresh policy ideas and direct engagement and collaboration with decisionmakers in government, business, and civil society. Working together, our centers bring the inestimable benefit of multiple national viewpoints to bilateral, regional, and global issues.

© 2013 Carnegie Endowment for International Peace. All rights reserved.

Carnegie does not take institutional positions on public policy issues; the views represented herein are the author's own and do not necessarily reflect the views of Carnegie, its staff, or its trustees.

No part of this publication may be reproduced or transmitted in any form or by any means without permission in writing from the Carnegie Endowment.

Please direct inquiries to:
Carnegie Endowment for
International Peace
Publications Department
1779 Massachusetts Avenue NW
Washington, DC 20036
P: +1 202 483 7600
F: +1 202 483 1840

CarnegieEndowment.org



@CarnegieEndow



facebook.com/
CarnegieEndowment

Aid agencies should add more anthropologists and sociologists to the field, alongside lawyers and judges. Legal professionals have essential credibility within their professions—but the rule-of-law field is about far more than legal reform. Legal professionals must be complemented by those from other disciplines more attuned to power dynamics and social structures.

THINK LIKE ADVOCATES

Successful rule-of-law reform requires reformers to think less like development professionals with technical expertise and

more like advocacy organizations mobilizing reformers and finding pressure points to change the policy, politics, or culture of countries. Outside agencies must be politically savvy, using the tools at their disposal in tandem and with creativity to assist internal groups with the ability and insight to work for reform.

Doing this successfully will require significant changes to how international actors structure their work. The difficulty of making such alterations at home should remind rule-of-law proponents of the immense task other nations face in improving their societies. **■**