

THE RULE-OF-LAW FAÇADE

A playbook for regimes

By Alfredo Romero¹

Introduction

The governments of Venezuela, Ethiopia, Egypt, Saudi Arabia or Azerbaijan—among others—have developed a “playbook”² or a game plan for surreptitiously obstructing formal democratic institutions and repurposing them for political persecution and imprisonment. These regimes use the national criminal justice system for systematically violating the civil, political, and human rights of individuals for unfair political reasons.

These regimes keep up a careful façade: their leaders systematically imprison and persecute their political opponents or whoever they consider as politically inconvenient, while making sweeping claims that their actions uphold the “rule of law.” Tactics employed by the governments include fabricated criminal charges, threats against noncompliant judges and prosecutors, concealment and invalidation of exculpatory defense evidence, gross due process violations, illegal seizure of assets, demonization in the media, and years of illegal incarceration under inhumane and unconstitutional conditions.

Notwithstanding that purely authoritarian regimes (eg. Cuba or North Korea) may use their own rule-of-law-façade, this paper focuses on competitive authoritarian regimes, as defined by Steven

¹ Fellow at the Carr Center for Human Rights Policy, Harvard Kennedy School of Government, Harvard University. Law Professor of Universidad Central de Venezuela, Law School. Executive Director of the NGO Foro Penal Venezolano.

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² A playbook is a notebook used in sports, like football, which contains a game plan or a diagram with a range of possible set of plays and tactics for a team.

Levitsky and Lucan Way.³ In these countries, there is real electoral competition, but the deck is stacked heavily in favor of those already in power.⁴ These are states with civilian regimes where democratic institutions remain the primary means of gaining power, but where systemic fraud, civil liberties violations, and abuse of state and media resources create a powerful non-democratic apparatus for political control. Levitsky and Way consider these regimes *competitive* because there are opposition parties that use formal democratic institutions to get a foothold, but ultimately deem them *authoritarian* as because a highly uneven and dangerous political arena suppresses opposition forces.⁵

The purpose of this paper is to reveal the “rule-of-law façade” that some regimes around the world have set up, and examine a game plan or a *defensive playbook* they employ to maintain their power and crush the opposition. To this end it discusses the broader context in which a *defensive playbook* unfolds when the offensive set of tactics for maintaining power by using democratic institutions as mentioned above, have failed. That is when a comprehensive system of repression come into play, involving each branch of the state in order to regain the regime’s offensive position (as in a football game).

To identify and explicate the typical schemes and tactics employed, I analyze the case of Venezuela, where the regime have systematically adopted formal elements of the rule of law in order to construct a façade or mask which hides behind an oppressive and authoritarian system. I then draw parallels between the establishment of Venezuela’s system of repression and that of other countries, and discuss the implications of this system. Later on, I propose an agenda for international comparative research, as well as a set of actions or alternatives for those fighting for

³ Steven Levitsky and Lucan A. Way, Chapters 1 and 2, “Competitive Authoritarianism: The Origins and Dynamics of Hybrid Regimes in the Post-Cold War Era,” in *Competitive Authoritarianism: Hybrid Regimes after the Cold War*, Cambridge University Press, August 2010. These countries include Venezuela and Ethiopia, among many others listed in their work.

⁴ A parallel concept to competitive authoritarianism is illiberal democracy. In both cases, some elements of the rule of law or democracy, such as elections, are present, but those elements are insufficient for true rule of law or democracy. Fareed Zakaria denotes countries as “illiberal democracies” when democratically elected regimes “ignor[e] constitutional limits on their power and depriv[e] their citizens of basic rights and freedoms.” Fareed Zakaria, “The Rise of Illiberal Democracy,” *Foreign Affairs*, November/December 1997, available at <https://www.foreignaffairs.com/articles/1997-11-01/rise-illiberal-democracy>.

⁵ Levitsky and Way, note 3 *supra*.

the release of political prisoners, based on a hypothetical costs and benefits analysis for having political prisoners made by regimes.

The rule of law and the rule-of-law façade

In April 2014, Marcelo Crovato, a Venezuelan human rights attorney and volunteer with Foro Penal Venezolano,⁶ was arrested in Caracas while at the home of his neighbors and clients Ignacio Porras and Marlyn Márquez. The police had a search warrant for their home because of their supposed participation in demonstrations against the government.⁷ The police had no mandate or prior authorization to arrest Mr. Crovato. However, the prosecutor in charge, Ms. Francy Ávila, ordered his detention by telephone when she learned he was present during the house search. Mr. Crovato was placed in custody, arraigned two days later, and subjected to preventive detention in Yare III, an overcrowded prison. In December 2014, he attempted to commit suicide in his cell. After 10 months of incarceration, he was placed under house arrest due to serious physical and psychological ailments. To date, almost two years after his initial arrest, Mr. Crovato remains under house arrest, without a trial.⁸

Other similar examples in other countries are those of human rights lawyer Intigam Aliyev, jailed in Azerbaijan in 2014, sentenced to seven years and six months in prison⁹ or Ethiopian Judge Birtukan Mideksa¹⁰, arrested in 2005 to life in prison, pardoned in 2007, and re-arrested in 2008 until October 2010.¹¹

⁶ The Foro Penal Venezolano (Venezuelan Penal Forum) is an NGO which has worked defending human rights since 2002, offering free assistance to victims of arbitrary detentions, torture and cruel, inhuman and degrading treatment. The Venezuelan Penal Forum currently has 200 volunteer lawyers, regional offices throughout the country and more than 1,500 volunteer activists who provide assistance and free legal support to victims.

⁷ They were indicted for road safety assault, incitement to disobey laws, public intimidation, and conspiracy.

⁸ See Amnesty International “urgent action” in favor of Marcelo Crovato at <http://amnesty-chile.de/Venezuela/Marcelo%20Crovato.%20Hoja%20de%20cas.%20FINAL.%20EN.pdf>

⁹ See Human Rights Watch report on Intigam Aliyev at <https://www.hrw.org/news/2015/04/22/azerbaijan-human-rights-lawyer-convicted>

¹⁰ Xan Rice, “Jailed but not Forgotten: Birtukan Mideksa, Ethiopia’s Most Famous Prisoner,” *The Guardian*, January 9, 2010, <http://www.theguardian.com/world/2010/jan/09/jailed-birtukan-mideksa-ethiopia-prisoner>.

¹¹ Birtukan Mideksa, “Prisoners of Conscience in Ethiopia,” *AlJazeera*, March 30, 2013, <http://www.aljazeera.com/indepth/opinion/2013/03/2013318943162458.html>.

As Gerald Hauser notes, incarcerating or otherwise excluding dissidents from society benefits regimes by silencing and removing them from the public consciousness.¹² Naturally, leaders deny the political nature of these actions and insist they are following the principles of the rule of law (clear, written, ex ante laws; accessible process for the enactment of the law; and due process rights) even as they hold themselves and their supporters above the laws to which they claim allegiance. As William Dobson notes in *The Dictator's Learning Curve*, modern (quasi) authoritarian leaders and regimes clothe their power and abuse in the language of democracy, good governance, and the rule of law.¹³

In June 2010, Venezuela's President Chavez was asked about an infamous sentence in an interview for BBC's "Hardtalk." He was asked how strong Venezuela's commitment to judicial independence and democracy could be, given the arrest and incarceration of Judge Afiuni for making a law-abiding decision contrary to the executive branch's wishes. (Judge María Afiuni had been held without trial for almost three years, and was raped and tortured in prison after granting the conditional release of Eligio Cedeño, a businessman and banker with ties to the Venezuelan opposition.¹⁴) Chávez's response was to frame the case as one of judicial autonomy: not even a judge is above the law, he argued, and an independent judge had judicially sentenced the former judge. However, in truth, Afiuni had been in jail for two years without a sentence.¹⁵

The rule-of-law façade allows Chavez to claim that the judiciary exercises autonomous power even as the facts of Afiuni's case seem to demonstrate exactly how the regime *does* exercise

¹² Gerald A. Hauser, *Prisoners of Conscience: Moral Vernaculars of Political Agency*, Columbia, South Carolina: University of South Carolina Press, 2012, p. 5.

¹³ William J. Dobson, *The Dictator's Learning Curve: Inside the Global Battle for Democracy*, Random House, Inc: New York, 2012.

¹⁴ El Hadji Malick Sow, "Report of the Working Group on Arbitrary Detention," United Nations General Assembly Human Rights Council, Sixteenth Session, Agenda item 3, January 19, 2011, p. 12, ("According to information received, Judge María Lourdes Afiuni was promptly arrested on 10 December 2009 by police intelligence officers after having ordered the conditional release pending trial of Mr. Cedeño. Mr. Cedeño's counsel team had submitted to Judge Afiuni during the trial the Working Group's Opinion No. 10/2009 (Venezuela) on Cedeño, which declared his detention to be arbitrary. (A/HRC/13/30/Add.1, p. 325). . . . The Working Group is very concerned that the use of its Opinion on Mr. Cedeño and the subsequent conditional release of this person has been the reason for reprisal against Judge Afiuni."), available at <https://www1.umn.edu/humanrts/wgad/2011report.pdf>.

¹⁵ Hugo Chavez Interview, *BBC HARDtalk*, min. 4:04, available at <https://www.youtube.com/watch?v=o9TVE117HcI>

control over the judiciary. This rhetoric protects Chavez and others in Ethiopia, Egypt or Azerbaijan against the international denunciation of human rights defenders, democratic governments, and critical journalists. As a result, they enjoy international immunity and avoid sanctions, actions, or reactions from persons, governments, or other institutions that are supposedly committed to the rule of law and human rights. Yet precisely because of the official denial, it is vitally important to pull back the curtain and reveal how these regimes use the rule of law as a means to commit human right abuses.

Globalization has allowed these regimes to deflect criticisms by acting smart and supported by informal coalitions of authoritarian regimes.¹⁶ They have “hijacked” *soft power* techniques¹⁷ to attract international allies, foreign aid and investment, media and social media attention and support, and even to secure seats for their authoritarian allies in human rights entities such as the UN Human Rights Council. This “antidemocratic toolkit” used by authoritarian regimes, states Christopher Walker, includes “government-organized nongovernmental organizations (GONGOs)” and “zombie election monitoring” to manipulate the election process with refined techniques, through state-controlled media that appeared to be private and independent like democratic countries, and fake institutions which serve as a democratic façade for an antidemocratic system of repression.¹⁸

Before delving into the nuances of the “rule-of-law façade,” it is important to understand what the term “rule of law” actually describes. Many definitions focus on formal or procedural aspects of the justice system, such as the presence of stable, clear, and publicized laws and reliable processes for their enactment and enforcement.¹⁹ For example, Guillermo O’Donnell considers

¹⁶ China, Russia and Iran have internationalized their authoritarianism by providing financial aid and investment into the developing world, including Venezuela, Cuba, Nicaragua and Bolivia, Argentina. Venezuela has also done the same by subsidizing oil supply to the Caribbean and other Latin American countries, which have reimbursed its favor by silencing human rights abuses and providing international diplomatic support. These authoritarian regimes have been effective in controlling international media (Chinese CCTV, Russian RT, Iran’s Press TV, Venezuelan’s TELESUR) and creating international coalitions of governments who support each other. See Christopher Walker. “The Authoritarian Threat: The Hijacking of ‘Soft Power’”, *Journal of Democracy*, Volume 27, Number 1, January 2016, pp. 60-62

¹⁷Nye, Joseph S. Jr. *Soft Power: The Means to Success in World Politics*. New York: Public Affairs.

¹⁸ Walker, note 16, supra, at. 50-51, 56.

¹⁹ “What is the Rule of Law?” World Justice Project, available at worldjusticeproject.org/what-rule-law.

that, at a minimum, the rule of law means that laws are not only written and made public, but also “fairly applied.”²⁰ Gretchen Helmke and Frances Rosenbluth add to the common definition that the rule of law must not be arbitrary. The authors refer to the difference between “rule by law” and “rule of law.” To “rule by law,” means making law the façade for the few to control the many, or to preserve majority rights at the expense of minorities, even when competitive elections have clarified a majority will.²¹

O’Donell broadens the definition to describe a “democratic rule of law” or “estado de derecho.” The concept of *estado de derecho* includes the whole democratic state system, not just the institutions and the *corpus juris*, but a substantive democratic state. As O’Donell affirms, authentic rule of law entails the existence of a legal system that is itself democratic, in three senses:

- 1) It upholds the political rights, freedoms, and guarantees of a democratic regime;
- 2) it upholds the civil rights of the whole population; and
- 3) it establishes networks of responsibility and accountability which entail that all public and private agents, including the highest state officials, are subject to appropriate, legally established controls on the lawfulness of their acts.

As long as it fulfills these three conditions, such a state is not just a state ruled by law or a state that enacts the rule of law; it is a state that enacts a democratic rule of law, or an “estado democrático de derecho.”²²

²⁰ By “fairly applied”, O’Donell means that “the administrative application or judicial adjudication of legal rules is consistent across equivalent cases; is made without taking into consideration the class, status, or relative amounts of power held by the parties in such cases; and applies procedures that are pre-established, knowable, and allow a fair chance for the views and interests at stake in each case to be properly voiced”.

See Guillermo O’Donell. “Why Rule of Law matters”, *Journal of Democracy*, Volume 5, Number 4, Oct. 2004, p. 33.

²¹ Gretchen Helmke and Frances Rosenbluth, “Regimes and the Rule of Law: Judicial Independence in Comparative Perspective”, *The Annual Review of Political Science*, Vol. 12, 2009, pp. 347-48.

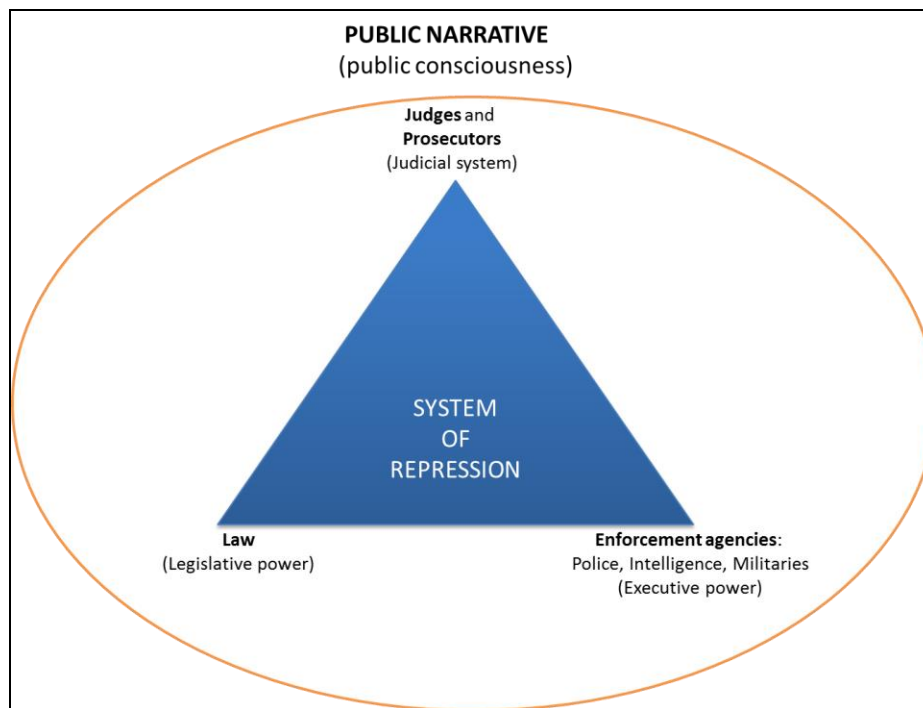
²² *Idem*, p. 36

Judicial independence is a necessary but not sufficient condition for the rule of law.²³ Theorists who employ a formal, procedural definition of the rule of law tend to forget that judicial independence is a means to an end—not an end in itself. The judiciary’s purpose in a democracy is, amongst other purposes, to uphold the democratic principle of protecting the minority against the majority; it must hold the majority leaders in power accountable if they suppress any given minority (including political opponents or dissidents).

It is important to note that in regimes that rely on a rule-of-law façade, systematic violations of individuals’ rights do not occur extra-legally. These regimes utilize formal, legal channels for law making, law enforcement, and legal interpretation and judgments. The institutions and principles that should protect the less powerful against the majority rulers in power exist, but are abused for the purpose of repression. These institutions and principles are subordinate to a bigger system of repression that stretches across all branches of government and is justified by a propaganda machine that permits the construction and maintenance of the system. The diagram bellows illustrates this system:

Figure 1.

²³ The authors argue that true rule of law can only exist in a democracy. As Helmke and Rosenbluth state, “although there may be situations in which authoritarian leaders use laws to govern, which we might term “rule by law” (or “rule of will”), in no case is “rule of law,” which entails nonarbitrariness, fully achieved” outside of a democratic state with an independent judiciary. Helmke and Rosenbluth, note 21 *supra*, at 348.



The repression that I refer to using Goldstein’s wording, consists in physical actions executed within a state territory against individuals or entities in order to eliminate activities, beliefs, and persons who represent a threat to the government.²⁴ Christian Davenport recalls that Weber included among the range of tools available for repression “coercion, normative persuasion, material or symbolic benefits, [and] neglect.

Finally, regimes using the rule-of-law façade differ from regimes that leave the judiciary untouched, tolerating it as long as it does not challenge the executive’s views.²⁵ In such situations, judges do not face direct coercion or interference from the government or the private sector²⁶, and/or improper influence from other institutions.²⁷ The playbook for the rule-of-law

²⁴ Robert J. Goldstein, *Political Repression in Modern America from 1870 to the Present*, Chicago: University of Illinois Press, 1978, p. xxvii, cited in Christian Davenport, “State Repression and Political Order,” *Annual Review of Political Science*, Vol. 10, 2007, p. 2.

²⁵ Helmke and Rosenbluth, note 21 *supra*, at 356.

²⁶ Keith S. Rosenn, “The Protection of Judicial Independence in Latin America,” *University of Miami Inter-American Law Review*, Vol. 19: 3-35, 1987, p. 7 cited in Linda Camp Keith, *Political Repression: Courts and the Law*, Philadelphia: University of Pennsylvania Press, 2012, pp. 118-19.

façade, however *actively* controls the judiciary. The following case study of Venezuela illustrates how this is done.

The Venezuelan regime playbook

Hugo Chávez was elected President of Venezuela in 1998. His rhetoric appealed to the poor and traditionally disenfranchised and spoke in revolutionary terms. In 1999, the country's name was changed to the Bolivarian Republic of Venezuela, after Simón Bolívar, and Venezuela ratified a new constitution under Chávez's direction.²⁸

The constitution appeared to guarantee the judicial branch's insulation from politics.²⁹ The Supreme Tribunal of Justice has the power to select judges and is protected from legislative interference through a ban on magistrates' removal without two-thirds of the National Assembly's support.³⁰ The constitution also states that judges may only be removed by established and public procedures.

However, the constitution did not and does not in fact govern judicial practice for two reasons. First, the majority of judicial appointments have been and continue to be only provisional. The constitutional protections and requirements do not apply. In 2014, the International Commission of Jurists (ICJ) estimated that 66 percent of Venezuelan judges were provisional³¹ and only approximately 20 percent were incumbent.³² According to Foro Penal, some criminal court

²⁷ John Ferejohn, Frances Rosenbluth, and Charles Shipan, "Comparative Judicial Politics," 2004, available at , <http://leitner.yale.edu/sites/default/files/files/resources/docs/comparativejudicialpolitics.pdf>, p. 3 *cited in* Linda Camp Keith, *Political Repression: Courts and the Law*, Philadelphia: University of Pennsylvania Press, 2012, p. 119.

²⁸ Lauren Castaldi, "Judicial Independence Threatened in Venezuela: The Removal of Venezuelan Judges and the Complications of Rule of Law Reform," *Georgetown Journal of International Law*, Spring 2006, Vol. 37, 479.

²⁹ *Id.* at 493.

³⁰ *Id.* at 494.

³¹ Alexander Salinas-Rivera, "Venezuela: The Sunset of Rule of Law: ICJ Mission Report 2015," International Commission of Jurists, p. 9.. *See also* "Final Observations in the Fourth Periodic Report on the Bolivarian Republic of Venezuela, United Nations Human Rights Committee, July 2015, ¶ 15.

³² "Informe Alternativo Conjunto del Instituto de Derechos Humanos de la International Bar Association, la Unión Internacional de Magistrados, Grupo Ibero-Americano y la Comisión Internacional de Juristas: Examen del Cuarto

judges are sons, daughters, in-laws, and other relatives of high-level government officials. Similarly, more than 90 percent of prosecutors were provisional.

Second, the Constituent Assembly decreed a judicial emergency in 1999 and established, without external mandate or authorization, the Emergency Judicial Commission³³ with the authority to suspend judges and nullify their appointments arbitrarily.³⁴ The Commission allowed the government to manipulate the judiciary while trumpeting its independence. In effect, the judicial emergency decree “created a parallel set of laws that apply to judges without any of the due process safeguards provided for in the constitution.”³⁵

The Venezuelan regime conducted four tactics for securing political control by dominating the judicial system and crushing opponents and dissidents hiding the state repression behind the rule of law facade:

1. The Constituent Assembly

Chavez, who had attempted a failed coup d’etat in 1992 and spent two years in prison, had learned his lesson. In the name of Chávez’s “Bolivarian Revolution,” which promised to fight corruption and lift up the 80 percent of Venezuelans in poverty, a Constituent Assembly was selected to draft the new constitution, and the electorate approved it by referendum the same year.³⁶

Informe Periódico de la República Bolivariana de Venezuela Presentado al Comité de Derechos Humanos,” June 29-July 24, 2015, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/06/Venezuela-ICJ-IBAHRI-IAJ-Informe-Alternativo-Advocacy-legal-submission-2015-SPA.pdf>, pp. 3-4.

³³ Castaldi, pp. 494-95; *see also* “Report on the Situation of Human Rights in Venezuela,” Inter-American Commission on Human Rights, OEA/Ser.L/V/II.118, December 29, 2003, ¶ 164, accessed November 15, 2015, available at <http://www.cidh.org/countryrep/Venezuela2003eng/chapter1.htm>; Decree of Judicial Emergency in *Gaceta Oficial* No. 36.772, August 25, 1999 and *Gaceta Oficial* No. 36.782, September 9, 1999.

³⁴ Castaldi, note 53 *supra*, at 495-97.

³⁵ *Id.* at 499.

³⁶ Castaldi, note 28, *supra*, at 492.

The Constituent Assembly appeared legitimate but was, in effect, a “political instrument.”³⁷ It was meant to frame a state reform and establish a new legal apparatus. However instead of settling a state supported on the rule of law, it supported a regime ruled by its own built legal framework and a trustworthy collection of prosecutors and judges.³⁸

2. *The Emergency Judicial Commission.*

The Emergency Judicial Commission, established in 1999, dismissed or suspended hundreds of judges on grounds of corruption, claiming a need for deep judicial reform for stronger judicial independence. However, in practice, this “revolutionary” transformation set up a new judiciary to serve the regime’s political purposes.³⁹

3. *The consolidation of a politicized judiciary: The Reichstad fire formula.*

The April 11, 2002 coup d’etat attempt was a powerful justification for Chavez strategy to regain and strengthen political and state control. To understand this best, one has to look back a bit further in world history, when regimes take advantage of an emergency, either provoked or coincidental, as an excuse to twist the law and justify human rights abuses, most of the times in the name of sovereignty and national security. That is what I call the Reichstad fire formula, alluding to the fire and destruction of The Reichstad in Germany in 1933.

On February 28, 1933, “The Reichstad,” a building that housed the German Parliament burned to the ground. The police and government officials asserted that communists were responsible, while rumors circulated in Berlin that the Nazi government ordered secret services to burn the Reichstad. About 4,000 alleged communists were arrested and publicly accused as terrorists.⁴⁰ Whoever set the Reichstag Fire, it served as a perfect justification for Hitler’s expansion of power over Germany and a keystone in the Nazi regime’s own rule-of-law façade. The ensuing “Reichstag Fire Decree” severely restricted personal freedom and freedom of opinion, including

³⁷ Allan R. Brewer-Carias, *Dismantling Democracy in Venezuela: The Chávez Authoritarian Experiment*, New York, NY: Cambridge University Press, 2010, 56.

³⁸ *Idem.*, p.57-58.

³⁹ Castaldi, note 28, *supra*, at. 482, 492.

⁴⁰ The Guardian, March 28, 1933 at <http://www.theguardian.com/world/1933/mar/28/germany.secondworldwar>

the freedom of the press, the freedom to organize and assemble, and the right to private communications. It permitted unrestricted warrants for house searches, orders for confiscations, and restrictions on property rights.⁴¹

In 2002, a mass demonstration in Caracas led to the murder of 19 people and took President Chavez out of power for 48 hours. While the demonstrations were taking place and after his return to power, Chavez fired employees of the state-owned oil company (PDVSA), police agents, and other public officers without due process. Presidential decree restricted freedom to organize and assemble in areas declared as security zones. Political opponents and military officers were incarcerated or forced into exile. Justices whose rulings denied that a coup d'état had occurred were removed. Attempts to assert political influence over the Supreme Tribunal of Justice, the highest Venezuelan court, accelerated.

In 2004, new demonstrations against the government led to 14 deaths and many arrests. Chávez again applied the *Reichstag fire* formula. The National Assembly passed the Law of the Supreme Tribunal of Justice, which increased the number of judges on the court from 20 to 32, lowered the threshold to a simple majority for the National Assembly to name judges, and changed the procedures and grounds for suspending judges.⁴² In 2005, the Inter-American Commission on Human Rights found that judges that did not rule in favor of the government were dismissed with greater frequency than those ruling in favor of the government.⁴³

The addition of 12 new judges created new legal channels for President Chávez and the National Assembly dominated by his supporters to influence the highest court. Every new judge was to be a supporter of President Chavez's movement; after the court's expansion, the prior ruling dismissing charges against those accused of attempting the coup to remove Chávez from office in 2002 was reversed.⁴⁴

⁴¹ See more at: <http://alphahistory.com/nazigermany/the-reichstag-fire/#sthash.CuwHh0Rp.dpuf>

⁴² Castaldi, note 28, *supra*, at 500.

⁴³ *Id.* at 498, citing the Inter-American Commission on Human Rights Report No. 24/05 (2005).

⁴⁴ *Id.* at 500-02.

Prior to the change in the law, only a two-thirds majority vote of the legislature could remove a judge for a breach of duty. After, judges could also be suspended pending a hearing on an alleged breach and could be removed by the invalidation of their original appointment by a simple majority vote of the legislature.⁴⁵ The grounds for such invalidation are vague and arbitrary, such as offending the prestige of the court.⁴⁶ Although only the Chief Judge resigned because of these changes, the National Assembly removed almost all of the remaining judges within a few months.⁴⁷

In the words of the ICJ, these changes to the Supreme Tribunal of Justice produced “a complete permeation of the political lines emanating from the [Tribunal] to the lower courts, directly affecting the autonomy of lower court judges.”⁴⁸ The ICJ found that specific chief superior judges reviewed all court decisions involving political nuances or government interests,⁴⁹ and that judges who failed to follow these implicit rules were subjected to reprisals.⁵⁰

Eladio Aponte is a former president of the Criminal Chamber of the Venezuelan Supreme Court, now living in the US as a political refugee, who spoke out against the prosecution and imprisonment of political opponents.⁵¹ He confirmed that the President’s office routinely attempted to influence his court’s rulings. He claimed that every Friday, he, the General Prosecutor, the Ombudsman, and others met at the Vice President Office to plan strategies in relation to political prisoners.

Not all judges complied, but the repercussions for asserting their independence could be severe. The fate of Judge Maria Lourdes Afiuni provides one infamous example.

⁴⁵ Id. at 503.

⁴⁶ Id. at 504.

⁴⁷ Brewer-Carias, note 37 *supra*, at 59.

⁴⁸ Salinas-Rivera, note 31 *supra*, at 9.

⁴⁹ Id. at 11.

⁵⁰ Id.

⁵¹ See video of Eladio Aponte Aponte interview at <https://www.youtube.com/watch?v=pnDb440q9dE>

3. *The Afiuni's effect*

In 2009, the UN Working Group on Arbitrary Detention (WGAD) took the case of dissident banker Eligio Cedeño, stating that “the proceedings stalled for a long time as a result of inaction on the part of the Prosecutor General's Office, and the Government has failed to justify such delay, in violation of the provisions of article 14 of the International Covenant on Civil and Political Rights.”⁵² WGAD also noted that “the preventive custody has been extremely long, exceeding two years and six months, while the Venezuelan legislation (article 244 of the Code of Criminal Procedure) stipulates granting provisional release two years after the arrest...”. On December 10th, 2010, Judge Afiuni released Eligio Cedeño on bail. She was arrested minutes later.

President Chávez, describing Afiuni as a “bandit,” demanded that she be sentenced to the maximum prison term: 30 years. The WGAD recognized these statements as judicial interference: “the judges who are and will be responsible for trying Judge Afiuni Mora must feel this pressure, which means that the trial will not be conducted by independent or impartial judges.”⁵³

The arrest, imprisonment, and sexual abuse of Judge Afiuni sent a strong message to judges who defied the regime..⁵⁴ Not a judge remained in Venezuela is willing to issue a sentence with even minimal political repercussions without the regime's approval. In practice, judges had to consult all the way up a de facto chain of command to obtain specific instructions from the executive.

⁵² See UNWGAD opinion at [http://www.unwgadatabase.org/un/Document.aspx?id=2380&terms=\(+venezuela+\)](http://www.unwgadatabase.org/un/Document.aspx?id=2380&terms=(+venezuela+))

⁵³ See the opinion of the UN Working Group on Arbitrary Detention at [http://www.unwgadatabase.org/un/Document.aspx?id=2419&terms=\(+venezuela+\)](http://www.unwgadatabase.org/un/Document.aspx?id=2419&terms=(+venezuela+))

⁵⁴ In relation to the Afiuni's case, the UN Working Group on Arbitrary Detention considered that “the function of a judge is one of the noblest manifestations of the human right to freedom of expression and opinion referred to in article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights. The exercise of this freedom is the way in which judges fulfil their responsibilities on behalf of the people; it is therefore all the more imperative to prohibit the harassment of judges because of their decisions. Measures adopted against judges by organs of the State undermine the exercise of this right. Thus the detention of Judge Afiuni Mora is also an example of arbitrary deprivation of liberty under category II of the categories applied by the Group” See [http://www.unwgadatabase.org/un/Document.aspx?id=2419&terms=\(+venezuela+\)](http://www.unwgadatabase.org/un/Document.aspx?id=2419&terms=(+venezuela+))

Judges frequently suspended hearings to await instructions.⁵⁵ As Human Rights Watch Managing Director for the Americas Daniel Wilkinson put it, “There’s no independent judiciary left in the country. Instead, what you have are judges and prosecutors who fear that if they don’t do what the government wants, they’re going to lose their jobs and could even end up behind bars themselves.”⁵⁶

Results

In 2015, the ICJ determined that Venezuela’s judiciary existed to serve the political interests of the government.⁵⁷ According to the ICJ, between 2005 and 2013, 99 percent of petitions made by public entities were accepted, while 98 percent of individual or private entities requesting hearings for official mistreatment were denied.⁵⁸ The independence and impartiality of the judiciary were seriously undermined.⁵⁹ The World Justice Project’s Rule of Law Index ranked Venezuela 102nd out of the 102 countries it examined in 2015.⁶⁰ According to the Inter-American Commission on Human Rights, the lack of judicial independence and the use of the courts to persecute human rights defenders, demonstrators, political opponents has cracked the foundation of Venezuela’s democracy.⁶¹

By controlling the judiciary, and hiding state repression behind the rule-of-law façade, the Venezuelan regime possesses an effective tool to tackle domestic opponents when they manage ways to gain some power in this “competitive authoritarianism” political game. Figure 2 below compares this situation to an American football playbook. Judges and prosecutors identified with

⁵⁵ Taken from testimonies of criminal lawyers and human rights defenders: Gonzalo Himiob Santomé, Alonso Medina and Fernando Ovalles.

⁵⁶ John Otis, “Winning Big, Venezuela’s Opposition Now Plans Push for Prisoner Release,” *National Public Radio*, December 12, 2015, available at <http://www.npr.org/sections/parallels/2015/12/12/459054144/winning-big-venezuelas-opposition-now-plans-push-for-prisoner-release>.

⁵⁷ Salinas-Rivera, note 31 supra, at 11.

⁵⁸ *Ibid.*

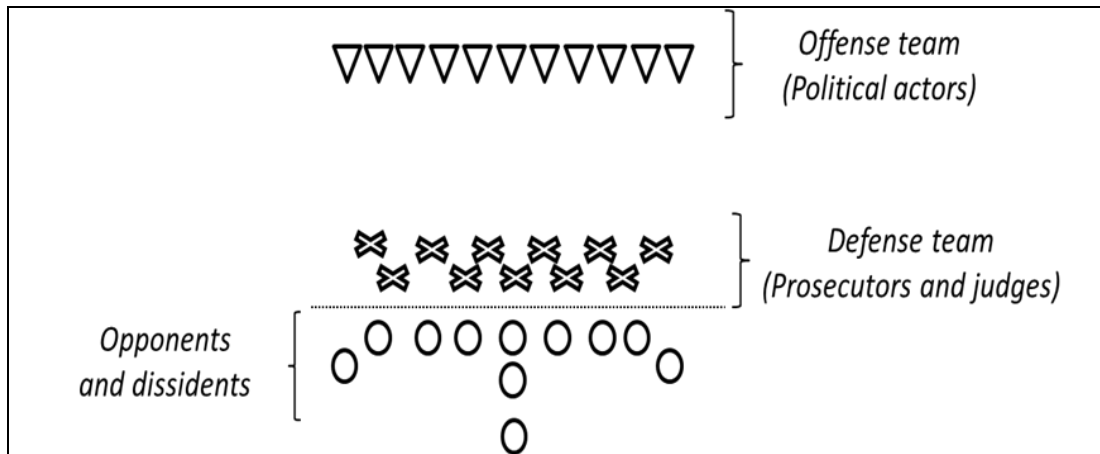
⁵⁹ Salinas-Rivera, note 31, at 5.

⁶⁰ *Ibid.* at 5 n.2.

⁶¹ “Annual Report 2014: Chapter IV: Venezuela,” Inter-American Commission on Human Rights, ¶ 328, available at <http://www.oas.org/en/iachr/docs/annual/2014/docs-en/Annual2014-chap4Venezuela.pdf>.

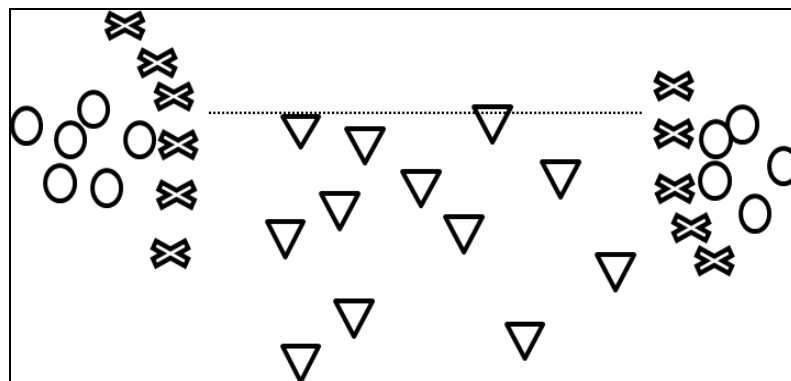
an “X” and referred to as the defense team stand at the defense line when the regime’s offense team (political actors), identified with triangles, has lost power and remain out of the field.

Figure 2. Regime’s defensive playbook



As it shown in figure 3, by detaining and incarcerating dissidents (identified with circles), the regime’s defense team (judges and prosecutors) remove them from the field, allowing the regime’s team of political actors to re-enter the game, regain political space and keep in power.

Figure 3. Regime’s offensive playbook



In the case of the defensive playbook, the referees are the justices of the Supreme Tribunal of Justice. When it refers to the offensive playbook the referee is the National Electorate Commission (Consejo Nacional Electoral).

Today, the political influence over the judiciary and public officers is explicit and normalized. High public officials, including the President, use state-owned or controlled media to publicly accuse and condemn dissidents even before a criminal investigation or prosecution initiated. This allows the state to instruct officials, judges, and prosecutors and to intimidate those who dare to defy the government.⁶² The former President of the National Assembly and government party (PSUV) leader Diosdado Cabello, hosts a weekly television show, “Con el Mazo Dando,” (“Hitting with a Hammer”) through which he makes criminal allegations against dissidents and human rights defenders and effectively instructs officials to file charges.⁶³ “Con el Mazo Dando” is just the latest in a line of similar programs dedicated to propaganda, intimidation, and stigmatization including Chávez’s own “Aló, Presidente.”⁶⁴

The extreme efficiency and regularity with which the judiciary prosecutes and convicts political opponents or dissidents is juxtaposed with its complete incompetence and ineffectiveness in matters of crime and public security. The public lacks trust in judicial and police authorities and perceives their inability to improve security and control crime efficiently.⁶⁵

⁶² Few hours after the mayor of Caracas, Antonio Ledezma, was arrested by the secret police, Intelligence Bolivarian Service (SEBIN), president Nicolas Maduro appeared in TV condemning Ledezma for conspiracy and terrorism, even before the General Prosecutor office made any accusation or a trial was initiated. Guptafeb, G. (2015, feb. 20) Mayor’s Arrest on Sedition Charges Deepens Sense of Crisis in Venezuela. *The New York Times*. http://www.nytimes.com/2015/02/21/world/americas/caracas-mayor-antonio-ledezma-arrested.html?_r=0

⁶³ Salinas-Rivera, note 31 *supra*, at 12.

⁶⁴ Antonio Canova González, “Propaganda y Neolengua Política en Venezuela (1999-2014): Un instrumento eficaz para dividir, glorificar, engañar y confundir,” in Antonio Canova González et al., *La Neolengua del Poder en Venezuela: Dominación política y destrucción de la democracia*, Editorial Galipán, S.A., 2015, p. 37.

⁶⁵ Id. at 16, citing the Venezuelan Violence Observatory 2014 report.

Since 2009, the WGAD has adopted 17 opinions concerning 356 persons arbitrarily detained in Venezuela, and 328 occurred in 2014.⁶⁶ Foro Penal Venezolano have registered 3,784 political detainees since January 2014 until April 2016.

Conclusions

Governments that use the rule-of-law façade to routinely violate human, political, and civil rights with the help of law makers, law enforcement, and the judiciary benefit both domestically and internationally. They can continue to exert authoritarian control without interference from the international community. The pretense of respect for the rule of law and core democratic principles reduces international condemnation and hamstring domestic opposition. This phenomenon is not new. As Ingo Muller explains, the Nazi regime employed a similar scheme: the campaign to persecute and deport dissenters and the rationale for committing genocide were enshrined in legislation and carried out not just by the military but by police, lawyers, judges, and even professors of law.⁶⁸

Recommendations

A new substantive definition of rule of law

⁶⁶ “Nueva decisión de la ONU califica como arbitrarias detenciones de ciudadanos por manifestaciones,” Foro Penal Venezolano, October 29, 2015, available at <https://foropenal.com/noticias/nueva-decisi%C3%B3n-de-la-onu-califica-como-arbitrarias-detenciones-de-ciudadanos-por>.

WGAD opinions about Venezuela since 2009: 7/2015 (Rosmit Mantilla), 26/2015 (Gerardo Carrero and other 4), 51/2015 (Vincenzo Scarano Spisso), 51/2014 (Maikel Giovanni Rondón Romero and other 316 personas), 26/2014 (Leopoldo López Mendoza), 29/2014 (Juan Carlos Nieto Quintero), 30/2014 (Daniel Omar Ceballos Morales), 47/2013 (Antonio José Rivero González), 56/2012 (César Daniel Camejo Blanco), 28/2012 (Raul Leonardo Linares Amundaray), 62/2011 (Sabino Romero Izarra), 65/2011 (Hernán José Sifontes Tovar, Ernesto Enrique Rangel Aguilera y Juan Carlos Carvallo Villegas), 27/2011 (Marcos Michel SiervoSabarsky), 28/2011 (Miguel Eduardo Osío Zamora), 31/2010 (Santiago Giraldo and others); 10/2009 (Eligio Cedeño)

⁶⁸ David Matas “The Law as an Accelerator of Genocide”, *The Holocaust and the United Nations Outreach Programme, Discussion Papers Journal*, Volume II, United Nations, 2013, p. 39.

<<http://www.un.org/en/holocaustremembrance/docs/pdf/dpj_II.pdf>>

Current definitions of the rule of law tend to focus on formal or procedural aspects. These are indeed important aspects.⁶⁹ Yet, the case study shows how regimes can uphold those formal and procedural principles while committing human rights abuses. To prevent these abuses, it is incumbent upon the international community to promote a more substantive definition of the rule of law, including substantive outcomes. The definition must emphasize political and civil rights, connect the rule of law to the functioning of democracy, and promote social justice.⁷⁰

The idea that we need a definition of rule of law that emphasizes or abides by the democratic principle of protecting the minority against the majority is not new: the Inter American Democratic Charter of the Organization of American States establishes in its Article 3 that a representative democracy includes essential elements such as respect for human rights and fundamental freedoms, and the access to and the exercise of power “in accordance with the rule of law.”⁷¹

International comparative research

Venezuela’s actions are just one example of the rule-of-law façade. The playbook the Venezuelan regime uses is not unique, but anecdotal evidence of similarities is not the same as systematic comparative research. More regimes can and should be scrutinized on why and how they employ the rule-of-law façade. It is noteworthy that countries as diverse as Ethiopia, Russia, Saudi Arabia and Venezuela violate human rights systematically and imprison political opponents, but still sit on the UN’s Human Rights Council⁷²

A complete playbook of tactics

This research can lead to the composition of a more complete playbook of tactics used by non-democratic regimes, in order to provide tools to help human rights defenders, activists and policy

⁶⁹ Thomas Carothers. “The Rule of Law Temptations”, *The fletcher forum of world affairs*, Vol. 33:I, Winter/Spring 2009, pp 51-53.

⁷⁰ *Idem*, pp 53-54.

⁷¹ See at: http://www.oas.org/charter/docs/resolution1_en_p4.htm

⁷² “Current Membership of the Human Rights Council, 1 January – 31 December 2015,” United Nations Human Rights Office of the High Commissioner, available at <http://www.ohchr.org/EN/HRBodies/HRC/Pages/CurrentMembers.aspx>.

makers to acquire an in-depth understanding of these tactics and to build their own playbook for counteracting authoritarian regimes that hide behind the rule-of-law façade and to unmask them.

When the rule-of-law façade falls away, all the grandstanding, arrests, show trials, and endless detainments will be revealed in their ordinary ugliness as intimidation, abuse, and crimes against humanity.