

# Lessons, Challenges, and Puzzles for Building Rule of Law in the Arab World

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**Building rule of law in the Arab world requires both institutional reform and political savvy.** Comparative analysis drawn from the experience of other regions suggests a menu of measures to build accountability, impartiality, and reliability into state institutions. It also helps identify political obstacles to implementing such reform as well as certain remedies to overcome these obstacles. Nevertheless, the political scene in the Arab world presents some distinctive challenges for building rule of law. In this chapter, I distill several of the general lessons suggested by comparative analysis as well as some of the contemporary realities found on the ground in Egypt, Tunisia, and other parts of the Arab world. I highlight a number of the distinctive challenges faced by the region, put forward some observations about the larger questions such as the relationship between rule of law and democratization, and suggest issues worthy of future research in the field.

## **Toolkit for Building Rule of Law: Comparative Lessons**

*Building Rule of Law in the Arab World* has drawn on extraregional experience to assemble a “toolkit” for building four of the institutional pillars of the rule of law: the judiciary, the police, the army, and anticorruption/regulatory agencies.

The judiciary, as Lisa Hilbink explains, contributes to the delivery of rule of law through the provision of impartial and consistent arbitration of conflict as well as impartial and consistent application of the law. To

achieve this objective, the judiciary must be independent from the control of government officials as well as other powerful actors in society. The latter is crucial to guarantee that the law will be respected “by rulers and ruled alike.”

To achieve judicial independence a number of conditions must be met. First and foremost, the judicial corps must not be beholden to the state for its professional well-being. More specifically, issues such as judicial appointment, promotion, tenure, salary, and budget must be beyond the discretion of the executive branch. Ideally, such terms will be anchored in constitutional guarantees and implemented by judicial councils that are separate from the executive. In addition, Hilbink recommends that a variety of measures designed to enhance the “professionalism” of the judicial corps be adopted. These measures include enhanced professional training (through the creation of judicial academies) as well as the provision of respectable judicial salaries. Both will raise the intellectual and professional caliber of individuals entering the judiciary as well as make the judges “less vulnerable to ‘improper influences.’” Although Hilbink argues that a variety of political factors beyond the scope of mere institutional reform are also crucial to ensuring judicial independence (see below), the aforementioned institutional modifications are indispensable conditions for the creation of an independent judiciary. These are lessons drawn from extensive study of a host of late-developing countries and most extensively illustrated by the Chilean case, and they are, no doubt, valid for the Arab world as well.

The police, Querine Hanlon and Diane Davis explain, contributes to the provision of the rule of law through the maintenance of public order—delivered consistently, fairly, predictably, and in accordance with the law. The primary mission of the police must be focused on guaranteeing popular safety, not regime protection. The police must embrace a mission of service to society and abandon fear as a tool of enforcement.

To achieve this objective, the police must embrace “oversight, transparency, and accountability.” Reaching this goal calls for the creation of various auxiliary institutions (e.g., oversight commissions located in parliament as well as in society) in addition to the incentivization of transparent communication between the police and these oversight bodies. New training regimens and recruitment criteria must be embraced to inculcate a new “culture of service,” enhance professionalism, and reinforce respect for human rights. Adequate salaries must be paid to reduce the temptation of corruption. Finally, legal reform is necessary in order to specify limits on the use of force, clarify the public’s right to assembly and free speech, and delineate the regime’s commitment to human rights.

The military, as Zoltan Barany explains, contributes to the delivery of rule of law through the provision of order and public defense in a manner that is depoliticized, accountable before the law, and subject to civilian con-

trol. To achieve the provision of order and public defense the government must establish clear subordination of the military to civilians through a number of institutional measures. As Barany suggests, a clear chain of command must be spelled out with the civilian president designated as commander in chief, and the top-ranking member of the military subordinated to a civilian defense minister. The budget as well as the conduct of the military must be subject to parliamentary (as well as executive) oversight. Members of the military must be depoliticized, meaning that they must relinquish any political role "other than exercising their civic right to vote." In addition, drawing on the experience of a broad array of countries from across the world, Barany recommends a number of auxiliary measures including contraction of the military's role on the domestic front (e.g., it should not be used for crowd control, containing domestic unrest, or developing the national economy), identification of new missions (international peace keeping, humanitarian assistance, and disaster relief abroad), and provision of adequate resources (decent salaries, up-to-date materiel), as well as markers of prestige and respect.

Finally, anticorruption/regulatory agencies, as Michael Johnston, Günter Heidenhof, and Lida Bteddini explain, contribute to building rule of law by ensuring that governments define and implement their policies and regulations in an impartial, rule-bound, and predictable fashion. In addition, these agencies are tasked with preventing government officials from misusing public funds for private ends. To achieve this objective, regulatory agencies such as audit agencies, ombudsmen, and anticorruption commissions must be empowered to monitor government behavior and sanction wrongdoing (O'Donnell, 1999: 28). These powers are the essence of exercising oversight. Measures such as recruiting highly professionalized auditors, providing the agencies with resources "independent and insulated from the executive," and placing opposition party members in leading positions in the regulatory agencies, are just some of the reforms advocated by leading analysts (O'Donnell, 1999: 48). However, Johnston, especially, is skeptical about the effectiveness of institutional reform in rooting out official malfeasance and delivering rule-bound governance. His insistence on a host of auxiliary measures makes salient the need to address the question of the timing and sequencing of different political reforms.

## **Politics**

Given the extensive experience of so many countries with building the rule of law, identifying a menu of advisable institutional reforms turns out to be a relatively straightforward task. However, the process of implementing these reforms proves most challenging. Aside from the high cost of such

reform (which, as Tewfiq Aclimandos points out, is a substantial deterrent for many late-developing countries), the process of implementation is intensely political. Building autonomous judiciaries, accountable and transparent police, militaries subject to civilian control, and regulatory agencies with substantive power to monitor and sanction government officials is a process that “threatens the power and prerogatives” of important individuals and constituencies who have significant incentives to act as spoilers of the reform process, as suggested by Querine Hanlon, but something noted by many of the authors. The challenge is not simply to delineate the technical measures essential to building rule of law but to muster the political will and wherewithal to carry them out. To successfully build the institutional foundations of rule of law, reformers are advised to keep three things in mind.

First and foremost, reformers must pay conscious attention to fostering “buy-in” by potential spoilers within the state institutions. Querine Hanlon, Zoltan Barany, and Tewfiq Aclimandos, among others, suggest a host of strategies. Aclimandos proposes bundling institutional reform together with improvements in salary and working conditions and then presenting the ensemble as a “package deal,” to lure potential spoilers. Barany recommends “diversionary” tactics: for example, providing the military with new missions and professional opportunities (international peacekeeping or disaster relief abroad) to compensate for the elimination of some of its prior prerogatives. Still others focus on a “divide and rule” approach, cultivating insiders who may be more receptive to reform (due to generational differences, training differences, ethnic/sectarian differences) while maneuvering the ouster of others less receptive to change. No matter the diversity of these strategies, the underlying imperative is the same. To build rule of law, the sustained and concerted commitment of crucial stakeholders within these institutions must be cultivated. As Hilbink warns, technical reform of state institutions alone will not deliver rule of law.

Second, and related to the first, harnessing the interest of stakeholders outside the state institutions is also essential to fostering rule of law. This is why so many champions of rule of law stress the importance of civil society’s development—the cultivation and empowerment of locally grounded collectivities in society that will monitor the state’s behavior, expose wrongdoing, and hold the state accountable (Peruzzotti and Smulovitz, 2006; Schedler, 1999: 25). This logic also drives the analysis put forward by Michael Johnston, who argues that harnessing self-interested contention is necessary to build the rule of law. The study of countless cases of anti-corruption campaigns around the world has persuaded him that institutional fixes and formal legal changes alone are ineffective at delivering good governance. More important is what he calls “deep democratization,” that is, the opening up of political space in a safe and secure way so that citizens

may advocate for, and defend, their own interests. The only way to truly ensure the rule of law, Johnston argues, is to give those with a stake in ending official abuse the means to oppose it that cannot be ignored. Or, in other words, to check power with power through political processes of contention. Without such empowerment, he argues, institutional and legal reform packages not only may be ineffective at delivering rule of law but may actually make matters worse.<sup>1</sup> This conclusion raises the question of the logical linkage between democratization and building rule of law; the matter of proper sequencing will be explored below.

Third, the evidence from countless cases around the world suggests the importance of appropriate time horizons. Building rule of law is a long and arduous process that may take many years to bear fruit. Institutional reform that is overly accelerated and comprehensive is likely to antagonize and unify opponents and thereby sabotage the process. Barany's exploration of successful reform of the military in Chile and Indonesia, where subordination to civilian control came in stages (Chile) and where a full frontal attack on the military's economic privileges was postponed (Indonesia), provides compelling support for the wisdom of a gradational approach to reform. The lesson seems to be accept a long time frame, embrace gradualism, and recognize that persistence is the key to success. As Johnston points out, to this day, many advanced industrialized democracies still experience lapses in good governance and rule of law. We must recognize that realization of this objective is a slow and never-completed process.

### **Timing and Sequencing**

The last two observations raise the issue of the optimal timing and sequencing of reforms to the political system. Should activists pursue democratization before they attempt to build rule of law? Or is establishing the institutional foundations of rule of law necessary to, and hence logically prior to, the effective pursuit of democratization? There are at least two good reasons to believe that building the institutional foundations of rule of law ought to come first. First, democracy without rule of law is robbed of much of its meaning. Second, order is to some degree prior to freedom.

With regard to the first, the distinctive quality that defines democracy is its vaunted capacity to make government accountable to the people, the essence of what Guillermo O'Donnell (1999: 29) calls "vertical accountability."<sup>2</sup> The classic institutional mechanism that delivers vertical accountability is free and fair elections, which empower citizens to reward or punish politicians by voting the latter in or out of office. The problem is that elections are insufficient to guarantee accountability that is closely attuned to popular preferences because elections are intermittent, the behavior of offi-

cial is often opaque, and voting is a blunt instrument that cannot target too many specific issues. To compensate for these gaps, O'Donnell calls for the development of institutions of "horizontal accountability," that is, agencies within the state empowered to investigate, expose, and sanction governmental wrongdoing (O'Donnell, 1999).<sup>3</sup> These institutions include many of those that constitute the foundational core of rule of law: independent judiciaries, effective regulatory agencies, and the like.

In the absence of mechanisms of horizontal accountability, governmental malfeasance can skyrocket and accountability to popular preference is robbed of its meaning, no matter how free and fair the elections held. In fact, the failure to develop adequate "horizontal" checks on state power explains the widespread popular disappointment with many of the democracies created in Africa, Asia, and Latin America during the third wave. Although these transitions ushered in free and fair elections, governmental corruption remained rampant, and executives were often heedless. This made a mockery of governmental accountability to popular preferences and emptied democracy of much of its valued content. The experience of these countries suggests a certain priority for the development of rule of law if democracy is to be meaningful and effectively deliver on its distinctive promise of accountability.

The second reason one might argue that building rule of law should precede the pursuit of democracy is that, psychologically, order is to some degree prior to freedom. Without some modicum of safety and stability, it is impossible to exercise (and enjoy) freedom and choice in any meaningful way. This truism is reflected in the classics of human psychology, notably, Aaron Maslow's (1943) hierarchy of needs, through which he suggests that the desire for self-actualization is pursued only after one's need for security and safety is guaranteed. Although this conclusion does not mean that all the institutions associated with rule of law must be established prior to the pursuit of democracy, it does suggest that at least some of its foundational elements (a military with a monopoly on the means of coercion, a police force that is effective and reliable) are logically necessary prior to democratization.

But before sequential precedence is given to building rule of law, two contrary observations should be made. First, establishing the institutional foundations of rule of law without democratic "backup" is likely to leave those institutions impotent. Second, building rule of law in the absence of democracy is politically improbable.

With regard to the first, experience around the world suggests that many of the conditions that are associated with democracy are indispensable to making the institutional foundations of rule of law effective. Freedom of speech, freedom of information, a robust media, and engaged and autonomous associations in civil society are all necessary to facilitate expo-

sure and oversight of official behavior. Fragmentation of power (as in rule by alternating parties) has proven essential to encouraging officials in oversight agencies to challenge powerful state officials.<sup>4</sup> And as Johnston so eloquently argues, “deep democratization,” that is, empowering citizens so that they may advocate for their own interests and harness their interests to “check power with power,” is crucial to giving backbone to institutions of oversight and to preventing them from being abused or misdirected for official ends.

With regard to the second, building rule of law in the absence of democracy is politically improbable, the cardinal insight of Thomas Carothers (2007) in his pioneering reflection on the question of sequencing. As Carothers (2007: 14–15) shows, nondemocratic regimes are unlikely to set their sights on building rule of law because an inherent contradiction lies between the logic of the rule of law and the logic of autocratic rule. Impartial application of the law, an independent judiciary, and guaranteed rights for all citizens “restrict or remove the tools that autocrats typically employ to control political life and stay in power.” Rule of law contradicts the typical autocrat’s *raison d’être* as well as his *modus vivendi* (respectively, self-advantage and the elimination of political challengers). Autocrats, like Singapore’s Lee Kuan Yew, who embrace the rule of law because they prioritize their country’s overall betterment (especially its economic development) are few and far between. Those intent on building rule of law must realize that the hope of achieving this goal in a nondemocratic setting is seriously far fetched.<sup>5</sup>

What this question suggests is a chicken-egg conundrum: Which comes first, rule of law or democracy? But in fact, as Carothers (2007) argues, abandoning a sequential approach and instead recognizing that the two processes are mutually reinforcing is best. Neither one is complete without the other. Consequently, both rule of law and democratization should be pursued simultaneously. This may be why, as Günter Heidenhof and Lida Bteddini show, the World Bank has embraced aspects of both processes in its prescription for the pursuit of good governance.

Recognizing the mutuality of the two processes, however, does not mean that both will be achieved simultaneously or that we should expect linear progress on both. A better analogy might be taken from sailing. Countries intent on achieving both democracy and rule of law can expect to tack back and forth between the two in the hope that, over time, the ship of state will advance on both fronts. But there is no reason to be paralyzed by failure in any one of these areas. As Johnston implies, we can’t wait until all the tectonic plates are perfectly aligned to get started. Regression and failures are part of the process. As Sheri Berman (2007) wisely observes with regard to the experience of Western Europe, achieving political reform “is difficult. But it cannot be completed if it never starts.”<sup>6</sup>

## Stocktaking in the Arab World

Building the institutional foundations of the rule of law is an ambition embraced by many in the Arab world. But progress thus far has been limited. The empirical evidence collected by our authors suggests that the obstacles faced in other regions of the world carry over to the Arab context as well. At the same time, certain challenges distinguish the Arab world and present special obstacles to building the rule of law. The following distills some of the major empirical findings of the book.

With regard to the judiciary, Mohamed Salah Ben Aissa confirms that in Tunisia one of the key obstacles to the development of judicial independence during the first years after the revolution was the failure to shield judges' appointment, compensation, advancement, and discipline from executive discretion. Historically, the Tunisian Constitution (ratified in 1959) had adopted a conception of the justice system that designated the judiciary as merely a "tool" in the service of the state. More specifically, the regime had created the High Judicial Council (responsible for supervising the professional lives of the judges), which was entirely dominated by the executive branch. In the first years following Ben Ali's fall, a reform-minded group in parliament attempted to, but did not succeed at, getting a majority to vote for the creation of an independent judicial council. This initial failing, Ben Aissa argues, was due to the opposition of the Islamist party, Ennahda, which controlled a significant share of the seats in the Constituent Assembly as well as the leadership of the Ministry of Justice. The failure to reconfigure the judicial council led to high-handed and irregular management of the judiciary in those first post-Ben Ali years. Ben Aissa argues that without substantial reform of judicial council, establishing judicial independence was impossible.

By 2014, however, some progress was evident. A new constitution, hammered out through an inspiring if exhausting political process of dialogue and compromise between the major parties in Tunisia, provided both rhetorical support for the principle of judicial independence as well as the legal foundation for shielding the supreme judicial council (to some degree) from domination by the executive branch. Political compromise and emphasis on national unity by the major political parties made this reform possible. But the process of reforming the judiciary is still incomplete, and different forces in civil society (judges, lawyers, etc.) continue to jockey over the content of these reforms. The future, Ben Aissa argues, lies in the political will of the public and most importantly the political will of the legal professionals themselves.

With regard to the judiciary in Egypt, Nathalie Bernard-Maugiron finds that, as in Tunisia, the outside role played by the executive branch in the process of judicial appointment constituted a major obstacle to the development of a fully independent judiciary. Prior to the enactment of the consti-



tution of 2014, the president of the republic enjoyed full discretion in the appointment of many leading judicial figures, including the chief of the Supreme Constitutional Court and the chief of the Court of Cassation. The executive branch also controlled the staffing of the key institutions that oversaw judicial nominations, promotions, salaries, and discipline such as the Supreme Judicial Council and the Judicial Inspection Department. In addition, the executive branch maintained a special court system to try cases it deemed “sensitive.” It also selectively enforced the judiciary’s rulings. All of these practices compromised the judiciary’s autonomy and its capacity to deliver rule of law. (Nevertheless, Bernard-Maugiron documents the surprising fact that the Egyptian judiciary occasionally managed to carry out some bracing acts of independence that challenged the executive during the Hosni Mubarak era despite these constraints.)

The constitution enacted in 2014 promised to correct some of this executive overreach. Certain key judicial appointments (such as the general prosecutor and the chief justice of the Supreme Constitutional Court) have now been taken out of the hands of the executive. And the budget allotted to the judiciary is also more insulated from executive manipulation. But many of the institutional mechanisms for executive domination of the judiciary remain unchanged.

Beyond these institutional constraints on the judiciary’s autonomy, Bernard-Maugiron identifies an equally troubling development that has compromised the judiciary’s capacity to contribute to building rule of law in Egypt, that is, the extraordinary politicization of the judiciary since the fall of Mubarak. Bernard-Maugiron recounts the battle that raged between the judiciary and the executive branch prior to and during the rule of the Muslim Brotherhood president Mohamad Morsi (i.e., 2012–2013) and then, after July 2013, the judiciary’s collusion with the regime of Abdel Fattah el-Sisi. She recounts the political overreach that characterized many of the judiciary’s rulings during 2011–2013, rulings that included the dissolution of Parliament as well as political exclusion laws. This political assertiveness was met with retaliatory measures taken by the Morsi regime, aimed at “unpacking” the Supreme Constitutional Court, purging the judiciary, and declaring itself (temporarily) beyond judicial review. Following the removal of Morsi in 2013, the courts began to deliver selective justice, meting out lenient treatment to culpable members of the old regime (accused of misusing public funds and killing political protestors) at the same time that they delivered extremely harsh punishment to opponents of the Sisi regime (whether secular or Muslim Brotherhood affiliated). Such behavior has tainted the reputation of the judiciary and compromised its reputation as a politically dispassionate locus of power.

Most interestingly, Bernard-Maugiron does not link these two problems causally. That is, she does not attribute the political partiality evidenced by the judiciary directly to its lack of institutional autonomy from the execu-

tive branch. Bernard-Maugiron argues that there is no evidence that the judiciary's problematic rulings, such as failure to deliver impartial treatment of regime opponents under Sisi or the judiciary's general hostility to Morsi, have been due to direct interference from the executive (or the army). Rather she traces this behavior to the judiciary's cultural mind-set as well as to the demographic profile that characterizes the "guild" of Egyptian judges. Bernard-Maugiron argues that most judges in Egypt hail from the middle or upper middle class. Consequently, she argues, most judges have a "patriarchal and conservative" mind-set, they prioritize the stability of the country above all else, and they are suspicious of the Muslim Brotherhood, which they perceive as an "alien force" that has brought the state (including state institutions like the judiciary) under attack. Building more institutional autonomy for the judiciary, then, is not likely to deliver the politically dispassionate institution necessary to guarantee rule of law, at least not in the short-term.<sup>7</sup> The Egyptian case shows just how difficult it is to create the conditions for an impartial judiciary in a time of enormous political flux and polarization.

With regard to the police, Querine Hanlon explores the Tunisian case and the difficulty of transforming an institution that had historically been committed, first and foremost, to regime protection into an institution devoted primarily to public service and the provision of public safety in accordance with the law. Hanlon shows that in Tunisia, the Ministry of Interior's opaque and complex organizational structure undermines police accountability, poor training and low pay discourage professionalism, and ambiguity in the laws governing the use of force and citizens' rights undermines the protection of basic human rights. She recommends more transparency, better training, better pay, clearer laws, and parliamentary and citizen oversight to correct these problems.

But even if the institutional recipe for reform is straightforward, the process to implement it is politically fraught, partly as a result of internal resistance mobilized from within the police force itself. (Hanlon describes the physical resistance and the strike organized by security sector insiders in 2012 to stave off the punishment of one of their "own.") Part of the delay in police reform stems from a lack of political will on the part of the Tunisian politicians to prioritize police reform amidst a host of other competing political goals. The larger security context, the challenges Tunisia faces from extremists both within the country and from neighboring Libya, and the porous borders that facilitate access to weapons, explosives, and drugs, all make Tunisian leaders (and citizens) wary about dismantling and restructuring the police apparatus, even in the name of reform. Consequently, Tunisia has largely avoided police reform in the first post-Ben Ali years.

Tewfiq Aclimandos traces a similar dynamic with regard to reforming the police in Egypt. As in Tunisia, the police in Egypt, Aclimandos argues,

need to embrace a major shift in culture: espouse a mission of service in the name of the rule of law and abandon a long history of corruption, nepotism, and human rights abuse. As in Tunisia, the heinous behavior of the police in Egypt was motivated by the definition of their mission as primarily one of regime protection, and its efforts were focused, first and foremost, on eradicating the Islamic threat. And as in Tunisia, the primary question in the post-Mubarak era has been whether sufficient political will and wherewithal can be cultivated to carry out police reform. Police insiders, of course, resist reform. The process is expensive, and as Aclimandos points out, Egypt's financial situation is precarious. But the most important obstacle to police reform is the fraught security situation. The "disastrous security situation," Aclimandos argues, makes even many "liberals and secular parties . . . reticent about taking on the project of police reform." Again, the political will necessary to carry out police reform seems destined to make this a reform postponed.

Subordinating the military to civilian control and eliminating its political autonomy is the defining marker of a military performing in service to the rule of law. But as Robert Springborg shows in the Egyptian case, this ambition has proven elusive in the years following the ouster of Mubarak. During the first three years, the military and the Muslim Brotherhood engaged in constant jabs and counterjabs to determine who would prevail. An early alliance of convenience soon gave way to confrontation. Two months after his election to the presidency, Muslim Brotherhood leader Mohamed Morsi took advantage of a moment of military failure in the Sinai to exploit generational discontent in the military, retire some of its leadership, and promote more amicable insiders. But despite the removal of some senior generals, the military quickly reasserted its autonomy, parrying precisely the sorts of reforms that Barany argues are necessary to subordinate it to civilian control. Specifically, the military forced through constitutional provisions that assigned control of the Ministry of Defense to an active duty officer (not a civilian) and denied Parliament any oversight regarding its operations or budget. In addition, the military retained its hold on an enormous array of economic ventures providing it with substantial financial independence. These provisions created the institutional foundation for the army to reassert itself as supreme ruler less than three years after Mubarak had been deposed.

Springborg describes the elaborate cat-and-mouse game played by the Muslim Brotherhood and the military in the years following Mubarak's ouster. Cultural, strategic, and institutional interests put the two at odds from the beginning. But Springborg argues that the military in Egypt would have resisted democratic oversight no matter the ideological color of the elected government (Islamist or not) because such oversight would have been likely to reveal the military's bloat and inefficiency as well as erode

its economic privilege. The popular uprising of early 2011 presented a unique moment in Egyptian history when the military might have been tamed politically. But, Springborg argues, that moment quickly passed. The economic disarray, the crime spike, and the general insecurity that assailed Egypt in 2012–2013 made the populace receptive to a return to the “strong hand” of the military. The unprecedented public demonstrations calling for Morsi’s removal in the summer of 2013 provided the military with the political cover to unseat him and take charge. The consequence: Egypt has returned to a military-led regime unconstrained in its ability to rule in fully repressive fashion.

The situation of the military in Tunisia could not be more different. In the post–Ben Ali era the Tunisian military proved altogether prepared to submit to democratic control. Risa Brooks attributes this acquiescence to the prior strategy of “marginalization and exclusion” adopted by both Zine El Abidine Ben Ali and Habib Bourguiba vis-à-vis the military. The adoption of this strategy was facilitated by historical contingencies (the negligible role played by the military in the independence struggle) as well as geographic accident (Tunisia’s distance from any serious enemy or external security challenges). Both factors spelled political weakness for the military from independence on. The military’s weakness was then compounded by the ruling autocrats’ strategy to consign it to the periphery of the regime and starve it of resources. This strategy, however, had unanticipated consequences for the authoritarian regime’s survival. The strategy worked to depoliticize the military. It cultivated a strong corporate ethos within the institution as well as a self-understanding that saw intervention in domestic politics as beyond its mandate. Instead, a sense of mission evolved that focused on defense of the country from external enemies and radical threats rather than protection of the state from its own citizens. The autocrats’ strategy also prevented the military from developing any material stake in sustaining the authoritarian status quo or any vestige of the old regime. In short, the autocratic regime’s treatment of the military in Tunisia prepared the military to embrace democratic transition and civilian oversight in a way quite atypical for the region.

For a military to contribute to building rule of law, it need not only meet the challenge of subordinating the coercive apparatus to civilian control. To contribute to rule of law, the institution must also live up to the Weberian ideal; that is, it must exercise a legitimate monopoly on the means of coercion. Establishing a legitimate monopoly on the means of coercion is especially challenging in countries that are deeply divided ethnically (e.g., Iraq, Syria, and Yemen). These countries face the dilemma of how to build a military that is perceived as committed to the defense of the entire society rather than partial to specific communities within it. The challenge is to cultivate a sense of ownership for the military among all the

communities found in society. Oren Barak explores this challenge, drawing on extensive experience with the Lebanese case to address this issue. He argues that in divided societies an inevitable trade-off must be made between the military's legitimacy and its effectiveness. In order to cultivate legitimacy, the military must prioritize inclusiveness in its recruitment as well as modesty in its missions. The latter means that at times it may have to duck some of its role of providing order through the use of force. The best evidence of such modesty, Barak argues, may be found in the Lebanese military's unwillingness to arbitrate the conflict between the March 14 and March 8 alliances in 2007. The military made this decision in order to sustain its image as a nonpartisan institution and to avoid dividing the military along ethnic lines. Barak argues that the tension between the military's dual goals of effectiveness and legitimacy can be reduced by reframing the role of the military. Observers must recognize that the military contributes to national security not only by being the provider of order through force of arms but also by its inherent multicomunal inclusivity. Through its all-inclusive constitution, the military by its very existence mitigates intercommunal tension and contributes to civil peace.

Finally, Günter Heidenhof and Lida Bteddini confirm the complexity of fighting corruption and building good governance in the region. Collecting evidence on the region as a whole, they show that the Arab world lags behind most other regions on a variety of governance measures, and they attest to the significance of the political obstacles to correcting this lag. The problem lies less in deficiencies in the legal framework necessary to address corruption and poor governance and more in the political will to implement these rules. The World Bank advocates "transparency, accountability, and participation" as the foundation of successful governance reform, but in the absence of civil liberties, freedom of information, and political freedom, achieving any of these is difficult. The legacy of pervasive authoritarianism in the region that persists even in the wake of the uprisings of 2011 throws a wrench in the "deep democratization" that analysts like Michael Johnston argue are essential to anchoring good governance. They make this aspect of rule of law the most distant prospect of all four facets explored here.

### **Exceptional Challenges in the Arab World to Building the Rule of Law**

Comparative analysis suggests a fair degree of parallelism in the factors that subvert the establishment of rule of law around the world as well as parallelism in the likely remedies. Nevertheless, a number of conditions make building rule of law exceptionally difficult in the Arab world and merit special attention and brainstorming.

First, the Arab world is renowned for its exceptionally long and deep experience with authoritarian rule. This legacy has created a number of especially formidable obstacles to building rule of law. For example, many of the authoritarian regimes in the region embraced elaborate “coup-proofing” strategies to survive (Quinlivan, 1999). These strategies led to significant replication, fragmentation, and opaqueness of the coercive apparatus. Consequently, building a rule-governed, professionalized, transparent, and service-oriented police and military is especially challenging. It requires a thorough overhaul of the coercive apparatus, which is extremely costly politically.

An additional legacy of long-standing authoritarianism is the relative underdevelopment of civil society, the inexperience of the media in investigative work, and the lack of experience with (or cultural expectation of) freedom of information. These are all crucial assets for bolstering the rule of law, and without them, the struggle to establish it is more challenging. In short, countries that are faced with the dual challenge of transitioning to democracy and building rule of law simultaneously face much more serious challenges than is the case of even imperfect democratic countries whose ambition is more single minded, with a focus on building better governance alone.

Second, many countries in the Arab world are deeply divided on the basis of identity, whether this cleavage is drawn along ethnic lines (as in Syria, Yemen, Iraq, Lebanon, Bahrain, and Libya) or along ideological lines (notably, Islamist vs. secular as witnessed in Egypt and Tunisia). In many cases this division has been drenched in blood and violence—sometimes even full-fledged civil war—and this experience has scarred society and undermined trust across the divides. In this deeply polarized context, it is especially difficult to build institutions that can be perceived as “impartial” (which is central to building rule of law). Every appointment, every institutional innovation is closely scrutinized for “capture” by one group or another. Close attention to balanced inclusion and representation of all groups may alleviate some of this distrust, though as Barak shows in the case of Lebanon, such inclusion may compromise the effectiveness of some of these institutions.

Third, many Arab countries faced with the challenge of building rule of law today are situated in extremely challenging security conditions. The proximity of failed states (in Libya and Syria) and the reality of porous borders shared with those states lead to the dangerous proliferation of weapons and extensive drug running and crime. This situation makes building rule of law more challenging, not least because in this context, society and state tend to prioritize the establishment of order, even if that order comes at the expense of law. This trade-off has certainly been an obstacle to reform of the coercive apparatus in Egypt and Tunisia as Aclimandos and Hanlon

have shown. In addition, extrastate forces, be it international franchises, like al-Qaeda, or conventional states with regional ambitions, such as Iran, Qatar, and Saudi Arabia, often intervene in domestic power struggles and tip the balance in ways that do not serve the domestic adjudication of rule of law.

## **General Lessons, Further Research, and Conclusion**

Comparing the experiences of several Arab countries with those of other regions of the world suggests a number of important lessons for building rule of law in the Arab world and beyond.

First, we should not underestimate the role of unintended consequences in building the rule of law. The importance of this factor was first made clear in the venerable experience of medieval and early modern Europe, where competing ambitions between rulers and rivals inadvertently led to the creation of the institutional foundation of the rule of law. The same is true today as evidenced by the case of Tunisia. The strategy of military “marginalization and exclusion,” embraced by Bourguiba and Ben Ali to safeguard the survival of their autocratic regimes, inadvertently gave rise to a military with just the sort of corporate ethos and sense of mission that facilitated the jettisoning of authoritarianism and the construction of rule of law. Of course, recognizing the impact of “unintended consequences” does not mean negating the importance of conscious intent and purposeful political mobilization to building rule of law (see lessons three and four below). But it does call attention to the fact that political trajectories are complex, and this complexity can lead to unpredictable outcomes, both desirable and not.

Second, institutions create a social legacy that may long outlive the institutions themselves. Hence, we should not expect institutional reform to deliver immediate results in terms of creating rule of law. This is one of the lessons of the Egyptian case. Simply building more autonomy into the institution of the judiciary will not immediately deliver a politically dispassionate legal institution. The demographic constitution of the judicial “guild” confers a distinctive political bias to the court system. In time, reduced interference by the executive in the screening of judicial hopefuls may change the social profile of the judiciary in Egypt and reduce this bias. But this change will not come overnight.

Third, as has been emphasized by “second-generation” analysts of the rule of law, cultivating local stakeholders is crucial to the long-term entrenchment of rule of law. This view is confirmed by incidents of both success and failure at building rule of law observed in the cases presented in this book. In Tunisia the partially successful reform of the High Judi-

cial Council was the product of persistent lobbying carried out by engaged associations of lawyers and judges. In Egypt the failure to reform the judiciary substantially was, in part, the consequence of the decision of the formerly activist Judges' Club to refrain from activism at this time. As second-generation analysts have elaborated, without the engagement of local forces with long-term horizons and on-the-ground knowledge, building rule of law is impossible since perseverance and vigilance are the essential bedrock of this process.

Why do we see this variable engagement by local forces in the drive for rule of law? This question leads to the fourth lesson, the importance of political will to building rule of law. The failure of both Tunisia and Egypt to make any progress in carrying out police reform, for example, is first and foremost attributable to a lack of political will and the refusal to prioritize such reform by both political leaders and the citizenry.<sup>8</sup> Countries that have proven successful at building rule of law in the last thirty years have generally been distinguished by the presence of leaders or forces in civil society expressly committed to carrying out such reform (Mungiu-Pippidi, 2006). Building rule of law is a battle, and without the will to wage it, this ambition is unlikely to be realized.

The lack of political will evidenced in our cases links into a fifth lesson: when it comes to building rule of law, Maslow's hierarchy of needs prevails. The reluctance to prioritize reform by many in the region derives from the preoccupation with (and prioritization of) concern for safety and security. The precarious security situation in the Arab world, itself the consequence of the proliferation of failed states, the easy access to weapons, and the rise of extremism, has persuaded many citizens that a focus on accountable governance is a luxury that must be postponed. Building rule of law is a challenging process no matter the context. In an apt metaphor, Colgate political scientist Bruce Rutherford compares it to "reconstructing a ship while it is at sea."<sup>9</sup> In the Arab world today the challenge has been compounded by the fact that the sea is exceptionally stormy. The pervasive sense of crisis has sapped the will to reform.

The sixth lesson, also related to the problem of will, concerns the problem of polarization. As mentioned above, it is especially difficult to build "impartial" institutions in a society that is deeply divided along ethnic, sectarian, or ideological lines. Every institutional innovation is closely scrutinized for "capture" by one group or another. The will to introduce "impartiality" into state institutions is compromised by profound skepticism about the possibility (or even the desirability) of such a goal. Such polarization characterizes much of the Arab world today, inhibiting the drive for rule of law. The exception is Tunisia, where a constellation of broad-minded leadership, timing, and luck led to a collaborative stance across the country's ideological divide (Bellin, 2013), thus permitting the rule of law to



progress. But without explicit strategies to build bridges across these divides (e.g., through inclusiveness or explicit quotas that guarantee representation of all groups), progress elsewhere is stymied.

Many of the challenges facing the Arab world are not unique to the region. Research focused on comparable cases from beyond the region could shed needed light on how to address these issues. How has ethnic and ideological division been “de-charged” elsewhere to overcome the distrust necessary to build effective judiciaries and police? How have other countries with deeply authoritarian legacies managed to dismantle their coercive apparatuses? Could other clever ways be found to incentivize “buy-in” by potential spoilers? These are just a few of the outstanding questions.

But perhaps the most pressing issue comes back to the question of sequencing and whether building rule of law is possible in the absence of democracy.

This book project was conceived during a moment of great optimism in the Arab world, when authoritarian regimes were collapsing, masses of ordinary people were mobilizing in the streets, seizing self-empowerment, and democratic transition seemed a possibility for the first time in a number of countries. Several years on, the mood in the Arab world is much more somber. The chances for near-term democratization are dim in most Arab countries, with the exception of Tunisia. And so the question arises as to whether this grim political reality should spell despair about the possibility of building rule of law in the Arab world, at least for the near term. Does the absence of democracy make building rule of law impossible?

Our prior discussion of democratization and rule law rejected the notion of any unequivocal sequencing of these two processes. It found instead that rule of law and democratization were interdependent and mutually reinforcing, that linear progress in any one without the other was unlikely, and that the metaphor of “tacking” (taken from sailing) probably best captured the likely advance of the “ship of state” on both fronts. Nevertheless, Carothers (2007) makes a compelling argument for why progress on building rule of law was improbable in the context of thoroughgoing authoritarianism. The logic of rule of law contradicts both the *raison d’être* and the *modus vivendi* of the typical autocrat.

At the same time there is reason for hope. This should be drawn from Johnston’s keen observation that to achieve meaningful rule of law one must mobilize power against power and interest against interest. As Johnston argues, institutional reform is merely an empty shell unless the structure of power in society is reconfigured in ways that make the state assailable. And in fact, structural and technological changes are afoot in the Arab world and are changing the balance of power. The spread of literacy, the growth of the middle class, the organizational and informational capabilities made possible by the Internet, all point to an inexorable shift in the dis-

tribution of power that favors society over the state in ways not anticipated a generation ago.

This conclusion is not meant to be a naïve or mechanistic regurgitation of modernization theory. Building the rule of law is in no way structurally inevitable, no matter the level of a country's development. Building rule of law requires focused political will and tireless political mobilization. Moreover other structural factors—identity cleavages and conflict and international rivalries and interventions—may work to undermine the process. Nevertheless, new sources of power are evolving in the Arab world that will progressively challenge the state's invulnerability. The Wael Ghonims of the world are not going to disappear; they are only going to grow in number. And with their growing power, they will have the possibility of setting sail, one issue at a time. Fully realized democratization need not be a prerequisite.

The goal of this book is to provide an empirical and theoretical foundation to launch creative thinking about cultivating rule of law in the Middle East and North Africa. Analysts and activists alike are committed to ending arbitrary rule in the region. Joining this effort are the scholars who have authored this book.

## Notes

1. For example, he argues that the creation of anticorruption commissions, without the proper social foundation, may become the regime's tools of factional conflict, means for political reprisal, and smoke screens for self-enrichment.

2. He uses the term *vertical* because of the hierarchical relationship implied, with government (above) held accountable to the people (below).

3. O'Donnell (1999) uses the term *horizontal* because the institutions involved are on an equal footing as fraternal components of the state.

4. Lisa Hilbink (2012) explores the importance of alternating party rule for cultivating political autonomy in the judiciary. She argues that when one party dominates the political system, the party's ability to punish judges unilaterally discourages judicial independence. See also Helmke and Rosenbluth (2009).

5. Carothers (2007) goes further and shows how democracy, although not without its own problems of governance, is philosophically in line with rule of law given the fact that both are committed to subordinating government officials to the law and both respect political and civil rights.

6. The question of timing also raises the question of the proper sequencing of reform of the different institutional anchors of rule of law. Should police reform logically precede judicial reform? Or military reform precede all others? Again, there is a degree of mutuality between these different facets of rule of law. There can't be an effective judiciary without a reliable police force to enforce its rulings. There can't be an effective anticorruption agency without an effective judiciary to enforce its sanctions. And of course there can't be any rule of law without an effective army monopolizing coercion and maintaining order (although perhaps it need

ot be subordinated to civilian control to achieve this end). Although some rough logical priority might be drawn (army first, police and judiciary next, regulatory agencies last), in fact the four are inextricably linked and mutually reinforcing. How this sequencing actually plays out comparatively would be worthy of future research.

7. Of course Bernard-Maugiron recognizes that the demographic profile of the Egyptian judiciary has been shaped by explicit interference from the arms of the executive branch. State security services long screened all applicants for positions in the judiciary, and they eliminated candidates of lower-class origin as well as those with Islamist associations. Such executive interference, however, is quite different from “telephone justice” (where the executive phones in rulings to pliant judges). Standard reforms to improve the judiciary’s autonomy from the executive (such as permitting the judges’ “guild” to elect leading posts in the court system) would not eliminate the political bias that currently characterizes the judiciary in Egypt.

8. See Sayigh (2015) for a very rich account of the failure of police reform in Egypt and Tunisia that echoes the observations put forward by Hanlon and Aclimandos.

9. Personal communication with the author, January 25, 2015.