Building Rule of Law in the Arab World:
Tunisia, Egypt, and Beyond

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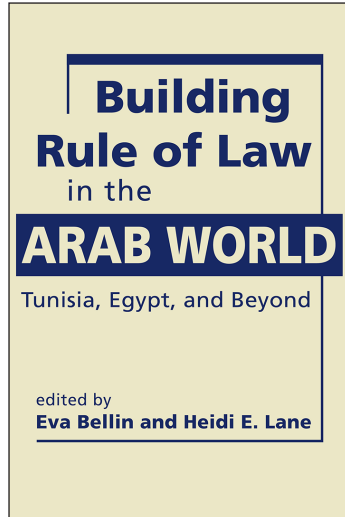
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Building Rule of Law in the Arab World: Paths to Realization

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Arbitrary rule has long plagued the Arab world. Its attendant consequences—injustice, cruelty, corruption, and degradation—have cultivated a deep sense of political anger and resentment among the people of the region. In fact, outrage over such arbitrary rule proved to be one of the primary triggers for the spate of uprisings that seized the region in 2011–2012. Along with a desire for "bread" and "freedom," the people hungered for human dignity, that is, an end to the capricious and often-cruel treatment meted out by remote and unaccountable states. This desire spurred hundreds of thousands, if not millions, of citizens to take to the streets and demand political change. In the language of political analysts, the people yearned for the "rule of law." The question facing activists and analysts alike is how to achieve this objective?

In *Building Rule of Law in the Arab World* we aim to tackle this question, at least in a preliminary way. The goal of this endeavor is to get a clear sense of the institutional and political underpinnings of rule of law, consider the comparative experience of others who have wrestled with this ambition, explore the empirical foundations (and obstacles) to building rule of law in the region, and construct the analytic foundation for future research on this question. To make the project manageable, we have limited our focus to the development of four of the institutional building blocks of rule of law: the judiciary, the police, the military, and regulatory/anticorruption agencies. We draw first on the experience of specialists expressly not from the region to gain comparative analytic leverage on the means that have so far proven most effective in fostering rule of law elsewhere. Our inquiry is guided by several questions: Is there a standard menu of prac-

tices, a "toolkit" of sorts, that fosters rule of law in the given institution? What are some of the key obstacles, political and otherwise, that subvert the implementation of these reforms? What should be the timing and sequencing of these measures? And can an intrinsic relationship be identified between building rule of law and democratization such that the two must be pursued simultaneously? Or should one project logically precede the other?

To anchor this analysis in the experience of the Arab world, we have enlisted the work of specialists with expertise in the workings of the judiciary, military, police, and regulatory agencies in the region. These specialists delve into a series of case studies focused primarily (but not exclusively) on the experience of the two Arab countries at the forefront of change ushered in by the upheavals of 2011, namely Tunisia and Egypt. The goal is to highlight the specific challenges faced by these countries in building rule of law as well as to construct an empirical and historical foundation for future research in this area. The analysis makes clear some of the unique challenges faced by countries in the region just as it confirms the presence of more generalizable impediments identified by broader comparative analysis.

Defining Rule of Law

The rule of law is a capacious concept—so much so that the term's varied usages have given rise to "conceptual cacophony" (Moller and Skaaning, 2014: 173).[1] Nearly all understandings of the term embrace the notion of "restricting the arbitrary exercise of power by subordinating it to well-defined and established laws," and most definitions make gestures to such ideals as "fairness," "equal treatment," "predictability," and "transparency." But variations in both foci and remedies typically follow from the users' divergent ambitions and institutional perches. Lawyers will typically seek to end arbitrary arrests, trials without due process, and cruel or degrading punishment, and they advocate for the creation of independent and impartial judiciaries. Anticorruption crusaders will typically focus on the problems of the misuse of public funds (for private ends) and advocate for the creation of regulatory agencies with the power to monitor and punish official malfeasance. For the purposes of this book, we will embrace a slightly abridged version of the definition put forward in a report by the UN secretary-general for the UN Security Council (2004), which defines rule of law as

> a principle of governance in which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are *publicly promulgated, equally enforced,* independently adjudicated, and which are *consistent with international human rights norms* and standards. It re-

quires, as well, measures to ensure adherence to the principle of supremacy of law, equality before the law, accountability to the law, fairness in application of the law, separation of powers, . . . legal certainty, avoidance of arbitrariness, and procedural and legal transparency.[2] (emphasis added)

The Path to Rule of Law? Different Approaches

The value of establishing rule of law seems self-evident. The path to achieving it is anything but. A rich and varied literature has developed over the years exploring the diverse routes that countries have taken to building rule of law. The actionable lessons of this research, however, are far from conclusive.

Perhaps the most august literature touching on this issue delves back into the origins of the modern state in Western and Central Europe. Building rule of law was part and parcel of this state-building process. The development of rule-governed bureaucracies, reliably impartial judiciaries, and accountable institutions of rule helped spell the distinctive success and survival of many states in medieval and early modern Europe. The historical genesis of these institutions was complex, and their creation was often the unintended consequence of competing ambitions between rulers and rivals, both external and internal. Charles Tilly (1985), for example, traces this state building to the geopolitical competition faced by European monarchs and the fiscal pressure they bore to wage war successfully against their neighbors. The latter drove the creation of rationally organized bureaucratic apparatuses capable of effective tax extraction—the institutional core of capable, rule-governed states. Joseph Strayer (1970) traces the emergence of a unified and impartial legal system in England to the political ambition of the English monarchy and the kings' desire to earn fees, build their own prestige, and undermine the authority of local lords who proffered a competing system of seigneurial justice. Thomas Ertman (1997) links the variable rise of rational bureaucratic (as opposed to patrimonial) administrative apparatuses to the distribution of medieval universities and spread of literacy (both of which shaped the supply of skilled personnel capable of manning the state). And Jorgen Moller and Svend-Erik Skaaning (2014) trace the origins of accountable government in Europe to the presence of multiple powerful and privileged groups in society (cities, churches, the nobility) uniquely equipped with long-established corporate rights and thus well positioned to demand corporate representation and consultative powers from the ruler in exchange for their fiscal support.[3]

While this literature traces European success at building rule of law to almost inadvertent institution building, another body of work focuses more on the region's distinctive cultural endowment. The role of the church was

important not only because it emerged as an institution autonomous of the state and capable of limiting state discretion (Fukuyama, 2011: 274), but also because it was the propagator of a particular set of ideas, specifically the idea of human equality (Fukuyama, 2011: 324), as well as the notion that even the ruler was bound by Christian law (Moller and Skaaning, 2014: 136). Both provided ideological justification for the rule of law. The process was abetted by the Protestant Reformation, the invention of the printing press, and the development of the natural sciences, all of which undercut traditional conceptions (and figures) of absolute authority (Fukuyama, 2011: 430). And building on the classical tradition of Roman republicanism, liberal philosophers such as John Locke articulated theories of natural rights and liberties that provided the ideological foundation for placing limits on arbitrary rule—the essence of rule of law (Moller and Skaaning, 2014: 146).

A third body of literature turns away from the exceptional historical and cultural trajectory of Europe and looks instead at broader contemporary world experience and the structural variables that tend to correlate with (and perhaps cause) the establishment of rule of law. Statistical analysis suggests that rule of law, or at least some of its component parts, correlates with level of socioeconomic development, absence of natural resource abundance (of the "resource curse" variety), cultural homogeneity, degree of capitalism, and marketization of the economy, among other factors (Moller and Skaaning, 2014; Mungiu-Pippidi, 2014). The causal mechanisms linking these factors with successful establishment of rule of law are varied. Higher socioeconomic development is associated with higher rates of literacy and lower rates of economic vulnerability among the citizenry. Both of these factors discourage official high-handedness and nurture the development of countervailing power and oversight by societal groups—essential to building rule of law. Putting limits on the resources subject to discretionary distribution by the state, as in market-driven economies and where resource rents are absent, limits the opportunities for official corruption. Cultural homogeneity, as in limited sectarian or ethnic fragmentation, fosters a culture of "ethical universalism" in human exchange—another impetus to fair and equal treatment (Mungiu-Pippidi, 2014: 2).

But these three approaches, although analytically valid and rich, are discouraging to contemporary advocates of building rule of law in at least two ways. The first two approaches are focused on the exceptional experience of Europe, and indeed European countries and European settler colonies are statistically the strongest performers on rule-of-law indicators (Moller and Skaaning, 2014). This suggests that countries without European legacies are at a distinct disadvantage in building rule of law. In addition, all of the aforementioned factors—long historical trajectories, deep cultural endowment, level of ethnic homogeneity, degree of socioeconomic

development—are big, slow-moving forces, beyond the near-term control of policymakers. Focusing on these factors is likely to discourage latecomers about the prospects of building rule of law in the here and now.

But counterbalancing these grounds for pessimism are reasons to believe in the possibility of purposively building rule of law. Yes, historical trajectories are important, but historical paths need not be meticulously replicated in order to emulate their outcomes. The lessons of other countries' historical accidents or cultural inspiration can be learned by latecomers; there might even be a "late-comer's advantage" as Joseph Schumpeter (1912) proposed with regard to industrialization. And yes, cultural endowment matters, and those with a long tradition of constitutionalism, republicanism, and self-governance may be advantaged in building rule of law. But cultures can change, sometimes with dramatic speed. Technology may be a catalyst here. For example, the role of social media in propelling the Arab Spring, although often overstated, certainly encouraged popular engagement and political activism in the Arab world and helped many people overcome a long-rooted "culture of fear" and political lassitude. And yes, structural conditions statistically favor certain outcomes. But these conditions are by no means deterministic. The existence of consistent "overachievers" in this domain—countries like Botswana or Estonia or South Korea that outperform the expectations set by their socioeconomic standing or cultural endowment or historical legacy—suggests the possibility of the political.[4] In each case some combination of committed leadership and mobilized civil society, motivated by crisis or proximate exemplar or contingent political calculation, and (occasionally) enabled by technological innovations or foreign assistance, or both, led to the construction of rule of law, despite the odds.[5]

Politics as Possibility or Barrier?

Mobilized political will can make this happen. But just as politics opens the door to the possibility of reform, it also erects barriers. As Thomas Carothers (2006: 4) explained, "the primary obstacle to [rule-of-law] reform [is] . . . political. . . . Entrenched elites cede their traditional impunity and vested interests only under great pressure. . . . They are reluctant to support reforms that create competing centers of authority beyond their control." The only way to overcome this opposition is to mobilize power against power and interest against interest.

This is the great insight of the "second generation" of thinking on rule of law (Kleinfeld, 2012). Earlier efforts at promoting rule of law dating back to the 1980s adopted what Carothers (2006: 21) calls a "breathtakingly mechanistic approach," one focused primarily on diagnosing a coun-

try's shortcomings in selected laws and institutions and then advocating the wholesale import of Western models—laws, institutions, and even technology—irrespective of context (Kleinfeld, 2012: 10–18). This approach yielded a proliferation of programs focused on training judges, building police academies, computerizing court systems, and rewriting laws to encourage transparency—"technocratic, cookie-cutter" programs that ended up having only a minor impact on boosting rule of law.

Why such modest returns? The problem, Rachel Kleinfeld (2012) explains, was that these programs treated reform as apolitical. The program's authors did not consider the vested interests committed to the status quo. They did not anticipate the deep resistance to change. They did not realize that to be effective, these programs needed to cultivate "an internal will to reform" and harness "local stakeholders" with extensive on-the-ground knowledge and long-term time horizons (181). In fact, to advance the rule of law, reformers are obliged to do nothing less than change the local power structure, to build up alternative centers of power (e.g., citizen committees and bar associations) capable of pressuring the government to follow the law (Kleinfeld, 2012: 163).

Going Forward in the Arab World

The goal of this book then is to take seriously the lessons of both first- and second-generation thinking on the rule of law. An institutional "toolkit" is required for anchoring the rule of law, and to determine which institutional fixes might work best, it is useful to draw on the experiences of other countries (both latecomers and veteran bearers of rule of law). At the same time, it is crucial to keep political realities in mind and consider the different strategies that might be adopted to mobilize local champions and to muster the countervailing power necessary to anchor these institutional fixes on the ground and give them local resonance. Attention to both the political experience of other regions as well as to the specific empirical realities and challenges faced in the Arab world is necessary in order to think creatively about how to build rule of law effectively in the region.

The book that follows is divided into four sections; each one is focused on a different institution that is an anchor for building the rule of law. They are, in order, the judiciary, the military, the police, and anticorruption/regulatory agencies. Each section begins with a chapter that offers a transregional perspective, presenting general lessons drawn from comparative experience about what institutional fixes are advisable and how political challenges to reform might be met. This overview chapter is followed by empirical chapters, focused primarily but not exclusively on the cases of Tunisia and Egypt, aimed at exploring the reality on the ground and the

challenges faced in carrying out reform. The book concludes with some overall reflections presenting general lessons learned and future paths for research.

The challenges to building the rule of law are real. But as Daniel Kurtzer (a US diplomat long experienced in tangling with seemingly insurmountable political quandaries) once said, "political problems are manmade, and so are the solutions."[6] Deficiencies in rule of law are a manmade problem. In this book we aim to gather the collective experience and wisdom of many scholars and countries in the hopes of fostering sober reflection on this challenge as well as the will to meet it.

Notes

1. Moller and Skaaning (2014) devote the better third of their book to exploring the variety of definitions and measures used to capture the notion of "rule of law." Although the components that distinguish these different conceptions often correlate with one another, they do not uniformly do so. To manage this "conceptual cacophony," Moller and Skaaning advise that analysts always clarify their usage and explicitly "define their terms" up front. See also Kleinfeld (2006) for an extraordinarily lucid and insightful discussion of the meaning of rule of law. Kleinfeld distinguishes rule of law by identifying five ends that are typically associated with it, namely (1) government bound by law, (2) equality before the law, (3) law and order, (4) predictable and efficient justice, and (5) lack of state violation of human rights.

2. The unabridged version of this definition also includes the notion of public "participation in decisionmaking" as part of the concept of rule of law. In my mind, the right to participate in decisionmaking is more appropriately associated with "democratization" than with building rule of law. For more on the relationship between the two, see below.

3. Fukuyama (2011: 405, 333) identifies several other factors such as religion and historical experience that helped reinforce the solidarity of these social forces in their challenge to absolutist rule. For example, he argues that in the case of England "concern about being ruled by a Catholic" helped drive the Glorious Revolution and the conviction by many that government ought to be based upon consent of the governed (417). In addition, a long history of local participatory self-governance that predated even the Norman Conquest in the eleventh century predisposed many to support limits on absolutist rule.

4. And of course there are "underachievers" as well. Alina Mungiu-Pippidi (2014: 3) develops this argument cogently with regard to country performance on one component of rule of law: control of corruption. She finds that structural factors such as the level of economic development account for only about half of the variation observed among 185 cases for which data is available. This finding, she argues, "leav[es] some room for human agency."

5. Mungiu-Pippidi (2014) provides examples of each of these from cases of "overachievers" in the battle to limit corruption. Enlightened leaders committed to reform played a central role in reducing corruption in Estonia, Botswana, and Georgia. Mobilized civil society played a key role in Uruguay. Financial crisis spurred reform in Chile and South Korea. Proximity to (and emulation of) foreign models

played a role in Estonia, Georgia, South Korea, and Chile. Calculations of political advantage and specifically the desire by new political parties to distinguish themselves from the "old guard" associated with corruption drove reform in Taiwan and Georgia. Technological innovations such as "e-procurement" and online public expense tracking facilitated anticorruption efforts in Estonia as did foreign assistance from Scandinavian countries.

6. Personal e-mail communication with the author, May 31, 2015.