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**U.S. Rule-of-Law  
Aid in the Arab  
World**

*David M. Mednicoff*

**Democracy and  
Rule of Law Project**



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Carnegie Endowment for International Peace  
Publications Department  
1779 Massachusetts Avenue, NW  
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Phone: 202-483-7600  
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## **About the Author**

**David M. Mednicoff** is assistant professor in the Department of Legal Studies and the Center of Public Policy and Administration at the University of Massachusetts–Amherst. His expertise and research are in the areas of international law, comparative politics, and the contemporary Middle East. This paper is part of a larger study on the meanings of the rule of law in contemporary Arab politics and the implications of this for U.S. foreign policy.

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THE PROBLEM OF KNOWLEDGE IN RULE-OF-LAW PROMOTION, above all the basic question of whether Western rule-of-law aid programs are on the right track to help build the rule of law in recipient countries, is especially acute in the Arab world. Arab states generally share two features that render external rule-of-law aid particularly difficult—long-standing nondemocratic governments, and legal systems that graft Ottoman, European, and contemporary sources onto Islamic norms. We cannot presume that U.S. common-law practitioners can build the rule of law by transporting or transplanting their technocratic techniques into such different legal soil. Indeed, the very idea that people in Arab societies would be receptive to American guidance in legal reform is dubious in the current climate of broad, popular mistrust of the United States.

Thus, expectations must be low for the prospects for U.S. law specialists to improve the rule of law for Arabs. Nonetheless, the desire of many Arabs for more predictable, responsive, and fair laws is indisputable, a desire that is growing as pressure for liberalizing political change in the region mounts. The 2004 *Arab Human Development Report* is only the latest and most prominent statement by Arabs of the central importance of the rule of law to social improvement. Moreover, although U.S. rule-of-law aid to Arab countries during the last decade was a rather modest endeavor, receiving little backing from senior U.S. officials, rule-of-law reform is now a subject of much greater attention and funding, as part of the George W. Bush administration's broader push for democratic change in the region. Therefore, this is a propitious time to examine how the United States can work to enhance the rule of law in ways that are useful to Arabs.

U.S. rule-of-law advisors face a daunting impediment right from the start: widespread, twofold Arab skepticism about the United States as the messenger for the rule of law in the Middle East. Many Arabs believe that U.S. policy makers neither know nor care to know basic aspects of law, politics, and society in Arab countries. And there is an even stronger and equally widespread perception that the United States does not in fact practice what it preaches about the rule of law in its own policies, particularly those in the Middle East.

As a result, however well-intentioned, U.S. efforts to export ideas and techniques about the rule of law to Arabs are likely to be handicapped unless and until the United States is seen as less hypocritical in its own embrace of the rule of law at home and abroad. Even should this change, U.S. rule-of-law development programs as currently configured will be problematic for two reasons. First, the typical emphasis of these programs on the performance of courts rests on the questionable assumption that judicial reform is central to bolstering the rule of law more generally, despite the fact that a broad social understanding of legal rights and respect for law's authority is not necessarily achieved by improving the efficiency of courts. Second, the rule of law in Arab states cannot be decoupled readily from its general authoritarian political context. Programs that aim to improve the rule of law without taking account of the possibility that increasing legal efficiency will merely heighten political centralization will do little to foster democratization.

With these basic points in mind, after looking briefly at several key tensions within the concept of the rule of law itself, I examine in this paper how conceptions of law are similar and different in the United States and in Arab societies. I then analyze the approaches of U.S.-based rule-of-law programs in the Middle East to assess their prospects and problems for contributing to actual Arab legal and political reform. I conclude by recommending areas that hold the best hope for U.S.-based rule-of-law work in Arab contexts—areas that have the potential to decrease the gap between the concept's ideal and reality in the subordination of government elites to laws.

## WHAT IS THE RULE OF LAW?

The rule of law often appears as a vague or undefined idea in both general speech and technical policy documents. As one scholar put it, “the rule of law thus stands in the peculiar state of being *the* preeminent legitimizing ideal in the world today, without agreement on precisely what it means.”<sup>1</sup> The concept generally refers to two different things. On the one hand, it stands for the ideal that legal norms should prevail over personal political authority, or, as often formulated, a government of laws, not men. On the other hand, it can describe a specific set or constellation of functioning legal institutions.

When used to denote an ideal, the term *rule of law* is often deployed in diverse and imprecise ways.<sup>2</sup> Nevertheless, these uses typically assume a separation between a society's politics and law.<sup>3</sup> Specifically, the rule of law is meant to protect people from political anarchy and arbitrariness. It suggests a promise that legal supremacy, stability, and accountability will prevail over leaders' caprices.

Yet, the ideal embodies a tension between the importance of law in providing order, and the promise of law to guarantee citizens' rights, justice, and equality. Despite the ideal that laws will stand above the self-interested actions of specific people, the reality is that the drafters, executors, or interpreters of law can flout this ideal unless meaningful accountability, popular awareness, and transparency exist in the political system. In other words, the rule of law can bolster democracy or it can slide into rule *by* law and reinforce strong-handed political control.

Indeed, one vein of recent social scientific scholarship on the rule of law insists that the ideal is unrealizable and that the concept is inseparable from specific political practices.<sup>4</sup> This is in line with the way in which lawyers and development specialists often use the term, as shorthand for well-functioning courts and other legal institutions. Ideas about implementing the rule of law in non-Western countries focus on the dimension of institutional reform, especially of courts, with little overt rationalization as to how or even whether such reform connects to the ideal. In Arab countries, U.S. rule-of-law aid has primarily followed this line, seeking to promote judicial modernization through judicial training or other forms of technical assistance for the courts.

Yet how the practices of legal institutions link to the ideal of the rule of law is important for understanding the context and consequences of institutional reform. When reform efforts are confined to legal institutional performance with little reference to the issues of broader justice, a society may be ruled by law without approximating the democratizing dimension of the ideal of the rule of law.<sup>5</sup> For this reason, the most promising general approaches to conceptualizing the rule of law, such as those put forward by Rachel Belton, tie ideals to practices by developing detailed criteria for how political and legal systems approximate rule-of-law values in areas such as legal restraints on

government, neutrality, and popular respect for law and human rights.<sup>6</sup> Such criteria can certainly be applied and evaluated in contemporary Arab contexts.

Yet, there is little empirical research as to how legalist ideals and practices are connected in specific Arab societies. Existing work tends to focus on judicial opinions and the function of courts, rather than whether or how popular understanding of or respect for law may matter to legal and political systems more generally.<sup>7</sup> As insightful and important as this research is, both its sparseness and lack of specific argument as to how elite legal functionaries connect to broader social rule-of-law ideals serve to underscore the problem of knowledge for rule-of-law programs in places like the Middle East.<sup>8</sup> My overview below of the ideal and practice of the rule of law in Arab societies is meant as a very modest step in the direction of addressing the knowledge problem in a particularly important specific current context.

## **RULE OF LAW IN ARAB AND AMERICAN SETTINGS: POINTS IN COMMON**

As in the United States, the rule of law has long been an influential doctrine in the Arab world. Indeed, the Islamic and Ottoman socio-legal traditions that contribute to contemporary Arab law predate the Anglo-American common law by many centuries. Moreover, the Middle Eastern origin of two of the most renowned, ancient legal codes—the Code of Hammurabi and the Judeo-Christian Bible—should not be forgotten. Thus, discussion about the potential for U.S. rule-of-law specialists to bolster the rule of law in Arab states cannot proceed without acknowledgment that the general concept has deep Middle Eastern roots.

Although Arab legal systems combine a variety of traditions, including Islam, I focus in this section on common points between Islamic law and U.S. law with regard to the overall idea of the rule of law. This is sensible in light of several facts. First, Islam has dominated the development and practice of law in the Arab world from the seventh century until the present. It remains at the rhetorical and actual center of discussions of law in contemporary Arab states. In particular, many Arab constitutions clearly endorse traditional Islamic law as the primary source for legislation.<sup>9</sup> Second, the dominant current trope of political discourse and opposition in Arab countries at present is also Islam. Thus, the notion that Islamic law may resemble law in the United States in significant respects has implications for contemporary rule-of-law work. Third, given the above points, Islamic ideals play the same broad, basic foundational role in Arab legal orders that the combination of Judeo-Christian values and original constitutional principles do in the United States.

The legal sources and historical patterns of Islamic law are too diverse to allow for simple description or derivation from the founding documents of the religion, the Quran and the *hadith* (sayings attributed to the prophet Mohammed).<sup>10</sup> Despite this, it is possible to delineate three sociopolitical effects of Islam from its seventh-century inception of obvious relevance to the rule of law and to comparisons with U.S. legal ideas. First is the general understanding of Muslims that Islamic theory specifically stressed political accountability by insisting that rulers' legitimacy was grounded in their status as defenders of the Islamic faith and its principles, whether this status is based on descent from the prophet Mohammed's bloodline or some other distinction. In particular, rulers were to be judged by qualified Islamic scholars and Muslims more generally on their record of executing and enforcing Islamic law.

To be sure, leaders historically used their military might more frequently to subjugate than to empower Muslim jurists, although the latter were supposed to determine when Islamic law was being upheld. In fact, the gradual restriction of the functions of legal promulgation and interpretation to those jurists who were part of ruling elites in Islamic history is a reflection of the very tension between the ideal of the rule of law as constraining rulers and the ordering tendencies of rule by law described above. Thus, the subordination of laws to authority stood alongside the ideological link between law and political legitimacy as a core trend in Islamic history. Because the very purpose of an Islamic political order is to execute law, the rule of law is an ideal integral to Muslim society; institutional practice is what has often fallen short.<sup>11</sup>

A second point of importance for the rule of law is the manner in which concerns about justice have been centrally and popularly embedded in Islam. Justice as a concept and a discourse is ubiquitous in the Quran. Moreover, as is true with American legal ideals, Islam's emphasis on justice includes significant attention to social equity and individual rights. Thus, discussions of many of the general and specific issues that frame legal discourse are engrained in the religious identity of a large majority of the people in Arab societies. The importance of justice within Islam also contributed to the fact that Islamic jurisprudence never fully developed a concept of natural law. This has meant that there is no clear theory to ground a completely secular legal order, as natural law helped do over time in the West.<sup>12</sup>

A third, if more debatable, point is that Islamic political theory can be read as presupposing two central tenets that have clear relevance to contemporary Western ideas about the rule of law: first, that despite the ideal that political authority exists for the benefit of Islam, authority in practice will tend toward absolutism, rather than subordinating itself to communal legitimacy or justice; and second, that resources autonomous from the state (civil society) are needed to check leaders' actions. In essence, a significant tendency of classical Islamic legal theory is a distrust of government and an emphasis on finding legal ways to constrain authority that would sound quite familiar to many Americans.<sup>13</sup>

One scholar argues that Islamic law shares a fourth and crucial feature of Anglo-American law—it is a common law system. Anthropologist Lawrence Rosen makes a good case for considering as fundamentally similar American and Islamic laws' reliance on local courts and local cultural information as characteristics that distinguish both from the legal centralization of a civil law system.<sup>14</sup> Thus, American and Arab lawyers may share a similar understanding of the importance of locally based legal processes, among other things.

## **POINTS IN CONTENTION**

I have argued so far that, due to the influence of Islamic legal ideals and development, the rule of law exists as a political touchstone in Arab societies in a manner similar to its status in the United States. Yet particular differences in the sociopolitical history of the Middle East and North America shape local understandings and implementation of the rule of law in significant ways. An appreciation that legal systems in the United States and the Middle East may share important features should not carry with it the assumption that differences can or should be minimized.



Prime among these differences—and an important if sometimes overstated source of many contemporary Arabs' concerns about Western countries' politics—is the multifaceted impact of Ottoman and European colonial domination. The impact of foreign great power rule on the rule of law in the Middle East and North Africa was threefold. First, it led to a patchwork of legal orders in a given society, rather than the relatively long-standing growth of a unitary national legal system such as occurred in the United States. Second, it set up an authoritarian norm that law would in fact be subordinated to imperial political power. And, third, it fostered a tendency for constitutions to exist without a significant history of judicial interpretation. In some states, such as Morocco, this led to frequent postcolonial redrafts of the constitution to reflect changes in the power or preoccupations of political authority, in contrast with the U.S. norm of a single basic constitutional document that can only be modified with difficulty.

The legal system of every contemporary Arab nation is a unique mixture of Islamic, Ottoman, European, and postindependence laws.<sup>15</sup> To be sure, a number of territories escaped direct foreign domination, most notably in the Persian Gulf. Yet even in these places, Western legal ideas and practices have supplemented indigenous combinations of Islamic and customary law. The *mélange* of legal sources in most Arab societies does not in itself preclude legal clarity or checks on authority. However, along with the lapses in territorial and ethnic logic that European colonial powers frequently employed in setting borders for many of the contemporary nations of the Middle East, the lack of legal systemic unity in Arab states has two consequences for recent U.S.-fostered efforts to enhance the rule of law.<sup>16</sup> It means that the jurisprudential reference points of lawyers in the United States are not likely to be of direct use to Arab societies. And it has contributed to political situations in which postcolonial Arab leaders have had many incentives to centralize their authority and no real legal impediments to doing so.

This second point is even more obviously related to the primary legacy of colonialism in the Middle East—an emphasis on control backed by force that was not meant primarily to serve the best interests of indigenous citizens. The political example that socialized Arab nationalist elites was the colonial regimes' resort to invented political forms like mandates and protectorates to conceal their exercise of raw power. Legal norms and institutions existed under colonialism in which the contradictions between stated and true purposes were readily apparent.

At the same time, these norms and institutions were somewhat successful at centralizing political and economic administration. However much Arab nationalists rebelled against colonial rule, they also learned that the lofty promises of colonial political ideas were generally subservient, or even in direct contrast, to the reality of police control. It is small wonder, facing severe economic and other challenges, that these nationalists built on, instead of dismantled, the legacies of authoritarian rule that they inherited.

To be sure, the ideal of the rule of law will often be at odds with the centralizing tendency of governments. I argue that Arab states in the Middle East in general had an especially wide gap between the ideal and the reality because of the combination of the relative lack of autonomous precolonial unified legal order in these states and the particular repressive nature of colonial governments. More subtly, I am suggesting that the level of discontinuity between the rational, legalistic values preached by European administrators and their practice of resource extraction and police rule tainted the very ideal of the rule of law in a way that is unlikely to resonate with the socialization of many American lawyers.

In short, many Arabs view the rule of law in a manner similar to American legal scholars on the left, as an ideology of political control, not as a check on political abuse. This is important because it implies that efforts by internal and external reformers to strengthen the rule of law will not necessarily be associated with political opening within Arab societies. A striking example of how well-formulated ideas of the rule of law can exist alongside repressive political tendencies is the publication of a thoughtful tract on the ideal of legalism in Iraq at the very same time that Saddam Hussein was beginning his final consolidation of his particular style of brutal authoritarian rule.<sup>17</sup>

Despite this authoritarianism, Arab regimes have not lacked defined legal structures. In fact, most Arab states have basic laws or constitutions. Thus, a third major distinction between Arab and American political experiences with the rule of law is that Arab constitutions exist and may matter, but they have had much less of a history of institutionalization and independent judicial interpretation than has the U.S. Constitution.

This difference is neither surprising nor unknown to U.S. rule-of-law experts. In fact, given Arab political centralization, the very existence of constitutions is at least as interesting a political phenomenon as the dearth of independent judicial interpretative traditions for these documents.<sup>18</sup> For my purposes here, however, it is worth underscoring the challenge that the juxtaposition of constitutions and political regimes with few genuine legal checks poses for building broad social support, or even judicial competence, for the rule of law.

A fourth difference of approach to the rule of law between U.S. and Arab societies does not connect directly to the Middle East's history of outside great power influence. It is the relationship of law and religion. Within the United States, religious pluralism has led to the ideal that law should facilitate the separation of church and state. However, most Arab societies have predominantly Muslim populations, with political orders that often establish Islam as a state religion. Thus, laws and legal institutions in many Arab states, even those with secularized leaders, privilege Islam and its traditions.

Of course, most scholars of U.S. constitutional law would assert that the separation of church and state in the United States is far from perfect or unproblematic and has often favored Christian ideas.<sup>19</sup> Ironically, as suggested above, the way in which religious influences have grounded the rule of law in Arab countries has much in common with the United States. Nonetheless, the assumption that Islam *should* inform the political and social order has caused and is likely to continue to cause misunderstandings and difficulties for would-be U.S. political reformers in the region.

The extent to which Islam in general and the Sharia in particular should inform the rule of law and what forms this should take is currently a complicated area of great debate and discussion among Arab and non-Arab Muslim scholars. Adding to the complexity of this issue is the theoretical contradiction between the Islamic ideal of *siyyasa al-shari'a* (the government of God's law) and *siyadat al-qanun* (the sovereignty of man-made law). The latter term, the general way in which the Western idea of the rule of law is translated into Arabic, conveys with it a patina of illegitimacy to some, although by no means all, Muslims.<sup>20</sup>

There is no obvious reason that the ideal political effects of the rule of law of constraining governmental abuse and providing procedural fairness are impossible to achieve in a society with an established religion, so long as religious dissenters and minorities receive legal protection. Yet understanding, navigating, and being sensitive to the ways that religion and politics are intertwined

in most Arab societies is a daunting task for U.S. rule-of-law experts, and one that their own socialization and training in the First Amendment of the U.S. Constitution is unlikely to facilitate. This is especially the case because the ways in which Islamic norms and theory are used in Arab politics are many and varied, often having in common only a shared rejection of the theoretical ideal of a wall between religion and secular state.

Within the broad point that the Islamic legal tradition is bound up in contemporary Arab reform, four trends can be identified, which I refer to as orthodox, conservative, reconstructionist, and reform:

- **Orthodox:** This tendency is what Americans often refer to as Islamic fundamentalism. Corresponding no less to the Saudi Arabian government than to Al Qaeda and the former Taliban regime, reformers within this category think of Islam in rather rigid terms that embrace many of the social norms and practices of Islamic history, including the subordination of women. Such a tendency can continue the historical practice of authoritarian control, so long as a ruling government is enforcing a well-defined tradition of Islamic law.
- **Conservative:** I use this term in its most obvious and literal sense, that of resisting change. This tendency simply refers to a lack of strong interest in reforming the patchwork of Islamic, colonial, and other laws out of comfort with or belief in the importance of maintaining the status quo. Alexis de Tocqueville's observation that lawyers in the United States tend to have affinities for order and power may be no less true for legal professionals in Arab societies, who frequently see the major problem with their own legal systems as citizens' lack of respect for law, as opposed to issues about the accountability or effectiveness of law itself.
- **Reconstructionist:** Islamic jurisprudence has nearly always been characterized by a strong tendency to reinterpret specific and important principles in a manner that addresses the needs of a particular situation. Although the use of classical terminology often leads some contemporary Islamic reconstructionists to be labeled as "fundamentalists," the varied Western and Arab proponents of this approach display a variety of exciting, articulate approaches to reinventing, rather than reverting to, traditional practices based on the relationship of Islam and society. The common point here is a belief that Islamic ideas with historical resonance can be rethought to be compatible with analogues in Western and other democratic theory. Influential theorists such as the Sudanese-American scholar Abdellahi An-Naim and the Syrian Mohammed Shahrur exemplify this approach.<sup>21</sup>
- **Reform:** This tendency cautions against having too much faith in the prospects for traditional Islamic political and legal theory to contain or embrace many core ideas in contemporary Western or other democratic theory. Reflected in the work of the authors of the *Arab Human Development Reports*, this posture is not a rejection of the importance of Islamic identity or law per se. Rather, it is a preference, or at least a willingness, to articulate theories of legal and political reform in terms translated directly from global usage such as *dimaqatriyya* (democracy), *huquq-el-insan* (human rights), and *siyadat al-qanun*. This tendency can be grounded in skepticism about the possibility of traditional Islamic terms to adapt to modern political debates, a desire to avoid overburdening religious concepts with excess contemporary meaning, or both.

Given that all four of the different trends above assume some connection between Islam and the rule of law, it would be easy for American-trained lawyers who think of the religion-state link as ideally one of separation to miss the important distinctions among them. As a general matter, Western advocates of Arab legal change often favor ideas that fall within the “reform” category above, while indigenous activists more typically fit within the “reconstructionist” and “orthodox” trends. The U.S. government has often supported “conservatives” and has even aided “orthodox” Arab governments and nonstate movements, most obviously in the respective cases of Saudi Arabia and the Islamist militias who fought Soviet control of Afghanistan in the 1980s. Yet, if Western rule-of-law or other democratization specialists are unprepared for the extent to which and the diversity in which indigenous Arab language of legal change is saturated with Islamic terminology, even within the reform trend, their ability to see nuances and connect with actual legal change will be hobbled.

It is important to reiterate that the above four major differences between Arab and American experiences with the rule of law do not preclude either that Arab governments can have more robust legal checks or that many Arabs value the rule of law. My point is instead that the experiential differences discussed above pose intellectual barriers for U.S. law specialists who seek to strengthen the rule of law in the Middle East. Moreover, these differences raise some Arabs’ suspicions that American lawyers are functioning in the manner of previous agents of Western foreign powers, whose attractive political words concealed their complicity in imperial coercion.

In sum, U.S. and other Western rule-of-law experts face a variety of general and specific cognitive handicaps in trying to bring legal reform to Arab societies. The diverse sources and systems of law, the repressive legacy of colonialism, the lack of authority and tradition of judicial review, and the connection of mosque and state are all features of the Middle Eastern legal landscape that hinder easy access for lawyers whose primary grounding is in U.S. common law and politics. Furthermore, a general wariness toward Western incursion alongside a particular negative reaction to U.S. foreign policy since September 11, 2001, creates in many Arab quarters a particularly unreceptive current environment for rule-of-law reformers with even the best of techniques and intentions.

## **WHAT U.S. RULE-OF-LAW REFORMERS DO IN ARAB COUNTRIES**

I have argued above that there is a likely mismatch between the training of American lawyers in general and the specific context for rule-of-law work in Arab countries, despite the importance of the rule of law in both the United States and the Arab world. Compounding this are at least two additional barriers to effective U.S.-based rule-of-law assistance in the region. First, the general lack of international and Middle Eastern expertise by many Americans in general and American lawyers in particular makes it difficult to find knowledgeable and experienced specialists to staff particular programs. A second barrier is literal; as several Americans with rule-of-law mission experience have mentioned to me, U.S. citizens’ concern for their safety in Arab countries often keeps them within isolated quarters or compounds, thereby further decreasing their opportunities to develop a deep understanding of the everyday realities of Arab societies.

Rule-of-law work is thus likely to be done by well-meaning Americans with limited detailed knowledge of the people and legal systems which they hope to aid. This makes it tempting for practitioners to carry assumptions based on their own national experiences into Arab contexts.

Rule-of-law specialists are aware of this problem and of the general difficulty of resolving mismatches between their experiences of law and the needs of Arab countries. Yet, these translation problems can still be daunting and easy to underestimate.

In fact, it can be tough for American lawyers to realize how unusual (and not necessarily portable) U.S. ideas and practices about law truly are. One experienced professional conveyed his conviction that Arab judges found strange and irrelevant the extent to which rule-of-law programs focused on teaching U.S. notions of intellectual property law and alternative dispute resolution, neither of which seem to have much of anything to do with current questions of greatest import in Middle Eastern courts or societies.<sup>22</sup> Coupled with the lack of specific information as to what supports the rule of law, and whether and how the rule of law encourages democracy, barriers to knowledge and understanding in this area of foreign policy appear particularly challenging.

How have U.S. practitioners dealt with this challenging environment? In many respects, it is too early to generalize, given that rule-of-law programs in Arab countries are in their early stages of development. One clear conclusion is that U.S. rule-of-law work has so far been focused almost exclusively on Arab judges and courts. This corresponds to the more general experience and efforts to analyze and apply the experience that U.S. development agencies have accrued in judicial reform in parts of the world other than the Middle East.<sup>23</sup>

The slant of U.S. rule-of-law programs toward judiciaries is readily understandable for a number of reasons. Judges are a small, elite subset of Arab societies, often with strong Western educational training and language facility, making them easy collaborators for American lawyers. Judges' work, in the form of case decisions, can often be monitored, quantified, and even read, meaning that methods exist to measure program results, which is naturally important to development aid administrators in Washington. The general nature of common law and the particular significance of judicial review in the United States may also predispose American lawyers and political figures to conflate the rule of law and the primacy of judges.

Moreover, centering rule-of-law work on Arab judiciaries has a defensible rationale; a truly independent judicial authority can indeed be a potent force for subordinating political officials to law. Yet arguing that an established judiciary with significant autonomy from other parts of government helps laws trump rulers says nothing as to whether U.S. programs geared toward judiciaries can actually lead to this goal in particular Arab contexts. It is difficult in terms of both theorizing and data collection to be sure about how judicial independence in a society is developed and maintained.<sup>24</sup> Because U.S. programs in the Arab region to date have most often emphasized issues such as court administration and training judges in the application of commercial law, these programs may not have any logical connection to political liberalization.<sup>25</sup>

In fact, there are grounds to suspect that U.S.-sponsored programs that are mostly limited to Arab judiciaries might even work against the very goal of increasing judicial authority. Court efficiency can be a tool of political centralization and repression, just as it can serve to protect people against government excess. If little empirical research exists to suggest when U.S. technical assistance to Arab judges might serve political liberalization, there are several logical reasons to suspect that such work may be more likely to contribute to entrenching authoritarianism.

First, the level of political cooperation between Arab governmental entities and U.S. aid contractors necessary to implement projects may subordinate U.S. rule-of-law work to the agendas of

local political authorities, which have extensive experience at thwarting pressures for liberalization. The entrenchment of illiberal political systems in Arab countries makes the problem of authoritarian control especially significant. As one expert told me, in democratizing contexts like Eastern Europe, because of the potential for rapid integration with the West that has come along with economic and political reforms, rule-of-law reformers have a much wider variety of carrots and sticks to use with political actors than in the authoritarian setting of Arab countries.<sup>26</sup>

Second, in the context of widespread anti-American rhetoric in many Arab societies, judges may not be particularly receptive to efforts by U.S.-based legal professionals to train them. In fact, judges may have little stake in broad political change or may see their judicial system as in need of nothing more than modest gains in efficiency. Third, and as a consequence, both judges and U.S. rule-of-law specialists may find themselves identified more with unpopular political elites than with forces within Arab societies striving for greater political autonomy. Even in Egypt, the Arab country in which the principle and the practice of judicial review are the most developed,<sup>27</sup> it is easy to see courts as dependent on the government.<sup>28</sup> When judges in a country such as Egypt do confront the authoritarian leadership, they may limit their efforts to legal issues and to strategies that do not undermine the advantages they enjoy through a conciliatory attitude toward central power.<sup>29</sup>

Concerns about becoming embroiled in local politics are precisely why most U.S.-based rule-of-law programs are conceived in technical terms that avoid political sensitivity. It is easy to argue that narrowly focused work is most practical in the context of pervasive Arab political centralization and vigilance. Yet it does not stand to reason that such work can foster judicial independence, which seems to be the key hope for connecting rule-of-law work to democratization.

Because Arab governments have used and will continue to use their talent for the co-optation of potential political opposition to consolidate their authority, efforts to buttress the power of the judiciary or the autonomy of law would seem most likely to succeed when they are linked to nongovernmental or popular Arab social forces. Yet U.S. rule-of-law programs have not generally taken this direction, and not merely because of concerns about politicization. In a field in which there are few data about results, donor organizations and U.S. governmental agencies expect rule-of-law specialists to be able to demonstrate specific results. This means that programs on broad issues of improving legal education, fostering social support for law, and building citizen knowledge of legal protections are only a tiny piece of the U.S. rule-of-law industry; such programs are generally quite unlikely to produce obvious or quick results.

Nonetheless, Arab lawyers and U.S. experts with whom I have spoken tend to agree that programs geared toward civic and professional education are precisely what is needed to achieve real progress on improving the rule of law, judicial independence, and democratization. Because governments have the coercive capacity to repress courts, judicial independence is to some extent dependent on acceptance by a significant segment of a country's population that citizens have rights, as well as obligations, under law, and that judges can and should help citizens realize their rights. The 2004 *Arab Human Development Report* stresses that local civic education in human rights is a severely underdeveloped prerequisite for political freedom in Arab societies.<sup>30</sup> Arab legal education for the most part does not include critical analytical skills or broad thinking about justice; indeed, most Arab university law faculties lack prestige, sufficient teaching and economic resources, and pedagogical accountability to students.

If Arab citizens and lawyers are taught that their legal system has little respectability and reliability, then judges can find few allies or pressures to challenge their subordination and the subordination of law more generally to the authoritarian political systems in which they operate. Making courts function more efficiently in such a context may serve to further centralize antidemocratic governments and even increase Arabs' cynicism about what the rule of law means in practice. In short, U.S.-based rule-of-law programs in countries that are focused almost entirely on judicial efficiency at best have an indeterminate effect on Arab democratization and at worst can damage it.

Of course, this discussion is premised on the assumption that Washington means what it says when it links the rule of law to democratization. Perhaps rule-of-law programs in Arab societies really reflect the ambivalent cooperation of the United States with repressive regimes or the desire of American lawyers to feel useful in the world. If so, then it is less significant that neither empirical data nor analytical logic support a link between the programs we have run and the prospects for Arab laws to constrain leaders. However, if the point of U.S.-based rule-of-law programs is truly to strengthen the authority, accountability, and autonomy of Arab law, then both the contours of Arab debates about the rule of law and the context of enduring Arab authoritarianism must be central to informing and shaping Washington's efforts.

## REFORMING WHAT THE REFORMERS DO

One response to the formidable challenges to U.S.-based rule-of-law work in Arab countries is to cede the terrain of reform to indigenous Arab activists and experts, who are best-suited to understand their sociopolitical environments. Because U.S. foreign policy hubris and naïveté may have weakened U.S. ability to influence certain types of change in the region, American humility and introspection may prove to be the best strategy to foster legal reform in the long run.

Nonetheless, given that even prominent Arab reform specialists believe that foreign governments can be useful, I do not contend that abandoning the possibility of a meaningful role for the United States in Arab legal reform is a necessary conclusion from my analysis above.<sup>31</sup> Working to improve the prospects for legal systems to moderate governmental excess continues to be one possible way of improving Arabs' lives, and remains a potential channel for the real idealism and commitment for this task that motivates the Americans involved in this work. The key to rule-of-law work in the Middle East is the realization that it cannot get very far if it is decoupled from broader strategies that address the repressive tendencies of authoritarian regimes in the region, along with the popular perceptions of many Arabs that the U.S. government is complicit in this repression.

Explanations abound for why Arab governments consistently rank among the worst cases in the world in their refusal to uphold their citizens' political freedoms, human rights, and civil liberties.<sup>32</sup> Part of the story is Washington's understandable, if short-sighted, historical practice of preferring governments in the Middle East that it might characterize as stable, even when stability comes at the point of a gun. For example, Egypt, the second-largest recipient of U.S. foreign aid in almost every year since the late 1970s, has used its funds to increase the coercive capacity of the unpopular authoritarian leader Hosni Mubarak. Washington's predilection for maintaining extant regimes has generally outweighed its commitment to popular accountability and democratization. In fact, it may be no accident that U.S. rule-of-law programs in Arab contexts have focused more on law as order than on law as empowering citizens against unpopular leaders.

However, the aftermath of the September 11 attacks against the United States has changed this picture. Although the Bush administration continues to maintain close relations with autocratic Arab regimes, President Bush is making the promotion of democracy in the Middle East one of the rhetorical centerpieces of his foreign policy. And the administration has begun to exert diplomatic pressure for political change against some Arab leaders, notably, Egyptian President Hosni Mubarak, and has launched new aid initiatives aimed at supporting political and other reforms in the region. Washington's new apparent emphasis on the problem of Arab authoritarianism is an opportunity to rethink and reformulate U.S. rule-of-law programs in the Middle East.

The bad feelings that Arabs retain for the experience of Western imposition of laws and politics on their societies should serve as a general caution that the United States cannot and should not expect that it can create new legal orders in the Middle East. However, experienced rule-of-law practitioners, who would doubtlessly share this general caution, can take other steps to help Arab legal systems function more credibly. One obvious first step is for reform efforts to be more specific about recognizing the common and contentious points discussed above with respect to the nature and cultural reception of the law. Each Arab society's own unique discourse on Islam and politics, mixture of legal systems, and pattern of popular understanding of law and its relation to authority need to be mapped with an eye to exactly how country-specific reform might be possible. Rule-of-law specialists whom I interviewed would embrace this suggestion wholeheartedly; realizing this, however, would require much more research and on-the-ground knowledge about the detailed patterns of legal culture in individual Arab contexts, as well as data on how rule-of-law work connects to particular rule-of-law ideals.

A second more challenging step is for rule-of-law reformers to tailor their efforts to reflect clearly that entrenched authoritarian practices are the major impediment to expanding the role that legal norms and institutions can play in Arab political liberalization. Doing this is not necessarily easy; it runs counter to the argument that rule-of-law work is most effective when it is politically uncontroversial and technical. Moreover, steering rule-of-law projects toward addressing broad antidemocratic social patterns is less amenable to short-term assessment than focused, technocratic initiatives. For this reason, such projects are not necessarily appealing to donor agencies.

Despite these concerns, I believe that rule-of-law work that aims to build a broad social understanding of law offers more potential to enhance legalism in Arab societies in the long run than work geared mostly to the reform of judges and courts. Examples of projects that would fit this approach would include law school curriculum enhancement, funding of independent or populist local media projects that provide independent information about law, and collaborations with indigenous human rights movements. Programs such as these tend to require a longer-term commitment and ongoing, relatively equal partnership on the part of U.S. specialists. Such programs also are likely to expose U.S.-based practitioners to a wider range and deeper level of local knowledge and contacts. This, in turn, has the potential to increase social trust of Washington-sponsored rule-of-law work among a more varied sample of Arabs than typical judicial reform programs, as well as to increase the expertise of U.S. specialists. Given these advantages, it is not surprising that both Arab lawyers and senior U.S. experts with whom I spoke agree that rule-of-law programs should attempt to connect directly with a wider range of people than judges over a sustained period of time if possible.<sup>33</sup>



Indeed, teaching Arab legal functionaries about management and specialized topics of law is likely to be useful in genuinely broadening the impact of the rule of law only if the judges wish to or have political space to decide cases or write opinions independent of governmental control. However, strengthening the capacity of marginalized groups with liberalizing agendas to make claims grounded in law that challenge the repressive excesses of Arab regimes may foster broader respect for legal tools and ideas among Arab citizens. This is why grassroots programs to improve legal education and popular legal knowledge are potentially at least as important as projects aimed at judges and officials. The kinds of legal empowerment approaches that Stephen Golub has advocated for the Asian context are very relevant for the Middle East as well.<sup>34</sup>

Of course, current Arab governments may be reluctant to endorse or facilitate rule-of-law projects that foster real political liberalization. Nonetheless, legalism can only flourish in postcolonial Arab societies where there is widespread belief that it is genuine, rather than window dressing for a repressive regime. Given this, if rule-of-law specialists are unable to gain Arab governmental cooperation for work targeted toward broader popular support and respect for law, it may be preferable for them to hold off on their efforts. Programs that are limited to a narrow stratum of judges and approved by autocratic officials may actually have the effect of further isolating the judiciary from sources of political support and, thereby, strengthening these autocrats' political control.

Even where a narrowly construed judicial reform project achieves some success, it can be partially undermined by its dependence on the changing priorities of political elites. The World Bank team responsible for developing discrete commercial courts in Morocco experienced this problem, leading team leaders to assert the importance of identifying as early as possible a wide variety of local stakeholders as a key lesson for future rule-of-law projects.<sup>35</sup> The World Bank's report from this project thus implies what I am arguing directly—rule-of-law work in Arab societies should prioritize ways to build diverse constituencies within a target country that have a stake in legalist reform.

A general approach to rule-of-law work in Arab countries that moves beyond court reform to attempt to build broader social support for law should follow four operational principles:

1. Link to and build on Arab-led activities and initiatives;
2. Look for more multilateral program development opportunities, especially with European groups that may have complementary experience and expertise;
3. Focus reform on issues or sectors that increase legal pressures for political accountability; and
4. Emphasize issues such as education, freedom of the press, and popular access to diverse, international media and opinions that may be prerequisites, rather than obvious components, of respect for the rule of law.

Successful examples exist of work that builds on these principles to improve social respect for law and legal constraints on government. Arab human rights reform provides one interesting set of case studies.<sup>36</sup> As I have argued elsewhere, a variety of politicized groups in several Arab countries in the 1980s and early 1990s found human rights activism particularly useful, because it manifested the potential to chip away at state authoritarianism.<sup>37</sup> More specifically, international human rights activism in Morocco and Tunisia was able to link particularly well with local initiatives to the extent that it seemed in tune with pressuring governments to liberalize politically.

In Morocco, the ongoing synergy between rights activism and gradual political opening has meant a continuation and diversification of human rights politics. This culminated notably in work that bridged the efforts of international and indigenous women's rights supporters to reform the country's *mudawana* (family code) in early 2004. The new *mudawana* encompasses the most extensive set of changes of any Arab country to family law provisions that are anchored in Islamic norms. The variety of Moroccans involved in this legal reform, in turn, has caused this issue to enjoy a high profile sufficient to encourage broader discussions in the news media on the importance of law in society more generally.<sup>38</sup>

The 2003 release of prominent Egyptian sociologist Saad Eddin Ibrahim, who was imprisoned in Egypt for his criticism of Hosni Mubarak's government, is another notable example of the involvement of a coalition of Arab and Western lawyers, intellectuals, and other activists on an issue with potentially important implications for the rule of law. This coalition managed to get the Bush administration to put high-level pressure on the Egyptian government, which in turn publicized the extent to which the Mubarak regime's trial and sentencing of an outspoken critic flouted legalist ideals, despite the existence of an efficient court system and judicial review. Even though Ibrahim's release might appear to be a more modest accomplishment than the training of a cadre of judges in Anglo-American jurisprudence, it serves the growth of the rule of law precisely because it highlights the general manner in which a well-developed Arab legal system can nonetheless be subordinated to authoritarian politics. Moreover, the case demonstrates that creative coalitions of activism can produce cracks in the authoritarian barriers to the prospects for law to serve political liberalization.

My suggested strategic approach to rule-of-law work builds on four major points from this essay. First, the rule of law as an ideal is relevant to and understandable within Arab societies. Second, the legacy and endurance of authoritarianism in Arab countries engenders understandable cynicism about governments' and outsiders' use of the term. Third, rule-of-law work cannot therefore be decoupled from addressing the resilience of political elites who see law as serving rather than constraining them. Fourth, the particular differences between the Arab and U.S. contexts for the rule of law and the particular distrust which many Arabs have for the U.S. government require circumspection, caution, and coalition with Arab activists if rule-of-law work is to have even a modest hope of success.

This sketch of the broad contours of politics of rule-of-law work in contemporary Arab societies and the conclusions that follow should not be read as an attack on U.S. specialists who believe in the importance of strengthening the promise of equality, rights, and political accountability for the betterment of Arabs in general. I am simply arguing something that is likely to be known by the most experienced and proficient of these activists—that a change of tactics, a scaling-down of expectations, and a scaling-up of patience represent the best prospects to counteract the sustained subjugation of law by some Arab leaders.

The above may sound like a bromide, yet calls for caution, cross-national cooperation, and circumspection are essential in a U.S. policy environment where major initiatives like forced Iraqi regime change are undertaken that may seem rushed or unsound in their long-term reasoning. Echoing Tocqueville's belief that American lawyers are less inclined than most Americans to political rashness, I would like to think that the U.S.-based practitioners of rule-of-law projects in Arab societies would allow this particular policy area to be characterized by diligence, deliberation, and diplomacy, rather than unsubstantiated strategies that have little to do with regional realities.

## NOTES

- <sup>1</sup> Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 4.
- <sup>2</sup> See Richard Fallon, “‘The Rule of Law’ as a Concept in Constitutional Discourse,” *Columbia Law Review*, vol. 97 (1997), 1–40; and Frank Upham, “Mythmaking in the Rule-of-Law Orthodoxy,” Carnegie Endowment Working Paper no. 30 (Washington, D.C.: Carnegie Endowment for International Peace, September 2002).
- <sup>3</sup> Gerhard Robbers, “The Rule of Law and Its Ethical Foundations,” in *The Rule of Law*, ed. Joseph Thesing (Sankt Augustin, Germany: Konrad Adenauer Stiftung, 1997).
- <sup>4</sup> José María Maravall and Adam Przeworski, eds., *Democracy and the Rule of Law* (Cambridge: Cambridge University Press, 2003), 15.
- <sup>5</sup> Guillermo O’Donnell, “Why the Rule of Law Matters,” *Journal of Democracy*, vol. 15, no. 4 (2004), 33–4.
- <sup>6</sup> Rachel Belton, “Competing Definitions of the Rule of Law: Implications for Practitioners,” Carnegie Paper no. 55 (Washington, D.C.: Carnegie Endowment for International Peace, January 2005).
- <sup>7</sup> See, for example, Eugene Cotran and Mai Yamani, eds., *The Rule of Law in the Middle East and the Islamic World: Human Rights and the Judicial Process* (New York: I. B. Tauris, 2000); and Erik G. Jensen and Thomas C. Heller, eds., *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford, CA: Stanford University Press, 2003). The latter useful study notes both the conflation of the rule of law to institutional programs by reform specialists, as well as the limited impact of such reform programs, pp. 1–3.
- <sup>8</sup> But, see Nathan Brown, *The Rule of Law in the Arab World* (Cambridge: Cambridge University Press, 1997), for work on courts in Arab countries that provides insights regarding embedded Arab authoritarian politics.
- <sup>9</sup> Even a country with as developed secular legal and social traditions as Egypt makes Islam its basic source for legislation in article 2 of its constitution. For discussion of this, see Baudouin Dupret, “La Chari’a est la Source de la Législation: Interprétations Jurisprudentielles et Théories Juridiques,” in *L’État de Droit dans le Monde Arabe*, ed. Ahmed Mahiou (Paris: CNRS Éditions, 1997), 125–42.
- <sup>10</sup> Chibli Mallat, “From Islamic to Middle Eastern Law: A Restatement of the Field (Part II),” *American Journal of Comparative Law*, vol. 52, no. 1 (2004) 285.
- <sup>11</sup> For a general account of the tension between the ideal and practice of the rule of law in Islam, see Khaled Abou el Fadl, *Islam and the Challenge of Democracy* (Princeton, NJ: Princeton University Press, 2004), 12–4.
- <sup>12</sup> George N. Sfeir, *The Modernization of Arab Law: An Investigation into Current Civil, Criminal, and Constitutional Law in the Arab World* (San Francisco: Austin and Winfield, 1998), 11–2.
- <sup>13</sup> Ellis Goldberg, “Private Goods, Public Wrongs and Civil Society in Some Medieval Arab Theory and Practice,” in *Rules and Rights in the Middle East: Democracy, Law, and Society*, ed. Ellis Goldberg, Resat Kasaba, and Joel S. Migdal (Seattle: University of Washington Press, 1993), 251, 255, and 263.
- <sup>14</sup> Lawrence Rosen, *The Justice of Islam* (Oxford: Oxford University Press, 2000), 48–9.
- <sup>15</sup> For a succinct summary of the combination of sources of law in each Arab area, see Brown, *Rule of Law*, 3–5.
- <sup>16</sup> Roger Owen, *State, Power and Politics in the Making of the Modern Middle East* (London: Routledge, 2000), 11.
- <sup>17</sup> Samir Khairi Tawfiq, *Mabda Siyadat al-Qa’nun* [The Principle of the Rule of Law] (Baghdad: 1978). Considering that it was published a year before Saddam Hussein moved from partial to undisputed political control of Iraq, this thoughtful, philosophical discussion of the rule of law in terms that would sound familiar to Western legal scholars is a particularly interesting treatise on the subject in the Arabic language.
- <sup>18</sup> For a detailed discussion of the political roles for Arab constitutions, see Nathan Brown, *Constitutions in a Non-Constitutional World* (Albany: State University of New York Press, 2002).
- <sup>19</sup> Indeed, one might question American exceptionalism with respect to religion and politics generally as is done thoughtfully based on a multination comparison by N. J. Demarath III in *Crossing the Gods: World Religions and Worldly Politics* (New Brunswick, NJ: Rutgers University Press, 2001), 215–46.
- <sup>20</sup> One of the signs of both legal pluralism and the relative novelty of the Western notion of the rule of law in Arab countries is that there is no single phrase that is used in every country to translate the term. For example, in Morocco, the concept is often referred to as *dawla el-haq w’al-qa’nun* (the rule of right and law), instead of *siyadat al-qa’nun*. This term gained currency through the Moroccan monarchy’s efforts to employ it as a slogan for its own purported fealty to the ideal of the rule of law.

- <sup>21</sup> A thorough and excellent discussion of many of the varied ideas that fit into contemporary Arab debates on democracy and that generally assume the possibility of what I am calling the reconstructionist tendency can be found in Larbi Sadiki, *The Search for Arab Democracy: Discourse and Counter-Discourses* (New York: Columbia University Press, 2004), especially 198–252.
- <sup>22</sup> John Stuart Blackton, interview with author, April 8, 2005.
- <sup>23</sup> Perhaps the best publicly available document that tries to accrue lessons from judicial rule-of-law programs is a study that was published by the U.S. Agency for International Development (USAID) in 2002, *Guidance for Promoting Judicial Independence and Impartiality* (Washington, D.C.: Office of Democracy and Governance, USAID, 2002). This remarkable document, which brings together the perspectives of leading scholars and experienced practitioners, does not include data or assessments from Arab countries because of the relative youth of dedicated U.S.-based rule-of-law programs in these countries.
- <sup>24</sup> Matthew Stephenson, “Judicial Independence: What It Is, How It Can Be Measured, Why It Occurs,” World Bank Policy Brief (Washington, D.C.: World Bank), available at [www1.worldbank.org/publicsector/legal/judicialindependence.htm](http://www1.worldbank.org/publicsector/legal/judicialindependence.htm).
- <sup>25</sup> John Stuart Blackton, “Neo-Wilsonianism in the Middle East: Democracy-Lite,” *National Interest*, vol. 2. no. 43 (November 5, 2003), 2.
- <sup>26</sup> Keith Schulz, interview with author, April 7, 2005.
- <sup>27</sup> For a valuable inside appraisal of Egypt’s recent experience with judicial review, see Adel Omar Sherif, “The Rule of Law in Egypt from a Judicial Perspective,” in Cotran and Yamani, *Rule of Law*, 1–34.
- <sup>28</sup> Yustina Saleh, “Law, the Rule of Law and Religious Minorities in Egypt,” *Middle East Review of International Affairs*, vol. 8, no. 4 (December 2004), 83.
- <sup>29</sup> Nathan J. Brown and Hesham Nasr, “Egypt’s Judges Step Forward: The Judicial Election Boycott and Egyptian Reform,” *Policy Outlook* (Washington, D.C.: Carnegie Endowment for International Peace, May 2005), 1, 4.
- <sup>30</sup> United Nations Development Programme (UNDP), *The Arab Human Development Report 2004* (New York: United Nations, 2005), 149.
- <sup>31</sup> UNDP, *Arab Human Development Report 2004*, 20.
- <sup>32</sup> See, for example, the special issue of *Comparative Politics* from January 2004 devoted entirely to explaining Arab authoritarianism and Daniel Brumberg, “Liberalization versus Democracy: Understanding Arab Political Reform,” Carnegie Endowment Working Paper no. 37 (Washington, D.C.: Carnegie Endowment for International Peace, April 2003).
- <sup>33</sup> For example, John Stuart Blackton, interview, and Attorney Myriam Bennani, interview with author, March 12, 2005, Casablanca, Morocco.
- <sup>34</sup> Stephen Golub, “Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative,” Carnegie Endowment Working Paper no. 41 (Washington, D.C.: Carnegie Endowment for International Peace, October 2003).
- <sup>35</sup> World Bank, *Implementation Completion Report (Scl-45630) on a Loan in the Amount of US \$5.3 Million to the Kingdom of Morocco for a Legal and Judicial Development Project* (Washington, D.C.: World Bank, December 30, 2004), 12–7.
- <sup>36</sup> See, generally, Ann Elizabeth Mayer, *Islam and Human Rights*, 3rd edition (Boulder, CO: Westview Press, 1998); and Susan Waltz, *Human Rights and Reform: Changing the Face of North African Politics* (Berkeley: University of California Press, 1995).
- <sup>37</sup> David M. Mednicoff, “Think Locally, Act Globally? Cultural Framing and Human Rights Movements in Tunisia and Morocco,” *International Journal of Human Rights*, vol. 7, no. 3 (2003), 72–102.
- <sup>38</sup> See, for example, the article “Un An Après: la Moudawana à l’Épreuve du Réel,” which covered the general legal enforcement and understanding of the new family code in urban courts and the countryside and appeared in a weekly Moroccan news magazine with a growing reputation for accuracy and independence, *Tel Quel* (March 5–11, 2005), 22–9.

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