

**COLETTE RAUSCH**E-mail: [crusch@usip.org](mailto:crusch@usip.org)

Phone: 202-429-3860

**JASON GLUCK**E-mail: [jgluck@usip.org](mailto:jgluck@usip.org)

Phone: 202-429-3886

**VIVIENNE O'CONNOR**E-mail: [voconnor@usip.org](mailto:voconnor@usip.org)

Phone: 202-429-3898

**SCOTT WORDEN**E-mail: [sworden@usip.org](mailto:sworden@usip.org)

Phone: 202-429-3811

## Traveling toward the Rule of Law in the Middle East and North Africa: Avenues and Obstacles

### Summary

- Popular uprisings throughout the Middle East and North Africa are demanding justice, security, and accountability—defining features of the rule of law.
- Constitutional reform is a priority, but it must be done by legitimate representatives of the people, not hangovers from the past. Principles of inclusivity, transparency, and participation must be at the heart of the process.
- Transitional justice must deliver justice for the victims of the former regimes but not impose victor's justice. It must also mesh with Islamic justice where relevant.
- The legal debris of the past must be removed through a process of law reform, and steps must be taken to ensure that old ills, such as endemic corruption, do not reappear.
- Rising crime and retribution against security forces make it difficult to maintain security. But providing security as well as justice is vital if the new political orders are to maintain popular support.

“Unrealistic expectations for rapid reform must be kept in check—while keeping clearly in mind the ultimate goal of a society that is both just and secure. Sacrificing security for justice will undermine popular support for future reform. Sacrificing justice for security will lead back to the authoritarian past.”

### Introduction

The upheaval sweeping the Middle East and North Africa is driven by the people's demand for a voice in decisions that affect their lives and for a society that provides justice, security, and accountability for everyone—in other words, a society that abides by the rule of law. In the eyes of those who dared to protest against unaccountable leaders, corrupt judges, and brutal security forces, the uprisings will not have succeeded until their countries embrace the essence of the rule of law.

This Peace Brief maps out major avenues that can lead to the rule of law in the region. It also charts obstacles that stand in the way of new governments in Cairo, Tunis, and elsewhere as these nations seek to satisfy popular hunger for fairness. And it warns that promoting justice without ensuring security will lead nowhere.

### Rewriting Constitutions

In all countries transitioning from authoritarian rule, constitutional reform is a priority. But the sense of urgency in the push to create the legal basis for a new political order in the Middle East and North Africa can obscure two major challenges.

How to sequence constitutional reform and elections? Who is to lead the process of constitutional reform? And when should it be conducted? Electing new representatives under an existing constitutional order may simply turn over the machinery of authoritarianism to a new set of actors. Early elections favor parties that flourished under the previous regime. A longer transitional period allows comprehensive and popularly-led constitutional reform to occur. But longer transitional periods can entrench transitional, often unelected actors.

In Egypt, the transitional government, led by the Supreme Council of the Armed Forces, conducted a secretive and limited constitutional review in just 10 days, with only three weeks of public discussion before a March 12 referendum. The referendum passed with significant dissent from the opposition, which felt the reforms did not go far enough. Elections for the legislature are now scheduled for September, with presidential elections expected to follow in November—too soon, many fear, for the opposition parties to be able to compete fairly.

Tunisia is taking a different approach: it will elect (in July) a constituent assembly that will develop an entirely new constitution, and not until that has happened will elections for a president and a parliament take place. But in Tunisia, as in Egypt, early elections favor established parties at the expense of the reformers who led the revolutions. And without prior constitutional reform, there is no guarantee the new assembly will draft a new constitution consistent with the reformists' democratic agenda.

At its heart, this is a problem of legitimacy for the new constitution and, by extension, the new political order in Egypt and Tunisia. Ironically, the best solution may be a less democratic one, in which the state augments the elected membership of a constitution-making body with appointees who reflect the country's various political, social, and economic communities.

*How to design a legitimate constitutional review process?* The tension between constitutional reform and elections can be reduced by adhering to fundamental principles designed to legitimize the constitution-making process:

- **Inclusivity:** the constitution-making body must reflect the diversity of the nation so all voices are heard
- **Participation:** the people are educated about the process and given an opportunity to express their will
- **Transparency:** the public is aware of what is happening throughout the process
- **Consensus:** Decisions are reached based on discussion, negotiation, and persuasion, not by application of majority rules
- **National ownership:** The process should be defined, developed and led by national actors, not international interests, donors, or experts

Officials in both Egypt and Tunisia claim they are adopting many of these principles. Time will tell if these claims are accurate.

## Delivering Justice for Victims

The ouster of authoritarian regimes presents victims and their families with the chance to seek redress for torture, unjust imprisonment, "disappearances" and extrajudicial executions. These deep-rooted grievances fueled the protests, and protesters expect that their demands for justice will be met by the new administrations.

Those administrations can choose from a variety of transitional justice mechanisms already used by new democracies in sub-Saharan Africa, Latin America and Asia to address atrocities and mass human rights abuses. Past experience suggests that multiple mechanisms should be used to

address different types of crimes and different impacts on victims. Selecting the right combination of truth commissions, war crimes trials, memorials and reparations will be difficult. But the new governments have other questions to address, too.

*How to get justice for victims, but not victor's justice?* Legitimate demands for justice inevitably coincide with political fault lines within each country. Many of those who are victims of past abuse were out of power. Now that they have a voice, their pursuit of justice may be seen by groups who prospered under the old regime as an attempt at victor's justice. There will be fears that collective blame for past atrocities will be used as a pretext for broad exclusion from political or economic power in the future. Therefore, transitional justice processes must be transparent, inclusive and incremental.

*How to mesh transitional justice and Islamic justice?* Broadly speaking, the principles of Islamic law—in particular, its emphasis on social and criminal justice—align with international legal norms of truth, accountability and compensation for victims of mass crimes and human rights abuse. Yet, transitional justice mechanisms are relatively rare in Muslim countries. In parts of the Muslim world, international courts and criminal sanctions are painted as illegitimate, anti-Islamic and Western constructs.

The uprisings in Egypt and Tunisia present an opportunity to set the record straight. Both are secular states with plural religious traditions. But they are also deeply Muslim societies, with strong Islamic legal traditions. Because the revolutions that overthrew the old regimes were accomplished without significant foreign support, their approaches to transitional justice should be not be tainted by accusations of anti-Islamic bias, as was the case in Iraq and Sudan. A new conversation may soon begin about the rights of Muslim victims who have suffered atrocities from other Muslims.

## Leaving the Past Behind

Populations across the Middle East and North Africa are demanding wholesale transformation. To achieve this requires not only large-scale measures, like rewriting constitutions, but also more limited reforms that can help a transitional state avoid repeating past mistakes.

*How to deal with the former regime's laws?* A key demand among those who have fought to oust entrenched regimes is the abolition of abusive laws that sustained those regimes. Syria's State of Emergency Law, for instance, has been in force since 1963 and has heralded numerous other laws that infringe or restrict rights and liberties. In Libya, the rights of freedom of expression and association have been criminalized. Across the region, journalists are routinely restricted in their ability to criticize authoritarian regimes.

Extensive law reform efforts are needed to expunge such laws from criminal codes and safeguard civil rights. But major revisions will have to wait until new constitutions have been drafted. Meanwhile, new governments should take steps to address the impact of unfair laws. The transitional government in Tunisia, for example, has already released political prisoners, introduced an amnesty law, guaranteed freedom of expression and association, and allowed the media to report freely. Similar initiatives in Egypt have paved the way for political parties and civil society to exercise their right to freedom of association.

*How to avoid repeating the past?* Corruption was endemic in the old regimes, and the threat of it infecting the new political orders is real. Prosecutions of leading figures from outgoing governments guilty of large-scale corruption (as is occurring in Egypt) will be a deterrent. But these punitive measures need to be accompanied by steps to create unambiguous and up-to-date laws and regulations that impose stiff penalties for corruption. In Tunisia, a new Anti-Corruption

## ABOUT THIS BRIEF

This brief was written by the director of USIP's Rule of Law Center of Innovation and three of the center's senior advisers: Colette Rausch, Jason Gluck, Vivienne O'Connor and Scott Worden. The authors' analysis is informed by their knowledge of the Middle East and North Africa and their firsthand experiences in promoting the rule of law in transitional states such as Afghanistan, Cambodia, Haiti, Iraq, Kosovo and Nepal.



UNITED STATES  
INSTITUTE OF PEACE

2301 Constitution Ave., NW  
Washington, D.C. 20037

[www.usip.org](http://www.usip.org)

USIP provides the analysis, training and tools that prevent and end conflicts, promotes stability and professionalizes the field of peacebuilding.

For media inquiries, contact the office of Public Affairs and Communications, 202.429.4725

Commission has been established to investigate allegations of corruption by the former regime and to create laws on corruption for future enforcement.

Optimism that reforms will endure can be fostered by removing those actors who perpetuated the injustices of the past. Repressive security agencies can be dismantled—as they have been in Egypt and Tunisia—and members of justice and security institutions vetted to weed out individuals guilty of violating human rights. The creation of strong oversight mechanisms, such as the appointment of a human rights ombudsperson, would help maintain respect for human rights on an ongoing basis.

## Providing Security amid Rising Crime

While steps to protect human rights and promote justice have been welcomed by the public, popular support for the new regimes will not endure if they cannot keep their citizens safe from crime and violence. The task of maintaining public security, however, is more challenging than it was under the previous regimes.

Instability and violence in the wake of regime changes are often fueled by power struggles among politicians who manipulate existing tensions for their own ends. In Egypt, would-be political leaders already seem to be playing on religious tensions between Muslims and Christians.

Furthermore, crime typically rises after major political convulsions, including domestic violence, petty crime, violent crime and organized crime. Egypt and Tunisia are unlikely to escape this pattern. Indeed, the situation in Egypt has been exacerbated by the former regime's decision to release serious criminals from prison and by desertions from the demoralized ranks of the police. Tarnished by their role in suppressing popular revolutions and violating human rights, the police are often looked upon with disdain by the public. In Egypt and Tunisia, police stations have been looted and burned, and today the police are conspicuously absent in many locations. Fearful and uncertain of their role in the new political order, the police in Egypt and Tunisia have been slow to address the rising tide of crime, thus resulting in a security vacuum. Now the public is frustrated with police for their inaction in stemming this rising tide of criminality.

Short-term solutions include vetting the security forces and promoting reform-minded officers while increasing pay, training and patrolling. Longer-term solutions include promoting dialogue, joint problem-solving, and cooperation between civil society and the security forces.

## Staying the Course

Even small steps toward the rule of law will take time, and great patience and dedication will be required to stay the course. Unrealistic expectations for rapid reform must be kept in check—while keeping clearly in mind the ultimate goal of a society that is both just and secure. Sacrificing security for justice will undermine popular support for future reform. Sacrificing justice for security will lead back to the authoritarian past.