

Foreword

Breaking, Buying, and Building Nations

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I. INTRODUCTION

The Yale Law School's annual Middle East Legal Studies Seminar brings together legal scholars and practitioners from North America and the Middle East to address the most pressing challenges facing the region. In a year filled with enormous political change—the aftermath of the Iraq war, the death of Yasser Arafat, and the assassination of Rafik Hariri—this Symposium on Nation-Building in the Middle East could not be more timely. Seminar presentations touched on Israel, Jordan, Lebanon, Morocco, and Palestine among others. Iraq, however, dominated discussion from the first session to the last. For many, reflection on the justice and legality of nation-building took place against the background of a graveyard, populated by as many as one hundred thousand Iraqi casualties of the U.S. invasion. Others rejoiced in the historic events of January 30, 2005, the final day of the Seminar and by chance the day millions of Iraqis risked their lives to choose their government. The discussion throughout the weekend was animated and informed by these conflicting impulses toward optimism and despair.

The essays included in this Symposium—discussing constitutionalism, economic development, and transitional justice—exemplify the diversity of topics discussed and approaches employed by Seminar participants. Their selection reflects limitations of space, as well as this journal's sense of its mission and audience, rather than the quality of the presentations, which was uniformly outstanding.

The Seminar was closed to the public, but it was preceded by an open panel discussion on the future of Iraq. Noah Feldman argued that, in the absence of a strong national identity, Iraq is best served by a federal system that divides power among Sunni, Shiite, and Kurdish regional governments. Bernard Haykel responded that federalism will only entrench sectarian division and allocate positions in government along ethnic and confessional lines. Haykel's home country of Lebanon presents a striking example of a nation in which governmental structures and functions reflect and perpetuate the need to balance power among confessional groups: Sunnis, Shiites, Druze, and Maronite Christians. An Iraqi state composed of three confederated regional governments, composed along ethnic and sectarian lines, may not only replicate but exacerbate the weaknesses of the Lebanese model, setting the stage for conflict over land, water, oil, and other resources.

Haykel's pessimism was eclipsed, however, by Salem Chalabi, former general director of the Iraqi Special Tribunal, who in the same public session

indicated that ethnic cleansing may be an inevitable side-effect of the reconstruction process. Chalabi's chilling assertion trades on the mistaken view that mass violence arises from ancient hatreds beyond anyone's power to eliminate or control. In every case of which we are aware, mass violence is instigated and orchestrated by organized groups for the sake of their own political power. In nations as varied as Congo, East Timor, India, Rwanda, and Sierra Leone, these groups have included the government, the military, political parties, paramilitary groups, religious organizations, private corporations, and criminal gangs. These groups train, arm, and motivate assailants; plan and lead assaults; block police and medical teams from scenes of destruction; and bribe or co-opt state actors with the power and responsibility to prevent and punish crime. Mass violence can arise in Iraq only through the failure of the Iraqi government and of the United States to identify and suppress groups that stand to gain from such violence. Repeated invocation of discredited myths will not absolve those who ought to know better.

II. TOWARD SAUDI CONSTITUTIONAL REFORM

In an early intervention, Robert Post drew a helpful distinction between nation-building and state-building, between the formation of the discursive self-understanding of a people and the construction of positive legal institutions that govern a territory. While state-building by an external actor raises questions of morality and legality, nation-building by an external actor raises questions of intelligibility. The stability of the state rests on the strength of the nation, but it is not clear that an external actor can generate the social solidarity among citizens required for a nation to arise and endure.

Abdulaziz Al-Fahad paints a striking portrait of state power mediated not by legal institutions but by custom and national tradition. Al-Fahad's essay challenges the received wisdom that Middle Eastern nations have *constitutions*—written legal documents—but lack *constitutionalism*—customs and practices that effectively constrain state power.¹ Al-Fahad observes that Saudi Arabia's Basic Law does not even pretend to restrict the power of the executive, and he argues that before oil rents insulated the rulers from the ruled, custom and practice had provided the *only* operative limits on state authority. The current constitutional reform movement seeks to establish a new compact based on traditional Saudi customs and values. Thus, as Post would suggest, the discursive self-understanding of the Saudi nation not only provides the foundation of the Saudi state but also polices its outer bounds.

Al-Fahad traces the growth of popular pressure for constitutional reform in contemporary Saudi Arabia. He introduces the reader to traditional constraints on royal power, discusses past reform efforts and their failures, and identifies distinctive features of the current constitutional moment. While earlier periods of constitutionalist agitation were driven or catalyzed by external pressures, the current movement is entirely homegrown, and this, he

1. The received view is given its most eloquent expression in NATHAN BROWN, *CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD* (2001). Brown argues that Arab constitutions organize but do not constrain state power. These constitutions, therefore, often facilitate autocratic rule.

argues, is its greatest source of strength. The movement is representative of Saudi society, including people from all regions of the country, all religious sects, and even members of the Wahhabi religious establishment.

Saudi Arabia's new reformers hope to amend the Basic Law to limit more effectively the power of the king and to hold political authorities accountable for their actions. They seek a new dialogue between rulers and subjects, a participatory politics in which citizen grievances are channeled through a consultative, negotiated process. Al-Fahad's reformers are pro-accountability, but not necessarily pro-democracy. They want their country to remain faithful to its traditions and customs, and do not necessarily think that Western-style mass constitutional democracy fits their needs. The reformists seek to craft a more effective rule of law, but they decline to duplicate Western forms of governance.

The goal of the reformist agitation is the creation of a forum and a climate that both encourage and enable participatory politics. Al-Fahad sees the ruling family's increasingly autocratic tendencies as a main source of popular discontent, and contrasts their practices with the degrees of participation allowed under King Abd al-Aziz fifty years ago. His recurrent theme is that of participatory politics, but it remains unclear whether Al-Fahad sees participatory politics as a transcendent political value, as a religious imperative, or as an instrument of governance that provides an outlet for popular dissatisfaction.

It is often hard for the reader to share Al-Fahad's optimism for successful reform, particularly after he explains that the 1992 Basic Law was drafted in secrecy without the consultation of elites or public debate, and that it makes no allusions to popular sovereignty or participatory political rights. Yet he sees the Saudi Basic law as the first offer in a protracted negotiation between the monarchy and domestic reformers. He describes the historic events that have occurred subsequent to its passage, noting tangible steps the royal family has taken to show its commitment to developing a new political framework. Al-Fahad points to public petitions received openly by the government—as opposed to the traditional norm of private consultation with dissenters—as well as a series of nationwide dialogues on contentious social and political issues—including women's rights and freedom of expression—as evidence of substantial steps toward reform.

Finally, Al-Fahad points to more tangible restraints on power within the Basic Law to show that an organic process of state reform is in fact possible. The Basic Law establishes shariah as the only substantial constraint on the power of the executive. Classical Islam posits a bifurcation of political power between an executive/legislative branch and a judicial branch that exercises a strong form of judicial review.² The king may write any law he chooses, but judges may enforce only those laws they find compliant with shariah.³ Since shariah courts have comprehensive jurisdiction over all civil and criminal matters, Saudi Arabia may come to serve as an interesting case study in how

2. For an excellent discussion of how Islamic judges historically operated as a constraint on political power, see SHERMAN JACKSON, *ISLAMIC LAW AND THE STATE* (1996).

3. Al-Qarafi's writings echo this sentiment: "not everything that issues from a caliph, sultan, or other government official constitutes a binding decree." *Id.* at 196.

shariah functions as a meaningful constraint on political authorities in the modern world.

III. ECONOMIC DEVELOPMENT: FROM THE INSIDE OUT OR THE OUTSIDE IN?

While Al-Fahad argues that religion, culture, and history play a crucial role in meaningful and effective constitutional reform, Ian Ayres and Jonathan R. Macey claim that the causal contributions of those same factors to economic underdevelopment in the Middle East have been overstated. The authors first disentangle issues of macroeconomics from those of microeconomics, and insist that policymakers should focus their energies on microeconomic determinants of growth. Here they echo Peruvian economist Hernando de Soto, whose pioneering work examines legal impediments to the economic empowerment of the world's poor.⁴ De Soto argues that legal regulation often stifles entrepreneurial activity and forces the poor into an informal, extra-legal economy, inhibiting their ability to develop their assets into active capital.⁵

Ayres and Macey redirect the attention of policy reformers from the complex task of creating the macro components of a robust capitalist economy (such as protections for creditors and capital market formation) to the task of crafting regulations that better promote entrepreneurial activity, particularly business creation itself. Ayres and Macey advocate the promotion of risk-taking by small entrepreneurs through the limited liability corporate form. What distinguishes Ayres and Macey's approach from conventional neoliberal critiques of regulation is their call for reforms to promote small businesses. They see small business as the cornerstone of economic growth, pointing out that even in the United States small businesses account for 99% of all employers. Ayres and Macey focus on domestic small business and distinguish reforms that target domestic firms from those that support foreign investors and multinational corporations. Even those who disagree with neoliberal economic policies can sympathize with efforts to level the playing field for small businesspersons in the developing world by eliminating regulations that block the poor from gaining legal protections for their businesses. Ayres and Macey share with de Soto a recognition that people who want to create businesses may be dissuaded by bureaucratic hurdles to registration. The question lingers whether this cultural shift can also help enable economic growth in countries with largely agrarian, rural economies.

Ayres and Macey contend that the true stumbling block to economic reform in the Middle East is a divergence between the incentives of rulers and entrenched elites and the interests of potential entrepreneurs. Economic liberalization, they argue, will have a democratizing effect and will thereby threaten the power of political and economic insiders. At times, their analysis

4. See, e.g., HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* (2000).

5. Importantly, de Soto sees the poor as deeply entrepreneurial, with all the skills needed to start and manage successful businesses. Legal recognition of these assets is essential to empowering the poor in a number of developing countries. HERNANDO DE SOTO, *THE OTHER PATH* 243 (1989) ("In Peru, informality has turned a large number of people into entrepreneurs, into people who know how to seize opportunities by managing available resources, including their own labour, relatively efficiently . . . This new business class is a very valuable resource: it is the human capital essential for economic takeoff.").

seems to conflate the sociological dynamic of new elites emerging and gaining power with the political dynamics of democracy, decentralization, and enhanced equality of opportunity. An emergent middle class will not necessarily want to share power with other social groups. Amy Chua's recent work has shown that the interests of the business class do not necessarily align with those of democratic reformers, and oftentimes the business class may even be directly opposed to democratization.⁶ Similarly, Ayres and Macey argue that corporations can be a powerful democratizing agent particularly because they permit decentralized capital formation that circumvents established elites. Their analysis, however, ignores the role of corporations as self-interested political actors. Due to this distinction between the economic and political effects of corporations, the corporate form might facilitate societal power-sharing without promoting democracy as such.

The authors seek to craft policy from the perspective of the potential entrepreneur, leading them to ignore the effects of international legal regimes on economic growth. While country-specific factors explain variation within the group of developing nations, global factors nonetheless partly explain the performance of the group as a whole. As Thomas Pogge observes, international legal rules undermine development efforts in a variety of ways, including trade protectionism, inadequate controls on bribery and corruption, and a dearth of accountability standards for natural resources management.⁷ International law grants to those in effective control of a given country the legal power to transfer the country's resources, a global factor especially relevant to the oil-rich nations of the Middle East.⁸ This international resource privilege drives both the rentier state phenomenon and the striking negative correlation between resource wealth and economic performance.⁹ The two consequences are of course related: the former is the cause and the latter the effect of the relative absence throughout the developing world of democratic governments that design economic policies with an eye to the common good.¹⁰

Ayres and Macey's placement of domestic small business at the heart of the economic growth story laudably reasserts the agency of developing

6. AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* (2003).

7. See Thomas Pogge, 'Assisting' the *Global Poor*, in *THE ETHICS OF ASSISTANCE: MORALITY AND THE DISTANT NEEDY* 260 (Deen K. Chatterjee ed., 2004).

8. This international resource privilege has disastrous effects in poor but resource-rich countries . . . Whoever can take power in such a country by whatever means can maintain his rule, even against widespread popular opposition, by buying the arms and soldiers he needs with revenues from the export of national resources and with funds borrowed against future resource sales.

Pogge, *supra* note 7, at 270 ("The resource privilege . . . also gives outsiders strong incentives to corrupt the officials of such countries who, no matter how badly they rule, continue to have resources to sell and money to spend").

9. For examples including Bahrain, Kuwait, Oman, Saudi Arabia, and the United Arab Emirates, see U.N. DEV. PROGRAMME, *HUMAN DEVELOPMENT REPORT 278-81* (2003), available at http://hdr.undp.org/reports/global/2003/pdf/hdr03_complete.pdf.

10. Leonard Wantchekon, *Why do Resource Dependent Countries Have Authoritarian Governments?*, 5 J. AFR. FIN. & ECON. DEV. 557 (2002); Ricky Lam & Leonard Wantchekon, *Political Dutch Disease* (Apr. 10, 2003), <http://www.nyu.edu/gsas/dept/politics/faculty/wantchekon/research/lr-04-10.pdf>.

nations seeking to control their own destiny. It remains to be seen whether macroeconomic internationalist or microeconomic domestic variables will determine future economic growth.

IV. TROUBLED BEGINNINGS OF THE IRAQI STATE

Aslı Bâli's primary concern is with the development of durable, effective, and legitimate legal institutions, which she argues will be inhibited by the poor example provided by both Saddam Hussein and U.S. occupation forces. Bâli's predictive claims have sadly been vindicated. The U.S. State Department reports that abuses by Iraqi officials include "arbitrary deprivation of life, torture, impunity, poor prison conditions—particularly in pretrial detention facilities—and arbitrary arrest and detention," as well as "unlawful arrests, beatings, and the theft of valuables from the homes of persons who were detained."¹¹ Bâli rightly lists reform and oversight of police, prisons, and the judiciary among the most pressing tasks facing the nascent government.

Bâli's second, and in some ways deeper point is that troop withdrawal and free elections conceal longer-lasting economic mechanisms of foreign control put in place behind the veneer of Iraqi self-determination. As she points out, the United States has sold off large areas of the Iraqi economy to U.S. corporations. Any attempt by the new government to reclaim these areas may be met with severe economic reprisals by the United States as well as by transnational organizations such as the World Bank and International Monetary Fund.¹² Bâli's position contrasts sharply with that of Noah Feldman, who argues that the special moral obligations owed by the United States to Iraq essentially end with the current military occupation and the transfer of effective territorial control to a domestic security force adequate to its task.¹³ The convenience of Feldman's view from the perspective of the United States is the first and perhaps the best reason to question its validity.

11. U.S. DEP'T OF STATE, *Iraq, in COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2004*, available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41722.htm> (Feb. 28, 2005) ("There was a widespread perception that police made false arrests to extort money."). See also Human Rights Watch, *The New Iraq?: Torture and ill-treatment of detainees in Iraqi custody 4* (Jan. 2005), <http://hrw.org/reports/2005/iraq0105/iraq0105.pdf>.

Human Rights Watch investigations in Iraq found the systematic use of arbitrary arrest, prolonged pre-trial detention without judicial review, torture and ill-treatment of detainees, denial of access by families and lawyers to detainees, improper treatment of detained children, and abysmal conditions in pre-trial detention facilities. Trials are marred by inadequate legal representation and the acceptance of coerced confessions as evidence. Persons tortured or mistreated have inadequate access to health care and no realistic avenue for legal redress. With rare exception, Iraqi authorities have failed to investigate and punish officials responsible for violations. International police advisers, primarily U.S. citizens funded through the United States, have turned a blind eye to these rampant abuses.

12. The recent nomination of Deputy Defense Secretary Paul Wolfowitz to the presidency of the World Bank does little to alleviate concern that international financial policy tracks U.S. foreign policy and national self-interest. *Bush backs US hawk for World Bank*, BBC, Mar. 17, 2005, at <http://news.bbc.co.uk/2/hi/business/-4354839.stm>; Paul Blustein & Peter Baker, *Wolfowitz Picked for World Bank: Bush Nominee for Chief Faces Opposition Overseas*, WASH. POST, Mar. 17, 2005, at A1.

13. NOAH FELDMAN, *WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION-BUILDING* 127-28, 130 (2004).

Bâli's policy proposals reflect her broadly juridical approach to justice and accountability, one that contrasts sharply with Feldman's reliance on political checks and balances. Feldman argues that the U.S. occupation of Iraq can be justified if the two nations stand to one another as trustee to beneficiary.¹⁴ Feldman proposes political mechanisms to monitor the occupying power in the absence of legal remedies. The occupied may constrain the occupier to act in the former's interests through vigorous exercise of freedoms of speech, press, and assembly, and by exploiting the occupier's need for cooperation from local elites.¹⁵ Bâli does not share Feldman's taste for counterfactuals; she views the forced restructuring of Iraq's economy as proof that the United States has subordinated Iraqi interests to its own. Bâli advocates legal remedies the absence of which Feldman presumes, and she suggests ways to integrate them into a transitional regime. She argues that insulating U.S. activities in Iraq from civil suit and criminal prosecution merely confirms a suspicion that still lingers on two years after the fall of Saddam: that talk of justice merely masks "the interest of the stronger."¹⁶

Feldman's conception of accountability is essentially forward-looking, a matter of ensuring ongoing convergence of interests among governors and governed. Bâli's conception of accountability is essentially backward-looking, a matter of attributing responsibility for and crafting responses to past wrongs. Feldman avoids discussion of the legality and morality of the invasion, preferring to let bygones be bygones and look to the future.¹⁷ Bâli, by contrast, frames her analysis against a backdrop of perceived injustice the taint of which must be lifted before a legitimate state can arise. We suspect Bâli has the better of the argument. The future has an unfortunate habit of becoming the past, and it makes little sense to treat the rights of others as of paramount importance until the moment of their violation, and thereafter treat those violations as sunk costs. Duties of mutual restraint and reasonable care do not disappear upon their breach; the interests that ground them give rise upon their infringement to further duties of repair and, in appropriate cases, liability to punishment.¹⁸ Accounts must be settled lest the new Iraqi state take its first steps over the victims of U.S. nation-building efforts.

14. Curiously, Feldman himself notes that the analogy "cannot succeed" in part because the trust is not created by the rightful settlor, whom Feldman properly identifies as "[t]he people themselves." FELDMAN, *supra* note 13, at 64. Rather, the relevant assets are seized by the occupying power. Nor, as he notes, are the beneficiaries "authorized to come into court and challenge the trustee's management." *Id.* at 66.

15. *Id.* at 66-67.

16. PLATO, REPUBLIC 338C.

17. FELDMAN, *supra* note 13, at 4-5.

18. We owe this characterization of the relationship between primary and remedial duties to Jules Coleman.

