1 Arab courts in comparative perspective

Modern Egyptian courts would seem to be unattractive both to ruler and ruled. Yet since their establishment over a century ago, they have not only become important parts of the social and political landscape but have been imitated throughout the Arab world.

Why did Egypt's political leaders construct and maintain a system that seems – at least at first glance – to restrict their own authority? Egypt may be the Arab country that has come closest to establishing the strong and autonomous legal institutions necessary for the rule of law. With courts that have freed political extremists and twice brought down the country's parliament, Egypt's judicial system is regarded as possessing remarkable independence and integrity (even while it is often perceived as a European imposition).

Why does an autonomous and dilatory system recommend itself to Arab rulers outside Egypt? Far from filling Arab observers with dismay, Egyptian courts are a model throughout the region, emulated in varying degrees in political systems as diverse as those of Libya, Kuwait, Iraq, and Yemen. Egyptian legal models – along with many Egyptian judicial personnel – have been employed in much of the Arab world.

Why do so many Egyptians choose to bring their disputes to court? The Egyptian legal system is widely held to be confusing, overburdened, and forbidding. Criticized as culturally inappropriate when founded a century ago, lampooned by Tawfiq al-Hakim as overworked and incomprehensible to Egyptians a half-century ago,[1] and constantly described today as slow and strained to the breaking point, Egyptian courts not only survive but are increasingly sought out by Egyptians from all walks of life.

This study will focus primarily on Egypt and more broadly on the Arab world (especially the Arab states of the Gulf). Nevertheless, there will be an effort to cast the answers to these questions in more general terms. Throughout the developing world, legal systems based on

[1] Tawfiq al-Hakim, *Yawmiyyat na'ib fi-l-aryaf* (Diary of a Prosecutor in the Countryside), Cairo: Maktabat al-Adab, n.d., originally published 1937.

Western models are very much the rule rather than the exception. The influence of such models did not die with imperialism. Indeed, in recent years one alternative legal orientation has collapsed with communism, leaving the former Soviet bloc scrambling to undertake reforms quite similar to those begun in Egypt over a century ago. Thus the motivations behind, and the reactions to, legal reform in the Arab world are likely to have global relevance.

In at least one respect, the legal systems of the Arab world are particularly accessible to this sort of study. Unlike Europe and the United States (and parts of the developing world as well), they were consciously created in a relatively short historical period. Those involved in the creation of modern court structures and legal codes are easily identified, and their writings and actions are thus not difficult to uncover.[2] A brief consideration of the history of legal reform in the modern Arab world will assist us in discovering what impelled them to create the system and understanding how their creation has operated.

The construction of the modern legal system

Most countries in the Arab world share comprehensive legal codes, on the continental model, that combine elements of French and Islamic law. Court systems are similarly based on centralized and hierarchical civil-law models. The origin of the current legal system in most Arab countries can be traced back to the Ottoman reforms of the nineteenth century. Prior to that time, the Ottoman government certainly had a strong interest in the administration of justice, and *qadi*s (judges), appointed by the Empire or its local representatives, adjudicated disputes based on a combination of *shari'a* (Islamic law) and *qanun* (state law, itself heavily based on the *shari'a*).[3] Other localized systems of justice, often informed by custom, operated in specific areas. A series of centralizing reforms throughout the nineteenth century resulted in a more hierarchical system as well as several attempts to codify existing law. The culmination of the Ottoman codification effort, the *majalla*, issued between 1869 and 1877, was intended to be Islamic in content but was based in form on the *Code Napoléon*.[4] Even as domestic legal

[2] The use of the term "modern" to refer to the court system (here and throughout the text) simply designates the historical period in which the system was adopted and operates. No necessary connection with other aspects of the modern period is assumed.

[3] Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (Albany: State University of New York Press, 1994).

[4] June Starr, *Law as Metaphor: From Islamic Courts to the Palace of Justice* (Albany: State University of New York Press, 1992), chapter 1. Brinkley Messick argues that the attempt to codify Islamic law inherently changed its meaning; see Brinkley Messick, *The*

reform progressed, the capitulations, a series of agreements with European powers, generally expanded in their impact until they gave Europeans (and some others) extraterritorial status; this led to a system of consular courts for those who could claim European citizenship.

The effectiveness of the Ottoman reforms varied according to the degree of influence exercised from Istanbul. Egypt, technically an Ottoman province but autonomous throughout the century, generally followed Ottoman developments, though the pace and content of reform sometimes differed.[5] A series of tribunals, consisting of local officials (sometimes supplemented by *shariʿa*-trained qadis) was established throughout the nineteenth century that operated alongside the *Shariʿa* Courts, ruling on the basis of locally enacted legislation, itself partly based on the *shariʿa* and Ottoman legislation.[6] The 1870s saw a protracted (and finally successful) effort to establish Mixed Courts, which had jurisdiction in all civil cases in which a foreign interest was (even remotely) involved. These courts operated according to their own code, drawn heavily from the Code Napoléon.[7] They continued until 1949 when foreign residents became completely subject to the regular Egyptian courts. Following the establishment of the Mixed Courts, Egyptian governments attempted to construct a new, centralized court system, based largely on a French model. Work on the new system and its code was interrupted in 1882 with the British occupation, but was completed in 1883 when the new National Courts began operation. While some effort was made to incorporate Islamic elements, the Egyptian code was far closer to the French than to the Ottoman *majalla*. *Shariʿa* Courts continued in operation, though they were much restricted in scope, handling only matters of personal status (chiefly marriage, divorce, and inheritance). In 1956, the work of the *Shariʿa* Courts (and of the *Milli* Courts which served Egypt's other religious

Calligraphic State: Textual Domination and History in a Muslim Society (Berkeley: University of California Press, 1993), chapter 3. For a different version of the same argument, see Ann Elizabeth Mayer, "The Shariʿah: A Methodology or a Body of Substantive Rules?" in Nicholas Heer (ed.) *Islamic Law and Jurisprudence* (Seattle: University of Washington Press, 1990).

[5] The most authoritative works on judicial reform in Egypt are: Byron Cannon, *Politics of Law and the Courts in Nineteenth Century Egypt* (Salt Lake City: University of Utah Press, 1988); and Latifa Muhammad Salim, *Al-nizam al-qadaʿi al-misri al-hadith*, 2 vols. (The Modern Egyptian Judicial System), (Cairo: Markaz al-Dirasat al-Siyasiyya wa-l-Istratijiyya bi-l-Ahram, 1984).

[6] See Rudolph Peters, "The Codification of Criminal Law in Nineteenth Century Egypt: Tradition or Modernization?" in Jamil M. Abun-Nasr, Ulrich Spellenberg, and Ulrike Wanitzek (eds.), *Law, Society, and National Identity in Africa* (Hamburg: Helmut Buske Verlag, 1990).

[7] Nathan J. Brown, "The Precarious Life and Slow Death of the Mixed Courts of Egypt," *International Journal of Middle East Studies*, 25 (1), 1993, p. 1.

communities) was folded into the National Court structure. While Egypt's law codes have been updated at several points, they remain linear descendants of those enacted with the construction of the National Courts. The courts themselves, while supplemented at various points (with, for instance, an administrative court system in 1946 and a constitutional court in 1979), have continued to constitute the centerpiece of Egypt's judicial system.

In the other Ottoman Arab provinces, the *majalla* was at least theoretically in effect when the Empire collapsed in the wake of the First World War.[8] The mandatory powers – France in Lebanon and Syria; Britain in Jordan, Iraq, and Palestine (as well as Sudan) – attempted in varying degrees to recast the legal system in their own images. Especially in Sudan, Jordan, and Palestine, the British drew on the Indian experience in an attempt to meld the *majalla* or other sources with a common law system. With independence, most countries amended their codes (often with the assistance of Egyptians) and continued or increased the centralization of their court structures.

In most of the Arab Gulf states, the British slowly obtained jurisdiction in cases involving foreigners. British officials therefore attempted to establish their own courts and codify law, drawing principally on their Indian experience. Attempts were made to draw up legal codes (with Indian, Jordanian, Palestinian, and *shariʿa* law informing the efforts to various degrees). Local rulers drew up their own codes, generally with Egyptian (though sometimes with British) assistance. Even before the British withdrawal from the area in 1971, Egyptian influence had increased markedly.

Since Saudi Arabia and Yemen never came under British protection, and since the Ottoman reforms were felt only in certain areas, the preexisting *shariʿa* system was never restricted. Yemen has made efforts to centralize and codify its legal system quite recently. Saudi Arabia has generally avoided the appearance of doing so, and *shariʿa* courts retain general jurisdiction in the kingdom. Alongside *shariʿa* courts, however, a complex system of tribunals enforce commercial, financial, and labor regulations.[9] French influence was paramount in North Africa, although Morocco is notable for the large degree of Islamic influence in its codes.

Turkey and Iran, Muslim neighbors to the Arab world, also

[8] For a summary presentation of legal reform in the Arab world, see Farhat J. Ziadeh, "Permanence and Change in Arab Legal Systems," *Arab Studies Quarterly*, 9 (1), 1987, p. 20.

[9] A. Lerrick and Q. J. Mian, *Saudi Business and Labor Law: Its Interpretation and Application* (London: Graham and Trotman, 1982), chapter 6.

centralized and Europeanized their legal systems. Republican Turkey did so by effecting a fairly complete secularization of its law code, even in matters of personal status. Iran under Reza Shah adopted a version of the Swiss law code; this remained in effect until after the Islamic revolution. Even after the revolution, Iran's courts are more hierarchically and formally organized than the preexisting Islamic courts.

The adoption of the modern legal system

Why should Middle Eastern states turn to centralized, hierarchical, and Western models? The first two questions posed by this study – involving the purpose of legal reform in Egypt and the remainder of the Arab world – require a focus on elite motivations. These motivations, although often taken for granted by students of the area, have rarely been systematically explored. When considering the evolution of legal systems more generally, three orientations have generally suggested themselves. First, a legal system can be imposed by the outside for motives related to the interests of an imperial power. Second, a legal system can emerge along liberal lines in an effort to regularize (and even limit) authority and guarantee property and predictability of economic relations. Third, modern legal systems have been portrayed as emerging out of efforts to centralize authority and secure the domination of specific groups or classes. All three of these explanations have been suggested not simply for Egypt (and the Arab world) but for the non-Western world more broadly. Each grows out of a distinct approach to the question of legal development in non-Western settings.

Imposed law

Imposition of law by imperial powers has been adduced most frequently to explain why non-Western societies adopted Western legal systems. Such a perspective has implicitly guided many studies of the history of the Egyptian legal system for a century: European states (especially Britain) imposed new standards of justice and new legal procedures on a country that had known only arbitrary government tamed occasionally by Islamic practices.[10]

Most of the world's population which experienced European imperialism now lives under legal systems that have been based, at least

[10] See for instance the Earl of Cromer, *Modern Egypt* (London: Macmillan, 1908); and Jasper Yeates Brinton, *The Mixed Courts of Egypt*, revised edition (New Haven: Yale University Press, 1968). Also of interest is Tariq al-Bishri, "Mi'a 'amman 'ala al-qada' al-misri" (One Hundred Years of the Egyptian Judiciary), *al-Quda*, 5/6 1986, p. 28.

partially, on European models. Some tie between imperialism and law has thus been obvious for at least a century.[11] Late nineteenth-century and early twentieth-century European writers understandably adopted such a view because law was often seen as an integral part of (sometimes even a justification for) the imperial mission. A British author who visited Egypt on the eve of the First World War wrote that "We have introduced the principle of English law which requires that a person, even if known to be guilty, shall not be punished unless his guilt can be proved in open court by the evidence of witnesses. This is alien to the Eastern temperament."[12]

More recent writings have actually accentuated rather than undermined this view of the relationship between law and imperialism. While scholars are increasingly open to discovering local resistance and the survival of precolonial law, many still "show how law served the 'civilizing mission' of colonialism – transforming the societies of the Third World into the form of the West."[13] Perhaps because studies of subsaharan Africa have been influential in understanding the relationship between imperialism and law, much current scholarship continues to assert or assume that the basic contours of legal systems were laid by the metropole, local imperial officials, and expatriate populations.[14] Recent studies of the origin of "customary" law have revealed that even when imperial authorities claimed – and indeed sought – to leave law in the hands of traditional authorities, they often ended up creating "traditions" or thoroughly transforming what had existed previously.[15] Attempts to codify and enforce indigenous law often had the paradoxical effect of enshrining anachronistic or particularistic (rather than customa-

[11] See Sandra B. Burman and Barbara E. Harrell-Bond, (eds.), *The Imposition of Law* (New York: Academic Press, 1979), and John Schmidhauser, "Power, Legal Imperialism, and Dependency," *Law and Society Review*, 23 (5), 1989. Also of interest is Sally Engle Merry, "Law and Colonialism," *Law and Society Review*, 25 (4), 1991.

[12] Sidney Low, *Egypt in Transition* (New York: Macmillan, 1914), p. 248.

[13] Merry, "Law and Colonialism," p. 894.

[14] Joan Vincent, "Contours of Change: Agrarian Law in Colonial Uganda, 1895–1962," in June Starr and Jane Collier (eds.), *History and Power in the Study of Law* (Ithaca: Cornell University Press, 1989); Richard Roberts and Kristin Mann, "Law in Colonial Africa," in Kristin Mann and Richard Roberts (eds.), *Law in Colonial Africa* (Portsmouth: Heinemann, 1991); Francis Snyder and Douglas Hay, "Comparisons in the Social History of Law: Labour and Crime," and Frederick Cooper, "Contracts, Crime, and Agrarian Conflict: From Slave to Wage Labour on the East African Coast," in Francis Snyder and Douglas Hay (eds.), *Labour, Law and Crime* (London: Tavistock Publications, 1987).

[15] Martin Chanock, "Making Customary Law: Men, Women, and Courts in Colonial Northern Rhodesia," in Margaret Jean Hay and Marcia Wright (eds.), *African Women and the Law*, Boston University Papers on Africa, VII (1982), and Bernard S. Cohn, "Law and the Colonial State in India," in Starr and Collier (eds.), *History and Power in the Study of Law*.

rily accepted) legal texts as national standards.[16] In Burma, J. S. Furnivall describes a British effort to safeguard local custom by providing for the attendance in court of a Burmese "skilled in Burman law and usages." However, "the whole idea of giving judgment in accordance with fixed legal principles was contrary to Burmese customs, and the decisions on this plan were as foreign as the court."[17] Similar transformations in the very meaning of law occurred (though not always so unintentionally) when the legal system was Islamic in nature, even though Europeans recognized Islamic law as sophisticated and highly developed.[18] These experiences indicated that it may have been possible that imperialists determined the structure and workings of the legal system whether they wished to or not.

This view, centered as it is on the motives and actions of the imperial power, should cause some discomfort because it risks writing the population of much of the world out of its own history. It may be such discomfort that has prompted some scholars to investigate ways in which local populations have reacted to legal changes initiated by the imperial power, often in ways European rulers found quite frustrating. Indeed, such an approach was adopted as far back as Lloyd Rudolph's and Susanne Hoeber Rudolph's *The Modernity of Tradition*.[19] More recent writings have focused on the effect dominated populations had on shaping the operation of law in an imperial context.[20] Even with this increasing focus on the subaltern, however, the stress on the actions and intentions of the imperial power is not lessened. The local population emerges subverting imperial goals not so much through overt resistance as through self-interested behavior (which sometimes can also be characterized as resistance) informed by preimperial ideologies and practices. Even in this work, the local population responds to external challenges; historical change is still primarily the turf of imperialism.

[16] Lloyd I. Rudolph and Susanne Hoeber Rudolph, *The Modernity of Tradition: Political Development in India* (Chicago: University of Chicago Press, 1967); and Leopold Pospisil, "Legally Induced Culture Change in New Guinea," in Burman and Harrell-Bond (eds.), *The Imposition of Law*.

[17] J. S. Furnivall, *Colonial Policy and Practice: A Comparative Study of Burma and Netherlands India* (Cambridge: Cambridge University Press, 1948).

[18] Allen C. Christelow, *Muslim Law Courts and the French Colonial State in Algeria* (Princeton: Princeton University Press, 1985); and David S. Powers, "Orientalism, Colonialism, and Legal History: The Attack on Muslim Family Endowments in Algeria and India," *Comparative Studies in Society and History*, 31 (3), 1989.

[19] Rudolph and Rudolph, *The Modernity of Tradition*.

[20] Merry, "Law and Colonialism"; Roberts and Mann, "Law in Colonial Africa"; Julia Wells, "Passes and Bypasses: Freedom of Movement for African Women Under the Urban Areas Acts of South Africa," in Hay and Wright, *African Women and the Law*; and Peter Fitzpatrick, "Transformation of Law and Labour in Papua New Guinea," in Snyder and Hay, *Labour, Law and Crime*.

We should be careful before we remove the initiative from the subject population. Since imperialism often worked through, around, or in spite of local elites, we must consider the possibility that those elites may have played an independent role in constructing and maintaining new legal systems. In point of fact, such a role has been noted for rulers and regimes that felt foreign pressure without coming under direct imperial control. David Engel notes such a situation in Japan, Ethiopia, and Turkey; he states that in Thailand "while the end result of judicial centralization . . . was comparable in many ways to the process that took place in her colonized neighbors, a greater flexibility and adaptability in the Thai legal system probably resulted from the fact that it was administered for the most part by the Thais themselves."[21] In order to ascertain the relative role of the imperial power and of local elites in our study of the Arab world, it will be necessary to examine the timing and the nature of legal reform there.

If local elites did play a prominent role in constructing legal systems that at least appeared to limit their authority, what impelled them to do so? Two alternative orientations direct our attention inside rather than outside the country. One is based on liberal legality; the other is based on the idea that law is a tool of domination.

The emergence of liberal legality

Liberal legality posits the rule of law as the surest guarantee against arbitrary government. A proper legal system must guard against despotic and tyrannical rule and circumscribe the authority of rulers, forcing them to rule in compliance with established procedures and norms. Legal reform in Egypt and the rest of the Arab world would thus be understood as an attempt to restrict – or at least regularize – the unlimited authority that Egyptian rulers possessed at the beginning of the reform period. Few social scientists would employ a liberal perspective uncritically, but the ideas behind it remain powerful in Egypt. Members of the Egyptian legal profession have generally found liberal legality appealing, jealously guarding whatever measures of autonomy they have managed to achieve for the legal system. Indeed, many writings on the Egyptian legal system betray a largely liberal image of law.[22] And international human-rights organizations work hard to measure current practice against largely liberal standards.

[21] David M. Engel, *Code and Custom in a Thai Provincial Court* (Tucson: University of Arizona Press, 1978), p. 28.

[22] See, for example, Farhat Ziadeh, *Lawyers, the Rule of Law, and Liberalism in Modern Egypt* (Palo Alto: Stanford, 1968); Donald M. Reid, *Lawyers and Politics in the Arab*

Images of liberal legality tend to be far more prescriptive than descriptive. It is far easier to explain what an ideal system would be than to explain how it might emerge. Unsurprisingly, therefore, academic writings that deal with the social and political origins of legal systems are far less likely to adopt such a liberal perspective that may seem naively idealistic. Central to the liberal perspective is the idea of the "rule of law"; the corresponding Arabic phrase *siyadat al-qanun* occurs in constitutions as well as legal and human-rights writings throughout the Arab world. In the criminal realm, the rule of law would allow no punishment without a clear legal justification. In the civil realm, the rule of law would protect property rights, again allowing no infringements on property that did not have a clear legal basis. Authority operates on the basis of fixed, identifiable, and predictable legal rights rather than unlimited personal discretion. An independent judiciary, free from executive interference, works to apply the law to concrete disputes, and is equally accessible to all. Rulers are fully subject to the text of the law just as ordinary citizens are.

Defenders of the rule of law rarely take the position that it is ever fully realized or that the rule of law alone can guarantee a perfect and just society. Yet they point to real benefits, both moral and material, that accrue from approximating its ideals. Andrew Altman writes, "liberal theory does not promise salvation through legal rules; what it promises is a society that does a better job of protecting people from intolerance, prejudice, and oppression than it would if law was dispensed with."[23] Certainly some conception of the rule of law is necessary for a liberal political system to be maintained; a state that is separate from, and accountable to, the society could not exist if the authority of public officials was arbitrary and unrestricted. Beyond this, some have argued that litigation is itself a form of political participation consistent with and supportive of the goals of democratic theory.[24]

In recent years, a separate argument has been revived: the rule of law is a necessary foundation for market economics and economic development. Hernando de Soto gained great attention for arguing that the unsuitability of the political and legals system of Peru forced would-be entrepreneurs to operate informally, without the protection and predict-

World, 1880–1960 (Minneapolis: Bibliotheca Islamica, 1981); and Salim, *Al-nizam al-qada'i al-misri*, vols. I and II.

[23] Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton: Princeton University Press, 1990), p. 200.

[24] Susan E. Lawrence, "Justice, Democracy, Litigation, and Political Participation," *Social Science Quarterly*, 72 (3), 1991, p. 464; and Frances Kahn Zemans, "Legal Mobilization: The Neglected Role of Law in the Political System," *American Political Science Review*, 77, 1983, p. 690.

ability of the legal system. This, he claimed, discouraged investment, innovation, specialization, and commerce with disastrous results for the Peruvian economy.[25] Douglass North has written in a similar vein, viewing uncertainty concerning property rights as characteristic of Third World legal systems and a major impediment to economic development.[26]

Yet a concentration on the benefits of liberal legality begs some questions. If it provides so many benefits, why is it not universally adopted? Here many of its advocates, including de Soto, point to the entrenched though particular interests that sustain illiberal legality. Yet this leads to a further question: if powerful elites and interest groups profit from illiberal legality, how can its liberal counterpart ever emerge?

Surprisingly, the burgeoning literature on democratization and liberalization gives us little guidance in answering these questions. In the current public policy debates in the United States, democracy, free markets, constitutionalism, and the rule of law are not only seen as linked; the terms are also used almost interchangeably. Such analytical imprecision hardly aids understanding. Yet even in the scholarly literature on democratization and liberalization, courts and the law are rarely mentioned. Given the historic importance of the rule of law in liberal ideologies and political struggles, the short shrift given to law and courts in writings on liberalization is striking indeed. Just as the authoritarian regimes of Latin America and the communist regimes of Eastern Europe were easier to bring down than to replace with stable, free-market democracies, so scholars have had far more success understanding the breakdown of authoritarian regimes than in exploring what replaced them.[27] Even Adam Przeworski, who explicitly addresses himself to democracy and economic liberalization rather than simply the breakdown of old regimes, says little more about law than "we tend to believe that an independent judiciary is an important arbitrating force in the face of conflicts"; this comment occurs in a discussion of how little empirical knowledge exists about institutional design and democratic stability.[28]

[25] Hernando de Soto, *The Other Path: The Invisible Revolution in the Third World* (New York: Harper and Row, 1989); see especially chapter 5.

[26] Douglass C. North, *Institutions, Institutional Change, and Economic Performance* (Cambridge: Cambridge University Press, 1990).

[27] For example, see Nancy Bermeo (ed.), *Liberalization and Democratization: Change in the Soviet Union and Eastern Europe* (Baltimore: Johns Hopkins University Press, 1991); and Guillermo O'Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Baltimore: Johns Hopkins University Press, 1986).

[28] Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (New York: Cambridge University Press, 1991), p. 35.