Retrospective

Law and Imperialism: Egypt in Comparative Perspective

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Despite the great varieties of imperial relationships, most scholarship has focused on law as an instrument of imperial domination. This article invites greater attention to the motives and actions of the subject population. In the Middle East, the pattern of legal change suggests that imperial control affected the outcome of elite efforts but did not supplant them. In Egypt, legal reform was largely the fruit of efforts undertaken by a centralizing elite that sought to circumscribe foreign influence even when it collaborated with it. This elite used law to preempt imperial penetration and strengthen the administrative capacity of the Egyptian state. The Egyptian population subject to the new legal system shaped its development still further.

Most of the world's population that experienced European imperialism now lives under legal systems that have been based, at least partially, on European models. The tie between imperialism and law has thus been obvious for at least a century (Schmidhauser 1989; Burman & Harrell-Bond 1979). It would be a surprise if that tie were uniform, however, because the political arrangements subsumed under the rubric of imperialism were so varied. If we look just at the African continent alone, we can see that the Algerian experience with settler colonialism was obviously quite different from the imperialism experienced in French West Africa. The British occupation of Egypt, after which Egypt remained legally a part of the Ottoman Empire and in fact retained some internal autonomy, obviously had different effects than the far more intrusive establishment of British colonial rule

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in Kenya. It should be no surprise that often law in general (and courts specifically) served as a direct tool of imperialism.

Given the great varieties of imperial arrangements, it might also be expected that in some circumstances legal systems may have been unrelated—or even an obstacle—to imperialism. Of all the institutions founded during the era of European imperialism, legal systems and courts have been the most enduring. In other words, the legal systems founded during the imperial period have almost always long outlived the political circumstances that existed when they were founded. This in itself should lead us to suspect that they were often much more than a product or tool of imperialism. In many cases, if we wish to understand the history, structure, and functioning of the legal system, we should focus much more attention on the actions of the members of the subject society than on those of the imperialists.

In fact, however, while previous scholars have noted the various ways in which imperialism could affect law, what is most surprising is the extent to which most writers have viewed law in imperial and postimperial settings as largely, and even exclusively, a product and even a tool of imperialism. Such a view is unsurprising in late 19th-century and early 20th-century writings 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 World War I wrote: "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" (Low 1914:248). Yet, recent writings have accentuated rather than undermined this view of the relationship between law and imperialism. A recent survey of the literature shows that while scholars are increasingly open to discovering local resistance and the survival of precolonial law, their works still "show how law served the 'civilizing mission' of colonialism—transforming the societies of the Third World into the form of the West" (Merry 1991:894). Perhaps because studies of sub-Saharan Africa have been influential in understanding the relationship between imperialism and law, much current scholarship continues to assert that the basic contours of legal systems were laid by the metropole, local imperial officials, and expatriate populations (Roberts & Mann 1991; Snyder & Hay 1987a; Cooper 1987; Vincent 1989). 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 wound up creating "traditions" or thoroughly transforming what had existed (Chanock 1982; Cohn 1989). Attempts to codify and enforce indigenous law often had the paradoxical effect of enshrining anachronistic or particularistic legal texts as national standards (Rudolph & Rudolph 1967;

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Pospisil 1979). In Burma, Furnivall (1948:31) described 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." Such an unintentional transformation occurred even when the legal system was Islamic in nature, although Europeans recognized Islamic law as sophisticated and highly developed (Powers 1989; Christelow 1985). These experiences indicated that imperialists often determined the structure and workings of the legal system even when they tried to avoid doing so.

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 and Susanne Hoeber Rudolph's *The Modernity of Tradition* (1967). More recent writings have focused on the effect dominated populations had on shaping the operation of law in an imperial context (Merry 1991; Roberts & Mann 1991; Fitzpatrick 1987; Wells 1982). 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 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.

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 an extensive role in erecting new legal systems. In fact, such a role has been noted for rulers and regimes that felt foreign pressure without coming under direct imperial control. David Engel (1978) 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" (p. 28). Likewise, in the Ottoman Empire and Japan (Ward & Rustow 1964; Beer 1982), the absence of direct foreign control allowed for more selective borrowing and greater adaptation to local conditions.

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The absence of direct imperial control may seem to make these cases the exception in the non-Western world. Certainly only a few other societies were granted similar freedom of maneuver. Nevertheless, since imperialism rarely erased all traces of local autonomy, some imperial cooperation with preexisting elites and political structures was usually necessary.

Thus the newer focus on the role of subject populations is not only warranted, it should be deepened (at least in some cases) rather than restricted. A closer look at the role of local elites is particularly warranted in the Middle East. It is true that the areas least penetrated by Europe (including much of the Arabian peninsula) saw the least comprehensive attempts to adopt Western-style legal systems. Yet the initial—and often the most comprehensive—attempts to recast local legal systems along Western lines were taken not by regimes under direct control of Europe but by ambitious, centralizing elites (in Iran, the Ottoman Empire, and Egypt) who often worked to stave off further Western penetration. For instance, June Starr (1992:21) portrays 19th-century Ottoman legal reform as an attempt by the central bureaucratic elite to strengthen its position with regard to internal and external challenges.

The pattern of legal change suggests that direct imperial control affected the outcome of elite efforts but did not supplant them. The Middle East had a diverse set of arrangements with imperial powers. Iran and the Ottoman Empire maintained formal independence but came under very strong pressures from European powers. All of North Africa was occupied by European powers before World War I, but political arrangements varied greatly. Syria, Lebanon, Jordan, and Iraq came under French and British mandates after the collapse of the Ottoman Empire. The states of the Arabian peninsula came under British protection and influence, though most retained considerable autonomy, especially in domestic matters. Yet the wide variety of experiences with imperialism is not reflected in a similarly wide variety of current Middle Eastern legal systems. With a few exceptions, Middle Eastern legal systems combine strong centralizing tendencies, a hierarchical and formal court structure, professional judges, and legal codes based on the Napoleonic Code, significantly modified to incorporate Islamic elements (especially in matters of personal status). The Ottoman Empire and Egypt pioneered legal reform in the Middle East in the second half of the 19th century, modeling their reforms after the French system but making efforts to preserve and codify elements of Islamic law. The court structure and legal codes developed in Egypt were used as models in almost every other country of the Arab world. Often Egyptian experts were brought in by other Arab states to assist in designing and later in staffing their own legal systems. This suggests that to the extent that the Arab world today follows

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a French model, it does so not because the French directly imposed it but because intentional adoption of the Egyptian model brought with it unintentional adoption of the French model. Arab legal systems were more often imposed by Arab rulers than by imperial powers.

The enduring nature of Western-style legal reform, the strong role of local elites in initiating it, and its rapid spread throughout the Middle East all suggest that imperialism can hardly be seen as the only (or perhaps even necessarily the primary) cause of change.

Building a Legal System: Egyptians and Their Courts

The European presence in Egypt grew markedly in the 19th century, protected by the capitulations which had the effect of granting extraterritorial status to all who claimed citizenship of a European state. Separate consular courts tried all cases involving foreigners until the establishment of the Mixed Courts in 1876. The latter had jurisdiction in all civil cases in which a foreign interest was involved, however remotely. Work began immediately after the Mixed Courts were established to develop a national court system for civil and criminal disputes involving Egyptians, though these did not become operational until 1883.

Legal reform coincided with a protracted political crisis that eventually resulted in the British occupation of Egypt. An autonomous province of the Ottoman Empire, Egypt was able to contract loans from Europe but was less able to repay them, leading to Anglo-French financial control in 1876. Most of the country's political elite chafed at such direct foreign influence, and government austerity led to military resentment as well. Britain responded to the rising movement against European control by occupying the country in 1882. The British never assumed direct control of the Egyptian government (even though British personnel were employed at all levels of Egyptian administration), but British power was exercised regularly and even heavy-handedly in the country. No Egyptian government could take an action that the British actively opposed. Egypt remained an Ottoman province until the British declared it a protectorate in 1914. Failing to negotiate a suitable arrangement, the British unilaterally declared the country independent in 1922 but refused to concede control over important issues, including defense and protection of foreigners. An Anglo-Egyptian treaty was finally negotiated in 1936, but British troops remained in the country until the 1950s.

In Egypt, legal reform was very much the turf of a centralizing elite that sought to circumscribe foreign influence even when collaborating with it. Initial appearances have suggested otherwise, however. Legal reform was undertaken during an era of imperialism, and the coincidence of strong European penetration

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and European-style legal reform has led some to see the system as it operated in the late 19th and early 20th centuries not simply as a product of foreign influence but also as its tool. While the picture drawn in detailed accounts of legal reform in Egypt is often more subtle than this (Ziadeh 1968; Hill 1979; Cannon 1988), most of this subtlety is lost in more general treatments. Daisy Dwyer (1990a:3) claims that Western legal principles "entered the region primarily as a product of the colonialist enterprises of the French and the British and, to a lesser degree, other Europeans, and came to predominate in civil, commercial, and criminal law." John Schmidhauser (1989:863) refers to the Mixed Courts of Egypt as "imposed by European capitulations" (though the truth is that the Egyptian government worked to construct the courts in order to limit the capitulations; Brown 1993). Jeswald W. Salacuse (1986:243) wrote along similar lines:

> Prior to the Free Officers' Revolution of 1952 and the advent of President Gamal Abdel Nasser, the economic door to Egypt had . . . been open—so much so that foreign interests controlled major sectors of the economy, including banking, insurance, transportation, and commercial trade. To service these interests Egypt accepted a variety of essentially foreign institutions, such as the Mixed Courts, European mortgage law, legal codes from France, and commercial banking methods from Britain.

Juan R. I. Cole (1993:32, 162) maps the Egyptian political elite of the late 19th century in great detail, but his description of Nubar Pasha, several times prime minister and the politician most responsible for the adoption of French-style courts and legal codes, does not go beyond "pro-European" and "pro-absolutism." This view is widespread not only in Western scholarship; it has also gained wide currency in Egypt, particularly (though hardly exclusively) among Islamicists. Tariq al-Bishri (1986), a prominent writer and leading judge, has portrayed the Egyptian system as completely imported. Yet a close look at the timing of Egyptian legal reform, the attitude of the British occupiers, and the personnel who staffed the system shows this view to understate seriously the degree of Egyptian participation in the process.

Timing

A careful examination of the steps taken reveals that legal reform was initiated before European penetration was acutely felt and continued under some anti-imperialist regimes. The reforms were often more evolutionary rather than revolutionary. There certainly was no sudden break from a system based largely on Islamic jurisprudence to the Napoleonic Code. Thus the key periods in legal reform hardly coincide with the height of imperial penetration.

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Throughout the first three-quarters of the 19th century, administrative officers and bodies took on adjudicative functions even while shari'a-based courts continued to operate (Cannon 1988; Salim 1984; Kahil 1938). In general, the responsibilities and formality of these administrative-judicial bodies grew over time. The decision to found the National Courts in 1884 represented a shift in several ways: it established a separate, professional judiciary; it involved borrowing large parts of the French legal code; and it established a hierarchy of courts that has been greatly supplemented but not to this day replaced. Yet the British occupation of 1882, rather than bringing the National Courts into being, actually delayed them. A commission was established in 1880 to design the new system and write its code; Egyptian daily newspapers from the period reported eagerly and impatiently the slow progress of the commission during 1881 and the first half of 1882. The political turmoil of the events surrounding the occupation led to an interruption of the commission's work, but in late 1882 a reconstituted group picked up where its predecessor had left off, bringing the work to completion in 1883.

Even as significant a new step as the establishment of the National Courts was not taken without some efforts to maintain continuity. The new courts left matters of personal status to religious courts. The commission also attempted to provide continuity through another measure which British representatives in Cairo thought unwise:

> A grave objection to the scheme is that it leaves too much outstanding and does not provide that the new Codes must abrogate all other existing laws. On the contrary it provides that the new Tribunals are to take cognizance of all existing laws and decrees that do not contradict their own Codes.[1]

Just as the construction of the National Courts was a project begun before the British occupation, so their strengthening continued after the occupation. The Egyptian political elite (with foreign support) successfully staved off attempts to Anglicize the system. And after the British declared the country independent in 1922, Egypt's first constitution enshrined the independence of the judiciary. Indeed, it was Nasser's regime (hardly a tool of French imperialism) that did away with separate shari'a courts, folding them into the French-style National Courts.

British Attitudes Toward the National Courts

The British occupiers of Egypt never felt comfortable with the National Court system. It had been established in spite of their misgivings; John Scott, a former Mixed Court judge and future advisor to the Egyptian Ministry of Justice, wrote to the Brit-

[1] Sir Edward Malet to Lord Granville, 28 Nov. 1881, FO 141/144, piece 348, Foreign Office Records, Public Record Office, Kew, England.

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ish Consul-General in Egypt in 1887, attributing the unsatisfactory operation of the Courts to the fact that "they have been left to Egyptian supervision more than other reforms."[2]

To be sure, the British did successfully infiltrate the workings of the National Courts as the occupation wore on (indeed, Scott himself had a major role in that process). They did so through securing the appointment of some British judges and a British adviser to the Egyptian Ministry of Justice. These officials served as employees of the Egyptian government, but they reported to and advised Lord Cromer (the Consul-General from 1883 until 1907) and his successors. Even after the 1922 declaration of independence, British infiltration of the system continued. One official, J. F. Kershaw, served simultaneously as a judge and as the acting legal adviser to the British High Commissioner. Indeed, he was involved in perhaps some of the most heavy-handed British interference in the system, involving the trial of those accused in the 1924 assassination of Lee Stack, the commander of the Egyptian army and the governor-general of Sudan. When most of those accused were acquitted, Kershaw, in violation of Egyptian judicial practice, made public his dissent. Kershaw resigned from the Egyptian judiciary in protest at the verdict after the British cabinet guaranteed he would not suffer financially. Earlier he had recommended that an Egyptian colleague who sat on the case with him receive an honorary decoration from the British because of his helpful attitude.[3] British infiltration of the system declined in the 1920s and was negligible by the signing of the Anglo-Egyptian Treaty of 1936.

Yet even when British influence in the National Courts was at its height—from the 1890s until 1922—British actions made clear that they were frustrated by their inability to exercise greater control. In particular, two sorts of British action made this frustration apparent.

First, the British moved to avoid the National Courts in matters deemed extremely sensitive. This was particularly true with offenses involving British military forces in Egypt. Less than four years after British troops had landed, the British consul-general complained of "the delay which constantly occurs, in the Native Courts, in dealing with cases in which natives are charged with offences against British soldiers."[4] The result was the establishment of special tribunals to deal with such offenses (Masadi 1969). The most notorious of these tribunals sentenced several

[2] John Scott to Evelyn Baring, 12 Dec. 1887, FO 141/246, piece 597, Foreign Office records, Public Record Office, Kew, England.

[3] Lord Lloyd to Sir Austen Chamberlain, 8 June 1926, FO 371/J1691/215/16; Arthur Henderson to Sir Austen Chamberlain, 20 June 1925, FO 371/J1817/90/16, both in Foreign Office records, Public Record Office, Kew, England.

[4] Evelyn Baring to Lord Rosebery, 29 March 1886, FO 141/232, no. 103, Foreign Office records, Public Record Office, Kew, London.

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residents of the village of Dinshway to hang and several others to floggings after they had clashed with pigeon-hunting British troops in 1906. Lord Cromer expressed directly and publicly at the time that extraordinary measures were necessary because reliance on the regular institutions of justice was sometimes insufficient in a country accustomed, in his eyes, to lawless and despotic government.[5]

Indeed, the British can claim far more credit for founding Egypt's modern system of martial law than they can for the National Courts. In 1914 with the Ottoman Empire, still the nominal sovereign power in Egypt, at war with Britain, the British government declared a protectorate over Egypt; the British authorities immediately afterward in the country declared martial law. Since they controlled Egypt's military after 1922, the British anxiously insisted on provisions in the 1923 constitution for the declaration of martial law in emergencies. In the 1936 Anglo-Egyptian treaty, after which most vestiges of British infiltration of the Egyptian government were removed, the British still insisted on the right to require the Egyptian government to declare martial law to support British military efforts. This step was actually taken in 1939—the British put heavy pressure on the Egyptian government to declare war on Germany and asked for preparations for martial law. The Egyptians balked at entering the war but did declare martial law (Khawli 1952, 1953).[6] Although frustrated, British officials admitted in internal documents that martial law would give them the necessary freedom of movement in the country.[7] During World War I especially, martial law allowed British military authorities to mobilize Egyptian resources to an impressive degree, watch and suppress enemy activity, and maintain an often rough order in the country—all without concern that transgressions of Egyptian law would be brought to the Mixed or National Courts. Subsequent Egyptian governments learned a valuable lesson; the current Emergency Law in force in Egypt (a target of bitter opposition criticism) is a linear descendant of martial law instituted under the British. The lesson can hardly be credited with strengthening the role of civilian courts in Egyptian society.

A second British action that demonstrated the extent of British alienation from the National Courts was a bold but abortive attempt to Anglicize the system. During World War I, a commission guided by William Brunyate worked to modify the Egyptian legal system. Capitulatory privileges of foreign powers were to be

[5] Earl of Cromer, Annual Report for 1906, FO 371/J8788/16, pp. 32–33, Foreign Office records, Public Record Office, Kew, England.

[6] Jasper Y. Brinton, "Martial Law in Egypt 1914–1949," 883.00/5-2749, U.S. Department of State records, National Archives, Washington, DC (1949).

[7] Foreign Office, memoranda and correspondence on martial law in Egypt, FO 371/J3369/16 (1939), Foreign Office records, Public Record Office, Kew, England.

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abandoned; instead the British would take responsibility for protecting foreign interests in Egypt. The Mixed Courts and the National Courts were to be unified, the number of British judges would be greatly increased, English would become the principal language of the new unified court system, and British jurisprudence would naturally begin to outrank French in influence. The Brunyate proposals excited controversy, but British determination to push forward was clear to all. Egyptian nationalist leaders, fearing correctly that the proposals amounted to a step just short of annexation, protested strongly. With the outbreak of the 1919 uprising in Egypt, the British abandoned the proposals (and eventually scaled down their ambitions in the country). Yet the memory of Brunyate's proposals were sufficiently strong that the Foreign Office kept him out of Egypt for months; only in 1920 could a visit be discreetly arranged.[8]

Personnel

The staffing of the National Court system demonstrated both the reality of imperial penetration and its limits; those limits generally increased over time, due partly to the deliberate actions of the Egyptian political leadership. Adoption of a system based on a French model raised an immediate difficulty: few in Egypt had the requisite training to serve as either judges or lawyers. In addition, since some Egyptian leaders hoped (at least in the first few years of the National Courts) that the capitulatory powers would eventually accept the jurisdiction of the courts over foreign nationals, there were efforts to ensure that the procedures and personnel of the courts inspired respect in Europe. Thus the Egyptian government felt compelled from the beginning to appoint a significant number of European judges—though this measure did provoke opposition (Salim 1984:113–14).

Yet even in this regard the Egyptian leadership made the most of the leeway given them. They realized some success, especially in limiting British influence. Nubar Pasha, the Prime Minister most associated with judicial reform, made a point of employing Belgians over other Europeans—Belgian judges brought expertise in a French-style legal system, but their home country (unlike France and Britain) had few political ambitions in Egypt. Egyptian leaders bridled particularly at any British presence in the system. When such a presence seemed to be growing in the early years of the occupation, Nubar Pasha designed a system of extraordinary "Commissions on Brigandage" which took much criminal jurisdiction away from the National Courts he had worked so hard to establish and gave it to wholly Egyptian administrative bodies chaired by provincial governors (Brown 1990).

[8] This account is drawn from the file on Sir William Brunyate, FO 141/686/8760, Foreign Office records, Public Record Office, Kew, England.

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That effort unraveled, as did the attempt of Nubar's successor, Riyad Pasha, to prevent the appointment of a British adviser to the Ministry of Justice. The establishment of that position occasioned Riyad's resignation in 1891. Further British inroads into the system were prevented, however, and over time the number of Egyptians trained to serve on the bench of the National Courts increased. The foreign component of the National Court judiciary gradually declined, and, after the defeat of Brunyate's proposals and the 1922 British declaration of Egyptian independence, the British had little leverage with which to fight their loss of influence. The last foreign judges were replaced with Egyptians and the post of Judicial Adviser was abolished after the conclusion of an Anglo-Egyptian treaty in 1936.

Yet it is not only the ultimately successful fight to limit foreign penetration of the National Courts that demonstrates a measure of Egyptian autonomy in legal reform. More important is the nature of Egyptian participation in the system. Egyptian lawyers, judges, prosecutors, and other court personnel often frustrated imperial officials. Allen Christelow (1985:4), writing on Algeria, notes this phenomenon about colonialism more generally:

> Colonial administrators tended to see the native lawyer as an unscrupulous opportunist, out to exploit the gullible, and to sow discord where patriarchal peace and harmony had prevailed. They were thus inclined to keep as much of law as possible in the hands of customary sages of the village councils, or in their own presumably equally sage hands. Custom and administration were to be allied against the corrosive, divisive effects of the law and lawyers.

From Algeria to India (Rudolph & Rudolph 1967), imperial officials were as likely to see local lawyers as their adversaries as their tools. In Burma, Furnivall (1948:384–85) accused lawyers of fostering disputes in the search for clients; there "legal practice forsakes the honourable traditions that mitigate litigation in the West." In Egypt, British consular officials deemed local lawyers as unscrupulous from the beginning of the occupation. Over time, the lawyers became a bastion of nationalist opposition as well (Ziadeh 1968; Reid 1981). Yet not just lawyers were suspect. Egyptian judges were often seen as excessively inclined toward nationalist sentiment. In 1912, after the alleged attackers of a French engineer were acquitted in an Egyptian court, Lord Kitchener (then the British consul-general in Egypt) wrote:

> All legal authorities agree that the case was fully and satisfactorily proved against the two men accused, one of whom had been twice tried for attempted murder in the last four years; yet they were both acquitted by Egyptian judges. These judges were

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> known to be Nationalists, and it is naturally considered that race and religious feeling alone can account for their finding.[9]

Kitchener's complaint was not unique. Throughout the occupation, the British expected unfavorable rulings from Egyptian judges whenever nationalist feelings were involved. Indeed, it was precisely this sentiment that led to the establishment of special courts in politically sensitive cases discussed above. After the British declaration of Egyptian independence and the subsequent diminution of British presence in the National Court system, officials continued to complain that Egyptian judges were unlikely to convict those accused of nationalist crimes. For instance, British officials were particularly outraged at the 1948 acquittal of Anwar al-Sadat and several others accused in the murder of Amin Osman, a leading public figure fatally identified with the British. The British charged that the court had allowed the trial to become an investigation of British interference in Egyptian politics and to come close to condoning attacks on British troops in the country.[10]

Thus, British officials in Egypt scarcely regarded the personnel of the National Courts as serving the European presence. Egyptians connected with the courts similarly stressed the local role in their creation and operation. In the 1930s, on the occasion of their 50th anniversary, the National Courts, along with the Justice Ministry, produced a lavish, two-volume history ([National Courts of Egypt] 1937/38). Articles addressed various aspects of the courts; while the international environment and British occupation were not totally ignored, it was clear that those working in the courts as lawyers, prosecutors, and judges wished to see the Courts as an Egyptian accomplishment. The ceremony marking the 50th anniversary took place at a time of intense rivalry between an authoritarian government sponsored by the palace and the nationalist opposition of the Wafd party. The Wafd, far more powerful among leading lawyers, boycotted the official ceremony and held its own. According to a British report, Makram 'Ubayd, the president of the Bar Association and a leading Wafdist, used the occasion to criticize the speech of 'Abd al-'Aziz Fahmi, a leading judge, at the official ceremony as too favorable to the British and pointed out that the National Courts "owed their existence to inspiration dating from before the British occupation."[11] If Fahmi's speech was too favorable to the British, it showed no partiality to other foreign powers; the French and Italian ministers were sufficiently worried by its tone and

[9] Kitchener to Grey, 27 June 1912, FO 371/27388/27388/16, piece 1363, Foreign Office records, Public Records Office, Kew, England.

[10] File on political cases in Egypt, FO 371/J file 1651/16, Foreign Office records, Public Record Office, Kew, England.

[11] Arthur Yencken to Sir John Simon, 5 Jan. 1934, FO 371/J143/14/16, Foreign Office records, Public Record Office, Kew, England.

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content (especially its denunciation of the Mixed Courts) to raise the matter with the prime minister (Hanafi 1938). Other nationalist concerns were raised at the time. A leading lawyer called for making Arabic a more suitable language for legal arguments and judgments ('Uraybi 1938). And the committee charged with planning the official ceremony discussed the term used to denote the National Courts. One member suggested that they should simply be called the "Courts" since all other courts (especially the Mixed Courts) were exceptional in his view. Others agreed that the general term used in French (*Cours Indigenees*) was no longer appropriate and perhaps even insulting; the corresponding English term, the "Native Courts" seems to have been dropped about the same time in favor of "National Courts" for similar reasons (Hanafi 1938).

Motivations for Reform

Legal Reform to Preempt Imperialism

Why did Egyptian elites work to build a European-style legal system if European powers did not always force them to do so? One answer to this question is that reforming the legal system along European (generally French) lines could be a tool of resisting direct European penetration. In this limited sense, legal reform could be an indirect effect of (or, more accurately, a preemptive response to) imperialism. This was especially the case in Egypt, where a narrow political elite, led by Nubar, used European-style legal reform to circumscribe imperialism in the late 19th century in three ways.

First, and most generally, law constituted the defining difference between European civilization and the despotism of the rest of the world. Such at least was the view of many imperialists. Britain and France were governed by the rule of law; Egypt and the entire Middle East were held to be governed by the will of capricious rulers. Indeed, in attempting to explain the British role in Egypt, Cromer (1908) made the argument even more broadly: "Although the details may differ, there is a great similarity in the general character of the abuses which spring up under Eastern Governments wheresoever they may be situated." Among the characteristics that Egypt shared with the rest of the East, was that "the most elementary principles of law and justice have been ignored" (ibid., vol. 1:5). Legal reform therefore had a preemptive element. The establishment of structures and procedures that Europeans could not help but recognize as law might serve to rob imperialism of its ideology. The "great similarity" Cromer sensed could provoke similar responses. In the Ottoman Empire, leaders pointed to legal reform to answer European charges of despotism and oppression of Christians (Inalcik 1964). In this

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and similar cases, the motives behind legal reform went far beyond the desire to satisfy or undermine European critics, but courts and procedures based on European models provided powerful ideological ammunition to those resisting direct imperial control.

Second, and more specifically, legal reform often answered particular European complaints. The Mixed Courts of Egypt gave European creditors a way to press claims against the Egyptian government. European powers, initially suspicious of the courts, quickly rallied to them. While the courts did not prevent the British occupation of Egypt, the Egyptian government kept them alive partly in the hope of forestalling more direct European intervention. Nubar worked in the mid-1880s to build a sufficiently strong reputation for the National Courts that the European powers would allow the dismantling of the Mixed Courts. Respected and independent National Courts would constitute a bulwark against excessive European intervention without strengthening the British. His efforts failed completely. The National Courts lost their autonomy from the British with the appointment of a British Judicial Adviser, and the European powers demonstrated little interest in accepting their jurisdiction. The dominant attitude among the Egyptian political leadership then became much more favorable to the Mixed Courts, since they at least constituted a barrier to further British penetration of Egyptian justice (Brown 1993).

Finally, in Egypt, the French system had an additional attraction after the British occupation—it obstructed British attempts to assert control over the system and thus helped keep some measure of official power in Egyptian hands. Insisting on following French models allowed Egyptian lawyers and judges to take a path independent of their British occupiers. The preference for Belgian judges has already been mentioned, as have Brunyate's proposals to reign in Egyptian autonomy by Anglicizing the legal system.

Legal Reform and State Building

In these ways, the course of legal reform was heavily influenced by imperialism but in a reactive way that served nationalist more than imperialist goals. In other ways, however, legal reform was unrelated to imperialism. European-style legal systems were adopted not simply because they were European but also because of their attractiveness to ambitious and centralizing state elites. What attracted such elites was not the Western nature of the legal systems they constructed but the increased control, centralization, and penetration they offered. It is instructive in this regard that Middle Eastern states generally turned to civil law—most often French—models. Civil law systems were adopted even by

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non-Arab states, including both Iran (Fischer 1990:124–25; Arjomand 1988:66) and the Ottoman Empire (Starr 1992). The French system offered a unified law code and a nationwide hierarchy of courts to enforce it. While rulers may not have been able to influence individual decisions by courts, they would have tremendous influence over how courts would approach disputes submitted to them—much more influence than Islamic law courts, customary courts, or a common law system would have offered. The point, as will be clear below, was hardly to repudiate Islam; it was to have codified law and hierarchical courts operating under the supervision of a centralizing state. The new system was to operate with a professionalized judiciary that was part of the state apparatus. The preceding system relied both on nonjudicial administrators and officially sanctioned shari'a judges who supported themselves on fees collected directly from litigants.

It is therefore more than historical coincidence that centralized court systems were instituted in the late 19th century, the same period in which centralized police forces, educational establishments, and more ambitious recordkeeping were also pursued. And when the Egyptian government abolished the vestiges of an Islamic court structure by folding religious personal status courts into the regular court system, the move was justified as removing "all traces of exceptional judicial systems with their consequential limitations of governmental authority which tended to undermine the national sovereignty of the country."[12]

Thus, while the European model of "rule of law" has connotations of limiting official power, in the Arab world—and elsewhere (Snyder & Hay 1987a; Chanock 1989)—legal reform on European lines was used so that official power would operate more effectively. For Meiji Japan, Robert Scalapino (1964) describes legal and constitutional reform as part of a general process of centralizing authority. Reform of this sort, if related to imperialism, is best seen as a defense against it. Engel (1978:18) observed in Thailand: "As pressures increased from the English in Burma and Malaya and from the French in Indochina, the king hastened to recodify the laws and to create a centralized judiciary that was the keystone for his new administrative system." Indeed, few states in the world today have managed, or even attempted, to avoid any sort of centralized legal system. Even in Nazi Germany the judiciary provided valuable assistance to the regime (Müller 1991). Yash Ghai (1986:179) notes:

> Few rulers have found it possible to govern without the assistance of law and legal institutions. The chaos produced by such attempts, such as Idi Amin's, to govern in disregard of the law, is testimony to its efficacy in ensuring some order and sense of security in society.

[12] Garvey to Macmillan, 7 Nov. 1955, FO 371/JE 1641, piece 113768, Foreign Office Records, Public Record Office, Kew, England.

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This should not be taken to imply that liberal conceptions of the "rule of law" are totally without foundation. The Egyptian elite responsible for adoption of the European-based system in the late 19th century unmistakably sought to regularize property rights and diminish the autocratic authority of the Khedive, the hereditary governor of the country (Ziadeh 1968; Cannon 1988). This elite can hardly be considered to constitute the leadership of a civil society, distinct from the state however—almost all its members were state officials; at that time, large landownership and public officialdom were largely coterminous.

In Africa and India (Kidder 1978), as well as in the Arab world, the European-style legal systems constructed over the past century and a half have been maintained precisely because of the benefits they provide to centralizing and reformist regimes. While the systems have not been abandoned, they have been modified—and it is the malleability of Western systems that is a final reason for the attractiveness of Western-style legal reforms. By adopting the principle that there could be "no punishment without a text," those who introduced the new law codes guaranteed that paramount responsibility for defining the law would lie in their hands and their successors. Having incontrovertibly written the law, political authorities could change it and extend it to new areas. Laws covering political violence and labor unions, for instance, were omitted from the original criminal code; these areas were covered when they arose in the early 20th century ('Atiya 1938).

To be sure, the Egyptian political elite could be badly divided—on how to react to the British occupation, on proper constitutional arrangements, and on many other practical and ideological questions. Bar association elections, for example, could become (and remain to this day) battlegrounds for competing political tendencies (Reid 1981). Yet these divisions never obscured an underlying consensus that Egypt needed a centralized code and court system and that the French model was most appropriate to the country.

Legal Reform and the Shari'a

Why did Egypt's centralizing elite adopt a European model rather than build on a preexisting shari'a-based system? A system based on shari'a courts was particularly inappropriate for several reasons. While not immutable, the shari'a tended to evolve, sometimes according to a logic quite different from that of the rulers. The paucity of clear, authoritative texts led to a widespread image of an incomplete shari'a that allowed judges to rule arbitrarily. Leading Egyptians, including many whose piety could not be doubted, shared a common belief with many colonial officials that the shari'a in its then current form was unsuitable for a

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modern state. This feeling was general throughout the Ottoman Empire (Messick 1993:54–68). The shari'a was not abandoned, but it was restricted to matters of personal status and to areas where it could be clearly and easily codified. This latter process of codifying the shari'a, begun in the Ottoman Empire, was continued in Egypt by two of the most influential individuals associated with the development of law codes—Muhammad Qadri in the 19th century and 'Abd al-Razzaq al-Sanhuri in the 20th. Al-Sanhuri specifically sought to draw on Islamic jurisprudence in his codifying work (al-Sanhuri 1938; Hill 1987). Yet he did so in ways (for example, selecting doctrine from various schools of law and seeking to reconcile the shari'a with modern sensibilities) that many Islamic jurists would probably have found overly eclectic at best and incoherent at worst.

What the proponents of legal reform sought, then, was a system consistent with (and occasionally even derived from) principles of the shari'a but not a wholly shari'a-based system. What is most striking about the gap between the new codes and the shari'a is that however much some (especially radical Islamicists) may view that gap as unbridgeable, at the time it provoked little public discussion. Codifying law, even if it meant considerable borrowing from the law of non-Muslim states, was not seen as undermining the shari'a; if anything, it strengthened Islamic law through clarifying it. In reporting the deliberations of the committee charged with drawing up the codes, the Cairo daily *Al-Ahram* mentioned only one dispute that involved the shari'a—whether a judge trained in the shari'a should be present when a sentence was issued in a murder case (*Al-Ahram*, 5 & 10 March 1883).

Only in the 1930s were some voices raised that criticized the codes as being insufficiently Islamic, and then only in the most muted ways (Enayat 1982:77–80). Shari'a court judges, then having jurisdiction only in personal status cases, boycotted the ceremony marking the 50th anniversary of the founding of the National Courts.[13] While they did so ostensibly to protest the failure to base Egyptian law on the shari'a, their likely motive was to avoid siding with the government in its conflict with the Wafd. (Indeed, the president of the shari'a court bar association attended the alternative, Wafd-sponsored celebration.) Also in the 1930s, al-Sanhuri (1937) began to criticize the Egyptian legal code for paying insufficient attention to the shari'a. He called only for reviewing the codes and modifying them by borrowing more heavily from Islamic law. Even then, he argued, there was no reason for concern that Egypt's close connection with Western law would be disturbed; it would not be difficult to reconcile the principles of the shari'a with Western legislation.

[13] Arthur Yencken to Sir John Simon (cited in note 11).

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Even the 1955 decision to fold the work of the shari'a courts into the National Courts drew only limited opposition on Islamic grounds. Al-Sanhuri (1937) had called for such a measure two decades earlier. Some complaints were heard from Islamic scholars and judges (Ziadeh 1968:113–14), but if the records of British and American diplomats are indicative, the opposition of minority religious communities was far more vocal.

In short, what seem like systems of European origin have been adapted to the local situation more than outside observers (and indigenous Islamicist political forces) often allow. To describe a legal system as European in style says less about its origins and still less about its current operation than may initially seem to be the case. At times adopting a European system was an offer that local elites could not refuse, but just as often they took the step for their own reasons.

Popular Shaping of the Courts

While it was members of the Egyptian political elite more than agents of imperial powers who imposed the new system on the Egyptian population, that population attempted to shape the system—or work it to maximum advantage—in ways like those noted elsewhere. Egyptians used the system constructed in the late 19th century from its inception in ways that suggest that they have shaped the system as much as they have been shaped by it. While little direct evidence has been left on how individual Egyptians used the courts, unmistakable tracks can be found in the historical record. These indicate that Egyptians frustrated both the British and the Egyptian elite with their uses (and perceived abuses) of the courts.

A search of this historical record reveals that imperial officials involved in the construction of legal systems often complained that their work was misunderstood, contaminated, or abused by the local population or by unscrupulous lawyers and incompetent judges. Lord Cromer (1908: vol. 2:516, 519) wrote that prior to the British, "any system of justice, properly so called, was unknown in the country. The divorce between law, such as it was, and justice, was absolute." In light of Egyptian unfamiliarity with any conception of justice, the chief difficulty in legal reform was "not to devise a system, but to find men capable of working it." While firm British control kept the system viable in Cromer's eyes, he had little confidence in the abilities and moral character of Egyptians associated with the law.

Cromer's attitude should be familiar to any student of imperialism. Recent research on imperial settings has begun to suggest that such complaints stem not simply from local corruption and aberrations but from creativity and resistance as well. The problem was not that local populations misunderstood or were

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ignorant of the new systems but that they used them for their own ends (Brown 1991). They did so even in sub-Saharan Africa, where imposition of law often constituted a justification for imperialism. Richard Roberts and Kristin Mann (1991:3) observe, "Under colonialism . . . Africans used law as a resource in struggles against Europeans. Legal rules and procedures became instruments of African resistance, adaptation, and renewal, as well as of European domination." It may be true, as Sally Engle Merry (1991:891) claims, that the contest over law was an unequal one "in which colonial officials and settler populations exerted vastly greater power than colonized groups." Yet even if power was disproportionately distributed, the courts needed local cooperation if they were to work. Indeed, because of the heavy reliance of courts on the local population to supply plaintiffs and witnesses (and often judges and lawyers as well), courts were among the most penetrated institutions of the colonial state.

The strong role the local population played in shaping the workings of the legal system helps makes sense of a paradox displayed in British (and often Egyptian) writings about Egyptian courts. On the one hand, British officials in Egypt joined their counterparts in India (Rudolph & Rudolph 1967) and Burma (Furnivall 1948) in complaining of the litigiousness of the local population. Egyptians were far too willing to bring even the most trivial cases to courts—courts that were slow and inefficient to begin with. As local disputants flocked to courts (at least in civil cases), imperial authorities worried that they were aggravating social tensions rather than alleviating them. On the other hand, the Egyptian population seemed too reluctant to cooperate with the new institutions of criminal justice to allow them to work. To colonial officials, Egyptians, like Indians and Burmese, seemed to take perjury quite lightly (Rudolph & Rudolph 1967; Furnivall 1948).

The new police force and criminal courts introduced in the late 19th century could not operate without testimony from witnesses, and Egyptians remained insufficiently forthcoming (Brown 1991). Crime was one of the major obsessions of the British occupation and, when it was directed against British troops or the occupation itself, led the imperialists to employ extreme emergency methods outside the regular court structure (including military courts and invoking collective responsibility). Even those Egyptian officials most committed to European-style legal reform used the crime rate to justify extrajudicial methods of apprehending and punishing suspected criminals (Brown 1990).

How could the British simultaneously complain that Egyptians went to court too often and that they did not cooperate enough with the courts? How could Egyptian governments echo the same complaints before and after independence? Few officials noticed the irony of their own complaints, and indeed, the

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contradiction was more apparent than real. In civil disputes, Egyptians proved ready to enlist courts when necessary. By 1920, they were bringing over one-half million civil or shari'a cases to court. The inefficiency and frequent postponements associated with the courts did not always discourage potential litigants; indeed, some quickly became adept at using delays as part of their strategy to obtain a favorable settlement.

Involvement in criminal cases, however, could be much less attractive. Charges were difficult to drop once they had been filed, giving the aggrieved party less control over process and outcome. Witnesses to crime often had no incentive to testify. As a result, considerably less than half of serious crimes in Egypt were even brought to trial. Egyptians therefore shaped the operation of both civil and criminal courts—the first by their creative uses and the second by their creative avoidance.

Conclusion

The history of imperialism in sub-Saharan Africa has led many scholars to view the history of legal reform in the non-Western world—especially that portion of the world ruled at some point by European powers—as one of imposition and coercion. When the Egyptian experience (and the Arab experience more generally) is included in the consideration of the relationship between imperialism and law, a more varied (and counterintuitive) picture emerges. One might initially expect that continued use of customary systems would indicate weak imperial influence and that use of European-style systems would indicate a strong imperial hand. The evidence presented here, combined with other research, reveals that the opposite may be just as close to the truth.

Many of the works cited above show that what was termed customary law by imperialist powers throughout the world was often anything but customary. On occasion, even imperial officials came to suspect that the "custom" they sought to preserve was subtly changed, thoroughly transformed, and even wholly invented by imperial authorities (see, e.g., Cohn 1989). On the other hand, European-style legal systems were often adopted (at least in the Middle East) by local elites for their own reasons and adapted to their own needs and ambitions. The current focus on subaltern resistance needs to be taken one step further (and higher). A focus on the role of indigenous elites may show that there was room not only for maneuver but even for initiative, even under imperial occupation.

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