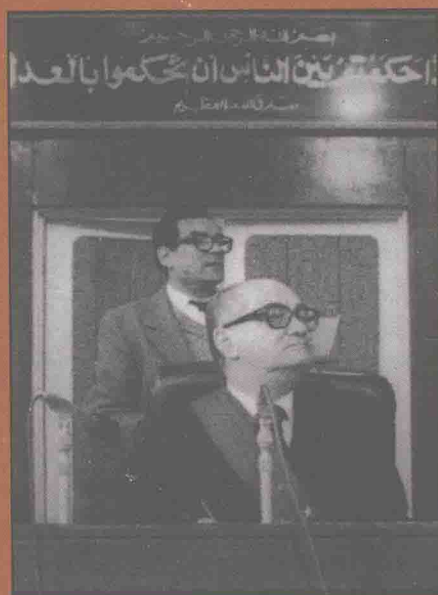


Cambridge Middle East Studies

The rule of law in the Arab world

Courts in Egypt and the Gulf



Nathan J. Brown

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The George Washington University



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press
The Edinburgh Building, Cambridge CB2 2RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org

Information on this title: www.cambridge.org/9780521590266

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First published 1997

This digitally printed first paperback version 2006

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data

Brown, Nathan J.

The rule of law in the Arab world: courts in Egypt and
the Gulf / Nathan J. Brown.

p. cm. – (Cambridge Middle East studies)

Includes bibliographical references and index.

ISBN 0 521 59026 4 (hardback)

1. Courts – Arab countries. 2. Courts – Egypt.

3. Courts – Persian Gulf States. 4. Rule of law – Arab countries.

5. Rule of law – Egypt. 6. Rule of law – Persian Gulf States.

I. Title. II. Series.

KMC459.B76 1997

347'.1492701–dc21 96–44075 CIP

ISBN-13 978-0-521-59026-6 hardback

ISBN-10 0-521-59026-4 hardback

ISBN-13 978-0-521-03068-7 paperback

ISBN-10 0-521-03068-4 paperback

Nathan Brown's comprehensive and penetrating account of the development and operation of the courts in the Arab world is based on extensive fieldwork in Egypt and the Gulf. The book addresses several important questions. Why, for example, did Egypt's political leaders construct an independent judicial system which so obviously limited their own authority? And why does a seemingly autonomous and dilatory system recommend itself to Arab states outside Egypt as diverse as Libya, Kuwait, Iraq, and the Gulf? While most accounts stress the role of imperialism or liberal ideology in answering such questions, the author maintains that the primary purpose of the system – certainly in the eyes of the political leaders who have built and sustained it – is to provide support for the officially sanctioned order. In other words, the Egyptian legal and judicial system was constructed as an integral part of an effort to build a stronger, more effective, more centralized, and more intrusive state. The system offers similar attractions for other Arab rulers.

From the theoretical perspective, the book makes a powerful and original contribution to the debates about liberal legality, external and internal sources of political change during and after imperialism, and the relationship between law and society in the developing world. It will be widely read by scholars of the Middle East, law students, and anyone with an interest in the history of law and its evolution.

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To Judy

Preface

In 1995, the Palestinian authority in Gaza and Jericho took its first unambiguous step in the direction of statehood by creating State Security Courts for cases of political violence (especially against Israeli targets). At the same time an assortment of Islamist movements in neighboring Egypt were engaged in a violent struggle with state authorities, with the movements claiming that the failure to implement the Islamic *shari'a* rendered the regime illegitimate. The regime responded by using all tools available, including, most controversially, military courts to try civilians.

Courts and legal systems have been the focus of intense political struggles in the Arab world, in some locations for over a century. Legal issues are, as everywhere, technical and arcane at times, but just as often they are closely connected to the definition and operation of political power and political community. Residents of the Arab world encounter courts and the legal system in many of their affairs; in fact, they seek out the courts at surprisingly high rates.

This study concerns the role of courts in social and political life in the Arab world. Egypt receives the major focus, but I have also conducted primary research in the Gulf and have included references to other Arab cases in order to cast the argument as widely as possible.

In transliterating Arabic names and terms, I have endeavored above all to be consistent. In general I follow the system suggested by the *International Journal of Middle East Studies* except that I have not used any diacritical marks. Consistency does have its costs, one of which is that several of the people mentioned may barely recognize their own names.

In the course of carrying out the research for this book over the past six years, I have received much assistance from friends, colleagues, students, and acquaintances. At George Washington University, Jenab Tutunji, Saba Atteyih, Roni Amit, and Jocelyn Aqua provided research assistance. Khalid Bishara not only assisted me with his encyclopedic knowledge of Kuwait; he also arranged many of my interviews in that

country. My colleagues Harvey Feigenbaum and Marty Finnemore also read portions of the manuscript, offering expert comments on the theoretical argument. Outside of GWU, I have benefited from the advice and assistance of a number of colleagues, including Lisa Anderson, Elizabeth Burns, Jerry Green, James Rosberg, Armando Salvatore, Ron Shaham, Diane Singerman, Robert Vitalis and John Waterbury. Emad al-Din Shahin read a draft quite carefully, making comments that have helped me improve both accuracy and clarity.

In Cairo, Enid Hill, Nabil 'Abd al-Fattah, Ahmad 'Abd Allah, and Bruce Rutherford, fellow scholars with similar research interests, took time out from their own work to offer their comments and suggestions. I spoke with a number of Egyptian judges over various aspects of this research; I was consistently struck by their openness and hospitality; indeed, I have gained several new friendships as a result of this research. In particular, I would like to thank 'Awad al-Murr, Muhammad Abu al-'Aynayn, 'Abd al-Rahman Nusayr, 'Adil 'Umar Sharif, Najib 'Ulama, and other members of the Supreme Constitutional Court and its Commissioners Body; I am also grateful to Muqbil Shakir, Fathi Jawda, Khalid 'Abd al-Ghaffar, and Bakri 'Abd Allah. Several other individuals with knowledge or experience in the Egyptian legal system were of great assistance in Cairo, including Kamal Abu al-Majd, Rajab al-Banna, Mahmud Riyad, Alex Shalaby, and Yahya Salim. I received invaluable research assistance from Husam Mahmud Muhammad, Muhammad Hanafi, and Sahar Hasan.

In Qatar, I also found an open and friendly research climate. 'Abd Allah al-Marri and Salah Hasan helped me establish many of the contacts necessary for research. Elizabeth Thornhill, Michael Adler, Bushara Bushara, and the staff of the American Cultural Center helped me use my time in Doha as efficiently as possible. Members of the Qatari judiciary were extremely helpful, including Ahmad Fakhru, Thaqil al-Shammari, Yusuf al-Zaman, and 'Abd al-'Aziz al-Khulayfi. Others in Qatar also helped me with their knowledge on the Qatari legal system. In this regard, I thank 'Abd Allah al-Muslimani, 'Abd al-'Aziz Hanifi al-'Usayli, 'Abd al-Rahman Al Mahmud, Fath al-Rahman 'Abd Allah al-Shaykh, and Bihzad Yusuf Bihzad.

The research climate in Kuwait deserves special mention. Although I poked into some of the most sensitive issues in Kuwait (such as the treatment of domestic servants), I found no obstacles in the course of my research. On the contrary, Kuwaitis in official position and in private life talked freely, rarely showing even a trace of inhibition in addressing any topic. To be sure, conducting research as an American in the aftermath of the restoration of Kuwait greatly facilitated matters, but I

received the strong impression that many Kuwaitis talked as freely to me as they would to each other. The frankness and freedom of Kuwaiti political discussions may come as a great surprise to those who conducted research elsewhere in the Arab world.

Before I arrived in Kuwait, three colleagues, Jill Crystal, Greg Gause, and Mary-Ann Tetrault, gave me helpful suggestions on whom I should speak with. Several Kuwaitis, most notably 'Abd al-Rahman al-Humaydan, assisted me in establishing contacts with Kuwaiti legal practitioners and experts. The USIS staff in Kuwait, Millie McCoo, Barton Marcois, and Mona Faruqi, were also of great help. In the Ministry of Justice, Jamal Ahmad al-Shihab and Muhammad al-Ansari gave me more time than I had a right to expect. In the Ministry of Interior, 'Adil Ibrahim, Fallah al-'Utaybi, and Muhammad al-Fahd were especially helpful, as was the staff at the Dasma police station and at the Office of Household Labor. In the judiciary, Khalid Faysal al-Hindi and Riyadh al-Hajiri provided assistance. Several members of parliament took time out of busy schedules to speak with me about my project; in this regard I would like to thank Nasir al-Sani', Mishari al-'Usaymi, Ya'qub Hayati, and 'Abd Allah Rumi. At the Faculty of Law at Kuwait University, I benefited from the constitutional expertise of 'Adil al-Tabtaba'i and Muhammad al-Muqatti' (who even let me audit his graduate course). Others in Kuwait who were generous with their time and expertise include Bahbahani 'Abd al-Rusul 'Abd al-Rida, and the staff of the Embassy of the Philippines, 'Abd al-'Aziz al-Dukhayl, Muhammad al-Jasim, Khulud al-Fili, Sharon Kenny, Ghanim al-Najjar, Badriya al-'Awadi, Sara al-Du'ayj, Baron Hall, Ernest Alexander, and Mustafa Ayad.

Some of the research for this book was funded by the United States Institute of Peace and by a Fulbright regional research grant. In connection with the latter, I also owe thanks to my sponsors and sponsoring organizations in each country: the binational Fulbright Commission and 'Ali al-Din Hilal of Cairo University in Egypt, USIS and Qatar University in Qatar, and USIS and Ahmad al-Samdan of Kuwait University in Kuwait. Of course, the opinions, findings, and conclusions or recommendations expressed in this book are my own and do not reflect the views of any sponsor or funding organization.

Also in the course of research I was fortunate to be able to present preliminary findings to audiences in the region. In Egypt, my lecture at the Department of Political Science at Cairo University provoked a very lively and interesting discussion. At Qatar University, the Department of Law invited me to give an informal presentation; their comments proved quite helpful. And in Kuwait, the Lawyers' Association sponsored a

public lecture and provided a friendly audience for me to explore some of my ideas.

My wife Judy has read all of what I have written, contributing her own knowledge and expertise, restraining some of my more fanciful arguments, and sharpening much of the prose. She accompanied me in visiting the region as well (along with our children, Ariel and Eran). This book would be less well-informed and far more muddled without her help. Whatever training I have as a political scientist does not equip me to do more than acknowledge this assistance in a direct and unadorned fashion. I hope that I may compensate for this by dedicating this book to her.

Glossary

'Abbas	Egypt's khedive (hereditary governor from 1849 to 1854)
'Adliyya Courts	The civil courts in Qatar (as opposed to the <i>shari'a</i> courts)
Arab Socialist Union (ASU)	Egypt's sole political party from 1961 until it was dismantled by Sadat in the mid-1970s
capitulations	Agreements by the Ottoman Empire to try subjects of foreign powers by their own laws; continued in Egypt until the Montreux conference of 1937 resulted in an agreement to abolish them
<i>diya</i>	Indemnity paid for causing death
Free Officers	The group of army officers who launched the 1952 coup, overthrowing the monarchy and the parliamentary regime
Isma'il	Egypt's khedive (hereditary governor) from 1863 to 1879; during his reign the Mixed Courts were established
<i>mahdar</i>	A formal statement made to the police
<i>Mahkamat al-Naqd</i>	Egypt's Court of Cassation; the highest level for civil and criminal cases
<i>mahr</i>	In most Muslim societies the groom pledges an amount to the bride. There is great variation among (and sometimes within) societies as to who holds the money and the precise form that it takes. In Egypt it is common to pledge one amount (the <i>mahr muqaddim</i>) upon marriage and a separate amount (the <i>mahr mu'akhkhar</i>) in the event of a divorce or death.
<i>majalla</i>	A late nineteenth-century Ottoman attempt to codify law on an Islamic basis (the full name was the <i>majallat al-ahkam al-'adliyya</i>)
<i>Majlis al-Dawla</i>	Council of State; in Egypt the structure was

	established in 1946 and comprises administrative courts as well as a body to offer advice to the government on legislation
<i>Milli Courts</i>	Personal-status courts that operated for different religious communities in Egypt until 1956
Mixed Courts	A court system that operated in Egypt from 1876 until 1949; had jurisdiction in civil cases in which a foreign interest was involved; also given limited criminal jurisdiction
National Courts	Established in 1883 with jurisdiction in Egyptian civil and criminal cases (also referred to in English as the Native Courts and in Arabic as <i>al-mahakim al-ahliyya</i> , <i>al-majalis al-ahliyya</i> , and <i>al-mahakim al-wataniyya</i>); with the abolition of the Mixed Courts in 1949, and of the <i>Shari'a</i> and <i>Milli Courts</i> in 1956 they were referred to simply as the regular Egyptian courts
<i>niyaba</i>	An institution based on the French <i>parquet</i> system in which judicial personnel have responsibility for investigating and presenting criminal cases to courts; the <i>niyaba</i> system was adopted first in Egypt and later emulated in many other Arab countries
Nubar	Egyptian political leader of the late nineteenth century; served in various diplomatic and cabinet positions (including prime minister) before and after the British occupation; instrumental in establishing the Mixed Courts and influential in domestic legal reform as well
<i>qadi</i>	Judge; in Islamic courts the term refers to any judge whereas in civil courts it generally refers to a judge of lower rank (as opposed to a <i>mustashar</i> or senior judge) though the plural (<i>quda</i>) refers to judges as a body regardless of rank
<i>qanun</i>	In current usage, positive laws and codes; in the Ottoman Empire <i>qanun</i> generally referred to texts that fixed or codified Islamic and imperial law
Revolutionary Command Council (RCC)	The body established by the Free Officers after the 1952 coup to exercise executive authority

Riyad	Egyptian political leader of the late nineteenth century; influential in legal and judicial reform
al-Sanhuri, 'Abd al-Razzaq	Egyptian jurist of the mid-twentieth century; rewrote Egypt's civil code; served as president of the <i>Majlis al-Dawla</i> ; assisted other Arab states in writing their civil codes
<i>shari'a</i>	Generally translated as Islamic law; the <i>shari'a</i> covers all areas of religiously-mandated and regulated behavior
<i>siyadat al-qanun</i>	Sovereignty of law; Arabic equivalent to the phrase "rule of law"
Supreme Judicial Council	The Egyptian body responsible for judicial hirings, assignments, and promotions; from 1969 to 1984 the body was replaced by the Supreme Council of Judicial Organizations (this latter body still operates but its role in judicial assignments for the regular judiciary is now a formality)
<i>'urf</i>	Custom and customary law
'Uthman Khalil 'Uthman	Egyptian legal scholar who drafted Kuwait's constitution
Wafd	Nationalist Egyptian political party that emerged out of the 1919 revolt against the British occupation; banned with other parties after the 1952 coup, it resumed activity as a result of political liberalization under Sadat and Mubarak

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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 *qadis* (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*