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Guy Bechor

God in the Courtroom

The Transformation of Courtroom Oath and Perjury between Islamic and Franco-Egyptian Law

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INTRODUCTION

1. Mutual Functionality between Legal History and Comparative Law

Little has been written in Western literature about the institution of the Franco-Egyptian or Islamic courtroom oath, or indeed about the institution of courtroom oath in other legal systems. Of the few references that can be found, most are tangential.[1] Even in Arabic-language literature—whether Islamic or modern Arab in character—discussion of the courtroom oath is usually a minor aside copied from one source to the next. It is rare to find a comprehensive, critical, and certainly comparative examination of this fascinating institution, which some scholars have even imbued with a mystical dimension. The paucity of research on this subject is surprising given the importance of the courtroom oath within the structure of Islamic law or its central role in the contemporary law of Arab countries. A similar paucity is evident in discussion in the West of the Islamic or Arab legal proceeding of which the courtroom oath forms part. Bernard Haykel, guest editor of an issue of *Islamic Law and Society* devoted to procedure and evidence in Islamic law commented regretfully on this situation:

> Clearly much else deserves the attention of scholars interested in questions pertaining to evidence... It is my hope that the present issue offers a contribution to this neglected but important subject, highlighting existing lacunae and offering examples of how the study of evidence, in both its theoretical and applied aspects, can further out understanding of Islamic law and Muslim societies.[2]

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[1] See *inter alia*, Johannes Pedersen, *Der Eid bei den Semiten*, Verlag von Karl J. Trübner, Strassburg, 1914; Herbert J. Liebesny, "Comparative Legal History: Its Role in the Analysis of Islamic and Modern Near Eastern Legal Institutions", *The American Journal of Comparative Law* 20 (1972), pp. 38–52; Richard Lasch, *Der Eid, Seine Entstehung und Beziehung zu Glaube und Brauch der Naturvölker*, Verlag von Strecker & Schröder, Stuttgart, 1908; Stephan Kuttner, *Die juristische natur der falschen beweisaussage: Ein beitrag zur geschichte und systematik der eidesdelikte*, W. de Gruyter, Berlin, 1931.

[2] "Theme Issue: Evidence in Islamic Law", Guest Editor: Bernard Haykel, *Islamic Law and Society* 9(2002), pp. 129–131.

This book seeks to examine the institution of the courtroom oath on the basis of three criteria: Islamic law, which discusses the oath in the context of the judicial proceeding, including debate between different schools and interpreters; the sources and approach of Egyptian law on this subject as an example of a leading contemporary Arab legal system; and, lastly, the core of this book—a detailed legal comparison between the Islamic oath and the Franco-Egyptian oath. This is a study in legal history examining the origins, character, sources, and doctrines of the oath in Egyptian law. At the same time, it is a comparative study of Islamic and contemporary Egyptian law in this field. As I wrote this book I discovered an inherent tension between the discipline of legal history and that of comparative law. The former field requires a broad examination of society, validation, individuals, and culture, while the latter focuses mainly (but not exclusively) on the comparative analysis of texts. Despite this, I attempted to blend the two methodologies, embedding internal legal processes within the historical context and insisting on connections between the legal sphere and broader historical changes. By way of example, the doctrinal discourse on the subject of the courtroom oath serves both legal history and contemporary law; it can provide rich insight not only into history and law, but also into the nature of societies and aspects of belief that were embraced or avoided over the course of time. Emphasizing the distinction between the jurist and the historian, the French jurist Saleilles (1855–1912) explained that Historical school cannot be a legal school unless it grants method to the progress and development of law. If law develops, the historical school must tell us how it developed; and if it is unwilling or unable to do so, it has ceased to be a legal school. It may, perhaps, satisfy the historian, but not the jurist.[3] Accordingly, the approach taken by this study in examining its topic is one of mutual functionality. The comparative study serves as a tool for proving legal history, while at the same time legal history functions as a tool for understanding comparative law.

[3] Raymond Saleilles, *The Individualization of Punishment*, Kessinger Publishing, 1911, pp. 20–21. See also Friedrich Carl von Savigny, *System of the Modern Roman Law* (Eng. Trans.), Vol. 1, J. Higginbotham Publisher, Madras, 1867; *System des Heutigen Römischen Rechts*, 1840; *Von Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, 1814; Max Weber, *Economy and Society*, University of California Press, Berkeley and Los Angeles, 1978, pp. 880–895.

The book also seeks to place the courtroom oath on the broader canvas of general human development, in additional to the specific Islamic or Franco-Egyptian legal context. Blending these two disciplines will be far from easy. The former requires an orientation in the complex legal, political, and social processes that formed the background to the drafting of the modern Arab legal codes and the accompanying procedural rules, as well as in the history of Islamic law over a period of more than one thousand years. The latter requires broad knowledge both in Islamic law (*fiqh*) on a specific issue such as the institution of the oath and in modern Egyptian law, not to mention the rules of comparative law. These issues relate to disparate circles involved in examining this issue in the Middle East—legal experts, jurisprudents, and lawyers, on the one hand, and on the other the clerics who study the *fiqh*—Islamic law—as the core of religious faith. Accordingly, this is an encounter between scholars from different schools and between religion and state in the Arab Middle East—a charged encounter in any context, and particularly so in the context of the issue examined in this book. Sometimes legal discourse touches religious discourse, but often the two remain detached. Given this complexity, one of the focal points of the book is Chapter Four, which compares the institution of the oath in Islamic and Franco-Egyptian law; the discussion identifies points of tessellation, but also the far more dominant points of difference. This is not only a legal encounter in terms of comparative law, but also an encounter on the social, political, and historical planes. Justice Cardozo (1870–1938) argued that comparative historical inquiry is of great importance for the maintenance of law and society, since history often illuminates the paths of logic and certain legal issues can be understood only within their historical context.[4] Cardozo gave land law as an example of this, and we can make the same claim concerning the courtroom oath, an institution whose historical development is vital in order to understand its place within any legal system. The subject of the courtroom oath in both these legal systems is indeed complex, blending elements of history, theology, philosophy, culture and law, as well as the comparative study of different legal systems.

[4] Benjamin Cardozo, *The Paradoxes of Legal Science* (1928), The Lawbook Exchange, New Jersey, 2000, p. 27: "The notion that a jurist can dispense with any consideration as to what the law ought to be arises from the fiction that the law is a complete and closed system, and that judges and jurists are mere automata to record its will or phonographs to pronounce its provisions".

Even literature published in the East has refrained from embarking on a comparison of the two legal systems, for reasons that will be discussed below. As a result, the mistaken impression is created that modern legislation in the Egyptian legal system on this subject forms the natural continuation of Islamic law, or that there are no significant differences between these two legal approaches. Thus the courtroom oath in its modern format is seen as a stage in a historical continuum, whereas in reality it may actually represent a break with tradition or a legal challenge based on the assumption of a new identity and a new approach.

2. Egyptian Law and Its Arab Weight

This book places particular emphasis on Egyptian law, and the examination then extends to the legal systems of the other Arab countries. There are two reasons for this. Firstly, the format and interpretation of the current Egyptian Code of 1949 was adopted or used as a key source by many Arab countries, and is still widely employed. The code was adopted with minor changes by Syria (1949) and Libya (1953). The author of the Egyptian Code, ʿAbd al-Razzāq al-Sanhūrī (1895–1971), also authored the Iraqi Civil Code (1951), which is very similar to the Egyptian one. Sanhurī's Egyptian Code also served as a central point of departure for the civil codes of Jordan (1976), Yemen (1979), Kuwait (1981), and other Arab countries. Large sections of substantive and procedural Egyptian law were copied or served as inspiration for Arab nations in the Persian Gulf and North Africa. An understanding of the Egyptian Civil Code, the transformations it underwent, and the methods by which it has been interpreted is essential for any examination of law in the Arab world—and certainly civil law. These interpretive methods are also used in the countries that have adopted the Arab code.[5]

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[5] Guy Bechor, *The Sanhuri Code and the Emergence of Modern Arab Civil Law (1932–1949)*, Brill, 2007; Guy Bechor, *Mudawwanat al-Sanhūrī al-Qānūnīya, Nushū' al-Qānūn al-Madanī al-ʿArabī al-Muʿāsir (1932–1949)*, al-Shabaka al-ʿArabīya lil-ʾAbḥāth wa-al-Nashr, Beirut, 2009; Guy Bechor, *Be-hipus ahar seder hevrati, Sanhuri ve-huledet ha-mishpat ha-ezrahi ha-ʿaravi ha-moderni*, Mifʿalot ha-Merkaz ha-Beinthumi Herzliya, Herzliya, Israel, 2004; Nabil Saleh, "Civil Codes of Arab Countries: The Sanhuri Codes", *Arab Law Quarterly* 8 (1993), p. 161; Nathan Brown J., *Rule of Law in the Arab World: Courts in Egypt and the Gulf*, Cambridge University Press, Cambridge, 1997; Byron Cannon, *Politics of Law and the Courts in Nineteenth Century Egypt*, University of Utah Press, Salt Lake City, 1988.

The second reason is the sense of pan-Arab responsibility that Egyptian law has traditionally maintained, and which continues in large measure to this day. The perception of Egyptian law as a big brother to the other Arab nations reflected the rapid development of this legal system from the second half of the nineteenth century, with the establishment of the Mixed Courts (1875) and the Native Courts (1883)—the first time that Western legal systems had been adopted in the Middle East. An example of the pan-Arab approach of Arab jurists can be found in the twelve-volume commentary on the Egyptian Civil Code *Al-Wasīṭ fī Sharḥ al-Qānūn al-Madanī*, which discusses and quotes from the Arab codes drafted in the spirit of the Egyptian code. The author, Sanhūrī, even proposed in the commentary that pan-Arab legal union could also serve as the first step toward political union. A similar sense of responsibility can be seen in the work of the Egyptian jurist Sulaymān Murqus, whose masterpiece on civil procedure paid careful attention to analogous Arab legal systems in the Middle East and North Africa. Murqus also started from the assumption that law in the wider Middle East is Egyptian in origin, with local variations based on Islamic law or on local customs. He explained that he mentioned procedures in Arab nations:

> In order to reach solutions that will be acceptable to the Arab legal systems, by way of preparation for the union of our laws in this field. We have always noted that the union of the Arab nations will be achieved not through political rapprochement among their pinnacles but through rapprochement at their bases; that is to say, through the mutual rapprochement of the Arab peoples, through the unification of their laws and culture, and through the common elaboration of their economies.[6]

It is reasonable to presume that Sanhūrī and the Egyptian jurists have taken this idea of the unification of their laws from Europe, where after world war I a committee was established for the *Union législative entre les nations allieés et amies.* Sanhūrī regarded this union as a blessed one.[7]

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[6] Murqus, Sulaymān, *ʾUṣūl al-ʾIthbāt wa-ʾIjrāʾātuhu fī al-Mawād al-Madanīya fī al-Qānūn al-Miṣrī muqāranan bi-Taqnīnāt sāʾir al-Bilād al-ʿArabīya*, ʿĀlam al-Kutub, Cairo, 1981, Vol. 1, p. 9.

[7] Sanhūrī, ʿAbd al-Razzāq, "Min Majallat al-ʾAḥkām al-ʿAdlīya ʾilā al-Qānūn al-Madanī al-ʿIrāqī wa-Ḥarakat al-Taqnīn al-Madanī fī al-ʿUṣūr al-Ḥadītha" (1936), in Sanhūrī, ʿAbd al-Razzāq, *Majmūʿat Maqālāt wa-ʾAbḥāth al-ʾUstadh al-Duktūr ʿAbd al-Razzāq al-Sanhūrī*, Maṭbaʿat Jāmiʿat al-Qāhira, Majallat al-Qānūn wa-al-ʾIqtiṣād, ʿAdad khaṣṣ, Cairo, 1992 Vol. 1, p. 288.

From the mid-nineteenth century Egypt saw considerable development in the field of legal studies; Western study models were adopted and Arab terminology was developed for European legal concepts. Contacts were forged with leading European jurists who worked directly as teachers in the higher education system in Egypt. By way of example, Edouard Lambert (1866–1947) served as Dean of the School of Law at the University of Cairo (previously known as the Khedivial Law School) in 1906–1907. Lambert is considered one of the founders of the sociological approach in French and European law and his importance extends far beyond his activities in Egypt. Lambert continued to educate generations of Egyptian doctorate students after returning to France. Another figure was Léon Duguit (1859–1928), who served as Dean of the same Cairo school in 1925–1926. Duguit was also a founding figure in the French and European sociological approach to law and is considered one of the initiators of the concept of 'social solidarity' through law. These jurists were directly involved in Egyptian law and had a sense of responsibility for its development, advancement, and integration in European law. To this one should add the Mixed Courts, which directly introduced Western legal norms into Egyptian law, as well as the heritage of the *code civil*, which became civil law in Egypt in 1875. Legal journals were founded in Arabic and French; law bars were established for the first time in the Arab world; commercial, criminal, and procedural law was rapidly developed; and a cadre of jurists began to take its place in the political, social, and legal leadership of the nation. All these developments led to a powerful sense that at any given point in time Egypt was dramatically more advanced than the other Arab nations.

Among these Egyptian jurists there was a sense that law was a means for the advancement and reform of the Arab societies. Accordingly, their assumption was that if Egypt was experiencing the most significant process of modernization in legal terms, it was only natural that it should also lead the other Arab countries that had not undergone the same process of development and European influence toward similar innovation. Equally, these Arab societies themselves were eager to benefit from what Egypt had to offer in this field in order to develop themselves; thus the legal affinity was a shared interest of both societies. At the end of Murqus' book on civil procedure, he proposes a unified civil procedure law for all the Arab nations—under Egyptian hegemony, needless to say. Such a proposal was a natural assumption for an Egyptian scholar, due to his sense of responsibility toward