# **Chapter One: Legal Borrowing and Influences on the Egyptian Legal System**

##

As noted by Maurus Reinkowski, nowhere else in the Middle East did different colonial and Eastern powers converge so closely as in nineteenth century Egypt, where the interests of France, Britain and the Ottoman Empire combined.[[1]](#footnote-2) This chapter aims at understanding these encounters, the lively research discourse they have generated, and the changes they brought into the Egyptian judicial system.

The purpose of this chapter is to provide an overview of the legal reforms which took place in Egypt during the nineteenth century, focusing on the historiography of these reforms. The first part of this chapter will focus on the British, French, and Ottoman influences on the emerging Egyptian legal system in the nineteenth century. The second part will address the scholarly discourse on the question of the motivation for the legal reforms. Finally, this chapter will discuss the ideology of “legal positivism” that, as this thesis claims, was implanted into Egypt’s judicial system. In the next chapters, an Egyptian judicial journal will be examined in light of similar genres of literatures in the Ottoman Empire and in France in order to get a better understanding of this legal ideology and concept.

**Egyptian Judicial Reforms in the Nineteenth Century**

The purpose of this part of my discussion is to introduce the judicial reforms that occurred in Egypt in the nineteenth century, focusing on legal borrowing. According to Nathan Brown, in the nineteenth century the Egyptian ruling elite worked to build an independent judicial system and to introduce codified law. They moved away from Islamic and Ottoman law towards a French legal system. Brown argues that the reforms in the Egyptian judicial system and the desire for codification of the law, paralleled by an effort of state centralization, were not a new trend. Rather, these measures merely extended a trend that had been in motion since Muhammad Ali’s reign. At the beginning of the century Muhammad Ali had established several new judicial bodies, staffed mainly by officials, who performed judicial and administrative duties alongside the Shari`a courts of Egypt.[[2]](#footnote-3) Rudolph Peters explains that these councils marked the beginning of the development of a "secular" Egyptian judiciary, a development that started in 1842 with the creation of the "Cem'iyet-i Hakkaniye" (Ottoman Turkish for ‘legal council’). Later, it was replaced by the "Majlis al-Ahkam" (Arabic for ‘legal council’). This was a specialized judicial council, based on its European counterpart. Its main objectives were: investigation of the legality of penal sentences, settling administrative disputes, and trying high officials in the first instance. These councils also marked the beginning of a more hierarchical legal system in the country. The introduction of the Imperial Penal Code in 1852-1853 brought a lower level of jurisdiction to the system by creating provincial councils. Provincial councils became an important part of the judicial system and were under the direct jurisdiction of the newly established Department of Justice in Cairo (1862). Two Appellate Councils were established in 1864 in order to meet the growing amount of cases addressed by the councils. Peters claims that in a few years the Egyptian government created a fully developed judicial system independent from the religious court system. The new court system, however, was not in competition with the Shari`a courts.[[3]](#footnote-4)

These judicial developments were part of a wider range of social and political changes which Egypt underwent in order to create a “modern," independent (or semi-independent) and centralized state. Ehud Toladano explains that during the nineteenth century, the Egyptian government assumed new roles and functions in order to promote economic and social development. By the end of the nineteenth century, a centralized bureaucracy had replaced the old administration, which was carried out by autonomous groups. This new structure had been influenced by both western and Ottoman models.[[4]](#footnote-5)

In the course of thirty years, the reformed judicial system was extended so that councils that previously had dealt exclusively with criminal and administrative matters started addressing civil cases as well. Both Peters and Brown argue that the reformed judicial system, which they call “secular," was an answer to a need for specialization in the field of law in Egypt. The need for specialization became evident from 1830, when Egyptian reformers started to think about public order in terms of legislation and codification. The previous judicial system gave much more power to individuals in positions of authority. Legislation and codification reduced the arbitrariness and unlimited power of provincial governors.

As we have seen, a reformed judicial system, commonly described in scholarship as secular, emerged from the beginning of the century. The non-Shari`a judicial system that existed in Egypt in the first three quarters of the nineteenth century was considerably hierarchical and centralized, administered by officials in Cairo.[[5]](#footnote-6) In the last quarter of the nineteenth century, a new judicial system emerged. This system continued the centralized and hierarchical lines, but also adopted foreign codes and the separation of the judicial and the administrative powers as a means of securing the independence of the courts.[[6]](#footnote-7) Was this an evolutionary or a revolutionary process? This question seems to be a major issue in the historiography of Egyptian legal reforms. Brown and Peters perceive it as an evolutionary process. This assessment, however, is not accepted by all the different researchers as will be presented later.

In the following part of this chapter, attention will be directed to two of the most important legal institutions that emerged during the reforms of the nineteenth century, the Mixed and the National courts. Each of these institutions presents an interesting example of the mixed judicial culture that emerged in the country as part of the legal reforms. The nature of these bodies offers an explanation for some of the motivations for those reforms.

**The Mixed Courts**

At the end of the nineteenth century, Egypt entered a new economic phase that included a significant growth in foreign investments and an increase in the flow of capital into the Egyptian economy. Benefitting from capitulatory rights, European citizens had the right to be judged by their respective consular courts in Egypt, while native Egyptians had to be tried in the regular Egyptian judicial system. This legal structure soon collapsed under the amount and the complex nature of the judicial cases the new economic situation in the country had generated. In addition, in order to attract more foreign investors, the government had to find a way to construct a judicial system that would protect investors’ belongings and investments in Egypt, especially from government intervention.[[7]](#footnote-8) In order to reform the judicial structure and to build a judicial system that would suit the needs of the country, Nubar Pasha, one of the senior ministers of Khedive Ismail (1878-1789, 1884-1888, 1894-1895) and a future Prime Minister, turned to France, the same source that had inspired diverse administrative and legal reforms in Egypt since Muhammad Ali’s reign.[[8]](#footnote-9)

According to Jasper Y. Brinton, Muhammad Ali understood the necessity of European cooperation in the completion of his reform projects. He encouraged Europeans to travel to Egypt, to invest in the country, and to participate in Egyptian expeditions. As a result, the European consuls in Egypt gained more and more power, and enlarged their jurisdiction. This situation, especially considering the capitulations,[[9]](#footnote-10) led to the judicial chaos of foreigners living in Egypt, but not liable to Egyptian law.[[10]](#footnote-11) Instead, they had at their disposal Consular Courts that were presided over by consular officials. In order to remedy this situation, Nubar's original plan was to establish a system of Mixed Courts whose judges should be evenly divided between Egyptians and Europeans, and which should exercise jurisdiction in all civil and commercial cases concerning foreigners and natives, as well as general criminal jurisdiction over foreigners. He extended the scope of his projects later to include commercial suits and criminal cases among Egyptians, and all civil cases between Egyptians when the parties agreed to submit to the new courts. The different parties involved in the creation of the courts were not easily convinced by Nubar’s plan. An agreement was finally reached between Egypt and the European Powers. It took the form of a document known as the "Statute of Judicial Organization.” This document provided for the establishment of the Mixed Courts, fixed their duration, and defined their organization, jurisdiction, and the selection of their members.[[11]](#footnote-12)

In order to see his project becoming reality, Nubar had to make considerable concessions. Two of those concessions are especially important. The first required the Egyptian government to enforce judgments passed against itself. This concession was derived from neither British nor French statues, but was made in order to protect foreign bondholders and investors from government takeover. In addition, it generally limited the government’s power. The second concession was taken directly from the French judicial system and required the adoption of the French system of the *parquet* which designated officers of the courts to investigate and prosecute crimes, advise the court on legal matters, and represent the general interests of the state. The Mixed Courts *parquet* was to be headed by a foreigner and staffed by both Egyptians and foreigners, giving greater authority to foreign officials. According to Brown, some of the concessions Nubar had to make, particularly the formation of the *parquet*, agreed with his judicial and political ideology and with his visions for the new Egyptian judicial system as a judicial system based on the rule of law. Nubar not only wanted to create a unified judicial system that would secure both foreign and Egyptian interests in Egypt, but he also wished to create a judicial system that would be protected from, and even limit the power of, the khedive. This and the transformation of the government into a legal person are key features of the rule of law.[[12]](#footnote-13)

In 1876, the opening year of the Mixed Courts, there were thirty-two judges in the three Mixed Courts in Egypt, and two thirds of them were foreigners. Throughout the years, the number of judges and the proportion of foreign judges varied until after 1937, when foreign judges who retired were replaced only by Egyptian judges. The fluctuations in the proportion of foreign judges were closely connected to the different colonial and native powers in charge. The foreign judges were usually recruited from among diplomat or colonial administrators. Appointed by the khedive, the Egyptian judiciary consisted of graduates from law faculties from abroad or from *L'Ecole du Droit Français*, which was established in 1892 in Cairo. The judges of the Mixed Courts were required to possess international experience because they were expected to apply principles of different legal systems. The foreign judges were expected to break any relation with their home country after their appointment. On the whole and usually these judges were independent of external and internal influences. The Mixed Courts were the only Egyptian jurisdiction that granted lifetime appointment to its judges. According to Petricca, the jurists in the Mixed Courts came from different nationalities, worked together effectively, and did not let their different nationalities come in the way of their judicial work. The staff in the Mixed Courts included not only judges but also clerks' officials, interpreters, scribes and more. The Attorneys pleading in the Mixed Courts were generally French, Greek, Italian or Swiss who had moved to Egypt after the opening of the courts. Most Egyptians considered the Mixed Courts as a forum for rich and foreign people even though the Bar association created a mechanism of legal aid for poor clients. The languages used in the courts were French, English, Arabic and Italian. However, French was used exclusively as the official language of the courts, as it was the official language of public administration since Muhammad Ali’s reign. Even after the British occupation, French remained the Lingua Franca of the administration in Egypt.

 The Mixed Courts worked according to the ‘Mixed Codes’, which were created explicitly for this purpose. Petricca claims that the Mixed Codes were largely influenced by the French codes but that it is a mistake to state, as some historians have done, that they were only a poor copy of the Napoleonic Code. For Petricca, the Mixed Codes were the Egyptian adaptation of the most successful law codes of the time. The choice to borrow from the French codes was a natural step for the Egyptians, considering the possible connection between Muslim and Roman law (which was the base of the French code). This connection existed due to the fact that the two continents were locked in relation through a history of conquest and occupation which had led to cultural exchanges.[[13]](#footnote-14) However, Petricca explains that if the Mixed Codes contributed to a legal dialog between different cultures, it was a side effect of these bodies rather than the intention of its designers. After all, these courts were part of a semi-colonial structure created to serve the "Egyptian business". The legal dialog between the different law cultures is apparent in the Mixed Codes and in the unofficial instruments the Mixed Courts used to solve cases (such as traditional customs or law). Petricca claims that this dialog is one of the reasons for the success of these courts. The Mixed Courts often had to deal with cases involving plaintiffs that came from different backgrounds and claimed their rights according to different and often conflicting norms. This situation required judges and advocates to be familiar with elements of different law cultures, including Islamic law and customs.

 To conclude this overview, the legal system of nineteenth century Egypt was a combination of several judicial cultures and the result of concessions, influences and struggles between different local and colonial interests. As will be presented later, this combination of cultures was presented in scholarship as a weak spot of the Egyptian legal system of the nineteenth century. However, an alternative perspective is offered by Mahmoud Hamad who argues that an important feature of the modern Egyptian legal system, which took root in the reforms of the nineteenth century and the foundation of the Mixed Courts, is the integration of legal ideologies of law taken from the west with those that originated in Islamic law. From the West came the ideas of liberal politics and justice which value citizens’ rights and freedom, checks and balances, and the separation of powers. On the other hand, Islamic law brought to the judicial culture of Egypt the importance of the judge's independence, impartiality, the aspiration for justice, and large political and sociological mandates.[[14]](#footnote-15) Hamad claims that this rich and unique combination of different cultures of law has given to the Egyptian judicial system over the years a sort of strength that cannot be ignored.

**The National Courts**

In 1876, shortly after the establishment of the Mixed Courts, the Egyptian government started working on the creation of a separate judicial structure that would have under its jurisdiction cases involving only Egyptians. Nubar’s idea of a joint judicial system for both foreigners and Egyptians had failed. According to Brown, this was not surprising since the Mixed Courts were founded to meet the needs of antagonistic parties. Egypt was in an extremely difficult financial situation at that time, and when the Courts ruled against the Egyptian government numerous times in financial cases, the khedive became hostile to the new structure. In contrast, the French appreciated the courts as a check on Egyptian government.[[15]](#footnote-16)

The new judicial bodies were originally called the Local Councils. Since they were defined "National Courts". The structure of the courts was determined in 1881, but ultimate definition of the legal source to be applied took some more time. This delay resulted from disagreements among the different parties involved in the process and the general political crisis of 1879-1882, known as the Urabi Revolution.[[16]](#footnote-17) One group of reformers wanted to use the French code as a base for these courts, whereas another group wanted to adopt a code that would be more closely based on the Shari`a.[[17]](#footnote-18) The British occupation of Egypt in 1882 drove the cabinet to proceed with the French code rather than waiting until a more suitable code could be written. According to Brown, this decision was an answer to the cabinet’s concern that the lack of a functioning national court system would increase the risk of British domination of the Egyptian judicial system.[[18]](#footnote-19) The final decree establishing the National Courts was issued in 1883, and the Mixed Codes were adopted by them with minor changes. The structure of these courts reflected in many ways that of the Mixed Courts, and the idea was that in a given time period the two judicial structures would be united. However this did not happen and the Mixed Courts continued their independent existence for sixty six more years.

 The result of these reforms was that by the year 1876 four parallel jurisdictions, recognized both by Egypt and by the Porte in Istanbul, operated in Egypt: the Mixed, National, Consular and Religious Courts.[[19]](#footnote-20) Access to a certain court was determined by the nationality of the plaintiff for civil and criminal cases, and by religion for cases of personal status. Foreigners of the same nationality could settle their civil and criminal cases in the Consular Courts. Foreigners of different nationalities and cases of Egyptians versus foreigners belonged in the Mixed Courts for civil matters, and in Consular Courts for criminal cases. Egyptians went to the National Courts for both civil and criminal cases. For matters of personal status, Egyptians had to go to the religious courts, whereas foreigners had the choice of going to either the Consular Courts or to the courts of their religious affiliation. The organization of different courts for different religious affiliations was based on the Ottoman organization patterns that were established during the Tanzimat, in which each religious community had its own religious courts for matters of personal status (the *Millets*). However, this organization and distribution of jurisdictions between the different courts was rarely respected and people were switching for one legal venue to another, manipulating their religious and nationality affiliations.[[20]](#footnote-21)

 Arguably, the foundation of the Mixed and National Courts marked the start of fundamental changes in the judicial structure of Egypt. The questions that will be examined next will concern the French and the British role in the building of the new judicial structure. Since there are numerous theses concerning the different influences on the emerging Egyptian judicial system, the remaining part of the chapter will present the tumultuous dialog between the different researchers on that subject.

It may seem impossible and unnatural to attempt to divide the influences on the Egyptian legal system clearly between French, British, and Ottoman influences. Moreover, it is the assumption of this study that all these influences were at play in the emerging Egyptian legal system. However, in order to understand the existing scholarship, I will first introduce the discourse which places French influences at the center. Then I will address the arguments which place British and Ottoman influences at the center. At the end of this chapter, these different theses will be integrated in order to explain the basic assumption of this study, which is that all the different players, as well as the realities on the ground, contributed to the emerging Egyptian judicial system in the nineteenth century.

**The French influences on the emerging Egyptian judicial system**

The ideologies and politics of the nineteenth century were mainly influenced by France, where the revolution against the "old" political and social order of Europe started. France became the great example of national identity, providing new ideas of liberal and democratic political parties. The French influence on Egypt’s government structures increased after the French occupation of the country in 1798 by Bonaparte. The French occupants inserted only minor changes in the Egyptian legal structure, such as the replacement of the Ottoman *Qadi* by local judges and the establishment of judicial structures specializing in commercial law. However, these changes and the French occupation had tremendous effect on the legal reforms of the nineteenth century. Immediately after the French withdrawal from Egypt in 1807, Muhammad Ali started reforms inspired by France in various fields. In the legal field, the best example of these early reforms is the judicial councils (see page 2) that were built after the French example. The French influence on the different state’s institutions soon became so important that Muhammad Ali started to send student expeditions to France in order to adjust new graduates to the new system.[[21]](#footnote-22) As Petricca claims, due to such early French influence in Egypt, Egyptians associated French-based reforms more with modernity than with imperialism and colonial power.[[22]](#footnote-23)

The phenomenon of legal borrowing was not confined to Egypt. Countries all over the world also adopted French law during the nineteenth century. However, it is also important to stress that legal borrowing in general was not a new phenomenon. As Alan Watson argues, legal borrowing was an important and common phenomenon which characterized the changes that occurred in Europe from the eleventh to the eighteen centuries when Roman law replaced the local legal traditions[[23]](#footnote-24). As in Europe, the Ottoman Empire pre-modern law was shaped by the local customs form the different provinces of the Empire.[[24]](#footnote-25)

The claim that the legal reforms based on French law started early on in Egypt is consistent with Brown’s argument that positive law and comprehensive law codes were already known in the Egyptian legal system. In addition, the idea that courts would rule on the basis of State Legislation and Ruler Decrees was already implemented in Egypt. This is also part of Brown’s claim that the judicial reforms at the end of the nineteenth century were a continuation of reforms that started earlier in the century in Egypt, as well as in the rest of the Empire. However, the two new bodies that were added to the judicial structure, the National and the Mixed Courts, according to Brown differed in many ways from the judicial system that had existed in Egypt before their creation. The two new courts incorporated comprehensive, positive, Western law more than the old system did. These two judicial structures and the French influence on them have already been discussed in this chapter. The French influence on the emerging Egyptian legal system is undeniably important, but it was not the only external influence on this system. British influence was another major factor in these reforms.

**British influence on the Egyptian Judicial System**

 To understand the British influence on the Egyptian legal system, it is important to examine the kind of colonial control the British exercised in Egypt. The British occupied Egypt from 1882, but never succeeded in gaining full control of the country. According to Petricca, other colonial powers were united in order to weaken British influence in Egypt. In addition, national Egyptian political parties and other foreign elements in the country used every tool they could to undermine British control of Egypt. According to Petricca, one can see in Egypt an example of "combined colonialism.” One could find in nineteenth century Egypt a number of internationally staffed institutions such as the Mixed Courts or the Administration of Public Debt (both institutions had been in existence in the Ottoman Empire). The existence of these mixed institutions can be interpreted as a result of compromises intended to offer an effective coordination between the different powers at play in the country.[[25]](#footnote-26) In addition, as mentioned earlier, these mixed institutions were also designed to provide legal solutions to the process of the integration of Egypt into the capitalist world economic system.[[26]](#footnote-27) Samera Esmeir provides another explanation for why the British did not assert complete rule over Egypt. According to Esmeir, the British modeled themselves as observers and advisers for Egyptian government institutions, while the Egyptians were given the role of executers. This division of labor was particularly true at the beginning of the British occupation of Egypt when it was unclear how long this situation would last. This decision served the British in claiming that they did not colonize Egypt and protected them from certain accusations.[[27]](#footnote-28)

While colonial British officials considered the judicial system in Egypt prior to occupation as dysfunctional, most recent scholars argue that the legal system prior to 1882 was functional and relatively adequate. Older research by Robert L. Tignor, for instance, argues that the Egyptian legal system was highly political, consisting of too many judicial courts and jurisdictions, and its legal codes were an unclear combination of Ottoman law, Egyptian administrative ruling, and French law.[[28]](#footnote-29) What Petricca and Hamad describe as a strength of the Egyptian judicial system, Tignor sees as a weakness.

In England, the judicial system was based on Common law. This type of law was transferred to most of the colonies which England founded or conquered. However, the British opted for Civil Law in some colonies, such as India. In addition, in most of the large British colonies, such as India, the British recognized the use of local customs and law and combined them into the "new" legal structure that they created.[[29]](#footnote-30) After the British invasion of Egypt, the invaders declared their intention to leave the country as soon as they could restore order. However, they soon realized that order could not be restored without reforming all of the Egyptian administration. Clearly, this was a formal rationalization of the occupation, the objective of which was economic gains and political gains within the colonial competition. The dominant scheme of administrative reforms introduced by the British were structured based on their experience in India. However, the British confronted a number of problems on their way to reform the Egyptian judicial system. First, they had no "excuse" to reform the Mixed Courts, which had only been established a short while before and were functioning effectively. Second, the British were reluctant to deal with the religious institutions in the country so they did not try to reform the Shari`a courts system. Accordingly, the British quickly turned their efforts on reforming the National Courts. However, the British encountered numerous obstacles in the way of the reforms they wished to implement in these courts. The main obstacle was the strong implantation of the French law in the National Courts. British officials found it difficult to implement the unfamiliar French codes, and that the National Courts were overcentralized, slow and expensive.[[30]](#footnote-31)

Due to the fact that the "technical" part of the emerging Egyptian judicial system was under French influence, it seems that the main effort of British colonial administrators was to change the ideologies behind the Egyptian legal structure, rather than purely technical reforms. According to Esmeir, the principal goal of the British concerning the Egyptian legal system was to insert in the country the "Rule of Law" which would replace the "Rule of Man.” The British sought to replace the "Rule of Man", capable of mistakes and injustices, with the "Rule of Law,” leading to an institution separated from man, and therefore incapable of making such errors.[[31]](#footnote-32) Esmeir refers here to the ideology of legal formalism. At the end of the nineteenth century and the beginning of the twentieth century, legal elites imagined the rule of law in terms of legal formalism and positivism. A national system of law was created in order to reflect the normative order of a given society. In the late nineteenth century, for example, German scientists worked to establish an international and gapless legal system.[[32]](#footnote-33) Another important influence of the British was the reconfiguration of the meaning of "Human" and of "Humanity" in the country through Law. The British colonial rule transformed, with the help of positive law, each Egyptian into a "New Man" whose entire life and being would be regulated by law and its structures. This was part of a movement of positive law that appeared during the French revolution, for which the conception of the "Human" and "Humanity" were the final aim.[[33]](#footnote-34) According to Esmeir, modernity appropriates for itself the power of determining who is “human." Modernists grant the law the power of decision over the human because of its status to decide who is human. The British started integrating the Egyptians into the role of human after 1883 with the help of the emerging judicial system. These "new Egyptian humans" were supposed to exist in the concept of a positive, liberal, universal, autonomous and abstract judicial system. This system was to be the complete opposite of the violent khedival legal system and its inhumanness.[[34]](#footnote-35) Of course, as will be examined in the third chapter, the judicial system under British colonial rule was far from being more "human" and less violent then that of the khedive.

One can find an example of the importance of "Humanity" in the British reforms in nineteenth century Egypt in reforms of criminal justice, especially the prison system. The objectives of these reforms was the implantation of more "Humane" living conditions and punishments in prisons. What was inserted in the criminal law was the "Humanity" that replaced the local Egyptian arbitrariness, violence and cruelty. It is important to stress that these reforms did not only take place in Egypt, and were not the invention of the British. As Foucault argued, in Europe of 1775-1840, a new form of discipline and punishment developed, directed more at the soul and mind of the prisoner and less at his body. This was thought to be the Human, Just, and Fair form of punishment. This new form of punishment rendered the law more likable, and granted it more legitimacy. Both Fahmi and Peters claim that these reforms directed at controlling pain and suffering in the Egyptian criminal legal system were not the fruit of British colonial rule, but had already existed in Khedival Egypt. However, according to Esmeir, the appeal to the "Human" was a distinctively British colonial development. The reforms of the colonial power were not only meant to teach Egyptians the correct way to act as humans, but also to establish native Egyptians as humans in terms of law and modernity.[[35]](#footnote-36)

Cruelty and violence, however, still existed in the Egyptian judicial system under British colonial rule. Esmeir explains how even the violence was "Humanized". The punishments were classified, and had to be useful and in correlation with the crime. Only pain that served a means was acceptable.[[36]](#footnote-37) Moreover, violence was kept outside of the regular judicial structure of the law and those protected by it. This separation was meant to secure the "regular" law structure as just and human, while still being able to use unlimited violence if needed. Special tribunals protected and shielded the normative judicial order, as the violence they generated was kept outside of the normative system.[[37]](#footnote-38) According to Sadiq Reza, this separation between the "Normative" and "Human" system of law and the "Special" system remained very much present in Egypt after the British occupation. It may be observed even today in Egypt’s endless state of emergency which allows the judicial system to act outside of its regular structures through "special tribunals.”

At the beginning of this chapter, I mentioned Brown’s and Peters’ theories concerning the continuity that existed in the legal reforms in Egypt. However, this theory is not accepted by everyone. Esmeir disagrees with Brown, claiming that there is no continuity in the legal history of Egypt. She argues that Egypt experienced a rupture in its legal history under British colonial rule at the end of the nineteenth century. She refers to a rupture from the "old" legal structure based on the Ottoman and Shari`a law, leading to a "modern" judicial structure based on western law and influences. Esmeir claims that British colonial rule in Egypt influenced not only the judicial structure and the legal ideology, but also the bond between the present and the future in legal history. In its quest for homogenization, the colonial power directed itself at taking control of the judicial history of the native and connecting them to the present reality of colonial law.[[38]](#footnote-39) The past was described as inadequate, violent, arbitrary, and unjust because it was examined through the lens of modern and positive law. This led to a detachment from the previous system of law in favor of a new and "modern" system. This detachment was created by British and Egyptian jurists who allowed a new positivist concept of law to take power over the judicial structure.[[39]](#footnote-40)

The British also managed to influence the Egyptian legal structure in a more "technical" way. However, this came at the price of great effort with unsatisfactory results. Lord Cromer, British Agent and Consul General of Egypt from 1883 to 1907, was of the opinion that the Egyptian ministry of justice was one of the least satisfactory. In 1891, Cromer requested the service of a new judicial adviser in order to carry out further reforms and organizations in the Egyptian judicial court system. The new adviser, John Scott, had knowledge of both French and English law, as well as Egyptian and Indian courts. Only after Scott’s appointment were some of the French-based procedures of the Egyptian courts transformed in the light of the Anglo-Indian judicial structure.[[40]](#footnote-41)

Thus, the judicial reforms in nineteenth century Egypt were contested by various powers. Although British and French influences were presented separately in this chapter, the different influences on the Egyptian legal system were entangled in such a way that separating them is impossible and unproductive.

**Comparison between the Ottoman and the Egyptian Judicial System**

A connection between Egyptian and Ottoman legal reforms of the nineteenth century has seldom been made. However, this comparison can help explain the different influences on the Egyptian legal system because similar changes occurred in both places. These changes led to the creation of two judicial systems with common features and the same "base" of judicial ideology.So far this chapter has discussed only the French and British influences on nineteenth century Egyptian legal reforms because these influences are considered by most historians of the period to be the major influences, or even the only influences, on Egyptian legal reforms.

Legal changes in the Ottoman Empire have been represented in scholarship mainly through the concept of "secularism", “westernization," and "top down" reforms. However, Rubin claims that Ottoman reforms were more evolutionary than scholars have assumed. According to Rubin, the reforms were a continuum that started at the late eighteenth century and ended with the end of the Empire. For Rubin, most of the administrative and legal innovation in the nineteenth century reforms had been proposed by reformers from earlier generations inside the Empire. The wish to reform the legal system had its roots within the Ottoman Empire, with a group of thinkers and bureaucrats claiming that the weakness of the states demanded overall reforms. As in the Egyptian case, the nineteenth century judicial reforms in the Ottoman Empire, even if they were not a new concept, were also a consequence of increasing pressure from western countries.[[41]](#footnote-42)

The Ottoman Empire refashioned its legal structure in the nineteenth century. As in the case of Egypt, until those reforms, the Ottoman legal system was based on Shari`a law. However, the passage of the Ottoman Empire to a modern legal system brought the end of the dominance of Shari`a rule on the legal system. From 1840, major state institutions, including the judicial system, underwent reforms called the *Tanzimat*. In the mid-1860s, a new set of courts were introduced called the *Nizamiye* courts (‘regular courts’), which were largely based on the French system. The emerging Ottoman judicial system was an amalgam of local and borrowed law designed to address the needs of the time, with the main influence coming from French law.[[42]](#footnote-43) Rubin argues a bit differently, claiming that these judicial reforms differed from other reforms which took place in the empire, for they were neither a project nor a program. According to Rubin, the emergence of the new court system was a matter of evolution which did not have a clear and predicted outcome. The outcome was determined, as time went by, by the necessities on the ground. The Ottoman officials did not, according to Rubin, "plan ahead" to create an "Ottoman version" of the French judicial system.[[43]](#footnote-44)

As in the Egyptian legal reforms, what is of enormous importance in the Ottoman reforms is the involvement of the European powers, especially France and Britain. England was deeply invested in Ottoman politics and reform. In contrast, France had major influence on these reforms due to the adoption of French codes in the new judicial system.[[44]](#footnote-45) However, France did not demand reforms and was much less involved in the Ottoman Empire than Britain. The Ottomans were inspired by the French legal system, which was prestigious at that time. It was relatively easy to implement, the code system allowing an efficient modification of the legal system. While it is impossible to deny British and French influences, it is also clear for many researchers today that the judicial reforms were also meaningfully influenced from within the Empire by elites who wanted to build a more centralized system.[[45]](#footnote-46)

Apart from the fact that the judicial reforms in both the Ottoman Empire and in Egypt were largely inspired by French law, there are other important features that the two emerging judicial structures share. The judicial reforms of the nineteenth century in the Ottoman Empire redefined the place of the Shari`a in the judicial structure and, as in Egypt, the jurisdiction of the Shari`a courts was limited to matters of personal status. The scholarly discourse on Ottoman legal reform brings to mind the Egyptian legal system and the adoption of dualism in the two emerging legal structures. As Rubin explains, historians have assumed a division between the secular and the religious judicial structures. In the field of law, modernization and secularism have been represented by the adoption of French codes and *Nizamiye* courts, while religious law has been represented by Shari`a courts. The existence of the two is often given as an example of the confusion of the Ottoman and Egyptian reforms and as a reason these reforms were not successful. Toprak claims that the dichotomy between Islamic and secular law went on for more than a century in the Ottoman Empire. Toprak also claims that during the *Tanzimat* reforms there were constant efforts to remove the conflict between the two systems.[[46]](#footnote-47) Other researchers such as Rubin and Iris Agmon, argue that, on the contrary, the Shari`a court system also changed and evolved, becoming an integral part of the "modern" judicial system, which could hardly be called "secular" because the concept was not present in nineteenth century Ottoman society.[[47]](#footnote-48)

However, as Rubin argues, the fact that the Shari`a was reduced to matters of personal status did not mean that Islamic law and jurists were marginalized from the emerging Ottoman judicial structure. As in the case of the Egyptian judicial structure, a large number of the *Nizamiye* judiciary previously worked in the Shari`a courts, and a considerable portion of normative law was influenced by Islamic law. The reformers, claims Rubin, did not view the fusion of Islamic law and borrowed law as an anomaly.[[48]](#footnote-49) Another important feature that can be found in the judicial reforms of the Ottoman Empire, as well as in the judicial reforms in Egypt is the advancement of the idea of court independence from political powers. In the Ottoman Empire, this feature was introduced in the reform of 1879 when the judicial system became independent from interference by administrative powers.[[49]](#footnote-50)

In addition to the similar motivations for reforms, the political and economic situation leading to them was similar as well. One of the reasons for the judicial reforms in the Ottoman Empire was the presence in the Empire of a growing number of foreign investments. The growing interaction between Ottoman and foreign traders following the integration of the Ottoman Empire into the world economy in the first half of the nineteenth century gave birth to complex legal situations. In addition, the Ottoman government was looking for ways to solve the numerous problems that the capitulations had created for Ottoman sovereignty. In 1847, the first organ of what would become the Mixed Courts in the imperial court was established to deal with economic offenses between foreigners and Ottoman subjects. However, the lack of legal tools in those courts became immediately apparent and problematic. In order to solve that problem, the much more systematic commercial courts were established a couple of years later. These courts were based on French codes and, as in the case of Egypt, there are several reasons for the adoption of the French legal code by the Ottomans. Rubin claims that the Ottomans chose the French codes due to the fact that it was a homogenous code divided into a number of articles, offering a smooth transplantation process. According to Roger Owens and to Rubin, one of the major motivations for choosing the French codes concerned commercial law issues between the empire and Europe.[[50]](#footnote-51) The French codes were also chosen due to the fact that the British commercial codes were inadequate and were causing numerous problems in the British mercantile community.[[51]](#footnote-52)

The many resemblances between the judicial reforms in Egypt and the Ottoman Empire are not surprising given the connection between the two countries and their exposure to similar influences and situations. The next chapters of this thesis will examine an edition (from 1908) of an Egyptian judicial journal. This kind of judicial literature is common to both the Ottoman Empire and to Egypt. The needs it served, and the features of the judicial system it helped create, are also similar in both cases. I argue that investigating these judicial journals produces knowledge about the impact of positive law on the emerging judicial structures in both countries. This adoption of a different law ideology had tremendous influences on these judicial spheres. This study focuses on Egypt, but it also draws on previous studies on this genre of literature in the Ottoman Empire and in France, in regard to the purpose it served in the "parallel" judicial sphere of Egypt.

**Motivations guiding the course of judicial reforms in Egypt:**

Brown presents three arguments that can serve to explain the motivation behind the legal reforms of the nineteenth century in Egypt. The first argues that the legal reforms were a direct consequence of imposed policies by western powers, especially Britain and France. The second approach claims that the legal reforms were initiated in Egypt long before the European presence in the country became a major feature in Egyptian society. The third approach, which Brown advocates, combines the first two.[[52]](#footnote-53) Imperialism and Colonialism certainly helped to shape legal reforms in Egypt, but these reforms also appealed to Egyptian leaders in and of themselves. Legal reforms were not merely consequences of colonialism and foreign pressure.[[53]](#footnote-54)

For Brown and others, a major motivation for the Egyptian judicial reforms was the desire of the Egyptian elite to create a more centralized and hierarchical system. This was also the main motivation for choosing the French codes as the basis of the new judicial system. What attracted this political elite to the French code was the option for penetration and state control that this code could supply.[[54]](#footnote-55) However, Brown also connects the motivation for Egyptian judicial reforms to imperialism since the reforms were used by Egyptians as a tool for resisting British influence as well as imperialism in general. European imperialists disregarded the Egyptian legal system prior to reform, viewing Europe as governed by the rule of law, and Egypt, as well as the rest of the Middle East, as governed by capricious rulers. From an Egyptian perspective, the establishment of law and structures of law that the European powers could not help but recognize as legitimate might undermine the justification for Imperialism.[[55]](#footnote-56)Here it is important to note that this description of the position of the Egyptians is in accordance with the imperial narrative about, on the one hand, the primitiveness of native law, and on the other, the resistance to British rule.

Peters agrees with Brown in his discussion of the changes in the Egyptian judicial system prior to the British invasion of the country. He argues that the reforms resulted from Egyptian elites perceiving a need for specification and clarity in the judicial system, a requirement that became clear in 1830 with the idea that the maintenance of public order had to be regulated by status in order to limit the, until now, unlimited power and arbitrariness of provincial governors, and to make the criminal justice system acceptable to the public.

Asad, on the other hand, argues against the idea that the French code was used by Egyptians in order to resist British influence. For Asad, Brown’s theory implies that British imperial power was a clear and well-calculated unit whose actions and goals were known in advance. Only if this was the case could one claim that a certain step was made in order to resist the imperial power. However, for Asad the British colonial rule was not a clear and calculated one but rather a combination of diverse powers creating a new space yet unknown. Accordingly, Asad claims that Brown’s theory is inadequate in that it fails to account for the contributions of Imperialism in the nineteenth century to Egyptian legal reforms.[[56]](#footnote-57)

 Other scholars, such as Esmeir, claim that Egyptians did have an important role in creating a juridical system based on French law. However, if Brown claims that the goal of the Egyptians was to resist British influence on Egypt’s juridical system, then for Esmeir one of the Egyptians’ goals was to establish a juridical field of power for the new Egyptian law students. An significant number of Egyptian law students returned to Egypt at the end of the nineteenth century, having completed their law degrees in European countries, especially France. The legal training these students had gained in Europe could not make them judges or lawyers in the old Egyptian legal system, as it was based mainly on Ottoman and Shari`a law. Esmeir claims that through the judicial reforms of the nineteenth century, these Egyptian lawyers created for themselves a new juridical space by redefining the legal knowledge needed to participate in the juridical structure.[[57]](#footnote-58)

Brown tries to determine the status of the Shari`a in the new judicial system in Egypt, thus identifying another source of legal borrowing and influences on the emerging judicial system: the religious or cultural angle. The question Brown attempts to answer is the following: if there was an abrupt turn away from the Shari`a in the nineteenth century, as many researchers have claimed, why did this not inspire many political debates? For Brown, one possible answer would be that the Shari’a never reigned alone as the single law of Muslim countries. Muslim countries were frequently under the reign of leaders who used Islamic law in order to justify their rule while the countries lived by tribal law, local customs, and edicts from the rulers. If this was the case, then the turn to European law was not a turn away from Islam, towards secularism, because the Shari`a was never the only and supreme law of Muslim countries. However, Brown claims that this theory fails to account for the increased importance of Shari’a law in the Ottoman Empire, as in many other Muslim countries, before the legal reforms took place. For Brown, a more plausible explanation for why the judicial reforms and changes in the Shari`a court did not inspire heated political debates would be that what mattered for those who supported the Shari`a was the maintaining of its institution and practices, not merely the maintenance of the codes and rules of Islamic law. The Shari`a survived the transformation of the legal system because it was understood not only as a law, but as a set of institutions and practices. The educational system, which was an important part of the Shari`a institution, remained almost untouched in Egypt and in the Ottoman Empire. In Al-Azhar the Shari`a was taught in the same way it had been before, long after the reforms took place. Moreover, Brown claims that Shari`a courts maintained their position, as they had done before the reforms, in most Muslim and Middle Eastern countries. According to this view, what changed was not the Shari`a courts but the relationship between the Shari`a courts and the rest of the new legal system. The national and secular courts gradually gained more and more jurisdiction while the jurisdiction of the Shari`a court was limited to matters of private status only.

 For Asad, the reforms of nineteenth century Egypt had enormous consequences on the entire Islamic tradition, and not just the Shari`a legal system. The judicial reforms of the nineteenth century eventually led to the creation of a category called "secular" in Egypt. For Asad, these changes involved the creation of political spaces a new order in terms of the legal authority of the nation-state, the freedom of market exchange, and the moral authority of the family. This new order was based on the distinction between law and morality. In this new order, the Shari`a became a subdivision of the legal system that was authorized and framed by the centralized state. However, this does not mean that it lost its importance to society. In the modern and secular state and society, explains Asad, the family emerged as an important category of law, public discourse and social politics. Family became the new unit to which the individual was morally and physically reduced. Moreover, family, in the modern and secular state, is a legal category and so an object of administrative intervention, and a way to create the "good" family and individuals for society. Accordingly, Asad claims that the Shari`a occupied an enormous political and sociological space in being the guardian of individual privacy, morality and self-government.[[58]](#footnote-59)

**Legal positivism: Legal Positivism** refers to the legislations made by man, and it claims that there is no law besides those. The validity of the law comes from the fact that it was decided upon by a human legislator in a particular society. The existence of laws does not depend on their satisfying any particular moral values.

Legal positivism emerged as a reaction to Natural Law,[[59]](#footnote-60) and is connected to the rise of the modern concept of the state.[[60]](#footnote-61) It is within the context of this concept of the law that the idea of *"Etat* *de* *droit* *legislatif*" (state under the law) emerged. The structure of this model of state is characterized by the supremacy of statutory law. Concepts that developed alongside legal positivism include: monopolization and centralization of power, a strong concept of sovereignty, separation of state powers and submission of the jurists to law, and codification. This modern doctrine of the state arose mainly in France and Germany towards the end of the 18th century, and it influenced the legal history of many European countries. The main feature of states based on positivism is the rejection of the concept of the absolute state. In the modern state, sovereignty no longer resides in a single person; rather it is attributed to an impersonal body. In the French model, for example, sovereignty belongs to *la nation*. In the structure of the modern state, the doctrine of the separation of the different state powers is essential. First, state functions have to be exercised by distinct state organs which have to be run by different people. Secondly, both jurisdiction and public administration are subjected to legislation. On the one hand, jurists are required to apply the law without involving personal thoughts or beliefs. On the other hand, public administration is supposed to act only within a framework previously determined by the law. Statutes are at the top of the hierarchy in the modern state.

Legal positivism aims to interpret laws in a logical and mechanical way. In the modern state, the legal system is coherent and gapless due to the ability of the political class to produce the "correct" statutes for the society that it governs. Accordingly a neutral approach is required from the jurists in order not to jeopardize the aim and goal of the statutes.[[61]](#footnote-62)

 The concept of positive law played a major role in Egypt’s nineteenth century legal reforms. Due to the influence of positive law, "legal formalism" was adopted as a main ideology in the emerging judicial system. **Legal formalism** treats law as a science and is associated with the idea that the process of making a judicial decision involves nothing more than a mechanical deduction. According to legal formalism, a judge’s decision is determined only by the content of an already existing rule. An important concept following legal formalism is **judicial constraint**:a formalist decision is completely constrained by the content of the existing rule being applied. Legal formalists believe that judicial constraint will preserve the democracy of a system, but in order to constrain judges it has to be possible for them to rule by mechanically applying existing rules. In addition, the decision of the judges must be transparent for anyone involved in the judicial system–policymakers, lawyers, defendants, media, and the public.[[62]](#footnote-63)

**Conclusion**

Legal orders shaped by legal borrowing are syncretic in nature, emerging from combinations of both local and foreign practices. As Esmeir explains, law is not a passive object which changes as it encounters history, but a result of actions, dialogues and reforms by judges, lawyers, teachers and writers. For Esmeir, both Egyptian and European actors worked together in a reconfigured legal space and produced a law that was neither European nor Egyptian. In this author’s opinion, this explains in the clearest way the different influences on the Egyptian judicial reforms. France, Britain, Egypt and the Ottoman Empire, as well as the situation on the ground were all at play in reshaping the Egyptian judicial system. Examination of the respective influences on the Egyptian legal reforms yields important knowledge since some of these influences continue to this day, affecting both international and local politics in this region of the world. The next chapters of this thesis will address the Egyptian legal system’s adoption of legal positivism, the "new ideology of law.”

1. Maurus Reinkowski, "Uncommunicative Communication: Competing Egyptian, Ottoman and British Imperial Ventures in 19th-Century Egypt,” *Die Welt des Islams*, (2014): 403. [↑](#footnote-ref-2)
2. Nathan J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge: Cambridge University Press, 1997): 23-24. [↑](#footnote-ref-3)
3. Rudolph Peters, "Administrators and Magistrates: The Development of a Secular Judiciary in Egypt, 1842-1871", *Die Welt des Islams* (1999): 381-392. [↑](#footnote-ref-4)
4. Ehud Toledano, "Social and economic change in the ‘long nineteenth century’, in *The Cambridge History of Egypt vol. 2: Modern Egypt, from 1517 to the end of the twentieth century,* ed. M. W. Daly (Cambridge: Cambridge University Press, 1998): 254-263. [↑](#footnote-ref-5)
5. Nathan J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*, (Cambridge: Cambridge University Press, 1997), 23-24. [↑](#footnote-ref-6)
6. Ibid, 67. [↑](#footnote-ref-7)
7. Nathan J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*, (Cambridge: Cambridge University Press, 1997), 26-27, Francesca Petricca,"Filling the Void: Shari`a in Mixed Courts in Egypt: Jurisprudence 1876-1949,” *Journal of the Economic and Social History of the Orient* (2012): 723-724. [↑](#footnote-ref-8)
8. Byron D. Cannon, "A Reassessment of Judicial Reform in Egypt, 1876-1891,” *The International Journal of African Historical Studies* (1997): 51-53. [↑](#footnote-ref-9)
9. Capitulations were special agreements between the Porte and a few foreign, mainly European, states such as Belgium, Denmark, Egypt, France and Germany. It allowed the establishment of European merchants in the Ottoman Empire, granting them individual and religious liberty. The foreigners of those countries would be judged in civil and criminal affairs by their consuls, according to their homeland law, with the right of appeal to officers of the sultan for help in carrying out their sentences. In the 19th century, new countries such as the [United States](https://www.britannica.com/place/United-States), Belgium, and Greece signed capitulation agreements with the Ottoman Empire.

See - <https://www.britannica.com/topic/capitulation>. [↑](#footnote-ref-10)
10. Jasper Y. Brinton, "The Mixed Courts of Egypt,” *The American Journal of International Law,* 20.4 (1926): 672-673. [↑](#footnote-ref-11)
11. Jasper Y. Brinton, "The Mixed Courts of Egypt", *The American Journal of International Law, Vol. 20, No. 4* (1926): 674-675. [↑](#footnote-ref-12)
12. Nathan J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*, (Cambridge: Cambridge University Press, 1997), 26-28. [↑](#footnote-ref-13)
13. Francesca Petricca," Filling the Void: Shari`a in Mixed Courts in Egypt: Jurisprudence 1876-1949", *Journal of the Economic and Social History of the Orient* (2012): 723-724. [↑](#footnote-ref-14)
14. Mahmoud Hamad, *When the Gavel Speaks: Judicial Politics in Modern Egypt.* (ProQuest,2008): 295-29. [↑](#footnote-ref-15)
15. Nathan J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*, (Cambridge: Cambridge University Press, 1997), 28-29. [↑](#footnote-ref-16)
16. The "Urabi Revolution". [↑](#footnote-ref-17)
17. A similar debate took place in the Ottoman Empire prior to the codification of the civil law. [↑](#footnote-ref-18)
18. Nathan J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*, (Cambridge: Cambridge University Press, 1997), 19-30. [↑](#footnote-ref-19)
19. The local religious minorities had their own courts for certain issues, mainly personal status. [↑](#footnote-ref-20)
20. Francesca Petricca," Filling the Void: Shari`a in Mixed Courts in Egypt: Jurisprudence 1876-1949", *Journal of the Economic and Social History of the Orient* (2012): 770-771. [↑](#footnote-ref-21)
21. Lee Epstein, Karen Oconnor and Dianna Grub, "Middle East", in *Legal Traditions and Systems: an International Handbook,* ed. Alan N. Katz (California: Greenwood Press, 1986): 221-223. [↑](#footnote-ref-22)
22. Francesca Petricca," Filling the Void: Shari`a in Mixed Courts in Egypt: Jurisprudence 1876-1949", *Journal of the Economic and Social History of the Orient* (2012):732. [↑](#footnote-ref-23)
23. Alan Watson, "Legal transplants and European private law", *Electronic Journal of Comparative Law 4.4* (2000). [↑](#footnote-ref-24)
24. Avi Rubin, "Legal borrowing and its impact on Ottoman legal culture in the late nineteenth century", *Continuity and Change* (2007): 280.

 [↑](#footnote-ref-25)
25. Francesca Petricca," Filling the Void: Shari`a in Mixed Courts in Egypt: Jurisprudence 1876-1949", *Journal of the Economic and Social History of the Orient* (2012):722-723. [↑](#footnote-ref-26)
26. Ibid, 720-721 [↑](#footnote-ref-27)
27. Samera Esmeir, "*Juridical Humanity: A Colonial History*", (Stanford: Stanford University Press, 2012), 249. [↑](#footnote-ref-28)
28. Robert L. Tignor," The "Indianization" of the Egyptian Administration under British Rule", *The American Historical Review*, (1963): 639-640. [↑](#footnote-ref-29)
29. Arnot H. Raymond, "The Judicial System of the British Colonies", *The Yale Law Journal Vol. 16 No. 7* (1907): 504-505. [↑](#footnote-ref-30)
30. Robert L. Tignor," The "Indianization" of the Egyptian Administration under British Rule", *The American Historical Review*, (1963): 639-641. [↑](#footnote-ref-31)
31. Samera Esmeir, "*Juridical Humanity: A Colonial History*", (Stanford: Stanford University Press, 2012), 200. [↑](#footnote-ref-32)
32. Duncan Kennedy, "Three Globalization of the Law and Legal Thoughts: 1850-2000", *Suffolk University Law Review* (2003): 26. [↑](#footnote-ref-33)
33. Samera Esmeir, "*Juridical Humanity: A Colonial History*", (Stanford: Stanford University Press, 2012), 73-74. [↑](#footnote-ref-34)
34. Ibid, 1-18 [↑](#footnote-ref-35)
35. Samera Esmeir, "*Juridical Humanity: A Colonial History*", (Stanford: Stanford University Press, 2012), 114-119. [↑](#footnote-ref-36)
36. Ibid, 142. [↑](#footnote-ref-37)
37. Ibid, 257. [↑](#footnote-ref-38)
38. Samera Esmeir, "*Juridical Humanity: A Colonial History*", (Stanford: Stanford University Press, 2012), 22. [↑](#footnote-ref-39)
39. Ibid., 41. [↑](#footnote-ref-40)
40. The Earl of Cromer, "*Modern Egypt"* (London: Macmillan and Co, 1908): 642-644. [↑](#footnote-ref-41)
41. Avi Rubin, "Ottoman Judicial Change in the Age of Modernity: A Reappraisal,” *History Compass*, (2008): 1-2. [↑](#footnote-ref-42)
42. Zafer Toprak, "From Plurality to Unity: Codification and Jurisprudence in the Late Ottoman Empire,” in *Ways to Modernity in Greece and Turkey: Encounters with Europe 1850-1950*, ed. Anna Frangoudaki and Caglar Keyder (London: I.B Tauris and Co, 2007): 26-27. [↑](#footnote-ref-43)
43. Avi Rubin, *Ottoman Nizamiye Courts: Law and Modernity* (USA: Palgrave McMillan, 2011): 21-23. [↑](#footnote-ref-44)
44. Avi Rubin, "British Perceptions of Ottoman Judicial Reform in the Late Nineteenth Century: Some Preliminary Insights,” *Law and Social Inquiry* )2012): 993. [↑](#footnote-ref-45)
45. Ibid. [↑](#footnote-ref-46)
46. Zafer Toprak, "From Plurality to Unity: Codification and Jurisprudence in the Late Ottoman Empire", in *Ways to Modernity in Geece and Turkey: Encounters with Europe 1850-1950*, ed. Anna Frangoudaki and Caglar Keyder , (London: I.B Tauris and Co, 2007): 37. [↑](#footnote-ref-47)
47. Iris Agmon, "*Family and Court: Legal Culture and Modernity in Late Ottoman Palestine"* (New York: Syracuse University Press, 2006), and Avi Rubin, *Ottoman Nizamiye Courts: Law and Modernity*, (USA: Palgrave McMillan, 2011), 56-59 [↑](#footnote-ref-48)
48. Avi Rubin, "British Perceptions of Ottoman Judicial Reform in the Late Nineteenth Century: Some Preliminary Insights,” *Law and Social Inquiry*) 2012):1001. [↑](#footnote-ref-49)
49. Avi Rubin, "British Perceptions of Ottoman Judicial Reform in the Late Nineteenth Century: Some Preliminary Insights", *Law and Social Inquiry,*) 2012): 991-992. [↑](#footnote-ref-50)
50. Roger Owen, *The Middle East in the World Economy: 1800–1914* (London: I.B. Tauris, 2002): 90, and Avi Rubin, "British Perceptions of Ottoman Judicial Reform in the Late Nineteenth Century: Some Preliminary Insights", *Law and Social Inquiry,*) 2012): 996-997. [↑](#footnote-ref-51)
51. Avi Rubin, "British Perceptions of Ottoman Judicial Reform in the Late Nineteenth Century: Some Preliminary Insights", *Law and Social Inquiry,*) 2012): 996-997. [↑](#footnote-ref-52)
52. Nathan J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*, (Cambridge: Cambridge University Press, 1997), 44. [↑](#footnote-ref-53)
53. Ibid, 60. [↑](#footnote-ref-54)
54. Ibid, 57. [↑](#footnote-ref-55)
55. Nathan J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*, (Cambridge: Cambridge University Press, 1997), 48-49. [↑](#footnote-ref-56)
56. Talal Asad, "Thinking about Secularism and Law in Egypt," *Leiden Isim* (2001): 3-5. [↑](#footnote-ref-57)
57. Samera Esmeir, "*Juridical Humanity: A Colonial History*", (Stanford: Stanford University Press, 2012), 42-43. [↑](#footnote-ref-58)
58. Talal Asad, "Thinking about Secularism and Law in Egypt,” *Leiden Isim* (2001): 8-10. [↑](#footnote-ref-59)
59. Natural law is a [philosophy](https://en.wikipedia.org/wiki/Philosophy) which states that certain rights are inherent by virtue of [human nature](https://en.wikipedia.org/wiki/Human_nature). This kind of law is determined by [nature](https://en.wikipedia.org/wiki/Nature), and is therefore universal. The theories of positive law and of natural law are irreconcilable because they are based upon two different concepts of law. [↑](#footnote-ref-60)
60. Gorgio Pino, "The Place of Legal Positivism in Contemporary Constitutional States,” *Law and Philosophy* (1999): 515.

 [↑](#footnote-ref-61)
61. Gorgio Pino, "The Place of Legal Positivism in Contemporary Constitutional States,” *Law and Philosophy* (1999): 519-521. [↑](#footnote-ref-62)
62. Christopher J. Peters, "Legal Formalism, Procedural Principles, and Judicial Constraint in American Adjudication,” in General Principles of Law: The Role of the Judiciary, ed. L. Pineschi (International Publishing Switzerland, 2015): 23-26. [↑](#footnote-ref-63)