3-1-1975

The Mixed Courts of Egypt: A Study of The Use of Natural Law and Equity

Gabriel M. Wilner
University of Georgia School of Law

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*Gabriel M. Wilner**

I. INTRODUCTION

The system of the Mixed Courts of Egypt was an unusual institution. It represented an international solution in the context of what was obviously a colonial situation.[1] The system lasted 74 years from 1876 to 1949.

A system of law was established whose sources were general codes created especially for use by the Mixed Courts. The Charter of the Mixed Courts specified two residual sources of law. It is these sources and their application upon which this paper is principally focused. Article 34 reads:

> The new Courts, in the exercise of their jurisdiction in civil and commercial matters, and within the limits of the jurisdiction conferred upon them in penal matters, shall apply the codes presented by Egypt to the Powers, and in case of silence, insufficiency, and obscurity of the law, the judge shall follow the principles of natural law and equity.

The language of the Charter was incorporated into article 11 of the Mixed Civil Code of Egypt which stated: "In case of silence, insufficiency, or obscurity of the law, the judge shall apply the principles of natural law and the rules of equity."[2] Such a provision does not appear to have a counterpart in other modern legal systems. Neither the Swiss Civil Code[3] nor any other European code permits the judge to make

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* Associate Professor of Law, University of Georgia. B.A., William and Mary, 1959; D.P.A., University of Exeter (England), 1960; LL.B. 1963, LL.M. 1965, Columbia. The author has translated, from the French and the Italian, all passages quoted from the judgments of the Mixed Courts and from Judge Messina's treatise.

[1] Of course, the circumstances under which the Mixed Courts system operated are unlikely to be repeated; it is certain that the imposition, by external pressures, of a separate system of law and judicial tribunals to deal with disputes with foreigners is not desirable. Had there been no mixed system, Egyptian law, including its rules on conflict of laws, would have been applied. The Mixed Codes and the rules of law set forth in the Charter were thus far more than an attempt to harmonize divergent legal systems in order to avoid choice of law problems under Egyptian law. The mixed legal system was a substitute for the Egyptian legal system and reflected fears that still plague the international community today. These fears include a lack of confidence in the laws of particular legal systems and suspicion as to the capability and impartiality of the national judge.

[2] "En cas de silence d'insuffisance ou d'obscurité de la loi, le juge se conformera aux principes du droit naturel et aux règles de l'équité." LES CODES MIXTES D'EGYPTE (U. Pace ed. 1932).

[3] Section 1 of the Civil Code of Switzerland states:

> The Law must be applied in all cases which come within the letter or the spirit of any

use of these sources of law as the entire basis for a judgment.

The discussion of the application of article 34 of the Charter and article 11 of the Mixed Civil Code will be preceded by a description of the origins of the system of the Mixed Courts, of their jurisdiction and organization, of the background of the Mixed Codes, and of their content. The Mixed Courts operated under the original Charter from 1876 to 1937. The revision of the Charter in 1937, in preparation for the termination of the Mixed Courts which was to take place 12 years later, did not affect article 11 of the Civil Code. Article 52 of the revised Charter reaffirmed the use of natural law and equity in the same terms as article 34 of the original Charter.

Whatever conclusions can be drawn from the use of natural law and equity by the Mixed Courts, the technique itself merits the attention of the jurisprude, the comparativist, and the expert in international law and transnational transactions.

II. THE MIXED COURTS SYSTEM

A. *Origins of the Mixed Courts System*

The European powers had long enjoyed special privileges in Egypt when, in the 1860's and early 1870's, the abuses of the existing system gave way before the reforms inspired by a number of dedicated and talented men, the foremost of whom, Nubar Pasha, is considered to be the founder of the Egyptian system of Mixed Courts.[4]

The bases of the peculiar position of foreigners in Egypt were a series of treaties (or capitulations)[5] which from the 16th century on, had been negotiated with various foreign powers. This system was characterized

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of its provisions. Where no provision is applicable, the judge shall decide according to the existing Customary Law and, in default thereof, according to the rules which he would lay down if he had himself to act as legislator. Herein he must be guided by approved legal doctrine and case law.

I. WILLIAMS, THE SOURCES OF LAW IN SWISS CIVIL CODE 22 (1923). It is interesting to note that the Mixed Court of Egypt expressly refused to follow this line of thinking in applying article 11 of the Civil Code to fill a gap in the law. See the Judgment of January 4, 1923, *infra* notes 93-94 and the accompanying text for a case where the Court refused to act as legislator.

[4] *See* J. BRINTON, THE MIXED COURTS OF EGYPT (rev. ed. 1968) [hereinafter cited as J. BRINTON].

[5] The term "capitulation" came from the chapters or *capitula* which contained the various privileges granted. The first of these agreements was negotiated by the Ottoman Empire with the merchant cities of France and Italy, such as Genoa, Venice, Pisa, and Marseilles. They guaranteed freedom of commerce and religion for their citizens within the Ottoman Empire. The powers also gained the right to appoint consuls who would settle cases, both civil and criminal, between their citizens. *See* G. DE HERREROS, TRIBUNAUX MIXTES D'EGYPTE 1-22 (1914) [hereinafter cited as G. DE HERREROS].

in the 19th century by two sets of privileges which embraced all immunities granted to foreigners. These privileges were as follows:

> a. Jurisdictional immunity freed the foreigner from the jurisdiction of all but the courts of his own country. This was true absolutely in criminal matters, but only partially so in civil matters, since the maxim *actor sequitur forum rei* was followed. Thus, the foreigner could never become a defendant in any court but his own.
> b. Legislative immunity was also enjoyed by the foreigner. Since the foreigner was subject only to his own courts, Egyptian legislation was not likely to be applied.[6]

The harmful consequences of such a system are quite apparent. There was much uncertainty regarding every type of legal relationship. In a case involving defendants of various nationalities, the plaintiff would have to carry on a number of suits, requiring preparation in several legal systems. The power of the defendant to counterclaim was also curtailed since by doing so he would act as plaintiff in the action, defeating the rule *actor sequitur forum rei.* Appeals from consular courts were carried abroad, and thus the successful plaintiff would be forced to defend the appeal before a foreign court with the difficulties, bother, and expense inherent in the conduct of a case under such conditions. Even when the consular court decided in favor of the plaintiff and was willing to enforce the decision, an assignment by the defendant to a person of another nationality would work to remove jurisdiction from that particular consul, leaving the plaintiff with the option of either no recovery or of the institution of a wholly new suit in the court of the assignee. A paralyzing influence had set in on the legal life of Egypt and a way out of the problem had to be discovered.[7]

In 1867 Nubar Pasha, the Prime Minister and Foreign Minister of Egypt, proposed to the Khedive that reforms be instituted, based on cooperation between Egyptian and foreign powers, with the purpose of establishing a novel organization of justice for the country.[8]

After many years of sometimes discouraging negotiations, the 14 capitulatory powers[9] agreed to the reforms which were embodied in the Charter of the Mixed Courts (*Règlement d'Organisation Judi-*

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[6] 1 S. MESSINA, TRAITÉ DE DROIT CIVIL EGYPTIEN MIXTE 11 (1927) [hereinafter cited as 1 S. MESSINA].

[7] *Id.* at 11-14.

[8] *Id.* at 16-18.

[9] The 14 capitulatory powers were: Germany, Austria, Belgium, Denmark, Spain, the United States, France, Great Britain, Greece, Italy, Norway, Holland, Portugal, and Russia.

ciaire).[10] This document, signed in 1875, heralded the creation of the Mixed Courts of Egypt, which began their operations on February 1, 1876.

The Charter was prepared by an international commission and, with minor changes, continued to be the basis of the international cooperation that had its practical application in the operations of the Mixed Courts. It was meant to have a life of 5 years, but it was renewed periodically until 1921 when, after further negotiations, the powers of the Mixed Courts were prolonged for an indefinite period.[11] The Charter was revised in 1937 and was given a final time span of 12 years.[12]

If the Charter served as the foundation for the Mixed Courts, the Mixed Codes gave them life. The capitulatory privileges were suspended for the most part and the consular courts functioned to a very limited extent. With a new system of justice came new rules of law which could be uniformly applied. Rather than relying on the system of any one country, the solution was reached whereby a new system of substantive law was to be established through the use of codes. The process of the composition of the codes was much more hurried and informal than that which had accompanied the negotiations leading to the formulation of the Charter.[13] From the start it had been tacitly conceded that French law, adapted to the needs of Egypt, was to furnish the foundation for the legal system within which the new courts would operate.[14]

The extremely difficult job of reconciling the provisions of the French codes with Egyptian law, and with the law of the Mediterranean countries whose principles had always been used, was given to an advocate

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[10] For the text of the Charter see J. BRINTON, *supra* note 4, at 232-41.

[11] *Id.* at 193.

[12] The Charter was revised pursuant to the Treaty of Montreux of 1937, which also provided that the Mixed Courts were to remain in existence until October 24, 1949, at which time the system was to pass out of existence. The Treaty of Montreux was entitled "Convention Concerning the Abolition of Capitulations in Egypt." Article 11 of the Convention stated that the parties agreed "to the complete abolition in all respects of Capitulations in Egypt." The revised Charter made certain changes in the structure of the Mixed Courts by strengthening the position of the Egyptian members. Certain laws which were considered to belong to the capitulatory system were abolished. The Mixed Codes were reconfirmed. New Egyptian legislation was to be accepted by the Mixed Courts, after the Egyptian Government had given its assurance that the legislation would not be "inconsistent with the principles generally adopted in modern legislation." Some limitations were placed on the scope of jurisdiction of the Mixed Courts with respect to their application of the principle of "mixed interest," and with respect to their jurisdiction in actions against the Government. *See* J. BRINTON, *supra* note 4, at 200-03.

[13] 1 S. MESSINA, *supra* note 6, at 30 n.1.

[14] Judge Messina, a distinguished member of the bench of the Mixed Courts, believed that the manner in which the codes were drawn up was not an ideal solution. "Nevertheless, the solution was unmistakably practical." *Id.* at 22.

from Alexandria, Maître Manoury, who was Secretary of the International Commission. In an astonishingly short time he prepared six codes: civil, commercial, maritime, civil procedure, penal, and criminal procedure.[15] The circumstances surrounding the writing of these codes have occasioned some criticism. Judge Messina[16] wrote that even if one recognized Manoury's general competence, practical experience, and intellectual preparation for such work, the time element involved made it impossible for him to be thoroughly prepared for such a task. Others, such as Judge Brinton,[17] disagree with Judge Messina and praise both Manoury and his work.

B. *The Jurisdiction and Organization of the Mixed Courts*

The manner of the creation of the Mixed Courts sporadically gave rise to arguments that the regime had no national roots. Brinton represents the view of the majority when he describes Nubar Pasha's conception of the courts which he sought to establish as a national institution:

> In this sense then the designation "Mixed Courts" must be understood as contrasted with those "international" courts whose source of authority is, properly speaking, not a national but a group sovereignty. The Mixed Courts are national courts, functioning under conditions fixed by international agreements for the trial not of international but of "mixed" causes.[18]

Three courts of first instance, called district courts, were established: one at Alexandria, one at Cairo, and one at Mansura.[19] The Court of Appeals (*Cour d'Appel Mixte*) was located in Alexandria. The total number of judges in the 1930's was seventy,[20] of which two-thirds were drawn from the foreign powers which had signed the Charter; the remaining one-third were drawn from the Egyptian bench and bar.[21]

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[15] *See* LES CODES MIXTES D'EGYPTE (U. Pace ed. 1932).

[16] 1 S. MESSINA, *supra* note 6, at 24.

[17] J. BRINTON, *supra* note 4, at 86. M. E. Piola Casselli noted in his review of Professor Walton's study on the Egyptian law on contracts that Professor Walton called attention to 50 instances where the Egyptian Code showed distinct improvements upon the French Code. Casselli, *La Reforme des Codes Civils Egyptiens*, 12 L'EGYPTE CONTEMPORAINE 189 (1921).

[18] J. BRINTON, *supra* note 4, at 11. The term "Mixed Courts" should be distinguished from "international courts," whose source of authority is not national. The *raison d'être* of the Mixed Courts was the adjudication of "mixed" causes. *Id.* at 10-11. For a debate on the nature of the Mixed Courts see *id.* at 11 n.14. For a list of other sets of mixed courts such as those of Iraq, Lebanon, Palestine, and China see *id.* at n.13. *See* Blanchard, *De l'application simultanée sur le territoire de l'Egypte de lois d'ordre public international émanées de souverainetés différentes*, 24 L'EGYPTE CONTEMPORAINE 513 (1933).

[19] This was an important cotton center in the Nile Delta.

[20] Originally there were 32 judges.

[21] Appointments were made by the Egyptian Government after recommendations had been given

Despite the Mixed Courts official status as Egyptian courts,[22] their composition distinguished them from other judicial systems. Even their outward appearance was striking:

> It is always an interesting experience to visit the Mixed Courts of Cairo, for they are the most picturesque courts in the world. The courtrooms are large, well lighted, and attractive. The judges are robed in gowns of many colors, each according to his country's custom. The Egyptian judge wears his red fez, the French his round cap, the English his big wig, the American in black silk robe but with no headcovering at all. The advocates are all robed, and the spectators more variegated than the court. The Egyptian city dwellers wear European dress but with added fez, and there are always rural spectators present who have native and tribal costumes, long loose robes coming to the feet and turbans of various hues.
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> The proceedings are conducted in the French language, all pleadings, arguments, and decisions being in that tongue. Most town-dwelling Egyptians speak French and many of them speak English also. If now and then a witness appears who knows only the native Arabic, the Egyptian judge feels quite at home, and many of the foreign judges from their long service on this bench are familiar with the Arabic also. In fact, all the judges are good linguists, all of them speaking French, and most of them speaking English, Arabic, and Italian also.[23]

The jurisdiction of the Mixed Courts included the territorial area of Egypt. Judge Brinton explains that the dominant position of the Mixed Courts was due to the fact that their subject matter jurisdiction had the characteristic of drawing to them all litigation of any importance.[24]

In ordinary civil and commercial cases, this jurisdiction covered all suits between Egyptians and foreigners and between foreigners of

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by the powers involved. The Charter, in article 5, stated that "[t]he appointment and choice of judges shall belong to the Egyptian government . . . ." The Egyptian judges were governed by the same rules as applied to local courts. The percentage of foreign judges was also fixed by the Charter. However, the distribution of judgeships among the powers was settled by means of diplomatic negotiations and agreements. Each capitulatory power was to have at least two judges in the district courts. In filling the other seats the Egyptian Government was not limited to the capitulatory powers. After 1914 German and Swiss judges were named. Tenure was for life, insuring the independence of the judiciary. Article 19 of the Charter stated: "The judges who compose the Court of Appeal and the District Courts, shall be irremovable. This irremovability shall last only during the five-year period. It shall become definitely established only after the completion of this trial period." The judges were also financially independent. J. BRINTON, *supra* note 4, at 53; G. DE HERREROS, *supra* note 5, at 43-50.

[22] Their national status was reinforced by their somewhat abortive legislative role. J. BRINTON, *supra* note 4, at 173-83.

[23] W. BURDICK, BENCH AND BAR OF OTHER LANDS 495-96 (1939).

[24] J. BRINTON, *supra* note 4, at 60-71.

different nationalities, except questions involving personal status.[25] Generally, questions of family law were left to other tribunals. The Mixed Courts also had jurisdiction over cases involving land, even if the dispute was between foreigners of the same nationality.

All foreigners had the privilege of having their claims brought before the Mixed Courts. It had been argued that only nationals of the states which had participated in the formation of the Courts might be admitted before them, and that all other foreigners were amenable to actions before the native Egyptian courts. The Mixed Courts refused to take this view. They created the fiction that the capitulatory powers had contracted for the benefit of all foreign powers, and thus they held that the Mixed Courts were open to subjects and citizens of all foreign nations.[26] Another such theory was that of the "protected persons" (*protégés*). Under this theory, those foreign powers which had been successful in persuading some capitulatory power to take them under its wing would enjoy the use of the Mixed Courts. Switzerland is the principal example of this class of states.[27]

According to the text of the Charter, the jurisdiction of the Mixed Courts was based primarily on the difference of nationality between the parties to the litigation.[28] However, the Courts went considerably beyond the letter of the definition. They affirmed jurisdiction in cases where "mixed interest" was to be found, although the actual parties to the suit were both Egyptians. Despite much criticism leveled at them, the Mixed Courts did not waiver from the principle of the "mixed interest," and its constant application was a major factor in the spread of their influence in Egypt.

The Mixed Courts saw themselves as the protectors of foreign interests and never hesitated to pierce protective veils to discover such inter-

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[25] *Id.* at 60. The first nationality law in Egypt, promulgated in 1929, was evidently passed to aid in ending the problem of who was to be classified as a foreigner.

[26] *Id.* at 63-64. It should be noted that World War I did not affect the rights of subjects of the Central Powers, who continued to enjoy the right to appear before the Mixed Courts. But Soviet citizens (with whose government Egypt had no diplomatic relations) could not bring a suit before the Mixed Court.

[27] *Id.*

[28] Article 9 of the Charter states:

> The Courts shall have exclusive jurisdiction over all litigation in civil and commercial matters between natives and foreigners and between foreigners of different nationalities, outside the law of personal status.
>
> They shall have jurisdiction over real estate actions between natives and foreigners or between foreigners of the same nationality or of different nationalities.

(The second paragraph originally stated: "They shall also have jurisdiction of all real estate actions between all persons, even those of the same nationality.")

ests. This attitude is exemplified in corporate law. Private corporations in Egypt were either foreign corporations, organized under the law of a foreign country, or corporations of Egyptian nationality, formed under Egyptian law and holding charters authorized by the Government. By the application of the theory of "mixed interests," the Mixed Courts subjected "Egyptian" companies to their jurisdiction. They acted on the possibility that the stock of every company is, partly at least, in the hands of foreigners. This possible ownership was deemed sufficient "mixed interest" to warrant assumption of exclusive jurisdiction, even in a case involving an "Egyptian" company and purely Egyptian litigants. Thus, all of the largest enterprises in the country, including the Suez Canal Company, were brought within the subject matter jurisdiction of the Mixed Courts.[29]

In bankruptcy, as well as in the matter of attachments of property in the hands of third parties, the Mixed Courts exercised jurisdiction. The device of the "straw man" was widely used. The name of a foreign person without any real interest in the case was introduced solely to confer jurisdiction upon the Mixed Courts. It should be noted, however, that the Mixed Courts were slow to entertain jurisdiction when closely connected litigation was pending before other courts.[30]

The cases brought before the Mixed Courts encompassed nearly all civil and commercial relations extant in the country. Judge Brinton points out that the "litigation which comes before these courts faithfully reflects the varied occupations of the people who inhabit the land."[31] Since the growing of cotton was the main business enterprise in Egypt, all types of transactions incident to its cultivation and sale were the subject of suits. Furthermore, since Egypt was a commercial crossroads, Egyptian businessmen often litigated in the Mixed Courts. Land formed the only means of investment for most Egyptians and it was the subject of much litigation. Mortgages and loans on mortgages accompanied investment in land. The certainties of title to land were also a constant source of lawsuits and were made more complicated by the institution of the *wakf*, the religious or family trust. Of course, insurance played a large role in the commercial life of the country, as did shipping. Corporate law took precedence, quite naturally, over other fields in terms of the monetary amounts at stake in litigation.[32]

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[29] J. BRINTON, *supra* note 4, at 65-66.

[30] *Id.*

[31] *Id.* at 69-71.

[32] Other important areas of law involved were partnerships, patents and trademarks, unfair competition, torts, and suits against the Government. J. BRINTON, *supra* note 4, at 71.

C. *Legal Background for the System*

The system of law devised to regulate the myriad interrelationships within the competence of the Mixed Courts had its roots in Roman law as adapted by the French. Amos observed that:

> Egypt offers an example of the reception of French law by a people totally alien to Europe in language, religion and social and political traditions. When . . . Nubar Pasha secured the consent of the Powers to the institution of the International Courts, it was agreed without debate that the only possible law with which to equip them was that of the French Codes.[33]

The influence of France, both before and during the period of British domination, is quite obvious. The style of the Mixed Courts evidences inspiration from the French system of law.

However, the mixed law was not, as Judge Messina points out, the result of a codification typical of civil law countries, in which customary law is slowly evolved by the elements constituting the process of legal development in given surroundings. It was the product of individual work, hurriedly completed. He stated that "[t]he Mixed Law was born at a particular place and time, officially established with bureaucratic precision."[34] In addition, mixed law "is an adaptation which is sometimes ingenious, more often very cursory, rather frequently incomplete of the European Codes of the French type, that the compiler who was very hurried simply reproduced, introducing slight modifications and sometimes mutilating them without reason."[35] Thus, "the truth is that the Mixed System is not the result of the arbitrary and haphazard importation of a body of foreign laws into the legal philosophy of the Moslem society whose relationships it was meant to regulate."[36] It is significant that in Judge Messina's time the Mixed Courts enjoyed the confidence of the people. One might say, therefore, that the Mixed Courts drew their authority not from an artificial legislative import but from "an intimate relationship between its provisions and the feeling of the people."[37]

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[33] Amos, *The Code Napoléon and the Modern World*, 10 J. COMP. LEG. & INT'L L. (3d ser.) 222, 235 (1928).

[34] 1 S. MESSINA, *supra* note 6, at 25.

[35] *Id.* at 26.

[36] *Id.* at 27.

[37] *Id.* at 28. Judge Messina cites Bey, *La confiance des égyptiens dans les Tribunaux Mixtes*, in LIVRE D'OR AU CINQUANTENAIRE DES TRIBUNAUX MIXTES (1920), which is not available to the author.

D. *The Codes of the Mixed Courts*

The Civil Code of the Mixed Courts system contained 774 articles and was divided into four books: property, obligations, various types of contracts, and debtor-creditor law. It is interesting to note that without counting the articles on personal status, the number of articles was about half the number of those found in the French and Italian codes. This seems to indicate that the Code was a summary of the subject matter.[38] In 1904 Armijon stated that "in formulating a summary of the French codes, the Egyptian legislator seemed not to have taken account of the laws, ordinances and decrees which completed, clarified and corrected these works and whose classification under diverse subjects resulted in forming real codes."[39]

The Commercial Code contained 427 articles, contrasted with the 648 articles of its French counterpart. The disparity has been explained as being caused by the existence of a separate Code of Maritime Commerce. The Commercial Code drew the all-important distinction between commercial and civil matters.[40] The most elaborate of the Mixed Codes was the Code of Civil and Commercial Procedure which contained some 800 articles covering every aspect of procedure, pleading, and proof. The Penal Code and the Code of Criminal Investigation were promulgated in the hope that they would soon be implemented. That wish was never fulfilled to any significant extent; the consular courts retained jurisdiction over criminal matters.[41]

The preliminary provisions of the Civil Code, articles 1-14, were addressed to the civil law and constituted a general preamble to the whole of the mixed law. These provisions declared the basic principles which were to be common to civil, commercial, maritime, and criminal law, as well as to the law governing procedure.[42] It has also been observed that these preliminary provisions have the effect of binding treaty provisions since they are actually almost identical with articles of the Charter.[43]

The formal sources of mixed law were *la loi* and *la coutume*. Law (*loi*) consisted of the codes and also of the legislation of the Egyptian Government. The laws, ordinances, and orders of the Egyptian execu-

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[38] 1 S. MESSINA, *supra* note 6, at 33.

[39] P. ARMIJON, LE CODE CIVIL ET L'EGYPTE, as quoted in 1 S. MESSINA, *supra* note 6, at 33.

[40] The Commercial Code covered such subjects as commercial contracts and papers, partnerships, corporations, and bankruptcy.

[41] J. BRINTON, *supra* note 4, at 123.

[42] 1 S. MESSINA, *supra* note 6, at 35-36.

[43] *Id.* at 37 n.1.

tive and legislature, as long as not inconsistent with capitulatory rights, were enforced by the Mixed Courts. Approval by the powers was necessary for their application to foreigners but Judge Brinton points out that many areas of strictly internal administration were governed by the enactments of the Egyptian legislature without any interference from the powers.[44]

Coutume, or usage, was the second formal source of mixed law.[45] It is an element which played an extraordinarily large role in regulating the relations of peoples in Moslem countries. The Mixed Codes themselves contained many references to it. The decisions of the courts were filled with references to usage in every field but particularly in those relating to commercial operations.[46]

III. NATURAL LAW AND EQUITY IN THE CASE LAW OF THE MIXED COURTS

The Mixed Codes and other legislation could scarcely be expected to answer all questions posed in the thousands of cases brought before the Mixed Courts. The case law (*jurisprudence*) took account of such deficiencies in the Mixed Codes. An example is furnished by a 1923 case in which the Court enumerated areas of the law which were not covered by the codes but which must have been thought of by those responsible for the legislative acts.[47] Custom (or usage) came into the law only through settled case law. Thus, in view of the importance of custom in Egyptian law, case law played a significant role in the transmission of legal principles.[48]

The Mixed Courts were never common law courts. The basic authority for their decisions came from the Mixed Codes and enacted law. Courts should and sometimes did refuse to apply decisions of other Mixed Courts, including decisions of the *Cour d'Appel*.[49] However, the notion of settled case law (*jurisprudence constante*) was well established. Judge Brinton states that "[p]revious interpretations of the written law are followed not because they make the law but because of the assumption that they have been made according to the law and of the vital

[44] J. BRINTON, *supra* note 4, at 89-96. Judge Messina notes, however, that the power of the Mixed Courts to disapprove of enactments of the Egyptian Government was both an indirect and weak power. 1 S. MESSINA, *supra* note 6, at 68-69.

[45] *Id.* at 44.

[46] J. BRINTON, *supra* note 4, at 89; 1 S. MESSINA, *supra* note 6, at 111 *et seq.*

[47] *Id.* at 34.

[48] *Id.* at 49-50.

[49] J. BRINTON, *supra* note 4, at 94.

interest of the public in seeing such an interpretation maintained."[50]

The Civil Code did not refer to precedent, but in article 11 it invited the judge to fill the gaps left by enacted law with principles of "natural law" and of "rules of equity." As one of the introductory articles of the Civil Code, article 11 was applied to all judicial operations of the Mixed Courts.[51]

Article 34 of the Charter and article 11 of the Civil Code represented bold steps on the part of the creators of the system. Judge Messina commented that "[w]ith the sure intention, which only deep experience in relationships in real life can give, the Mixed Judiciary formulated in its case law a notion of natural law and equity, which is not nebulous or immutable, nor subjective or arbitrary."[52]

The case law, which developed the scope of article 11 and article 34 of the Charter and the practical and jurisprudential limitations this case law sought to impose, is proof of the honest attempt by the Mixed Courts to devise a way of coping with the constant problem of gaps in the mixed law. It is important to recall that the gaps in mixed legislation could not, because of circumstances, be filled through auxiliary legislation. The Mixed Courts were creatures of international agreements between the capitulatory powers and the Egyptian Government. Thus, they could only expect to be governed by legislation agreed to, or at least accepted, by all parties.

The Mixed Courts had to be inventive; evidently they did not want to be inventive at the expense of traditional legal techniques. They had before them a unique opportunity to administer justice through the constant and indiscriminate use of the broadest principles; namely, natural law and equity. But the Mixed Courts did not succumb to the temptation. The Mixed Courts were conscious of the fact that many of the problems involved were intensely practical and required definite, technical, and precise answers.

There was never any doubt that article 11 would not be applied unless "the law is silent, insufficient or obscure." In a case involving a contract for the sale of land by one corporation to another, problems of breaches of corporate law and sales law were discussed. The Court pushed aside the contention that article 11 was applicable to the particular fact situation, stating that "the rules of equity can only serve as the basis of judicial decisions when the law is silent, insufficient or unclear (Art.

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[50] *Id.*

[51] *See* note 2 *supra* and accompanying text.

[52] 1 S. MESSINA, *supra* note 6, at 227.

11)."[52.1] In this case the question was "only if they had acted in conformity with their legal right."[53] In a 1925 case before the district court, the judge refused to apply article 11 in a bankruptcy case, holding that:

> The judge is authorized to rule on the basis of equity, under the terms of Article 11 of the Mixed Civil Code, only in cases of true gaps in the law and not in cases where equity is invoked to go beyond the legal rules whose boundaries have been clearly, precisely and rigorously established.[54]

The case at hand concerned "the claims of builders and contractors to whom the Mixed Law (C. Civ. art. 729) does not accord any privileged rank. The Mixed case law is settled in this regard."[54.1] It was equally clear that the Mixed Courts would not decide solely on the grounds of equity when positive law on the subject existed. Thus, in a case involving the complaint of contractors for their work (they had signed a contract with the husband in his personal status, when the work was really to be done for the benefit of the wife), the Court stated that "[a]lthough the appellant's claim appears to be just in itself and would have merited being upheld if the Courts could decide solely on the basis of equity, unquestionably legally the claim cannot stand."[55]

In *Nungovich Egyptian Hotels Co. v. Rifki*,[56] a case involving preemption and the types of property subject to that concept, the Court held, with respect to the judge's role:

> [A]lthough it is the role and duty of the judicial authority to conform to principles of natural law and equity in case of silence, insufficiency and lack of clarity of the law (Règ. d'Org. Jud. Art. 24 and C. Civ. Art. 11) the judicial authority cannot make decisions on the basis of general provisions in matters regulated by statute. To do the former would be to create by means of case law, distinctions, exclusions, and grounds for not taking jurisdiction for which the statutes have not provided. . . .
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> It goes without saying that the judge cannot dismiss preemption on the basis of extra legal considerations, however, rational and equitable these considerations might be.[56.1]

[52.1] Judgment of Feb. 13, 1913, 25 Bulletin de Législation et de Jurisprudence Egyptiennes 178 (Cour d'Appel). This reporter will be cited hereinafter as Bull. Leg. Jur. Egypt.

[53] *Id.* at 181.

[54] Judgment of April 21, 1925, 15 Gazette de Tribunaux Mixtes d'Egypte 170 (Trib. Civ., Alex.).

[54.1] *Id.*

[55] Judgment of May 21, 1918, 30 Bull. Leg. Jur. Egypt. 433, 455 (Cour d'Appel).

[56] 18 Bull. Leg. Jur. Egypt. 154 (Cour d'Appel 1906). *See also* Judgment of June 14, 1906, 18 Bull. Leg. Jur. Egypt. 331 (Cour d'Appel).

[56.1] 18 Bull. Leg. Jur. Egypt. 154 (Cour d'Appel 1906).

In a labor accident case, *Administration des Chemins de Fer v. Hamdi*,[57] the plaintiff argued for the application of article 11, since mixed law did not settle the immediate issue of the case. The court disagreed and said "the alleged gap does not exist in Mixed Law, which in article 212 and the articles which follow, of the Civil Code, settles the questions of liability and compensable actions."[58] The fact that the worker in this case was not protected by the law was unfortunate, but it did not change the applicable rules.

The substitution of foreign law for existing positive legislation of the Mixed Courts was equally unwelcome. In another labor accident case the Court held that it was up to the worker who alleges injury on the job to furnish proof of fault, imputable to the employer and of such a nature as to engage his responsibility. It commented that:

> [T]hrough its settled case law [*jurisprudence constante*], the Court has always decided that the Mixed Courts cannot, by means of equity, apply principles different from those set forth in the law that governs them, namely the provision of articles 212 and 213 of the Civil Code, nor substitute for them principles of natural law or certain legislative enactments on labor accidents (Judgment of March 8, 1905, 17 Bull. Leg. Jur. Egypt. 155).[59]

In the field of contract law, the potential power of the judge, through the use of article 11, to interpret the contract in such a way as to effect fundamental changes was not utilized. In *Iacchia v. The Land Bank of Egypt*,[60] the defendant had issued bonds in 1905 and 1906 which were bought by the plaintiff. Repayment was to be in *monnaie française* in Egypt, London, Basel, Geneva, Amsterdam, or Brussels at the rate prevailing in Paris. Payment was made in bank notes and in Egypt. The basic issue was whether payment should be made in gold or in bank notes, the prevailing form of exchange at the time of payment. Since the contract called for payment at the rate prevailing in Paris, the fact of inflation which reduced the real value of the bond could not be changed. The Court commented that a contract must be interpreted in accordance with the common intention of the parties. The Court stated:

> If the judge is authorized in cases of silence, insufficiency or lack of

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[57] 17 Bull. Leg. Jur. Egypt. 155 (Trib. Civ., Alex. 1905).

[58] *Id.* at 156.

[59] Egyptian Delta Light Ry. Ltd. v. Samad, 29 Bull. Leg. Jur. Egypt. 334, 335 (Cour d'Appel 1916). It is interesting to note here the express citation of previous cases and the discussion of *jurisprudence constante*.

[60] 40 Bull. Leg. Jur. Egypt. 112 (Cour d'Appel 1927).

> clarity in the law to use principles of natural law and equity (C. Civ. Art. 11) he is not permitted to refuse to apply the applicable law and to shift the precise and formal terms of a contract in favor of one of the parties, on the pretext that the performance of the conditions of the contract has become onerous, it being understood that the contract which binds the parties leaves no room for doubt that it was freely consented to and does not disturb *ordre public*.[61]

The concept of a court's incapacity to reform a contract to fit its own notions was equally valid with respect to judicial revision of law in general. In a case involving a law which did not permit an employee of the Mixed Courts to take part in a court auction, the Court stated that "the Court certainly does not have the right to remake the law," although it admitted that it had "a very narrow right to correct a substantial error or to set aside a flagrant contradiction with the intention of the legislator."[62]

Even in the absence of written law which was directly applicable, the Mixed Courts were charged with the application of analogies to a positive rule of law whenever possible. Thus, in a case involving the structure of a *société anonyme* the *Cour d' Appel* held:

> [I]n the absence of any special provision on this subject, and given the elements that come together at the creation of limited companies and with regard to their operation, all disputes which may arise are subject to general principles of law, as well as to the rules which have been established on the subjects of contract and agency, from which these elements arise directly.[63]

Judge Messina stated that only in cases where analogy to a specific rule of law was impossible or insufficient could recourse be had, by an analogy, to a general principle of law.[64] Thus, no resort would be made to a general principle of law until the possibility of finding an analogy to a specific legal rule had been exhausted. Only after the search for a general principle of law had failed, was article 11 to be used. Actually, the distinction between general principles of law and rules of natural law and equity was often quite subtle.[65]

The meaning of the terms "natural law" and "equity," in the context of article 11 and the mixed law, had a long and slow development. The

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[61] *Id.* at 113-14.

[62] Judgment of May 24, 1927, 39 Bull. Leg. Jur. Egypt. 505, 507 (Cour d'Appel).

[63] Ralli v. M. Tourtoulis Bey, A. Lunghis, 23 Bull. Leg. Jur. Egypt. 81, 83 (Cour d'Appel 1910).

[64] 1 S. MESSINA, *supra* note 6, at 234.

[65] The same rule was likely to be termed a rule of natural law in one case and a general principle of law in another. *See id.* at 235-36 n.1.

concepts regarding the use of analogies were also late in development. It must be remembered that the judiciary of the Mixed Courts came from diverse legal backgrounds. There was obviously a lack of a common legal tradition. French culture had played a preponderant role in the early stages of the legal system. The Mixed Codes themselves were modeled after those of France. Such factors worked initially to induce the Mixed Courts to look to French law as the major source of rules to fill the gaps in mixed law. For example, in a case heard in 1886 involving a statute of limitations the Court held:

> [T]he time limitations [*prescription*] of 5 years established by Article 102 responds to the time limitation of 10 or 20 years provided for by Article 2265 of the French Civil Code, and requires, moreover, proper title and good faith. The silence of Egyptian law on good faith [*bonne foi*] must, by virtue of the article, be supplemented by the application of fundamental principles on the subject of time limitations.[66]

With time, the Mixed Courts began to limit the application of French law. In 1898 the *Cour d'Appel* held that the general principle of applying French law in case of gaps applied "only in cases specifically indicated by the law such as provided for by *such articles* of the *Code Napoléon* whose principles served as the basis of the Mixed Codes."[67] This attitude was carried forward in many subsequent cases which declared French law inapplicable. In a 1917 case the *Cour d'Appel* observed:

> The Code in Article 292 attributed to private writings the same evidentiary force between the parties as formal writing [*actes authentiques*] and does not contain any provision analogous to that of Article 1325 C. Nap.; such a provision does not rest either on principles of law or on rules of equity, and therefore, cannot be considered to be based on Article 1325 C. Nap.[68]

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[66] Judgment of Nov. 28, 1886, 1 Bull. Leg. Jur. Egypt. 440 (Cour d'Appel).

[67] Judgment of March 9, 1898, 10 Bull. Leg. Jur. Egypt. 186, 189 (Cour d'Appel).

[68] Judgment of May 10, 1917, 29 Bull. Leg. Jur. Egypt. 418 (Cour d'Appel). In an interesting decision involving succession, the Court observed:

> It is arguable that this prohibition [of an agreement for succession, governed by French law] constitutes one of these principles of natural law—universal and absolute—that the judge must apply, even if law and custom are silent; in this matter that the various legal systems—the expression of the most representative of the collective conscience of peoples in history—dealt with in the most diverse of manners, Roman law recognized agreements [*partes*] on the succession of third parties when there was also the will of the *de cujus*; for the common law [*droit commun*] and customary law, the prohibition was controversial and for practical purpose hardly existed; French law where the prohibition is so much criticized by the writers [*doctrine*], permits this contractual

It became clear that not only French statutes and case law but also Moslem institutions were sources for article 11, especially with respect to the *vie sociale* of the country.[69] In a case involving a wall which was in ruins and had to be rebuilt, the Court held that the recalcitrant owner could not be forced to contribute to the cost of rebuilding or reinforcing the wall which the co-owner wanted for his own benefit. Thus, the *nazir* of a *wakf* could not order reconstruction of a structure which had fallen into ruin. He could only order it restored to its original appearance and only with the permission of the *Cadi*. The Court stated:

> [T]he Egyptian Code being silent on the question of joint ownership, the Court has the right, under the terms of Article 11 of the Civil Code to have recourse to the principles of natural law and the rules of equity, while also basing itself on Moslem law, applied in the country before the creation of the *Tribunaux de la Reforme* for real estate disputes, and on French law, the principal source of our Civil Code. . . .
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> . . . [U]nder the terms of both Islamic and French law joint ownership is considered as a special form of joint possession resulting from the community (see Arts. 70 and 71 of the Real Property Code of Madri Pasha—articles 1211 and 1212 of the Ottoman Megallah—Planiol Vol. I p. 776 No. 2503—Pothier Vol. IV p. 313).[70]

In matters of land law, as in questions involving preemption, Moslem law was acknowledged as being the main source for filling the gaps. In a 1903 case the *Cour d'Appel* held that in view of the vague and general nature of the provisions of the Egyptian codes which defined the law of property, one should deduce that the codes implicitly referred to the constitutional law concerned with real property in Ottoman countries. Such law did not grant real property rights to foreigners unless they subjected themselves to the law and regulations which governed Ottoman subjects.[71]

In conflicts between French law and either the Mixed Codes or Egyptian regulations, the Mixed Courts usually followed the latter. *Boulad v. Crédit Foncier Egyptien*[72] involved the following problem:

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institution in certain cases; the Mixed Law contains only one simple article on this subject concerning sales; it is difficult to say what the rule is in Moslem Law; the German and Swiss Codes allow this contractual institution.

[69] 1 S. MESSINA, *supra* note 6, at 238.

[70] Wakf de Feu Aly Bey El Korei v. Elias El Gamayel, 35 Bull. Leg. Jur. Egypt. 330, 331 (Cour d'Appel 1923).

[71] Judgment of April 30, 1903, 15 Bull. Leg. Jur. Egypt. 264 (Cour d'Appel).

[72] 30 Bull. Leg. Jur. Egypt. 145 (Cour d'Appel 1968). *See also* Judgment of Nov. 25, 1925, 38 Bull. Leg. Jur. Egypt. 69 (Cour d'Appel), in which the Court held: "Contrary to the provisions of the French law applicable to bonded warehouses, Egyptian legislation does not obligate the bailee to weigh the merchandise before it enters the warehouse."

Against whom "should claims for expropriation be directed when a building which is to be expropriated is in the hands of a third party holder?"[72.1] The Court reviewed the case law on the subject, but came to the conclusion that the very first case—which the subsequent ones followed—was based on French legal rules. The Mixed Code had not adopted these rules. The Court reasoned:

> [I]f one then looks at the French text and the Mixed text, the difference in the terms employed and in the declared provisions cannot but strengthen this conviction; it seems evident that the Egyptian legislator, who knew the French Code, had in mind a system other than that embodied in articles 2168 and 2169 of the French Code . . . .
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> . . . [I]t is thus not possible, in Mixed Law to refer to the French treatises [*doctrine*] and case law [*jurisprudence*], which were dictated by other legislative provisions.[73]

Reliance on general mixed law rather than on a particular system of law was proclaimed as early as 1892 when the *Cour d'Appel* decided that if mixed law had not adopted a provision of the French Codes, the rule would depend upon mixed law.[74] In 1914 the Court held that in the absence of a Mixed Code provision corresponding to that of the *Code Napoléon*, "it is necessary to apply the terms of Article 11 of the Code Civil and to have recourse to natural law and to the rules of equity."[75]

Judge Messina concluded that the use by the Mixed Courts of French statute and case law had philosophical rather than historical justification. One reason that reference to the *Code Napoléon* was continued was that its provisions were truly considered to represent natural law and equity.[76] In a 1917 case concerning a creditor-debtor relationship and questions of subrogation, the Court stated:

> [I]f it is true that the Mixed Civil Code has not reproduced the provisions of Article 1252 of the *Code Napoléon*, which provided that subrogation can harm the position of the creditor only if he has made no more than part payment . . . it is no less true that this provision is the application of a principle of natural law and equity.[77]

Another reason for the continued reference to the *Code Napoléon* was that in the areas where it was certain that the Egyptian Legislature did

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[72.1] *Id.*

[73] 30 Bull. Leg. Jur. Egypt. at 147.

[74] Judgment of June 2, 1892, 4 Bull. Leg. Jur. Egypt. 308 (Cour d'Appel).

[75] Judgment of April 3, 1914, 26 Bull. Leg. Jur. Egypt. 335 (Cour d'Appel).

[76] 1 S. MESSINA, *supra* note 6, at 239.

[77] Curiel v. Crédit Foncier Egyptien, 29 Bull. Leg. Jur. Egypt. 235, 238 (Cour d'Appel 1917); *cf.* Judgment of Dec. 8, 1897, 10 Bull. Leg. Jur. Egypt. 37 (Cour d'Appel).

not want to innovate, it was "natural and logical to fill the gap, resulting from an incomplete reproduction of the model, by using provisions in the French Code."[78] As proof for this proposition, Messina quoted from *El Kerm v. El Gharby*,[79] a case involving a question of the matrimonial regime with respect to property:

> Since, on the basis of the judgments cited . . . it has been decided that the Egyptian legislator, despite the terms of Article 554, which differ from those of Article 883 [*Code Napoléon*], did not wish to innovate upon French law on the subject of the division of matrimonial property, it is natural and logical, given the Mixed Code's silence on the question of whether the matrimonial property decision can be rescinded on the ground of *lésion*, to have recourse to French law.[80]

Reliance on the legislation of other countries was obvious. After mentioning natural law and equity, numerous decisions declared that their *ratio decidendi* was to be found in a number of sources of legal rules, including "general rules of law" (*droit commun*). In *Pauillac v. Chikaoui*[81] the Court held: "In the absence of a special law on the subject, industrial property is protected in Egypt by the rules of *droit commun* and attacks on such property rights give rise to an action (against the author of such attack) for compensation for the damage caused."[81.1]

Reliance on general principles of law was quite widespread. Judge Messina pointed to other concepts which reinforced article 11 and what it attempted to accomplish. For example, in a case involving a sales contract where no provision of the Mixed Codes was appropriate, the Court refused to use article 1325 of the French Code because such a provision "which is not based either on general principles of law nor on rules of equity could not be introduced on the basis of Article 11."[82] By way of contrast, general principles were used even though a provision of the Code existed, if such principles were more consonant with the legal relationship[83] or the facts of the case. This was especially true if the general principles were more consonant with the nature of the economic and social interests and relationships for the protection of which the particular rule was used.[84]

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[78] 1 S. MESSINA, *supra* note 6, at 239-40.

[79] 35 Bull. Leg. Jur. Egypt. 464 (Cour d'Appel 1923).

[80] *Id.* at 466.

[81] 26 Bull. Leg. Jur. Egypt. 63 (Cour d'Appel 1913).

[81.1] *Id.*

[82] Judgment of May 10, 1917, 29 Bull. Leg. Jur. Egypt. 418, 419 (Cour d'Appel).

[83] *See, e.g.*, Judgment of Nov. 18, 1914, 27 Bull. Leg. Jur. Egypt. 24 (Cour d'Appel).

[84] In Judgment of Feb. 5, 1913, 25 Bull. Leg. Jur. Egypt. 163 (Cour d'Appel), the issue was

In many cases the Mixed Courts used their own concepts, based on the fundamental sources of natural law and equity, to fill gaps in the mixed law. In such cases the Mixed Courts can be said to have made their most original contribution. Judge Brinton chose the role of article 11 in the protection of trademarks and patents as a demonstration of the effectiveness of the article. He stated that "[f]eeling their way step by step, the Mixed Courts gradually developed a system of protection which, even if it lacked the completeness and precision of the written law, responded admirably to the needs of commercial justice."[85] In *Karkour v. Venieri*,[86] which concerned a suit to stop the use of a trademark of a brand of cigarette, damages and the destruction of the offending articles were sought. The Court held:

> [I]n the absence of a special law on the subject of industrial property in Egypt such property is protected by the principles of natural law.
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> . . . [I]t is undeniable as a matter of principle that no one has the right to enrich himself at the cost of others . . . .
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> . . . [N]umerous judgments have applied this principle . . . .[87]

A closely related field, the protection of literary and artistic property, gave rise to a similarly extensive case law. In *Horn v. Vayssie*[88] the issue was whether a newspaper article should be considered to be literary property. The Court observed:

> Whereas . . . in the absence in Egypt of a law recognizing literary property [copyright] . . . according to the prevailing opinion, the creation of a literary or artistic work constitutes, for the benefit of its author, property whose basis is found in natural law and in international law.
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> . . . Mixed case law [*jurisprudence*] is settled along these lines . . . . [I]t has been decided a number of times by the Court, and in the absence of any special law, literary and artistic property is protected and guaranteed in Egypt by Article 34 of the Charter of the Mixed Courts.

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whether a servitude stated in article 54 of the Civil Code, dealing with supply of water, included the obligation to cede enough land to install a raising machine. The Court recognized the principle that servitudes are restrictively interpreted. However, it pointed out that it has repeatedly held that the article must be interpreted according to the circumstances and must respond to the interest of agriculture in Egypt. The Court added that the law in France might well be different because the needs are different. *See* 1 S. MESSINA, *supra* note 6, at 241.

[85] J. BRINTON, *supra* note 4, at 95-96.

[86] 20 Bull. Leg. Jur. Egypt. 14 (Cour d'Appel 1907).

[87] *Id.* at 15.

[88] 35 Bull. Leg. Jur. Egypt. 477 (Cour d'Appel 1923). In addition, *usage de presse* was utilized to defend the theory that articles permitted to be reproduced need the authority of the newspapers in which they were originally printed.

> . . . [I]t is, in fact, established today, without any appreciable argument, by the writings [*doctrine*] and case law [*jurisprudence*], that a newspaper article constitutes a property right in favor of its author.
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> . . . [T]his rule, which the first judges correctly applied, is justified by considerations of simple common sense and equity.[89]

In a similar type case, Mr. Zangakis, a photographer, engaged in several suits against parties who had reproduced his photographs on post cards. In *Zangakis v. Epitimios Frères*[90] the Court stated that "several legal systems specifically grant photographs the same general protection granted to works of art . . . (Germany, Law of 17 Jan. 1876, Grand Duchy of Finland, Law of 17 March 1880, Norway, Law of 12 May 1877) . . . ."[91] The Court discussed in some detail the Norwegian rule that the photographer has the exclusive right to reproduce the photograph. It then discussed the conventions between France and Belgium, and between Switzerland and Italy, which forbade unauthorized reproductions. In France such protection was accorded only if the artist had given his work an expressly artistic character. The Court here cited Despagnet on *Droit International Privé* and French cases. It continued, using the familiar formula:

> In the absence of a special law in Egypt on literary and artistic property such property, by application of Article 34 of the Charter of the Mixed Courts is placed under the protection of natural law and equity, since it is a basic principle in law that all attacks on the property of others gives rise to an action against the author of such an attack.[92]

It should be noted that the Court did not here expressly relate its discussion of various rules of law to its final pronouncement on natural law and equity.

Questions of real property rights often called for the use of article 11. A dispute existed over whether trees which came close to a boundary wall and which were wholly owned by one party could be removed. French law, the Court found, was specific in forbidding the growing of trees within a certain distance of the boundary.[93] However, the Court held that:

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[89] *Id.* at 478-79.

[90] 18 Bull. Leg. Jur. Egypt. 266 (Cour d'Appel 1906). The earlier case was *Zangakis v. Fix et David*, 17 Bull. Leg. Jur. Egypt. 140 (Cour d'Appel 1905). The reasoning of the Court was similar in this latter case.

[91] 18 Bull. Leg. Jur. Egypt. at 267-68.

[92] *Id.*

[93] Judgment of Jan. 4, 1923, 14 Gazette de Tribunaux Mixtes d'Egypte 29 (Cour d'Appel).

> [T]he Egyptian lawmaker did not think it necessary to take up this question and it is not the function of the judicial authorities to fill this gap in assuming the right to legislate rules regarding distances, thus treading on the powers of the legislative, administrative, and judicial authorities . . . . [A]t the most, one can be influenced, where the law is silent or insufficient, by the principles of equity, which in this case, simply mean that there is a limitation on the right of each person to rid himself absolutely of his thing measured by the right of his neighbor to do the same, according to the maxim *sic utere tuo ut alienum non laedas*.[94]

In a case involving the liability of the state for a tortious act, where a party received a grant of a concession to fish which was suspended before the period specified, the issue was whether damages were payable. The Court discussed the rule in French law, which declared that fault must be proved in such a case if the state is involved. The Court then stated that "there being in Egypt no special law on the subject the norms of general principles must be used."[95]

In a case involving the rights of a building contractor, the immediate issue involved the debt owed the builder by the owner. The Court held that "there is in the Mixed Law a gap with respect to the interests of builders . . . . It [article 11] authorizes the judge, in circumstances where equity has been violated, for example, where there has been evident enrichment at the expense of others, to apply the rules of such equity."[96] In a case involving the duties of a tenant the Court stated:

> [T]he Egyptian code does not contain special provisions on the subject

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[94] *Id.*; *see* note 2 *supra*. The use of *équité* by the Mixed Courts as compelling a certain result has its counterpart in the case law of international tribunals such as the *Cayuga Indians Case* (Great Britain v. United States), 6 U.N.R.I.A.A. 173 (1926) and *The Diversion of Water from the Meuse Case*, [1937] P.C.I.J., ser. A/B, No. 70, and in the writings of publicists such as Lauterpacht, Hudson, and de Visscher. Professor Friedmann discussed the distinction between Roman *aequitas* and the English equity on the one hand as systems of judicial administration designed to correct insufficiencies of the law, and on the other hand as the function of equity as a principle of interpretation. Friedmann, *The Uses of General Principles in the Development of International Law*, 57 Am. J. Int'l L. 279, 287 (1963). It is in the latter sense, it is assumed, that the Mixed Courts meant to use *équité*. However, according to Professor Lawson, French law has never known a distinction between law and equity. M. AMOS & F. WALTON, INTRODUCTION TO FRENCH LAW 17 (2d ed. 1963).

[95] Judgment of March 9, 1898, 10 Bull. Leg. Jur. Egypt. 184, 185 (Cour d'Appel). It should be noted that sovereign immunity was never a factor in Egypt. From the beginning, the Egyptian Government agreed to be amenable to the jurisdiction of the Mixed Courts. J. BRINTON, *supra* note 4, at 125-34. In fact, Judge Brinton recounts that the reason for Nubar Pasha's dismissal so soon after the organization of the Mixed Courts was that the Khedive was frightened and angry at his having agreed to subject the Government to the jurisdiction of the Mixed Courts.

[96] Judgment of May 19, 1915, 27 Bull. Leg. Jur. Egypt. 342, 344 (Cour d'Appel).

> of fire . . . and it does not regulate, as do foreign laws, the question of the responsibility of the tenant.
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> . . . [T]he question which is, on whom does the burden of proof regarding the damage fall, is governed by general law [*droit commun*] and the general principles of law.[97]

It should also be noted that the use by the Mixed Courts of general principles of modern legislation was frequent,[98] as were references to international conventions.[99]

IV. CONCLUDING COMMENTS

Much ingenuity was needed to translate into concrete rules the broad legislative mandate to use natural law and equity as sources of the law for deciding particular cases. The Mixed Courts were pulled in a variety of directions in making use of article 11. Nonetheless, one is struck by the pragmatic approaches taken by the judges.[100] These men, who were trained in a number of vastly different legal systems, were called upon to decide on the content of natural law and equity with respect to specific claims and controversies.

A number of techniques, which have been described above, were used. In some instances the judges referred to a provision of the French Code from which the Mixed Code provision was said to be taken and used the rules that had grown up around the French code provision. In other cases a rule of law of a particular national system (such as French law) was considered to be a statement of natural law. The judges sometimes used local customary law. In other instances one or another of the possible comparative approaches was used. Sometimes the technique was to compare the rules of Moslem law with those of one or more European systems for purposes of harmonization. Other solutions were based on the assessment by the court that a particular rule or principle was generally recognized by European legal systems.

Settled case law (*jurisprudence*) and writings (*doctrine*) developed regarding rules which had initially been declared on the basis of article 11. The Mixed Courts made use of these declared rules, either directly or by analogy, when called on to apply article 11.[101] In certain cases

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[97] Judgment of March 9, 1893, 5 Bull. Leg. Jur. Egypt. 157 (Cour d'Appel).

[98] For example, see the use of "generally recognized rules of international law" in the Judgment of Feb. 24, 1926, 38 Bull. Leg. Jur. Egypt. 258 (Cour Plénière).

[99] *See, e.g.*, Judgment of March 3, 1909, 21 Bull. Leg. Jur. Egypt. 236 (Cour d'Appel) (use of Brussels Convention of 1900 on the subject of industrial property).

[100] Judge Messina asserted that they "began by not looking in the philosophical clouds of natural law and equity." 1 S. MESSINA, *supra* note 6, at 241.

[101] The author was unable to trace the development of the law beyond 1930 except for the years

legislation filled gaps in the Mixed Codes which had earlier been filled through the use of article 11.[102] Nevertheless, article 11 and its counterparts in the Charter remained available for use by the Mixed Courts in novel situations and with respect to certain matters where it had been considered desirable by the powers concerned not to legislate.

It is not necessary to approve of the circumstances in which the Mixed Courts operated to appreciate the skill with which they accomplished their work and their successful management of the anomalous legal situation on the basis of which their jurisdiction was founded.[103] It is clear that the Mixed Courts did not abuse the freedom of action that was granted to them in article 11 of the Mixed Civil Code. That freedom of action in practical terms gave the Courts the power to find the most appropriate rule in the particular case with the world's legal systems as their sources for that rule.[104]

1938-1939 and 1947-1949. From 1947 to 1949 no case was discovered in the *Bulletin de Législation et de Jurisprudence Egyptiennes* in which article 11 or principles of natural law or equity are mentioned. Many cases do, however, refer to *jurisprudence* and *doctrine* in such fields as industrial property.

[102] It was not until 1939 that an Egyptian law on trademarks was passed, and not until 1949 that the Egyptian law on patents came into effect. It is beyond the scope of this paper, but it is of general interest to study to what extent these laws were influenced by the *jurisprudence constante* in these fields. *See* Brinton, *The Closing of the Mixed Courts of Egypt*, 40 Am. J. Int'l L. 303, 311 (1950).

[103] *Id.* at 306. It is interesting to note the early interest in a European Court modeled on the Mixed Courts evidenced in DE WÉE, PROJET DE CRÈATION DES TRIBUNAUX MIXTES EN EUROPE (1936).

[104] The technique of article 11 was preserved in the Egyptian Civil Code of 1949 which in article 1 states:

> 1. La loi régit toutes les matières auxquelles se rapporte la lettre ou l'esprit de ses disposition.
>
> 2. A défaut d'une disposition législative applicable le juge statuera d'après la coutume et à son défaut, d'après les principes du droit musulman. A défaut de ces principes, le juge aura recours au droit naturel et aux règles de l'équité.