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Comparative Commercial Law of Egypt and the Arabian Gulf

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COMPARATIVE COMMERCIAL LAW OF EGYPT AND THE ARABIAN GULF

IAN EDGE*

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I. INTRODUCTION

Middle East countries have approached the problem of reforming civil and commercial laws by adopting laws which purportedly suit the needs of a modern, industrial society. This note will examine the countries of the Arabian peninsula, particularly Kuwait, Bahrain, Qatar, the United Arab Emirates (U.A.E.), and Saudi Arabia, while making passing references to Jordan, Syria, Iraq, and Egypt. The thesis of the paper is that Egypt exercised and still continues to exercise a predominant position, practically, legislatively, and jurisprudentially in the Middle East, and particularly the Arabian peninsula. Consequently, the development and reform of civil and commercial law in the Middle East (at least in the countries mentioned above) is based on a mixture of European civil law and Shari'a, with little common law.

The adoption of foreign civil and commercial laws by Middle Eastern countries may be considered as occurring in certain definite stages. Chronologically these are: (i) the period of colonial rule (approximately 1850-1950); (ii) post Second World War to 1970; (iii) the decade 1970-1980; and (iv) 1980 to present. These periods are only suggestions based upon the material that is to be considered in this paper. The first period could

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easily be subdivided, but since this paper is more concerned with the latter three periods, it will be treated as a whole. The second period is that in which the non-Gulf states gained their independence from British or French colonial rule. In reforming their civil and commercial law these states looked almost solely to the precedents of European civil law and adopted their codes virtually without amendment.

During the third period, in the second wave of independence, the Gulf states that are the subject of this paper gained their independence. Their links with their European rulers were more tenuous and not as long-standing and their societies were more traditional. They had little or no experience of European laws and a modern court system. For these and other reasons, these states preferred to reform their civil and commercial laws by looking to the laws of other Middle Eastern/Arab countries, particularly those attaining independence in the second period. Intra-Arab borrowing was more acceptable than overt borrowing from European civil law. Nevertheless, the result was, in most cases, indisputably the same. The intra-Arab borrowing was more or less wholesale, with little amendment, and with little attempt to fit the new laws to the needs of the society in which they were to be enforced.

In the fourth and last period, there has been considerable pressure in all the states in question to "Islamicise" the laws, and to use, to some extent, European precedents which were amended to fit the needs of a modern yet *Islamic* society. During this period, almost all the states in question have reconsidered the positions of the foreign borrowing. In some cases, new laws have been promulgated; in others, there has been only discussion and the production of draft laws. How far the new measures succeed in truly "Islamicising" the application of civil and commercial laws in these states is an important question which will be discussed later in the paper. In practice, whether or not these laws are wholly Islamic is irrelevant, for the underlying attitude of these states is clear: the law must be more in harmony with the society in which it is enforced. How this will be resolved in the future remains one of the most interesting problems that these states face.

II. COLONIAL RULE

The history of the influence of European civil and commercial law in the Middle East is fairly well documented.¹ Therefore, the discussion will not dwell on this period except to mention briefly the themes of this influence which are important for the later periods of reform.

Up until the Second World War, the two main centers for the borrowing of European civil and commercial law concepts were Ottoman Turkey and Egypt. Each will be considered in turn.

¹ See generally H. LIEBESNY, *THE LAW OF THE NEAR & MIDDLE EAST* (1975).

A. Ottoman Turkey

Ottoman Turkey, in the middle of the nineteenth century, desperately wanted to join the Club of Europe. The price of admission was the westernization of its legal system, the so-called *tanzimat* reforms. From 1839 to 1879, Ottoman Turkey enacted into law all of the civil and commercial codes of France (with one notable exception) with little or no amendment. Special courts were set up to deal with the issues these codes raised. In practice, the courts were little used and the laws little regarded.

The one exception was the civil code. In this regard the Ottomans drew up the only truly Islamic code of civil and commercial law. This was the *Majallat-i Ahkami Adliye* (*Majalla*) (the Ottoman Civil Code) which was promulgated in 1875-1876 in sixteen books.²

The influence of Ottoman Turkey throughout this period was immense in all countries except Egypt. The *Majalla* was applied as civil law in the Ottoman domains and thus was the applicable civil law in Jordan, Syria, Iraq, and Kuwait. As Ottoman power did not wholly extend to the rest of the Gulf nor to Saudi Arabia, these countries never adopted the *Majalla*; however, Ottoman influence was occasionally apparent. When King Ibn Sa'ud wanted to reinforce the commercial law of Saudi Arabia in 1930, he adopted the Ottoman Commercial Code of 1850, although this code was already out of date. It provided, for example, for an auction to begin with the lighting of a candle and to end with its snuffing out. This law remains in force; it is an anachronism in Saudi Arabian law, unused but indicative of an Ottoman past.

B. Egypt

The borrowing from European law and its subsequent application within society was more extensive in Egypt than in Turkey, perhaps because the western (primarily European) powers had a greater self-interest in the application of European-style laws than in the application of an Islamic civil code.

A new judicial court system, *al-Mahākim al-Mukhtalita*, the Mixed Courts, was created in 1875. The Mixed Court codes were drafted by a Frenchman, Maitre Manoury, and were based solely upon French law. The only Islamic provisions were those relating to land tenure and rights in land (e.g. *shuf'ah*—preemption).³ The judges of these courts were almost wholly European and their jurisdiction was extended by shrewd use of the concept of "la jurisdiction mixte," until the Mixed Court System

² See generally C. HOOPER, *THE CIVIL LAW OF PALESTINE AND JORDAN* (1933).

³ Articles 93 to 101 (replaced by the Decree of 26 March 1900) on preemption; articles 102 to 116 on prescription; article 117 on real rights; articles 118 to 143 (replaced by the Law of 24 December 1906) on expropriation for public purposes. *Les Codes Mixtes D'Egypte* (1932).

became dominant in Egypt, at least in civil and commercial matters. There was a Penal Code for the Mixed Courts, but criminal matters tended to be treated as a matter for the Consular Courts.⁴

In 1883, the Native Courts (*al-Mahakim al-'ahliyya*) were created with similar codes and a similar jurisdiction for wholly Egyptian disputes.⁵ The Maritime Code of 1885 and parts of the Native Commercial Code of 1883 are still in force. The case law and the jurisprudence produced by these courts was immense, having a massive influence over the way the law developed in Egypt. This in turn has affected other Middle Eastern countries.

III. POST SECOND WORLD WAR TO 1970

By the time of the Montreaux Convention of 1937, the Mixed Courts of Egypt were to be abolished after a twelve year transitional period. This gave impetus for drafting new codes to deal with the situation after 1949 when the Mixed Court jurisdiction would cease. Dr 'Abd al-Razzāq al-Sanhūrī, a distinguished Egyptian judge and jurist, headed the commission which drafted the new civil code for Egypt. Each section of civil law was under the control of a *rapporteur*. Each *rapporteur* had a number of assistants who researched and compared foreign laws and the Shari'a sources, thus providing the raw material from which the *rapporteur* would produce a draft section of the civil code which would then be considered in a committee session. Professor Edouard Lambert, Sanhūrī's professor in Lyons, was invited to draft the general provisions in the preliminary chapter of what became the Egyptian Civil Code of 1949. These included the important provisions as to conflict of law problems, e.g., article 19 on choice of law in contract. The other *rapporteurs* were all Egyptian. One of the youngest, and the sole surviving member of the commission, was Professor Suleiman Morcos, who drafted the provisions in chapter two of the Code on leases. A seven volume work was produced with each proposed draft article followed by similar and comparable examples from European civil codes and other sources.⁶ This work is of the highest importance to any comparative lawyer. The draft code was also published separately in Arabic, French, and English, so that as wide a readership as possible could make comments on it.

Originally, the Code comprised just over 1500 articles. It was debated in the Majlis al-shuyūkh (the Parliament of the day) and subsequently re-

⁴ See J. BRINTON, *THE MIXED COURTS OF EGYPT* (1968); see also the *LIVRE D'OR* produced for the fiftieth anniversary of the Mixed Courts in Alexandria, 1976, under the patronage of Du Conseil de L'Ordre des avocats.

⁵ See the *KITAB DHAHABI* produced for the fiftieth anniversary of the Native Courts in 1933.

⁶ *MAJMU'AT AL-AL-MAL AL-TAHDIRIYYA* (Cairo 1949/50).

duced to 1149 articles. In the main, this reduction was achieved by rendering a number of the articles of the original into one article in the final code. Occasionally articles were removed, although there is little evidence of any consistent practice in the choice of articles removed—some were articles referring to the Shari'a ideas, while others referred to ideas of a purely European nature. The senior judge in the Mahkama al-Naqd (the Supreme Court), 'Abd al-aziz Fahmy Pasha, seems to have been the dominant force behind most of these changes. The resulting civil code of 1149 articles is truly a comparative code.⁷ Sanhūrī said that "we adopted from the Shari'a all that we could adopt, having regard to sound principles of modern legislation; we did not fall short in this respect."⁸

The debt owed by the civil code to the Shari'a has been adequately considered by Professor Anderson.⁹ The totality of provisions based on the Shari'a probably comes to no more than five to ten percent of the whole.

Sanhūrī, as Dean of Law in Damascus, had been asked to draft a civil law for Syria. He proffered the Egyptian law which, with some minor amendments on land and evidence, became the Civil Code of Syria even before it was law in Egypt.

The excellence of the code was immediately recognized. When Iraq wanted to reform its civil law in 1953, it enacted the Egyptian Code, with some amendments, to replace Majalla.

Finally, when Kuwait attained independence in 1961 the ruler of Kuwait had to decide whether to update and reform the laws, particularly the Majalla. He was persuaded not to make any outward changes. Sanhūrī drew up a commercial code, which was enacted as Law no. 2 of 1961. The second book of that law comprised, in effect, the provisions on contracts found in the Egyptian Civil Code. The Majalla remained the civil law of Kuwait, but in name only, for the civil law provisions of the Kuwaiti Commercial Code were what the courts had in fact applied.

At this time, the Gulf States, other than Kuwait, were still under the political control of the United Kingdom. Their history was very different from that of the countries thus far considered. Kuwait had never come under the direct authority of the Ottomans and had maintained a quasi-autonomy under British protection. The British Political Resident in the Persian Gulf was under the power of the India office in Bombay and the Gulf, and therefore was influenced by the politics and the policies of that office. When the Political Resident was accorded judicial powers, the laws he or his representative applied were English laws as applied in India, such as the India Contract Act and the India Evidence Act. After Indian independence in 1947, the British establishment in the Gulf was subordi-

⁷ Law no. 131 of the EGYPTIAN CIVIL CODE OF 1948 appearing in the JOURNAL DU COMMERCE ET DE LA MARINE (Perott, Fanner & Sims Marshall trans. 1952).

⁸ I MAJMU'AT AL-A'CMAL AL-TAHDIRIYYQ, *supra* note 6, at 85.

⁹ Anderson, *The Shari'a and the Civil Law*, 30 ISLAMIC Q. 29-46 (1954).

nated to the Foreign Office in London. The judicial systems were then often re-organized by Orders-in-Council.

By section 12 of the Bahrain Order 1959, specified enactments of the Indian legislature and the United Kingdom Acts of Parliament, along with Orders-in-Council and other regulations were the express laws to be applied in Bahrain. Section 12(3) granted a residual jurisdiction based upon "justice, equity and good conscience." Gradually, however, these foreign enactments were replaced by locally drafted laws. Two of the most important in Bahrain were the Contract Law of 1969 and the Civil Wrongs Law of 1970, both of which are wholly and completely based on English common law (as influenced by Indian statutes) and both of which still remain in force in Bahrain today. Since independence, however, Bahrain has adopted French and continental codes as models for its reforms in other areas.

IV. THE DECADE OF 1970 TO 1980

In 1971, the shaikhdoms of the Gulf, Bahrain, Qatar, and the seven Emirates making up the United Arab Emirates were accorded independence. Originally, Bahrain and Qatar were intended to join with the other Emirates in an informal federation although in the end they did not do so. At first Ras al-Khaima also refused to join the Federation of Emirates and did not do so until 1972. These states, although having substantial links with the United Kingdom and a legal system consisting of many British enactments and provisions, have turned to precedents of other Middle Eastern countries to modernize their legal system.

Qatar is the only one of these states to have enacted a new civil code. The other states have chosen to continue to use English laws but replacing them with new foreign-inspired, Arab-borrowed commercial laws. Qatar enacted a law on civil and commercial matters in 1971, which is basically the Kuwait Commercial Code of 1961 with some amendments and re-ordering of material. The Qatari law, for example, omits provisions on the assignment of debt. The first book of the Qatari law contains the provisions on obligations which comprise the second book of the 1961 Kuwaiti Commercial Law. The most noticeable difference is that, while the 1961 Kuwaiti Commercial Law did not refer to the Shari'a at all, article 4 of the Qatari law says that in the absence of any specific law a judge must apply custom or, failing that, the principles of the Shari'a. Bahrain, Dubai, and Ras al-Khaima all enacted a new Courts Law in 1971. In each case the law to be applied was expressly delineated in the order of priority as (i) the specific laws in force, (ii) principles of Shari'a and, (iii) custom.

Each of the Gulf States attaining independence in 1971 promulgated a constitution soon thereafter— the United Arabs Emirates in December 1971, Qatar in April 1972, and Bahrain in December 1973. These three constitutions follow the form and precedent of the Kuwait Constitution of

1963. All the constitutions have the same five basic chapters of provisions: Chapter one, the system of government; chapter two, the fundamental or guiding principles of society; chapter three, general rights and duties; chapter four, division of powers and the state's authorities; and chapter five, final provisions. The United Arab Emirates' Constitution has five extra chapters which define the relationship of the Emirates *inter se* and to the Union and delimit the Union's powers and functions.

With the states' vast expansion in commercial activities, the establishment of Bahrain as an international offshore banking system, and the influx of large numbers of foreign workers, the most essential laws to be enacted were in the field of labor and commercial law.

Prior to independence, foreign companies desiring to set up operating companies in these countries had some difficulties since no commercial registry existed. An ad hoc method was used initially in Bahrain and Dubai whereby a foreign company attempted to obtain a charter or special decree of the Ruler to set up a business with separate legal personality and limited liability. This unusual procedure mirrored the ancient method of creating chartered companies in English common law.

Soon after independence, each Gulf State adopted a Commercial Companies Code which defined the types of commercial enterprises possible to establish and the rules applicable to each. The material for these laws came from Kuwait, Egypt, and, ultimately, French law; this can be easily discerned from the categories of business enterprise envisaged. There are generally three types of commercial enterprise: (i) the individual trader or merchant (*tijāra*); (ii) the partnership (*mushāraka*); and (iii) the company (*shirka*).

Partnerships are normally of different kinds: (i) simple partnership (*mushāraka al-tadamūn*) in which the partners are fully liable for the debts of the partnership (in French law: the *société en nom collectif*). (ii) The limited partnership (*mushāraka al-tawsiya*) consisting of general partners and limited partners. The limited partners (i.e., those whose liability for the debts of the partnership is limited to the amount of capital they provide at the outset of the partnership) generally have no rights of management. In French law, this classification corresponds to the *société en commandite simple* and is a very common form of enterprise in France and other continental countries. English law recognizes the limited partnership since it is allowed by the Limited Partnership Act of 1907; however, it is very rarely used in England—this category directly borrows from French law via the Egyptian Commercial Code of 1883. (iii) Partnership limited by shares (*mushāraka ma' 'ashūn*) which corresponds to the French *société en commandite par actions*. This category is not really a partnership, but a hybrid company in which the managers or directors are personally liable for the company's debts. This type of partnership has no analogy in English law.

Companies are generally of two kinds: (i) the joint stock or public company (*shirka al-musāhama*). The precedent for this grouping is clearly

the *societe anonyme* of French law, which contains provisions that the constitution and articles of the company must be signed by all the founding members before a notary public and published in the official gazette, and that such a company can only last for a maximum of ninety-nine years; and (ii) the limited liability company (*shirka al-mas'ūliya al-mahdūda*). Again the precedent for this is clearly the *societe a responsabilite limitee* of French law. The maximum number of shareholders is limited; the company cannot issue freely negotiable shares and cannot exist for more than a certain number of years (generally twenty-five).

Since the reorganization of company law in England by the Companies Act of 1980, English law now has the public limited company (p.l.c.) and the private company which are more similar to the above categories. English law was altered to bring it in line with the various European Economic Community directives on the harmonization of company law in Europe, which resulted in English law adopting, at least partly, the corporate structure of France and the rest of Europe.

In 1979, Egypt decided to update company legislation (Law no. 26 of 1954 as amended), primarily because of its inability to deal with increasing foreign investment in Egypt, and to remove the distinctions and discriminations that existed between the foreign and the Egyptian investor. A Private Sector Company Law Conference, held in Cairo in the spring of 1980, was sponsored by, among others, the Ministry of Economy and Finance, the General Authority for Foreign Investment, USAID and the Ford Foundation. Legal experts from France, the United Kingdom, and the United States attended the conference to help draft a law which eventually became Law no. 159 of 1981. This unique experiment in comparative law appears to have worked. The business enterprises described in that law are exactly the categories enumerated above and clearly based on French law.

V. FROM 1980 TO PRESENT

Recently, Middle Eastern states generally have scrutinized their foreign legal borrowings in an attempt to make them more Islamic. The underlying reasons for this are manifold— though often political and beyond the scope of this paper, which concerns only how such laws have been affected. The reforms are mainly in the areas of *ribā'* (usury, or the charging of excessive interest), *gharar* (uncertain or risky contracts, e.g., futures) and *maysir* (gambling contracts, which includes insurance).

The following examples are taken from the Kuwaiti Civil and Commercial Codes of 1980 and the Egyptian Civil Bill of 1982. The Kuwaiti Civil and Commercial Codes of 1980 replaced the 1961 Commercial Law and the Majalla. Section 305 of the Civil Code (Law no. 67 of 1980) states that interest for the use of money by way of loan, or interest for late payment on a sum of money due, is prohibited. The provision for interest does not make the whole contract void, but severable, from the main contract.

Without more, this would affect all manner of contracts and considerably alter the commercial life of Kuwait. However, in the Commercial Code (Law no. 68 of 1980), interest on commercial loans is not prohibited as long as it is not excessive. The explanatory memorandum says that *riba'* is concerned with excessive interest and exploitation of weakness. Any non-commercial loan (i.e., within a family) is exploitative and must be prohibited. A commercial loan need only provide for interest that is not excessive. A figure of nine percent is often used in practice, though this is not mentioned in the Code.

Egypt has considered modification of its civil and commercial laws two times since 1949. The first time was in the early 1960's, when a committee was formed to review the civil code. It sat from 1962 to 1966 but never completed its work. The second commission was set up in 1978 to consider reforms in all areas of Egyptian law, and to find ways of bringing the laws more into conformity with the "Islamic Shari'a." Draft codes of civil law, commercial law, penal law, and procedural law were produced with extensive commentaries indicating precisely the Islamic and other texts used to support each draft article. The draft codes were presented to Parliament but have since been shelved, and there is no indication if and when they will come into force.

The preface to the commentary to the proposed Egyptian Civil Code states that the aim of the code is to make the rules of the Islamic Shari'a applicable to financial dealings.¹⁰ The committee has looked at the texts of all schools of Islamic jurisprudence as well as to sources of legislation which have included provisions from the Shari'a, e.g., the *Majalla*, the *Guide to the Confused* of Qadri Pasha, the 1961 and 1980 Kuwaiti laws, and the other Arab civil codes.

The proposed civil code contains important provisions basing the formation of contract upon the *majlis al-aqd*, and deals extensively with different types of contractual situations. Risk contracts and gambling contracts are also included, but the provisions on insurance are the most interesting. There is an extensive commentary on the insurance provisions in the proposed code. The commentary states that the jurists (*fuqahā'*) are divided in their views of insurance and gives numerous examples. The committee view emphasizes cooperation, however, and contends that insurance is permitted because a great number of insured are involved and co-operate with one another so that the misfortune of one is shared amongst all. The committee also refers to a *fatwa* of Mohammed Abdou which states that insurance is permitted as a *mudaraba* contract. Thus, insurance is supported if, and only if, it is provided for by means of *mudaraba*. The insured persons provide the capital, the insurer provides the labor (he undertakes the administration and the investment of the insurance funds) and the profit is divided between the two parties in an

¹⁰ See AL-MASHRU' AL-QAN'UN AL-MADANI (Majlis Al-Sha'ab 1982).

agreed proportion. Thus, insurance is seen as a method of investing money and not of merely providing compensation for the happening of uncertain events. The articles in the proposed codes (articles 747-73) put these ideas into effect. Article 758 provides that a *mudaraba* company shall be set up between the total number of insured persons and the insurer and that the profits will be divided between them. Article 764 requires that the bodies which undertake the administration and investment of the insurance funds must perform their activities legally according to the Islamic Shari'a.

VI. MODERNIZATION OF LAW IN THE ARABIAN GULF

The foregoing analysis demonstrates that French law has exerted the primary influence on the modernization of law in the Arabian Gulf, although often only indirect, via the experience of Egypt. The following will examine this aspect of modernization in more detail.

A. Practice of Law

Upon independence, most of the Arabian Gulf counties had no universities, no law schools, few local legal practitioners, and fewer judges versed in anything other than Shari'a law. Inevitably these states drew upon other Arab nations for the manpower they needed. In Bahrain, for example, the judicial system was composed almost entirely of non-Bahrainis such as Sudanese, Lebanese, Palestinians, and Egyptians. Similarly, practicing lawyers were often drawn from these states. The pervasive influence was twofold: that of Egypt and Lebanon. Both of these countries had well-established law schools from which the majority of legal practitioners in the Arab world graduated. Egypt had the advantage of having important secular law faculties (Cairo, Ein Shams, Alexandria) while being also the center of Shari'a teaching at al-Azhar. As the civil war in Lebanon disrupted university life there, Egypt adopted the central and critical role in legal studies in the Arab world. Presently Cairo University produces over 2,000 law graduates a year.

Egyptians jurists have comprised the main legal draftsmen or jurisconsults for the Arabian Gulf. Sanhūri had an immense influence in Kuwait and Qatar at the time of independence. More recently, the Kuwait Commercial and Civil Codes of 1980 were drafted by a commission headed by three distinguished Egyptian lawyers. The recent Jordanian Civil Code was drafted by a single Egyptian jurist.

Few publishing houses existed in the Arabian Gulf at independence. Although this deficiency is rapidly being altered, the main legal texts used as commentary and explanation are either Egyptian or Lebanese. Perhaps the greatest of all legal texts are the works of Sanhūri. Few practicing Arab lawyers are without copies of his work *al-Wasīṭ* (the *Middle Way*), a multi-volumned work on each and every aspect of civil law

which has become a modern Arab legal classic and much in need of translation. The companion to this text is Sanhūrī's smaller *Al-Maṣādir Al-Ḥaqq* (*The Sources of Obligations*), an excellent comparative summary of the history of obligations. Professor Tamāwī's books on administrative law are the distillation of his life's work in that area of law, and are particularly important in Egypt. Professor Suleiman Morcos's books on civil law, with particular reference to landlord and tenant law, are on a par with those of Sanhūrī, his teacher and mentor. Thus, the practice of law in the Arabian Gulf ineluctably draws on the wealth of Egyptian material.

B. Legislation

One important area in which recourse to Egyptian law and expertise is very clearly seen, and which has not so far been mentioned, is that of decennial liability. The French Civil Code of 1804 first provided for a ten-year warranty of the contractor and architect of a building for defects and safety. The French concept was adopted into Egyptian law in 1876 in the Mixed Civil Code (articles 500 and 501) and in 1883 in the National Courts Civil Code (articles 409 and 410). The same concept appears in the Egyptian Civil Code of 1949, in slightly more extended form, in articles 651 and 654. The actual Arabic of article 651 says that the contractor and the architect "guarantee" (*mutaḍāminīn*) what is built "during a period of ten years" (*khilāl 'ashr sanawāt*). Thus, although decennial guarantee would be a closer translation, this paper shall continue to use the more commonly used term "decennial liability." Saudi Arabia and some of the shaikhdoms of the United Arab Emirates have adopted a requirement of decennial liability in their public tender regulations. Of course, the policy behind decennial liability is to ensure that the contractor and architect insure themselves, and hence the property they build, against such liability. In this way, it becomes merely another overhead expense which is added to the cost of the construction contract. Egypt's public policy prohibits restricting or reducing decennial liability by contract: any such contract is null and void.¹¹ Under the guise of public policy there have been attempts to apply decennial liability in certain gulf states even though not strictly part of the states' law.

C. Case Law

There exists very little writing by Western academics on the modern case law of Arab countries. Islamic law itself shows little regard for judicial precedent. The judge in a Sharī'a court may consult texts of law in order to reach his conclusion, but his judgment does not add to the juris-

¹¹ See Law no. 131, art. 653, The EGYPTIAN CIV. CODE OF 1948.

prudence of the law, which is already fixed and immutable. Most Arab countries, by adopting legal systems based upon French models, have also adopted the attitude toward law reporting that those models engender. Codes are an anathema to judicial precedent. Though they may aim to be comprehensive, codes cannot cover every aspect of law; thus there is room for judicial interpretation. In France, only the decisions of the highest appellate court, the Cours de Cassation, are consistently reported. The reporting is alien to a common law attorney, however. Often the facts are not mentioned or are truncated to the absurdly simple, the judgments are often terse and brief, and there is often little embellishment or explanation. A case will probably not occupy more than a few pages. Where Arab countries practice law reporting, they follow closely the French practice rather than that of the common law.

In most Arab countries there is no organized law reporting. This is certainly true of the Arabian Gulf. There are few official law reports in any of these countries, though there are often ad hoc and haphazardly prepared transcripts of judgments (often prepared by the winning party), which are known and circulated amongst a limited number of practitioners. Each law firm builds up its own method of law recording and its own precedents. Occasionally these transcripts can be quoted in court, although there seems to be little regard for judicial precedent (another French trait). The major use of such material is, therefore, to indicate how the court might act on any issue. Gradually, however, even the Gulf States are starting to report important cases, even though their availability is often limited to the courts and very few practitioners. The mystique of the law dies hard.

Egypt, as one might expect, is a vast treasure house of judicial material, a treasure house as yet unplundered. The Mixed Courts and the Native Courts produced a mass of case law. This jurisprudence is of very high quality because of the excellence of the judges recruited by the Mixed and Native Courts and is still quoted and used in Egypt today. Its importance lies in the key feature of the Mixed Courts—the excellence of the judges it recruited. The main work of the Mixed Courts rests in the *Bulletin de Legislation et de Jurisprudence Egyptiennes*. This work, published from 1889 to 1949, totals sixty volumes. A second series was commenced after 1949, consisting of French translations of the most important Arabic judgments for the use of the many still practicing foreign lawyers permanently residing in Egypt. It lasted only a few years. The cases in the Bulletin are written in French (occasionally in English or Italian) and are generally very brief after the French fashion. Due to the expansion of the Mixed Courts, the *Gazette des Tribunaux Mixtes* began in 1911 and lasted until 1949. This was a more informal work and included articles and discussions of the law as it was and should be, with details or suggested changes and reforms. Finally, the *Journal des Tribunaux Mixtes* (three volumes a year instead of one) was begun in 1921 and lasted until 1949. This journal comprised mainly the courts' notices and announcements.

The Native Courts, in similar vein, produced their own jurisprudence, with their own official bulletin running from 1899 to 1949. The cases were fully reported in Arabic with summaries in Arabic, French, Italian, and English. After 1949, this became an official bulletin of the national courts and published reports from the lower courts and the appeal court. It ceased publication in 1955.

In 1933-1934 the Native Courts were reorganized and an appeal court created, the Mahkama al-Naqd, or Court of Cassation. From its inception, this court was headed by one of Egypt's greatest judges, Abd al-Aziz Fahmy Pasha. His judgments have been collected and published many times. They are a model of clarity in style and content.

When the Mixed Courts were abolished in 1949, the Native Courts (or rather the national courts) took over the Mixed Court's business and the Mahkama al-Naqd became the Supreme Court in Egypt. A new set of law reports of the decisions of the Mahkama al-Naqd was begun. These are the present law reports of Egypt.¹² Two sets of reports are produced, one for civil matters (*madani*) and one for criminal matters (*guzi'ya*). The number of volumes produced in each set varies from year to year but is generally two or three, making a total of four to six volumes of law reports each year. This compares favorably with the English official law reports.

The judgments in these law reports exhibit both civil law and common law traits. Over the years, they have come to provide a headnote, a set of facts, and a verbatim judgment, just like English law reporting, though they are still brief and terse compared to the majority of English cases. Also, only the Mahkama al-Naqd decisions are reported.

One problem with this material is its unavailability outside Egypt. There are no copies in any English library of note, and the Library of Congress has only odd volumes. Even within Egypt it is quite difficult to obtain access to a set—neither the American University in Cairo nor the Dar al-Kutub has them. The most complete collection of Egyptian materials, ancient and modern, is in the library of the judges of the Mahkama al-Naqd; Cairo University has the up-to-date series.

Elsewhere in the Middle East, where there is little or no reporting of case law, the judges often turn to Egyptian decisions to find a solution. This is more obvious where the laws under consideration are based on Egyptian laws. For example: There are a number of cases in Qatar which suggest that the principles of decennial liability are applied as part of public policy. One such case is case 34/92 of 1972. GISF agreed to construct a steel warehouse for TEA in 1972 for 27,600 Qatari Riyals (QR). GISF started the work but on March 11, 1972, the date when the warehouse should have been handed over, it was not completed, being without a roof. In May 1972, the warehouse collapsed in a storm. TEA commenced proceedings against GISF. The court stated that the liability of the con-

¹² Majmu'at ahkam al-Naqd (Maktab al-fani Cairo).

tractor for defects in buildings he erects was a liability (*a damān*) of a public law nature which it was not possible to contract out of. The period of liability (*damān*) was fixed by custom at five years. The Qatari Court of Appeal affirmed the Court of First Instance's judgment and supported its decision by reference to the contractual provision to which the parties had agreed. This decision was rather ambiguously followed in later Qatari cases.¹³

Cases on trademark law also exhibit the influence of Egyptian law.¹⁴ The United Arab Emirates has not enacted a trademark law; therefore, the courts have fallen back on early Egyptian practice and case law. An early case is that of *Thani ben Murshid v. Al Nawis Company*,¹⁵ the plaintiff was an agent for a Dutch company producing a well-known canned milk under the trademark "Rainbow." The defendant company imported for sale an inferior product called "Rainshow." The plaintiff company sued to stop this business. The court in Abu Dhabi looked at Abu Dhabi law first, and only when the answer could not be obtained from that, did it look to Islamic law generally and then the laws of other Arab countries. In this case, the court looked at textbooks from Egypt and Lebanon and some Egyptian case law. It decided (as the Egyptian courts had done in the early 1950's) that trademark infringement was a form of unfair competition. It was important for the state to protect its citizens from false, and possibly dangerous, consumer goods. The yardstick was the similarity of the names used.

Later cases developed this approach. In *McDonalds Company v. Arzūni*,¹⁶ the defendant set up a restaurant called "McDonald's Restaurant" and registered its name at the Ministry of Commerce. Notwithstanding registration, the defendant was restrained from using this name. It was irrelevant that "McDonald's" had not been registered in Abu Dhabi. It had been registered elsewhere in the world and was internationally known. It had the right of first user, and thus it would be protected. Again, an Egyptian textbook was cited in support.¹⁷

In other matters, United Arab Emirates courts have preferred to refer to general principle or to Islamic law, rather than directly to Egyptian law. Certain United Arab Emirates courts (particularly those of Dubai) have considered the validity of shipping contracts (bills of lading and

¹³ Appeal 16228/99 (1980) and Appeal 88/1400 (1982).

¹⁴ See the excellent article by Nasrallah Mangalo, *Trademark and Unfair Competition Law in the United Arab Emirates* in 13 I.I.C. 588-625 (1982).

¹⁵ English text of this 1973 Abu Dhabi decision appears in 12 I.I.C. 883-90 (1981)(civil court decision) and 891-92 (court of appeal decision).

¹⁶ The English text of this 1980 Abu Dhabi decision appears in 13 I.I.C. 656-61 (1982).

¹⁷ See also Judgment of Pif Paf 13 I.I.C. 661-65 (1982)(Dubai Civil Court of First Instance); Judgment of Prophecy and Cachet, 13 I.I.C. 665-68 (1982)(Dubai Civil Court of First Instance); and Judgment of Brylcream, 13 I.I.C. 668-71 (1982) (Dubai Civil Court of First Instance).

charterparties) which refer to a foreign choice of law, and which contain limitations of liability for the shipowner based on the Hague Rules (or more rarely the Hague-Visby Rules). This has given rise to two related questions: (i) the applicability of foreign choice of law clauses in contracts to be performed in the United Arab Emirates, and (ii) the validity of such exemption/limitation clauses in United Arab Emirates law. Neither question has been legislated for in the United Arab Emirates since it is not a party to the Hague Rules. In these cases the courts apply general principles of contract.

In *Sentosa Island*¹⁸ the question was the liability of the ship-owners for short delivery. The bill of lading referred to Singapore law, where the Hague Rules were applicable, which would reduce the cargo-owners claim from the actual loss of almost \$8,000 to sterling 1100 per carton lost. It was argued that for a Dubai court to apply a foreign law was contrary to public policy. This position was rejected. The court enforced the contract of the parties and as the foreign choice of law clause was part of the contract it had to be enforced too.

In the *Strathnewton* case,¹⁹ it was argued that a bill of lading which incorporated the Hague Rules was an "oppressive" contract which ought not to be enforced. The court accepted that it might be an "oppressive" contract in certain circumstances, but drew a distinction between bills of lading where the value of the goods was declared and those where the value was not declared. A limitation clause in the former case was considered oppressive because it was inconsistent with the declaration; in the latter case it was not because the cargo-owner could have chosen to declare the value but had not done so.

In other cases, such as *Iason* decision,²⁰ the court looked at the Brussels Convention and concluded that its provisions might be applied as custom. The maritime contract of carriage gave the stronger hand to the carrier, thus it was for the court to protect the weaker party, the cargo-owners. The court, however, would only intervene if the compensation provided for in the contract was *trivial* in relation to the underlying value of the goods shipped.

United Arab Emirates courts have also had problems with provisions of payments of interest. In *Abullah Fashid Hilal v. International Bank of Credit and Commerce*,²¹ the Abu Dhabi Court of Appeal considered the question of the enforcement of interest on a loan made by the bank to Hilal. The bank argued that interest was payable as it was one of the contractual provisions that Hilal had agreed to upon taking the loan. The bank further argued that the payment of interest was not in conflict with

¹⁸ Civ. Suit No. 1303 (Dubai 1977).

¹⁹ Appeal Case No. 8 (Dubai 1977).

²⁰ Civ. Suit No. 863 (Dubai 1977).

²¹ Civ. Appeal No. 5 (Dubai 1979).

the public policy of the state. The court rejected this argument. Interest was usurious (*riba*), whatever the amount, and whether the beneficiary was a bank or an ordinary person. In support of its position, the court quoted the Court Law of 1973 by which every agreement contrary to Shari'a law was to be void (article 85), and also a hadith of the Prophet that "people shall be bound by the terms of their agreement save where they allow a prohibited thing or prohibit a permissible thing." One judge out of the three dissented strongly.

Although this was not an isolated case, the position was one which could hardly be tolerated in a modern commercial environment. Thus, in 1981, the Council of Ministers of Abu Dhabi decided that the courts should decide questions of interest *in banking matters* on the basis of the relevant agreements between the banks and the persons to whom the loans were made. The Ministry of Justice was informed and the Minister informed the President of the Court of Appeal.

VII. CONCLUSION

The material cited in this paper supports a number of broad conclusions: (i) the development of law in the Middle East (and particularly the Arabian Gulf) has been one of inextricable borrowing—the majority of the foreign provisions have an origin in French law; (ii) the modernization of law in the Arabian Gulf states is increasingly replacing the residue of common law which remains only as part of the internationalized law of commerce; and (iii) Egyptian law strides the Arab world like a colossus and has not yet been adequately treated by Western academics.