BRILL

Journal of the Economic and
Social History of the Orient 55 (2012) 718-745

JESHO
brill.com/jesh

Filling the Void: *Sharīʿa* in Mixed Courts in Egypt: Jurisprudence (1876-1949)

Francesca Petricca*

Abstract

Mixed courts were an internationally staffed bench that represented the diplomatic alliances between capitulary powers and the Egyptian government. Decisions delivered by these courts were based on the so-called "mixed codes," which provided parties to a dispute with substantial scope for legal maneuvering. On the basis of a case study concerning a mortgage on a *waqf* (charitable endowment), I shall explain how legal actors, in spite of the state strong presence as regulatory agent, took advantage of the loopholes in the mixed-court system. Far from being an obstacle in the quest of justice, legal vagueness became an opportunity for anyone able to expand his own legal horizons beyond the limits imposed by the colonial rule.

Les Tribunaux Mixtes étaient des tribunaux internationaux résultat de la coopération entre les puissances capitulaires et le gouvernement Egyptien. Les jugements étaient basés sur les « codes mixtes », des codes crées expressément pour servir dans le tribunaux mixtes, toutefois les nombreuses lacunes des codes laissaient la place a des manœuvres juridiques à la fois audacieuses et peu orthodoxes. Sur la base d'un cas d'étude concernant un *waqf* et une hypothèque je démontrerai comment les acteurs légaux, en dépit de l'action régulatrice de l'état, profitaient des lacunes présentes dans les codes mixtes. L'imprécision des codes en fait se traduisait en opportunité pour tous les acteurs légaux capables d'agrandir les limitations des horizons juridiques fixés par le gouvernement colonial.

Keywords

Egypt, colonialism, state legal pluralism, civil law, *waqf*

*) Francesca Petricca, Graduate School "Society and Culture in Motion," Martin-Luther-Universität Halle-Wittenberg, fra.petricca@gmail.com. I thank Ido Shahar and Paolo Sartori and the anonymous reviewers of *JESHO* for their thoughtful comments on earlier drafts.

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DOI: 10.1163/15685209-12341272

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Introduction

"Law is much more than state law" is the primary tenet of legal pluralism.[1] Since the 1970s, the flexibility and broad applicability of the concept contributed to its circulation, and legal pluralism imposed itself as a pivotal notion in post-colonial studies and legal anthropology.[2] Though legal pluralism found a broad range of applications, it became increasingly difficult to disentangle the concept from the binary opposition of "state law" to "non-state law." Indeed, the advocates of legal pluralism considered non-state law as the most significant expression of a pluralistic normativity, because non-state laws were conceived as a challenge to legal centralism.[3] Only recently have students of legal pluralism begun to examine state law and found that state-centered pluralist normative orders are socially relevant and allow a high degree of legal agency on behalf of private citizens.[4] Legal pluralism can thus serve as an analytical tool for explaining the features of normative plurality, which are intrinsic in the application of state law.

I argue that this approach applies also to the case of Egypt at the turn of the twentieth century. I shall support this argument by analyzing the workings of the mixed courts of Egypt (1876-1949) and by situating them in a context of state legal pluralism. Mixed courts were an international bench created to adjudicate disputes in commercial and civil law between Egyptians and foreigners. During their existence, they operated within a legal order that envisaged the application of four different bodies of law, all of which were recognized by the state. My aim is therefore to find out how the coexistence of different normative systems of reference influenced the process of adjudication among foreign residents in Egypt. The paper is organized as follows: In Part 1, I shall demonstrate how mixed courts applied an internal-pluralistic policy by seeking recourse to more than one normative system at the same time. In Part 2, by drawing on a case study,

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1) See Dupret 2007, http://www.ejls.eu/1/14UK.pdf. According to Dupret one of the forerunners of legal pluralism was Georges Gurvitch; see his *L'idée de droit social. Notion et système du droit social: Histoire doctrinale depuis le 17me siècle jusqu'à la fin du 19e siècle* (Paris, 1932).

2) On the theory of legal pluralism, see also Keebet Benda-Beckmann 1981: 117-59; Franz Benda-Beckmann 2002: 1-55; Merry 2000; Tamanaha 1993: 192-217; Teubner 1992: 1443-62.

3) Griffiths 1986: 1-55.

4) Shahar 2008, www.bepress.com/cgi/viewcontent.cgi?article=1192&context=til. See also Benton 2004 and Sartori 2009: 627-52.

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I shall illustrate how legal actors pleading before mixed courts brought about a normative pluralism, which consisted in manipulating the given legal order in accordance with their cultural understanding, personal interests, and agendas, despite the boundaries between legal systems drawn by the state.[5]

1.1. *Mixed Courts and Egypt's Colonial Administrative Machine*

The role of mixed courts in Egypt's semi-colonial society is of major importance in understanding the relations between the courts and the Egyptian state-centered legal pluralist system. In 1876, the year mixed courts were established, Egypt was still part of the Ottoman Empire, although it enjoyed considerable political and administrative independence from the Porte. The pivotal element is the presence of capitulations (*imtiyāzāt*).[6] These granted the nationals of the capitulary powers juridical immunity and fiscal exemption within the Ottoman Empire. The privileges granted by the capitulations fostered European migration, mainly Greek and Italian, to Egypt and paved the way for the development of a European business milieu led by French and British nationals.

By virtue of capitulary rights, foreigners had the right to be heard by the consular courts of their home countries. By 1876, however, the consular system was about to collapse, due to the inordinate duration of lawsuits and the superimposition of the jurisdictions.[7] Given such a chaotic situation, capitulary powers agreed with the Egyptian government to establish special courts—the so-called "mixed courts"—that would replace consular

[5] Concerning "normative pluralism," see Bowen 2005: 152-69. Bowen remarks how, in Suharto's Indonesia, minorities (religious, ethnic, or linguistic) were governed according to distinct sets of norms, irreconcilable on an abstract and normative level, which were reconciled and therefore became convergent through processes of reinterpretation. On a political level it means that "each set of norms advocates to its own audience while engaged in serious negotiations with the other camp(s)": 167.

[6] Capitulations were special agreements between the Porte and a few foreign, mainly European, states: Australia, Austria (until 1918), Belgium, Denmark, Egypt, France, Germany (until 1918), Greece, Holland, India, the Irish Free State, Italy, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, the United Kingdom, and the United States of America.

[7] The great number of foreign residents of different nationalities entailed a complicated and unclear system of access to courts. Lawsuits were slowed down also by the fact that the consular courts were not allowed to act as second-instance tribunals, meaning that all appeals had to be adjudicated in the foreigners' home countries.

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courts in civil and commercial disputes between Egyptians and foreigners and among foreigners of different nationalities. On one hand, the establishment of the mixed courts reduced the conflicts of jurisdiction among the consular courts and the local courts, but on the other hand they led to the creation of a new legal forum. The result was that, by 1876, four parallel jurisdictions, recognized by both the Porte and the Egyptian government, were operating in the Egyptian legal arena.

The following table gives an overview of the competences of each jurisdiction.[8]

	Foreigner vs. foreigner of the same nationality	Foreigner vs. foreigner of different nationality	Egyptian vs. foreigner	Egyptian vs. Egyptian
Civil	consular courts	mixed courts	mixed courts	national courts
Penal	consular courts	consular courts (*actor sequitur forum rei*)	consular/ national (*actor sequitur forum rei*)	national courts
Personal statute	consular courts	consular/ mixed/religious	religious courts	religious courts

Nationality and religion were pivotal criteria for identifying the courts' jurisdiction over a dispute. Access to courts was, in fact, governed by the nationality of the plaintiffs in the civil and penal fields and by religious affiliation in matters concerning personal law. This organizational structure was modeled on the Ottoman pattern, in which special communal courts were designated for each of the recognized religious communities (millets).[9]

Notwithstanding the strict designation of the courts' competences, the borders between jurisdictions were rarely respected. People—locals in particular but even *mutamaṣṣirūn* (literally, "Egyptianized," referring to foreigners whose families had been living in Egypt for generations)—were

[8] National courts were established in 1883.

[9] For a comprehensive work on the Ottoman legal system, see van den Boogert 2005.

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constantly playing with their religious affiliation, so as easily to invoke the protection of a capitulary power to acquire a foreign nationality and switch from one legal venue to another without major concerns. The collapse of Ottoman political structures (1918) did not affect the former subdivision into millets. At least until 1929, the year of the promulgation of the nationality law, there were several options for those "infra-citoyens" (the term is used to define people enjoying the protection of a capitulary power) and who, taking advantage of the vagueness of the citizenship law, moved comfortably between mixed and national courts in order to find the most convenient venue.[10]

To understand how mixed courts were operating in the legal system, we must also take account of the peculiar form of colonial control that foreign powers exerted in Egypt. Great Britain, even after the military occupation of the country in 1882, never managed fully to impose its presence in Egyptian public life. National political parties and competing colonial powers were determined to fill all the available public spaces, making shrewd use of the instruments at their disposal. Foreign powers were eventually ready to cooperate in order to weaken British influence while enhancing their own. The simultaneous control of strategic sectors in Egypt's public life would, in fact, have created stability in the colonial states' power relations. Such a balance of power between colonial states could be achieved, thereby strengthening the connections among their nationals permanently residing in Egypt. Capitulary powers thus created internationally staffed institutions which were intended to administer specific sectors of public life. I define such regulatory bodies as structures of combined colonial control.[11] These institutions were generally dominated by

[10] The term *infra-citoyen* is used by Frédéric Abecassis 1992, www.ema.revues.org/index296.html0.

[11] I developed the concept of "colonial combined control structures" in my PhD dissertation while looking for an appropriate definition of the foreign presence in Egypt's administrative and economic life. The massive southern European and Mediterranean immigration was a common phenomenon in North African countries, but in Egypt it was not related to direct colonial rule. Furthermore, the foreign presence in Egypt was diverse, ranging from petty bourgeoisie to colonial officials, seasonal workers, and liberal professionals, as a direct consequence of the capitulary regime, which enhanced immigration. The status of foreigners continued to rest on treaties negotiated and signed by the Egyptian government with each country, even during the British occupation. The extra-territorial rights and privileges resulting from bilateral negotiations thus acted to isolate foreign communities. Consequently, they did not refer to themselves as collectively but separately, as Greeks, Italians, or British. The cohesion of national communities was strong, but it hindered the formation of

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mutamaṣṣirūn and were intended to administer foreign colonies' affairs, inducing a form of cooperation among them and between foreigners and local subjects. In spite of strong endogamy within the national communities and national specialization in specific economic sectors, the various national and religious communities engaged in multiple exchanges that had to be managed by "international" structures while having a solid local basis. Mixed institutions, such as the Quarantine Council, the Alexandria Municipality, and the Caisse de la Dette Publique, can be thus interpreted as the result of compromises intended to provide an effective coordination of foreign interests in Egypt.

1.2. *The Pillars of the Mixed Courts' Jurisprudence*

Mixed courts can be considered the legal platform on which the combined colonial control structures relied. Such regulatory bodies ran the administrative life of the country, managing the entangled international and local interests. By examining the functioning of the courts we will get a hint of the kinds of compromise reached between Egyptian government and capitulary powers in order to administer justice in Egypt, in the presence of a considerable variety of norms, juridical cultures, and legal actors. The instruments used by the mixed judiciary to cope with such legal heterogeneity were formal (mixed codes and the legislative assembly of the mixed courts) and informal (use of custom and the makeup of the courts). We will consider first the formal instruments.

Mixed courts based most of their decisions on codes drafted expressly for this purpose and thus called "mixed codes." They were compiled by a team of jurists led by Maitre Manoury, an Alexandrian lawyer of French origin, who was the secretary of the international commission assigned by the Egyptian government to this task. The job was carried out during the summer of 1872. The legislative corpus comprised six codes: civil, commercial, maritime commercial, civil procedural, penal, and criminal investigator. With the exception of a few modifications, mixed codes remained substantially the same throughout the seventy-three-year history of the institution.

a common transnational consciousness. Colonial combined control structures were meant to fill the gaps between foreign communities in order to facilitate the administration of the country. In other words, they were public spaces conceived expressly as shared by the foreign population and related directly to Egypt's internationalized colonialism.

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It would be pointless to deny the French legal tradition's great influence on the mixed system, but it would be superficial to suggest that the entire system was a poor copy of the Code Napoléon, as some have suggested.[12]

Mixed codes were drafted to serve in courts that had two main tasks, to guarantee foreign investments in Egypt and to repair the damage caused by the system of consular courts. They were thus expressly conceived to operate within the Egyptian context, which included various national and religious communities and various parallel jurisdictions. If it is true that the Code Napoléon was the main source of inspiration, efforts were made to adapt it to the Egyptian context. Bidwell ironically points out: *It would be nearly impossible to pick up another form of inspiration in an epoch in which it was assumed that, if the Code Napoléon did not fit a particular territory, the natives must be at fault.*[13] Mixed codes were, in a way, the Egyptian adaptation of the century's most successful legal codification, akin to the original but with its own special traits.[14]

Jasper Yeats Brinton claimed that mixed codes were the heirs of a Mediterranean legal tradition with roots in both Roman law and *sharīʿa.*[15] Although his point of view is, to some extent, partisan—Brinton served in mixed courts for more than twenty years—his considerations still open appealing perspectives. The similarity, in certain respects, between Roman and Muslim law has been demonstrated by several studies.[16] The mixed courts constitute a link in the long chain of contacts between the two sides of the Mediterranean: occupation always entails an exchange, albeit unequal. In Alexandria's and Cairo's tribunals, however, civil law came to terms not only with *sharīʿa* but with various legal cultures introduced by Egypt's inhabitants. If mixed bench and bar contributed to the dialogue between

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12) Messina 1923.

13) Bidwell 1973: 349.

14) Hoyle 1991: 16. The exceptional interest of Egyptian people in legal issues is acknowledged by many scholars. One of the most authoritative representatives of this theory is Enid Hill, who recognizes that law permeates Egyptian interpersonal relations at any social level, bestowing on Egyptians a real "taste for law." See Hill 1979: 4; Scheele 2008: 895-919.

15) Brinton 1930: 1-2.

16) Jeanne Ladjili-Mouchette, in her attempt to describe a Mediterranean juridical history, claims that tools developed by legal historians and specialists in comparative studies such as diffusion, penetration, reception, and resistance can be easily applied to the Mediterranean case. She thus compares and measures the contacts between Roman law (then civil law) and *sharīʿa*, demonstrating the existence of a coherent Mediterranean juridical system based on common practices and traditions; Ladjili-Mouchette 2007 (1990). One of the best-known exponents of this theory is Patricia Crone 2002 (1986): 178; see Aibek Ahmedov 2009.

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legal systems, they did so unintentionally. They were not an international organization promoting peace and cooperation but a semi-colonial establishment created to enhance European business. Power relations played a role in the administration of justice, and the mixed judiciary often claimed to have brought *l'esprit de la loi* to Egypt, but beyond colonial rhetoric, it is commonly acknowledged that mixed courts, by limiting consular influence, limited abuses and arbitrariness and contributed to the reorganization of the judiciary in the country.[17] The system worked for seventy-four years and proved to be, for the most part, efficient. Many Egyptians decided to plead before mixed courts, observing that they were more reliable than consular or even native courts.[18]

One reason for this success is, paradoxically, the vagueness of mixed codes. Mixed courts often adjudicated cases in which the plaintiffs claimed their rights according to culturally distant and sometimes conflicting norms. This required the judiciary to be acquainted with elements of Islamic law, as it was the system to which the majority of the local population had recourse. In mixed codes, however, there was little of *sharīʿa.* The lack of precision in mixed legislation reflected Manoury's intentions: in many cases, he expressly avoided precision. The variety of actors' backgrounds and the peculiarities of cases pushed the jurist to privilege flexible attitudes: silence in many cases was preferable, and the judge would have been free to apply the norm that best suited the case. The ruling on a mortgage issued in Alexandria could not, in most cases, be compared to a ruling issued on the same subject in Paris, though the law applied appeared similar.[19] The mixed bench, however, had some instruments with which to deal with legislative lacunae, mentioned explicitly in Articles 34 R.O.J. (Réglement d'Organisation Judiciaire) and 11 C.C.M. (Code Civile Mixte): "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."[20] The principles of equity and natural law could, in any case, be applied to a

[17] See the contrasting view of Hoyle: 192, and Nathan Brown 1993: 34.

[18] Native courts were Egypt's official state courts (*al-maḥākim al-ahlīya*), which were established in 1883. If we compare the numbers of suits taken to mixed and native courts, the figures are very similar: between 1932 and 1936 an average of 111,800 suits per year were taken to mixed courts, while native courts judged an average of 132,000 suits per year during the same period (Egypt Statistical Yearbook). The figures officially reported are not perfectly reliable, but they do give us a rough idea.

[19] Herreros 1926.

[20] C.M.M., art. 11.

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limited number of cases and only as a last resort. The judge could never apply these principles against enacted law (*contra legem*) or in cases in which he could fill the gaps by recourse to analogy, customary law, and Muslim norms.[21] The principle of legal certainty could not be derogated in favor of the application of abstract concepts in general.[22]

As Gabriel Wilner noticed, it was difficult to cope with the concepts of equity and natural law in cases in which intensely practical, definite, technical, and precise answers were needed. The use of foreign legislation was, nonetheless, unwelcome, and the application of Muslim law was often the solution, especially in cases with social implications.[23]

Mixed courts' tools for filling the numerous gaps in legislation were not, however, restricted to the application of Muslim enacted law and custom. The courts were provided in 1887 with a legislative assembly whose task was to emend mixed codes; it could also present proposed bills to the government. Until 1937 proposed bills were addressed directly to the European Office, an advisory body that was part of Egyptian machine politics.[24] Members of the assembly were either judges sitting in the mixed appeal court or judges belonging to first-instance courts whose nationality was not represented in an appeal court. Mixed courts were assigned functions not normally permitted to the judiciary, in light of their exceptional role as foreigners' communities referees in Egypt. Judiciary reform should have been coupled with legislative reform, in order to facilitate the necessary

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[21] The concept of equity has a parallel in the Islamic concept of *maṣlaḥa*. Meaning literally "utility," it was invoked as a basis for legal decision for the first time by the caliph ʿUmar (r. 13-23/634-44) in Iraq in a dispute concerning land distribution. The concept was taken up in Egypt by Muḥammad ʿAbduh and later by ʿAbd al-Razzāq al-Sanhūrī, who interpreted it as "common interest," to be effectuated by public authorities. See Khadduri, *Encyclopaedia of Islam* 2002: 738-40.

[22] R.O.J., art. 34 states that law and equity were admitted, with the following restrictions: "La loi régit toutes les matières auxquelles se rapporte la lettre ou l'esprit de ses dispositions. 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."

[23] "Toute fois ce fait d'avoir recours au droit français n'a pas été toujours entendu comme une nécessité. Au moins, la dérivation historique des textes n'en était pas, à elle seule, un argument décisif. Tout d'abord, en effet ce n'est pas, au droit français, mais aux institutions musulmanes, qu'il faut avoir recours pour ce qui concerne les rapports juridiques ayant trait aux principes islamiques de la vie sociale" (Messina 1926).

[24] Letters exchanged between the mixed legislative assembly and the European Office for 1876-1922 are in Dār al-Wathāʾiq al-Qawmīyah (National Archives), Majlis al- wuzarāʾ collection, Maḥākim al-mukhtalaṭa, no. 0075-039973.

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changes, but this was not possible because the Egyptian parliament could not, in fact, legislate on matters affecting foreign residents who enjoyed immunity, but it would have been an extremely long and complicated process to ratify every legislative project concerning mixed legislation through the parliaments of the capitulary powers' in their home countries. A compromise had to be found, so legislative powers were bestowed on the judiciary.[25] The legislative assembly, nevertheless, never proposed significant changes to the mixed codes. Legislative vagueness was, in fact, often considered an asset by the staff of the mixed courts and by the legal actors, who could, in such a flexible system, give free rein to their legal creativity.

The mixed codes and the role of the legislative assembly do not, however, fully explain how mixed courts managed the administration of justice in Egypt. This leads us to the analysis of the informal instruments: the use of custom, in a legal tradition that officially rejected the use of custom in favor of enacted law; and the unique legal background of the mixed bench and bar. Mixed courts commonly acknowledged the use of customary law (*ʿurf*) in the administration of litigation between locals and foreigners.[26]

Antonio D'Emilia acknowledges the similarity between the jurisprudence of the mixed courts and Muslim customary principles, especially in contract law.[27] He observed that, in the Egyptian Civil Code of 1949, numerous practices attributable to Muslim tradition passed from mixed-court jurisprudence to the new civil code without appreciable change. Contracts such as *ḥikr* (or *ḥukr*), which served to allow a form of revenue from *awqāf* or other mortmain properties, were assimilated by the mixed judiciary without major problems.[28] Another example of the influence exerted by Muslim legal practices on the mixed courts is presented by Hoyle who, using as an example the Islamic prohibition on selling a crop before it had germinated, shows that mixed codes provided that the sale of crops and fruits that had not yet germinated was void. The rule meant that farmers could not sell their crop before it had germinated, but the sale of not-yet-harvested crops was often a necessity in Egypt, in order to raise

[25] The legislative assembly nevertheless had no power to emend legislation concerning foreigners' rights in Egypt. This subject was still regulated by international agreements between the capitulary powers and the Egyptian government. The delegation of such matters to an assembly would, in fact, have entailed a loss of bilateral power and transformed the mixed courts into a sovereign entity!

[26] Brinton: 152.

[27] D'Emilia 1956: 556-7.

[28] Ibid., 561.

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money to harvest them. This rule, originally conceived to prevent speculation harmful to farmers, was thus inconsistent with Egyptian agricultural custom, and the article was interpreted to allow agreements to sell the crop at the market price on the day of delivery.[29]

To understand how mixed courts dispensed justice in Egypt, we must say a few words about the internal organization of the tribunals. In her diary, Mabel Caillard describes mixed-court judges as gentlemen nearing retirement and eager to spend their last years of service in a pleasant environment in a sunny place, where, between a bridge game and a cocktail party, they eventually dispensed justice.[30] Though the chronicles witness an active social life and frequent contacts between the staffs of the mixed courts and the Egyptian elite, including the royal family, siding with Caillard would be unfair towards these experienced jurists who usually moved on to mixed jurisdictions after a brilliant career in their homelands and in Egypt.

In 1876 there were thirty-two judges serving in Alexandria, al-Mansura, and Cairo (the three official seats of the mixed courts), and two-thirds of them were foreigners. During the 1920s, which saw the apogee of the courts, the number reached seventy. The proportion of foreigners changed over the years, and, after 1937, retiring foreign judges were replaced by Egyptian judges. The foreigners were frequently recruited from among diplomats or colonial administrators who boasted significant experience in international affairs, while Egyptians usually graduated from the l'École Française de droit that was established in 1892 and was considered the best way to obtain a place in the mixed bar. The school has been described by Donald Reid as the arena for struggles between the French academic approach and the (unsuccessful) British attempts to anglicize the Egyptian legal system.[31] Egyptian jurists frequently aimed to join mixed courts in order to complete their doctorates abroad, preferably in France.[32] Jurists serving on mixed courts required international experience, because they were expected to have a good command of the enacted laws and customs of three or four different legal systems. Mixed-court judges were appointed

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29) Hoyle (1991: 78) quotes C.C.M. art. 330: "La vente des fruits d'un arbre, quand ils ne sont pas poussés, ou d'une récolte qui n'est pas encore sortie de terre, est nulle."

30) Caillard 1935: 83-4.

31) Reid 1974: 24-57.

32) A significant number of dossiers regarding the careers of mixed judges is available in the Egyptian National Archives: Dār al-Wathā'iq al-Qawmiyya (Egyptian National Archive, Cairo), Majlis al-wuzarā' collection, no. 0075 067890.

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by the Khedive, from among eminent foreign and native jurists. Foreigners were chosen from a list provided by their governments. The judges were supposed to have no official relation with their home governments after their appointment. Though they might sometimes have appeared sensitive to European interests, the mixed judiciary was largely independent of internal and external influences. The mixed courts were the only Egyptian jurisdiction granting lifetime appointments to its judges.

Beyond the competence of the mixed bench, it was the rapidity of the harmonization between judges from very different backgrounds that is remarkable. A judge rarely referred to himself as French, Russian, or Belgian. Indeed, different sources confirm the mixed judiciary's solidarity, and the only tangible sign of the judges' national backgrounds was their outfit.[33] The effect must have been impressive. An observer visiting Egypt in 1939 remarks that,

> 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 fez, the French his round cap, the English his big wig, the American in black silk robe but with no head covering 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. 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.[34]

Obviously, in the tribunals' corridors there were not only judges walking in their long, multicolored gowns. Officials, *hussier*s (bailiffs), interpreters, and, of course, attorneys were all part of this cosmopolitan experiment. The employees (*greffiers, hussier*s, and interpreters) had to be at least twenty-four years old and prove a good preparation in the required fields. *Greffier*s

[33] Saʿād Saʿid, son of Zaky Saʿād Bey, a judge in the courts of al-Mansura in the 1940s, in an interview released in Alexandria in April 2009, described the internal cohesion of mixed judiciary as "esprit de corp." See also Brinton: 21, and Hoyle: 18.
[34] Burdick 1941: 495-6.

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(clerks of the court) were generally responsible for deeds and notarial acts. Mixed courts were a huge administrative structure. In the 1930s, 2249 people worked in Alexandria, Cairo, and al-Mansura.[35]

Attorneys pleading before mixed courts were usually French, Greeks, Italians, or Swiss who had moved to Egypt after the inauguration of mixed courts. The requirements for admission to the mixed courts' bar were a legal diploma, good character, residence in Egypt, and three years' training in a lawyer's office.[36] Legal fees were not covered by the Egyptian government, but the bar organized a scheme of legal aid for representing poor clients pro bono. According to Hoyle, this helped mixed courts expand their jurisdiction, although this viewpoint was not shared by the large majority of Egyptians who considered mixed courts a forum for foreigners and rich people.[37] Being part of the mixed bar was an asset, but, because not everyone could count on rich families paying for their studies abroad, many found alternative paths to the bar.[38]

Also part of the mixed-courts structure was the bar (*parquet*), which had two main functions, prosecuting cases on behalf of the state and defending public order. The criminal jurisdiction of the mixed courts was quite restricted, at least until 1937, so the *parquet* mainly performed its second function and was involved in every case affecting public administration. The *procureur général* was a foreigner whose functions are to be distinguished from those of the *contentieux*, which was responsible for prosecuting suits on behalf of the Egyptian government.

A few words should be said on the language of the mixed courts. The courts were established in accord with international agreements and served

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35) *Annuaire statistique de l'Egypte*, 1936-7, section "Tribunaux mixtes."

36) Hoyle 1991: 24.

37) In the columns of *al-Balagh*, a newspaper specializing in juridical chronicles, attacks on mixed courts were frequent; see in particular from 21 April 1937, an article by Abdel-Qader Hamza, editor in chief, in which he expresses his resentment toward these "first-class courts."

38) It is always fascinating to examine the biographies of mixed-court attorneys. Speeches in their memory are a precious source of information, considering the formality and politeness that pervaded the mixed bar. A good example is Habib Rathle. After he received his bachelor degree he was hired by the Egyptian administration as assistant to the director of the Domaine de l'État. This first job enabled him to finance his studies in Paris. After graduating in law he worked as a trainee in the office of Gabriel Bey Kahil and Antonio Colucci before collaborating with Selim Bey Rathle, where he worked until 1920, when he opened his own office with his son Gabriel. In 1923 he became spokesman of the mixed bar. He died in 1938.

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a cosmopolitan community whose official language was French, albeit a very special one. Egypt can, in fact, be considered a multilingual country until at least 1956.[39] There is a rich literature—scholarly and fictional—attesting to the country's linguistic diversity. Language mixture was especially common in Alexandria, though the lingua franca remained French. French leadership in science and administration dated back to the Napoleonic invasion. The French language rapidly became a symbol of modernization, the idiom of science and culture. It was adopted by Muḥammad ʿAlī (d. 1849) and his successors as the official language of the public administration, and Christian religious schools played a decisive role in the diffusion of the language among the Egyptian elite.[40] After 1882, in spite of the British occupation, French was still the lingua franca of the administration and among foreigners of various nationalities. The reasons for this success can be traced first of all to the strategy adopted by the French government after the signing of the Entente Cordiale in 1904. France renounced direct colonial aspirations in Egypt but made significant efforts to maintain its political influence through a vigorous cultural strategy.[41] While the IFAO (Institut français d'archéologie orientale, founded in 1880) assured French dominance in literary and scientific fields, L'École française de droit, and, indirectly, mixed courts, contributed substantially to the adoption of French juridical models.

Maurice Amos in 1929 observed how French law and language were deeply rooted in Egyptian life, in spite of British colonial domination:

> Egypt offers an example of the reception of French law by a people totally alien to any European language, religion, social and political traditions. When, fifty years ago, Nubar Pāshā 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 was that of the French Codes. Eight years later the year after the British Occupation, the French Codes were extended to the newly reorganized native jurisdictions, and this became the law governing all civil causes in Egypt excepting those relating to the family and personal status. The inevitable consequences followed; and after forty years of the British Occupation British Officials were administering French law in Arabic,

[39] Calvet 2004. Traces of the former linguistic diversity are still visible among the Alexandrian elite. In interviewing jurists and political representatives I noticed that it was common to use at least three languages with the same person.

[40] Avon 2005.

[41] The strategy implemented in Egypt was so successful that it induced the French administration to speak of an "Egyptian model" applicable to ex-colonies. See Gerard 1996, http://ema.revues.org/index1942.html.

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> teaching French law in English and arguing French law in French, and to-day a young Egyptian who has learned English at school finds that he has to learn French when he grows up in order to engage in business and to mix in society and the English administrator has often had occasion to observe that proposals for innovation were at least as likely to be criticized on the ground that they offended against the gospel according to Napoleon as for any reason based on the traditions of Islam.[42]

French thus represented modernization without being directly associated with colonial power. Beyond the rhetoric of a "Mediterranean discourse," according to which French was geographically and culturally closer to Egypt than English, it was at that time undoubtedly the Mediterranean lingua franca. Mixed courts were a good example of European cooperation. The official languages were French, Arabic, Italian, and English, but only French was actually used. There were no doubts about which language should be adopted in the new courts. Jasper Yeats Brinton, the last president of the Alexandria mixed court of appeal, did not consider French merely as a language but as the guarantee of impartial rulings in lawsuits, as the codes were conceived in French but for a non-French public. The American judge claimed French was required by collective necessity.[43] Nevertheless the mixed-court language was hybrid, flexible and filled with Arabic and Italian juridical terms.

After this review of the nature of the mixed courts and the tools, formal and informal, employed by the mixed judiciary to administer Egypt's justice in this varied and cosmopolitan environment, it is time to observe mixed courts in action, in order to grasp, by the analysis of cases in which civil law did not always prove applicable, the effective features of the solutions proposed. Let us examine a law case from 1938.

Part 2.1 *Actors Facing the Rule*[44]

In 1930 Asma Hanem Halim,[45] Hussein Pasha Wassef's widow, established a *waqf* (charitable endowment, pl. *awqāf*) of 913 *feddan*s of arable land and urban estates located in Cairo (Zeitoun and Kasr el Aini), Miniah, and Beni Suef.[46] The Société Royale de Geographie, established in Cairo in

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[42] "England and Egypt," Cust Foundation lecture, 1929.

[43] Brinton: 24.

[44] Data concerning the lawsuit are to be found in *Journal des Tribunaux Mixtes* 29 March 1938. The names are transliterated as they are in French documents.

[45] *Hanem* is an honorific title, equivalent to "lady."

[46] Maṣlaḥa Shahr al-ʿAqārī (Land Registry Office), folder 1673/1911ḥ.

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1875, was the official beneficiary (*mustafīd*) of the endowment. Fouad I, king of Egypt, was appointed as trustee (*nāẓir*) of the *waqf*. Asma Hanem Halim died childless in 1936. Her legitimate heirs were her nephews, the princes Mohammad Aly and Ibrahim Halim, sons of Aziza and Youssef Pasha Halim.

After the death of Asma Halim her heirs discovered that she had contracted a mortgage in 1911 on the same lands that were the object of the endowment. In 1937 the heirs pleaded before the Cairo *maḥkama sharīʿa* (*sharīʿa* court) for the annulment of the *waqf* and the consequent possibility of disposing of the lands to pay off the mortgage. The Royal Awqāf Administration also appealed to the Cairo *maḥkama sharīʿa*, requesting a statement that exempted Asma Halim from the mortgage repayment. The administration claimed that there was in the *waqfiyya* (register of endowments) no obligation on its account beyond the taxes.

The *maḥkama* ruled that the *nāẓir* should be exonerated from the mortgage repayment. Endowed properties could not, in any case, be used to repay a debt. The interdiction was stronger if the debt had the features of *ribā* and had been negotiated with a foreign creditor.[47] In appealing the judgment obtained by the competent jurisdiction, the royal administration was formally required to be considered not liable for repayment. The decision and all mortgages were registered at the mortgage office (Bureau des Hypothèques) of the mixed courts in Cairo.[48] Asma Halim's legitimate heirs were held responsible for the repayment.

The heirs rejected this argument and claimed that the Royal Awqāf Administration was liable. They argued that the mortgage installments had to be paid out of revenues belonging to the endowed property. The mortgage was made prior to the endowment, and, if the *qāḍī* noted no anomaly, the heirs could not repair someone else's mistake.

Mohammad Aly and Ibrahim Halim therefore sued the Royal Awqāf Administration in the Cairo mixed court. The involvement of an international stake-holder, the Credit Foncier Egyptien, in fact allowed them to

47) *Ribā*: increase, usury, and interest, and, in general, any unjustified increase of capital for which no compensation is given. The prohibition of *ribā* is prominent in Islamic law. See J. Schacht, "Ribā," in *Encyclopaedia of Islam* (Leiden: Brill, 1995): 8:491-3.

48) After their establishment, mixed courts completely reorganized the Egyptian cadastral system. All real-estate purchase deeds were registered in the Bureau des Actes Notariés, which was controlled by the mixed-courts bench. Even more significant was the role played by the Bureau des Hypothèques. Mortgage deeds were thus registered and regulated by the combination of enacted law and customs accepted by the mixed courts.

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plead before the mixed courts, and all cadastral acts were registered with the Bureau des Hypothèques, making the mixed courts the natural jurisdiction for the dispute.

This is a clear demonstration of how the official organization of the Egyptian juridical system, a state legal pluralism, enabled the actors to practice forum shopping, which is generally considered a characteristic of non-state legal pluralism.

The heirs, determined not to pay, referred to a judgment issued on 9 March 1915 by the Cairo mixed court in the matter of Chawarbi Pacha, in which *waqf* was compared to a donation and therefore, according to Ḥanafī scholars, creates no obligation for the donor or the donee.[49]

The Cairo mixed tribunal did not accept this thesis. Zaki Bey Ghali, president of the Cairo Third Civil Chamber, stated that, in this particular case, the donation was destined for works of public utility, Asma Halim's endowment was, in fact, a *waqf khayrī* (pious foundation). Because it was not a *waqf ahlī* (pious foundation destined to the members of a family), it could not be considered a donation, and the beneficiary was thus not entitled to dispose completely of the foundation. Moreover, Ḥanafī doctrine guaranteed creditors rights prohibiting *hiba* (gift between living people) in cases of insolvency.

The *waqf* is perpetual by law and cannot be used to repay a mortgage. If Asma Halim was able to endow those plots of land it means that she had other properties that could be used to pay off the debts. According to Ḥanafī doctrine, if the property was handed over before the endowment was created, or the founder dies or loses his/her right of disposal over the property as a result of bankruptcy, the *waqf* is void. The *waqf* is void in any case when it injures a third party, namely a creditor.[50] In this case, however, the *waqf* could not be void, because it did not harm the creditor.

Chalom Bey, legal representative of the heirs, tried, in his opening argument, to appeal to Article 53 of C.C.M. (Code Civile Mixte), according to which the creditor (in this case, the Credit Foncier Egyptien) was enabled to require that an act be overridden when it could harm the creditor's interests, which was an indirect confirmation of the Ḥanafī provision of Chalom Bey. But the strategy proved unsuccessful. Mixed jurisprudence did not, in fact, recognize the creditor's right to claim the exact object of the mortgage if the debtor had the possibility of paying off the debt with

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49) The account of the lawsuit is in *Gazette des Tribunaux Mixtes* 6: 108-341.

50) Behrens, *Encyclopaedia of Islam*, 2d ed. (Leiden: Brill): 63.

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other properties, contrary to what had been established in the French Civil Code, which stated that, “Le créancier ne peut être contraint de recevoir une autre chose que celle qui lui est due quoique la valeur de la chose offerte soit égale ou même plus grande.”[51]

Mixed justice did not give the creditor the option of claiming the exact object of the mortgage as did the French code and most other European codes. This was a compromise adopted in order to preserve the many *awqāf* endowed on mortgaged land. *Waqf* annulments could be sought only in extreme cases. Under normal conditions, private properties of the mortgage holder (*mulk*)[52] had to be used as loan pledge.[53] *Waqf* in Egypt was a common instrument for avoiding the repayment of debts.[54] The legislature had to face this problem, and both the national and the mixed civil codes declared a *waqf* void when it might harm the endowers’ creditors.[55] Enacted state law in this case followed Hanafī provisions. The various *madhāhib* (schools of religious law) agree that a *waqf* can be declared null and void by the *qāḍī* if it does not satisfy the conditions of validity or if the founder has introduced stipulations contrary to the essence of the notion of *waqf*.[56]

Zaki Bey Ghali, in his judgment issued on 29 March 1938, confirmed that *waqf* issues had to be dealt with according to the principles of *sharīʿa*. Mixed courts could not claim jurisdiction. The ruling issued by the *maḥkama* had to be considered valid and had to produce legal effects.[57]

The presence of foreign stakeholders could not change this provision. Madame Halim certainly knew about the mortgage at the moment the endowment was created but did not mention the alienated lands as guarantee for the loan and did not specify the means of the debt repayment. The judgment passed by Zaki Bey Ghali commanded the payment of loan

51) Art. 1843 C.C.M.

52) The Ottoman code of 1858 consisted of 132 articles and defined three categories of law: *mulk* (privately owned lands), *mīrī* (property of the *amīr*, the prince, the governor), and *waqf*. The same distinction was maintained in Egypt in the period under consideration. See Owen 2000: xix, and Siraj 2006: 241.

53) Art. 76 C.C.M. allowed the registered creditor to claim rights on the *waqf* as a last resort. It was inspired by the Ḥanafī doctrine of the protection of the creditor’s rights.

54) Cucinotta 1937.

55) Art. 76 C.C.M. and art. 53 C.C.M.

56) Behrens, 63.

57) The native Egyptian R.O.J. was stricter than the mixed R.O.J. National civil tribunals were not even allowed to express a juridical opinion about *waqf* issues.

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interest, amounting to 80,000 Egyptian pounds. The Royal Waqf Administration was ordered to pay the interest on the loan to the Credit Foncier Egyptien, which amounted to 5750 Egyptian pounds, while the heirs had to pay off the total debt on Asma Halim's properties.

Part 2.2 *Behind the Case: Context Reconstruction*

This lawsuit presents several aspects that deserve a detailed examination from both a juridical and a social perspective. Asma Halim, according to members of her family, was a sophisticated, well-educated woman with a passion for business, despite her aristocratic origins. She was involved with her husband, Hussein Pasha Wassef, former Governor General of the Suez Canal, in several economic activities, mainly the purchase of real-estate properties.[58]

Asma Halim and Hussein Wassef entered into a mortgage with the Credit Foncier Egyptien in 1911. As witnessed by the original deed, which is preserved in the Cairo Cadastral Office, the couple received the sum of 18,510,000 Egyptian piasters (pound cents) from the Credit Foncier, which had to be paid back by 31 January 1930.[59]

There is no mention in the records of irregularities in the payment of the mortgage installments, and Mme Halim in 1930 renewed the loan with the same terms. When she died, in 1936, the mortgage had not yet been

58) I interviewed Zeinab Saiyd and Nevine Halim, grandnieces of Asma Halim, in Cairo on 8 April and 13 April 2009 respectively.

59) Maṣlaḥa Shahr al-ʿAqārī, folder 1673/1911: "Le Caire le 31 Janvier 1911 a 11h25 l'inscription conventionnelle requise au Greffe des Hypothèques du Tribunal Mixte de Première instance au Caire en conciliation des articles 690 et suivants du Code Civil Egyptien Mixte au Profit du Crédit Foncier Egyptien, Société anonyme ayant son siège au Caire, représenté par Monsieur Remi Missel, administrateur délégué demeurant au Caire... contre 1) Son Excellence Hussein Pacha Wassef, fils du feu Mohamad effendi Ismail ex Gouverneur Général du Canal de Suez 2) Son épouse Asma Hanem Halim, fille du feu Ibrahim Pacha Halim les deux propriétaires sujets Ottomans et demeurant au Caire en Rue de Kasr el Aini quartier Kasr el Doubara débiteurs solidaires. En vertu d'un contrat passé au Greffe du Tribunal Mixte de Première Instance du Caire le Vingt-huit Janvier 1911 enregistré sus le N. 456 contenant prêt par le Crédit foncier Egyptien à S.E. Hussein Pacha Wassef et consort sous dénommées de la somme de Pt. Egyptiennes 18.510.00... que les emprunteurs se sont obligés à rembourser au Crédit foncier Egyptien de la manière suivante et jusqu'a concurrence de L.E. 6000,00 en un seul remboursement qui devra être effectué avec les intérêts y relatif au taux de six pour cent l'an... en vingt années à comptes du 31decembre 1910."

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paid off. As far as we can ascertain, it was settled only in 1938, after the mixed court's intervention.

In 1930, after the death of her husband, Asma Halim endowed 913 *feddans* located between Cairo and Beni Souef. The same plots had previously been used as collateral for the loan obtained from the Crédit Foncier Egyptien.

My first hypothesis was that the woman endowed her properties to protect them from the Crédit Foncier Egyptien (C.F.E.). The loan in fact expired in 1930, and she established the *waqf* in the same year. The C.F.E. was an important stakeholder in the Egyptian economic and social milieu.[60] It was the first investment bank to be established in Egypt, and mixed courts could adjudicate the case of Asma Halim because of the presence of the C.F.E. (the foreign actor in the lawsuit). In the event, the bank's expectations were also frustrated. It is true that the C.F.E. did not need to battle Asma Halim's heirs to get back the interest on the loan—Muslim and mixed legislation protected the creditors of a deceased person[61]—but it was not entitled to the original object of the mortgage.

The Cairo *sharīʿa* court in fact declared the *waqf* lawful. Because the copy of the *waqf* deed was unfortunately unavailable in the archives, at least two hypotheses can be made. Either the mortgage had not been discovered during the endowment procedures, or Mme Halim had other properties that could be used as a guarantee but did not specify which ones should had been used in order to pay off the mortgage. The first hypothesis

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60) Mixed courts contributed to the creation of an environment friendly to foreign investment, as claimed by Samir Saul 1997: 296. "Les causes entre étrangers de nationalités différentes ou entre étrangers et Egyptiens relèvent des tribunaux mixtes instaurés en 1875. Pilier de l'édifice juridique de l'intervention européenne dans le pays, ils constituent l'élément indispensable à l'engagement des capitaux européens dans le domaine du prêt hypothécaire. Ces tribunaux sont compétents pour statuer sur la validité de l'hypothèque et toutes ses conséquences, y compris la vente forcée de l'immeuble mis en gage et saisi. La législation hypothécaire à laquelle se réfère cette juridiction s'inspire de celle de la France. L'importance de la création des tribunaux mixtes comme condition préalable à la création de sociétés de prêt hypothécaire ne saurait être exagérée."

61) According to classical doctrine, a person may be in one of two states, either alive or dead, the doctrine suggests that the one is no less important than the other. There are, accordingly, various duties regarded as incumbent after death. The duty to pay one's debts, for instance, a point upon which the prophet Muhammad himself strongly insisted. The Prophet, when invited to pray at the funeral of any of his followers, would inquire whether all his debts were paid. If the debts were not paid he bade the relatives pray for the deceased themselves; see Russel 2008: 32.

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cannot be taken seriously into account, unless we assume that the *maḥkama sharīʿa* officials would not have checked for the existence of a mortgage on the endowed properties registered with the mixed courts' Bureau des Hypothèques. Nevertheless, the facts of the *waqf* and the high profile of the stakeholders would permit no such mistakes. The second hypothesis is that the *maḥkama sharīʿa* found no anomaly. The founder had other properties that could be used to pay off the mortgage without threatening the *waqf*'s integrity and validity.

If Asma Halim did not use the *waqf* to protect her properties from the Crédit Foncier Egyptien, why did she endow the properties? Was she moved simply by pious intentions?

An enquiry among Asma Halim's living relatives revealed that she actually used the *waqf* as a weapon against her legitimate heirs. She did not endow the plots of land in order to protect them from expropriation but to prevent her family from seizing her properties.

Asma Halim and her husband had no children. The adoption regime under *sharīʿa* is strict.[62] A form of adoption is recognized, but the relation between adoptive family and child can never replace the relation between the biological members of the family. This has consequences for inheritance rules. The adoptive parents can use their discretion to bequeath up to one third of their estate to their adopted child, while the remaining two-thirds are transferred according to the compulsory inheritance rules. Siraj Sait stresses that the scheme of mandatory fixed shares among the heirs is inclusive and leaves the actors no alternative. Estates are distributed across a wide range of immediate, near, and distant relatives who cannot be disinherited, and the shares cannot be altered.[63]

Fixed shares are, according to Islamic doctrine, a symbol of God's absolute ownership. As land ultimately belongs to God, it must be distributed according to his will. In his work on Morocco, Rosen claims that "everyone knows the Tradition that has the Prophet saying that knowledge of the laws of inheritance constitutes half of all useful knowledge in the world. And anyone in Morocco, however well or poorly educated, has a firm grasp of the essential of inheritance law."[64]

This does not mean that everyone respected the inheritance law. There are several examples in Egyptian legal history of how individuals used their

62) Russel 2008: 34.
63) Siraj 2006: 109.
64) Rosen 2000: 98.

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juridical knowledge to dispose of their properties according to their wishes. When the testamentary bequest was deemed insufficient, other devices could be deployed.[65]

Because of these restrictions Asma and Hussein Wassef decided to take their gardener's son, Kamal, and raise him as their own child. Asma moved to Switzerland for one year and pretended to give birth while she was there. Back in Cairo, she presented Kamal as her legitimate son. Nevertheless, Aziza Halim, Asma's sister, discovered and revealed the fraud. In spite of the bad relations between Asma Halim and her siblings, she was forced to appoint her nephews as her heirs. Despite apparently complying with her family duties, she was, in reality, using all the tools at her disposal to prevent her nephews from inheriting effectively. As the deceit had been discovered, *waqf* remained the only legitimate juridical instrument.

Fouad I was appointed *nāẓir* (trustee) of the *waqf*, and the official *mustafīd* (beneficiary) was the Société Royale de Géographie. Nevertheless, the revenues never reached the Geographical Society. In the registers of the Société, Hussein Wassef and Asma Halim are never mentioned as donors, and the Society faced a severe financial crisis in the 1930s, as witnessed by budget documents. A donation of 913 *feddan*s would certainly have helped remedy these financial problems.[66]

According to Asma Halim's relatives, the woman, who was on good terms with the royal family, paid a bribe to the king to establish a fictional *waqf* and managed to keep the alienated properties for Kāmal, who died in Cairo in 2003, having lived a comfortable life thanks to the Wassef-Halim fortune. Despite Aziza's complaint, Kāmal was, in fact, still Asma's protégé. This must be proved, but I have found no probative documents. Nevertheless, the presence of corruption would explain why the *maḥkama sharīʿa* made no mention of the mortgage and why the Geographical Society never

[65] The *waṣīya* (pl. *waṣāyā*) is the will but, as seen above, an individual can bequeath only up to one-third of his/her estate to a person who is not a member of the family.

[66] The documents concerning the Egyptian Geographical Society's budgetary troubles are available in the National Archives, Abdeen collection, *Jāmaʿīyāt ʿilmīya* section, 198-202. The current president of the Society, Dr. Abulezz, whom I interviewed in Cairo on 29 March 2009, confirmed that the society never received the revenues of Asma Halim's *waqf* and were not involved in the lawsuit between her heirs and the *waqf* administration. Nonetheless, the Society is presently involved in an analogous case against Ratib Pasha's heirs, who sued the Society, contesting the validity of a *waqf* drawn up in favor of the Society.

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knew about the *waqf* that was supposed to have been endowed for its benefit.

Regardless of the indications of corruption that open fascinating avenues of research, what is remarkable is Asma Halim's ability to take advantage of the legal tools at her disposal in such a varied legal context as that of Egypt in the period under review. Asma Halim resorted to *waqf* and mortgage, using juridical tools belonging to *sharīʿa* and civil law. At the beginning of the twentieth century, it was natural for people with such a social and cultural background to move between the two systems.

The case provides a shining example of the modus operandi of the mixed courts. On the one hand are the interests of a dominant foreign actor, the Crédit Foncier Egyptien, and on the other hand cunning legal actors, such as Asma Halim, who managed to achieve her objectives by a great variety of means. There were two levels of legal interaction, an official one and an informal one, which were both recognized by the state, by virtue of the simultaneous presence of different sets of rules, in this case civil law and *sharīʿa*. The distance between the two juridical systems defined both the boundaries of mixed courts' action and the degree of autonomy allowed to legal actors. In other words, the no-man's-land between normative cultures became an area of legal hybridity, in which plaintiffs and judiciary could play a hazardous, but still fair, game. The winners were, on the one hand, actors such as the Crédit Foncier Egyptien, who were protected by the state institutions, and, on the other hand, those such as Asma Halim, who were at ease in the legal no-man's-land.

Mixed codes protected the rights of creditors from the threat of land alienations, but they also recognized the legitimacy of Muslim institutions and did not allow creditors to claim the exact object of the mortgage, as was the case in the French civil code. If the economic interests of the foreign stakeholders were secured, mixed courts were generally open to contributions from juridical systems other than civil law. They usually avoided the dangerous territory of personal law, their *mission civilisatrice* ending at the threshold of the credit institutes. If, as in the case examined above, mixed courts were forced to deal with religious legislation, they usually claimed a focused indifference, accepting the decisions of the religious courts. The attempts at "domestication" and the efforts at interpretation made by magistrates to cope, for instance, with the idea of *waqf* facilitated the administration of legal affairs. The mixed judiciary did not, in fact, want to subvert the local legal cosmology (as far as they could understand it) and coped with the existent norms to fulfill their idea of justice.

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Conclusions

The mixed judiciary often claimed to have imposed the rule of law and rationality on a system dominated by chaos and irrationality. When attorneys were pleading or judges adjudicating, they had to cope with a chaotic reality and with the local legal tradition—especially *sharīʿa*, but also Coptic canon law and rabbinic law. Especially in matters of personal law, the magistrates of the mixed court applied a variety of laws as required by the circumstances. Power relations between legal systems are evident, especially in the context of legal pluralism, but we cannot agree with post-colonial scholars, in particular Franz Fanon, who, in describing Algeria, argues that native spaces such as the *sharīʿa* courts and their *qāḍī*s represent not only the absence of value but also the negation of value.[67] This was not the case in Egypt.[68] There is no better way to acknowledge a norm than to apply it, and the mixed judiciary was constantly applying norms belonging to different legal traditions, *sharīʿa* included.

Mixed courts were not merely a product of triumphant imperialism. They were born out of a compromise reached between European powers and Egyptian representatives in order to limit the impact of capitulary rights on the legal system. Mixed courts always accepted and coped with the presence of other jurisdictions and maintained the distinction, already present in the Ottoman state, between secular and religious courts.[69] Legal reforms enacted by Ottoman reformers had profound consequences for all aspects of life. Brinkley Messick argues that, when Ottoman reformers established secular schools and courts, they unwittingly transformed Islamic schools and courts into religious institutions. And when reformers began to codify parts of the *sharīʿa*, they transformed sacred texts into confusing and disorganized sources of law.[70] Although Messick does not expressly mention this, it is easy to understand how rationalizing market exchanges also involved the rationalization of other types of property

[67] Fanon 1975 (1952): 41.

[68] Ibrahim 2008.

[69] See Starr 1992: xli-243. The author acknowledges that Ottoman reformers did not challenge Islamic schools and courts but merely set up secular alternatives to them. She observes that Ottoman jurists charged with codifying parts of the *sharīʿa* dealing with commercial transactions deliberately left untouched those parts dealing with family matters, such as marriage, divorce, inheritance, succession, and adoption: 3-21. See also Goadby, 1934.

[70] Messick 1993, http://ark.cdlib.org/ark:/13030/ft7x0nb56r/. In the juridical field, the procedural reforms led also to profound changes in the whole legal discourse affecting interpersonal relations; see Iris Agmon 2006.

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transactions, such as those related to marriage, inheritance, succession, and adoption.

Ron Shaham illustrates persuasively the disorientation of the Muslim judiciary from 1876 to 1952. Despite the climate of profound uncertainty, however, Shaham argues that the rich tradition of *sharīʿa* jurisprudence continued to shape the colonial legal landscape.[71] Mixed courts themselves always looked with interest at the contributions from Muslim law, one of the sets of rules that they had to take into consideration in dispensing justice. In addition to the above-mentioned Article 11 of the R.O.J., which recommended the application of *sharīʿa* in the case of legislative lacunae, what strikes the researcher examining the adjudications of the mixed courts is the extremely pragmatic attitude of the mixed bench. The case study presented here illustrates clearly the flexibility demonstrated not only by judges but also by attorneys and plaintiffs in dealing with situations that required the application of a set of rules apparently alien to civil-law tradition. It could not have been otherwise, as, in many cases, the dossiers passed through the chancelleries of two or three tribunals before arriving at the competent court, which would eventually issue the final verdict. The boundaries, which, in the minds of the founding fathers of the mixed courts, should be clearly defined, often proved to be poorly defined. This was a direct consequence of the sorts of legal actors pleading before mixed courts. We know that access to courts was determined by religion and nationality. Despite this apparent simplicity, it could be difficult to sort out these two criteria, because of people's multifaceted religious, cultural, and national backgrounds.

In nineteenth- and early twentieth-century Egypt, legal actors pleading before mixed courts often had dual nationality, increasing the legal awareness demonstrated by the plaintiffs. The presence of a wider range of legal options encouraged people to explore the possibilities presented by the application of different sets of rules, in order to circumvent provisions that jeopardized their interests. The most daring examples of the circumvention of legislation were found in the area of inheritance law, where plaintiffs and attorneys felt free to adopt unprejudiced attitudes, safe in the knowledge that every practice was allowed, as long as it did not directly contradict Egyptian legislation (art. 28 R.O.J.). The constant references to legal practices other than civil law invoked by plaintiffs and attorneys encouraged the mixed bench to make adaptations in both directions. Mixed

[71] Shaham 1999: 440-55.

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courts were constantly translating legal practices in order to incorporate them into their cultural outlook.

Mixed courts, in fact, always had a practical attitude toward contributions from other legal systems, and they showed no particular concern in applying legal principles alien to civil law, the proclaimed model and source of inspiration. On one hand, this was a direct consequence of the lacunae in the mixed codes, which were intended to be filled by settled case law; on the other hand, legal creativity was assured by the relative independence enjoyed by mixed courts in a legal system, such as the Egyptian one, constantly threatened by intrusions of executive power. But most of all, this was the result of people's understanding of the infinite nuances of law, despite the presence of a strong state regulatory agency: they were taking advantage of the gray areas and the interstices in a system that was, in their eyes, anything but static.

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