Italy in Egypt and Historical Influences on Egyptian Codification

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Abstract

The presence of a large community of Italians in Egypt has assumed a meaningful dimension from the mid-XIX to the mid-XX century. Even if its economic and social profile was generally modest, it succeeded in creating schools, places of worship and meeting attended also by the Egyptian élites and by the members of other nationalities. Particularly appreciated in various professions, the Italians left important traces of their legal culture during the reforms of the Egyptian law after the end of the period of Capitulation system. The creation of the so called 'mixed' and 'national' systems has seen a participation of both Italian jurists and judges. The influence of the doctrine of Pasquale Stanislao Mancini was evident in the formation of the Egyptian private international law. The intensive work of Italian professors and advocates completed the circulation of Italian codification and it strengthened the Euro-Mediterranean legal *koinè*.

I. The First Egyptian Codification

The influence of the civil law model on the legal modernization period in Egypt, which began under Muhammad Ali's reign (1805-1849),[1] was quite clear from its very beginning. The presence of large communities of Europeans, especially Italian, Greek and French people, along with their participation in Egyptian administration, helped the development of that process of modernization.

It is maintained that:

> '(T)he transformation from Shari'a law to civil law started with establishing specialized judicial councils in response to Egypt's gradually increasing subjection to international commerce constraints and Western imperialist influence. These judicial councils progressively limited the competence of Shari'a courts in most of the matters unrelated to personal status'.[2]

It was a process that Egypt, as well as other Arab countries, underwent during

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[1] See C. Chahata, 'Les survivances musulmanes dans la codification du droit civil égyptien' 17(4) *Revue international de droit comparé*, 839-853 (1965); F. Castro, 'La codificazione del diritto privato negli stati arabi contemporanei' *Rivista di diritto civile*, I, 387-447 (1985).

[2] A.A. Alshorbagy, 'On the Failure of a Legal Transplant: The Case of Egyptian Takeover Law' 2 *Indiana International and Comparative Law Review*, 241 (2012).

the 19th century to reform their legal systems, which were mainly based on Islamic jurisprudence (*fiqh*), based on the European civil law model.[3]

Even though Egypt belonged to the Ottoman Empire, the Ottoman Commercial Code (1850) and the Majallah (1869-1872) were not adopted. Instead, the political leaders of Egypt opted for the drafting of legislative instruments imbued with Napoleonic tenets and principles.

Clearly, it has been highlighted that:

> '(I)n countries like Egypt, the Europeanization of law involved two separate, though overlapping, developments. First, governments restructured their legislative, administrative and judicial sectors. Second, they applied codes of statutory law, which were published in a national gazette and administered by a centralized court system'.[4]

The need to overcome the system deriving from the Capitulation treaties, entailing the existence of several foreign consular jurisdictions in matters involving foreign citizens, was the main reason to found a new Egyptian legal order.

The work carried out starting from 1869 by the then Foreign Minister of Khedive Isma'il, the Christian Armenian Nubar Pasha, resulted in an agreement which was signed by the seventeen capitular states settled in the country. The convention established the Mixed Courts, with the aim of overcoming the distortions of consular justice and involving the participation of judges belonging to each of the European powers in Egypt. The Mixed Courts would have unitary authority in disputes both between foreign citizens and between foreigners and Egyptians.

A new set codes were developed specifically for the new tribunals. The task was delegated to the French lawyer Jacques Maunoury who, in less than two years, developed six projects related to civil, commercial and maritime commercial matters, along with civil and commercial procedure, and the penal code and procedure.[5]

[3] See G.H. El-Hahal, *The Judicial Administration of Ottoman Egypt in the 17th Century* (Minneapolis: Bibliotheca Islamica, 1979); H. Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (Albany: State University of New York Press, 1994); N.J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (New York: Cambridge University Press, 1997); R. David and J.E.C. Brierley, *Major Legal Systems in the World Today* (London: Stevens, 3rd ed, 1985), 77 confirm the influence played by Italy and France legislation of the North Africa and Mediterranean Countries.

[4] C.B. Lombardi and N.J. Brown, 'Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law' 21 *American University International Law Review*, 387-388 (2006).

[5] As the 1875 Egyptian codification plan is concerned, see F. Castro, 'Sistema sciaraitico, *siyàsa shar'iyya* e modelli normativi europei nel processo di formazione degli ordinamenti giuridici dei Paesi del Vicino Oriente', in A. Bausani and B. Scarcia Amoretti eds, *Il mondo islamico tra integrazione e acculturazione* (Roma: Istituto di Studi Islamici, 1981), I, 165-202; Id, *Il modello islamico*, in G.M. Piccinelli ed (Torino: Giappichelli, 2007), 121-126.

The promulgation took place on 28 June 1875, together with the establishment of the Mixed Courts that were introduced on 1 January of the following year, when the mixed codification became effective.

Later, in 1883, six more codes, called the National Codes, were enacted homologous to the previous ones aiming to regulate the legal relationship among Egyptians.

It is said that:

> '(T)he dualism so established was apparently viable as long as there were distinct courts applying the two systems, which by their very nature, were opposed both in principle and method – one based on comparative law and human reason and the continually subject to change, while the other is based on premises of authority and faith and is by definition unchangeable'.[6]

The Mixed Civil Code followed the Napoleonic model, only with some reductions and the exclusion of family and inheritance legislations (*al-ahwàl al-shakhsiyya*) which continued to be entrusted to the sharia courts and their procedure, which were reformed on the same occasion.[7]

As far as the Mixed Commercial Code was concerned, it was mainly conformed to the Ottoman legislation which in turn had been modeled on the first and third books of the *Code de Commerce*, leaving maritime commerce out of the Code. For these matter, Maunoury resorted to the Ottoman Code of Maritime Commerce, for it seemed to have filled the gaps which were present in the French model.[8]

It is worth remembering briefly that, together with the mixed codification that solved, at least partially, most of the contradictions of consular justice according to the Capitulation system, the project of writing the Code of Personal Status (1875),[9] was assigned to Muhammad Qadri Pasha (1821-1888). The work *al-Ahkàm al-shar'iyya fi-l-ahwàl al-shakhsiyya*, or the personal status code for Muslims, responded both to the informational needs of the Mixed Courts and to its application by reformed sharia tribunals. The project was completed

[6] See R. David and J.E.C. Brierley, n 3 above, 478.

[7] L. Abu-Odeh, 'Modernizing Muslim Family Law: The Case of Egypt' 37 *Vanderbilt Journal of Transnational Law*, 1075 (2004) describes this system saying that '(T)he Codes applied in the national courts were very similar to those of the Capitulatory courts, with the exemption that some Taqlid rules (ie traditional rules copied from Islamic legal schools) were included. As a result of the establishment of the national court system, the qadi in Taqlid courts saw themselves overseeing an even more contracted jurisdiction, namely, that of the family (marriage, divorce, inheritance, and wills) and waqf (charitable institutions)'.

[8] See D. Palagi, *Le code de commerce maritime mixte commenté par la jurisprudence de la Cour d'Appel Mixte* (Alexandrie: W. Morris, 1929), 146.

[9] F. Castro, 'Muhammad Qadrî Pascià (1821-1888): giurista e statista egiziano. Primi appunti per una bibliografia', in B. Scarcia Amoretti and L. Rostagno eds, *Yād-Nāma. In memoria di Alessandro Bausani* (Roma: Bardi Editore, 1991), I, 161-165.

very quickly and by 1875 it had already been translated into several languages, including Italian. Despite its importance for the new direction taken by the legal system in Egypt, the Code was never promulgated and maintained a semi-official nature. Its role consisted in a sort of *Restatement* of the personal status code which, however, became the precondition of the subsequent 1920 legislation, as well as of the broader one passed in 1929.[10]

The purpose was not to reform the law in force at the time, but merely to make it more easily available for the judges of the new Mixed Courts and the judges dealing with personal status issues.[11]

David and Brierley claim that there was a 'consolidation' of the personal status legislation. They explain that there was a strong interest to start such a project since it would have organized and, somehow, synthesized the many and unclear or vague works available in Arabic, that was not easily comprehensible in all Muslim countries. The conservative part of the Muslim Egyptian society was conscious of the risk of simplification of the law and of the possibility of access to the courts; indeed,

> 'it was only very recently that the authorities have been allowed to legislate on questions of *statut personnel* and public benefactions, even though they aspired to nothing more than setting down rules which had already been admitted'.

They add,

> '(a) dichotomy began to develop between Sharia courts, which continued to apply mostly non-codified Sharia, and the national and mixed courts, in which judges with civil legal training applied western-inspired codes'.[12]

[10] L. Abu-Odeh, 'Modernizing Muslim Family Law: The Case of Egypt' 37 *Vanderbilt Journal of Transnational Law*, 1102 (2004). See J.J. Nasir, *The Islamic Law of Personal Status* (London-Boston: Graham and Trotman, 1990), 35-36 reporting that: 'The eminent jurist Muhammad Qadri Pasha compiled in 1893 The Sharia Provisions on Personal Status, a book of 646 articles on marriage, divorce, gift, interdiction, wills and inheritance, all based on the Hanafi doctrine'; see also D. Sudqi El Alami and D. Hinchcliffe, *Islamic Marriage and Divorce Laws of the Arab World* (London-Boston: Kluwer Law International, 1996), 51.

[11] See K.A. Stilt, 'Islamic Law and the Making and Remaking of the Iraqi Legal System' 36 *George Washington International Law Review*, 731 (2004). These personal status cases 'were usually the last remaining type of case to be heard in Sharia courts before their dissolution, which, in Egypt, occurred in 1955'. The civil courts increasingly took over jurisdiction from the Sharia courts, which, by 1880, had jurisdiction only over personal status, succession, religious endowments, gifts, and homicide. When law no 462 of 1955 on the dissolution of the Sharia and confessional courts transfer the complaints that would be heard before them to the national courts, and Art 1 abolished the Sharia courts in Egypt, personal status cases would be decided by an *ad hoc* division of the national courts.

[12] See R. David and J.E.C. Brierley, n 3 above, 476-477: 'Codes on statut personnel prepared by Kadri Pasha in Egypt (…) are still no more than private works, although their scholarship and strict conformity to the orthodox point of view have generally been recognized'. The Authors

The Egyptian law and that of other countries with an *hanafi* tradition would explicitly refer to Qadri's work for a long time in case of gaps in the law and if there were doubts about interpretation.

Towards the end of 1880, five years after the Mixed Courts were established, the Egyptian government appointed a commission charged with drafting the reform of the judiciary for the Egyptians.

The nationalists wanted these reforms to do away with the Mixed Courts, which they considered an affront to Egyptian sovereignty, and to replace them with a single judiciary which would have absorbed the disputes between foreigners. The publication of the six new codes elaborated in 1881 was sped up since they were to become effective before the intervention of Great Britain in Egypt due to the Sudanese issue. This happened by blocking at the same time a reform inspired to the French model and by introducing common law elements, foreign to the Egyptian system. The National Civil Code became effective on 28 October 1883, while the others followed on 13 November 1883. The last day of the same year, Khedive Tawfiq inaugurated the Court of Appeals and Cairo's Court of First Instance.

In the National Codes preparatory committee, some European jurists working in Egypt were summoned, among whom, besides the French Vacher and the Englishman Low, was the Italian Giuseppe Moriondo, who was charged with working on civil codes and procedure. Among the members, there was also former Justice Minister, Muhammad Qadri Pasha, who not only collaborated with Moriondo, but also specifically dealt with commercial codes.

In addition to the French Code, the authors took inspiration from Italian and Belgian law, and, in some cases, even from Muslim law, due to some influence drawn from the codification of Sharia done by Qadri Pasha.[13]

As adopted, the reform maintained both the two judiciaries and the twelve Codes. Their unification only took place in 1949, twelve years after the 1937 Montreux Convention.

II. The Influence of the Italian Post-Unification Model

The mixed codes system, at first, and then the national codes system, continued to be strongly inspired by the correlated French texts. The presence of Italian jurists and the participation of Italy in the negotiations for the creation of the Mixed Courts, however, allowed Italians to influence some particular institutions' codification, as noticeable considering the debate and the state of progress of national legislation.

add that: 'Major reforms have taken place in Egyptian law on the subjects of *ab intestato* succession and public benefications, although not in form of codes'.

[13] M.Z. Garrana and H.A. Boghdadi, 'Notizie storiche e sistematiche sul Diritto Civile Egiziano' *Annali di diritto comparato e di studi legislativi*, 17 (1935).

In order to understand the influence of the Italian model in Egyptian codes, it is useful to look at the two Parliamentary reports presented by the then Foreign Minister Pasquale Stanislao Mancini[14] on the eve of the initiation of the first mixed codification and the subsequent national codification.

On 20 March 1875, Mancini presented to the House of Representatives the Parliamentary committee's report that was in charge of examining the draft amendment of consular jurisdiction in Egypt.[15] This was a report that he himself took up again in his study concerning the Judicial Reform in Egypt (published in Rome in 1876), by not only focusing on problems of a judicial and trial nature, but also by proceeding with an accurate presentation of history, of circulation of legal models and of the regime of some legal institutions provided for by the mixed Egyptian codes.[16]

The new mixed legislative body was made up of six codes followed by a Judicial organisational regulation: Civil Code, Commercial Code, Maritime Commercial Code, Civil and Commercial Procedure Code, Penal Code, Criminal Instruction Code. As previously mentioned, all of these were inspired by the Napoleonic codification model with some variations due to some reforms that had already been carried out by some European states[17] and deeply examined by Mancini.[18]

[14] For his biography, see I. Birocchi et al eds, *Dizionario biografico dei giuristi italiani (XII-XX secolo)* (hereinafter DBGI) (Bologna: il Mulino, 2013), 1244.

[15] Camera dei Deputati, *Atti parlamentari, Sessione del 1874-1875, doc no 88-A, Relazione della Commissione*, 53 (the Committee was made up of the following Representatives: Mancini (president and rapporteur), Sormanierbi, Miceli, Lacava e Pierantoni) about the draft law presented by the Foreign Minister in cooperation with the Minister of Justice on 13 February 1875 session; 20 March 1875 Session (hereinafter, 1875 Report). The collection of diplomatic documents is important (in one of the so-called House of Representatives' Green Books) presented, also in 1875, by the previous Foreign Minister Visconti-Venosta together with the draft law about Egyptian Reform: Camera dei Deputati, *Atti Parlamentari, Sessione del 1871-1875*, d*oc no 63, Documenti diplomatici concernenti la riforma giudiziaria in Egitto presentati dal Ministro degli Affari Esteri (Emilio Visconti-Venosta) nella tornata del 26 gennaio 1875* (Diplomatic documents concerning judicial reform in Egypt and presented by the Foreign Minister (Emilio Visconti-Venosta) in 26 January 1875 Session), 256.

[16] For the study of the circulation of national and mixed Egyptian codes, it would be extremely interesting to consult the unobtainable E. Marinetti, *Concordanze tra i codici egiziani civile, commerciale, marittimo ed i codici francesi e italiani* (Alexandria, 1876). Very useful, J. Aziz, *Concordance des Codes égyptiens mixte et indigène avec le Code Napoléon, (I. Code Civil; II. Code de commerce)* (Alexandrie: Penasson, 1886-1889). This last book shows, in particular, that some Egyptian rules, as we will see, are original compared to the French model. Still, the possible source is not mentioned, except some reported rules of French special laws in the appendix to the first volume, which have perhaps represented the model for some parts of the Egyptian codes. As concerns the spread of French model in Europe, it is useful to refer to A. De Saint-Joseph, *Concordance entre les Codes Civils étrangers et le Code français* (Paris: Cotillon, 1856), and Id, *Concordance entre les Codes de commerce étrangers et le Code de commerce français* (Paris: Cotillon, 1844) (this one has also been translated into Italian, *Concordanza fra i codici di commercio stranieri ed il Codice di commercio francese* (Venezia: Tip. di Pietro Naratovich, 1855)).

[17] See 1875 Report n 15 above, 38-48.

[18] The project for that code was written by the French Maunoury and then revised by the

In the original text, the regulation established three courts of first instance (Alexandria, Cairo and Zagazig) and a Court of Appeal in Alexandria. Each court was made up of seven judges, among whom four were foreigners and three were Egyptians. The Court of Appeal was made up of eleven judges, and seven of them were foreigners. A foreign Magistrate was eligible by statute to the Presidency and was nominated by the Court itself, within the majority. The Egyptian Government elected the judges, while as concerned foreigners, the respective governments' input was also required. Once appointed, judges were non-removable and could not practice any other profession. The competence of the mixed Courts included civil and commercial disputes between Egyptians and foreigners and between foreigners of different nationalities, except those matters concerning personal status and inheritance, while questions concerning state properties were excluded, as well as those concerning the interpretation and execution of an administrative action.

The new judicature had to apply codes and laws that were supported by the Egyptian Government. Its official languages were Arabic, Italian and French.

Compared to the French Civil Code, the mixed civil one,[19] made up of seven hundred sixty-nine articles, lacks books concerning persons, family and legal and testamentary inheritance (which represent the personal statute, *al-ahwàl al-shakhsiyya,* and continue to be under the authority of the sharia judges) and lacks articles concerning state property and religious establishments (*waqf*).

Other changes concern the classification of goods into four species: free property goods (*mulk*); dead hand goods or *waqf* collected goods; taxation goods or *kharàjì* (state goods that are granted in usufruct to private parties according to some conditions provided for in specific instructions); and free or vacant goods (*mubàh*). What was differently regulated, compared to the French Code, was the property for a discovered treasure (Arts 81-82), accession of goods (Art 92), and testimonial evidence (Arts 285 et seq). The regulatory principles concerning bonds are simplified, whereas the rules regulating trials of invalid contracts were modified. The number of credits on which it is possible to register privileges was restricted.

Changes were not always drawn from the European codes: some rules were clearly taken from Islamic law since it is evident that their 'use is entrenched in the history of Egypt', as in the case of *shuf'a*, a pre-emption right to land.[20]

However, what is particularly relevant here are the rules that Mancini explicitly declared were taken from the Italian Civil Code (1865) in force at the

International committee which was established *ad hoc*.

[19] *Shuf'a* is a 'preference made in favour of a landowner when plantations are purchased and constructions are made on that land with his permission; preference made in favour of the undivided co-owner; preference in favour of the closest owner'. See D. Santillana, *Istituzioni di diritto musulmano malichita con riguardo anche al sistema sciafiita*, I, (Roma: Istituto per l'Oriente, 2nd ed, 1938), I, 393-400.

[20] See 1875 Report n 15 above, 40.

time. First of all, according to Mancini, legal easement of aqueducts (ie the right to request that water necessarily transits through intermediate lands for irrigation and industrial use) would pass onto the Egyptian project, something that the Italian Code, in turn, had taken from the Kingdom of Sardinia Code of 1837 and which was, in turn, taken from the old cities' statutes in Lombardy.[21]

However, as shown by an examination of the law, al-Sanhuri's thesis[22] should be accepted, since he considers this subject completely borrowed from Islamic Law. Still, it is also possible that a formulation of our 1865 Code has been used for a functionally identical legislation that is present in the Hanafi School.

On the other hand, Mancini[23] inserted easements where there were gaps in the Egyptian code,

> 'The legislation of which does not make any distinction between legal easements or those deriving from the locations and the conventional ones and, among the latter, between the easements that can be purchased with long possession necessary for prescription (continuous and apparent) and those requiring a title to be purchased (discontinuous).[24] No regulation controls the owners' consortia for waters use, particularly for irrigation. The easement of the forced passage of water on other people's lands (art 52) seems to be restricted only to the water required, while wider is the proportionality of phrases used by arts 538 and the following ones in the Italian Code'.

Therefore, Italian influence on this subject (if there has been one) does not seem to have been very strong. Rather, the very use of the adjective 'necessary', which is identified in the Islamic legal doctrine on the legal easement of aqueduct,

[21] A. Sanhoury, 'Le droit musulman comme élement de refonte du code civil égyptien' *Recueil E. Lambert* (Paris: Librairie générale de droit et de jurisprudence, 1938), 621-643. See also F. Castro, 'La codificazione' n 1 above, 399-400 and Id, 'Abd al-Razzàq Ahmad al-Sanhùrì (1895-1971): primi appunti per una biografia', in Id et al, *Scritti in onore di F. Gabrieli nel suo LXXX compleanno* (Roma: Università di Roma 'La Sapienza', 1984), 1-38. Concerning easement in Islamic Law, see D. Santillana, n 19 above, 382-386 and 453-465.

[22] As concerns international laws on inheritance in the 1865 Italian Civil Code and the role played by Mancini for their processing, see A. Migliazza, 'Successioni (Diritto internazionale privato)' *Novissimo Digesto Italiano* (Torino: UTET, 1971), XVIII, 862-893, in particular 864-867.

[23] See 1875 Report n 15 above, 42.

[24] See D.E. Stigall, 'The Civil Codes Of Libya And Syria: Hybridity, Durability, and Post-Revolution Viability in the After-Math of the Arab Spring' 28 *Emory International Law Review*, 297 (2014) who affirms that: 'The Egyptian Civil Codes adopted their concept of prescription from French law, treating it as a means of acquiring ownership rights. Although the concept existed in Islamic law, it was conceived of as a bar to actions against the adverse possessor and not as a means of acquiring property rights. Yet the period of possession prescribed in the codes as a prerequisite to the acquisition of such rights was taken from Islamic law, not the French Code'. See also R.A. Debs, *Islamic Law and Civil Code: The Law of Property in Egypt* (New York: Columbia University Press, 2010), 92, and F.J. Ziadeh, 'Property Rights in the Middle East: from Traditional Law to Modern Codes' 8 *Arab Law Quarterly*, 3, 4 (1993).

would support Sanhuri's argument.[25]

What is evident, however, is the Italian origin of the legislation (of private international law) of inheritance (Arts 75-77). The criteria for inheritance found in Arts 8 and 9 of the Italian Code's preliminary regulations, which were in force at the time, had been adopted. These regulations referred exclusively to the 'national law of the person whose inheritance is discussed, whatever the nature of the goods is and in whatever country they are.' Only one exception has been introduced in the Egyptian code as concerns *waqf* and *kharaji* goods, which are instead ruled by local law. Therefore, it is clear that these rules originated from Mancini's doctrine, as they are different from those belonging to the Napoleonic Code, which included a law applicable to people and personal properties, based on the criterion of connection to the deceased's last residence, and another one applicable to real estate concerning which the law identified according to the *lex rei sitae*'s principle[26] was used. In any case, it is clear that the acceptance of the criterion regarding nationality taken from the Italian code permitted the same laws implemented by consular courts to continue to be implemented in the case of foreigners' inheritance. An adjournment according to the French system would lead, in most cases, to the application of personal status according to Islamic law that regulated and still regulates this matter in Egypt, but which was unacceptable to the European powers at the time.

The influence of a solution that the Italian Civil Code of 1865 had already adopted (preliminary provision, Art 8) – which can be identified only in the two private international law rules (Arts 77-78, mixed Civil Code) dealing with inheritance that are also inspired to Mancini's proposals – enables to adopt the national law on the deceased as the only connective criterion, by overcoming the traditional law adjournment of the last domicile of *de cuius* and *lex rei sitae*.

Another innovation, in relation to limitation periods, would have derived not so much from the Italian 1865 Civil Code system, but rather from Italian doctrine: an innovation that, according to our report, has been already 'claimed within the Committee in charge of the last Italian Civil Code review'.

Compared to the French and Italian codes, those limitation periods seem to be reduced from ten-year and thirty-year, as they were in Roman law, to half as much, that is to five and fifteen years respectively.[27]

[25] See also J. Aziz, n 16 above, 27, which clearly shows the separation of the text of Egyptian Art 54 (that is Art 52 that Mancini refers to) from Art 640 of Code Civil, in which only water transit is discussed, '*qui en découlent naturellement sans que la main de l'homme y ait contribué*' ('flowing naturally from it without any interference by human hand').

[26] For propriety and law limitation, see Arts 102-116 of mixed Civil Code. For bonds, see Arts 268-277.

[27] A confirmation to Mancini's thesis may be found in the realization according to which Islamic judges, in general, deny the possibility that a bond can be discharged through limitation, on the basis of a *hadìth* attributed to the Prophet: 'the right of a Muslim does not die out for time progress' (Al-Tasùlì, comment on *Tuhfat al-hukkàm* by Ibn 'Asim, II, 12). Still, limitation

Even here, Al-Sanhuri[28] asserts that these limitation periods (that according to him prove to be reduced compared to the French Code) derive from the Islamic Law, in which, however, the limitation (seen as discharge of the right to take legal action) requires different times according to the different schools and depending on the institutions it is applied to, without any possibility of finding a uniform regulation that must have affected the Egyptian Code. The Ottoman *Majalla* fixed different terms, fifteen and thirty-six years respectively.[29]

Therefore, we must agree with Mancini who points out how

> 'time periods of ten- and thirty-year limitation, adopted by French and Italian codes exactly as they were in the Roman Law, when steam and electric system communications were not so easy and fast, are reduced in half, that is five years in favour of a third party owning title, and fifteen years for the owners who do not possess title (Arts 102 and 275). The five-year limitation is adopted also for taxes, rents and annual performances, and the shorter one, lasting one year for doctors, tutors and professors' fees, due to expenditure acts for court ushers and chancellors (why not adding fees for lawyers?) and for merchants' supplies (Arts 277 and 278)'.[30]

It is interesting to point out that the brief aside concerning lawyers' fees seems to have found acceptance in Art 209 of the National Egyptian Civil Code (which corresponds to Art 273 of the mixed code), perhaps due to the attention arisen by the report in the international judicial environments, so much so that it was translated into French on orders of the Egyptian Government itself.[31]

The (mixed) Commercial and Maritime Commercial Codes correspond exactly to the conforming Ottoman Codes (1850 and 1863 respectively), whose model,

established itself in the procedure, through the explanation that it concerns not so much time progress, but the owner's quitclaim through inactivity for an extended period.

According to the Maliki doctrine, immovable limitation lasts ten years, while movable things last one or two years (though it has been raised to ten between relatives and co-owners). Different terms are applied to pre-emption right to land (ten years), deposit (ten years), action statement for injury between co-owners (one year) and for credits not represented by a written title (sixteen or twenty years). Moreover, according to this school's influential opinion, the extinctive limitation should be 'transmitted, case by case, to the judge's prudent will, who will have regard for the several circumstances of time, person, nature'. See D. Santillana, n 19 above, 271-278 and 110-111.

[28] See F. Castro, 'La codificazione' n 1 above, 400.

[29] The *Majallat al-ahkàm al-'adliyya*, also called 'Ottoman Civil Code' since it tried to gather the main *Hanafi* legal doctrine on obligations and contracts, was issued between 1869 and 1876 and adopted in all Ottoman Empire territories. An English translation of this code is available at https://tinyurl.com/y975ec8s (last visited 30 June 2018).

[30] See 1875 Report n 15 above, 42.

[31] *Relazione della Commissione parlamentare al disegno di legge di proroga al 31 gennaio 1882 dell'introduzione della riforma giudiziaria in Egitto*, presented at the House of Representatives on 1 February 1881 session (Parliamentary Minutes, 14th Legislation, First Session, 1880, Doc no 156-A, 2).

in turn, was the 1807 *Code de Commerce*, whose second book on Maritime commerce, however, had been integrated and updated and represented a separate code.[32] Moreover, the other three codes, that is the Civil Procedure Code, the Commercial Procedure Code, and the Penal and Criminal Instruction Codes (mixed), do not detach themselves from the already tested, though at times incomplete, French model, except for a few changes.[33]

With regard to the 1883 Commercial Code, which remained in force with numerous amendments and integrations until 1999, the most relevant change compared to the French model is constituted by Arts 2 and 3 (corresponding to Arts 632 and 633 of the *Code de Commerce*) that list the acts of commerce without any reference to the commercial jurisdiction as in the French system. This change was inspired by the Italian Commercial Code of 1865 according to which acts of commerce were regarded as the mandatory objects of an entrepreneurial professional activity. This model was followed by all of the Arabic Commercial Codes enacted afterwards.

The National Penal Code, after a period where its enforcement was contentious, was amended in 1904, drawing inspiration not only from its French counterpart but also from the Italian, Belgian, Indian, Sudanese, German, and Dutch Criminal Codes. The system of preparatory instruction, based on principles of the separation of the power to charge the suspect and the powers of instructions,[34]

[32] As concerns the Ottoman Commercial Code, F. Castro, 'La codificazione' n 1 above, 393-394 remembers that the Committee (in charge of drawing up the code text) by showing the awareness of gaps inside the second book of French Code de commerce, which had not been recognized by the time of the first commercial coding and which reproduced, often *ad litteram*, the old 1681 navy decree, integrated the French legislation, by inserting, in the system of Code de commerce's second book, materials taken from the commercial codes of Holland (1837), Spain (1829), Portugal (1833), the Kingdom of the two Sicilies (1819) and the Kingdom of Sardinia Commercial Code (1842), as well as, on the subject of passenger transport, from *Allgemeines Landrecht für die Königlich-Preussischen Staaten* (1794), which had already been replaced in Germany by 1861 *Allgemeines Deutsches Handelsgesetzbuch*.

[33] In fact, Mancini critically points out, 1875 Report, n 15 above, 43-44, that the 'Penal code is the one in which, while a huge progress is reached for the current repressive practices in Egypt, the legislator has less dared detach from the not so admirable French model as concerns general rules, crime classification, sentence severity and capital punishment frequency'.

Compared to that model, the main variations introduced in the Civil and Commercial Procedure Code concern: decision oath, witnesses' examination and testimonial evidence admissibility, the possibility given to the court to transfer elsewhere (in serious cases) the trial location, appeal proposition limits, the introduction of the condition of reciprocity for the execution of foreigners condemned in Egypt. In the Penal Code Mancini, who is one of the main supporters of the abolition of capital punishment (see his *Abolizione della pena di morte* (Roma: Tip. dell'Opione, 1873) and *Sommi lineamenti di una storia ideale delle penalità e problemi odierni nella scienza e nella codificazione*, (Roma: Tip. dell'Opione, 1874), regretfully underlines that death penalty is kept, though with some remedies and temperaments. However, these are regulations that, because they are introduced to make its application and execution rare, would be vainly looked up even in the codes of the most civilized and human countries where people still don't have courage to give up the immoral and apparent gallows protection.

[34] C. Claro, 'Législation pénale de l'Egypte de 1883 à 1897' *Revue pénitentiaire*, 586-591 (1898).

did not meet Egypt's needs because the preparatory instruction on the part of the instructing judge seemed to delay the course of justice.[35]

Another interesting (and final) moment of the report is the presentation, by Mancini, of the new Egyptian mixed codes' omissions. This analysis was extremely important, particularly for the immediate and wide circulation registered by Mancini's report (which was translated into French on orders of the Egyptian government itself) both in Italy and abroad.

Referring to the mixed Civil Code, Mancini shifted his attention to the book about property, in which he deemed the rules governing the easements, ownership and business management 'insufficient',[36] while the rules governing donations suspension causes, emphyteusis and aleatory contracts were completely lacking.[37]

To be added, instead, (in imitation of Arts 6-12 of the Italian Civil Code, preliminary dispositions) would be private international laws, which would not deal with subjects like private property negotiations, or contracts among living people and bond verification tools.

It is worth mentioning, according to a very authoritative doctrine, that the Egyptian Civil Code enacted in 1949 – as the result of the unification of mixed and national justices – draws also on the French-Italian draft Code of Obligations

[35] See A. Badaoui, 'Les problèmes juridiques de l'Egypte contemporaine' 26 *L'Égypte contemporaine,* 373 (1935).

[36] In fact, as concerns this subject, the only presence of Art 207 seems to be 'dangerous', since it too much generically orders that 'anyone who intentionally procures a benefit to another person has got the right to get, from the latter, the percentage of the loss suffered until the achieved benefit'. See 1875 Report n 15 above, 42.

[37] Perhaps, the elimination of these was intentional in connection with the Quranic prohibition as concerns *gharar* (risk). Another rule that has been doubtless influenced by Islamic law is the one concerning legal interest (*ribà*), whose measure is left to the judge's evaluation (who has, then, the possibility of cancelling it in the disputes among Muslims) within the maximum established by the legislator. See, among the others, M. Rodinson, *Islam e capitalismo. Saggio sui rapporti tra economia e religione* (Torino: Einaudi, 1968), 168; M. Daoualibi, 'La théorie de l'usure en Droit Musulman', in Id et al, *Travaux de la Semaine Internationale de Droit Musulman* (Paris: Sirey, 1953), 139-157; N. Cagatay, 'Ribà and Interest Concept and Banking in the Ottoman Empire' *Studia Islamica*, 53-68 (1976).

Since the early 20th century, there has been a strong debate in Egypt on bank interests' legitimacy, from the islamic point of view, after a famous *fatwà* declared in 1903 by Muhammad 'Abduh (b. 1849 – d. 1905, *muftì* of Egypt since 1899). If we make a distinction between usury interest – typical of pre-Islamic era – and 'participation to profits of a legal deal', he considered bank interest legal, provided that it had the same value as a dividend or gain derived from savings bank general management profits. On this basis, a 1904 *khedivial* decree allowed the Post Administration to create some special windows that worked as savings bank where every depositor, at the moment of deposition, signed a proxy authorizing 'the Administration to use the deposited funds (…) in all the ways allowed by *sharì'a*, except for any form of usury (…) and to pay yearly the *dividends* deriving from this commitment'. This *fatwà* was remarkably carried on also in other Arabic countries that were looking for a legitimacy of financial models accepted by European countries. For an overview of the different positions within last century's Islamic doctrine, see Y. Al-Qaradawî, *Fatàwà al-bunùk hiyya al-ribà al-haràm* (Bank Interests are the forbidden *riba*), (Al-Qàhira: Dàr al-Sahuwa, 2008). See, in general, G.M. Piccinelli, *Banche islamiche in contesto non islamico* (Roma: Istituto per l'Oriente, 1996), 12.

of 1928 and the 1942 Italian Civil Code. For instance, the doctrine of the collapse of the basis of a transaction was not accepted by the French but was adopted by the Italian Civil Code.[38]

III. The Reasons: The Italian Community in Egypt

Since the beginning of 19th century, there was an increasing number of people moving from Italy towards the main cities of the Southern Mediterranean. This was at the beginning of the history of Italian emigration, but some important communities had already begun to establish themselves, particularly, in Tunis and Algiers or, further East, in Smirne, Constantinople and Alexandria in Egypt.[39]

Later, a different kind of migration started to consolidate, made up of fortune-seeking farmers and craftsmen, Jewish traders keeping close relations with the respective communities in Italy, and professionals – mostly doctors, engineers, architects and lawyers – in search of new frontiers.[40]

The Italian community in Egypt, which had a little less than seventeen thousand members between 1870 and 1880, grew considerably, reaching more than sixty thousand people at the threshold of the Second World War, ranking second only to the Greek community.[41] Mainly concentrated in Alexandria and Cairo, Italians founded their own schools,[42] places of worship and meeting, while keeping a general economically and socially modest profile.[43]

[38] K. Zweigert and H. Kotz, *An introduction to Comparative Law* (Oxford: Clarendon Press, 3rd ed, 1995), 110.

[39] Among the many studies on Italian emigration in the Mediterranean and towards North Africa, see P. Bevilacqua, A. De Clementi and E. Franzina, *Storia dell'emigrazione italiana. Partenze* (Roma: Donzelli, 2001), and in particular the essay by P. Corti, 'L'emigrazione temporanea in Europa, in Africa e nel Levante', 213-236; R. Romano and C. Vivanti, *Storia d'Italia* (Torino: Einaudi, 1972), IV, 553-556. Also a recent documentary has gathered and presented several testimonies and documents of the contribution of Italian Community to Egyptian history: *Gli Italiani d'Egitto,* by R. Di Marco, directed by film-maker Sharif Fathy Salem, 2010. See M. Ersilio, *Esuli italiani in Egitto. 1815-1861* (Pisa: Domus Mazziniana, 1958).

[40] See F. Cresti and D. Melfa eds, *Da maestrale e da scirocco: le migrazioni attraverso il Mediterraneo (Atti del convegno, Facoltà di scienze politiche, Università di Catania, 23-25 January 2003)* (Milano: Giuffrè, 2006). See also *Annuario statistico della emigrazione italiana dal 1876 al 1925, con notizie sull'emigrazione negli anni 1869-1875,* (Roma: Commissariato Generale per l'Emigrazione, 1927); *L'emigrazione italiana dal 1910 al 1923* (Roma: Commissariato Generale per l'Emigrazione, 1926), 692.

[41] See M. Petricioli, 'The Italians in Egypt (1936-1940)', in M. Petricioli and A. Varsori eds, *The Seas as Europe's External Borders and their role in Shaping a European Identity* (London: Lothian Foundation Press, 1999), 123-133; Id, *Oltre il mito L'Egitto degli Italiani (1917-1947)* (Milano: Mondadori, 2007).

[42] M. Petricioli, 'Italian Schools in Egypt' 24 *British Journal of Middle Eastern Studies*, 179-191 (1997).

[43] Many documents certify the humble condition of most of the Italians, particularly in Cairo where, at least until 1890-1891, we mainly register temporary migrations from the South of Italy, linked to services in public inns: see *Emigrazione e colonie. Rapporti dei RR. Agenti diplomatici e consolari pubblicati dal R. Ministero degli Affari Esteri* (Roma: G. Bertero National

With the passing of time, the Italian community grew in status. For example, a great number of engineers and workers were in Egypt following the realization of the Suez Canal project (started in 1846 and signed by engineer Luigi Negrelli, but later realized by the French Ferdinand de Lesseps who took all the credit for it), and the building activities of the most relevant Egyptian infrastructures until the construction of the Aswan Dam.[44]

The *khedivial* decree, dating 14 May 1876, appointed Senator Antonio Scialoja[45] as the first President of the Treasury Superior Board, which he was responsible for founding by himself together with the Public Debt Fund. Under his leadership, the English G. Goschen and the French E. Joubert also worked with him and they carried the tasks on after Scialoja left.[46]

The increasing mobility of scholars and professors, especially in the early 1900s, extended the Italian commitment to culture and teaching. King Fouad appointed the Arabist Eugenio Griffini Bey (died 1924) as responsible for the Court Library, a role that was traditionally reserved for Arabs.

Ultimately, trade and its relative legal terminology are incontrovertible evidence of the active Italian influence in Egypt. In *L'arabo parlato in Egitto: grammatica, dialoghi e raccolta di circa 6000 vocaboli*, published in 1900,[47] we find, for example, that 'contract' (the Italian *contratto*) is *kuntratu*, the word used for 'bill of exchange' is *kambyàla* (that is *cambiale* in Italy), and *birutistu* stands for 'protest' (from *protesto*), while *bùlisa* (from *polizza*) is used per 'insurance policy'.

IV. Italians as Lawyers and Judges

As we have seen, the presence of Italian lawyers in Egypt had been certified since the early 19th century. By considering the fragmented pre-unitary judicial reality, names and origins show that the profession mainly concerned consular

Tipography, 1893), 216-245. Moreover, diplomatic documents inform the Italian Government that often 'native people are already badly impressed by Italians because of the poorly admirable example given by our migrants who are largely very miserable and not always exemplary' (*I documenti diplomatici italiani*, by the Commission for diplomatic documents release (Roma: Government General Library, 2000), 56). The Emigration General Committee itself, by editing in 1926 the report on *L'emigrazione italiana dal 1910 al 1923* n 40 above, 694, highlights that 'most of the Italian community in Egypt lives with an under-waged or domestic job'.

44 Among the architects who were particularly active during the first half of the 20th century, we can mention Enrico Verrucci-Bey and Gennaro Scognamiglio. The first, in particular, worked for the construction and repair of many royal sites, among which the Montazah Royal Palace in Alexandria together with the realisation of a high tower modelled after the Mangia Tower in Siena. See M. Awad, *The Presence of Italian Architects in Mediterranean Countries* (Roma: Carucci, 1987).

45 See DBGI n 14 above, 1833.

46 M. Awad, n 44 above, 60-61.

47 C.A. Nallino, R. De Sterlich and A. Dib Khaddag, *L'arabo parlato in Egitto: grammatica, dialoghi e raccolta di circa 6000 vocaboli* (Milano: Hoepli, 1900).

judgment trials. This activity was necessary mainly to the European merchants' community and was particularly polarized in the Alexandria harbour, most of which had Italian origins, dating back several centuries.[48] However, during the first half of the 19th century, 'insufficient business' compelled many of them to have a second job, for example that of school teacher.[49] Some succeeded more than others, such as Paolo Paternostro from Palermo – father of Alessandro, born in Cairo[50] – who was able to obtain a high number of clients as a lawyer, became the Viceroy's counselor minister,[51] was appointed Bey in 1857, and, shortly thereafter, general director of the Egyptian Foreign Ministry.[52]

For a better understanding of the role of Italian jurists during the transition stage from the consular jurisdiction to the creation of mixed and national Egyptian law, the second report about judicial reform in Egypt is extremely useful; it would be read, in 1882, on the eve of the entry into force of national codes, by Pasquale Stanislao Mancini to the Italian Parliament.[53] In the report, Mancini reports the Italian magistrates' appointments, the organic constitution of the mixed judiciary, the courts' judgements.[54]

The introduction of the new jurisdiction raised disapprovals, especially concerning the rules on jurisdictional conflicts and civil and commercial sentence execution.[55] Mancini reacted by providing supporting data, giving a precise picture of 'reform benefits'[56] and of the 'participation of the Italian part to the reform (civil affairs)'.

To this purpose, he used a 'recent report written up (…) by the royal agent in Egypt, with the collaboration of the Italian reform magistrates'[57] which was quoted in the Report and from which we can clearly deduce how the level of trials involving was not particularly high, showing Italians more as defendants

[48] As concerns the presence of Italian merchants in Egypt and the role of Maritime Republics, particularly that of Pisa, in the origin of the Capitulation treaties, see F. Santorelli, *L'Italia in Egitto* (Cairo: Tipografia Italiana, 1894), 19.

[49] See M. Ersilio, n 39 above, 44-48.

[50] See DBGI n 14 above, 1521.

[51] M. Ersilio, n 39 above, 156 and also L.A. Balboni., *Gl'Italiani nella civiltà egiziana del secolo XIX* (Alexandria: Penasson, 1906), 424.

[52] See M. Ersilio, n 39 above, 260.

[53] House of Representatives, Parliamentary Minutes, 15th Legislation, First session, 1882-1883, Doc. no 4, *Relazione presentata dal Ministro degli Affari Esteri, Riforma giudiziaria in Egitto*, 23 December 1882 Meeting, 82 (from now on in fn: *1882 Report*) to which diplomatic documents are attached, 86-237 (now on in fn, *1882 Dipl. Doc.*).

[54] *1882 Report* n 53 above, 44-64. For instance, Comm. Giaccone as counsellor of the Alexandria Court of Appeal, Cavalier Moriondo as judge of the Alexandria Court of first instance, who was already Constantinople's consul judge, Advocate Bernardi as assistant solicitor general at the Court and tribunals, who worked at Justice and Religious Affairs Ministries, Comm. Ara as State controversy lawyer, Comm. Haimann as the divisional head Justice Ministry. ibid 18-19.

[55] ibid 64-73.

[56] ibid 73-78.

[57] ibid 49-54.

rather than as claimants in 'trials whose commercial nature is inferred by the mere claim's title' (eg promissory notes), rather than in 'trials born from commercial or industrial acts or companies'. Conversely, Italians, as claimants, appeared in 'summary' civil trials (particularly for wages), something which is easily explained

> 'by considering how our Community is made up mainly of workers, artists, service people, etc. A grimmer piece of data is that of how Italians appeared in front of summary court as house or warehouse rent debtors; it can and must be found only in the condition experienced by the Italian Community'.[58]

These notations are integrated by Mancini with some further elements useful for the evaluation of the participation and influence of Italian jurists on the transformation of the Egyptian legal system.

First, the official languages of Egyptian mixed courts: in addition to Arabic, only Italian and French were allowed, followed by English as of 1898. Then, since the new laws were 'mostly modelled after French and Italian codes',[59] a great deal of work was assigned to Italian magistrates. Moreover, since most of the lawyers defending in the first instance and in the Court of Appeals were Italian, and since there were 'among them some of the most respected in terms of doctrine and rhetoric', it is evident that the influence of Italian legal culture on judicial decisions was important.

The second report by Mancini mentions neither the upcoming implementation of national codes, nor the relations between the new mixed jurisdiction during the first seven years of its application, and the traditional Islamic judicature which was responsible for all of the disputes between Muslim Egyptians. Only a small reference, albeit a very interesting one, can be found in one of the attachments presented to the Parliament, containing the report of Alexandria's Italian committee of notables,[60] with regards to the revision of the 1875 Judicial organization rules (translated from Italian):

> 'We have already noticed how the weaknesses, inadequacies and abstruseness of current codes, both civil and commercial, are endless. Now

[58] ibid 53. The report adds: 'In the end, it has to be made known that, among the Italians appearing in the reform statistics, those protected and naturalized (often Israelites and Eastern people) are much more than people of Italian origin and, moreover, they are more often old Italian families rather than new-comers, except what concerns wages and rents'.

[59] ibid 54.

[60] *Rapporto della Commissione dei notabili della colonia italiana in Alessandria d'Egitto*, First attachment to *1882 Report* n 53 above, 191-206. It is worth remembering that treaties between European powers for the introduction of mixed coding and the related jurisdiction expected the obligation of following adaptations and amendments, to be suggested on the basis of practical experience, as a fundamental condition for the extension of that system. To this end, the Alexandria committee and another homologous one in Cairo were established.

> we add that in the same codes any logical connection is missing and that there are some gaps which can be only vaguely filled with a general declaration written in the organic procedure, in order to call for interpretation rules and to resort to the general rules of common law *de rebus dubiis, de verborum significationibus, de regulis juris*, etc. This general declaration will make less compelling the provision for the necessary and essential changes which require a long study of the different codes in order to be realized, an attentive study that must be practiced on the sources they were drawn from, an accurate examination of the last five years of jurisprudence, *as well as a perfect knowledge, as far as possible, of Islamic legislation, whose codification in an Islamic country must be sufficiently considered* (my italics)'.[61]

Inside the then current debate, particularly centred on the conservation of Capitulation privileges, though reorganized in the mixed jurisdiction, the Alexandria committee introduced the problem concerning the relation between the legislation in force and Islamic law, which was deeply rooted in the Egyptian legal culture. The recurring legal and judicial conflicts, given 'the necessity of considering the Ottoman law and of reconciling its useful parts with the great work of a wise justice reform in this mysterious Orient', could have found a solution by integrating the International Codes Review Committee (in charge of editing the national coding) with

> 'two of the most erudite and less prejudiced *ulemas* (experts in the law), in order to better coordinate the Oriental forensic theories, practices and legal discipline with the Western forensic theories, practices and legal discipline'.

It is worth noting that it was the difficulties in the application of the mixed reform that had led to a fast review of the 1875 judicial organization procedure, replaced by 'the 27 November 1881 Khedivial decree concerning Egypt's legislative and judiciary system' which is, in turn, a relevant premise to the implementation of the national legislation officially inaugurated at the end of 1883. As already mentioned, nationalists would have desired that the former replaced the mixed legislation, with the native jurisdiction incorporating disputes between foreigners as well.[62]

The political climate of that period, with the British military action and the 'Arabì Pashà uprising,[63] hastened the preparation and the implementation of

[61] ibid 203.

[62] The events that followed 1883 and the ever-increasing English influence on Egyptian issues can explain why facts have deviated greatly from the intentions of those who, for those reasons, have hastened to enact the judicial reform and national codes. See F. Castro, 'La codificazione' n 1 above, 397.

[63] For a clear and efficient summary of the Egyptian events related to this period, see G. Calchi-Novati, 'Le fonti del Ministero degli Esteri sulla rivolta di Arabi: il rapporto centro-periferia

the national legislation, not allowing, however, the completion of the reform project. The decision not to intervene in Egypt alongside Great Britain, grounded on the principle of nationality in Italian foreign policy supported by Mancini, gradually reduced our country's influence on many public administration sectors in Egypt that, from then on, were increasingly affected by England in issues of domestic affairs. However, the general legislative body had already been approved and, even though it was not completely well-established, it allowed Egypt to adhere to the French model and to be open to the contribution of civil law countries.

As pointed out by a prominent scholar, '(t)he process of codification was also tied closely to a phenomenon of the 'reception' of European laws'.[64]

Notwithstanding the subsequent colonization, given the presence of the 1876 and 1883 French-inspired Civil Codes 'British domination did not find it convenient or beneficial to disrupt the system already in place'.[65]

During this century, a complex historical period of transition, England started a codes and procedures reform, trying to introduce elements closer to the colonial experience of common law. In 1898, English became the official language in mixed courts, in addition to Arabic, Italian and French. The legal development was gradually integrated, according to what John Scott reported in the 1899 *Journal of the Society of Comparative Legislation,* together with a wide account of 'necessary' reforms for the Egyptian legal system. To this end, new judges and new lawyers were needed, rather than new laws.[66]

nella prospettiva italiana' *Rivista mensile d'informazione e di studi per la diffusione della conoscenza dell'oriente sopra tutto musulmano*, 3, 21 (1989).

[64] 'In the Middle East, reception is strongly associated with the colonization process. (…) Elsewhere, British political sway was significant mostly in Egypt (…), but Egypt adopted civil codes before English influence became dominant, and the system of courts itself was more directly inspired by the French legal system, owing in part, as modern research suggests, to an accident of history that made the stronger power, Britain, surrender the projection of its own system of courts and legislation to French judicial and legal influence in Egypt in return for political control. As a consequence, the English common law tradition remained in the Middle East of residual nature'. C. Mallat, 'From Islamic to Middle Eastern Law A Restatement of the Field (Part II)' 52 *American Journal of Comparative Law*, 277-278 (2004).

[65] ibid 278. See, as example of westerners approaching the Egyptian legal system: J. Yeates Brinton, *The Mixed Courts of Egypt* (New Haven and London: Yale University Press, 1968); B. Cannon, *Politics of Law and the Courts in Nineteenth-Century Egypt* (Salt Lake City: University of Utah Press, 1988); F. Ziadeh, *Lawyers, the Rule of Law, and Liberalism in Modern Egypt* (Redwood City: Stanford University Press, 1968); B. Botiveau, *Loi islamique et droit dans les sociétés arabes* (Paris: Karthala, 1993).

[66] See J. Scott, 'Judicial Reform in Egypt' 1(2) *Journal of the Society of Comparative Legislation*, 240-252 (1899): 'The native tribunals had been founded on the lines of the mixed tribunals, the French codes were the basis of their law, the people had to a certain extent got used to the French system, French was the foreign language then generally in use. As a judge of the mixed courts, I had applied French law and procedure and had found they worked fairly well. With the exception of the Englishmen in the Court of Appeal, there was hardly a person in the country who would have received with any favour a complete change in favour of an English system of law. I therefore urged that better men were wanted, not new measures. As I said in one of my reports, tant valent les juges tant valent les lois'.

The Khedivé's legal consultant since 1890, Scott worked hard to reform the *Madrasat al-huquq* (Law School) by employing new French, Italian and Egyptian professors and, as concerns national judges, by relying particularly on those Egyptians who had earned a university degree in law from Italy or France, that guaranteed an eminent university tradition and a legal education which was consistent with the legal system in force.

In 1904, as a replacement for the 1883 conforming texts, the national Penal Code (Law no 3/1904) and the related Penal Procedure Code (Law no 4/1904) were issued, re-examined. In the 1906 issue of the *Journal of the Society of Comparative Legislation*, William E. Brunyate gives us a wide account of it, highlighting that the original French system had not been modified, but the experience of Anglo-Indian coding had been considered, with some difficulties, as well as some innovations in Belgian and Italian laws.[67]

> 'The Penal Code of 1883 was modelled on that of the Mixed Tribunals, which was itself a hastily compiled and badly drafted adaptation of the French Penal Code as it existed in the 'seventies. It was adopted (probably rightly) in 1883 on the advice of Lord Dufferin, on the ground that such legal education as was then possessed by Egyptians had been acquired in France. It remained true until a very recent date that legal education in Egypt was essentially French. Any complete recasting of the Code at the present time would therefore have been ill-advised. The method adopted was that of amending those parts of the Code which worked unsatisfactorily in practice, drawing freely upon the Indian Penal Code and *to a less extent on those of Belgium and Italy*: large portions of the Code, admittedly defective but of infrequent application, were left practically unrevised. The general effect of the revision is to create a distinctively Egyptian Code which will require to be studied without slavish reference to precedents in foreign countries – a fact which should be distinctly beneficial to Egyptian legal education'.[68]

Arts 2 to 4 of the Egyptian text related to national law applicability to crimes committed abroad were explicitly modelled after Zanardelli's Code (the 1889 Italian Penal Code).

On the other hand, the transformation of national penal trial law is much wider than the other sectors of the reform; since 1895, with the abolition of *juge d'instruction*, it gradually lost the traditional character of the French law of evidence model in order to adopt some features of the English model.[69]

[67] W.E. Brunyate, 'Egypt' *Journal of the Society of Comparative Legislation*, 1, 55-65 (1906).

[68] ibid 55-56.

[69] ibid 57-58: 'It is a mistake to suppose that Egyptian criminal procedure has ever borne any very close resemblance to the procedure in France. There were from the beginning fundamental differences between the Procedure Code and its French prototype. But the

The good reputation of Italian jurists is proved by their constant presence on the occasion of important forensic editorial initiatives as well.

Since 1890, the *Bulletin de législation et de jurisprudence égyptienne* had been published for more than ten years and it was developed by the English Thomas Lebsohn and three Italians A. De Rensis, Dario Palagi, A. Schiarabati.

Between 1901 and 1945 (but with annual regularity until 1926) thirty-five volumes of *Gazette des Tribunaux Mixtes d'Egypte* were published, to which the following Italians contributed: Edoardo D. Bigiavi (from 1903 to 1916) (father of Walter Bigiavi who was born in Cairo in 1904),[70] Dionisio Anzilotti (in 1907),[71] Dario Palagi (from 1910 to 1932), Albert Lamanna (from 1911 to 1914), Salvatore Messina (from 1920 to 1932),[72] and Ernesto Cucinotta (in 1938).

These collaborations highlight the eclectic and heterogeneous environment experienced by jurists in Egypt during those years, when judges of different nationalities sat in the same court, applying the same law, by naturally switching from French to Italian, by making contribution from their own legal culture to every decision. A practice of interpretation and application thus consolidates, in accordance to the events, but also acting comparatively on the general principles, the institutions, the categories and the judicial terms. It is indeed difficult to trace a given solution back to a given model even where an Italian judge does draw up the judgment, and not a French or Greek one.

Thus, we can comprehend the perception in Italy of that distant debate and of that passion animating both the Egyptian legal system (not only the mixed system), during those years. From the legal point of view, Egypt was fully counted among the systems whose general principles complied with those common to civil law nations. This is proved by the motivations given by the Italian Court of Cassation in denying, in that period, petitions for the enforcement of the mixed Courts' decisions.

* * ** * *

essence of criminal procedure is intimately connected with the traditions of the magistracy, and a corps of magistrates with fixed traditions can scarcely be said to have come into existence prior to the time at which the late Sir John Scott gave vitality to the Courts by creating single-judge tribunals with extensive civil and criminal powers. That change was very shortly followed by the practical suppression of the *juge d'instruction* in favour of enquiries by the Parquet, and since 1895 the merits or demerits of criminal procedure have no longer been fairly imputable to its French origin. All that can be said of the present procedure is that it is pretty certainly transitional, and that its future development must depend largely on the degree of capacity which it proves possible to evoke in the magistracy. In the meantime, a good deal of the formalism of French procedure in detail had been reproduced in the Egyptian Code, and the magistracy had shown a decided tendency to mistake formalism for spirit. The inconveniences resulting from such formalism it was the special object of the revision to mitigate'.

[70] See DBGI, n 14 above, 254.

[71] ibid 52.

[72] ibid 1336.

The final act of 1937 Montreaux Conference marked the end of the double Egyptian legal system. After a transient period that lasted twelve years, in 1949 the new Civil Code became law, due to 'Abd al-Razzaq Ahmad al-Sanhuri[73] who had treasured the long experience of French and European law application in Egypt.[74]

Sanhuri himself, who was an advocate of a scientific reform of Islamic law which should have come before the legislative phase, wrote in his work on the Caliphate in 1926 (translated from French):

> 'Here (the statute of property and contracts), in countries like Egypt we would collide with a difficulty of another type. Some foreign systems, by the effect of a long application, already entered the legal heritage of these countries. An abrupt change would upset the stability of the legal relations there. For this reason, we could proceed to the substitution of these imported rights with a legislation of national and Islamic tint only step by step. The same policy of gradual and careful restoration would be imperative either in the branches of the private law other than the civil law, or in the public law: domains which would be renovated by the modernizing scientific movement'.

The great movement of ideas and interpretations within Egyptian law and the regular application of the law based on the European model for over seventy years are the motivations Sanhuri gives in the report attached to the new Civil Code and which justified the choice of the European model as the basis of the text. A completely different phase opened up then, a phase that would last through Nasserism and Arab Egyptian socialism, in which, nevertheless, the European scientific contribution continued to have an impact.

Italian professors in Egyptian universities, while not so many in the legal

[73] See especially the studies by F. Castro, in particular 'Abd al-Razzàq' n 21 above. See also E. Hill, *Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of ʿAbd Al-Razzaq Aḥmad Al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971* (Cairo: American University of Cairo, 1987).

[74] To sum up, Egypt appears to be a civil law system, widely influenced by the French one both for substantial and procedural rules. As far as the court system is concerned, it is formed of 'both regular courts and exceptional court systems' (See M.M. Hamad, 'The Politics of Judicial Selection of Egypt', in K. Malleson and P.H. Russell eds, *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Toronto: University Of Toronto Press, 2006), 260-262, including administrative (See M.S.E.A. Abdel Wahab, *An Overview of the Egyptian Legal System and Legal Research,* available at https://tinyurl.com/ybmf2scp (last visited 30 June 2018), civil (See B. Dupret, 'A Return to Sha-ria?', in N. Yassari ed, *The Sharia in the Constitutions of Afghanistan, Iran and Egypt implications for Private Law* (Tübingen: Mohr Siebeck, 2005), 164 ('Civil law is divided into summary courts (for minor issues) and plenary courts at the first instance level, Courts of Appeal, and the Court of Cassation'), and criminal courts, a Supreme Constitutional Court. E. Abdelkader, 'To Judge or Not to Judge: A Comparative Analysis of Islamic Jurisprudential Approaches to Female Judges in the Muslim World (Indonesia, Egypt, And Iran)' 37 *Fordham International Law Journal*, 350-351 (2014).

field, have left a deep mark thanks to their teachings. The Egyptian experience left clear traces of their studies. We remember, among them, Vincenzo Arangio-Ruiz,[75] who taught in Cairo for a long time between 1929 and 1940 and, then, also in Alexandria between 1947 and 1957. In 1950, upon his invitation, Gino Gorla[76] arrived to Alexandria, where he stayed, along with Rolando Quadri[77] and Tullio Delogu[78] until 1957.

The latter names, together with many others mentioned in this work, have participated and continue to participate in that Mediterranean juridical *koinè* that, over the centuries, albeit with varying intensity, has never stopped and which we hope will continue contributing to the great dialogue among civilizations.

[75] See DBGI, n 14 above, 91.
[76] ibid 1040.
[77] ibid 1641.
[78] ibid 755.