Denver Law Review

Volume 80
Issue 4 *Symposium - History and Practice of Law and the Business of Judging*

Article 10

January 2003

An Egyptian Judicial Perpsective

Aly Mokhtar

An Egyptian Judicial Perpsective

An Egyptian Judicial Perspective

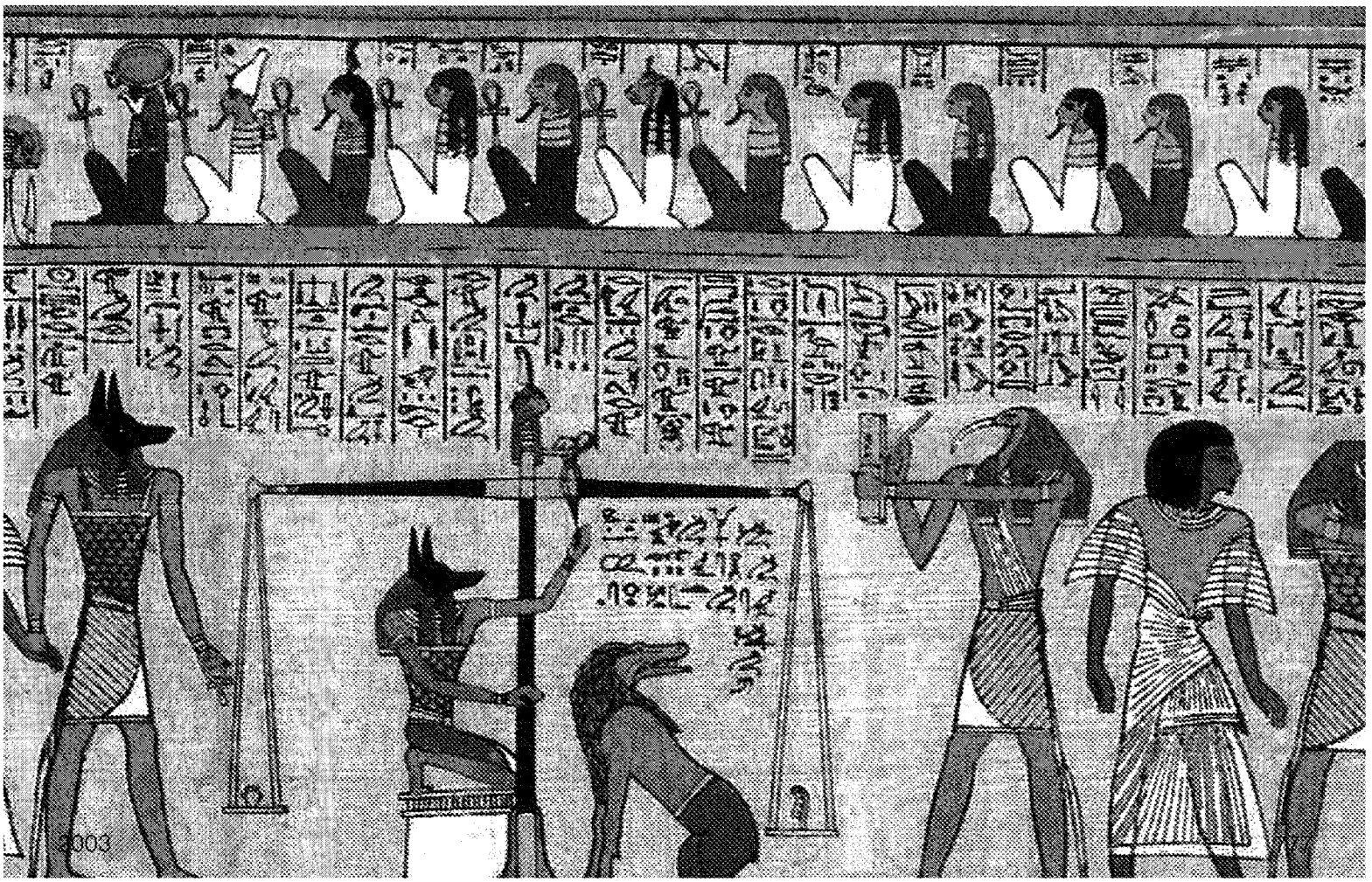
Aly Mokhtar
Judge, Egyptian Ministry of Justice

Introduction

The current article is a set of thoughts, which were put together; a common denominator might not exist save as that they are loud thoughts, generally related to the judiciary. The first section of the article is a brief look at the evolution of the Egyptian judiciary, especially since the Islamic era. The second section deals with divorce by women of their own will as stipulated in Law 1 of the year 2000. The third section discusses a practical application of the principle *nullum crimen sine lege, nulla poena sine lege*. The final section presents a subjective view about the judicial discretion in penalties.

A Historical Background of the Egyptian Judiciary

A casual observer to the Hunefer Papyrus, which dates back to about 1370 B.C., can easily tell that it represents a trial. Although the Hunefer Papyrus represents the trial of Hunefer on the Day of Reckoning, it clearly demonstrates that ancient Egyptians had an advanced and organized judicial system. In this Papyrus we can see "Hunefer kneeling before a table of offerings in adoration, in the presence of fourteen gods seated in order as judges. Below, we see the Psychostasia, or weighing the conscience; the jackal-headed Anubis examines the pointer of the balance, wherein the heart (conscience) of the deceased is being weighed against the feather, symbolic of law or right and truth[;] . . . on the right we see Thoth, the scribe of the gods, who notes down the result of the trial."[1]



The history of the judiciary in Egypt can be traced back to the ancient Pharos. However, for the purpose of understanding the present status of the Egyptian judicial system, one needs to briefly look at the evolution of the Egyptian judicial system since the Islamic period, i.e., since the seventh century. This is due to the fact that for over eleven centuries, all the procedures and legal doctrine in Egypt's judicial institutions were derived from Islamic *Sharia*. Throughout this period, judges were required to run the judicial system in accordance with Islamic rules.

The following incident explains what is meant by running a judicial system in accordance with Islamic rules. After having been appointed as Yemen's judge, Mu'az ibn Jabal visited the Prophet (i.e., Muhammad) to take permission before leaving to take up office. The following conversation took place: "On what basis shalt thou decide litigation? According to the provisions in God's Book (the *Koran*)! And if thou doest not find any provision therein? Then according to the conduct of the Messenger of God (i.e., Muhammad)! And if thou doest not find a provision even therein? Well, then, I shall make an effort based on my own opinion!" The Prophet was so delighted by this reply that, far from reproaching him, he exclaimed, "Praise be to God who hath guided the envoy of His envoy to what pleaseth the envoy of God!"

During the Islamic era, courts usually consisted of one judge who would sit in judgment of criminal, civil, and family cases. That is to say that this judge had a general *ratione materiae* within a specified territory.

In addition to being a religion regulating the relationship between God and believers, Islam is characterized by two main traits. First, it regulates the conduct of Muslims in their daily life, i.e., criminal matters, commercial relations, contracts, marriage, divorce, inheritance, etc. Second, Islam is applicable for all times and places. Despite the fact that there are some immutable rules in Islam, describing a religion that has existed nearly 1500 years with the two aforementioned characteristics makes it impossible to speak of completely rigid regulations.

The two main sources of Islamic *Sharia* are the *Koran* and the *Sunna* (the prophet's tradition). Additionally, there are other sources that complement these two main sources: *Al-Ijtihad*[2] (interpretative effort), *Al-qias* (analogy), and *Al-Ijma* (consensus of opinion reached by early Muslim jurists). Bassiouni maintains that besides the *Koran* and *Sunna*, other sources of law render the application of Islam to contemporary situations possible.[3]

To this author, *Al-Ijtihad* is not only a source that complements the *Koran* and *Sunna*, but it is one of the main sources of Islamic *Sharia*. This view could be supported by the above-mentioned conversation that took place between the Prophet and the Judge of Yemen. Additionally, one of the Prophet said *Hadith's*[4] states: "If a ruler performed *Al-Ijtihad* then judged and he was right, he would be double rewarded, but if he was mistaken, he would be rewarded once."[5] The aforementioned *Hadith* runs counter to the normal rules; usually if there is a reward for doing something right, there would be a punishment for doing the same thing wrong. However, this *Hadith* speaks of rewarding the mistaken. This clearly indicates that the Prophet is urging us to perform *Al-Ijtihad*.

Islamic *Sharia* and the Egyptian Judiciary

Many developments have taken place in the Egyptian judicial system since the beginning of the nineteenth century, each of which left a mark on the present judicial system.[6] However, to a certain extent, the Egyptian judicial system did not lose its Islamic identity.

Article 2 of the Egyptian Constitution of 1971 stipulated that "Islamic *Sharia* is a principal source of legislation in Egypt." In 1980, Article 2 was amended to raise the status of *Sharia*, stating: "Islamic *Sharia* is the principal source of legislation in Egypt." Needless to say, this amendment aimed at bringing all Egyptian laws in conformity with Islamic *Sharia*.

The effect of Article 2 of the Egyptian Constitution is to impose limitations on the lawmaker, i.e., the lawmaker is not allowed to enact any law embodying provisions that contradict Islamic *Sharia*. Similarly, this limitation applies to the Executive Authority's decrees.

Article 2 of the Egyptian Constitution caused considerable turbulence. Many legislative

enactments were challenged before the Egyptian Supreme Constitutional Court on the basis that they infringed upon Article 2 of the Constitution and Islamic *Sharia*.

Law 1 of 2000 was challenged on the aforementioned grounds. Before the promulgation of Law 1 of 2000, divorce was the husband's privilege. Nevertheless, the wife could obtain divorce by a judgment. However, for the wife to obtain divorce by judgment she had to provide proof of *darar* (damage, injury, or harm) and convince the judge that *darar* took place. Reasons for obtaining divorce for *darar* could be systematic abuse or mistreatment, incurable disease, lengthy absence or imprisonment, and non-provision of maintenance. This is called judicial divorce for *darar*. Divorce for *darar* preserves all the wife's financial legal rights, i.e., dowry, alimony, etc.

However, divorce for *darar* was much easier said than achieved. I witnessed a considerable number of wives struggling in the courts for over five years to obtain divorce for *darar*, and some may not have obtained it in the end. The complexity of obtaining divorce for *darar* became so famous that many wives were discouraged from filing for divorce for *darar* and lived in misery. Similarly, the situation was depressing for judges who sat in the hearings of such cases, sometimes unable to act due to procedural and legislative reasons.

In 1979, Presidential Decree 44 amended Family Law 25 of 1929, expanding the legal category of *darar* in marriage. Presidential Decree 44 interpreted the mere fact that a husband takes a second wife as *darar* to the first wife. Thus, the first wife could obtain a judicial divorce if she presented proof that her husband took another wife.[7] This decree was challenged on the basis that it contradicted Article 2 of the Egyptian Constitution since it contradicted Islamic *Sharia*. The Supreme Constitutional Court of Egypt nullified Presidential Decree 44 and declared it unconstitutional on May 4, 1985. However, this nullification was based on the lack of adequate constitutional basis to modify Family Law 25 of 1929 by means of a presidential decree.[8]

The misery continued until Law 1 of 2000 was enacted. I consider Law 1 of 2000 as the life jacket that saved the wives drowning in the choppy sea of family troubles. According to Law 1 of 2000, a wife may obtain divorce of her own will and without proving *darar*, conditional on the wife forfeiting all financial legal rights and returning the dowry she had received from the husband. However, the right to child custody and the children's rights (child support) are not affected by this type of divorce, which is called *Khula'* in Islamic law (literally meaning ousting or uprooting). Many lawyers, scholars, and judges argued that *Khula'* runs counter to Islamic *Sharia.* Nevertheless, *Khula'* is one of the rules provided by Islamic *Sharia*, but never incorporated into legislation.

At this juncture, one should note that there is a muddle-up between the Islamic *Sharia* and the customs in the Islamic countries. This is crystal clear especially in issues related to women. The Prophet Muhammad in his last speech spoke about women, stating: "You people fear God as to women, I am commanding you to be courteous to them."

On December 15, 2002, the Supreme Constitutional Court of Egypt declared in a landmark decision[9] that *Khula'* is in compliance with Islamic *Sharia*. Similarly, this was the view of the *Grand Sheikh of al-Azhar*,[10] who proclaimed that Law 1 of 2000 is consistent with Islamic *Sharia*. The law was approved

FAST FACT

The U.S. Supreme Court delivers between 80–90 formal written opinions each Term, with another 50–60 cases being disposed of without granting plenary review. The Court's written opinions, including concurring and dissenting opinions, account for an approximate 5,000 pages per Term.

United States Supreme Court Website, The Justices' Caseload, at http://www.supremecourtus.gov/about/justicescaseload.pdf (last visited Apr. 20, 2003).

by a majority vote in the Islamic Research Academy.

According to a study presented to the United Nations Development Program in August 2001, Egypt has one of the most highly developed and influential judicial structures in the Arab world. Thus, I strongly urge Arab and Islamic countries that do not apply *Khula'* to follow the Egyptian model in applying Law 1 of 2000.

Nullum Crimen Sine Lege

The principle that there must be no crime or punishment except in accordance with fixed, predetermined law, known as the principle of legality, and in its Latin dress known as *nullum crimen sine lege, nulla poena sine lege*, stands at the very head of many constitutions and domestic codes, and has been included in most of the human rights instruments as one of the basic rights and as a self-evident principle of justice.

The well-known twofold maxim *nullum crimen sine lege, nulla poena sine lege*, has different aspects. It includes the prohibition against *ex post facto* criminal laws and its derivative rule of non-retroactive application of criminal laws and criminal sanctions. Moreover, the maxim has four important corollaries: penal statutes must be strictly construed, the prohibition or limitation on the use of analogy in judicial interpretation, the requirement of specificity, and the prohibition of ambiguity in criminal legislation.

Although this maxim has been the basis of criminal law, it is a matter about which there is a great difference of opinions. This difference in opinions begins with identifying the origins of the principle and extends to its application.

The principle *nullum crimen sine lege* is deeply rooted in the Egyptian judicial traditions. The Egyptian Court of Cassation, in several judgments, expressed the view that it is absolutely prohibited to widen the interpretation of text in criminal legislation. It even went further by holding that the rule against retroactive legislation is a basic principle of jurisprudence that should be considered by the legislature; otherwise, the judge should refrain from applying laws enacted contrary to that rule.[11] In the Islamic *Sharia*, the principle of *nullum crimen sine lege* can be best illustrated by the following verses of the *Koran*: "We never punish until we have sent a Messenger,"[12] and "Your Lord would never destroy cities without first sending to the chief of them a Messenger to recite Our Signs to them."[13] The principle was also embodied in the Islamic instruments of human rights. For instance, Article 5 of the Universal Islamic Declaration of Human Rights[14] stipulates: "Punishment shall be awarded in accordance with the Law; . . . [and] "No act shall be considered a crime unless it is stipulated as such in the clear wording of the Law." Similarly, Article 19 of The Cairo Declaration on Human Rights in Islam[15] stipulates: "There shall be no crime or punishment except as provided for in the Shari'ah."

In 1998 while I was working as a senior prosecutor in the Tax Evasion Prosecution, I engaged my peers in a heated discussion concerning the application of a tax provision. The law defines tax evasion as any one of 6 exhaustive fraudulent means or acts triggering potential imprisonment. The sixth act was the failure to disclose one or more of the activities that is subject to taxation.

Meanwhile, the same law considers the non-presentation of the tax return as a misdemeanor charged by a fine. Thus, those who do not present their tax returns are legally in a better position than those who present an incomplete tax return. Abuse of the flawed law followed.

My colleagues expressed the view that those who do not

FAST FACT

To date, the U.S. Supreme Court has seen 16 Chief Justices and 97 Associate Justices (three of which went on to become Chief Justices of the Court).

United States Supreme Court Website, Members of the Supreme Court, at http://www.supremecourtus.gov/about/members.pdf (last visited Apr. 20, 2003).

present their tax returns should be indicted for a felony under the law for failure to disclose activities that are subject to taxation. They argued that fraud was satisfied and strict application would deter continued activity. I argued that those tax violators were aware of and had accepted the punishment prescribed for their tax code violation and could not be indicted under another provision that aggravates the punishment of the original violation. I believe that additional punishment would violate the principle of *nullum crimen sine lege*. The presiding judges shared my view, thus triggering a legislative amendment.

A Subjective View on the Judicial Discretion in Penalties

In the application of the law, very few legal provisions are so phrased that the judges are left completely devoid of discretion. This is because legal notions often have to cover a variety of legal situations (usually difficult to enumerate considering other social and moral concepts). Thus, a provision of a law might provide for a set of penalties for the committing of a certain act or omission, leaving the judge wide discretion to decide the suitable penalty.

If any of these penalties are so harsh that it is obviously disproportionate to the violation, it becomes an inoperative penalty or provision, since the judge does not apply it. After a certain period of non-application of this provision, it would be peculiar to subsequently apply it. To what limit may a judge abide by this customary non-appliance?

Let us first discuss the implication of non-application of a certain provision of law. Clarification of this implication will unfold considering the following incident that took place recently in Ireland. "I don't think any Nigerian is obeying the law of the land when it comes to driving. I had a few of them in Galway yesterday and they are all driving around without insurance and the way to stop this is to put you in jail."[16] Judge Harvey Kenny made this statement while a Nigerian woman was appearing in his court on a charge of driving without insurance.

Section 56 of the Irish Traffic Act of 1961 provides for 3 types of penalties for driving without insurance. Those penalties include a fine; or, at the discretion of the court, imprisonment; or both a fine and imprisonment. Nevertheless, imprisonment is not the usual penalty for merely driving without insurance. I consulted some Irish citizens outside the judicial and legal sphere, asking them their opinion on a judge imprisoning someone for merely driving without insurance. Some of them expressed the view that this would constitute inequality, since this is not the usual penalty, while other citizens stated that this is not in the penalty prescribed for driving without insurance as they believed the penalty was either a fine or disqualification.

Applying such a provision is not in violation of the principle of legality. Additionally, arguments could be raised to bring into play the principle that ignorance of law is no excuse. On the other hand, one could counter argue that this is a violation of the essence of legality. This argument could be based on the fact that consistently applying a certain penalty for a certain violation automatically induces an impression to the addressees that this is the penalty prescribed for this violation. However, consistent non-application of a certain provision induces the contrary effect to the addressees, i.e., that this provision does not exist.

In sum, within a personal parameter, it is preferable that judges remain within the remit of the customary application of penalties, especially in cases where a certain penalty is disproportionate to the conduct in question.

Endnotes

[1] E. A. Wallis Budge, Book of the Dead: Facsimiles of the Papyri of Hunefer, Ahhai, Kerasher and Netchemet, with supplementary text from The Papyrus of Nu, Plate Ch. CXXV, pg. 4 (London: Harrison and Sons 1899). The Hunefer Papyrus is on exhibition in the British Museum.

[2] Literally means to exert effort—the attempt of Muslim scholars to interpret the Sacred Texts, the *Koran* and the *Sunna*. In other words, it means that exerting the sum total of one's ability attempting to uncover God's rulings on issues from their sources.

[3] M. Cherif Bassiouni, The Islamic Criminal Justice System XIV (Oceana Pub. 1982).

[4] *Hadith* are the reports on the sayings and the traditions of the Prophet Muhammad or what he witnessed and approved. These are the real explanations, interpretations, and the living examples of the

Prophet for teachings of the *Koran*. His sayings are found in books called the *Hadith* books.

[5] Author's translation

[6] *See* ADEL OMAR SHERIEF ET AL., HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME COURT OF EGYPT (Kluwer Law Int'l 1997).

[7] In Islam the husband is permitted to have more than one wife. However, many rules in Islam are permitted but conditional on almost impossible conditions. Marrying more than one wife is allowed under conditions that might be impossible to comply with. In the case of having more than one wife, the condition is to be fair to all wives; that is to say that a husband should treat his wives equally. This equality also includes equality in feelings and emotions, which is impossible to achieve. Thus, unless equality and justice are fully achieved, the rule of having more than one wife is not applicable. This is because the verse in the *Koran* that speaks about having more than one wife reads as follows: "Marry women of your choice, two or three or four; but if ye fear that ye shall not be able to deal justly [with them], then only one. . . . Ye are never able to be fair and just as between women, even if it is your ardent desire." Qur'an Al-Nisaa (Women) 4:03, :129.

[8] *See* Case No. 28 Judicial Year 2 (constitutional), 16th of May 1985; *see also* OSAMA ARABI, STUDIES IN MODERN ISLAMIC LAW AND JURISPRUDENCE 173 (Kluwer Law Int'l 2001).

[9] *See* Case No. 201 Judicial Year 23 (constitutional), 15th of December 2002.

[10] The *Grand Sheikh of al-Azhar* is the highest Islamic authority in Egypt and the Islamic world. His authority to the Moslems all over the world could be compared to the authority of the Pope of the Vatican.

[11] Egyptian Court of Cassation, 19 Oct. 1953, Compilation of the Ct. of Cassation Judgments, Year 5, No. 13, at 39; *see also* MAHMOUD MOSTAFA, AL-TAALIK ALA QANOON AL-OKOBAT: AL-KESM AL-AM 99 (Cairo Univ. Press 10th ed. 1983) (Commentary on the Penal Code: The General Part). Prof. Mostafa asserts that although the principle is constitutional in France, however, the judge in France has no authority to overrule the constitutionality of the substance of the laws. Thus, if a law was enacted to be applied retroactively, he should apply it.

[12] Qur'an Al-Isra' (The Night Journey) 17:15. For this translation of the Holy *Koran*, see ABDALHAQQ AND AISHA BEWLEY, THE NOBLE QUR'AN: A NEW RENDERING OF ITS MEANINGS IN ENGLISH (Madinah Press 1999).

[13] Qur'an Al-Qasas (The Story) 28: 59.

[14] Universal Islamic Declaration of Human Rights 21, Dhul Qaidah 1401 (Sept. 19, 1981).

[15] The Cairo Declaration on Human Rights in Islam (Aug. 5, 1990).

[16] Despite the fact that this is a racist comment that was highly criticized by human rights proponents and that this actually led to an apology by Judge Harvey Kenny to the Nigerian woman, the issue of racism is not considered in this article.

Judge, Egyptian Ministry of Justice; Deputy Resident Representative of the International Development Law Organization (IDLO) in Afghanistan; and Vice President of SUNSGLO Associates (the center for Studying the United Nations System and the Global Legal Order). Judge Mokhtar received his LL.B. (Cairo 1991); Baccalaureate of Police Sciences (Cairo 1991); LL.M. (Irish Center for Human Rights); and is a Ph.D. Candidate. Prior to taking the bench, Judge Mokhtar was a Criminal and Tax Evasion Prosecutor, as well as a Police Officer.