

BUSINESS LAW IN EGYPT

MICHAEL H. DAVIES

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Preface

The purpose of any book on the subject of the business laws of a particular country directed primarily at non-nationals of that country can never be to try to provide a substitute for proper professional advice. It is, on the contrary, to enable the foreign investor or businessman and his advisers, whether they be lawyers, accountants or bankers, to have a sufficient understanding of the legal system with which they are to deal to enable them to formulate correctly their enquiries when seeking advice. This must save time and avoid potentially serious misunderstandings. It is hoped that this book will go some way towards achieving this goal in respect of the Arab Republic of Egypt.

I have given a description of the general legal system relating to the business environment and not just dealt with the laws relating to foreign investment. It is important that the immediately relevant laws are not considered in isolation from the overall system with its codes, laws, regulations and jurisprudence.

It is common practice in Egypt for laws, issued in accordance with due parliamentary process, to delegate authority to the President, the Council of Ministers or individual Ministers whereby decrees or decisions are issued supplementing the law in question. Ministerial Decisions, for example, can be issued upon the authority of the Minister alone without the need for submission to, or approval of, the People's Assembly or the *Shura* Council. Because of the ease of issue, amendments can be made to this body of delegated legislation on a regular basis. Many of the Ministerial Decisions referred to in this book may, therefore, in a short time be replaced, amended or abrogated. Nevertheless, they have been included for two reasons: first, to illustrate how the law-making process in general operates, and secondly, to give the reader a starting point from which to research further the area of law in question.

The laws and regulations governing the public sector are not covered. Matters of personal status are also outside the scope of this book. Because many of the concepts contained in the Civil Code and Commercial Code and in other legislation originated from the French legal system, I have in places made comparisons with the text of the current codes of France.

Translations of certain laws and Ministerial Decisions are contained in the main body of the book and in the appendices. Arabic is the official language of Egypt and therefore translations, even when issued by a Government authority, have no official status. On matters of interpretation regard must always be had to the original Arabic text. The translations contained in Appendices 1, 2, 3 and 4 are those issued by the General Authority for Investment and Free Zones, part of the Ministry of Investment and International Co-operation. They have been reproduced without amendment because it is these texts that are in use in Egypt and for this reason the temptation to improve upon them has been resisted.

In the preparation of this book I must acknowledge a great debt of gratitude to the late Dr. Gamal El Oteifi with whom I had the privilege to work for a number of years and whose advice, assistance and encouragement at all stages was invaluable. I would also like to thank Nicholas Kittoe, Tom Harris, Safaa El Din

PREFACE

El Oteifi, Mohamed Kamel and MLA for their helpful comments on both the substance and the form of the text. However, the responsibility for any errors rests, of course, with the author alone.

Cairo, 1983

Michael H. Davies

The Author

Michael H. Davies is a partner in an English firm of solicitors with offices in a number of Middle East countries. He has worked in France and in the Middle East, having spent the past five years in Cairo, Egypt. He has lectured frequently on investment and law in Egypt and contributes regularly to legal periodicals on these subjects.

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PART I

Introduction

CHAPTER 1

Constitutional Background

The present Constitution of the Arab Republic of Egypt is that of 11th September 1971, as amended on 22nd May 1980. This Constitution, adopted at the beginning of the Presidency of Mohamed Anwar El Sadat, provides for a Republican form of government with the executive head of state being the President.

During the twentieth century, the people of Egypt have lived under four different constitutional systems: a *Pashalik* of the Ottoman Empire (1517 to 1914), a British Protectorate (1914 to 1922), a Monarchy (1922 to 1953), and a Republic. It is the purpose of this opening Chapter to outline the constitutional history of Egypt and to describe the Constitution of 1971. The Chapter is therefore divided into two main sections, the first dealing with the period up until 1971 and the second with the present Constitution.

A. THE CONSTITUTIONAL POSITION UNTIL 1971

1. *The Ottoman Empire*

Following the conquest by the Arabs in A.D. 641, Egypt became part of the Domain of Islam, the *Dar al Islam*, and as such submitted to the rule of the Caliphs.¹ The power of the early Caliphs, who were mostly based in Baghdad or in Damascus, was, however, the subject of dispute owing to the rival religious factions which emerged at the beginning of the history of Islam. This dispute was concerned with the rightful successors of the Prophet and with the secular and spiritual authority of the Caliphate. It eventually led to the division into the two main branches of Islam, the *Sunni* and the *Shi'ite*. Apart from one period, that is, from A.D. 969 to 1171 when the *Shi'ite* Fatimid Caliphs were in power in Cairo, the Muslim population of Egypt has remained *Sunni*.²

The position of the Caliphs was subject to secular threat as well as religious argument. Persian, Mamluk and Turkish soldiers, amongst others, ruled over Egypt with the Caliph becoming a distant and purely religious figure. The Caliphate came to reside in Istanbul, the capital of the Ottoman Empire, and was finally abolished in 1924 by Moustafa Kemal Ataturk.

From 1250 to 1516 the Mamluks ruled Egypt. They were originally slave soldiers of the Ayyubid armies and had defeated the last of the crusaders. There were two main sects which ruled at different times and they continued to maintain

1. A Caliph was one of the successors to the Prophet Mohamed.

2. A substantial minority of the population are members of the Coptic Christian Church.

a dominant position even under the Ottoman Empire, their power not being fully eliminated until the early nineteenth century. In 1516, however, they were conquered by Sultan Selim and Egypt became a *Pashalik*³ of the Ottoman Empire which it legally remained until 1914.

Egypt was, therefore, constitutionally subject to the authority of the *Sublime Porte*⁴ at Istanbul and continued to be so for a period of four centuries. However, the reality of the situation was very different and the legal position was often far from clear. It is quite evident that both in fact and in law Egypt enjoyed an increasingly autonomous status within the Ottoman Empire. This independence reached its height in the nineteenth century under Mohamed Ali and his successors.

As a province of the Ottoman Empire, the Sultan had the right to appoint the Governor of Egypt. Within the *Dar al Islam* the person to whom executive authority of an area was delegated by the Caliph was called a *Wali*. Within the Ottoman Empire such Governors were often called by their Turkish title, *Pasha*.

By the middle of the sixteenth century Egypt had become fully part of the administrative system of the Ottoman Empire. The difficulty of maintaining a military presence sufficient to enforce the control of Istanbul and its revenue demands led to an unstable situation and resulted in the seventeenth century in the *de facto* Mamluk administration being extended by the introduction of more slave soldiers into Egypt from Europe and Africa. In practice the country was ruled by the strongest Mamluk of the day and the power of the Ottoman Governor was correspondingly diminished. A tribute was payable to the *Sublime Porte* in Istanbul but the frequency and amount depended always on the state of the finances and the strength of the ruling Mamluk.

The French occupation from 1798 to 1801 did not lead to any change in the constitutional status of Egypt as a part of the Ottoman Empire. The official French justification of the invasion, dismissed at once by the Turks, was to strengthen the constitutional position of Turkey by destroying the power of the Mamluks, ruling in the name of the Sultan, and thereby ensuring the regular payment of the tribute. The invasion in fact led to a declaration of war by Turkey. The British occupation that followed in 1801 also left the legal position as it had been but lasted in any case less than two years, the British being required to evacuate Egypt in accordance with the terms of the Peace of Amiens of 1802.

It was Mohamed Ali who finally destroyed the power of the Mamluks and who established a dynasty, the strength of which underlined the weakness of the Sultan and further increased the independence of Egypt. He came to power in 1805 and ruled until 1848. During his reign and that of his successors Egypt gained a legal autonomy greater than that allowed to other provinces of the Ottoman Empire.

Mohamed Ali was born in Macedonia and came to Egypt as the second-in-command of a contingent of soldiers from Macedonia, part of an army raised by

3. *Pashalik* denotes a province of the Ottoman Empire over which a *Pasha* governed. *Pasha* being an official title granted by the Sultan of Turkey.

4. *La Sublime Porte*, as it was known in French, or *Al Bab al Aly* as it was known in Arabic, referred to the residence of the Grand Vizier who was the chief minister of the Sultan. The expression came to symbolise his authority.

the Sultan to expel the French from Egypt. He rose to command an Albanian force in Egypt which had already become sufficiently powerful to expel the *Wali* from Cairo in 1803 and demand that a more acceptable Governor be sent by Istanbul. Mohamed Ali took command of this force after the death of its original commander and by skilful manoeuvring was able to divide the Mamluk leaders and expel them from Cairo in 1804. In the following year, he besieged the *Wali*, Hurshid, in the Citadel and forced him to leave Egypt. He then persuaded one of the leading religious figures of Cairo to declare the *Wali* deposed and to offer him the *Pashalik*.

The constitutional position of Mohamed Ali, like all the soldier governors of Egypt in the past, was based primarily on military power. However, an important event from the legal point of view took place in 1841. On 30th May 1841, the Sultan, under pressure from the European powers, issued certain *firmans*⁵ which laid down the legal conditions regarding Mohamed Ali's rule of Egypt and which dealt with the question of succession after his death and with the nature of Egypt's position in the Ottoman Empire. First, these *firmans* 'confirmed' that Turkey was sovereign over Egypt and that Mohamed Ali was the Governor of Egypt. They then provided that the succession was to pass after his death to his direct male descendants. The Sultan retained the right to appoint a Governor if the male line provided no successors. Governors of Egypt were to have the same rank as Governors of other Turkish provinces.

The *firmans* proceeded to apply certain Turkish laws to Egypt. In particular, it was stated that the decree of the *Hatti-Sherif* of Gulhane (Imperial Edict of the Rose Chamber) issued by Sultan Abdul Mejid on 3rd November 1839, a reforming decree dealing with civil rights, would have the force of law in Egypt and that the treaties of Turkey with foreign powers would bind Egypt. Further, it was specified that Turkish administrative decrees would apply to Egypt, but – a crucial proviso – 'in accordance with local needs and the principles of justice'. This important phrase allowed laws to be issued in Egypt which diverged in many respects from those of the rest of the Ottoman Empire. For example, the Ottoman Penal Code of 1840 was never applied in Egypt and Mohamed Ali enacted his own criminal legislation. Similarly, the Ottoman Land Laws of 1839 and 1856 were not applied and Mohamed Ali went his own way with land reform. On the other hand, the Ottoman law of 1867 dealing with ownership of land by foreigners and the law of 1869 dealing with mines were applied in Egypt. The laws of Egypt in the nineteenth century are further described in Chapter 2.

The successors of Mohamed Ali came to power in accordance with the rules laid down in the *firmans* of 1841 requiring the governorship of the country to pass to the eldest surviving male in direct line. The line of Mohamed Ali continued in this fashion even after Egypt ceased to be part of the Ottoman Empire, until the Monarchy came to an end in 1953.

However, during the latter part of the nineteenth century Egypt attained such a degree of independence that the sovereignty of Turkey became almost a technicality. From 1850 until the British occupation in 1882 'Egypt continued to progress . . . towards an independence which was increasingly *de jure* rather than

5. A *firman* was a decree of the Sultan of Turkey.

purely *de facto* . . .'.⁶ The *de jure* nature of this independence can be illustrated by a *firman* of 1867 which granted Ismail the title of *Khedive*,⁷ a title he and his successors bore until 1914, and which permitted him in certain matters to negotiate with foreign powers directly. It also allowed him further rights of internal legislation. This title and these rights were acquired at a substantial cost, namely, a large increase in the tribute paid to Istanbul. By 1873 the 'independence of Egypt in matters administrative, financial and juridical was virtually complete, although she remained, of course, juridically part of the Ottoman Empire until the beginning of the First World War'.⁸ For instance, Egypt was able to enter into commercial and postal treaties with foreign powers and to exchange consular missions, without the consent of Turkey. As another example of her ability to act independently notwithstanding her legal position as a vassal state of Turkey, Egypt entered into a condominium with Great Britain with respect to the Sudan, the Anglo-Egyptian Condominium Convention of 1899. Nevertheless the sovereignty of Turkey would sometimes assert itself. In 1869 the Grand Vizier, Ali Pasha, objected to the *Khedive* Ismail acting as a sovereign in his own right when dealing with the European powers and raising loans from them. A *firman* was therefore issued in September 1869 which amended the constitutional relationship between Egypt and Turkey and, in particular, stated prior approval was required from Istanbul before Egypt could contract foreign loans. The effect of this *firman* was, however, cancelled by another *firman* issued in September 1872. A further *firman* issued in June 1873 was the first to refer to Egypt as a state and not a *Pashalik*.

The continuing independence of Egypt was abetted by the European powers who began to take over the economic life of Egypt and to exercise privileges within the country as foreigners far in excess of those permitted in other parts of the Ottoman Empire.

The Capitulatory System, further described in Chapter 2, gave foreigners a privileged position by requiring disputes, even those with Egyptians, to be heard by the Consular court of the foreigner in question. The extent to which the Capitulatory Powers were able to claim special protection for their subjects was due to the large foreign influence, both economic and political, in Egypt, greater than elsewhere in the Ottoman Empire.

An important result of this foreign economic influence was the large and seemingly unmanageable debt to Europe. This led to two events of significance from a constitutional point of view. First, since Egypt remained a province of the Ottoman Empire, the Sultan could remove the Governor of Egypt which he did by the issue of a *firman* on 26th June 1879 which deposed the *Khedive* Ismail and replaced him by his son, Tewfiq. Although this appeared to demonstrate the sovereignty of Turkey over Egypt, it was more indicative of the influence of France and England who had instigated the deposition. Secondly, it led in 1882 to the British occupation on the pretext that European economic interests in Egypt had to be protected. As with the foreign occupations at the beginning of the

6. J. N. D. Anderson, 'Law Reform in Egypt, 1850 to 1950', in *Political and Social Change in Modern Egypt*, edited by P. M. Holt (Oxford: Oxford University Press, 1968), p. 212.

7. *Khedive* was a Prince of the Ottoman Empire.

8. J. N. D. Anderson, *op. cit.*, p. 212.

nineteenth century, the British occupation, intended to be temporary, did not change the legal standing of Egypt, at least not until 1914.

On the other hand, certain constitutional developments did take place. In the judicial field there was substantial reform with the rationalisation of the court system and the establishment of the Mixed Courts.⁹ There were also some reforms in the system of government. In the latter half of the nineteenth century attempts were made to make the Government of Egypt more representative. Mohamed Ali had created certain councils but these were composed of persons nominated by him and had little real power. In 1866 a Chamber of Deputies (*Majlis Shura al-Nuwwab*) was established, but the *Khedive* Ismail retained executive and legislative powers. In 1878, however, a Council of Ministers (*Majlis al-Nuzzar*) was created with some decision-making functions. All laws had to be approved by a majority vote and Ministers had full power to appoint and dismiss their civil servants. The Ministers were not, however, responsible to any elected body. Nevertheless, the creation of this body marked an important step in the constitutional development of Egypt. It was stated at the time that the intention of the reform was to 'bring the system of Government into line with the principles which apply for Governments in Europe'.¹⁰ Although this objective was not achieved in 1878 with the creation of the Council of Ministers, a significant step in this direction was made in 1883 at the start of the British occupation. A Constitution was enacted which appeared to establish a representative government, a type of constitutional Monarchy under the *Khedive* Tewfiq. There were two elected bodies, a Legislative Council and a General Assembly.

A Legislative Council was composed of thirty members of whom sixteen were elected by provincial councils and fourteen were appointed by the Government. The General Assembly consisted of eighty-two members, made up as follows: six ministers, the thirty members of the Legislative Council and forty-six members appointed by the electorate. The Assembly's legislative powers were limited to fiscal matters since no new taxation could be levied without the consent of the Assembly. On other matters it had to be consulted. Ministers were not accountable to either body, whose role remained, therefore, primarily consultative.

In 1913 Lord Kitchener, who had been appointed as Consul General in 1911, issued a new Constitution and abolished the Legislative Council and the General Assembly. A single Legislative Assembly was set up instead with seventeen members who were nominated and sixty-two members who were elected by indirect suffrage. The Assembly still had no real legislative powers, since an executive committee always made the final decision, its only function being to 'consider' all draft bills before they could become law. The Assembly was suspended in 1915.

The prime concern of the British occupation under Lord Cromer (1883 to 1907) was the improvement of Egypt's finances and the establishment of an effective administration. After Lord Cromer there was increasing pressure to incorporate Egypt fully into the British Empire, supported, in particular, by

9. See Section B of Chapter 2.

10. Statement issued on 28th April 1878 by the *Khedive*.

figures such as Lord Kitchener. The debate over this question was interrupted by the advent of the World War in 1914, when Great Britain found herself at war with Turkey. On 18th December 1914 Great Britain unilaterally terminated Turkish suzerainty and proclaimed Egypt to be under the protection of George V. Turkey did not formally renounce her rights to Egypt and the Sudan until the Treaty of Lausanne in 1923. According to Article 17 of this Treaty her renunciation was retroactive to 5th November 1914.

2. *The British Protectorate – 1914 to 1922*

Even as a British Protectorate the constitutional position of Egypt remained unclear. Although the nature of a Protectorate has no precise definition in international law, there usually exists a treaty between the two countries concerned whereby the status of the Protectorate in question and the relationship between the countries are defined. The existence of such a treaty is the main distinction between a Protectorate and a Vassal State. In the case of Egypt no treaty was ever signed. Being based on a unilateral declaration by Great Britain, the legal nature of the Protectorate therefore remained imprecise. As it was wartime Great Britain never took any steps to define the status of Egypt. The ambiguity of the position was compounded by the declaration of martial law in 1914 which automatically gave extensive powers to the British Commander-in-Chief. The Constitution of 1913 was suspended at the same time.

The King of England had taken the place of the Sultan of Turkey and Hussein Kamel took the title of Sultan of Egypt. The country was governed by a mixed civilian administration of English and Egyptian officials and the Sultan's Ministers took their decisions on the advice of the British officials who were themselves subject to the directions of the High Commission.

Towards the end of the First World War there was increasing pressure for the abolition of the Protectorate and independence for Egypt. This manifested itself in the formation of nationalist political parties, in particular, the *Wafd*, and in the violent uprising of 1919. Great Britain could see no way at that stage of reconciling Egypt's demands for complete independence and her own need to protect her economic interests, in particular, the Suez Canal and the route to India.

Finally, however, after lengthy negotiations, the Protectorate was abolished.

On 28th February 1922 a proclamation was issued by Great Britain, another unilateral act. This read as follows:

- '1. The British Protectorate over Egypt is terminated and Egypt is declared to be an independent sovereign state.
2. So soon as the Government of His Highness shall pass an Act of Indemnity with application to all inhabitants of Egypt, Martial Law as proclaimed on the 2nd of November 1914 shall be withdrawn.
3. The following matters are absolutely reserved to the discretion of His Majesty's Government until such time as it may be possible by free discussion and friendly accommodation on both sides to conclude agree-