

## CHAPTER VII

### CONCLUSION

The question of codification in the Muslim World goes back to the very early history of the Islamic Caliphate. Before raising the controversy of codification in the West, the Muslim World from the era of the Abbasid Caliphate argued the issue. After the adoption of the *Tanzīmāt* policy by the Ottoman Caliphate and namely within the reign of the Ottoman Caliph, Sultān ʿAbdul-Majīd, in 1839, a series of codes was imported from the Western models parallel to a code for Islamic civil law and another for the family law which were domestically produced, namely “*Majallah al-Aḥkām al-ʿadliyyah*” (The Compilation of Principles of Justice 1293AH/1876CE) and “*Qānūn al-ʿālah*” (Family Law 1336AH/1917CE). As far as the civil law is concerned, the Arab countries which ruled by the Ottomans applied the *Majallah* as the code of civil law in respect of transactions (*Mu ʿamalāt*). Egypt never applied the *Majallah* as it had gained its autonomy earlier with Muḥammad ʿAlī Bāshā in 1805.

Following the World War II, the Arabs achieved independence in a chain of historical events and political contexts. After acquiring full independence, it was the due time for Arabs to recover from political and social crisis that left behind by the mandatory powers and revise the statutes in all aspects of life and the foundations of the society. Codification has characterized the Arab countries of the period since World War II, both in areas regulated by Islamic law and in those already secularized. The National Civil Code was applied in Egypt between 1883 and 1949 and it was a duplicate of the French Civil Code of 1804. The late

professor Doctor ‘Abdul-Razzāq al-Sanhūrī (1895-1971) appeared in this era to show the need for, and then to draft, new code(s) of Arab civil law. He revised the Egyptian National Civil Code and the *Majallah* in Iraq in two different articles published in 1934 and 1936. Parallel to that, he suggested proposals to overcome the vices and shortcomings of the two compilations of law and proposed a plan for drafting the New Egyptian and Iraqi Civil Codes. Moreover, Sanhūrī’s enterprise did not end with accomplishing the Egyptian Civil Code in 1949 and the Iraqi Civil Code in 1951 as it was the fortune of the New Code(s) to be a model for other Arab countries that directly or indirectly quoted from these two prototypes. His work was assigned to different Arab countries with major or minor amendments. Syria (1949), Libya (1954), Kuwait (1961) and Jordan (1976) are instances of the Arab countries that Sanhuri had fully or partially drafted or given consultation to their codification process with special reference to civil and commercial laws.

After enactment of Sanhūrī’s Codes, a change in the status of Arab civil laws was observed. According to Sanhūrī (1962), the Arab World after this event was legally divided into two groups. One group maintained the status quo and its civil law remained unwritten, like the Kingdom of Saudi Arabia and Yemen. Meanwhile, other Arab countries followed the codification movement. The later trend, as Sanhūrī said in 1962, was divided into two different but integrated prototypes: The Egyptian current and the Iraqi current. The Egyptian Code was also adopted by Syria and Libya. It represented the Western legal culture (mainly French Civil Code) in the Arab World along with the Codes created for Lebanon, Tunisia, Algeria and Marrakesh. The Iraqi current compromised between the *Majallah* and the Western Codes in a moderate manner. Jordan and Palestine were also applying the *Majallah* and running closer to the Iraq current in those days. However, these two currents together were considered as a trend toward synthesis of Islamic and Western legal ideas in fields such as contract, and eclecticism

in the selection of sources. The foremost advocate in the Arab world of synthesis between the Shari'ah and Western law was Sanhūrī. It can thus be said that a new family of civil codes has developed in the Arab World which is less closely related to French Law than was the case with the previous Egyptian legislation and Lebanese Civil Code and which is much farther removed from Islamic law than was the *Majallah*. To compare in general the Iraqi Civil Code and its Egyptian counterpart, one can conclude the fact that the Iraqi Civil Code became one prototype and the Egyptian Code another. Meaning, the proposed revision of the Egyptian Civil Code was a different problem in that the Code was not a version of codified Islamic law as in Iraq, but in many parts a direct translation of French law. None of the Codes is a blind reproduction of a prototype. At all times Sanhūrī took into account the existing social environment and legal background. Sanhūrī felt that a country applying the *Majallah* cannot receive the same treatment as a country with a Western inspired Civil Code. The Iraqi Civil Code is distinguished from its Egyptian counterpart in that it contains a number of provisions of the *Majallah*. It can be concluded that insofar as the treatment of Islamic law is concerned; Iraq has taken the middle course between retaining Islamic jurisprudence in its entirety and going for radical reform and abandoning Islamic law. As such, the Iraqi legal system seems to be reasonably suited to the needs of its population. Furthermore, the performance of Iraqi Civil Code can be seen as one of the important historical events that marked the harmonization of Shari'ah and Civil Law. However, neither the Iraqi Civil Code nor the Egyptian counterpart was purely Islamic, although some analysts consider them as gradual steps to Islamizing a code for Arab civil law.

The differences between the Egyptian Civil Code and its counterparts in Syria and Libya are unremarkable. In spite of that, Syria was about to draft an Islamic Civil Code but the

military coup of Ḥusnī al-Za'īm in 1949 occurred and Sanhūrī's Code replaced it and put an end to the Islamic Civil Code project thereof.

In terms of general trends, sources and stances of the Code(s) from contemporary debates of law, judiciary and jurisprudence the Code is characterized as being a blend of Western and Islamic principles. It has attempted to forge a connection between two projects of identity and redistribution by resorting to the rational and social considerations as a conceptual tool of mediation. However, the rules of the Code(s) in consideration of Sharī'ah could be classified into two areas; an area whose rules are derived from the Sharī'ah directly or from its indicated principles and theories, and another area whose rules are mainly extracted from the modern law, but it will apply to the Islamic Sharī'ah if the latter is presented as a broad and flexible school of jurisprudence incorporating all the opinions and schools of law that emerged during the length of the Islamic legal history. This implies that the rules of the Code(s) are almost either extracted from the Sharī'ah directly or they could be interpreted in a way compliant to Sharī'ah if not as particular issues it will do so in general objectives and higher intents of the law. Sanhūrī on some occasions confessed to the relative difficulty of this co-application with some rules of the Code(s) as they are clearly contrary with the rulings of Sharī'ah and any interpretation that gives them legality from an allegedly Islamic viewpoint will be on the account of the Sharī'ah. That may be the reason that pushed Sanhūrī in 1962 to withdraw his overemphasized claims of the Islamicity of the Code that he had proclaimed in 1942. Therefore, he pronounced some exceptions and recognized that these are in no way complying with the Sharī'ah rulings, such as contracts involving non-existing objects, interests, and enrichment without just cause. However, this study concludes with the fact that

the subjects mentioned above, except interest, can apply to the rulings of Sharīʿah if taken in its entirety and with a flexible manner of compliance. The study concludes that a change dramatically occurred to Sanhūrī's judgments on the Code's Islamicity between 1942 and 1962, owing to Sanhūrī's realization of the difference between a methodology of treatment solely based on the concept of eclecticism '*Talfīq and Takhayyur*' and a correct and precise methodology that takes the principles of *Fiqh* and the express arts of its foundation into account. Therefore, the claim of Islamicity of the Code(s) can be easily established on the concept of *Talfīq*, although it is difficult to make this claim evident if the arts of foundation of Islamic jurisprudence are truly attached, within this complicated course of examination.

Therefore, the study suggests to the Arab countries that enacted or adopted Sanhūrī's Code(s) to make a further step and revise the Code(s) or amend it in the light of Islamic law to meet the standard future that Sanhūrī planned for and dreamed to be achieved in the Arab World. However, this dream was approached by the draft of the Jordanian Civil Code. Sanhūrī's works are perceived as having the greatest impact on the creation of it. Since the Law Committee of the Arab League recognized it as a prototype for a uniform Civil Code for Arab countries, it is required for countries like Egypt, Iraq, Syria and Libya to realize this and follow the way of the Republic of Sudan which imported the Jordanian Code and enacted it completely in 1983 and also the brave step of the United Arab Emirates which made an initiative and enacted it as its own Civil Code from 1 April 1986, under the name of "Law of Civil Transactions."

Moreover, all the Muslim countries should work together to make a uniform law derived from the Islamic law without jeopardizing necessary requirements of a modern civil code. Sanhūrī's enterprise, experience and plan could be a good ground for further

development towards Islamization of law, with special reference to the Iraqi prototype. Malaysia hopefully can play a good role within the Organization of Islamic Conference (OIC) in bringing up the issue and gathering the Muslim countries on the final plan that Sanhūrī proposed for an Islamic coloration of both law and state in the entire Muslim World, especially, the proposals of Sanhūrī in refreshment of a new concept of an [Eastern] Caliphate System that could be easily applied with the enterprise of *Islām Ḥaḍārī* in present Malaysia.