

CHAPTER I

INTRODUCTION

1.1 Preliminary

It is well known that different circumstances have been undergone by Arab societies since they converted to Islam. Muslims implemented Islamic law for centuries with various schools of jurisprudence. Due to the fact that Islamic law manifested itself in various juristic doctrines with a certain geographic diffuseness in the Muslim World, different historical attempts have been approached to unify and codify the laws, in the Abbasid jurisdiction era and the era of the Ottoman Empire respectively. In other words, before raising the controversy of codification in the west, the Muslim world from the age of the Abbasid Caliphate has been arguing the question. However, the question in the Muslim world was neither about the necessity of codification, nor was it the case of advantages and disadvantages generating from it, but was, rather, the question of legitimacy and legality.

The Ottoman Empire controlled the Arab World for several centuries and ruled according to Islamic laws and the fundamentals of Islamic jurisprudence. After the adoption of the *Tanzīmāt* policy by the Ottoman Empire, within the reign of the Ottoman Caliph *Sulṭān ‘Abdul-Majīd*, in 1839, a series of codes were borrowed from the western models. Simultaneously, a code for Islamic civil law and another for family law were domestically produced by the Caliphate, namely “*Majallaht al-Aḥkām al-‘Adliyyah*” (The Compilation of Principles of Justice 1293AH/1876CE) and “*Qānūn Ḥuqūq al-‘Ā’ilah*” (Family Law 1336AH/1917CE). However, as far as the civil law is concerned, the Arab countries which

were ruled by the Ottomans applied the *Majallah* as the code of civil law in respect of *Mu'āmalāt*. Egypt never applied the *Majallah* as it gained its autonomy earlier under Muḥammad 'Alī Bāshā in 1805.

Before the empire lapsed at the beginning of the last century, it gradually lost power over the entire Arab World and the Arabs complied, willingly or unwillingly, with a new political order, namely the Capitulation politics associated with the current of modernity.

Following War World II and the declaration of nations' rights of self-determination, the Arabs almost achieved independence in a chain of historical events and political contexts. The Arab countries in the last century and with the backing of the colonists commenced deriving laws from the western paradigm, creating a different way of life and advocating a different type of law. For some analysts, it was necessity that led to such derivation, whether it was an international challenge or internal persuasion, towards such a tremendous change in which they felt their national need was in the adaptation of a comprehensive modern lifestyle, including modern law. After gaining independence and sovereignty in some Arab countries, Arabs saw that the time was due to recover from the political and social crisis left behind by the colonists and to adopt a reformation in all aspects of life including the foundations of society.

'Abdul-Razzāq Aḥmad al-Sanhūrī (1895-1971) appeared during this era to draft a New Code of civil law in association with the eminent France lawyer Eduard Lambert.

Sanhūrī was born on 11 August 1895 in Alexandria, Egypt. He attended Rātīb Bāshā Primary School and the 'Abbasiyyah School, graduating in 1913 second in the Egyptian section. He was awarded a License in Law, graduating top of his class, in 1917. A series of

appointments followed, first as a deputy in the court's legal office (*Wakīl Niyābah*) attached to Mansurah's Mixed Courts. In 1920, he was appointed as a lecturer at the School for Sharī'ah Judges. He was delegated to France for post-graduate study and obtained a Doctorate in English Law at the University of Lyon. He also obtained a second Doctorate in political sciences. It was in his second thesis that his concern with reforming the legal systems in Arab countries was first announced. This second thesis, "*Le Califat, 1926*", which was later translated into Arabic under the title of "*Fiqh Al-Khilāfah wa Taṭawwuruhā li-Tuṣbiḥa 'Uṣbata Umam Sharqiyyah*", elaborated some key points to develop the concept of the Classical Islamic Caliphate to become a political organization unifying all Muslim countries.

When Sanhūrī came back to Egypt he was obliged to codify the civil law, therefore he wrote some articles motivating and justifying this step and performed the task within about six years (1936-1942), to be implemented in Egypt after another seven years in 1949. His work transited to different Arab countries with major or minor amendments, namely: Syria (1949), Iraq (1951), Libya (1956) and Kuwait (1961).

The Iraqi Civil Code became one prototype, the Egyptian Code another. Other codes are hybrids of the two models. 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 was in many parts a direct translation of French law. It means perceiving a particular environment and circumstance; Sanhūrī felt that a country applying the *Majallah* cannot receive the same treatment as a country with a western oriented Civil Code. The Iraqi Civil Code is distinguished from its Egyptian counterpart in that it contains a number of provisions of the *Majallah*. However, it is evident that Sanhūrī extracted laws from more than twenty western codes along with the rules he had taken from the Islamic Sharī'ah.

After the drafting of a series of Arab Civil Codes, Sanhūrī called for a new, final model Code to be extracted from Islamic sources. He put up a strategy to be adopted in several gradual steps. In his personal memorandum, he emphasized the implementation of Islamic law was one of his serious dreams and he stressed on the necessity of redrafting Islamic law in the light of contemporary theories of modern law. His call has been responded as can be seen in remarkable works and studies in the Muslim world. A number of studies and several legal attempts at the official level have been performed to persuade the need of the Muslim nation for an entire Islamic Code covering various aspects of law.

In spite of the legislative works he performed, Sanhūrī also occupied some ministerial posts. He was Deputy Minister of Education in 1939, Minister of Justice in 1944, and Minister of Education in 1945-1946, and became State Minister in 1947. In 1949, Sanhūrī became the President of State's Council (Chief Justice of *Majlis al-Dawlah*, the hierarchy of administrative courts and the body that issues advisory opinions). Following revolution of 1954, Sanhūrī was removed from his post. He passed away on 21 June 1971 and left behind him more than fifty books and articles.¹

1.2 Literature Review

There is an abundance of literature exploring the history of Islamic law and the foundation of Islamic jurisprudence. The debate on codification of Islamic law and the controversy about its legitimacy have been virtually discussed by the profound Professor Şubḥī Maḥmaşānī in “*Al-Awḍā‘ al-Tashrī‘iyyah fī al-Duwal al-‘Arabiyyah Mādīhā wa Ḥādīruhā*” (Legal Systems in the

¹ For further information about Sanhūrī, see: Nādiyah al-Sanhūrī, Tawfīq al-Shāwī (1988). ‘*Abul-Razzāq al-Sanhūrī min Khilāl Awraqih al-Shakḥiyyah*, 1st edn. Cairo: Al-Zahrā’ li al-‘Ilām al-‘Arabī. pp. 21-35; Enid Hill (1987). *Al-Sanhūrī and Islamic Law*. Cairo: The American University Press in Cairo. pp. 1-2; ‘Abul-Bāsiṭ al-Jumay‘ī (1972). ‘*Abul-Razzāq al-Sanhūrī al-Rajul al-ladhī Faqadnāh*,” *Maj. Al-Qaḍā’*, 27 (3-4). pp. 99-112; Muhammad ‘Imārah (2006). *Islāmiyyāt al-Sanhūrī Bāshā*, 1st edn. Al-Manşūrah: Dār al-Wafā’. volume. 1, pp. 17-74.

Arab States: Past and Present)² and “*Falsafat al-Tashrī’ fī al-Islām*” (The Philosophy of Jurisprudence in Islam).³ As such, the issue is studied by Amin Ahsan Islahi in “*Islamic Law: Concept and Codification*”.⁴ In these books, the authors discuss the development of legal status in the Arab world and explore in detail the historical events with regards to the compilation of Islamic law and the forms that Islamic law was presented in, with a special reference to the relation of law with the State and Judiciary policy. According to their conclusions, the freedom of *Ijtihād* was one of the main hindrances that made codification of the Islamic law prohibitive. However, the State had presented different ways to unify the laws, such as recognizing limited schools of law and appointing judges from certain schools of jurisprudence, and then selecting certain books of *Fiqh* to be the reference of Fatwa and judgment, and drafting collections of Fatwa by official directives from the State. The final status was promulgation of the official codes of law by the Ottoman Caliphs after enacting the policy of *Tanzīmāt* in 1839. Here, the “*Majallah*” for law of transactions and “*Qānūn al-Ā’ilah*” for the personal law were produced in a way technically similar to the western styles of codification.

The period before the enactment of Sanhūrī’s Egyptian Civil Code (1949) has attracted some writers. The period was known as the age of distribution between Native Courts which applied National Civil Code and the Mixed Courts which applied the Mixed Civil Code, in which the later was a part of Capitulation politics and discriminated the disputes of foreigners from those that were purely natives. It was the age of dichotomy in the sphere of legislation and judiciary which lasted for (74) years (1875-1949). Mark S. W. Hoyle’s “*Mixed Courts of*

² Subhī Maḥmaṣānī (1965). *Al-Awḍā’ al-Tashrī’iyyah fī al-Duwal al-‘Arabiyyah Mādīhā wa Ḥāḍiruhā*, 3rd edn. Beirut: Dār al-‘Ilm li-al-Malāyīn.

³ Subhī Maḥmaṣānī (1987). *Falsafat al-Tashrī’ fī al-Islām -The Philosophy of Jurisprudence in Islam*, Trans. Farhat J. Zaidh. Selangor Darul Ehsan: Penerbitan Hizbi.

⁴ Amin Aḥsan Iṣlāhī (2000). *Islamic Law: Concept and Codification*, 1st edn. Lahore: Islamic Publications Ltd.

*Egypt*⁵ and Enid Hill's "*Mahkamah: Studies in the Egyptian Legal System*"⁶ are two main references in this area of the study. The investigations they have concluded can be highly consulted for throwing light on the historical contexts that preceded Sanhūrī's enterprise. These studies show that the Mixed Courts were established to hear disputes between natives and foreigners, and between foreigners of different nationalities. Mixed Courts specially drafted Codes, based on a Civil Law format but with significant Islamic and local principles. The Native Courts were set up in 1883 to deal with disputes between natives. The Code of 1949 was solidly based on a mixture of the previous Mixed and Native Codes together with Egyptian jurisprudence, the Sharī'ah and various foreign Codes from nearly 20 countries. It is, however, remarkable to note that Sanhūrī had incorporated better parts of Mixed Courts jurisprudence into the Civil Code of 1949. According to the opinion of Enid Hill, Sanhūrī's concern was not the unification of the courts at this time, but rather the unification of law, so that would bring about unification of courts at the second turn (Islamic law As a Source for the Development, p. 164).

Having Sanhūrī's Code as the core concern of this study and to put the enterprise within a broader scope, it is necessary to read relevant topics of Sanhūrī's writings before and after the preparation of the Code. Herein, the researcher emphasizes that a special reference to Sanhūrī's Doctoral thesis entitled "*Fiqh al-Khilāfah wa Taṭawwuruhā li-Tuṣbiḥa 'Uṣbata Umam Sharqiyyah*"⁷ (The Caliphate and Its Estimated Progress to Become A Union For the Entire Oriental Nations) which was written in French as "*Le Califat*" (1926) and under the supervision of Eduard Lambert, his then companion in the drafting of the Egyptian Civil Code,

⁵ Mark S. W. Hoyle (1991). *Mixed Courts of Egypt*, 1st edn. London: Graham & Trotman.

⁶ Enid Hill (1979). *Mahkama: Studies in the Egyptian Legal system- Courts & Crimes, Law & Society*, 1st edition. London: Ithaca Press.

⁷ Abdul-Razzāq A. al-Sanhūrī (1989). *Fiqh al-Khilāfah wa Taṭawwuruhā li-Tuṣbiḥa 'Uṣbata Umam Sharqiyyah*. Trans. Nādiyah al-Sanhūrī, Tawfīq al-Shāwī. Cairo: Al-Hay'ah al-Miṣriyyah al-Āmmah lil-Kitāb.

is substantial. He reproduced the main ideas of the book briefly in an article published by *Majallat al-Muḥāmah* in 1929 under “*Al-Dīn wa al-Dawlah fī al-Islām*”⁸ (The Religion and the State in Islam). In these two works, Sanhūrī clearly adopted Islam as a religion as well as a State. Here, we can find out a detailed proposal for revising and implementing the Sharī‘ah by certain instruments and within the stages he described. However, before commencing the enterprise, Sanhūrī had written two proposals for two different prototypes of law that later on became effective in Egypt and Iraq. He revised the Egyptian Civil Code and proposed the road map for the New Code in the article published in *Majallat al-Qānūn wa al-Iqtisād* (1936) under the topic: “*Wujūb Tanqīḥ al-Qānūn al-Madanī al-Miṣrī wa ‘alā Ay’ Asās Yakūn Hādhā al-Tanqīḥ*”⁹ (The Revising of the Egyptian Civil Code and The Basis on Which the Revision Should Take Place). He also revised the Iraqi Civil Code, “*Majallah*”, and created some advanced proposals for the new Iraqi Civil Code in an article published in *Majallat al-Qaḍā’* (1936) under the topic: “*Min Majallat al-Aḥkām al-‘Adliyyah ilā al-Qānūn al-Madanī al-‘Irāqī wa Ḥarakāt al-Taqnīn al-Madanī fī al- al-‘Usūr al-Ḥadīthah*”¹⁰ (From the *Majallah* to Iraqi Civil Code and the Movement of Civil Codes in Modern Age). However, after the preparation of the Egyptian Code, he lectured the Royal Geographic Association on 24 April 1942 under the title: “*Mashrū‘ Tanqīḥ al-Qānūn al-Madanī al-Miṣrī*”¹¹ (The Revision Enterprise for Egyptian Civil Code) and provided vital information about the sources of the New Code and the way it was prepared. In parallel to the preparation of the Iraqi Civil Code, he also wrote a

⁸ ‘Abdul-Razzāq A. al-Sanhūrī (1929). *Al-Dīn wa al-Dawlah fī al-Islām*. In Nādiyāh al- Sanhūrī, Tawfīq al-Shāwī (ed.). (1992). *Majmū‘at Maqālāt wa Abḥāth al-Ustādh al-Doctor ‘Abdul-Razzāq al-Sanhūrī*. Cairo: Maṭba‘at al-Jāmi‘ah. volume. 1, pp. 9-17.

⁹ ‘Abdul-Razzāq A. al-Sanhūrī (1936c). “Wujūb Tanqīḥ al-Qānūn al-Madanī al-Miṣrī wa ‘alā Ay’ Asās Yakūn Hādhā al-Tanqīḥ,” *Maj. Al-Qānūn wa al-Iqtisād*, 6(1). pp. 3-121.

¹⁰ ‘Abdul-Razzāq A. al-Sanhūrī (1936b). “Min Majallat al-Aḥkām al-‘Adliyyah ilā al-Qānūn al-Madanī al-‘Irāqī wa Ḥarakāt al-Taqnīn al-Madanī fī al- al-‘Usūr al-Ḥadīthah”. In Nādiyāh al-Sanhūrī, Tawfīq al-Shāwī (ed.). (1992). *Majmū‘at Maqālāt wa Abḥāth al-Ustādh al-Doctor ‘Abdul-Razzāq al-Sanhūrī*. Cairo: Maṭba‘at al-Jāmi‘ah. volume. 1, pp. 269-325.

¹¹ ‘Abdul-Razzāq A. al-Sanhūrī (1942). “Mashrū‘ Tanqīḥ al-Qānūn al-Madanī al-Miṣrī”. In Nādiyāh al-Sanhūrī, Tawfīq al-Shāwī (ed.). (1992). *Majmū‘at Maqālāt wa Abḥāth al-Ustādh al-Doctor ‘Abdul-Razzāq al-Sanhūrī*. Cairo: Maṭba‘at al-Jāmi‘ah. volume. 1, pp.169-186.

report¹² to the Iraqi committee charged with preparing the Civil Code and submitted two documents with the report. It appears from the report that Sanhūrī, in the documents attached to it, provided information about the sources of the articles incorporated into the Code from the western inspired laws and how they apply with the provisions of Islamic law represented mainly by the *Majallah* and *Murshid al-Ḥayrān* of Qadrī Bāshā (1821-1866).

After the accomplishment of the Code and its transition to some other Arab countries, Sanhūrī wrote an article published in the Iraqi Journal “*Al-Qaḍā*” in July 1962 under the topic “*Al-Qānūn al-Madanī al-‘Arabī*”¹³ (The Arab Civil Code) addressing his final plan for the future of Arab Civil Law. He firstly confessed that either the Egyptian prototype or the Iraqi one is only an attempt for a bigger work which draws up the final Civil Code that will be directly derived from the Sharī‘ah. But due to the fact that this aim is distant and surrounded by plenty of difficulties and it takes a space of time that may cost one’s entire life as well as the scientific and legislative road being unserviceable, he had taken another path to gradually arrive at the aim.

Sanhūrī’s “*Al-Awrāq al-Shakhsiyyah*”¹⁴ (Personal Memorandum Papers) that was collected in his late years and published by his daughter Nādiyāh, is basically important as there are found plenty of provisions throwing light on Sanhūrī’s serious dreams and his everlasting hopes for the life of Arabs and Muslims altogether which can fill lacunae in this respect.

¹² ‘Abdul-Razzāq A. al-Sanhūrī (1936a). “Kitāb Marfū‘ ilā Fakhāmat Ra’īs Lajnat Taḥḍīr al-Qānūn al-Madanī al-‘Irāqī wa al-Wathīqatayn al-Mushtamilatayn ‘alā Lā’iḥat al-Buū‘ fī al-Qānūn al-Madanī al-‘Irāqī al-Muqtarah.” In Nādiyāh al-Sanhūrī, Tawfiq al-Shāwī (ed.). (1992). *Majmū‘at Maqālāt wa Abḥāth al-Ustād al-Doctor ‘Abdul-Razzāq al-Sanhūrī*. Cairo: Maṭba‘at al-Jāmi‘ah. volume. 2, pp. 61-199.

¹³ ‘Abdul-Razzāq A. al-Sanhūrī (1962). “Al-Qānūn al-Madanī al-‘Arabī,” *Maj. Al-Qaḍā*, 20 (1-2), pp. 7-33

¹⁴ N. al-Sanhūrī, T. al-Shāwī (1988). Op. Cit.

Despite that, consulting a number of official writings is greatly important such as “*Majmu‘at al-A‘māl al-Taḥḍīriyyah*”¹⁵ (The Collection of the Preparatory Works) as well as the introductory part of Sanhūrī’s commentarial encyclopedia known as “*Al-Wasīṭ fi Sharḥ al-Qānūn al-Madanī al-Jadīd*.”¹⁶ His book entitled “*Maṣādir al-Ḥaqq fi al-Fiqh al-Islāmī Dirāsah Muqāranah bi-al-Fiqh al-Gharbī*”¹⁷ is quite significant for it holds comparisons between the position of Sharī‘ah and his Code from the various issues of law related to transactions.

Sanhūrī’s project has been studied from different angles. Amongst the most significant studies are the works of Enid Hill, Guy Bechor and Amr Shalakany. Enid Hill has written a paper entitled “*Al-Sanhūrī and Islamic Law*”¹⁸ presented in Cairo (Papers in Social Sciences, Spring 1987). A part of the named paper has been published again in Arab Law Quarterly (January-November 1988)¹⁹ and in Islamic Law Social and Historical Contexts (1989).²⁰ She studied Sanhūrī departing from the assumption that he did bear an ideology to develop the Islamic Caliphate and his Codes were only manifestations of the broader agenda that he drew up earlier for the evolution of Islamic Sharī‘ah. However, the term of Islamic Sharī‘ah was redefined by Sanhūrī from a socio-cultural perception and described it as the law of the east, and the source of its inspiration and its intellect. So the Sharī‘ah, for him, was a system for civilization depending on a legal order and governance as the fruit of a common activity that all religious groups had contributed during centuries of co-existing and working together under the banner of Islam. As concluded by Enid Hill, “although he expressed his most sincere

¹⁵ Egyptian Ministry of Justice EMJ (1960). *Al-Qānūn al-Madanī Majmu‘at al-A‘māl al-Taḥḍīriyyah*. Cairo: Dār al-Kitāb al-‘Arabī.

¹⁶ ‘Abdul-Razzāq A. al-Sanhūrī (1972). *Al-Wasīṭ fi Sharḥ al-Qānūn al-Madanī al-Jadīd*. Cairo: Dār al-Nahḍah al-‘Arabiyyah.

¹⁷ ‘Abdul-Razzāq A. al-Sanhūrī (1953-1954). *Maṣādir al-Ḥaqq fi al-Fiqh al-Islāmī Dirāsah Muqāranah bi-al-Fiqh al-Gharbī*. Cairo: Dār al-Hanā’.

¹⁸ Enid Hill (1987). Op. Cit.

¹⁹ Enid Hill (1988). “Al-Sanhūrī and Islamic Law,” *Arab Law Quarterly*. London: Graham & Trotman, volume.3, pp. 182-218.

²⁰ Enid Hill (1989). “Islamic Law as a Source for the Development of a Comparative Jurisprudence.” In Aziz al-Azmeh (ed.), *Islamic Law Social and Historical Contexts*. London: Rutledge. pp. 146-197.

attachment and most profound respect for the religion of Islam, it is Islam as culture and civilization with which he concerned. He professes his interest since a young age towards all that is oriental and that he has always had a profound interest in the study of Islamic civilization that he revered and admired” (Islamic Law Social and Historical Contexts, p.149). The distinctive feature of Enid’s writings is that historical approach she followed in the study. She has studied Sanhūrī and the progress that his works have achieved in a historical order, starting from his study in Paris and ending by his occupation of the post of president of Council of the State or in another word the chief justice. And the question of her study was to examine the extent of the applicability of the Constitution of 1981 that verifies the necessity of amending the law of the State according to Sharī‘ah, on Sanhūrī’s Civil Law.

However, the work of Guy Bechor,²¹ which is recently published, is significant from a social standpoint. His study aims at examining the social incentives that made the members of the parliament and the Senate raise their hands to approve the proposed Code. He concludes that the issue for the Egyptian lawmakers was not how to reform the structure, but how to save it from meaningful change. According to him, the majority of the members of these two houses were from the ruling elite. They ratified the New Code based on their concern as small, threatened ruling elite (*Afandiyyah*) in years of social polarization, political violence and with a sense among the parliamentarians that they were losing power. Stability was sought to be necessary in order to prevent the collapse of an already sensitive social system. Understanding the concerns of his colleagues, Sanhūrī sought to alleviate these worries by maintaining three-fourths to four-fifths of the provisions of the old Code and rulings of Egyptian Courts in the current Code. Therefore, the sense of the parliamentary deputies was to accept the Code as the lesser evil. He believes the reform was excessively cautious, restricted and limited in scope.

²¹ Guy Bechor (2008). “The Sanhuri Code, and the Emergence of Modern Arab Civil Law 1932-1949, 1st edn. In Ruud Peters and A. Kevin Reinhart (ed.). *Studies in Islamic Law and Society*. Brill: Hotei Publishing. volume. 29.

In his article titled “*Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamise*”,²² Amr Shalakany questioned the identity of the New Egyptian Civil Code with reference to Sanhuri’s perception of the Code as he first in 1942 proclaimed the Code is a great victory of Islamic law and all its articles could easily be argued to represent principles of Islamic law, whilst later on, in 1962, he confessed that the New Code is a faithful representative of Western Civil Culture. The author concludes that the Code’s identity is distributed between two different projects, namely, the identity project of modernizing Islamic law and the redistributive project of engineering modern law to promote social justice. He maintains that although initially promoting the Code as “Islamic”, he eventually reneged on this claim as the “social” was displaced by the revolutionary turns in Nasser’s Egypt. He added:

‘However, several alternative interpretations may be offered. Perhaps Sanhūrī overemphasized the Islamicity of the Code 1942 as a calculated tactic to outmaneuver his political adversaries. Perhaps the subsequent experience of relying on the *Majallah* in drafting the Iraqi Civil Code influenced Sanhūrī’s view on the potentials of modernizing Islamic law. Perhaps his political marginalization under Nāṣir triggered his rigid dogmatism in judging the Code’s Islamicity. Perhaps the change reflects the archetypal conservatism in opinion that accompanies old age and overemphasizes the experience of religious at the expense of the temporal. In short, alternative readings are abundant.’²³

The transition of the Code to other Arab countries from Egypt is well studied by Muḥammad ‘Abdul-Jawād in “*Buhūth fī al-Sharī‘ah al-Islāmiyyah wa al-Qānūn*”,²⁴ Nabil Saleh in “*Civil Codes of Arab Countries: the Sanhūrī Codes*”,²⁵ and H. S. Amin in “*Middle East Legal System*”.²⁶ These studies show that none of the Codes drafted by Sanhūrī is a blind

²² Amr Shalakany (2001). “Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamise,” *Islamic Law and Society*, (8), pp. 201-244.

²³ Ibid, p. 243.

²⁴ Muḥammad ‘Abdul-Jawād (1977). *Buhūth fī al-Sharī‘ah al-Islāmiyyah wa al-Qānūn*, 2nd collection. Cairo: Maṭba‘at Jami‘at al-Qāhirah.

²⁵ Nabil Saleh (1993). “Civil Codes of Arab Countries: the Sanhūrī Codes,” *Arab Law Quarterly*, (8), pp. 161-167.

²⁶ H. S. Amin (1985). *Middle East Legal Systems*. Glasgow: Royston.

reproduction of a prototype. At all times he took into account the existing social environment and legal background.

To put Sanhūrī's Civil Code and the rules of Sharī'ah side by side, there have been several attempts by the Muslim jurists. Amongst these are the Sheikh Muṣṭafā al-Zarqā's comments published in his book "*Al-Qānūn al-Madanī al-Suriy*",²⁷ Sheikh 'Abdul-Raḥman al-Ṣābūnī's chapter three of his book "*Al-Madkhal li-Dirasat al-Tashri' al-Islami*"²⁸ that was devoted to some applications of Islamic law that transmitted to the Civil Code, al-Mustashār 'Abdul-Sattār 'Ādam's book "*Al-Sharī'ah al-Islāmiyyah wal-Qānūn al-Madanī al-Miṣrī*",²⁹ and Sheikh 'Iṣām Anwar Salīm's book "*Haymanat Mabādi' al-Sharī'ah al-Islāmiyyah 'Ala al-Qānūn al-Madanī*".³⁰ These studies demonstrated that the Civil Code has extracted many rules from the Sharī'ah source as particularities and faculties. Amongst the theories that were established based on the directives of Sharī'ah are the material trend of Islamic jurisprudence, liability of the minor person, theory of abuse of right, transfer of debt and theory of unexpected incidents.

A number of books and articles examined and evaluated the relation of the Codes with the Sharī'ah law generally or specifically. Amongst these studies are: N. J. Coulson's book "*A History of Islamic Law*,"³¹ Herbert J. Liebesny's "*The Law of the Near & Middle East*,"³²

²⁷ Muṣṭafā al-Zarqā' (1969). *Al-Qānūn al-Madanī al-Sūrī*. Jāmi'at al-Duwal al-'Arabiyyah: Ma'had al-Buhūth wa al-Dirāsāt al-'Arabiyyah.

²⁸ 'Abdul-Raḥmān al-Ṣābūnī (1988-1989). *Al-Madkhal li-Dirasat al-Tashri' al-Islāmi*, 4th edn. Alipo: Manshūrāt Jāmi'at Ḥalab.

²⁹ Al-Mustashār 'Abdul-Sattār 'Ādam (1969). *Al-Sharī'ah al-Islāmiyyah wal-Qānūn al-Madanī al-Miṣrī*. Cairo: Al-Majlis al-A'lā lil-Shu'ūn al-Islāmiyyah.

³⁰ 'Iṣām Anwar Salīm (1996). *Haymanat Mabādi' al-Sharī'ah al-Islāmiyyah 'alā al-Qānūn al-Madanī*. Alexandria: Mansha'at al-Ma'ārif.

³¹ N. J. Coulson (1964). *A History of Islamic Law*. Edinburgh: The University Press.

³² Herbert J. Liebesny (1975). *The Law of the Near & Middle East: Readings, Cases, & Materials*. Albany: State University of New York Press.

Wahbat al-Zuhayli's book "*Juhūd Taqnīn al-Fiqh al-Islāmī*",³³ Oussama Arabi's article "*Al-Sanhūrī's Reconstruction of the Islamic Law of Contract Defects*"³⁴ and the writer's article "*Abdul-Razzāq al-Sanhūrī wa Mashru'uh fī al-Taqnīn.*"³⁵ These studies show that none of the Egyptian and Iraqi prototypes was purely Islamic, even though the Iraqi Code was attributed to the features of Islamic jurisprudence much more than the Egyptian counterpart. However, Muḥammad 'Imārah in his book "*Islāmiyyāt al-Sanhūrī Bāshā*"³⁶ assessed the Sanhūrī Codes as true examples for Islamizing of law that should be followed by the legal professionals in the Muslim world. Therefore, he supported the people who appreciated Sanhūrī and counted him as the 'fifth Imam' of the Islamic jurisprudence.

For the translation of the Code's provisions, the study, perhaps to a certain extent, relies on the well versed translation made by Meredith and Ibrahim³⁷ for the Libyan Civil Code. Due to the fact that the Libyan Code is quite similar to the Egyptian Code, this work could be considered as an appropriate translation for the overwhelming majority of the Egyptian and Syrian Codes too.

The current study departs from the view that the studies that had previously been done about Sanhūrī's Codes are not sufficient to evaluate the work and make a correct assessment about it. The project should be given an independent study and the features of the enterprise should be assessed and examined as it reflects on itself more than giving focus to external sources and Sanhūrī's personal attitudes towards the Islamic Sharī'ah, as to the law and the civilization. However, an assessment on the methodology that Sanhūrī either proposed or

³³ Wahbat al-Zuhayli (1987b). *Juhūd Taqnīn al-Fiqh al-Islāmī*, 1st edn. Beirut: Mu'assasat al-Risālah.

³⁴ Oussama Arabi (1995). "Al-Sanhūrī's Reconstruction of the Islamic Law of Contract Defects," *Islamic Studies*, 6 (2), pp.153-172.

³⁵ Najm-Aldeen K. Kareem al-Zankī (2001). "Abdul-Razzāq al-Sanhūrī wa Mashru'uh fī al-Taqnīn," *Islāmīyat al-Ma'rifah*, (7) 27, pp. 63-94.

³⁶ M. 'Imārah (2006). Op. Cit.

³⁷ Meredith O. Ansell, Ibrahim Massaud al-Arif (n.d.). *The Libyan Civil Code: An English Translation and A Comparison with the Egyptian Civil Code*. London: The Oleander Press.

operated in regards with the Sharī'ah has not been given any concern in the former studies. Therefore, the current study tries seriously to read the project of Sanhūrī from different angles and to throw light on the significance of generic proposals that he posed for evolution of the Sharī'ah law in comparison to other different proposals for the renewal of the Islamic Sharī'ah as law and discipline.

1.3 Statement of the Problem

When a code is revised and drafted again, there should be some incentives and criteria to render the work possible. However, drafting Codes for different countries should take into account the environment and the circumstances prevailing in each individual country. Moreover, having a distinct strategy, such as the one proposed by Sanhūrī, to implement in the future and claiming that the implementation of Islamic Civil Law should be assigned only after certain procedures taking place either in scientific sphere or in legislative sphere; this is what makes Sanhūrī's Code controversial as to its originality as well as its distribution among various sources of law. Thus, the study attempts to examine the proposals that Sanhūrī offered before revising the former legal systems in each country, the extent of environmental difference and the influence imparted from it in relation to the Codes, as well as the criteria that Sanhūrī utilized in the new print of Arab Civil Codes and the start-point and roadmap he made in order to arrive at the final legislative stage as he proposed. The role of Sharī'ah laws in the Codes is another matter of concern in this study as Sanhūrī presented it as the ultimate source of legislation, after its due study under the light of contemporary legal theories. Therefore, the check and balance between the Sharī'ah on one hand and modern laws on the other hand is one of the main questions of the current study. In other words; the way Sanhūrī

compromised between the Islamic law and the modern laws in his version is the key issue of this research.

1.4 The Objective of the Study

This study aims to examine the development of the Arab society and the changes that shaped it in the era of modernity. A special focus, however, is given to Sanhūrī Codes for Arab Civil Laws in the middle of the Twentieth Century. To come up with a comprehensive study, the author will explore the historical contexts, the incentives for drafting the New Codes by Sanhūrī, the difference between the previous enactments and the New Codes, the faces of difference and accordance amongst Sanhūrī Codes and finally the upgrading or degrading (if applicable) of the place of Islamic Sharī'ah that took effect with the birth of Sanhūrī's Codes. Discovering the ways Sanhūrī used to overcome the expected conflicts and inter-contradictions amongst the bounds of the law that derived from different legal sources, then disclosing the identity of his law in aspect of its independence, is another significant aim. Lastly, the study aims to identify the inner identity of the Code. This aim can be achieved via placing the Code within a broader generic and practical set of proposals and strategies that Sanhūrī spelled out or drew up as his perception of the final legislative phase that the Arab lawmaker should undertake.

1.5 The Significance of the Study

This issue has a significant importance as follows:

- (1) It relates to the legal development incurred in an important era and arena, namely the Arab countries in the Twentieth Century.

- (2) Sanhūrī, by drafting the Civil Codes and then comparing the Codes' substance with Islamic Jurisprudential heritage, had advanced a great service for the discipline of Islamic Economics which should follow the progress of law.
- (3) It became a haggling debate among Muslims and Arabs to determine the authenticity of Sanhūrī's Code and the legitimacy of the law from an Islamic legal perspective.
- (4) The Sanhūrī's Code is a tremendous and influential project which deserves a comprehensive study to put in detail its advantages and disadvantages and positive and negative features.
- (5) The Code was shown to be a symbol of independence of the Arab people, as they possessed a New Code considering their norms of life and adapting to the formulas of the modern State.
- (6) Sanhūrī had departed in coping with Sharī'ah from a broader view point as to the meaning of the term 'Islamic Sharī'ah'. He proposed it to be equivalent to the features of an Islamic Civilization. His views on this subject are quite homogeneous to the concept of *Islam Haḍārī* that the Malaysian government had recently adopted.

1.6 The Scope of the Study

It is expected that the research will comprehensively study Sanhūrī's enterprise and come up with an assessment showing the assignment that Sanhūrī proposed for the Code, and the way he codified and compromised between the Islamic Sharī'ah on one hand and the modern law on the other.

The study will survey the transition of the Code from Egypt to Syria, Iraq, Libya and Kuwait and its impact on other Arab countries like Jordan, Sudan, United Arab Emirates and Qatar. Above all the mentioned points, the study will demonstrate clearly Sanhūrī's perception

of the Islamic Sharī'ah in context of legal discipline and civilization, the strategy he proposed for evolution and development of Islamic law in the light of modern legal theories and finally to identify the place of Sharī'ah in the Codes.

Hence, the scope of this study is Sanhūrī Codes for Arab Civil Laws in Egypt, Iraq, Syria, Libya and Kuwait. However, Sanhūrī's efforts in the legal sphere in general are concerned as much to relate to the project thereof. Moreover, the legal backgrounds, the historical events and the contexts of legislation in the Arab countries are roughly presented in this study to meet best the understanding of Arab laws.

1.7 Research Methodology

This is a library research and the type of methodology adopted for this research is historical, analytical and critical.

- 1) It follows the historical method to brief on the situation of Islamic law in the Arab countries before the enactment of Sanhūrī's Codes, with special reference to attempts that have been done to codify the law from the early Islamic age until the time of Sanhūrī and to follow the progress of his project during its revision, performance, and demonstration of its outstanding features by Sanhūrī himself. The main research question to be investigated is to find out how the historical contexts shaped the merits and scopes of the Codes and how Sanhūrī planned and then materialized his proposed standards in the fact of his formal works.
- 2) The study also hinges upon the descriptive-analytical and critical method to describe and critically analyze Sanhūrī's Code for Arab Civil Laws throughout its various phases. The author also will present the literature and the raw materials that have been discovered associated with the books, articles and arguments that Sanhūrī was involved in as well as the

official documents, the preparatory works of the projects, the collective ‘explanatory notices’ of the Codes as well as Sanhūrī’s personal memorandum in an analytical way to come up with comprehensive data and consistent conclusions. Consulting the Arab legal historians and the Sharī’ah jurists who assessed the works of Sanhūrī is also an important element to guide the researcher for a better way of analysis and to enrich the study with new ideas, perspectives, and other possible views for assessment. However, the data is collected from both primary and secondary sources and critically evaluated and organized to finally come up with a reasonable and justifiable evaluation of Sanhūrī as a legal professional and an architect for several Arab Civil Codes.

1.8 Outline of the Chapters

Chapter II is devoted to a theoretical discussion on codification and legal debate on codification of Islamic law. It explains scientific definitions, in the view point of law, to the main terms enclosed within the topic of the current study which is “Sanhūrī’s Civil Code for Arab Countries”, mainly the concept of “Code” or “Codification”, and, then “Civil Law”. A survey on the historical context of the codification in Arab world as both concept and procedure is done. Hereby, the historical efforts applied for the sake of codification in the Arab World since the appearance of Islam until the time Sanhūrī’s Civil Code was enacted in Arab World is the concern of this chapter.

Chapter III is devoted to a discussion on the proposals Sanhūrī advanced before being involved in the codification project. The chapter discusses positive as well as negative characteristics of the former Civil Codes and relevant ordinances under replacement. It examines the pre-projecting proposals and overviews of Sanhūrī for the new Egyptian and Iraqi Civil Codes and explores the necessary legal and historical information about the

previous codes of both Egypt and Iraq. Hence, it highlights the two different proposals he created for Egypt and Iraq to overcome the problematic issues of their Civil Codes. It also demonstrates the defects of the former codes and explains how Sanhūrī stood from the codes that were created before enactment of his codes.

Chapter IV discusses the characteristics of the new Civil Codes of both Egypt and Iraq. It clarifies the attributes of the codes, faces of accords and discords compared with the previous codes and the manifestation of the previous mentioned plans and proposals in their performance. In other words, this chapter is devoted specifically to study the birth of the New Egyptian and Iraqi Civil Codes and how did they officially ‘grow up’ as well as the differences prevalent between the proposals and factual Code. Also, to examine their qualities which differ from the previous codes and the way which had been undertaken in overcoming the defects and shortcomings of the former codes, as Sanhūrī approvingly claimed these. After that, the study discusses the transition of the New Codes to other Arab countries like Syria, Libya, Jordan, and Kuwait.

Chapter V focuses on the trends and sources of the Sanhūrī’s Code(s). However, in this chapter, a special focus is given to the general trends characterizing the new Egyptian Code as well as the sources that the Code had been officially constructed upon and those that gained force of interpretation in case of either obscurity or ambiguity that may surround the legal meaning and application of provisions of the Code. Other Sanhūrī’s Codes will be given consideration only where there is a difference or an apparent distinction not stated otherwise. This is due to unity of the Codes in general trends and sources and to avoid unnecessary expatiation on this matter. To elaborate on the general trends, however, a reference to doctrines of individualism and communism as well as to subjectivism and objectivism tendencies is necessary. Meanwhile, giving explanations to the official sources of the Code is

another concern of the chapter. Finally, the question of interpretation is tackled generally and in respect to the historical sources from which the provisions of the code(s) had been taken or extracted.

Matters related to identification of the position of Islamic Sharī‘ah in the New Code(s) are discussed in Chapter VI. Therefore, it aims to throw light on Sanhūrī’s Codes and their relation with Islamic law. In other words, since the Codes were aimed to be applied in the Arab World where the vast majority of the population believe in Islam as the way of belief and life, it is significant to have light thrown on the way the code coped with the Sharī‘ah in terms of faculties and particularities as well, mainly where it flew to the zone of Civil Law or the “*Mu‘āmalāt*” part of traditional Islamic law. However, to arrive at the mentioned aim, it is required to throw light on how Sanhūrī Bāshā contacted Sharī‘ah law and in what sense did he cope with it. A special reference to his appreciation of the Islamic law, as it was in his time and as he hoped it would be in the future, is made.

Chapter VII makes the conclusion. It contains the major findings of the thesis made in the previous chapters.