

CHAPTER IV

THE NEW CIVIL CODES

PROGRESS, STRUCTURE AND TRANSMISSION

In the last chapter, an examination was made of the proposals and overviews of Sanhūrī with regards to the new Egyptian and Iraqi Civil Codes and simultaneously stimulated the necessary historical and legal information about the previous Codes of both Egypt and Iraq. In this chapter, the characters of the New Civil Code of Egypt will be discussed to clarify the attributes of the Code, its accords and discords compared with the previous Code and the manifestation of the previous mentioned plans and proposals in its performance.

In other words, this chapter is devoted specifically to the study of the birth of the New Egyptian Civil Code and how it formally grew up and the differences prevalent between the proposals and the actual Code. Also, the chapter attempts to examine the Code's qualities which differ from the previous Code and the methods of overcoming the defects and shortcomings of the former Code. After that, the study shall discuss the formal progress and features of Iraqi Civil Code and lastly to come to the transition of the New Egyptian and Iraqi Codes to other Arab countries like Syria, Libya, Jordan and Kuwait.

4.1. New Egyptian Civil Code

4.1.1 The Formal Progress of the Revision

The idea to revise the old Civil Code was a result of the defects that it had been criticized for as already described in the last chapter. From an early time, the Code was subject to a variety of partial amendments in different cases.²⁹⁴

During World War I, a committee was established to review the possibility of canceling the foreign privileges imposed on the Egyptian government. This accidentally resulted in a proposal for the revision of the Civil Code. Yet, they initially proposed a partial amendment for the Code. But the huge political progress caused by the war put the idea of a full revision under discussion. Some professors like Walton and Boye supported the full revision, whereas others like Piola Caselli and Messina proposed a partial amendment.²⁹⁵

The first formal declaration of the revision could be said to be the official address of the Justice Minister in 1933 on the 50th anniversary of the establishment of the National Courts. He addressed the full revision of the Civil Code as well as the other Codes:

‘The Codes laid down during the foundation of Civil Courts have been frequently amended and purified to suit the circumstances of development in the country. And we have intention to fully revise them and amend what ought to be changed in the sense that it will resemble the code of the most urbanized countries. Hereby, a specialized committee from the outstanding experts is to be devoted.’²⁹⁶ (Trans. T.W.)

The opinion that prevailed amongst the legal personnel was motivated to hold a complete revision and to redraft the Civil Code comprehensively. Sanhūrī’s overview in his

²⁹⁴ Sanhūrī (1972). *Op. Cit.*, volume. 1, p. 11.

²⁹⁵ *Ibid*, volume. 1, p.12.

²⁹⁶ *Ibid*., p.13.

article entitled “The necessity of revising the Egyptian Civil Code and the basis on which the revision should take place” partook in the same current of belief.²⁹⁷

The political events persisted and World War II was at the door. The English intended to have a treaty with Egypt as a part of their war preparations. The government of ‘Aī Māhir Bāshā predicted that to put the privileges of the foreigners as a subject of the treaty they must campaign for an initiative to amend the Egyptian Codes that had been codified speedily with the foundation of the Mixed Courts and then transformed to the National Courts during their establishment. Therefore, the Ministry formed a couple of committees to undertake the revision of the Codes. A committee was devoted for the revision of the Civil, Commercial and Civil Action Codes.²⁹⁸ As concluded by Enid Hill, with the treaty of Montreux in 1937, the Capitulations were declared to be at an end. According to the treaty, the Mixed Courts were stipulated to come to an end in 1949. In anticipation of that event, commissions were appointed to prepare the Civil and Penal Codes and they were duly enacted.²⁹⁹

The Civil Code project passed through three subsequent committees due to different historical reasons. It was first thought that a committee from a large number of legal professionals should perform the project. The first committee was headed by Murād Sayyid Aḥmad Bāshā in association with seven members inclusive of ‘Abdul-Razzāq Aḥmad al-Sanhūrī. The committee was formulated based on a ministerial order issued on 1st March 1936 giving a period of two years for the accomplishment of the Code. Unfortunately, the committee was dissolved on 26th May 1936 due to financial shortages. It is noteworthy that the committee prepared the preliminary texts of the civil law in addition to about eighty Articles relevant to the Commercial Code. From the performed work the new Civil Code had,

²⁹⁷ Ibid.

²⁹⁸ Ibid; E. Hill (1979). Op. Cit., p. 52.

²⁹⁹ E. Hill (1979). Op. Cit., p. 52.

after minor amendments, preserved Articles by Professor Linen De Biltong regarding sources of law, conflict of laws and a project about juristic persons (*al-Ashkhāṣ al-ʿItibāriyyah*).³⁰⁰

On 20th November 1936, the Ministry bound Kāmil Ṣidqī Bāshā within other ten members to handle the project. This committee was responsible for the codification of land and sea commercial law, family law for non-Muslim subjects as well as the Civil Code. The committee held nearly twenty meetings to agree on the preliminary texts and others in relation with property, preemption and guarantee (*Kaḫālah*). This committee was dissolved on 21 June 1938. The New Code only preserved the texts that related to preemption and guarantee after fundamental amendments.³⁰¹

On 16 June 1938, the new Justice Minister, Aḫmad Khashbah Bāshā, reported to the Council of Ministers a memorandum clarifying that the legal professionals' tendency was to attribute the project to a single legal expert and the experience of the large committee was deemed to have lapsed. He recommended ascribing the task to one Egyptian legal expert to handle the project, and after accomplishment, to be sent to a public referendum through which comments could have a place. The Minister proposed to have two experts fully employed and entitled to handle the project and complete it within duration of six months. The approval of the Council was given on 21st June 1938 and then the second committee was dissolved. Upon that, the Justice Minister issued a ministerial order to appoint two legal experts to handle the first draft of the Civil Code, namely the French Professor Eduard Lambert and 'Abdul-Razzāq al-Sanhūrī Bāshā.³⁰²

³⁰⁰ Sanhūrī (1972). Op. Cit., volume. 1, pp. 13-14.

³⁰¹ Ibid., p. 15.

³⁰² Ibid., pp. 16-17.

Over nearly two years, the project was completely drafted including 1591 Articles. The project was published in 1942 to be available for legal professionals, law professors and a variety of legal and financial institutions, for comments. The Code was exhibited for nearly three years. On 29 March 1945, a committee of five legal experts headed by Sanhūrī, along with a technical committee, was formed to review the project in the light of the considerable number of comments provided. The experts were Sheikh Muṣṭafā Maḥmūd al-Shūrbajī Bek, al-Sayyid Ayūb, Muḥammad Kāmil Marsī Bāshā and Sulaymān Hāfiẓ Bek. Among the technical committee were ‘Abdū Muḥarram Bek, Ḥasan Aḥmad Baghdādī, Sulaymān Marqaṣ, Chafik Chehata and Naṣīf Zakī Bek.³⁰³

The Code, through the mentioned revision, was reduced to 1253 Articles. The final draft was sent to the Council of Ministers on 22 November 1945 to be sent to the parliament and the committee of legal affairs headed by Ayūb Bek. The revision by parliament and its legal committee took nearly six months from 17 December 1945 until 27 May 1946. The project then was transferred to the Senate which transferred the project to a special “Civil Code Committee” headed by Muḥammad Muḥammad al-Wakīl Bek. The committee spent nearly two years studying the project and reduced the number of Articles to 1149. The Senate approved the last draft on 28 June 1948 followed by the approval of the parliament on 5 July 1948. On 16 July 1948 a decree ensued to ratify the Code. It was published in official magazines on 29 July 1948 to be operative by 15 October 1949; the day when the judiciary system was united by the abolishment of the Mixed Courts.³⁰⁴

³⁰³ Ibid., p. 18.

³⁰⁴ Ibid., pp. 18-25. Also: EMJ (1960). Op. Cit., volume. 1, pp. 5-9.

4.1.2 The Main Differences between the New and Old Egyptian Civil Codes

There are differences between the new and old Codes. However, there were supposed to be more differences, but due to some difficulties the lawmakers could not make them possible.

One of the supposed differences that Sanhūrī himself figured out theoretically, and not realized, is about the inclusivity of the Code to conclude laws in relation to the family system.

But after the draft, Sanhūrī apologized by saying:

‘Some awkwardness put an obstacle before concluding the family laws under the New Code owing to that the sources of the family law could not be reduced to tenets of Islamic law by itself but there are other religious sources and the family laws are not uniform to be applicable once on all Egyptian subjects. Yes, they are united with respect to minor and restrained persons (*Mahjūr*), the rules of inheritance and will, but they are still separated with regards to marriage, divorce and relationship (*Nasab*). Upon that, the lawmakers preferred to avoid any clash with these complicated obstacles before materializing the performance of the Code and to focus on the law of transactions following the codes that precluded the family law like Lebanese Code, Russian Code and Swiss Code for Obligations.³⁰⁵ (Trans. T.W.)

To compare between both Codes, reference can be made to the following aspects:

- (1) Concluding a general division (preliminary chapter) into the New Code is one of the main differences. The lawmakers did clearly draw the boundaries and determined the subjects and subtitles that are included into the Code. The lawmakers found themselves before two paradigms, namely; the Latin Codes that usually do not conclude the general division and only have a primary and short chapter to explore the sources of the law and some regulations in relation to the conflict of laws. Another example is the German Code that concludes a general division covering two hundred and forty texts. This is true too with the Chinese Code that specified (in one hundred and fifty two Articles) to the general division, Argentinean Code (three hundred and thirty one Articles), Brazilian Code (one hundred and seventy four Articles) and the Russian Code (fifty one Articles). The general

³⁰⁵ Sanhūrī (1972). Op. Cit., volume.1, pp. 26-27.

part in these Codes usually explored sources of the law, abuse of the rights, individual and juristic persons, classifications of property and precepts in relation to theory of lawful action. The Egypt lawmakers, however, duplicated neither the German Code nor the Latin samples. Rather, they preferred to follow the middle course between the German Code and the Latin Code. Therefore, they followed the steps of the Swiss Obligations Code and reduced the general division to eighty eight Articles, only covering in the first chapter the introduction of law and its way of application with reference to the sources of law, abuse of rights, and other special regulations ruling conflicts of law as to space and place. In the second chapter it covered the ‘persons’ exploring the laws of individuals and juristic persons, including foundations and associations. Finally the last chapter indicated the classification of things and property. It means that they had totally precluded the theory of lawful action from the general division as they included it under the contract theory. Herby the difference could be demonstrated between the current and previous Code in a way that the previous Code did not conclude such an important preliminary chapter among its chapters.³⁰⁶

- (2) The New Code exceeded the fundamental defects division that occurred with the former Code. The former incorporated into the first chapter of property and principal real rights on things. But the New Code discriminated property from the principal real rights and put the classification of property under the preliminary chapter. Therefore, it validated the idea that property could be subject to financial rights. Also, the previous Code discriminated between theory of obligations and the named contracts in two different chapters. The New Code amended this and encompassed them altogether in chapter one owing to the fact that the named contract is only one of the applications of the obligation theory. Simultaneously, the obligations theory came in the beginning of the Code, instead

³⁰⁶ Ibid., pp. 27-29.

of principal real rights which occupied the beginning of the former Code. Moreover, the New Code avoided the confusion between the insurance of things, proving the rights over things and the registry documents. The New Code preserved only the insurance of things, proposing the replacement of the other two topics by a special Code for official registration after the establishment of a registry unit. Generally, the order of the New Code is better than the order of the former Code. The New Code includes a preliminary chapter and is then divided into two parts in which the first explores the personal rights and the second explores the real rights. The first part concludes with two parts, namely the theory of obligation and named contracts. The second part also includes two parts which are devoted to principal real rights and accessory real rights.³⁰⁷

(3) The classification of the Code had undertaken the opportunity to correct the deficient aspects and the artificial defects of the former Code and its coverage shortcomings. The differences as to this aspect could be as below:

- Book One of the New Code, which is devoted to **theory of obligations**, has been arranged in a way that avoids the defects of the former Code. The former Code commenced with the theory of obligations, and before a full coverage of it, transferred to the sources of obligations exploring the contract, and then gathering between two independent sources, namely the unlawful action and enrichment without just cause. Before ending sources of obligations it returned again to the theory of obligations, mentioning the causes of extinction of obligations and ending with unarranged texts about sources of obligations. It did not explore transmission of obligations, except in the last chapter that is devoted to sale contract. It is noteworthy that the New Code devotes the first book to obligation theory, specifying the first chapter to sources of obligations starting from the contracts including its elements, effects, and

³⁰⁷ Ibid., pp. 29-30.

its dissolution, and then shifting to unilateral undertakings, then unlawful acts, then enrichment without just cause and then obligations arising directly from the law. The second chapter is devoted to the effects of obligations covering specific performance and compensation in line of performance and retention insolvency as a legal means of realizing the rights of creditors. The third chapter is devoted to kinds of conditions modifying the effect of obligations, including conditional obligations and time clauses, plurality of objects of an obligation, and plurality of parties to an obligation. The fourth chapter is about the transmission of an obligation, including assignment of a right and assignment of a debt. The fifth chapter covers the extinction of obligations and the sixth chapter is devoted to proofs of obligations.³⁰⁸

- The second book is devoted to **named contracts**, specifying in the first chapter the contracts as regards ownership such as sale, exchange of properties, gift, partnership, loans and compromise (*Ṣulḥ*). The second chapter is devoted to the contracts on usufruct including leases and loan for use. The third chapter covers the contracts for the hire of services, like contracts for work (*Muqāwalah*), concessions of public utility services, contracts of service, agency, and deposits and judicial custody. The fourth chapter is specified for aleatory contracts such as gaming and betting, life annuities and contract of insurance and the last part was devoted for Suretyship.³⁰⁹
- The third book is devoted to the **principal real rights**. The first chapter covers the right of ownership including its limits and sanctions, the restrictions over it and its distinction from the rights of servitude, the causes of acquisition of ownership such as first appropriation of the natural source and acquisition by inheritance, winding up of an estate, will and

³⁰⁸ Ibid., pp. 30-31.

³⁰⁹ Ibid., pp. 31.

accession, contract, preemption and possession (*Hiyazah*). The second chapter is devoted to sub-originating rights from ownership like right of exploitation and servitude rights.³¹⁰

- The fourth book of the New Code is devoted to **accessory real rights**, namely the real securities. It was concluded in four chapters, namely legal mortgages, mortgages by agreement, pawning and privileged rights.³¹¹

All of these books and chapters are arranged in such a way that surpasses the former Code in terms of coherency, clarity of conceptions, and total propriety in style.

- (4) The language of the New Code presents a quality construction that undoubtedly improves on the language of the former Code. It reflects the progress of legal language over seventy years of practice since the previous code had been enacted. In this span of time the translation of the legal terms became more accurate. In addition to that, the New Code is purely in Arabic as the official language of the Code was reduced to Arabic language only, and the dichotomy of the official language of the code was totally resolved. Hereby, the technical art of the Code is stable despite the unity of the language that substituted the dual essence of the previous Code's language. Henceforth, the conflict between the official French original and the Arabic version was gone forever.³¹²

- (5) Despite that, the New Code basically extends on the previous Code. It also covers new aspects, stipulates unstated issues and generates necessary additions and clarifications. Doubtless, genuine differences are manifested between the contents of the New Code and that of the former Code. The thesis writer may return these substantial differences for two considerations:

³¹⁰ Ibid., pp. 32.

³¹¹ Ibid., pp. 32.

³¹² Ibid., pp.32-33.

- i. **Laws created by the New Code, not in operation within the former Code.** There are subjects completely constructed and others in relation to some details reconstructed and distributed over various chapters and subtitles. In the following Articles, these issues will be briefly indicated under two categories:

A. Complete subjects: There are subjects that are completely created by the New Code, like the regulations with respect to foundations, state of insolvency, debt assignment and winding up of an estate. Articles 69-80 clarified the rules in relation to foundations. The old Code did not cover that subject. The endowment and regulation of associations was perhaps the only law applied as regards foundations before, but these systems couldn't cover and fulfill all objectives of foundations. Therefore, many charity and social foundations couldn't function on that systems and borrowed other regulations or even operated out of directives of law. The New Code inserted regulations and mentioned some texts to decide the function of a variety of foundations under the law. The New Code regards the foundation as a juristic person belonging to a property devoted to a certain aim without generating any financial profits. This definition is true with all the charity activities, academic works, arts, sports and religious activities and any other works where the public interests are involved. Foundations are diverse from endowments in that the latter is specific to immovable properties, except if the custom provides otherwise. Despite that the endowment system is not flexible enough to cover a variety of activities such as government expenditure on hospitals, etc. Foundations differ from associations in which the subject of the former is property and the subject of the later is the person. It implies that both endowment and association are separate to foundation. Therefore, it is necessary to state the regulations specific to foundations in a flexible way to encompass broad social services and activities for public interest. Secondly, the rules of insolvency are precisely included in the Code (Articles 249-264). The old Code exhibited different rulings of

insolvency and its effectiveness without arranging them in a particular order. It was scattered and distributed over different subjects and subtitles. The New Code has taken into consideration the mutual interests of both debtors and creditors. It stipulates restrictions over the bankrupt if the debt due is more than the total amount of the debtor's wealth, taking into consideration the cause of bankruptcy, estimated capacity of recovery, physical ability of the debtor, as well as the extent to which his bankruptcy endangers the interests of the creditors. Thirdly, the assignment of debt is one of the new subjects that covered by the New Code (Articles 315-322). The old Code knew the assignment of rights and did not state assignment of debt. In this aspect the Code followed the contemporary Codes and Islamic jurisprudence as the later has organized the assignment of debt in an accurate way. Lastly, the New Code regulated the winding up of an estate (Articles 876-914). The previous Code recognized an estate is due only after settlement of the debts; it did not define the estate cleaning. As a result of that shortcoming, the judiciary as well as jurisprudence was confused with plentiful embarrassment how to fill this legal vacuum. The New Code therefore filled the vacuum with several Articles.³¹³

B. Partial and accessory subjects: Along with these, some details related to some laws are fixed into the Code. One of the important points is the Article One in the preliminary chapter which clarifies the sources of law. The Article counts Islamic jurisprudence as a fundamental source of law, the matter that assigns more roles for the Sharī'ah to play; as an adverse matter to the previous Code. Also, in Obligations the New Code states theory of unexpected events (Article 147), indistinctive minor's liability (164/2) and others.³¹⁴

³¹³ Ibid., pp. 58-62.

³¹⁴ Ibid., pp. 62-70.

ii. Laws were operative within and without the Code but the New Code gives them precise clarification, stipulation, and even codification. There are three segments that could be classified under this category, namely the following:

A. Texts stipulated in other Codes, but the lawmakers transmitted them to the new Civil Code. For instance, stipulation on the sources of law was recorded in the writ of National Courts but the lawmakers incorporated it into the New Civil Code. The laws of legal capacity, gift, and exploitation of property and leasing of the endowed properties were previously taken from the traditional references of Islamic jurisprudence. The laws of real exhibition, entrustment, assignment of debt between two restrained properties, the share of the heirs, and preemption, among others, are encompassed to the New Code, whereas these were initially located in various other places of the legal system namely the Code of Actions, the Code of Will and even some special ordinances, but they were eventually codified within the new Civil Code.³¹⁵

B. Texts were defective but the new Code drafted them in a proper way, such as those related to categorization of things and property, those related to fault, cause, nullity, stipulation for benefit of third party, indirect actions, restraining the sale during a mortal disease, restrictions imposed on the right of private ownership, theory of possession and theory of rights of servitude.³¹⁶

C. Rules were decided by the Egyptian judiciary and stood in line with the old Code without being stated by texts of the former Code. The new Code's lawmakers codified these decisions and reduced them within Articles of the New Code. "This category constitutes more than one half of the texts of the new Code", Sanhūrī stated. The new Code utilized the fruit of judiciary experience over seventy years regardless of whether this experience was generated

³¹⁵ Ibid., pp.72-73.

³¹⁶ Ibid., p.72.

from the National or from the Mixed Courts. For example, in the preliminary chapter there are plain texts stipulating theory of abuse of rights, individuals and juristic persons and associations. These cases were decided through the judiciary without being stated by the old Code. In obligation theory also, the decisions of the judiciary have been codified such as the similarity of mutual consent, contract holding between absent parties, contractual deputyship, and promise for an award. In other sources of obligations, except contract, the Code implemented the judiciary experience especially with regards to dilectual responsibility, ways of compensation, and theory of enrichment without just cause. In addition to that, the Code codified a variety of cases other than sources of obligations such as natural obligation, theory of financial threat, direct tort, and action of formality and renewal of current account. Furthermore, in named contracts the new Code drafted the judicial decisions pertaining to sale by credits, administration of company, contract on public utility service, work contract and insurance, etc. Moreover, in the principal real rights, the New Code extracted the judiciary decisions pertaining to neighboring rights, the right of running stream, the right of passage, the shared wall, stipulation on non-disposition, undivided ownership rules, distribution, the dispositions of a terminally diseased person, plurality of preemptors and restrictions over the owner of immovable properties that confine his freedom in his land. Finally in real securities the New Code implemented the judiciary decisions in different cases of pledge and details related to privileges of leasers, etc.³¹⁷

4.1.3 The Way Sanhūrī Overcame the Defects both of Codification in General and the Former Code as a Specific Concern

The topic flows into two curves, namely the way how he overcame the defects of codifications and the way how he overcame the former Code's defects.

³¹⁷ Ibid., pp.70-72.

4.1.3.1. The Way He Overcame the Defects of Codifications

Beside the advantages and benefits of codification, Sanhūrī recognized the disadvantages and defects that were demonstrated by codification opponents. Therefore he tried his best to create the Code in a way that removed those defects and so materializing the estimated benefits. In this context, he drafted the Code based on the principles of stability and flexibility. “The New Code aims to be an operative living Code. Such a code should undertake factors of development to be alive and factors of stability to be operative”,³¹⁸ Sanhūrī verified.

The factors of development that prevent or reduce the defects as well as the factors of stability that achieves the benefits, as had been clarified by Sanhūrī, will be clarified in the following points:

(1) Factors of development: Sanhūrī retuned these factors to the flexible criteria that replaced the rigid regulations and the discretionary power that given to the judge in adjusting the legal cases with the regulations of law.

- A. **Flexible criteria:** The New Code inherited some rigid regulations from the old Code owing to its importance such as the rate of interest (Articles 226-227). However these rigid regulations give only a permanent solution that can not be modified with possible diversification of state and change of context. Regulations which limit the legal decisions with explicit determinants such as a certain number or a certain described ratio should not occupy a large area in the codes as it will be an obstacle to achieving development and progress in application. Therefore, it is suggested to lay down flexible criteria that put the judge before guiding regulations, and not rigid solutions which do not change with change of circumstances. An example of replacement of a rigid regulation by flexible criteria is the Articles (291-292, 364-

³¹⁸ Ibid., pp.89.

366 old Code) that stipulate permissibility of nullification of a sale contract is only when a sale occurs cumulatively and then the purchaser discovers it is less than the agreed amount or quantity or the seller discovers it is more than the agreed upon amount or quantity. Then the old Code (Articles 292, 367) clarifies that nullification of this contract is confined to the situation when the difference between the agreed on and the real quantities exceed more than 1/20 of the total price. The New Code dissolved this rigid regulation and replaced it by a flexible criterion. It states (Article 433/1) when the quantity of the thing sold is fixed in the contract, the vendor, subject to any agreement to the contrary, is liable for any deficiency in such quantity in accordance with custom. The purchaser has not, however the right to demand cancellation of the contract by reason of such deficiency, unless he establishes that the deficiency is so great that if he had known of it, he would not have entered into the contract. Also it (Article 433/2) likened the exceeding quantity with the deficient one. The new criteria improve on the previous regulations as they enable the judge to make adjustments between the legal solution and the circumstance of every single case. However, the New Code created many flexible criteria in a variety of cases such as its determination for the duress (*Ikrāh*) which becomes a hindrance before the validity of a contract. It states (Article 127) in appreciating the extent of duress, the sex, age, social position and the condition of health of the victim should be taken into consideration, as well as any other circumstance that might have aggravated the duress. As observed, the Code determines a subjective criterion to the meaning of duress which is flexible enough for the judge to consider all physical and psychological factors associated with every single case, without generating a particular solution for all possible cases of duress.³¹⁹

- B. **Discretionary power of judge:** Another element as a factor of flexibility and giving room for development is the power facilitated to the judge. This factor is quite related to the previous

³¹⁹ Ibid., pp.89-91; Sanhūrī (1962). Op. Cit., pp. 14-15.

factor. The authority of judge is concluded to complement the missing elements that the two contracting parties missed out or even sometimes to amend the details of the mutual agreement, based on the requirement of justice. The New Code did not follow the Swiss Code that regarded the judge in non-statutory cases as a lawmaker, but the Code stopped before reasonable limits that do not allow a judge to play the role of a lawmaker. However, the Code grants the judge the power to make the law accessible and applicable in diverse circumstances. Hereby, the law is a flexible instrument in the judge's hand to promote and elevate the application of it to be able to decide endless changes on the ground. To illustrate this, one can refer to the power of a judge in determination of due compensation to the injuries that a person may cause to the transgressor in the state of legitimate self-defense. The Code limits the use of power with the extent of necessary defense that prevents the offence. Thus, if self-defense exceeds the boundaries of necessity, the person is bound to compensate the injuries that he caused based on the principles of equity (Article 166). The self-defense will not bring about any liability including compensation, if does not transgress the measures necessity except that the compensation seems equitable according to the courts' assessment (Article 166). Moreover there are texts allowing the judge to complement the missing elements of contract and amend some agreed on conditions. If the two parties agreed upon all genuine details in a contract and preserved or delayed some details to further negotiations, and they did not stipulate the effectiveness of the contract to commence after agreeing upon extra details, the contract will be effective. If any disagreement then arises in this regard the Court preserves the right to clarify the subject of disagreement according to the nature of the contract and principles of law, and as the principles of equity and customs of people demand (Article 95). Also, the judge has authority to reduce the obligations of a deceived contractor (Article 129), to reduce and nullify the void elements of a contract (Article 143) and to modify it with a valid contract

that is identical with the consent of contracting parties, and to amend leonine conditions in contracts of adhesion (Article 149), etc.³²⁰

(2) Factors of stability: The factors of stability are the objective criteria that planted within the New Code and the consideration of apparent consent instead of hidden consent in some conditions.

- A. **The objective criteria:** In spite of the subjective criteria that have been planted in the Code to construct flexibility, there are many objective criteria to create a balance between amenability to development and amenability to stability. However, those objective criteria do not bring about rigidity because they work for stability owing to their objectiveness and work for advancement and progress since they are criteria. The New Code tends to reduce the shape of the subjective trend that distinguishes the Latin Code through taking into consideration both apparent consent and objective consent together. However the Code tends to be more objective than subjective to the extent that with the subjective criteria there are objective dictates to gather between stability and adaptation to possible changes. Herby, to illustrate these, there shall be reference to some objective criteria and then some subjective criteria that surround objective dictates. One objective criterion is that of “reasonable care of thing” which goes back to Roman law. The New Code mentions this criterion as a principle of obligation with a work (Article 211/1). It states that if the debtor is required to preserve a thing or to manage it or to act with prudence in the performance of his obligation, he will satisfy the obligation if he brings to the performance thereof the care of a reasonable person, even if the object in view is not achieved. The Code applies this criterion in a variety of spheres including contracts, e.g. partnership (Article 521/2), renting (583/1), borrowing (641/1), agency (704), trust (720) and judicial custody (734/1). To illustrate the subjective criteria that are associated with objective

³²⁰ Sanhūrī (1972). *Op. Cit.*, volume. 1, pp. 91-93; Sanhūrī (1962). *Op. Cit.*, p. 15.

dictates, one can refer to Article 150/2 which determines the interpretation of a contract through mutual consent of the contracting parties, taking into account the nature of transaction and based on the loyalty and confidence the commercial usage necessitates. It seems that mutual consent is a subjective criterion whereas the nature of a transaction, loyalty, confidence and commercial usage are objective dictates.³²¹

B. **The apparent consent:** In line with the objective criteria and dictates disseminated in the Code it suggests apparent consent instead of hidden consent for the purpose of stability in transactions. However, for the same purpose, the Code regards a mere disposition as a manifestation of consent.³²²

4.1.3.2. The Way He Overcame the Former Code's Defects

The main defects of the former Code could be summarized in three points: disorder of Code's general classifications, language and style, and objective defects. In previous titles it has been clarified how he overcame the first two points. Hereby, it is worthy to clarify the last point.

Sanhūrī treated the objective defects in three ways, namely:

- (1) Creating new laws such as regulations in relation to conflict of laws as regards space and place, juristic person and the relative cases like associations and foundations, assignment of debt, public utility service, work contract, insurance, gift, exploitation and the rent of endowed properties, in addition to managing civil insolvency and winding up of an estate.
- (2) Completing deficiencies such as regulations related to composition of contract, stipulation for benefit of third party, contractual liability, delictual responsibility, judicial custody, undivided common ownership, and pawning.

³²¹ Sanhūrī (1972). Op. Cit., volume. 1, pp. 93-96; Sanhūrī (1962). Op. Cit., p. 15.

³²² Sanhūrī (1972). Op. Cit., volume. 1, p. 96; Sanhūrī (1962). Op. Cit., p. 16-17.

- (3) Gathering separate laws and putting them together, such as regulations in relation to possession, rights of servitude, privileged right and contractual mandate.³²³

However, there are defects that could not be removed or dissolved such as separation between family law and civil law owing to religious and social sensitivities that put an obstacle before concluding it within the same Code,³²⁴ as previously clarified.

4.1.4 The Code between Proposals and Facts

Sanhūrī proposed that New Code be comprehensive enough to conclude the personal statute beside the financial transactions. But after accomplishment, he apologized for materializing this aim stating:

‘Does the New Code include all subjects of a Civil Code e.g. includes the family law as includes the transactions? Some awkwardness put an obstacle before including the family laws under the New Code owing to that the sources of the family law could not be reduced to tenets of Islamic law lonely but there are other religious sources and the family laws are not united to be applicable once on all Egyptian subjects. Yes, they are united with respect to minor and restrained persons (*Maḥjūr*), the rules of inheritance and will, but they are still separate with regards to marriage, divorce and lineage. Upon that, the lawmakers preferred to avoid clashing these complicated obstacles before materializing the performance of the Code and to focus on the law of transactions, following the Codes that precluded the family law from the other divisions of Civil Codes like Lebanese Code, Russian Code and Swiss Code for obligations.’³²⁵ (Trans. T.W.)

Also, in his proposal he suggested that the Egyptian judiciary, the contemporary codes and the Sharī‘ah are sources of the New Code, but in the project he substituted the first source with the provisions of the old Civil Code and the Egyptian judiciary and he granted priority to Islamic jurisprudence over the contemporary Codes. The difference between the proposal and the project could be demonstrated in three essential points:

³²³ Sanhūrī (1972). Op. Cit., volume. 1, p. 26-33.

³²⁴ Ibid., volume. 1, pp. 26-27.

³²⁵ Ibid., pp. 26-27.

- In the proposal, the first source was only the Egyptian judiciary but in the project the provisions of the old Code is added to the Egyptian judiciary, even preceding it.
- The descending order of the sources is quite different as the proposal laid down the Sharī'ah as the last source but the project signifies the role of Sharī'ah to be the second source.
- He replaced the term “Sharī'ah” by the term “*Al-Fiqh al-Islāmī*” which means Islamic jurisprudence.

4.1.5 The Position of the Proposed Sources in the Code

The New Code extracted its provisions and rulings from three essential sources: the previous Egyptian Civil Code, Islamic Jurisprudence and the Contemporary Western Codes.

4.1.5.1 Previous Egyptian Civil Code

The wordings and rulings of the previous Egyptian Code along with the judicial decisions is the most significant source of the New Code. Sanhūrī was of the opinion that two-thirds of the New Code is derived from this source. He retained this for his intent in maintaining a relation between the past and the present. Therefore, the New Code preserves from the texts and rulings of the old Code what is thought to be valid and proper and then codifies the judiciary experience that interprets the ambiguous wordings and corrects the deficits of the previous Code. It is possible to say that Sanhūrī only transmitted with the Code from one stage to another. In the first stage the Code was a distasteful and imitative duplicate for the French Civil Code. In addition to that, the decisions that the Egyptian judiciary had made were separate and not compiled. Thus, the New Code presents a stage wherein the literal aping of

the French Code is passed-by, and the huge collections of Egyptian judiciary decisions are reduced into the Code.³²⁶

4.1.5.2 Islamic Jurisprudence

The position of Islamic jurisprudence could be demonstrated in regard with the New Code in the following points:

- a) The Egyptian lawmakers preserved what was enacted in the previous Code such as the contract of the person who suffers mortal illness, legal competence, preemption, gift, settlement of the debt before transition of the estate to the heirs, deception in the sale of a ward person, option of vision, the responsibility for destruction in sale contract, planting the trees in the leased property, the rulings in relation with the higher and lower stores and the shared wall, and the period of prescription (*Taqādum*).
- b) In addition to that, the lawmakers created new rulings from Islamic jurisprudence and German laws together such as theory of abuse of rights, debt assignment, and unforeseen events.
- c) Also the lawmakers extracted some rulings purely from Islamic jurisprudence such as that related to the session of contract, rent of endowed property, exploitation and release of.
- d) Over all these, the Code states that Islamic jurisprudence is one of the formal sources of the law.³²⁷ Article 1 of the Code states:

‘In absence of applicable legal provision, the Judge shall pass judgment in accordance with prevailing custom. In the absence of precedents in customary procedure, he shall pass judgment according to principles of Islamic Sharī‘ah, and in the absence of Islamic legal precedent, he shall pass judgment according to the principles of natural law and rules of equity.’ (Trans.)

³²⁶ Sanhūrī (1962). Op. Cit., pp. 11-12.

³²⁷ Sanhūrī (1962). Op. Cit., p.12.

Despite that, the Egyptian lawmakers did not run to the last stage to make the Civil Code entirely derived from Islamic jurisprudence. “The current Code represents the Western civilization culture and does not represent the Islamic legal culture. If it put the Shari‘ah in between its formal sources, but it comes in the third position after the Code’s provisions and the custom”.³²⁸ Sanhūrī stated.

Sanhūrī justified the agenda applied by the Egyptian lawmakers in this regard as something that the wisdom and gradualness of reforms demand. This is because the Egyptian society had been ruled by Western civil laws for about a century, wherein a gap was created between Islamic jurisprudence and society. Therefore, an immediate reference or a sudden return to Islamic jurisprudence would be quite difficult as it may bring about confusion and dichotomy in dealings and severe chaos in legal thinking. Therefore, the lawmakers preferred to go just one step ahead and make it one of the formal sources of the law in addition to the rulings that had been planted in a variety of subjects. The lawmakers would like to observe the progress of Islamic jurisprudence to the extent that it takes all the reasons of development to formulate an Islamic legal culture adapting to the requirements of the contemporary age.³²⁹

4.1.5.3 Contemporary Western Codes

The New Code referred to the Western Codes, including the Latin and German ones. According to Sanhūrī, the Egyptian Civil Code had been derived from 20 Civil Codes representing countries in Europe, Asia, Africa, and the Americas with particular reference to

³²⁸ Sanhūrī (1962). *Op. Cit.*, p. 12.

³²⁹ *Ibid.*, pp. 12-13.

the Germanic Codes.³³⁰ The main purpose of the lawmakers in this respect was to realize two objectives:

- (1) To avoid blind imitation of the French Code. Because the former Code was only a deficient copy of the French Code, the lawmakers wanted the New Code to represent the legal culture, not only in its French manifestation but also in the German manifestation. So the lawmakers could adapt to the spirit of age and appropriate the Code with the Egyptian social traditions. Therefore, the New Code in respect to its sources is a selective code.
- (2) To benefit from the new drafting styles that elevated highly after the issuance of the French Civil Code a century and half previously. The New Code therefore beats the most contemporary Civil Codes in its arrangement, style and drafting arts. “It is surely representing the western civil culture in the most modern picture”. Sanhūrī concluded.³³¹

It is noteworthy that the New Code in its preliminary draft was clearly influenced by the legal trends of the German Codes, but this influence had been gradually downgraded when the final draft was revised by the revising committee and lastly during final approval by the Civil Code committee in the Senate. Due to the amendments made on the Code in the final status it is distinctively biased to the Latin system. Therefore, if there are similarities between the Code and the German legal system it seems to be a manifestation of the same similarities that the Latin legal system has with the German legal trends. Therefore, the impact of the German trends on the New Code is similar to that of the Latin counterparts. The New Code is attributed to the Latin system in a circle that is wider than the attribution of French Civil Code because Sanhūrī intentionally attempted to extend the influence of the German legal trends, as

³³⁰ See: H. S. Amin (1985). Op. Cit., p. 168.

³³¹ Sanhūrī (1962). Op. Cit., p. 13.

far as possible, to the New Code. Hereon, the Code was faced by the allegation that it creates a revolution against the prevailing status in the country. Sanhūrī defended the Code by saying:

‘Latin system is preserved as the fundamental of the New Code and the system preserved is quite different from that prevailed the French Civil Code prototype in the beginning of 19th Century. Therefore, the progress created in the New Code is same with the one that was made to the Latin system in the extent of one and a half centuries.’³³² (Trans. T.W.)

4.2 New Iraqi Civil Code

4.2.1 Historical and Legal Context

The relation of Sanhūrī with Iraq is deep. In 1935, Sanhūrī went to Baghdad where he drafted a course of study for the college of law. He revised the curriculum of the basic degree in law to finally establish several sub-specialties. He became director of the Iraqi legal journal entitled *Al-Qadā'* and set up a system of governance for the faculty. Among courses he taught were principles of Islamic law and comparative studies between *Majallah* and Western civil laws. His activities had attracted the attention of Iraqi statesmen like the Minister of Justice of the time who eventually asked him to draw up a project aiming at the revising and drafting of Iraqi civil law. In an article of some length titled “*Min Majallat al-Aḥkām al-‘Adliyyah ilā al-Qānūn al-Madanī Al-‘Irāqī wa Ḥarakāt al-Taqnīn al-Madanī fī al-‘Uṣūr al-Ḥadītha*” (From the *Majallah* to the Iraqi Civil Code and the Movement of Civil Codification in Modern Age), which was published in *Al-Qadā'*, Sanhūrī moved a step closer to the theoretical as well as the practical work of the Iraqi Code.³³³ Sanhūrī took a substantial part in all preparatory works and

³³² Sanhūrī (1972). Op. Cit., volume. 1, p.76-77.

³³³ E. Hill (1987). Op. Cit., p. 43.

a few years later, in 1943, in drafting the Iraqi Code. It was finally enacted in 1951 and became effective from 1953.³³⁴

The Iraqi enterprise came as a different prototype amongst Sanhūrī's enterprises. Iraq had been under the control of the Ottoman Caliphate for centuries and the *Majallah* was the Civil Code that was applied. Despite the fact that the *Majallah* contains plenty of sound and suitable rules for the business of that time, it became insufficient to cover all aspects of civil law that the needs of the new age required, especially for a country with broad relations whether nationally or internationally. Therefore, it was necessary to revise the Iraqi civil law to broadly cover spheres of contemporary life and to be drafted in a more professional language and style. After the dissolution of the Ottoman Caliphate and getting self sovereignty, the Iraqi government thought about the revision. According to the Justificatory Report "*Al-Asbāb al-Mūjibah*", the idea of drafting a New Code for Iraq came up twice, firstly in 1933 and again in 1936³³⁵ when a committee was formed in Baghdad for the purpose of preparing the Code. The committee initially discussed three ways of codification:

- 1- A possibility to follow the Swiss Civil Code or the German Civil Code, while amending the part of law that was deemed unsuitable for Iraq and with the spirit and necessity of Iraqi society.
- 2- A probability to follow the New Egyptian Civil Code, while adding some necessary laws and amending some others.
- 3- To make the *Majallah* the basis of the project, while amending some of its rulings to be suitable and proper for the needs of the current time.

³³⁴ H. Muṣṭafā (1948). Op. Cit., p. 46; Nabil Saleh (1993). Op. Cit., p. 163.

³³⁵ IJM (1945). Op. Cit., p. 4; Muḥammad Ḥasan Kubbah (1948). "Kayfa Nasha'at Fikrat al-Qānūn al-Madanī wa Kayfa Wuḍi'a Mashrū'uh al-Nihā'i," *Maj. Al-Qadā'*, 6 (3). p. 2. See also: Robīn Baṭṭāṭ (1947). "Nazrah 'Āmmah fi Mashrū' al-Qānūn al-Madanī al-'Irāqī," *Maj. Al-Qadā'*, 5 (1), p. 17.

Finally, the committee agreed to draft it on the basis of Islamic jurisprudence, but with the incorporation of such provisions as might be deemed necessary for the exigencies of modern codes.³³⁶ The principles that were agreed on by the committee were as follows:

- I. The *Majallah* will be the basis of the New Iraqi Civil Code, and no deviation from it shall happen to resort to other Civil Codes. This can be returned for two reasons: (1) the best law is that which grew up in the environment of the country for which the Code is intended. Thus, the law of Iraq should be taken from Islamic jurisprudence that grew up there; (2) the Islamic jurisprudence does not lack any factor of promotion and growth in terms of legal principles and logic and it is flexible enough to incorporate the most recent legal theories of contemporary laws.
- II. There are chapters in the *Majallah* that were abrogated by later laws and ordinances. Therefore, the abrogated chapters should be replaced by the abrogating laws and ordinances.
- III. There are some scattered laws relevant to civil law, such as *Qānūn al-Arāḍī* of 1858 and ordinance of transfer of immovable properties. These should be collected and incorporated in the *Majallah*.
- IV. After attaining a clear picture of the New Code, the committee has to test two things: (1) to arrange the chapters of the Code in a scientific way; and (2) to amend whatever needs amendment. This can be made workable by making recourse to (a) opinions of Ḥanafī School other than that compiled in the *Majallah* or to those adopted by other Schools of Islamic law without being bound by a certain view or school of law; (b) the Iraqi judiciary; and (c) foreign laws and codes conforming with the country's traditions or what might be deemed necessary for the exigencies of modern codes.³³⁷

³³⁶ Sanhūrī (1936b). Op. Cit., volume. 1, p. 317; M. H. Kubbah (1948). Op. Cit., pp. 2-3; S. Maḥmaṣānī (1987). Op. Cit., p.48.

³³⁷ Sanhūrī (1936b). Op. Cit., volume. 1, pp. 317-318, the footnotes.

Sanhūrī appreciated this decision and described it as a “magnificent and historical decision”. He states:

‘The first effect of this decision is to return to Sharī‘ah the place it occupied after being about to dispel. We have seen the Eastern countries which revised their laws had deviated from the Sharī‘ah and taken the direction of Western laws. It was the prevailing phenomenon throughout the second part of Nineteenth Century until the present time. Egypt followed by Tunisia, Marrakesh, Turkey and Lebanon had previously applied Sharī‘ah and then shifted to western paradigm willingly or unwillingly (under political pressures). But Iraq is the first Arab country priding of the legacy of grandfathers and protecting it from destruction. It is not willing to be negligent before the magnificent legacy it inherited. The stance of Iraq from the Sharī‘ah, undoubtedly, will have a great impact in the other Muslim countries especially the Arab countries. Iraq is speaking loudly the Sharī‘ah yet is a valid and applicable legal system and it will never deviate from it to the other systems. Thus, if the call of Iraq becomes true, the other Arab countries should follow the step of Iraq. Iraq really drew up the way for others and obviously announced a new age.’³³⁸ (Trans. T.W.)

The committee worked for a short period and prepared Articles in respect to sale contract and later on, the committee’s work was suspended for an undetermined time. In 1943 the government reinitiated the work and entrusted Sanhūrī with the task of preparing the first draft to be studied by a specialized committee under his supervision. Later on, the enterprise was prepared after about three years working on the project and it was revised again by a subcommittee in Alexandria and was finally sent to the National Assembly to be approved according to the formal procedures which were followed. Finally, the Code was approved consisting of 1383 Articles.³³⁹ Albeit the Iraqi Civil Code was enacted in 1951, its preparatory work started even earlier than the revision of Egypt’s Nineteenth Century Civil Code.³⁴⁰

By the fact that the *Majallah* was the civil law of Iraq and Iraqi society was a multi-sectarian society and was regarded for centuries as the cradle of Ḥanafī rite, both in the sphere of jurisprudence and the sphere of judiciary, the Iraqi Civil Code was attributed to the features

³³⁸ Sanhūrī (1936b). Op. Cit., volume. 1, p. 319.

³³⁹ IJM (1951). Op. Cit., p.1; Munir al-Qāḍi (1954). *Muḥāḍarāt fi al-Qānūn al-Madani al-‘Irāqī*. Cairo: Dār Miṣr. pp. 2-3; H. S. Amin (1985). Op. Cit., p. 225; S. Maḥmaṣānī (1987). Op. Cit., p. 48.

³⁴⁰ Nabil Saleh (1993). Op. Cit., p. 163.

of Islamic jurisprudence to a greater extent than its Egyptian counterpart.³⁴¹ It was stated in the foreword of the project:

‘This enterprise was seen to be a sample for the law that should be followed in the Arab world. Therefore, it is created to gather rules extracted from the Islamic Sharī‘ah and rules taken from the Western Codes. It is, however, coordinating between the two different sources so that ready to face the challenges and needs of the new civilization and urging efforts to a comparative study of Islamic jurisprudence in order to return it back to its spring days and render it adaptable to the new circumstance.’³⁴² (Trans. T.W.)

Section two of the first Article is interesting too, as it differs slightly from that of Egypt. It reads:

‘If the Code does not furnish an applicable provision, the court shall decide in accordance with customary law, and failing that, in accordance with those principles of Islamic Sharī‘ah which are most in keeping with the provisions of this Code, without being bound by any particular school of jurisprudence, and, failing that in accordance with the principles of equity.’ (Trans.)

The phrase “without being bound by any particular school of jurisprudence” suggests a gesture to the Shiite population of Iraq in allowing specifically a resort to principles other than those of the Ḥanafī law.³⁴³

From the historical context, however, according to Sayed Hassan Amin, Sanhūrī Bāshā in the beginning was not very convinced to paint the Iraqi Code with an Islamic print, but contrarily tried to persuade the Iraqi committee to adopt the Egyptian Code without much modification. But they objected on the grounds that they wished to take into account the juridical views of all schools of Islamic jurisprudence, including the Shiite school, in a modern setting. As a result, the committee reached a compromise, which was to use the same method of presentation as in the French and Egyptian Civil Codes, but with the provision that the Iraqi Code must be drawn in order of priority, from the various schools of Islamic jurisprudence, and the French and Egyptian Civil Codes should be consulted only as secondary sources in

³⁴¹ Munir al-Qadhi (1954). *Op. Cit.*, , p. 3.

³⁴² IJM (1951). *Op. Cit.*, p. 3.

³⁴³ E. Hill (1987). *Op. cit.*, p. 48, pp. 95-96.

comparison to the Islamic law. Eventually, Iraq drafted a Civil Code which maintains very close links with the Islamic traditions. The deeply-rooted cultural and traditional values were given precedence over alien concepts imported into the modern Islamic world from the European legal system. As a result, the Iraqi Code includes a great many more provisions derived from Islamic law than does the Egyptian Code. In general terms, half of the Iraqi Civil Code has been borrowed from the Ottoman *Majallah*, which was in turn a codified version of the traditional Islamic jurisprudence. Hence, unlike the Syrian Civil Code and the Libyan Civil Code, the Iraqi Code is quite a distinct Civil Code.³⁴⁴

In fact, the mentioned conclusion of Amin about the alleged attempt of Sanhūrī to duplicate the Egyptian Code to Iraq is quite contrary to the proposals Sanhūrī created in the article titled “*Min Majallat al-Aḥkām al-‘Adliyyah ‘ilā al-Qānūn al-Madanī al-‘Irāqī*”, before starting the process of codification, earlier in 1936.³⁴⁵ Therefore, the reported dispute among the committee members could be on the primary source of the work; whether it would be the *Majallah* and would be then amended and suited with the exigencies of the modern codes or it would be the Egyptian Code and then amended and coincided with the Islamic jurisprudence. However, it is unanimous that the *Majallah* became the original version on which the new Iraqi Civil Code became workable.

Hence, it is noticeable that Iraq continued to enforce the Ottoman Code of Procedure and Evidence of 1879. However, certain aspects of the procedural law were reformed in the Civil Code 1951 and partially by the Code of Civil Procedure (act. No. 28 of 1951). It was, however, only in 1953 that the Iraqi Ministry of Justice started the drafting of a new law of civil and commercial procedure which finally resulted in the Civil and Commercial Procedural

³⁴⁴ H. S. Amin (1985). Op. Cit., pp. 168-169, p. 222.

³⁴⁵ Sanhūrī (1936b). Op. Cit., volume. 1, pp. 324-325.

Code 1956 which contained a total of 255 Articles. Later on, namely in 1969, the Code was replaced by a new Civil Procedural Code which contained 325 Articles.³⁴⁶

4.2.2. Faces of Accords and Discords between the Egyptian Civil Code and Iraqi Civil Code

To refer to the above titled question, the discussion shall be concentrated on the following points:

The Iraqi Civil Code followed the new Egyptian Civil Code in the order of the Code and division of its chapters. In the preliminary part the code mentions sources of law in Iraq and detailed the rules related to conflict of laws as regards space and place and rules related to individuals and juristic persons, as well as those related to division of things and property in the way that is known in the Western oriented Civil Codes. It is possible to say that the preliminary chapter is taken over from the new Egyptian Civil Code in a more literal way than otherwise, with an exception in regards to some general maxims that derived from the *Majallah*.³⁴⁷ The Iraqi Code, like the Egyptian counterpart, is divided into two parts; namely the personal rights and the real rights. In the first part a general theory of obligations is drafted. It is gathered from provisions of the *Majallah* as regards general rules of obligations in relation to the named contracts (*Al-'Uqūd al-Mu'ayyanah*) and was then complemented by provisions of the new Egyptian Civil Code. Sanhūrī described the derivation from the *Majallah* by saying: "I have met in provisions of *Majallah* a fertile literature without any difficulties and then complemented it with provisions of Egyptian Code".³⁴⁸

³⁴⁶ H. S. Amin (1985). Op. Cit., pp. 225-226.

³⁴⁷ Sanhūrī (1962). Op. Cit., p. 21.

³⁴⁸ Ibid., p. 21.

The second part covers ownership and the principal real rights. The rules of this part are furnished on the basis of a compromise between rules of Islamic jurisprudence and provisions of the *Majallah* in part, and the principles of Western laws as quoted from provisions of the new Egyptian Civil Code on the other side. Along with that, the provisions of *Qānūn al-Arādī* were revised and drafted in a clear style and entered into the Code. The Code covers real securities and coordination is created between the rules of special Iraqi laws and provisions of the new Egyptian Civil Code in the subject matter of mortgage on real estate and reconciles provisions of the Egyptian Code and provisions of the *Majallah* with regards to pawning (*Rahn Ḥiyāzī*) and aped the sample of the Egyptian Code in privileged rights.³⁴⁹

The sources of the Egyptian Civil Code are the old Egyptian Civil Code, Islamic jurisprudence and the contemporary laws. The sources of the Iraqi Civil Code are *Majallat al-Aḥkām al-ʿAdliyyah*, other Iraqi ordinances and laws that were effective with *Majallah* and finally the new Egyptian Civil Code.³⁵⁰

Before the issuance of the new Iraqi Civil Code, the civil laws of Iraq were separated in a variety of sources. The *Majallah*, being the most prominent source, covered the general rules, the named contracts, some of rules of ownership, and real rights. There existed also other Iraqi ordinances that were the estate of the Ottoman Caliphate organizing mortgage on real estate (*al-Rahn al-Ta'mīnī*). The registration and recording of real rights in (*Tāpo*) was detailed in special ordinances. Other important civil laws separated in procedural laws, the law of civil procedures, and the law of Conciliation Courts (*Maḥākīm al-Ṣullḥ*).³⁵¹ When Sanhūrī commenced the Iraqi enterprise, within the committee this problem was severely faced. As

³⁴⁹ IJM (1945). Op. Cit., pp.1-8; Sanhūrī (1962). Op. Cit., pp. 21-22.

³⁵⁰ Sanhūrī (1962). Op. Cit., p.18.

³⁵¹ Ibid., pp. 18-19.

part of a comprehensive treatment, the committee retained the provisions of *Majallah* as the primary source of the Code and utilized the provisions of *Murshid al-Ḥayrān*, authored by Muḥammad Qadrī Bāshā, to overcome the vices and shortcomings of the *Majallah* especially in the aspect of legal language and coverage of the contents. However, it is evident that Sanhūrī used the Civil Code of Tunisia (1906) which was drafted by a committee headed by Mr. David Santillana (1855-1931). The later was perceived to have a good combination of the Sharī'ah and the modern laws. The impact factor of this work can go back to the ratification it gained from a high quality scholarly committee encompassing five eminent jurists from *al-Zaytūnah* (Islamic) University and five judges from the Main Islamic Legal Court (*al-Maḥkamah al-Shar'īyyah al-Kubrā*). Also, Mr. Santillana's Code transmitted to Marrakesh and the Code was then provided with a commentarial work providing connotations for provisions of traditional Islamic jurisprudence. Therefore, the Iraqi committee headed by Sanhūrī utilized these as documentary reference.³⁵²

The committee also incorporated a variety of Iraqi ordinances into the Code such as *Qānūn al-Arādī* (1900), *Qānūn al-Rahn Al-Ta'amīnī* and *Qānūn Al-Tāpo* (1861). However, the committee took over the civil laws that included under the procedural law and put them in the positions due in the New Code. The rest of the rules were borrowed from the New Egyptian Civil Code which presents more than half of all Articles of the new Iraqi Civil Code.³⁵³

³⁵² Sanhūrī (1936b). Op. Cit., volume. 1, pp. 282-284; Sanhūrī (1962). Op. Cit., pp.19-20; 'Abduh Jamīl 'Aḍūb (2005). "Al-Qawānīn al-Waḍ'īyyah al-Faransiyyah wa al-Sharī'ah al-Islāmiyyah: Taqārub wa Tabā'ud". In *A'māl al-Nadwah al-latī 'Aqadathā Kullīyyat al-Ḥuqūq- Jāmi'at Beirut al-'Arabīyyah bi-Munāsabat Mi'atay 'Ām 'alā Iṣḍār al-Taqnīn al-Madani al-Faransi 1804-2004*, 1st edn. Beirut: Manshūrat al-Ḥalabī al-Ḥuqūqīyyah. pp.22-23.

³⁵³ Sanhūrī (1962). Op. Cit., pp.19-20.

The “Justificatory Report” of the Iraqi Code states:

‘This enterprise extracted the rules from the New Egyptian enterprise – that is a selected set of laws settled within the advanced Western Codes – and from the current Iraqi Laws – essentially the *Majallah* and *Qānūn al-Arāḍī* - and lastly from the Islamic Sharī‘ah. The overwhelming majority of these rules are testified/exemplified by Islamic Jurisprudence in its entirety and without adhesion to a certain school of law. However, the enterprise did not hesitate to harmonize between the rules it extracted from Sharī‘ah and those it extracted from the Western Codes. They are all integrated with each other in a unique type of uniform that may dispel multiply of the historical sources.’³⁵⁴ (Trans. T.W.)

It means that in spite of the broad diversity of the sources, it is perceived to be well integrated and looking like one body. Sanhūrī described the Iraqi Code, saying:

‘Within it, the provisions of the Islamic jurisprudence and the New Egyptian Civil Code are put together side by side. However, these provisions look together like a law with a unique source. They have been integrated together to the extent that the reader will be unsure how to distinguish between the two categories of provisions.’³⁵⁵ (Trans. T.W.)

From the forgoing point, it can be understood that the provisions of the Islamic jurisprudence matched with the provisions of the new Egyptian Civil Code within the provisions of the new Iraqi Civil Code. The states of this phenomenon could be drawn up in five different manifestations:

- I. In some locations, the Islamic law takes its full opportunity to create rules that never stand less than the stage of the Egyptian Civil Code. Therefore, the Iraqi Code preserves the rules of Sharī‘ah without any change. The example of this category is theory of nullity of contract. The Egyptian Code, following the western counterpart, divides the contracts as void, voidable, regular and binding, and regular but non-binding. The Iraqi Civil Code, following the style of Muslim jurists, divides contracts as void, voidable, non executive, executive but non-binding, and binding.³⁵⁶

³⁵⁴ IJM (1951). Op. Cit., p.4.

³⁵⁵ Sanhūrī (1962). Op. Cit., p. 26.

³⁵⁶ Ibid., pp. 30-31.

- II. There are locations where the Islamic law can apply to the provisions of the Egyptian Civil Code completely. To illustrate this, one can return to the “General Rules” that came in the preliminary part of the Iraqi Code, which are originally taken over from the Islamic sources of jurisprudence, especially the *Majallah*, such as the following general rules:³⁵⁷
- ❖ The provision of Article 2 that states: “No argument is allowed in the presence of a text” or in other words, “Where there is a text, independent interpretation (*Ijtihād*) cannot be applied” which is quoted from the *Majallah* (Part II, Article 14).
 - ❖ The Article 3 that states: “A thing established contrary to legal analogy (*Qiyās*) cannot be used as an analogy for other things” which is quoted from the *Majallah* (Part II, Article 15).
 - ❖ The Article 4 that states: “When an obstacle (*Māni‘*) and a want (*Muqtaḍī*) have presented themselves, the obstacle is given precedence. If the obstacle fails, the effect of the want does return. But a thing which fails does not return” which is quoted from the *Majallah* (Part II, Article 46, 51).
 - ❖ The Article 5 that states: “It cannot be denied that with a change of times, the requirements of the law change” or in other words, “It is an accepted fact that the rules of law change with the change in times” which is quoted from the *Majallah* (Part II, Article 39).
 - ❖ The Article 81 that states: “To a man who keeps silence no word is imputed, but where there is necessity shown, silence is a declaration” which is quoted from the *Majallah* (Part II, Article 67).
 - ❖ The Article 158 that states: “It is preferred that effect should be given to a word rather than that no effect should be given to it. But if the effect is impossible the word should be ignored” which is quoted from the *Majallah* (Part II, Article 60).

³⁵⁷ Ibid.

- ❖ The Article 160 that states: “An absolute word should be coped with accordingly unless provided it is qualified in letter or in implication” which is quoted from the principles of Islamic jurisprudence.
- ❖ The Article 161 that states: “The description which is given while the thing is present is of no account, but the description given in the absence of the thing is to be considered” which is quoted from the *Majallah* (Part II, Article 65).

Finally, these Articles and a number of others, as Herbert J. Liebesny commented, express principles not contained, in this form at least, in the Egyptian and Syrian Civil Codes. They illustrate, however, the mixture between the new and traditional which is considerably more marked in the Iraqi Code than in the two others.³⁵⁸

III. In some locations, the provisions of Islamic jurisprudence, represented by the *Majallah* and *Murshid al-Ḥayrān*, do apply with the Egyptian Civil Code in some precepts but do not apply with them in some respective details. The Iraqi Code does complement by the provisions of the Egyptian Code what the provisions of Islamic jurisprudence could not apply to. This is like the provision of Article 74 (Iraqi) that explores the object of contract according to Islamic jurisprudence and the (Article 75 Iraqi) that complements the rules of the former.³⁵⁹ Article 74 states:

‘An object of contract can be: a. things whether are movable or immovable, to be possessed either by compensation as sale or by free as gift, and to be protected as trust or to be consumed via its utilization of it as loan, b. the usufruct of things to be utilized by compensation as lease or utilized without compensation as borrow, and c. a particular work or service.’ (Trans. T.W.)

³⁵⁸ Herbert J. (1975). Op. Cit., p.100.

³⁵⁹ Sanhūrī (1962). Op. Cit., pp. 31-32.

Article 75 provides some additional details that do not exist in the *Majallah* and *Murshid al-Hayrān*. It reads: “A contract is valid on any other object if the adhesion to it is not contrary to public policy or public manner.”

Another example is the provision of Article 77 with respect to the expression that can establish offer and acceptance according to the rules of Islamic jurisprudence and the provisions of Articles 78-79 that give a necessary complementation to the aforementioned rules in accordance to the provisions of the Egyptian Civil Code.³⁶⁰ Article 77, which is derived from *Majallah* (Book I, the Preface 101-102 and Chapter I, 167-172),³⁶¹ states:

The offer and acceptance are any two statements that by the common usage and custom are used for concluding the contract. And any statement firstly spoken becomes offer and the statement spoken in the second place becomes acceptance. For the offer and acceptance the past tense is generally used as well as the aorist tense and the imperative tense can be used if the present tense is meant.’ (Trans.)

Article 78, following the Egyptian Code, states: “The contract that concluded by aorist tense that used for future and means merely a promise is concluded as a binding promise provided the concordant intention of the two parties of the contract proposes this.”

Article 79 states:

‘As the offer and acceptance can be made orally it likely can be made by writing, signs that have a common usage even though the man is not dumb, and by an exchange being carried out which implies the mutual agreement of the two parties as well as any other way that the contexts does not leave any doubts in its implication on the mutual consent of the contract makers.’ (Trans.)

In fact, Article 78 does not apply to the provisions of *Majallah* (Articles 170-171) that states: “By the aorist tense...if the present tense is meant, the sale is concluded, and if the future is meant, the sale is not completed. A sale is not concluded by words in the future tense...which mean merely a promise.”

³⁶⁰ Ibid.

³⁶¹ *The Mejelle* (2001). Op. Cet., p. 16, pp. 21-22.

Also, Article 79 contradicts partially with the *Majallah* as regards the signs, because the *Majallah* (Article 174) states: “By the known signs of a dumb man a Sale is completed.”

However, the *Majallah* (Article 173) approves that the offer and acceptance can be made by writing and an exchange being carried out: “As the offer and acceptance are also made by writing, in the same way as they are made by word of mouth.”

And Article 175 reads: “A sale is also concluded by an exchange being carried out, as that is evidence of that, which is the principal object of an offer and acceptance, which is the mutual agreement of the two parties.”

There are other examples in this sense like those related to personal rights and real rights, promise for contract, vices of consent, recession (*Faskh*), unlawful act, right in suretyship and damnation (*al-Habs wa al-Damān*), assignment of debt, sale, gift, company, compromise (*Sullh*), lease, guarantee, ownership, pawning, and others where provisions of Islamic jurisprudence and Egyptian Civil Code match and complement each other.³⁶²

- IV. In some locations the provisions of Islamic jurisprudence are silent and do not pronounce on a rule, then by the provisions of the Egyptian Civil Code the vacuum was filled. For instance, issues of adhering on behalf of another (*Ta'ahhud 'an al-Ghayr*), stipulation for benefit of third party, indirect action, action of formality, solidarity (*Taḍāmun*), assignment of right, proving, some of named contracts, right of utility, servitude rights, pawning, and privileged rights.³⁶³
- V. Lastly, the provisions of Islamic jurisprudence conflict with the provisions of the Egyptian Civil Code but the favor goes to the latter as it is more useful for the business of time.

³⁶² Sanhūrī (1962). Op. Cit., p. 32.

³⁶³ Ibid., p. 33.

There are examples for this type, such as the contract on nonexistent objects, interests, and enrichment without just cause.³⁶⁴ This conflict, however, is a matter for discussion as has been done in the last chapter of this thesis.

Finally, to compare in general between the Iraqi Civil Code and its Egyptian counterpart, one can refer to the well established statement of Professor Enid Hill:

‘The Iraqi Civil Code became one prototype, the Egyptian Code another... 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.’³⁶⁵

It means that Sanhūrī, perceiving a particular environment and circumstance, 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* that it was under revision and due to replace.³⁶⁶ As Nabil Saleh concluded, none of the Codes drafted by Sanhūrī is a blind reproduction of a prototype. At all times he took into account the existing social environment and legal background. Wherever the *Majallah* was in operation, he felt it necessary to draw from its provisions.³⁶⁷

It can be concluded that so far 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 the population.³⁶⁸ However, neither the Iraqi Civil Code nor the Egyptian counterpart was purely Islamic, although some analysts consider them as gradual

³⁶⁴ Ibid.

³⁶⁵ E. Hill (1987). Op. Cit., p.49.

³⁶⁶ Nabil Saleh (1993). Op. Cit., p. 163.

³⁶⁷ Ibid., p. 165.

³⁶⁸ H. S. Amin (1985). Op. Cit., pp. 222-223.

steps to Islamizing the entire code for Arab civil law.³⁶⁹ After the issuance of both Codes, Sanhūrī concluded:

‘The final aim that we shall endeavor to meet is to promote the Islamic jurisprudence according to the origins of its construction to derive from it a contemporary law suits the age... And the Egyptian Code or the new Iraqi Code is not more than a code suits the current time of Egypt or Iraq. The everlasting law for both Egypt and Iraq and all the Arab countries should be only the civil law that we shall derive from the Islamic Shari‘ah after its promotion is rendered possible.’³⁷⁰ (Trans. T.W.)

4.3 Transmission to Other Arab Countries

Sanhūrī’s enterprise did not end with drafting the Egyptian and Iraqi Civil Codes. It was the opportunity of the two New Codes to be models for the other Arab countries that directly or indirectly quote from them. Syria, Libya, Kuwait and Jordan are examples of the Arab countries that Sanhūrī had fully or partially drafted or contributed to their codification process in special regards to their civil and commercial laws.

In this chapter, the influence of Sanhūrī and his Egyptian and Iraqi Codes on the Arab counterparts, associated with exploring the historical background and faces of difference and agreement between these original and later counterparts, is to be examined. The discussion on the abovementioned enterprises will give a potential focus to the efforts of Sanhūrī in ‘nationalizing’ as well as Islamizing the civil law of each individual country.

4.3.1 Syrian Civil Code

4.3.1.1 Legal and Historical Context

Syria was implementing Ottoman laws including *Majallat Al-Aḥkām Al-‘Adliyyah*, and retained these laws during the League of Nations mandate period with an exception for the law

³⁶⁹ M. ‘Imārah (2006), volume. 1, p. 182.

³⁷⁰ Sanhūrī (1962). Op. Cit., p. 33.

of ownership over immovable property that was issued by the French mandate authorities in 1930. After the political coup that was led by Ḥusnī al-Zaʿīm in 1949, a legal change happened too when he instructed a committee headed by Asʿad Al-Gorānī, the Justice Minister, to draft a Civil Code, a Commercial Code and a Penalty Code. Then the Syrian Civil Code was issued by legislative decree number 84 dated 18th May 1949 to be implemented from 15th June 1949. The Code contained 1130 Articles which are drafted based on the Egyptian, German, French and Lebanese Civil Codes.³⁷¹

Although some believe that the architect of the Syrian Civil Code was ʿAbdul-Razzāq al-Sanhūrī,³⁷² Nabil Saleh holds the opinion that he was not directly involved in the preparation of the Syrian Civil Code, although it faithfully follows his own. In fact, Sanhūrī had in mind for Syria a code on the line of the Iraqi one which was then under preparation, Nabil added.³⁷³ However, the Syrian Civil Code is pictured as a faithful copy of the Egyptian Code and a retreat from the Sharīʿah rather than an extension of its scope; that is because until 1949, the *Majallah* served as a Civil Code and necessarily left deep marks on Syria’s legal system.³⁷⁴ According to J. N. D. Anderson, the New Code in Syria aped the Egyptian Code on the grounds that the emphasis was placed primarily on the inadequacy of the *Majallah*, both in form and in content, as a Civil Code for a modern and progressive State. It also laid on the similarity of the cultural, social, and commercial background in Syria and Egypt; and on the desire throughout the Arab world, as long-term policy, to introduce a uniform legal system.³⁷⁵ Moreover, some of its Articles were derived from the Lebanese Code of Obligations and

³⁷¹ S. Maḥmaṣānī (1965). Op. Cit., pp. 323-325; H. S. Amin (1985). Op. Cit., pp. 168-169, p. 361.

³⁷² H. S. Amin (1985). Op. Cit., p. 361.

³⁷³ Nabil Saleh (1993). Op. Cit., p. 165.

³⁷⁴ Ibid., p. 163.

³⁷⁵ J.N.D. Anderson (1954). “The Sharīʿa and the Civil Code,” *Islamic Quarterly*, 1, pp. 30-32.

Contracts such as the issue of assignment of right (Chapter 4, first division). Others were taken from the law of ownership that was enacted during the French mandate on Syria, in 1930.³⁷⁶

However, Sheikh Muṣṭafā al-Zarqā' reported in his book, "Islamic Jurisprudence in the New Dress: General Introduction to Jurisprudence", that his book was entitled to make a step toward codification of a civil law from Islamic jurisprudence. A committee of prominent jurists of Sharī'ah and law in Syria set about preparing a Civil Code purely derived from Islamic Sharī'ah, but then the Military coup occurred and the committee's work was suspended and Sanhūrī's Code was imported into and imposed on Syria. He stated:

'While Syrian Ministry of Justice obliged professionals to draft a Civil Code from Islamic jurisprudence adapting to new worldly needs, suddenly the military coup happened on 30th March 1949 and the new Civil Code was enacted by the efforts of the Justice Minister, Mr. As'ad al-Gorānī, in reign of Husnī al-Za'īm. Gorānī convinced Husnī - who took over either legislative and executive authorities - that enactment of a Code originated from foreign models, in Arab countries, instead of Islamic law, is the best way for him to retain good remembrance and achieve a magnificent place in the eyes of the foreigners. He pictured this progress to him as great as was the French Civil Code of Napoleon and how it stays alive more than the life of Napoleon and longer than the achievements of his battles. He believed that the new Egyptian Civil Code can realize this purpose as it was a model for a European oriented code. Hereby, they enacted it in Syria with waves of a pencil.³⁷⁷ (Trans. T.W.)

Sheikh Zarqā's records of this matter can be easily testified. In a study published in *Al-Qadā'* in 1948, a year before the military coup, the prominent Syrian lawyer Yosuf Kaḥlā held a comparison between the Iraqi Civil Code project and the Lebanese Civil Code and criticized both of them in terms of relying on sources other than the Islamic Sharī'ah. He stated: "We have a decisive desire to make Islamic Sharī'ah the only source of the Syrian Code without adhesion to any particular school of law."³⁷⁸

³⁷⁶ S. Maḥmaṣānī (1965). Op. Cit., pp. 324-325.

³⁷⁷ M. al-Zarqā' (2004). Op. Cit., volume. 1, pp. 21-22, p. 245.

³⁷⁸ Yosuf Kaḥlā al-Muḥāmi (1948). "Muqāranah Bayna Qānūn al-Mūjabāt wa al-'Uqūd al-Lubnānī wa Bayna Mashrū' al-Qānūn al-Madanī al-'Irāqī," *Maj. Al-Qadā'*, 6 (4), p. 12.

4.3.1.2 Faces of Accords and Discords between the Egyptian Civil Code and Syrian Civil Code

The Syrian Civil Code is generally a true copy of its Egyptian original counterpart. However, there are some differences between them in different phases. These differences go back to a difference of historical contexts and legal circumstances, especially with regards to judicial experience that usually varies between countries. In addition to that, Syria is perceived to have similar conditions with Lebanon in terms of population and multi-ethnic and religious groups and other socio-historical patterns. Because of the fact that Lebanon preceded Egypt in codifying laws of obligation and contract, the lawmakers in Syria had compulsorily referred to it to accommodate the New Code, with the situation of people in Syria, especially many of the citizens of both countries, had financial interests in the other country. That is why, in the new Syrian Civil Code, issues related with assignment of right and ownership were taken from either the Lebanese Code of Obligations and Contracts or the mandatory Code for Ownership over immovable property basically to retain the previous relations between both countries and safeguard mutual interests of their citizens and other inhabitants.

The main differences between the Egyptian and Syrian Civil Codes can be summarized in the following points:

(1) The real rights: In the part specified for real rights (*al-Ḥuqūq al-ʿAyniyyah*) the principal and accessory rights, all rules related to immovable properties in the Egyptian Code are erased from the Syrian counterpart and replaced by the Lebanese-Syrian law for ownership over immovable property (*Qānūn al-Milkīyah al-ʿAqāriyyah*) which was enacted in the period of the French mandate on Lebanon and Syria in 1930 and was known as decision number 3339. This was because it was the same in both countries. The citizens of both countries had

possession over immovable properties in each other's territories. Moreover, the registration law for immovable properties was based on registration of things in Syria, while in Egypt it was based on registration on a personal basis and the Syrian system was much more promoted than the Egyptian. Therefore, the lawmakers retained both the law of ownership of immovable properties and the law of determination and record and registration of immovable properties to keep the existing consistency between the both systems. Also, the judiciary in Syria became professional in applying the mentioned legal system and procedure and the jurisprudence produced a broad set of opinions and approaches on the system so that if it was replaced by the Egyptian rules as to real rights, it would to make legal chaos in both law and judiciary in Syria. Thus, the Syrian law as regards ownership over immovable properties replaced the respective Articles in the Egyptian Code and became a part of the new Syrian Civil Code.³⁷⁹

In addition to that, the new Syrian Code (Articles 936-940) abrogated the right of preemption, ultimately by the reason that it constitutes a weak right and the socio-economic circumstances in Syria would not motivate its application. The right of preemption in Syria before the New Code was retained for partners in joint property and it was abrogated in regards with neighboring preemption and it was limited in mixed partnership to the rights of easement (*Irtifāq*), according to the law of immovable property number 3339 in 1930. For Sheikh Muṣṭafā al-Zarqā', the bad exploitation of preemption rights, especially in its broad definition as applied by the Ḥanafī School of law (Also the *Majallah* 1008 and New Iraqi Civil Code 1129), was beyond the abrogation of this right in Syria as many cases were brought up to the Courts in which the intention of exploitation and tricks was clearly apparent. But these bad

³⁷⁹ M. al-Zarqā' (1969). Op. Cit., pp. 7-8.

effects could be avoided by adopting the Mālikī approach³⁸⁰ in abrogating neighboring preemption and confining the preemption in mixed partnership by the limits of servitude rights only, as mentioned in the law of 1932 and later applied in the Libyan Code (Articles 939-940).³⁸¹ Therefore, there was no justification to abrogate preemption in joint property because it serves the public social interest. In contrast, the new Egyptian Civil Code recognized the right of preemption with reasonable and wise-versed conditions so that it retained neighboring preemption with restrictions to warrant a sound application and a true use of this right. Egyptian Code (Articles 935-936) states:

‘(935) Preemption is the opportunity that a person has to substitute himself in a sale of immovable property in the place of the purchaser, in the cases and subject to the conditions laid down in the following Articles.

(936) The right of preemption belongs:

(a) To the bare owner, in the case of a sale of all or part of the usufruct attached to any or all of his bare property;

(b) To the Co-owner in common, in case of a sale to a third party of a part of the property held in common;

(c) To the usufructuary, in case of a sale of all or part of the bare property which produces his usufruct;

(d) To the owner himself in the event of *Hikr*,³⁸² if the right of *Hikr* were sold, and, on an equal footing, the owner of the right of *Hikr*, if the sale was of the land itself;

(e) To the neighboring landowners in the following cases:

1- In the case of buildings or land for construction situated in a city or village;

2- If the land enjoyed the right of servitude (*Irtifāq*) over the neighbor’s land, or vice versa- if the neighbor’s land enjoyed the right of *Irtifaq* over the sold land;

3-If the neighbor’s land were adjacent (*Mulāṣiq*) to the sold land on two sides, and had a value at least half that of the sold land.’ (Trans. T.W.)

³⁸⁰ Ibn Rushd al-Qurṭubī (2003). *Bidayat al-Mujtahid wa Nihāyat al-Muqtaṣid*, 3rd edn. Beirut: Dār al-Kutub al-‘Ilmiyyah. volume. 2, pp. 389-398.

³⁸¹ See: Wahbat al-Zuhaylī (1987a). *Al-‘Uqūd al-Musammāt fī Qanūn al-Mu‘āmalāt al-Madaniyyah al-Imārātī wa al-Qāmīn al-Madani al-Urdunī*, 1st edn. Damascus: Dār al-Fikr. pp. 23-24.

³⁸² *Hikr* is a special form of long term lease used mainly for saving the *Waqaf* properties from destruction. The owner of the *Hikr* right is entitled to the benefits of the leased property against reconstructing and necessary expenditure on the maintenance of the property. See G. Bechor (2008). Op. Cit., pp. 227-231.

Furthermore, the Egyptian Code recognizes the right of redemption (*Istirdād*) which implies an indirect right of preemption in joint movable properties. Even though the right of redemption is disputed among the Muslim jurists, the Egyptian Code recognizes it and gives the partner priority when the second party wants to sell an undetermined portion of a jointly owned property. The Syrian Code abrogated right of redemption although it retained some applications as regards a sale involving disputed rights. Therefore, it can be concluded that the second part of the Syrian Civil Code which explores the real rights differs totally from its Egyptian counterpart.³⁸³

(2) Sources of obligation: The sources of obligation were detailed by a special Code in Syria issued on 10th June 1947 known as “*Qānūn al-Bayyināt*” (Law of Evidences) before the new Syrian Civil Code. The distinction of this special Code goes back to its combination between objective rules of proving the obligations and the procedural rules and to the fact that it is keeping the entire rules united and away from separation for two different bodies. Therefore, the Syrian lawmakers did not incorporate the sources of obligation stated by the general rules of obligation as in the first chapter of the Egyptian code under the Syrian Code addressing them to the above-mentioned Code of “Evidences”. But amazingly there exist no huge differences between the rules that stated in this Code and its counterparts in the Egyptian Civil Code owing to the fact that the “Law of Evidences” was drafted by ‘Abdul-Razzāq al-Sanhūrī Bāshā seven years before the enactment of the new Syrian Civil Code. The only difference that could be recorded here is the number of Articles compared to each other. The Syrian Code of Evidences contains more formal rules and some divisions and details cannot be

³⁸³ M. al-Zarqā’ (1969). Op. Cit., pp. 8-10. For further information see: G. Bechor (2008). Op. Cit., pp. 236-247.

easily found in the Egyptian Civil Code as the latter concluded the evidences of obligation in 26 Articles, whereas the Syrian code of evidences concluded 159 Articles in this regards.³⁸⁴

(3) The lawful ratio of interest: In the Egyptian Civil Code the highest rate of interest (usury) at maximum is 7% and any agreed upon interest if exceeds the lawful ratio is prohibited. But the highest rate of interest in the Syrian Civil Code is 9% (Article 228).³⁸⁵

(4) Theory of contract: The Syrian Civil Code disagrees with the Egyptian counterpart Code in several places as in the followings:

In the Egyptian Civil Code right of cancellation of avoidable contracts, the action should be taken by the respective party in a period not exceeding three years considered from the time a contract concluded, in accordance to the Egyptian Code. But, in the Syrian Code (Article 130) this period is shortened to one year only.³⁸⁶

As regards time and place from which expression of consent produces effect, the Syrian Code differs with the Egyptian counterpart as the former regards the start of time from the issuance of acceptance, while the latter regards the starting time from the time acceptance meets the knowledge of the offer maker.³⁸⁷

As regards the age of majority from which a person gets complete legal capacity of performance (*Ahliyyat al-Adā' al-Kāmilah*), the new Egyptian Civil Code, following the old Code considers twenty one years, while the Syrian Code reduces it to eighteen years. This reduction refers to the reason that a person can be qualified for occupation of public career

³⁸⁴ M. al-Zarqā' (1969). Op. Cit., pp. 10-11.

³⁸⁵ Ibid., p. 11.

³⁸⁶ Ibid., p. 11, p. 195, p. 183, p. 114.

³⁸⁷ Ibid., pp. 11-12.

after eighteen years. Therefore, it was not reasonable to render a person of this age eligible for public career whereas he is not yet eligible to handle his private dealings.³⁸⁸

(5) The preliminary part: One of the main differences between the Egyptian Civil Code and its Syrian counterpart is the difference manifested in the descending order of the legislative sources that a judge should make recourse to in his judgments. The first Article of Egyptian Civil Code reads:

‘1- Provisions of law govern all matters to which these provisions apply in letter and spirit. 2- In the absence of applicable legal provisions, Judge shall pass judgment in accordance with the principles of Islamic law. In the absence of Islamic legal precedent, he shall pass judgment according to prevailing custom, and in the absence of precedents in customary procedure, he shall pass judgment according to the principles of natural law and the rules of equity.’ (Trans.)

But the first Article of the Syrian Civil Code refers the judge to the provisions of the Code. In the absence of a legislative provision in any particular case the recourse should be done to principles of the Islamic Sharī‘ah, if not to the customary practice and if not to principles of natural law and rules of equity.

According to a majority of jurists, this difference is significant and shows a remarkable progress towards Islamization of law, as it gives the Sharī‘ah second place after provisions of the Code and in the absence of a particular provision the recourse to Islamic law is a must. However the analysts refer this achievement of Sharī‘ah law to the historical contexts of Syria, especially to the act of *Majallat al-Aḥkām al-‘Adliyyah* which was the law in practice before enacting Sanhūrī’s Code in Syria. In contrast, Sheikh Wahbat al-Zuḥaylī sees the statement on Sharī‘ah as a secondary source after the provisions of the statutory law, regardless of whether it is located in the second or third place, is lacking practical significance as a judge will never

³⁸⁸ M. al-Zarqā’ (2004). Op. Cit., volume. 2, Pp.826-829; M. al-Zarqā’ (1969). Op. Cit., p. 12.

take recourse to secondary sources, except in situations provided the application of statutory law onto the case is impossible. Taking into account that the absence of a provisional law is rare, stating on Sharī'ah as a secondary source of legislation will make no remarkable sense to the practical application of Sharī'ah. Rather it gives only a theoretical emphasis to the role of Sharī'ah as to be necessarily studied by every judge and jurist to be able to complement the rules of law. However, this may gradually prompt the law professionals to acknowledge the rules of Sharī'ah and to impose it as a source of comparative law.³⁸⁹

To Sheikh Muṣṭafā al-Zarqā', stating on Sharī'ah before custom in Syria, contrary to Egyptian Civil Code, was neither a significant nor a remarkable difference.³⁹⁰ He says:

‘This difference is not remarkable. The reason for the making of this difference was the stress and anxiety occurred to the supporters of Islamic Sharī'ah. Public opinion in Syria became angry when the Syrian Justice Ministry in the time of military coup planned to extract a foreign Civil Code other than the Sharī'ah and suspended the legal enterprise that tended to have a code purely derived from Islamic jurisprudence. The Ministry wanted to please the public opinion by positioning Sharī'ah before customary practice in descending order of the sources. It is clear that this change does not make any difference to the real position of Sharī'ah. Rather, it disrupts the coherency of the legislative order. This is because Sharī'ah technically includes customary practice as one of the most important sources. Provisions of Sharī'ah and recommendations of jurists authorize custom as applicatory evidence. Therefore, relying on principles of Sharī'ah does necessarily mean to take recourse to custom that has essential consideration in extending and applying the rules of Sharī'ah. The mention of custom after principles of Sharī'ah is unnecessary expatiation that generates no remarkable notice except misleading the understanding. Moreover, taking recourse to custom in absence of principles of Sharī'ah automatically supposes the absence of custom as it is one of the sources of Sharī'ah. However, this comment is not applicable to the first Article of the Egyptian Code as its descending from custom to Sharī'ah is from a specific to a general term and from a narrow to a broad space.’³⁹¹ (Trans. T.W.)

In the thesis writer's opinion, Sheikh Zarqā's criticism is only partially true and this amendment makes a real difference because the meaning of custom and its dictates in this

³⁸⁹ W. al-Zuhayli (1987b). Op. Cit., p. 35.

³⁹⁰ M. al-Zarqā' (1969). Op. Cit., pp. 12-13.

³⁹¹ Ibid., p. 12.

section are totally different from what is a part of Sharī'ah and introduced by the traditional Muslim jurists. The mention of custom before Sharī'ah implies that it is free from restrictions of Sharī'ah and the dictates of Sharī'ah will not be necessarily applicable to it. In contrast, the custom which is a part of Sharī'ah is only that which does not contradict with principles of Sharī'ah. However, mention of Sharī'ah before custom means that if there is a custom in Sharī'ah it will be applicable, otherwise the custom of people is authoritative. Finally, the writer believes - as Sheikh Wahbat al-Zuḥaylī concludes - that "making custom in legislation prior to the rules of Islamic jurisprudence as done by the Egyptian Civil Code is a big mistake."³⁹²

4.3.2 Libyan Civil Code

Accompanying the declaration of independence of Libya in January 1954, Libya issued compilations of laws, namely the Civil Code, the Commercial Code, the Procedural Code, Penalty Code, and Criminal Procedural Code.³⁹³

The Libyan Civil Code is patterned on the Egyptian model with some amendments created mainly to suit the environment of Libya that had adopted the Mālikī School of jurisprudence. This amendment is clearly manifested in the issue of preemption rights (*Shuf'ah*) (Articles 939-940) as the preemption right of the neighbor and co-owner in a divided bare property was denied.³⁹⁴ There were other amendments suggested by the Italian lawyers in

³⁹² W. al-Zuḥaylī (1987b). Op. Cit., p. 61.

³⁹³ M. 'Abdul-Jawād (1977). Op. Cit., pp. 44-45.

³⁹⁴ Ibn Rushd (2003). Op. Cit., volume. 2, pp. 389-398.

Libya and accepted by Sanhūrī because of the circumstances of the country.³⁹⁵ However, despite that Sanhūrī was the head of the drafting committees and the draft code was submitted to him and got his approval, it is remarkable that with transmission of Sanhūrī Code to Libya some great and unpredicted mistakes took place, such as the mention of some provisions in relation to Nile River and Cairo Court. Meaning, the transmission was extra-ordinary quickly done mostly without due deliberations.³⁹⁶

The Code contains a total of 1151 Articles and like the Egyptian and Syrian counterparts do not include the legal maxims that the Iraqi Code had taken from the *Majallah* within the preliminary section of the Code. It is noteworthy that the order of legal sources differs from the Egyptian counterpart as the principles of Sharī'ah constitute the second place after the provisions of law and before the customary practice and natural law and principles of equity.

Under section one, Article 1 states:

‘1- Provisions of law govern all matters to which these provisions apply in letter and spirit. 2- In the absence of applicable legal provisions, Judge shall pass judgment in accordance with the principles of Islamic law. In the absence of Islamic legal precedent, he shall pass judgment according to prevailing custom, and in the absence of precedents in customary procedure, he shall pass judgment according to the principles of natural law and the rules of equity.’ (Trans.)

4.3.3 Kuwait Commercial Code

It is remarkable that the Kuwait State willingly and without any foreign or external influence had enacted the *Majallah* as its Civil Code in 1938, namely after the repeal of the *Majallah* in Turkey itself.³⁹⁷ In the early 1960s it was the turn of Kuwait, namely when British jurisdiction

³⁹⁵ ‘Uthmān Ḥusain ‘Abdullāh (1995). *Al-Sanhūrī Ustādh al-Qānūn wa al-Sharī'ah wa al-Waṭaniyyah*. Cairo: Dār al-I'tisām., p. 47.

³⁹⁶ M. ‘Abdul-Jawād (1977). Op. Cit., pp. 44-45; Nabil Saleh (1993). Op. Cit., p. 163.

³⁹⁷ W. al-Zuhaylī (1987b). Op. Cit., p. 69.

came to an end in 1961. The Kuwait State commenced to develop its own national legal system following the example of other Sunni Arab States. The Mālikī School was the traditional doctrine of the ruling family and thus the dominant school of law in Kuwait. Despite a sizeable Shiite community, the Kuwait courts recognized the Mālikī jurisprudence as the reference of judgments in absence of statutory law. Particularly, Kuwait imported many Egyptian legal Codes that were inspired from the French module. Eventually, the Egyptian Civil Code transmitted to Kuwait with minor modifications.³⁹⁸

The Government of Kuwait invited Sanhūrī Bāshā to advise and assist in modernization and codification of the Kuwaiti law. Hence, Sanhūrī is perceived to have had a direct hand in the drafting of the Kuwait's Code of Commerce (1961) which includes a substantial treatment of obligations.³⁹⁹

In fact, Sanhūrī did not feel that a comprehensive Civil Code would be well-appreciated. Instead he included an entire section (Book Two) coping with general rules of obligation and taken for the most part from the Iraqi Code on the same subject, in the Commercial Code of 1961 which he drafted. The *Majallah* and Book Two formed a hybrid code which remained effective until repealed on 25 February 1981, when a comprehensive and integrated Civil Code and Commercial Code came into force.⁴⁰⁰ Moreover, it can be said that the Kuwaiti law is closer to the Iraqi prototype than the Egyptian example.⁴⁰¹ As such, in Kuwait Sanhūrī further confined his handling of Obligations to commercial matters only as opposed to civil matters which remained governed by the *Majallah* until 1980. However, both

³⁹⁸ H. S. Amin (1985). Op. Cit., p. 275; M. 'Abdul-Jawād (1977). Op. Cit., pp. 45-46.

³⁹⁹ Nabil Saleh (1993). Op. Cit., p. 165.

⁴⁰⁰ Ibid., p. 163.

⁴⁰¹ H. S. Amin (1985). Op. Cit., p. 276.

the Iraqi Civil Code and Kuwaiti Commercial Code are less related to the French law than was the case with the Egyptian counterpart.⁴⁰²

Sanhūrī's compilation for Kuwait consists of five books. The first book deals with commercial acts, merchants, and commercial institutions; generally provided in the same line as Lebanon, Syria, Iraq and Egypt. The second book is about obligation in general. The third book deals with commercial contract and is again based on Egyptian and Iraqi models of Commercial Code. The fourth book, which is borrowed mostly from the Syrian Commercial Code and the Commercial Code of the United Arab Republic (the then union of Egypt and Syria), contains relevant issues to negotiable instruments and commercial papers. The fifth and final book covers the law of bankruptcy which was modeled after the Draft Commercial Code pending before the United Arab Republic legislature.⁴⁰³

Hence, it is noteworthy that Qatar's Civil and Commercial Law of 1971 is a mere adoption of Book Two of Sanhūrī's Kuwait Code for Commercial Law with some additions and adjustments as deemed necessary. However, Sanhūrī was certainly not involved in the draft of Qatar's Civil and Commercial Law 1971.⁴⁰⁴

4.3.4 Jordanian Civil Code

An early bill for a Civil Code in 1954 was ratified by the Jordanian Chamber of Deputies, but the Senate returned it to the Chamber recommending the draft to take place throughout drawing it from the *Majallah* and the rich treasure of Islamic juridical heritage, while making necessary additions upon the requirements of contemporary dealings. In 1966, the Senate invited Sanhūrī and Sheikh Muṣṭafā al-Zarqā' to participate in the preparation of the

⁴⁰² Nabil Saleh (1993). Op. Cit., p. 165.

⁴⁰³ H. S. Amin (1985). Op. Cit., p. 276; W. al-Zuḥaylī (1987b). Op. Cit., p. 57.

⁴⁰⁴ Nabil Saleh (1993). Op. Cit., p. 165.

enterprise, but the invitation was not taken up, probably due to the ill health of Sanhūrī. The Jordan's Civil Code was eventually enacted in 1976 and came into force on 1 January 1977 by a committee headed by the then Prime Minister Bahjat al-Talahūnī.⁴⁰⁵

The distinctive feature of this Code is that it does contain parts directly derived from Islamic jurisprudence and other parts that were declared not to contradict the Islamic Sharī'ah. It made Sharī'ah the source of judgment in absence of statutory provisions, and also upgraded the place of Sharī'ah in that it adopted the Principles of Islamic Jurisprudence (*Uṣūl al-Fiqh al-Islāmī*) as the main methodology for interpreting the provisions of the Code (Article 1.1 and 1.2). The disciples of Sanhūrī have had great impacts on the creation of this Code.⁴⁰⁶ However, the Law Committee in the Arab League recognized it as a prototype for a uniform Civil Code for Arab countries. Hence, the Republic of Sudan imported the Code and enacted it completely in 1983. The United Arab Emirates also made an initiative and enacted it as its own Civil Code from 1 April 1986, under the name of "Law of Civil Transactions" to indicate by "transactions" the rules of the Code are almost taken from the Sharī'ah.⁴⁰⁷

4.4 Status of Arab Civil Law after the Enacting of Sanhūrī's Codes

After enactment of Sanhūrī's Codes, a change in the status of Arab Civil Laws was obviously seen. According to Sanhūrī, 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

⁴⁰⁵ Naqābat al-Muḥāmmīn al-Urduniyyīn NMU (1976). *Al-Mudhakkirāt al-Idāhijīyah li-al-Qānūn al-Madanī al-Urdunī*. Amman: Maṭba'at al-Tawfiq. volume. 1, pp. 15-27.

⁴⁰⁶ Ṣubḥī Maḥmaṣānī (1979). *Al-Mujāhidun fi al-Ḥaqq: Tidhkārāt min Mālik ilā al-Sanhūrī /Jurists on the Path of Right: From Imam Malik to Sanhuri*, 1st edn. Beirut: Dār al-ʿIlm li-al-Malāyīn. p. 234.

⁴⁰⁷ Nabil Saleh (1993). Op. Cit., p. 163-165; M. al-Zarqā' (2004). Op. Cit., volume. 1, pp. 303-304; W. al-Zuḥaylī (1987b). Op. Cit., pp. 68-69. N. K. al-Zanki (2001). Op. Cit., p. 93.

codification movement. The latter trend, as Sanhūrī said in 1962, was divided into two different, although integrated, prototypes:

- A- The Egypt current that created a new Civil Code. This Code was also adopted by Syria and Libya. This Code represented the Western legal culture (mainly French Civil Code) in the Arab world along with the Codes created for Lebanon, Tunisia, Algeria and Marrakesh.
- B- The Iraq current that combined the *Majallah* and the Western Codes in a moderate manner. Jordan and Palestine also were applying the *Majallah* and ran closer to the Iraq current in those days.⁴⁰⁸

⁴⁰⁸ Sanhūrī (1962). Op. Cit., pp. 10-11.