

CHAPTER V

TRENDS AND SOURCES OF THE CODES

The trends and sources of Sanhūrī's Codes are almost identical. However, in this chapter, a special focus is given to the general trends characterizing the new Egyptian Code, as well as the sources that the Code had been formally constructed upon as well as those that gained force of interpretation in the case of either obscurity or ambiguity that may surround the legal meaning and application of the provisions. Other Sanhūrī's Codes will be given consideration only where there is a difference, or an apparent distinction, not stated otherwise. This is due to the unity of the Codes in general trends and sources and also to avoid unnecessary expatiation on this matter.

5.1 Code's General Trends

As Sanhūrī declared, both the Egyptian and Iraqi Civil Codes are constructed on the same legal trends, as the later has borrowed at least half of its provisions from the former. What distinguishes the Iraqi Code from that of Egypt is that it was the first modern law wherein the Islamic jurisprudence and modern Western Codes met each other equally in terms of quality and quantity.⁴⁰⁹ Since the other Codes of Sanhūrī are mainly extracted from these two, their trends are identical too.

Under this topic, two basic issues will be discussed: the New Code(s) between individual and community and the stance of the New Code(s) from the general trends of contemporary legal systems.

⁴⁰⁹ Sanhūrī (1962). Op. Cit., p. 22.

5.1.1 The New Code between Individual and Community

The new Egyptian and Iraqi Codes take a moderate stand on the question of individuals and community so that the individual is not sacrificed for the interest of community and the community is not improperly exploited for private interest. The New Code(s) protects the individual and the community simultaneously.

5.1.1.1 The Protection of Individual

The New Code grants reasonable room for the protection of individual self-freedom whether is in the quarter of the contract or is in the quarter of ownership.⁴¹⁰

Pertaining to contract, the Code recognizes the power of consent regardless of the restrictions it imposes on the concept. The individual is the person who holds the contract, and an individual's consent is what establishes the contract and creates its effects. The contract is the law of the two contracting parties after exchanging the offer and acceptance in a way that shows mutual consent. The contract is one of the fundamental sources of obligations. If the Code elevates the position of other sources of obligations, e.g. unlawful acts, to a position similar to the position of the contract, it would imply no degradation in the position of the contract. The New Code imposes some restrictions on the power of consent in the interests of both individual and community to the extent that it negates extreme individualism as was dominant in the French Civil Code. But it does give the power of individual consent within acceptable and reasonable limitations, inasmuch as in the current age the doctrine of individualism has been degraded from its extreme manifestations.⁴¹¹

⁴¹⁰ Sanhūrī (1962). *Op. Cit.*, p. 17.

⁴¹¹ *Ibid.*; Sanhūrī (1972). *Op. Cit.*, volume. 1, p. 97.

As regards ownership, the New Code recognizes private ownership and protects it from any forms of transgression. The owner alone has the right of usage, exploitation and disposition of the property. He also holds the rights in its outcomes, products and sub-generating benefits and nobody should be restrained from utilization of his property unless the law decides otherwise. The owner also is free in disposing of the property; if he is willing to transfer it to another person with or without a counter value or if he is preserving it to be eventually transferred to his heirs and to whom he makes a bequest upon his demise, it will be executed.⁴¹²

The New Code, however, alleviates restrictions that had been previously placed on the right of ownership in the previous Code. Amongst these are: preemption as it is narrowed by new restraints; and monopoly as its period and subject matter are more precisely limited so that no monopoly that exceeds sixty days is lawful.⁴¹³ In conclusion, the Code protects the individual in the form of two fundamental rights, namely the freedom of the individual in the making of contracts and his freedom in appropriating private ownership.⁴¹⁴

5.1.1.2 The Protection of Community

Despite that Sanhūrī introduced the New Code as a descendant of capitalism which grants priority to the protection of individuals over the protection of society,⁴¹⁵ he describes the Code as a revised and more adaptive formulation to the socialist trends as manifested in the new Latin Codes. He states: “The new code is adapting to the spirit of the age and the significant progress occurring to individualism as a doctrine”.⁴¹⁶

⁴¹² Sanhūrī (1962). Op. Cit., p. 17.

⁴¹³ Sanhūrī (1972). Op. Cit., volume. 1, p.97.

⁴¹⁴ Sanhūrī (1962). Op. Cit., p. 17.

⁴¹⁵ Sanhūrī (1953-1954). Op.Cit., volume. 3, p. 243, p. 249.

⁴¹⁶ Sanhūrī (1962). Op. Cit., p. 17; Sanhūrī (1972). Op. Cit., volume. 1, p.98.

To illustrate the protection of community, Sanhūrī refers to contract and ownership again. The New Code imposes, to a distant extent, constraints on the power of consent reflecting the interest of the community. The New Code can be distinguished in the way it abides by the protection of the weaker party in contractual relations, especially where the balance between the contracting parties is jeopardized and one of the parties becomes incapable before the second party. The community is obliged to protect the incapable party and remove his deficits to be able to confront the second party.⁴¹⁷

To illustrate this one may refer to adhesion contracts, theory of exploitation, theory of unforeseen circumstances, contract on work, insurance and many others. The New Code runs contrary to the old Code which exclusively protected the creditor. In interest due on the debts, the New Code degrades the right of the law-based and agreed-on-based interest to the rate of 7% only and imposes plentiful restrictions on consumption of interest (Egyptian Code, Articles 229, 230, 232 and 544)^{418, 419}. As regards ownership, the New Code makes it a social function rather than a private right. There are a variety of restrictions imposed in this regard so that the ownership is defined as a social duty, whether this definition is derived from the ethos of the laws or from the direct application of their letters. The Egyptian Code (Article 807/1)⁴²⁰ obliges the owner not to exercise his right in an excessive manner detrimental to his neighbors' property. The Egyptian Code (Articles 808-824)⁴²¹ mentions a series of constraints imposed on the right of ownership such as those related to water, passage, running stream, shared wall and other legal and agreeable constraints, which put obstacles before harmful utilization of property and abuse of ownership rights. The forgoing points ensure the concept

⁴¹⁷ Sanhūrī (1972). Op. Cit., volume. 1, p.98.

⁴¹⁸ Libyan Civil Code, article 232, 233, 235, 543; Syrian Civil Code, article 230, 231, 233, 512; Iraqi Civil Code, article 173/3, 174, 690.

⁴¹⁹ For further details in this regards see: Sanhūrī (1953-1954). Op.Cit., volume.3, pp.243-249.

⁴²⁰ Libyan Civil Code, article 816; Syrian Civil Code, article 776; Iraqi Civil Code, article 1051.

⁴²¹ Libyan Civil Code, articles 817-833; Syrian Civil Code, articles 777-779, 970-975, 977, 986; Iraqi Civil Code, articles 1054-1055, 1058-1060, 1087, 1090, 1092.

of social solidarity is occupying the primary concern of the ownership policy. In addition to that, the proposal draft of the project stipulated (Article 1662) that the owner, as long as he is bound by the law, owns the right in using, utilizing and disposing of his property without any intervention, provided that all of these should be in line with the social function of ownership. The mentioned Article was finally erased only because it was regarded as a repetition for what is disseminated in different locations in the Code and because it was likened to jurical commentaries that application of certain provisions of the Code can easily replace.⁴²²

5.1.2 The Stances of the Code from General Trends of Contemporary Legal Systems

To draw up the position of the New Code from the general trends of the contemporary legal systems, two fundamental questions are to be discussed:

- 1) The extent to which the New Code recognizes the power of will and the lines that differentiate between the power of will and the power of law in determining the effects.
- 2) The extent to which the law has been concluded upon subjective tendency and objective tendency. It implies to examine:
 - i. What doctrine the Code follows in drawing up the obligations: personal doctrine or material doctrine?
 - ii. What theory the Code adopts in identifying the consent: theory of internal will or theory of external will?
 - iii. The relation between abstract act and causal act?⁴²³

⁴²² Sanhūrī (1962). Op. Cit., p. 17-18; Sanhūrī (1972). Op. Cit., volume. 1, pp. 98-99.

⁴²³ Sanhūrī (1972). Op. Cit., volume. 1, p. 74.

The subjective tendency is based on the assumption of holding the personal doctrine of obligation and preferring the internal will, and also on the fact that it does not give noticeable room to the abstract act as compared to the causal act. But the objective tendency goes against the subjective tendency in adopting the material doctrine of obligations, preferring overt intention theory, and giving a noticeable place to abstract act associated with causal act.⁴²⁴

Hereby, the common trends could be returned to four fundamental cases, namely: the question of power of intention, personal theory and material theory of obligation, theory of internal will and theory of external will and causal act and abstract act.⁴²⁵

It is usually said that these common trends differentiate between the Latin originated Codes and the German originated Codes, with the first trend attributed to the Latin Codes and the second trend attributed to the German Codes. But Sanhūrī suspects this fact and returns the noticeable difference for the act of jurisprudence rather than the arts of codification.

‘There exists no a Code that is ultimately biased unto one of these two trends and that definitely abolished the other. The German law respects the principle of consent to a long extent, regards the personal elements in obligations, considers covert will in many aspects, and recognizes causal act but it regards it void if it transgresses the moralities or exceeds the limits of the public order or if one of the defects of consent associates it. However, the French law puts many constraints on the power of consent and sometimes regards the material elements in obligation, considers external will in some aspects, and recognizes abstract act although exceptionally.’⁴²⁶ (Trans. T.W.)

It can be concluded that the German Codes tended towards some trends in contrast to the Latin Codes, without making a total isolation between these two prototypes. In addition to that, the Latin law approached the German law in the last fifty years and Saleilles rose up the banner of this movement at the beginning of the Twentieth Century. The implication of this approximation was manifested in many new Latin oriented codes such as the Civil Codes of

⁴²⁴ Ibid.

⁴²⁵ Ibid, volume.1, p. 75.

⁴²⁶ Ibid, volume. 1, pp. 75-76.

Tunisia, Marrakesh, Lebanon, Italy- France Project, new Italian Code, Brazilian Code, and Chinese Code.⁴²⁷

In addition to that, the noticeable and sensible differences between the Napoleonic Code and the later French Civil Code represent the impact of the mentioned approximation. Therefore, the New Codes of Sanhūrī also gather the two mentioned tendencies in a way upholding the preservation of the Latin spirit.⁴²⁸

5.1.2.1 Power of Consent (*Sulṭān al-Irādah*)

The Sanhūrī Code(s) stands on power of consent in an intermediate position. It does not decline this power to the extent that it may disappear under the power of either the lawmaker or the judge. Also, it does not voluntarily support it to the extent of independently establishing legal relations and effects without taking into consideration the public interest and the requirements of justice and equity. Sanhūrī said.⁴²⁹

The New Code(s) preserves constraints that the old Egyptian Code had imposed on the power of consent as there are still formal contracts (*al-'Uqūd al-Ṣūriyyah*) as to some considerations in relation to public order or to the protection of the contracting parties. As such, the contracts based on mutual consent are defined as those that agree with public order and moralities only. The material limits of fraud in some contracts are still available, like the fraud in relation to the sale of immovable properties of a ward, leasing the endowed properties, in addition to rescission of partition (*Qisma*) if one of the co-practitioners succeeds in proving that he has been injured to the extent of more than one-fifth of his share (Egyptian Code,

⁴²⁷ Ibid, volume. 1, p. 76.

⁴²⁸ Ibid, volume. 1, pp. 76-77. See also: 'Alī Muḥiddīn al-Qaradāghī (2002). *Mabda' al-Riḍā fī al-'Uqūd: Dirāsah Muqāranah fī al-Fiqh al-Islāmī wa al-Qānūn al-Madanī*, 2nd edn. Beirut: Dār al-Bashā'ir al-Islāmiyyah. volume. 1, pp. 66-70; volume. 2, pp. 1259-1270.

⁴²⁹ Sanhūrī (1972). Op. Cit., volume. 1, pp. 77-78.

Article 845).⁴³⁰ The New Code(s) also created some additional constraints to adapt to the socio-economic development of the legal status during his time and occasionally recorded what the Egyptian judiciary had decided as correspondence to such developments. Therefore, the Code(s) constrains much more the power of consent through providing more room to the effect of fraud and advancing it from a rigid material theory that functions on certain contracts to a flexible objective theory that applies to entire forms of contract. It puts new limits on consent and hinders each of the contracting parties from abusing the concrete consent of the other party.⁴³¹ If it is established that the party who has suffered prejudice entered into the contract only as a result of the other party exploiting his obvious levity of character or his unbridled passion, even if the deceived party is concluded to have satisfaction with the fraud to him, the contract is annulable and the obligation of the deceived party is a matter of reduction by a judge, because this consent in this status is void and no effect will follow from it in law (Article 129).⁴³² Also, in the contracts of adhesion when the contract contains leonine conditions, the Code allows the judge, based on the principle of equity, to modify the conditions or relieve the adhering party of the obligation to perform these conditions (Egyptian Code, Article 149).⁴³³ The New Code(s) goes further in constraining the power of consent. It, for example, makes it binding on the minority to follow the decision taken by the majority of co-owners as to the ordinary acts of management (Egyptian Code, Articles 828, 829 and 832).⁴³⁴ It also gives the administration of the majority the priority over the will of the minority if the co-owners of shared floors of a building constitute a syndicate (Articles 864, 865, 866 and 867).^{435 436}

⁴³⁰ Libyan Civil Code, article 849; Syrian Civil Code, article 779; Iraqi Civil Code, article 1077.

⁴³¹ F. al-Duraymī (1985). *Op. Cit.*, pp. 134-141.

⁴³² Libyan Civil Code, article 129; Syrian Civil Code, article 131; Iraqi Civil Code, article 125.

⁴³³ Libyan Civil Code, article 149; Syrian Civil Code, article 150; Iraqi Civil Code, article 167/2.

⁴³⁴ Libyan Civil Code, articles 837, 838, 841; Syrian Civil Code, articles 783, 784, 787; Iraqi Civil Code, articles 1064, 1065, 1062.

⁴³⁵ Libyan Civil Code, articles 868-871; Syrian Civil Code, articles 810, 820-822; no provision in Iraqi Civil Code.

⁴³⁶ Sanhūrī (1972). *Op. Cit.*, volume. 1, pp. 78-79.

The Code(s) also constrains, by the recognition of the doctrine of unforeseen circumstances, the power of consent during execution of a contract. The Code(s) considers an unforeseen catastrophe as a factor for reducing the obligations of the suffering party. When performance of the contractual obligation as a result of exceptional and unpredictable events of a general character, becomes excessively onerous in such a way as to threaten the debtor with exorbitant loss, the judge may, according to the circumstances, and after taking into consideration the interests of both parties, reduce the obligation to reasonable limits. Any agreement to the contrary is void (Egyptian Code, Article 147/2).⁴³⁷ This doctrine was implemented with a special concern in the contract of lease (Egyptian Code, Article 608/1)⁴³⁸ and contraction (*Muqāwalah*) (Egyptian Code, Article 658/4)^{439 440}.

These were some examples of the restrictions laid down on the power of consent. They are mostly innovated by the New Code(s). They tend to reduce the individualism that distinguishes the Latin oriented codes that give unbridled power to the consent which sometimes is contradicting with the principle of equity and public welfare.

However, the New Code(s) does not transgress the boundaries of a middle solution between extremes as regards the power of consent. The Code(s) adapts to the new tendencies of the contemporary codes whether they are German oriented or Latin oriented. To illustrate the Code's respect for the power of consent, one can refer to the provision related to partition of contract as regards its irregularity and nullity. When a part of a contract is void or voidable, that part alone will be annulled, unless it is established that the contract would not have been entered into without such a part, in which case the contract will be void as a whole (Egyptian

⁴³⁷ Libyan Civil Code, article 147; Syrian Civil Code, article 148; Iraqi Civil Code, article 146.

⁴³⁸ Libyan Civil Code, article 607; Syrian Civil Code, article 575; Iraqi Civil Code, article 790.

⁴³⁹ Libyan Civil Code, article 657; Syrian Civil Code, article 624; Iraqi Civil Code, article 877-878.

⁴⁴⁰ Sanhūrī (1972). Op. Cit., volume. 1, p. 79.

Code, Article 143).⁴⁴¹ However, when it contains the elements of another contract, the contract will be valid to the extent of the other contract if it appears that the parties intended to conclude that other contract (Egyptian Code, Article 144)^{442 443}.

5.1.2.2 Personal Theory and Material Theory of Obligation

In the world of comparative law during the introduction of the New Code(s) there were two principal schools as regards legal perception of an obligation. They differed in their views on the definition of obligation. The personal school saw the essence of the definition of an obligation as relating to the personal relations created between a specific creditor and a specific debtor. This approach is essentially characteristic of Latin law. By contrast, the material school proposes the subject of the obligation as the essential factor in the relationship and downgrades the personal relationship between the two parties of a contract so that an obligation becomes more a financial (material) than a personal relationship. The focus in the material approach is on the subject of the transaction rather than on those who perform the transaction. This approach is essentially the characteristic of the German law.⁴⁴⁴

The effect of this disagreement appears in the assignment of a right and the assignment of a debt. If the obligation is a personal relationship it follows that the obligation may cease to exist with the change or replacement of this relationship and it is therefore not possible to imagine the replacement of the creditor in the assignment of a right and the replacement of the debtor in the assignment of a debt, as far as the obligation remains unchangeable. The material school provides logical justifications in the foregoing issues and in exploring how it is possible

⁴⁴¹ Libyan Civil Code, article 143; Syrian Civil Code, article 144; Iraqi Civil Code, article 139.

⁴⁴² Libyan Civil Code, article 144; Syrian Civil Code, article 145; Iraqi Civil Code, article 140.

⁴⁴³ Sanhūrī (1972). Op. Cit., volume. 1, p. 81; O. Arabi (1995). Op. cit., pp. 153-172.

⁴⁴⁴ ‘Abdul-Razzāq A. al-Sanhūrī (1938). *Al-Mūjaz fī al-Nazariyyah al-‘Āmmah l-al-Itizāmāt fī al-Qānūn al-Madani al-Miṣri*. Beriut: Al-Majma‘ al-‘Ilmī al-‘Arabi al-Islāmī, Manshūrāt Muḥammad al-Dāyah. pp. 6-7; Sanhūrī (1972). Op. Cit., volume. 1, p. 81; G. Bechor (2008). Op. Cit., pp. 268-269.

to establish an obligation without the existence of a creditor. It means an obligation can remain valid even if the parties involved changed. Other applications of this view are such as obligations in promising a reward, stipulation for the benefit of a third person and the obligation toward a bearer's certificate by the person who signed the certificate. The Latin law, despite adopting the personal approach, has given space to some applications of material approach as it recognized assignment of a right and a debt and recognized the right of a bearer's certificate in its content. It also knew stipulation for the benefit of a third person, even if he is not identified or even not born yet. After the friction between the material doctrine and personal doctrine the Latin oriented codes had achieved more progress to the extent that some of the Latin codes recognized promise of award for an undetermined person.⁴⁴⁵

The New Civil Code(s) takes a moderate position on this issue as it accepts the material approach to an extent reflecting the developments that have been seen in the Latin Codes under the influence of German law. Firstly, it retained the small number of applications of material approach that were already included in the outgoing Egyptian Code. It recognized assignment of a right (Egyptian Code, Articles 303-314)⁴⁴⁶ and then decided what in the case law the jurisprudence and judiciary had concluded, so that it allowed stipulation in favor of a future person or an unidentified person or institution, provided that these persons can be identified at the date when the effects of the contract come into operation in accordance with the stipulation (Egyptian Code, Article 156).⁴⁴⁷ Secondly, the New Code introduced and even maximized the most recent achievements and developments of the Latin oriented codes in this field, particularly those from the proposed France-Italy Civil Code of 1928, which later became the Italian Civil Code, just as these Codes had adopted the material school. Thus, it incorporated assignment of a debt besides assignment of a right (Egyptian Code, Article 315-

⁴⁴⁵ Sanhūrī (1938). *Op.cit.*, pp. 7-9; Sanhūrī (1972). *Op. Cit.*, volume. 1, pp. 81-82.

⁴⁴⁶ Libyan Civil Code, articles 290-301; Syrian Civil Code, articles 303-314; Iraqi Civil Code, articles 362-374.

⁴⁴⁷ Libyan Civil Code, article 158; Iraqi Civil Code, article 154; no provision in Syrian Civil Code.

322),⁴⁴⁸ and it stated precisely that a person who makes a promise to the public an undertaking of reward in return for a specified service is bound to pay the reward to the person who performs the service, even if he acted without thought of the promise of reward, or without knowledge thereof (Egyptian Code, Article 162).⁴⁴⁹ After all, the Code did not neglect the personal approach totally with no motivated justification. The Code continued to view the obligation as a personal relationship between two persons who had expressed a common will to associate; this will permits the entry of the mental and moral factors. The consent should be free and unqualified, free from duress and excessive exploitation, and away from mistakes and fraud. The New Code(s) also created specific rules pertaining to contracts of adhesion and granted room to unforeseen circumstances. Pertaining to involuntary relationship, the Code(s) maintained that it is a relationship between two persons to the extent that the right of a creditor for compensation for moral prejudice cannot be transmitted to a third party, e.g. his inheritors, unless it has been fixed by agreement, or it has been the subject of legal proceedings in the court (Egyptian Code, Article 222).⁴⁵⁰ In *Al-Wasīṭ*, Sanhūrī noted that these examples embody explicit evidence of Code's recognition of the personal dimension in non-contractual obligations.⁴⁵¹

However, Sanhūrī was of the belief that the material school is much closer to the Islamic theory than the personal school. According to him, if we look at the Sharī'ah and its position from this question, we will find that it prefers the material approach.⁴⁵²

In addition to that, if the concern is shown to be for the meaning in the Sharī'ah then the meaning cannot be produced without relevant wording. Therefore, the consideration is

⁴⁴⁸ Libyan Civil Code, articles 302-309; Syrian Civil Code, articles 315-321; Iraqi Civil Code, articles 339-341, 348.

⁴⁴⁹ Libyan Civil Code, article 164; Syrian Civil Code, article 163; Iraqi Civil Code, article 185.

⁴⁵⁰ Libyan Civil Code, article 225; Syrian Civil Code, article 223; Iraqi Civil Code, article 205.

⁴⁵¹ Sanhūrī (1972). *Op. Cit.*, volume. 1, pp. 82-83.

⁴⁵² Sanhūrī (1953-1954). *Op.Cit.*, volume. 1, p. 77.

given to the external will and not to the internal will. Hence, the Muslim jurists departed from this view in many locations to decide the rulings of the oral dispositions of the man and they applied different rules for different wordings. However, they did not sacrifice the meaning just for the sake of words as some may allege, but rather they considered the external will that is known through the implications of the words, in order to preserve the stability of the dealings by a conservative interpretation of the words in usage. However, they did not consider the covert intentions and the internal will that cannot be measured by a certain dictate and that may destabilize the dealings. Therefore, the criteria of Sharī'ah are material and do stand with the boundaries of usage and custom. Therefore, he concluded that the principle in Islamic jurisprudence is that the external will (overt will) takes priority if it is clear. However, when the external will is not clear or suffers from ambiguity, the recourse to the internal (covert) will is necessary to provide a proper interpretation for the ambiguous word.⁴⁵³

The 'explanatory notices' of the Jordanian Civil Code, which is perceived to be an Islamic oriented Code, supports the same concept. It states:

'The material current is generally the direction of Islamic law. Although the consideration in contracts is given to the meanings and not given to the wordings, however, these meanings are those which are deduced essentially from the wordings. Therefore, the consideration is given to the external will and not to the internal will...The Muslim jurists consider the overt will furnished by words and letters, to retain stability of contracts. The Islamic law also respects the usage and custom of people in their transactions and this is an objective measure in all categories of contract.'⁴⁵⁴ (Trans. T.W.)

However, Sheikh 'Alī al-Qaradāghī opines that there are two different directions in Islamic jurisprudence pertaining to the consideration of will. The Ḥanafī and Shāfi'ī Schools of law consider the overt will without considering internal will and the motive and covert intention, whilst the Mālikī and Ḥanbalī Schools of law tend to have the internal will as the

⁴⁵³ Ibid., volume. 1, p. 90.

⁴⁵⁴ NMU (1976). Op. Cit., volume.1, p. 24. See also: M. al-Zarqā' (2004). Op. Cit., volume. 1, pp. 435-437.

primary concern and not the intention and covert will. Therefore, the two currents of contemporary jurisprudence can be simply applied to the two different directions of Islamic law.⁴⁵⁵

Therefore, he concludes that the Egyptian Civil Code applied the personal approach as the general concern. However, it was influenced by the material approach and tried to make compromises between the two directions. Thus, it depended on the personal approach as the principle and did not ignore the material approach for the purpose of preserving stability of the transactions. According to him, the Iraqi Civil Code followed the way of Islamic jurisprudence and did not make any of the two approaches adopted in separation from each other. Therefore, it seems to be much closer to the way of Islamic jurisprudence than the Egyptian Civil Code.⁴⁵⁶

5.1.2.3 Theory of External Will and Internal Will

As discussed in the previous section, there are two directions of law pertaining to the discretion of power of internal and external will. The Latin law upholds the covert will as a reference of the consent and the verbal expression as apparent evidence. It implies that the concrete manifestation of this will is no more than a presumption (*Qarīnah*) that may be contradicted. The German law which is typified by external will emphasizes the external manifestation of will, which it considered as will itself, since this manifestation is the social appearance of will, relying on the fact that the law is generally concerned with the social appearance rather than the internal and mental appearances. A mutual agreement in some applications could be observed as the Latin oriented codes occasionally recognize the apparent will and the German oriented codes accept the covert will in some applications as well. Since

⁴⁵⁵ A. al-Qaradāghī (2002). Op. Cit., volume. 2, pp. 1268-1269. See also: F. al-Duraynī (1985). Op. Cit., p. 237.

⁴⁵⁶ A. al-Qaradāghī (2002). Op. Cit. Volume. 2, pp. 1260-1261, 1267-1268.

the new Egyptian Civil Code is believed to attribute to the Latin codes, it adopts the covert will with some exceptional applications of the overt will as well. The measure noticed here are stability of transactions as to formation as well as interpretation of the contract.⁴⁵⁷

As regards formation of contract, the code in some instances makes the external will the basis of the contract. It states that a declaration of intention becomes effective from the time that it comes to the knowledge of the person for whom it was intended. It follows from this that if a person received a legal offer and agreed to it, but later changed his mind, but the person making the offer heard of the other party's acceptance before he learned of the withdrawal thereof, he should adhere to the contract, on the basis of overt will (Egyptian Code, Article 91).⁴⁵⁸ This adherence goes back to the overt will of the acceptance, but not the covert will that manifested in the later intention of withdrawal. Also, the code established that if the person who expressed his will dies or becomes legally incapable before the declaration of will takes effect, then the death or loss of legal capacity does not prevent the effectiveness when this reaches the knowledge of someone to whom it was addressed (Egyptian Code, Article 92).⁴⁵⁹ This rule cannot be justified based on the covert will as it lapses with the will-maker and dispels with the loss of his competence. Rather it should be interpreted on the basis of overt will which departs from a person and functions independently regardless of the death or the life of its maker. This constituted a revolution in Egyptian law and indeed it was difficult to accept, since the case law prior to the New Code had determined that the death or legal incapability of the offer-maker led to the nullification of the offer. Widespread opposition among the judges of the Egyptian Supreme Court was aroused. The representatives of the Ministry of Justice supported the new concept. After a discussion on the matter, the Civil Code Committee in the Senate decided to reject the judges' objection. However, the

⁴⁵⁷ Sanhūrī (1972). *Op. Cit.*, volume. 1, p. 83; G. Bechor (2008). *Op. Cit.*, p. 272.

⁴⁵⁸ Libyan Civil Code, article 91; Iraqi Civil Code, article 87; no provision in Syrian Civil Code.

⁴⁵⁹ Libyan Civil Code, article 92; no provisions in Iraqi Civil Code and Syrian Civil Code.

‘explanatory notices’ stated that the Mālikī School of Islamic law supported such a separation between the expression of will and personal will, although the Ḥanafī School opposed it.⁴⁶⁰

As such, the New Code(s) decides that a substantive error by either party would not create grounds for nullifying the contract, unless the other party had also fallen victim to the same error, known thereof or had a good possibility to discern it (Egyptian Code, Article 120).⁴⁶¹ It follows from that, if the error occurred to one party and did not occur to the second party and he did not and could not have noticed it, the contract will be valid, based not on the real will of the first party, since a substantial error invalidates it, but on the basis of his overt will as expressed, on which the second party relied. Also, the New Code(s) established that if fraud was committed by a person other than the two parties of a contract then the defrauded party does not have the right to request the nullification of the contract unless he proves that the other party to the contract knew or should have known of the fraud (Egyptian Code, Article 136).⁴⁶² As such, the foregoing regulation expanded to duress. The Code(s) states that when the duress is practiced by a person other than one of the contracting parties, the victim cannot demand the nullification of the contract unless it is established that the other contracting party had, or should necessarily have had, knowledge thereof. If the second party does not know about the existence of duress or fraud and it was unfeasible to know it, then the contract is valid, not on the basis of the true will of the first party, since this will was defaced by the duress or fraud, but on the basis of his overt will, on which the other party to the contract relied (Egyptian Code, Articles 126, 128)^{463 464}.

⁴⁶⁰ EJM (1960). Op. Cit., volume. 2, pp. 30-35; G. Bechor (2008). Op. Cit., pp. 273-274.

⁴⁶¹ Libyan Civil Code, article 120; Syrian Civil Code, article 121; Iraqi Civil Code, article 119.

⁴⁶² Libyan Civil Code, article 136; Syrian Civil Code, article 137; Iraqi Civil Code, article 132/1.

⁴⁶³ Libyan Civil Code, articles 126, 128; Syrian Civil Code, articles 127, 129; Iraqi Civil Code, article 122.

⁴⁶⁴ Sanhūrī (1972). Op. Cit., volume. 1, pp. 83-84.

Regarding interpretation of contracts, it is possible to say that the New Code(s) indirectly implements the overt will regarding contracts whose verbal manifestation is clear. It is decided that when wording of a contract is clear it cannot be deviated from in order to ascertain by means of interpretation the intention of the parties (Egyptian Code, Article 150/1).⁴⁶⁵ In addition to that, it established that a contract is created from the moment that two persons have exchanged two concordant intentions (Egyptian Code, Article 89).⁴⁶⁶ So, the verbal expression becomes the way to the cognition of mutual consent. Yet it is not true to say that the New Code(s) made overt will a common regulation. If it implemented overt will in some cases, it would really emanate from a justifiable consideration aiming at stability of transactions. Therefore it is clear that the New Code(s) implements the covert will which represents the real consent of the parties, regardless of whether it relates to formation or interpretation of a contract, since the Code gave effect to the defects of consent like mistake, deception, duress and fraud and even it validates the effect of the motive that may function as an incentive for a certain disposition. Also, in interpreting the contract the Code(s) implements internal will if the verbal expression of the contract is unclear. It states that when a contract needs to be interpreted, it is necessary to ascertain the common intention of the parties and to go beyond the literal meaning of the words, taking into account the nature of the transaction as well as that trust and confidence which should exist between the parties in accordance with commercial usage (Egyptian Code, Article 150/2).⁴⁶⁷ Regardless of the fact that the Code(s) proposes objective criteria such as nature of the transaction and the commercial usage, the principle is the internal will of the two parties and these criteria provided effective tools for reaching the true will of the parties under an element of reliable control. Sanhūrī concluded that the reference for identification of consent is the internal will. But in some states this will,

⁴⁶⁵ Libyan Civil Code, article 152; Syrian Civil Code, article 151; Iraqi Civil Code, article 155.

⁴⁶⁶ Libyan Civil Code, article 89; Syrian Civil Code, article 92; Iraqi Civil Code, articles 73-76.

⁴⁶⁷ Libyan Civil Code, article 152; Syrian Civil Code, article 151; Iraqi Civil Code, articles 155.

according to the requirements of stability in transaction, takes different manifestations as to the means of presenting it. In some cases, internal will acquires a concrete form and becomes overt will in accordance with the requirements of commercial stability. And if it is perceived that the New Code(s) considers the overt will much more than the French Civil Code has done, it is because it follows in the steps of the contemporary Latin law. But nevertheless, it surpasses the German oriented Codes in giving consideration to overt will. Therefore, it is truly attributed to the group of advanced Latin Codes”.⁴⁶⁸

As concluded by Guy Bechor:

‘Sanhūrī was alluding here to an intermediate theory, between internal will and external will that appears in the German and Swiss Civil Codes, and is known as the theory of trust. This theory supports internal will, but deduces this will in accordance with objective criteria, as manifested in the New Egyptian Code...Overt will is a means...but it is not a goal in its own right, Sanhūrī explained, in an effort to solve the logical contradiction.’⁴⁶⁹

5.1.2.4 Causal Disposition and Abstract Disposition

One of the attributes that distinguishes the subjective oriented codes from the objective oriented codes is the theory of cause and the way of its identification. The first trend implements a self-interpretation theory of cause and grants it a broad space for operation. It therefore, does not recognize abstract disposition that separates from its cause, except in limited boundaries only. The objective oriented trend implements an objective theory for cause and grants only limited space to cause, while it broadly recognizes the abstract disposition and reduces it into a general regulation.⁴⁷⁰

The French law broadly adopted theory of cause. The French judiciary as such substituted the restrictive conventional view that related to objective trend with a modern

⁴⁶⁸ Sanhūrī (1972). Op. Cit., volume. 1, pp. 85-87.

⁴⁶⁹ G. Bechor (2008). Op. Cit., p. 277.

⁴⁷⁰ Sanhūrī (1972). Op. Cit., volume. 1, p. 87.

theory which regards the motive behind disposition as a factor interpreting the cause. Thus, it stipulates that every disposition is linked with a cause. Therefore, there is no abstract disposition, except in exceptional states that are justified by the requirements of stability in transaction and these are precisely identified by the provisions of the law.⁴⁷¹

In contrast, the German oriented codes view cause as merely an objective concept. This view, in fact, is only an expansion of the objective trend that disseminates over the entire legal thought of these codes. Thus, they recognize abstract disposition in many conditions. Hereby, the contracts of transferring ownership are abstract contracts that transfer the ownership of a property regardless of their validity. As such, they consider many contracts establishing obligations as abstract contracts that are entitled to attain validity even though they have no cause or have an illegitimate cause, such as assignment of a right, assignment of a debt, exemption from own right and agency in settlement of a debt. Moreover, this trend returns all applications of abstract dispositions to a general regulation which states that the obligation could be separated from its cause to take the form of an abstract promise in settlement of a debt or to take the form of an abstract confession of a debt.⁴⁷²

The question now is about the trend that the New Civil Code(s) preferred. Sanhūrī clarifies this subject carefully and states that the Code is biased totally to the Latin approach. It, therefore, follows the French judiciary in defining the cause as a broadly subjective theory that subjective and formal factors are taking place in the depth of the legal relationships following from it. The Code(s) never contrasted fully nor partially the trend of the Latin codes and it abided totally by the subjective criterion of cause. Therefore, the New Code(s) is causative, as well as the old Code and its French Code counterpart. It stipulates that every

⁴⁷¹ Ibid.

⁴⁷² Ibid.

obligation is linked with its cause and that the cause should be lawful, otherwise the contract is invalid and void. The Code(s) does recognize abstract obligation to a limited degree and does not lay down a general regulation like the German codes. If the Code(s) would implement the abstract theory, it only would have to do it to stabilize the transactions and it therefore would specify these cases by specific provisions. Hence, it can be concluded that the Code(s) follows its Latin counterparts and gives no influence to the German codes' trend in this matter.⁴⁷³

5.2 Code's Formal and Interpretative Sources

Formation of a law usually refers to two types of sources, namely material or objective sources and formal sources. The objective sources refer to those from which the material or the substance of the regulation is extracted. As such, the objective sources clarify the factors that played roles in the formulation of the laws, e.g. those factors related to natural, economical and social circumstances such as environment, religion and tradition. This prescription is true on the historical sources as the latter refers to the historical origins from which the law is extracted. For instance, the Roman law is a historical source of the French Civil Code. As such, French Civil Code, Sharī'ah and German law are historical sources for many regulations laid down in the Egyptian Civil Code. Moreover, interpretative sources can be grouped under objective sources. However, an interpretative source tends to be the reference that assists in clarification of the precepts in terms of removing the ambiguities and furnishing the details of ambivalent and obscure precepts. It is held that interpretative sources could be returned for two main references, namely works of jurisprudence and judiciary. They both cooperate in interpreting the laws and provisions in terms of clarifying the rulings and occasionally in accommodating the laws with the social developments in the ground. Jurisprudence and judiciary are believed to have been formal sources of some ancient laws. But, nowadays

⁴⁷³ Ibid, volume. 1, pp. 87-88.

jurisprudence constitutes only an interpretative source for the contemporary laws. As such, judiciary is an interpretative source in almost the modern legal systems, with an exception regarding the English law and the Anglo-Saxon laws in which judicial precedents/case law form a formal source.⁴⁷⁴

Formal sources denote the technical means by which a legal regulation is born. They are known as formal because they constitute the reliable ways that make the law binding and the matter of execution. They also reflect the external appearance of the binding will of the society.⁴⁷⁵

5.2.1 Formal Sources and the Descending Order of Priority in Application

Article (1) of the preliminary chapter of the Egyptian - as well as the Iraqi - Civil Codes states:

‘1- Provisions of law govern all matters to which these provisions apply in letter and spirit. 2- 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.)

The mention of this provision in the preliminary chapter of the Code(s) tends to clarify the sources of law in entire branches of private law, because the ‘preparatory notices’ applies these sources into the entire private law owing to that a civil code tends to be the fundamental origin of the private law. However, this does not apply to law of personal statute as the current Civil Code(s) excludes this aspect from its scope forwarding it to religious laws and other laws that manage the applications of this subject.⁴⁷⁶

It can be noticed from the foregoing provision that the formal sources of the Civil Code(s) in respect to financial transactions are: the provisions of the Code(s), the customary

⁴⁷⁴ ‘Abdul-Mun‘im Faraj al-Şadda (n.d.). *Uşūl al-Qānūn*. Beirut: Dār al-Nahḍah al-‘Arabīyyah. pp. 83-84.

⁴⁷⁵ Ibid, p. 85-86.

⁴⁷⁶ Ibid, p.87; Sanhūrī (1972). Op. Cit., volume. 1, p. 26-27.

practice, the principles of Sharī'ah and lastly the rules of natural law and equity. The judge should descend to these sources according to the prescribed order mentioned by the provision. He should refer firstly to the Code as it constitutes the principle formal source. However, he should not take recourse to the following sources except in situations wherein no statutory law is applicable or where the provision of the Code in relation to the subject matter refers the judge to other sources. Therefore, all sources other than the Code⁴⁷⁷ are only secondary. If the judge cannot figure out a statutory law whether by letter or by spirit, he takes recourse to the custom; failing the custom to the principles of Sharī'ah; failing this to the rules of natural law and equity. In no particular case shall the judge deviate from the provisions of the Code even with the ambiguity of the provision(s).⁴⁷⁸ According to Doctor Abdul-Mun'im al-Ṣadda, the rules of natural law and equity do not constitute a complete source of law as truly the term 'law' denotes. It rather implies to conclude with a solution to the particular case that is presented before him by way of rational thinking and extending the laws through analogy and other scientific methods.⁴⁷⁹

5.2.1.1 Customary Practice

The term 'custom' generally means that which a group of people have become accustomed to do and in a way generating a regulation that is believed to be binding. In other words, custom is an unbroken chain of behavior of human beings in a particular field whereby they believe that this behavior has become binding for them. The foundation of custom is defined by two elements, namely acceptability (*ʿItiyād*) and attribute of a normative power (*Ilzām*) attached to the behavior. Custom is the product of two principal factors: the nature of a country and the

⁴⁷⁷ The matter with Iraq was a little bit different as the New Code could not immediately abrogate all previous laws and ordinances of Iraq. Therefore, the legislative texts of the Code along with provisions of some others – like Law of *Huqūq al-Arāḍ* and *Tāpo* became inclusive except if they conflict with the provisions of the new Code. See: D. Khaṭṭāb (1956). Op. Cit., p. 184.

⁴⁷⁸ D. Khaṭṭāb (1956). Op. Cit., pp. 184-185.

⁴⁷⁹ A. F. al-Ṣadda (n.d.). op. Cit., pp. 86-87.

national spirit. It grows in strength and popularity by means of imitation.⁴⁸⁰ Usage ‘‘*Ādah*’ is a collective action of lower status in terms of binding normativity. However, the Islamic jurisprudence does not make the distinction between custom and usage that there is an obligation to observe such a custom whereby there is no such observation with regards to usage. Also, the Iraqi Civil Code is evident to have created no such distinction between the two terms.⁴⁸¹

The Iraqi Civil Code gives a good prescription for the requirements of an authoritative custom. They are mostly extracted from the provisions of *Majallah* and Islamic law. Generally there are four conditions to be fulfilled:

- (1) The custom must represent a common and recurrent phenomenon. Also, it is possible to be common in a certain region or among a certain group of people. The substance of this condition is incorporated in the Iraqi Civil Code where it is provided that ‘‘Usage is arbitrator, whether it is general or specific’’ (Iraqi Code, Article 164/1).
- (2) It must be ancient, i.e., enough time must have passed in order to have a stable and consistent custom. However, there is no specific duration for the passage of the custom and discretion is left to the court. In this regard the Code provided that ‘‘Custom is only given effect to, when it is continuous or preponderant. And that is esteemed preponderant which is commonly known and not that which rarely happens’’ (Iraqi Code, Article 165).
- (3) The custom must be permanent and prevalent among the community, because the use of people is evidence according to which it is necessary to act. The Iraqi Code stipulates that ‘‘A matter known by common usage is like a stipulation which has been

⁴⁸⁰ S. Maḥmaṣānī (1987). Op. Cit., p. 130; A. F. al-Ṣadda (n.d.). op. Cit., pp. 140-142.

⁴⁸¹ M. ‘Abdul-Jawād (1991a). Op. Cit., pp. 137-138; D. Khaṭṭāb (1956). Op. Cit., pp. 185-186.

made. And what is directed by custom is as though directed by law” (Iraqi Code, Article 163/1).

- (4) The custom must not violate the provisions of law. Therefore, a custom contradicting with the precepts of the statutory law cannot be enforceable and get the power of law. Also, the custom must not contradict moralities and public order.⁴⁸²

Since custom is one of the sources of law, a debate arose as to the basis of the binding force that a custom gets in regards with creating of laws. Some jurists attributed it to the objective of the lawgiver as it gives indirect room to custom in this regard. Others believed that the custom takes force from the collective consciousness and convenience of people. As such, some believed that the force of custom emanates from the decision of the courts. The moderate and admissible opinion in jurisprudence upheld that custom derives force from social necessity in imposing it and making its implementation indispensable.⁴⁸³

Here, al-Ṣadda figured out that when the New Code(s) recognized custom as a formal source for law, it had added nothing new to the binding force of custom, as this force is attributed to custom without any need for this statutory recognition. Rather, the lawmakers determined the rank of custom as a secondary source for filling lacunae in the Code(s) so that a judge will have to make recourse to it provided no particular provision is present to regulate the case.⁴⁸⁴ However, Bechor opined that before the New Code the real sense of law was the custom of Egypt as it was a living force in every detail of the legal system to the extent that it constantly supplemented and often, in fact, actually modified, in matters of procedure, the written law. As a result, a form of dissonance emerged between custom, which dictated the

⁴⁸² D. Khaṭṭāb (1956). Op. Cit., pp.185-186; *Majallah* (articles 37, 41, 42, 43), p.8; Ḥāshim Kamālī (2004). *Principles of Islamic Jurisprudence*, 2nd edn. Selangor: Ilmiah Publishers Sdn. Bhd. pp. 286-289.

⁴⁸³ D. Khaṭṭāb (1956). Op. Cit., p.185; A. F. al-Ṣadda (n.d.). op. Cit., pp. 154-157.

⁴⁸⁴ A. F. al-Ṣadda (n.d.). op. Cit., p.157.

rhythm of Egyptian society, and positivist Egyptian civil law. However, Sharī'ah managed to coexist with custom in all matters relating to civil law, to the point that it was eventually difficult to gauge the distance, if any, between custom and Sharī'ah. This situation was reversed in the New Code. Custom not only gained a prominent place in the list of legal sources of the new law, but was even positioned before Sharī'ah.⁴⁸⁵ Hence, the custom became a medium between the provisions of the Code(s) and Sharī'ah, while it was following the print of Sharī'ah to the point that it was overruling the previous Egyptian civil law.

Generally the secondary sources of law operate on the assumption that the Code cannot be inclusive or comprehensive in substance enough to decide all possible applications with special reference to future cases. This is because of the nature of the events and dispositions that cannot be enumerated in nature and because of that a positive lawmaker can never duly enclose all the legal details within the wordings of the provisions, since the changes cannot be suspended or stopped before a limit. Therefore, new legal relationships between the subjects of law are to be created without which the lawmaker specifically has indicated.

The main function of custom is to fill the existing lacunae in the Code. Therefore, custom is only a secondary source. If a judge finds no statutory law applying to the case, then he has recourse to custom. In addition to that, the lawmaker may sometimes seek for assistance from custom in organizing or managing some regulations of law, whether for establishing the law or determining criteria in relation to a law or in giving interpretation to the will of the parties to a contract. As such, the lawmaker may see that a customary regulation is more suitable than the regulation of a statutory law and therefore codifies the latter but giving the customary regulation priority over it while comes to existence. The later question gives

⁴⁸⁵ G. Bechor (2008). *Op. Cit.*, pp. 278-283.

rise as to whether a customary regulation can contradict or amend a law or not. Hereon, the role of customary experience in relation to the Code returns to one of three probabilities, namely: complementary role, supplementary role and surpassing the regulation of statutory laws.⁴⁸⁶

5.2.1.1.1 Complementary Role of Custom

The Egyptian and Iraqi Civil Codes (Article 1/2) state that in the absence of applicable legal provision, the Judge shall pass judgment in accordance with prevailing custom (*‘Urf*).

The ‘explanatory notices’ of the Egyptian project says:

‘In fact, custom is a source that follows the provisions of Code in position. The judge is bound to make recourse to it if he finds no a particular provision... Therefore, custom is the well-rooted common source that is connected with society. It is considered as a natural means of action through which the society will administer the details of transactions and provide the criteria that provisions of codes are incapable to furnish due to their complexity and reluctance to textual compilation. Accordingly, this source remains as a complementary source alongside the Code, and its scope is not solely limited to commercial transactions, but includes the transactions of the civil law and other sections of private and public law.’⁴⁸⁷ (Trans. T.W.)

As is clear from the foregoing text, custom is given a complementary role. Despite the absolute and unconfined expression thereof in describing the role of custom for the entire body of the private law, this regulation is not applicable on criminal law as ‘no crime and no penalty come into existence without a provision by law’.

5.2.1.1.2 Supplementary Role of Custom

The lawmaker sometimes seeks assistance from custom to fulfill purposes that are more consonant to custom than legislation or even the custom is more capable to produce.

⁴⁸⁶ A. F. al-Ṣadda (n.d.). op. Cit., pp. 157-158.

⁴⁸⁷ EMJ (1960). Op. Cit., volume. 1, pp. 187-188.

1. The lawmaker sometimes gives custom a rise to manage the case that is mentioned in a provision.⁴⁸⁸ Example for this is Egyptian Civil Code (Article 233)⁴⁸⁹ that states: “The legal rate of commercial interest on current accounts varies according to the local market rate applicable, and capitalization is effected on current accounts according to commercial usage.”
2. The lawmaker sometimes seeks assistance from custom in determining flexible criteria created in the precepts of law.⁴⁹⁰ Example for this is Egyptian Civil Code (Article 148/2)⁴⁹¹ that stipulates:

‘A contract binds the contracting parties not only as regards its expressed conditions, but also as regards everything which, according to law, usage, and equity, is deemed, in view of the nature of the obligation, to be a necessary sequel to the contract.’ (Trans.)

3. The lawmaker may give rise to custom in providing clarification on the will of two parties to a contract.⁴⁹² For example the Egyptian Civil Code (Article 95)⁴⁹³ states:

‘When the parties have agreed on all the essential points of a contract and have left certain details to be agreed at a later date without stipulating that, falling agreement on these details, the contract shall not be concluded, the contract is deemed to have been concluded, and the points of detail will, in the event of dispute, be decided by the court according to the nature of the transaction to the provisions of the law and to custom and equity.’ (Trans.)

4. It happens sometimes that the lawmaker codifies some ideas but forwards its applicatory boundaries to the customary practice.⁴⁹⁴ For instance, the Egyptian Civil Code transfers the identification of defect limits to custom. It states (Article 448),⁴⁹⁵ “The vendor is not liable for defects which are customarily tolerated.”

⁴⁸⁸ R. Abū al- Su ūd (1983). Op. Cit., volume. 1, p. 511. A. F. al-Šadda (n.d.). op. Cit., pp. 159-160.

⁴⁸⁹ Libyan Civil Code, article 236; Syrian Civil Code, article 234; Iraqi Civil Code, article 175.

⁴⁹⁰ R. Abū al- Su ūd (1983). Op. Cit., volume. 1, p. 513. A. F. al-Šadda (n.d.). op. Cit., p. 160.

⁴⁹¹ Libyan Civil Code, article 148; Syrian Civil Code, article 149/2; Iraqi Civil Code, article 150.

⁴⁹² A. F. al-Šadda (n.d.). op. Cit., pp. 160-161; R. Abū al- Su ūd (1983). Op. Cit., volume. 1, pp. 512-513.

⁴⁹³ Libyan Civil Code, article 95; Syrian Civil Code, article 96; Iraqi Civil Code, article 86/2.

⁴⁹⁴ R. Abū al- Su ūd (1983). Op. Cit., volume. 1, p. 513.

⁴⁹⁵ Libyan Civil Code, article 437; Syrian Civil Code, article 416; Iraqi Civil Code, article 559.

5.2.1.1.3 Conflict between Custom and Statutory Laws

The regulation in the New Civil Code(s) is that the custom does not apply unless in the absence of the provision of law. Therefore, it implies that it is not permissible to contravene the Code(s) with a custom. The New Civil Code(s) (Article 2) states: ‘A provision of law can only be repealed by a subsequent law.’

The ‘explanatory notices’ explored this principle and established that it is doubtless that stating on the inadmissibility of repealing a provision of law only by a similar provision implies the inadmissibility of repealing a statutory law by a subsequent custom.⁴⁹⁶

Despite that, the lawmaker may sometimes create a supplementary regulation, in the sense that if a customary rule comes into existence then the priority will go to the latter. For example, the Egyptian Civil Code (Article 456/1)⁴⁹⁷ states that: “Unless otherwise agreed upon or dictated by custom, the price shall be due for payment at the place of delivery of the sold items.”

Also, it (Article 463)⁴⁹⁸ states:

‘In the absence of agreement or usage indicating the place and time of delivery, the purchaser is bound to take delivery of the thing sold at the place where it was at the time of the sale and to remove it without delay, subject to the time necessary for such removal.’ (Trans.)

Another example is (Article 464).⁴⁹⁹ It states: “Subject to usage or to an agreement to the contrary, the costs of taking delivery of the thing sold are borne by the purchaser.”

Also, it (Article 656)⁵⁰⁰ in regards with contraction, states: “in the absence of custom or an agreement to the contrary, the price is payable upon delivery of the works.”

⁴⁹⁶ EMJ (1960). Op. Cit., volume. 1, p. 196.

⁴⁹⁷ Libyan Civil Code, article 445/1; Syrian Civil Code, article 424; Iraqi Civil Code, article 573.

⁴⁹⁸ Libyan Civil Code, article 452; Syrian Civil Code, article 431; Iraqi Civil Code, article 586.

⁴⁹⁹ Libyan Civil Code, article 453; Syrian Civil Code, article 432; Iraqi Civil Code, article 587.

These examples show that consideration should go first to the agreement, if not possible to the custom, if not possible to the statutory provision. But it does not mean that a customary rule is entitled to abrogate a statutory provision. Rather it means that the custom has force by law to apply otherwise. In general, a custom can operate when the law gives it room in regards to supplementary regulations and not imperative or normative regulations. The regulation that prohibits contradiction to statutory provision by customs is absolute with regard to the imperative provisions and there shall be no exception applied with regard to supplementary provisions, except where the provision of law facilitates this.⁵⁰¹

5.2.1.2 Principles of Islamic Law

Islamic law is the fundamental source of legislation regarding personal statutes. In regard to civil law, Shari'ah is one of the secondary sources which come after custom. Article (1) 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 Shari'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.)

In fact, upgrading Shari'ah to be one of the sources of law relative to the old civil code is considered as going a step up towards implementation of Shari'ah. According to some supporters of Islamicity of Sanhuri's Code(s), the New Code(s) proposed a “common law solution” to precede the Islamization of the Code(s) gradually. The Islamic law here acts as a default source in the presence of gaps.⁵⁰² In his lecture before the 1942 meeting of the Royal Geographic Society, Sanhuri made the following remark:

⁵⁰⁰ Libyan Civil Code, article 655; Syrian Civil Code, article 622; Iraqi Civil Code, article 876.

⁵⁰¹To further know about the application of custom with regards to the Iraqi Civil Code see: D. Khaṭṭāb (1956). *Op. Cit.*, pp. 187-193.

⁵⁰² A. Shalakany (2001). *Op. Cit.*, p. 215, pp. 228-229.

‘Before we go any further, we must first call attention to the groundbreaking intervention the draft code has pursued in favor of Islamic law. Article (1) of the Code requires the judge to fill the gaps and lacunae that exist in the Code by resorting to the principles of Islamic law. Occasions where the judge will be faced with such gaps in the Code are bound to be numerous, and so the judge will be required to decide various disputes in accordance with the principles of Islamic law. The Code is great victory for Islamic law, especially if we keep in mind that all its Articles could easily be argued to represent principles of Islamic law. And so, notwithstanding the existence of gaps in the Code, our judge only has two options: either he applies codified Articles that do not conflict with Islamic law, or he applies the very principles of Islamic law. In addition to all that, the draft code has also directly incorporated Islamic law by codifying both its general theories and its detailed normative solutions.’⁵⁰³ (Trans.)

To further determine what is meant by principles of Islamic law one should return to the stages that were passed by this Article in the new Egyptian project. It was first mentioned to be one of the supplementary sources that a judge could benefit from without making Sharī‘ah a binding source. It means it was assembled to jurisprudence and judiciary experience. It was stated after the mention of formal sources that the judge infers legal regulations from principles of Sharī‘ah, as below:

‘2- 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 natural law and rules of equity .3- The judge inspires the rulings that decided by the judiciary and jurisprudence (Egyptian or foreign) as such inspires from principles of Islamic Sharī‘ah.’⁵⁰⁴ (Trans.)

The ‘explanatory notices’ commented on this provision as Sharī‘ah is only one of the elements that guide in inference and derivation of the rules and in seeking their understanding, but it will have no binding force of adherence. Also, it concludes that giving this room for principles of Islamic Sharī‘ah is a renovation intended to return the access of Sharī‘ah, not only as a historical source for a part of the project’s regulations, but also because it is a unique example for an excellent legal system. Also, if Sharī‘ah is concluded to have a manifest place in comparative jurisprudence and to have preceded the most excellent contemporary codes in discovering theory of abuse of right and its similitude that reflect ethical originated theories, it

⁵⁰³Sanhūrī (1942). Op. Cit., p. 179.

⁵⁰⁴EMJ (1960). Op. Cit., volume. 1, p. 183.

is a must to be a source for inspiration by judiciary specially as most of the rules of the project could be reproduced on Sharī'ah principles with no difficulty if reference is made to all doctrines of Sharī'ah without determination of particular doctrines or discrimination of denominations.⁵⁰⁵

As a response to Sanhūrī's suggestion, the revising committee amended the mentioned Article to make principles of Sharī'ah a formal source and to be descended in order of priority before principles of natural law and equity in order to have a space for application.⁵⁰⁶ The previous Article was amended with this wording:

‘In the 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 that more consistent with provisions of this Code without adhering to a particular doctrine (school), and in the absence of Islamic legal precedent, he shall pass judgment according to the rules of equity.’⁵⁰⁷ (Trans.)

Later on, and namely with the Egyptian Senate's Committee of Civil Code, a phrase was erased from the previous provision as it was perceived unnecessary owing to its probable inference from the concept and context of the Article itself. Briefly, they deleted “that more consistent with provisions of this Code without adhering to a particular doctrine”, for three considerations. Firstly, the concept of consistency is inferred automatically, and secondly, the principles of Sharī'ah are not different in the views of schools of jurisprudence so that stipulation on not adhering to a particular school was perceived dispensable, and lastly, because this phrase shows many restrictions on implementation of Sharī'ah relative to other

⁵⁰⁵ Ibid., volume.1, p. 189.

⁵⁰⁶ R. Abū al- Su'ūd (1983). Op. Cit., volume. 1, p. 523.

⁵⁰⁷ EMJ (1960). Op. Cit., volume. 1, p. 190.

sources. This is especially as there is no mention of such restrictions in respect of other sources of law like custom and principles of natural law and equity.⁵⁰⁸

From the foregoing information it is clear that principles of Islamic Sharī'ah in the New Civil Code(s) is intended to mean the faculties, fundamentals and undisputable tenets of Sharī'ah which do not vary from one doctrine of law to another. So the detailed solutions and particular rulings that vary from a rite of jurisprudence to another or those that vary among opinions of a single doctrine of jurisprudence are not entitled to have reception as a source of law that acts in absence of provisions.⁵⁰⁹ As Sfeir concluded, Sanhūrī's choice of 'principles' (*Mabādi*) over 'rulings' was dictated by his concern that resort to Sharī'ah may adversely affect its unity and integrity. Therefore, the use of more general and ethical Sharī'ah principles would guard against that. He likely attempted to equate Sharī'ah with something similar to natural law in the western legal tradition.⁵¹⁰

Furthermore, inferring and applying the principles of Sharī'ah are restricted to the condition that a manifest consistency is seen between Sharī'ah oriented principles and the fundamental principles on which the Code is constructed. Therefore, if an Islamic legal principle contradicts or conflicts with the principles of the statutory law then it will be precluded and perceived inapplicable owing to the fact that the consistency of laws is a prerequisite for inferring rules from secondary sources that operate in time when law's provisions indicating no answer for the question of the subject matter.⁵¹¹

⁵⁰⁸ Ibid., volume.1, pp. 191-192.

⁵⁰⁹ Ibid, volume. 1, p. 192; D. Khaṭṭāb (1956). Op. Cit., pp.193-194.

⁵¹⁰ G. N. Sfeir (1998). Op. Cit., p.96.

⁵¹¹ A. F. al-Ṣadda (n.d.). op. Cit., pp. 160-170; R. Abū al- Su'ūd (1983). Op. Cit., volume. 1, p. 521-524; D. Khaṭṭāb (1956). Op. Cit., pp.194.

The practical significance of this Article was the subject matter of heated debate among members of the Egyptian Senate. Supporters of the Article defended its Islamic potential for the reason that it directs the judge to apply custom before Islamic law, but such customary law quite often represents Islamic law, particularly in rural areas. Therefore, the reference to customary law as a symbolic gesture of no practical significance, other than its Islamic potential, advances the application of Islamic law more profoundly than is suggested on the face of it.⁵¹² By contrast, members of the Committee who opposed the Article described its impact as more sentimental than practical. Some of its opponents warned against the failure to specify a particular school of Islamic jurisprudence in case of lacunae, thus opening the door to future conflicts in court decisions.⁵¹³ Upon these criticisms, the *Sharī'ah* was introduced as general principles that do not vary from one school to another.

5.2.1.3 Principles of Natural Law and Equity

There are two points assisting in determining the purpose of transferring judges onto principles of natural law and equity. Firstly, the shortcoming of statutory law in covering all possibilities of application, as the languages of the man cannot introduce all laws in a perspicuous and unequivocal way so as to be able to produce endless applications, especially in subjects that change with time and circumstances. Secondly, there is an essential concept that a judge should apply justice regardless of the presence or absence of legislative provisions. The judge is not allowed to refrain from making a legal decision in the subject matter, claiming that the law is silent, obscure, or insufficient, and the judge who refuses to judge a case, shall be prosecuted as being guilty of denial of justice.⁵¹⁴

⁵¹² EMJ (1960). Op. Cit., volume. 1, p. 92.

⁵¹³ Ibid., volume. 1, p. 191; A. Shalakany (2001). Op. Cit., pp. 233-234.

⁵¹⁴ D. Khaṭṭāb (1956). Op. Cit., pp.197-198; A. F. al-Ṣadda (n.d.). op. Cit., pp. 171-172; Herbert J. (1975). Op. Cit., p. 59.

5.2.1.3.1 Definition and Concept of Natural law and Equity

Principles of equity are those regulations that exist in line with statutory law and are based on rationality and fairness. They may sometimes tend to replace or substitute the regulations of statutory law by favor of their ‘spiritual’ force that emanates from the supremacy of these principles themselves.⁵¹⁵ ‘Natural law’ is a group of regulations ruling the social behavior of human beings that are not related in any way to domestic traditions and local habits of a particular people or not related to statutory provisions of a law as they are evident to purely emanate from instinct and self-evident principles of intellect.⁵¹⁶ Such principles are constructed upon primary and eternal maxims, namely the principles of pure justice and genuine goodness.⁵¹⁷

In ancient times, jurists called such principles ‘divine law’ or ‘natural law’ or ‘eternal law’. Aristotle and other Greek philosophers had written about it as well as such Roman figures as Cicero, Gaius and Justinian. Later French, English and German jurists provided more writings about such maxims. They all agreed that these eternal principles are binding over the entire globe in all countries and at all times. This attribute necessarily gives rise to another attribute, namely that they are almost identical in all legal systems, such as Roman law, the Shari‘ah and modern European laws. Therefore, such similarities are bound to exist regardless of whether or not various peoples have interacted as these principles are indivisible truth discernable by reason. Hereby, such similarities between the legal systems of the various nations do not constitute evidence that some nations borrowed from others.⁵¹⁸

⁵¹⁵ D. Khaṭṭāb (1956). Op. Cit., p.198; R. Abū al- Su‘ūd (1983). Op. Cit., volume. 1, p.526.

⁵¹⁶ R. Abū al- Su‘ūd (1983). Op. Cit., volume.1, pp.528-529.

⁵¹⁷ S. Maḥmaṣānī (1987). Op. Cit., p. 149; A. F. al-Ṣadda (n.d.). op. Cit., p. 172.

⁵¹⁸ See S. Maḥmaṣānī (1987). Op. Cit., pp. 149-150.

In the beginning, the idea was perceived as to be a comprehensive model of law that includes fundamental bases of any legal system, as well as including the detailed regulations generating from such principles in which they will not vary with space and place. Later on, the concept of natural law with changeable boundaries appeared. It implies that this group of laws constitutes the highest values and virtues that guide and inspire a lawmaker in concluding solutions for the necessities and conditions of society which gives possibility to different approaches with difference of space and place. The natural law, according to this trend, became inclusive for a numerable group of principles that represent the shared eternal maxims which are common between various nations and in various ages. Also, the concept is inclusive for the regulations that descend from these principles with taking space and place into account.⁵¹⁹

In the final age, the concept of natural law was perceived as a family of maxims that are numerable and commonly shared between nations in different ages. These maxims give ethical guidance and enable the lawmakers in each society to conclude regulations that change with time and place. Therefore, the concept of equity was proposed to be in line with natural law as the latter is indivisible and unchangeable and equity is the instrument by which application of these principles to a variety of societies with a variety of circumstances is rendered possible.⁵²⁰

5.2.1.3.2 Historical Context

As is clear the New Civil Code(s) mentions principles of natural law and equity as a secondary source of law in times of absence of statutory provision, customary practice and principles of Shari'ah. But the term in the context of the Egyptian legal system goes back to the era of early

⁵¹⁹ A. F. al-Şadda (n.d.). op. Cit., pp. 172-173; 'Abdül-Jawād (1991a), Buḥūth, pp.153-156.

⁵²⁰ A. F. al-Şadda (n.d.). op. Cit., pp. 172-173.

codes of Egypt influenced by the French Civil Code. It is reported that the Egyptian Mixed Code, following its Napoleonic counterpart in taking guidance from natural law, had concentrated on this source as a formal reference that judges shall resort to. The Mixed Civil Code that was promulgated in 1875 states (Article 11): ‘In absence of a statutory law or in state of ambiguity or inefficiency of the provision, the judge decides according to natural law and principles of equity.’⁵²¹

The same text is repeatedly proven in the Writ of Judicial Administration of the Mixed Courts, (Article 52).⁵²²

It is noticeable that with the compilation of the National Civil Code in 1883, a dispute was raised between the jurists regarding natural law and its fundamentals, benefits and principles. The traditional perception on this source was criticized and the new generation of jurists degraded its importance. Therefore, the Egyptian author of the new Code hesitated to make this source as a reference. Therefore, the Writ of Administration of National Courts (Article 29) stated: ‘If no a plain text is met, the judge decides according to principles of equity. And in commercial subjects the judge decides based on principles of equity and commercial usages.’⁵²³

But after developing the concept of natural law to the new forum manifesting in natural law whose boundaries are changeable, the supporters of natural law reinforced the concept and they satisfied the lawmakers to take it into consideration. Thus on 25 May 1897 and namely with establishing the judicial system for Şiwa centre, the natural law in its new forum was stated to be a source of adjudication. Also, the High Command (Article 15) on 1 July 1911

⁵²¹ EMJ (1960). Op. Cit., volume. 1, p. 184; R. Abū al- Su ūd (1983). Op. Cit., volume. 1, p.535.

⁵²² Ibid.

⁵²³ R. Abū al- Su ūd (1983). Op. Cit., volume.1, p.536; EMJ (1960). Op. Cit., volume. 1, p. 186.

pertaining to Sīnā's judicial system stated that the courts decide in civil subjects according to the principles of equity and natural law with giving preference to the permanent domestic customs in the event of their conflict with these principles. And Articles 17, 24 of the foundation law of Akḥṭāṭ courts (number 11 of 1912) stipulated that permanent domestic customs that do not conflict with principles of equity and natural law can be considered.⁵²⁴

Later on, after the treaty of Montreaux was concluded, the lawmakers stated (Article 52, Writ of Judicial Administration of Mixed Courts issued in 1937) that in absence of a provision applying to the presented case or in states of inefficiency or ambiguity of the provision, the judge shall follow principles of natural law and rules of justice and equity.⁵²⁵

Due to the fact that the rules of equity and natural law are commonly uncertain and undetermined, a dispute occurred about this source and its position in the New Civil Code(s). When the first Committee charged with revision of the civil code discussed Article 11 of Mixed Civil Code that considered the natural law as one of the formal sources of law, the chief of the Committee, Murād Sayyid Aḥmad Bāshā, commented on the issue. He was of the belief that there is no clear inference of the term 'natural law'. If it is only a group of self evident and indivisible rules that all legislations, legal systems and societies stand up with them to the point that it implies each single body of a law is covering the natural law, then this concept does not advance any positive criteria. Otherwise, it means natural law is ambiguous and lacks milestones.⁵²⁶ Therefore, it is not reasonable to transfer the judge to a fictional body of law that is totally invisible. Accordingly, the Committee suggested the sources of law, as the text reads:

⁵²⁴ R. Abū al- Su ūd (1983). Op. Cit., volume.1, p. 536.

⁵²⁵ Ibid.

⁵²⁶ EMJ (1960). Op. Cit., volume.1, pp. 183-184.

‘In absence of an applying provision, the judge decides according to the general principles of Egyptian Code inclusive of Islamic Sharī‘ah. And if the judge does not find in the Egyptian law a rule that applicable on the dispute he should apply the general principles that are common between the countries.’⁵²⁷ (Trans. T.W.)

But the final Committee refuted this text and preserved the statement on natural law and principles of equity.

As the ‘explanatory notices’ of the New Egyptian Civil Code explained, the authors of the New Code did not want to follow the way of the Swiss Civil Code (Article 1/2) in giving the judge a discretionary power to decide the case according to such law as he would have deemed proper to legislate, because it entitles the court to the right of legislation; the task which is not consistent with the applicatory duty of judges. The authors of the Code also did not follow the style of the new Italy Civil Code (Article 3) that transferred a judge to the general principles of the State’s law. The New Code also did not follow the way of Chinese Code (Article 1) which transfers to general principles of law without any qualification. The authors of the New Code justified the resort to natural law and principles of equity despite the ambiguity and uncertainty it is alleged to have, because they recognized that these principles do not refer the judge to decisive dictates so that to be unequivocally known. It is rather intended to oblige judges to apply their own opinions in order to avoid the denial of justice as a result of abstaining from adjudication. Instead of keeping silent, the judge must decide the case in the light of general objectives of law and must avoid adjudication with unbridled dictates. Therefore, the transfer to principles of equity and natural law tended to facilitate the judiciary with a means of reasoning and *Ijtihād* in a very broad sense, irrespective of how this source of legislation is expressed.⁵²⁸

⁵²⁷ Ibid., volume.1, p. 186.

⁵²⁸ Ibid, volume. 1, p. 188; R. Abū al- Su ūd (1983). Op. Cit., volume. 1, pp. 536-539.

5.2.1.3.3 Possible Implications of Transferring to Principles of Natural Law and Equity

Jurists revoked two questions with regards to the meaning and implication of natural law and equity. The main question was how possible is it to resort to this source as a final solution after absence of Shari'ah? Because the later is perceived as comprehensive a legal system as to cover all aspects of law including indivisible and eternal principles and is also believed to have access to this source as any legal system whose principles have attribution to equality and justice among mankind.⁵²⁹

To imagine the answer to the mentioned question it is a requisite to give analysis to the meaning of natural law and equity from the viewpoint of the Code's author as provided by the historical and legal context. Some jurists are of the belief that the author during the drafting of this Article was of the belief that analogy is a part of rules of interpretation and he had included analogy and general principles under the principles of natural law and equity.⁵³⁰ Another group of jurists held that the Egyptian lawmaker followed the approach of the scientific school which views the resort to the essence of law as essential where no provision of statutory laws is applicable. According to them, the author expressed the essence of law by 'principles of natural law and equity'.⁵³¹

For some, this transfer should be understood on the basis that the author followed the approach of a free scientific research that upholds the principles of law in line with the actual facts. According to this opinion, analogy and general principles are instruments of a scientific research and reasoning in absence of the other formal sources. To them, justice requires equality before law which implies that the rule of a certain case should expand over all its

⁵²⁹ M. 'Abdul-Jawād (1991a). Op. Cit., p. 153.

⁵³⁰ R. Abū al- Su'ūd (1983). Op. Cit., volume. 1, p. 539.

⁵³¹ Ibid.

similar cases unless the existence of a difference between the cases is evident. Also, the general principles could be one of the instruments that work through inducing a common tenet from a group of rules such as to conclude the legal existence of a fetus in any case for his advantage from the group of rules related to inheritance that decide the inheritance of a fetus in an affirmative way. In summary, this current views principles of natural law and equity as general directions that give a role to scientific evidence, inclusive of analogy and general maxims as well as the natural facts that a social order provides.⁵³² To support this opinion, they referred to a text from the ‘explanatory notices’ that shows that under the shadow of natural law and principles of equity, the courts had applied the general principles of the Egyptian law and even extracted some of the rulings from Sharī‘ah. Moreover, under the same shadow, the courts created rules as a product of the nature of social relations, to deduce rules that the Egyptian Code could not state.⁵³³ Therefore, it can be understood that the principles of natural law are just general directions of justice that functions on the basis of real facts existing in the ground.⁵³⁴

According to Ramaḍān Abū al-Su‘ūd, Muḥammad ‘Abdul-Jawād and Faraj al-Ṣadda, transferring judges to the principles of natural law is quite ambiguous as it comes in order of descent after the principles of Islamic Sharī‘ah. The reason is that Sharī‘ah is a combination of rules and sources. If the case gets no guidance from the texts of Sharī‘ah and the scholarly consensus (*Ijmā‘*), there exists a chance to make recourse directly to the sources of Islamic law among which are *Qiyās* (analogy), *Istiḥsān* (juridical preference or equity), *Maṣlaḥah* *Mursalah* (considerations of public interest) and *Istiṣḥāb* (presumption of continuity). These

⁵³² Ibid, volume. 1, pp. 539-540.

⁵³³ EMJ (1960). Op. Cit., volume.1, p. 188-189.

⁵³⁴ R. Abū al- Su ‘ūd (1983). Op. Cit., volume. 1, p. 540.

sources of law do not leave a space or role for an external natural law to play in the round as they form together a broad sense of juridical practice and legal cognition.⁵³⁵

Some writers likened the principles of equity with the principles of Islamic jurisprudence. The profound professor, Hāshim Kamālī, refers to *Istihsān* as ‘equity in Islamic law’. According to him, *Istihsān* in Islamic law, and equity in Western law, are both inspired by the principle of fairness and conscience, and both may authorize departure from a rule of positive law when its enforcement leads to unfair results.⁵³⁶

This implies that equity, according to this interpretation, is not an independent source of law and, as Sayed Hassan Amin expressed, theoretically the Islamic law corresponds to the natural law and contains the two concepts of an ethical quality in law and the capacity of human reason to discern it.⁵³⁷ But the term in the context of the preliminary provision can be understood as an expression to imply application of human reasoning (*Ijtihād*). It means that if the judge finds no principle in Sharī‘ah or an evident rule he may have to apply his own *Ijtihād* and reasoning to deduce a rule from the sources of Sharī‘ah and otherwise sources. The judge, however, is bound by principles of justice and equity and is not free to apply his own understanding that gets no justification from the principles thereof. Hence, Abū al-Su‘ūd, ‘Abdul-Jawād and al-Ṣadda all believe that the principles of natural law and equity is not an independent source of law as the Sharī‘ah principles cover the premise of justice and equity.⁵³⁸

⁵³⁵ R. Abū al- Su ‘ūd (1983). Op. Cit., volume. 1, pp. 541-542; M. ‘Abdul-Jawād (1991a). Op. Cit., p. 153; A. F. al-Ṣadda (n.d.). op. Cit., p. 175-176.

⁵³⁶ H. Kamālī (2004). Op. Cit., p. 245. See also: D. Khaṭṭāb (1956). Op. Cit., p. 198.

⁵³⁷ H. S. Amin (1985). Op. Cit., p. 222.

⁵³⁸ R. Abū al- Su ‘ūd (1983). Op. Cit., volume. 1, pp. 541-542; M. ‘Abdul-Jawād (1991a). Op. Cit., p. 153; A. F. al-Ṣadda (n.d.). op. Cit., pp. 175-176.

According to Ḍiya' Sheth Khaṭṭab, however, the opinions of Muslim jurists that based on reasoning and wisdom and spirit of the rules of Sharī'ah could be included under the term 'principles of equity'. To him, the term is inclusive of what is called '*al-Ra'y*' in Islamic jurisprudence. Thus, the difference between Sharī'ah principles and *al-Ra'y* is that the former is attached to the common principles, while the latter is attached to the common maxims of *Fiqh* and the opinions of the Muslim scholars. However, there are some maxims of *Fiqh* that can be considered either as a principle of Sharī'ah or as a rule of natural law and equity. He illustrated these with some *Fiqh* maxims like "Freedom from indebtedness is to be presumed" (*Majallah*, Article 8), "As to attributes which may exist or not, the presumption, which there is, is that they do not exist" (*Majallah*, Article 9), "Damage and retaliation by damage is not allowed" (*Majallah*, Article 19), "That which in fact follows a thing, follows it also in law" (*Majallah*, Article 47), "A special guardianship is stronger than a general guardianship" (*Majallah*, Article 59), "Evidence is for the person who claims, the oath for the person who denies" (*Majallah*, Article 76) and "The detriment is as a return for the benefit" (*Majallah*, Article 87).⁵³⁹ Based on the aforementioned interpretation, the role of Sharī'ah although is narrowed as to the principles, it can be extended through rules of natural law and equity.

In conclusion, the researcher believes that the forgoing critique is quite debatable, as principles of natural law and equity are an independent source of law in the New Civil Code(s). This is not due to the principles of Sharī'ah not covering the principles of equity and justice, but because making recourse to Sharī'ah, in the project, is confined with a condition restricting its application to the situations where the Sharī'ah is consistent with the principles of the New Code(s). This condition was stipulated in the primary wording of the provision and

⁵³⁹D. Khaṭṭāb (1956). Op. Cit., volume. 1, p. 198-201.

it was then erased only because it is understood from the context and the purpose of the discourse. It was firstly stated:

‘In the 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 Shari‘ah that more consistent with provisions of this Code without adhering to a particular doctrine (school), and in the absence of Islamic legal precedent, he shall pass judgment according to the rules of equity.’⁵⁴⁰ (Trans.)

Therefore, natural law and equity is applicable, even though the case is covered by a principle of Shari‘ah provided the latter does not comfort with the principles of the statutory laws as reduced into the New Civil Code(s). The sources of Shari‘ah, like public interest and *Istiṣhāb*, are functioning on the criteria of Shari‘ah and they cannot ever contradict a clear text of it. Therefore, the concept of natural law and the measurement of equity is quite different between Shari‘ah and the man made law criteria. Also, it is evident from the historical context of the provision that the term “principles of natural law and equity” has been given a specific meaning which was totally tended to take the position of an alternative to the principles of Shari‘ah in cases where the latter does not provide a consistent rule complying with the principles of the Code. Therefore, the role of Shari‘ah principles in this Code is deemed to be narrowed since it comes after custom and the principles of natural law and equity can replace it in case inconsistency occurs between the particular principle of Shari‘ah and the general principles of the statutory laws.

5.2.2 The Interpretative Sources

The interpretative sources are those which are meant to have authority and force in clarifying the rules of law that are deemed to be ambiguous or unclear. These kinds of sources are useful

⁵⁴⁰ EMJ (1960). Op. Cit., volume. 1, p. 190.

and able to generate guidelines for judges in enlightening the way of inferring the rules of law. However, the force of this category is not binding.⁵⁴¹

The interpretative sources of the Egyptian – as well as the Iraqi - Civil Code are mainly two: jurisprudence and judiciary experience. Jurisprudence represents the scientific dimension of law. The jurists (legal thinkers) have to look over the social relations and infer the legal decision of particularities in the light of general principles and rules of law. In this effort, the jurists should take into account a variety of activities and social trends and behaviors. Meanwhile, the judiciary is the functional dimension of law. A judge is entitled to apply rules of law to the cases brought up before the courtroom. The law, in the sense of judiciary, should be perceived as a living body that is ‘growing’ and getting ever more developed. It must be prompted to act as the age may require. The coordination between jurisprudence and judiciary is essential so as to complement one another. The judge may make recourse to the opinion of jurists to get guidelines in the way of application and the jurists have to benefit from past experience in instructing the juridical works to the way of the real life of society. However, both of them, either judiciary or jurisprudence, enlightens the way before the lawmakers to amend the laws if more adaptation to the age’s requirement is needed. Moreover, in plenty of conditions and circumstances they became material references for the rules of law.⁵⁴²

Despite the fact that jurisprudence and judicial precedents are considered formal and material sources of some classical legal systems, such as Roman law in general and common law with reference to judiciary, they both have been given the course of interpretation in major world legal systems including the Egyptian. Therefore, either judicial precedents or jurisprudence form not more than a secondary and incidental source of law in terms of helping

⁵⁴¹ Ibid., p. 202; A. F. al-Şadda (n.d.), op. Cit., p. 177.

⁵⁴² A. F. al-Şadda (n.d.), op. Cit., p. 177-178.

judges for inspiration of the rules and deducing the implications of the provisions in depth without getting binding force over the judgment of particular cases. So, they are not mentioned in the first preliminary Article that precisely determined the formal sources of legislation and ruling. However, an additional provision was drafted in the primary status of the Article on the role of judiciary and jurisprudence as two sources of legal inspiration and legal undertaking. It was stated that “the judge has to make recourse to the rules that are decided by judiciary and jurisprudence, whether they are Egyptian or foreign experience.”⁵⁴³

The ‘explanatory notices’, however, commented on the forgoing statement as it contains entire elements and components that judges benefit from in finding out the rules and searching for their implications but without making them binding sources of law.⁵⁴⁴ The Committee of Civil Code in the Egyptian Senate erased this statement owing to the fact that the general rules have satisfactorily indicated and spelled out such a rule.⁵⁴⁵

In short, in spite of these sources not being binding, the jurisprudence and judicial precedents enlighten the way of making legal decisions and judgments and in preparation of the legal projects that are mainly held by lawmakers. As historically proven, the Egyptian authors of the New Civil Code (1948) referred to the judicial experience that lasted for more than seventy years, in terms of providing clarifications for the provisional rules and embodying applications that demonstrated the deficits of the previous Code. Therefore, authors of the New Code replaced, amended, revised and redrafted again numerous provisions of the former Code in the shadow of the judiciary experience.⁵⁴⁶

⁵⁴³ EMJ (1960). Op. Cit., volume. 1, p. 190.

⁵⁴⁴ Ibid., volume. 1, p. 189.

⁵⁴⁵ Ibid., volume. 1, p. 183, p. 189, p. 190, p. 192; A. F. al-Şadda (n.d.). op. Cit., p. 181.

⁵⁴⁶ A. F. al-Şadda (n.d.). op. Cit., pp. 186-187.

Despite the aforementioned facts, Sanhūrī has more clarified the exact meaning of sources of jurisprudence and judiciary that are meant to give interpretations to the provisional and inspirable rules of the law. He maintained that the historical sources of the New Code are totally different and divergent in the sense that a group of provisions is totally new, but there are groups of precepts taken from either the French Code or the old Egyptian Civil Code or extracted from other modern civil codes or the Islamic Sharī‘ah. Therefore, he explained the way how interpretation of diverse groups of provisions can take place without getting into complex conflicts.⁵⁴⁷

It is remarkable also to notice that the Egyptian judiciary precedents played a significant role in the successful application of the New Code in those Arab States which adhered to the Egyptian style code. While the ‘explanatory notices’ of the Syrian Civil Code attributed the decision of the lawmakers to reproduce much of the Egyptian Code for the benefits that can be derived from the decisions of the Egyptian courts and the works of Egyptian jurists, the Iraqi Code made it a condition⁵⁴⁸ in Article (1) as stated:

‘1- Provisions of law govern all matters to which these provisions apply in letter and spirit. 2- In the 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 that more consistent with provisions of this code without adhering to a particular doctrine, and in the absence of Islamic legal precedent, he shall pass judgment according to the rules of equity. 3- The Courts shall be guided by the rulings of the Iraqi courts and the courts of other countries with laws analogous to the Iraqi Code.’ (Trans.)

In the following sections, there is a discussion about the way that described by Sanhūrī in order to determine the methodology of interpretation with regards to three categories of provisions included under the New Code, namely those extracted from the Egyptian judiciary

⁵⁴⁷ Sanhūrī (1972). Op. Cit., volume. 1, pp. 34-57.

⁵⁴⁸ G. N. Sfeir (1998). Op. Cit., p. 97.

and the old Egyptian Code, those related to Islamic jurisprudence and those taken from other modern civil codes.

5.2.2.1 Provisions in Relation with Old Egyptian Civil Code and Judicial Experience

The majority of provisions incorporated into the New Egyptian Code are a duplicate of those in the old Code as the New Code preserved entire provisions that were perceived as valid and appropriate. However, there are some amendments and additions concluded by the judiciary and its experience in application.⁵⁴⁹ The report of the Committee of Civil Code in the Egyptian Senate demonstrated this fact as stated:

‘The sources from which the new enterprise extracted the rules are firstly the old Code and the respective decisions of Egyptian courts. The ‘explanatory notices’ prepared by Justice Ministry indicated the counterpart texts from both Codes as well as the principles that standardized by the judiciary in interpreting the provisions of the Code. It also explained the similarities and differences between the provisions of the New Code relative to the old Code’s provisions and clarified whether amendments and additions had taken place with reference to judicial decisions or juridical opinions. The enterprise however retained the rules of current Code what was deemed as appropriate although revised and redrafted provisions to accommodate with the advanced technical language in current Egypt and the new styles of Egyptian literature. Therefore, it can be concluded that the enterprise retained general rules that were incorporated into the old Civil Code and added the law that the judiciary created in its application. The enterprise does not divorce the past and does not hesitate to protect the heritage of this judiciary in terms of principles and traditions it made and created. On the contrary, it dressed the stabilized states of the past in a new cover of reform that protects it from defects and weakness that were observed before. However, this Code paved the old Code for utilization in the best way possible.’⁵⁵⁰ (Trans. T.W.)

Hereon, Sanhūrī stated that the Egyptian experience in judiciary and jurisprudence that grew up under the shadow of the old Civil Code is a compulsory reference in interpreting provisions of the New Code. Therefore, in his commentarial work on the New Code titled “*Al-Wasīṭ fī Sharḥ al-Qānūn al-Madanī al-Jadīd*” he referred to the judicial experience that grew up in the age of the old Code in giving interpretations to the provisions of the New Code with the assumption of making it an experience emanating from the practice of the New Code. And

⁵⁴⁹ Sanhūrī (1972). Op. Cit., volume. 1, p. 35.

⁵⁵⁰ EMJ (1960). Op. Cit., volume. 1, pp.128-129; Sanhūrī (1972). Op. Cit., volume. 1, pp. 35-36.

to this extent he disregarded and simplified the disputes existing between the old and the New Codes.⁵⁵¹

To illustrate this, one can refer to different examples proving that the judicial experience could push some legal choices to the draft of New Civil Code. The New Egyptian Code (Article 129)⁵⁵² is a true example in this respect as it states:

‘If the obligations of one of the contracting parties are out of all proportion to the advantages that he obtains from the contract or to the obligations of the other contracting party and it is established that the party who has suffered prejudice entered into the contract only as a result of the other party exploiting his obvious levity of character or his unbridled passion even if the deceived party is concluded to have satisfaction with the fraud occurred to him, the contract is annulable and the obligation of the deceived party is matter of reduction by Judge, because this consent in this status is void and, in the vision of law, no effect will follow from it.’ (Trans.)

The main difficulty before applying this provision goes back to the ambiguity of the meanings that terms like ‘obvious levity’ or ‘unbridled passion’ imply. Therefore, it is doubtless that the judge should consult the judicial precedents in order to exhibit the cases that were presented before courtrooms in the past. In this context, the true understanding of the mentioned rule may take place perhaps throughout understanding of the fact that formerly the Egyptian court was confronting a social phenomenon that was manifested in lack of legislative provisions to manage some cases relevant to abuse of rights or excessive exploitation of obligations. For instance, it was repeatedly recorded that an old man divorcing his first wife to marry another, would cede all the property and wealth he possessed for her interest or for favor of her children from him.

Also, cases were brought to court where a father had died leaving huge wealth and his single heir misused the estate property, spending it in inappropriate ways. Cases had also been reported pertaining to a wife ceding a great amount of property to the interest of the current

⁵⁵¹ Sanhūrī (1972). Op. Cit., volume. 1, p.36.

⁵⁵² Libyan Civil Code, article 129; Syrian Civil Code, article 131; Iraqi Civil Code, article 125.

spouse in order to be divorced to finally marry the person whom she loves. These cases were presented before the courts and the Egyptian judiciary managed them under different indirect regulations as no provisional rules specifically were available to generate the legal decision in this respect. The cases were treated once under theory of seduction and temptation (*al-Ighwā' wa al-Tasalluṭ 'alā al-Irādah*). Cases were also treated under theory of duress but the dictates of duress were quite narrow and inapplicable here. To some extent, the theory of *Kḥulu'* (divorce in return for a money compensation to be paid by the wife to husband) was applied to manage cases according to Sharī'ah. Despite the divergence and instability of decisions, the judiciary was quite right when having tended to rescind or reduce the extra-ordinary obligations due on the burden of the weaker party, but it was relatively lacking to establish the decisions on a legal basis precisely provided in the Code, as Sanhūrī commented. So, if the judge brings to attention the pictures of the mentioned cases, then the implication of the terms like 'obvious levity' or 'unbridled passion' will be quite clear and understandable in this context. The precedents reflect the practical life of Egyptians so that no motive is available to present imaginary applications inspired from foreign environments that have no relation to Egyptian social life.⁵⁵³

5.2.2.2 Provisions in Relation with Islamic Jurisprudence and the Methodology of Interpretation

The New Egyptian Code had incorporated plenty of Sharī'ah rules. The provisions in relation to this source where the Islamic jurisprudence becomes their historical source should be interpreted in two ways. Sanhūrī stated.⁵⁵⁴

⁵⁵³ Sanhūrī (1972). Op. Cit., volume. 1, pp. 37-38. And for further examples see: Ibid, pp. 38-44.

⁵⁵⁴ Sanhūrī (1972). Op. Cit., volume. 1, pp. 48-49.

- a) By the Egyptian judiciary if it offers an interpretation. Of course, some provisions that flow under this group are taken from the previous Code that was implemented by the judiciary for about seventy years so that it offers interpretation to many principles and rules that are incorporated to the New Code such as issues of mortal disease, preemption, *Ḥikr*, and leasing of endowed property. He who interprets the texts of the New Code in these subjects should refer to the principles applied by the Egyptian judiciary.⁵⁵⁵
- b) The second source is the references of Islamic jurisprudence, especially if Egyptian judiciary does not advance an interpretation to the subject under question. However consulting the main references of Islamic jurisprudence is a must, especially after the Sharīʿah became one of the formal subsidiary sources of civil law.⁵⁵⁶

Sanhūrī suggested two genuine and core points in making reference to Sharīʿah as a formal source and an interpretative historical reference, as below:

- 1) Adhering to no a particular doctrine of Islamic jurisprudence. It means all doctrines/schools of Islamic jurisprudence are authoritative and have force of application. Thus they could be quoted from. Therefore, the traditional practice to adhere to the preferable opinions inside the Ḥanafī rite or even to the Ḥanafī rite in total is no more applicable. Furthermore, it is legitimate to facilitate doctrines other than famous and eminent Sunni Schools. Reference to schools like the Zaidiyyah and Imāmiyyah could be made for along extent.⁵⁵⁷
- 2) In consulting the laws of Islamic jurisprudence, special consideration should be given to compromise between Islamic laws and the general principles of civil law. Therefore,

⁵⁵⁵ Ibid., volume. 1, p.49.

⁵⁵⁶ Ibid., volume. 1, p.49.

⁵⁵⁷ Ibid., volume. 1, p.49.

it is not allowed to extract from Islamic jurisprudence rules that contradict with any of the principles that the civil code is composed of. Otherwise, the Code will lose its internal consistency. Therefore, making different doctrines of jurisprudence referable is giving a chance to take and implement the rules of Sharī'ah without crashing the principles of the Code or causing contradiction or damaging the Code's consistency.⁵⁵⁸

However, the sources of interpretation of the Iraqi Civil Code are the judiciary rulings and jurisprudence of Iraq and the other countries with laws analogous to the Iraqi Code which tended to have a close link with Egyptian judiciary and jurisprudence.⁵⁵⁹

5.2.2.3 Provisions in Relation with Contemporary Codes

One of the most remarkable points that Sanhūrī figured out in this respect is that the provisions taken from foreign codes are drafted and implemented in a way that agrees with the precepts of the old Code and the judiciary experience generated from it in a way that the lawmakers insisted on to remove any forms of inconsistency between the portions of the New Code via eliminating all manifestations of conflict and inconsistency. Therefore, Sanhūrī stated: 'The provisions of the Code that quoted from foreign codes should be totally and ultimately separated from their historical sources. Therefore, no consultation with these references should be done either in respect to interpretation or in respect of application.'⁵⁶⁰

It implies that these legislative provisions became a part of an integrated Code that has its own entity making it ultimately independent and separate from historical sources. Therefore, in giving interpretation to these provisions, consultation should be directed to the

⁵⁵⁸ Ibid., volume. 1, pp.49-50.

⁵⁵⁹ G. N. Sfeir (1998). Op. Cit., p. 97; D. Khattāb (1956). Op. Cit., pp.201-203.

⁵⁶⁰ Sanhūrī (1972). Op. Cit., volume. 1, pp. 51-52.

objective sources only, like Egyptian judicial precedents, classical Egyptian jurisprudence and old legislative precepts.⁵⁶¹

Furthermore, Sanhūrī provided some justifications for making a separation between texts that flow under this category and their historical sources as below:

1. The overriding majority of the provisions which quoted from contemporary codes are, at the end, only manifestations of the Egyptian judicial practice or they are brought here to correct deficits of the old Civil Code. Therefore, no intention to change the rules of the old code was present when the lawmakers quoted and implanted them in the New Code.⁵⁶²

2. The rest of the provisions which constitute only a minority compared to the first category had been quoted because they explored subjects that were not found in the old Civil Code. But they are implanted into the Code only after examining, purifying and making them to be consistent with principles of the New Code.⁵⁶³

3. It is not possible to consult plenty of historical sources from which these texts were derived as to the diversity and multiplicity of nature and methodology of each single legal system. Also, each code has its jurisprudence and judiciary. Therefore, how can it be admissible to interpret a consistent Code in accordance with various conflicting and inter-contradicting sources?⁵⁶⁴

⁵⁶¹ Ibid., volume. 1, p. 52.

⁵⁶² Ibid., volume. 1, p. 52.

⁵⁶³ Ibid., volume. 1, p. 53.

⁵⁶⁴ Ibid., volume. 1, pp.53-54.

4. However, if it would be necessary to consult any foreign source it will be the French jurisprudence because the Egyptian jurisprudence consistently refers to it and follows its steps.⁵⁶⁵

Hereon, it is notable to remark on the significant foreword delivery spoken before the Senate by the head of the Civil Code Committee, Sheikh Muḥammad Muḥammad al-Wakīl Bāshā, who addressed the issue of interpretation stating:

‘The majority of enterprise’s rules is extracted from the current civil code (old civil code) and from the principles created by the Egyptian judiciary... This is the exact source that should be consulted in interpretation. However, the minor rules taken from foreign codes pertaining to new subjects like institutions, assignment of a debt, family joint ownership, syndicate of co-owners, insolvency and estate cleaning, are accommodated with the current environment, made agreeable with customs and usages, and rendered consistent with other rules of the enterprise. So, these groups of rules are separated from their sources and achieved independence standing on their solidarity with other provisions of the law. The interpretation of this category of provisions takes place via referring to the provisions themselves associated with the judiciary’s practice in similar situations.’⁵⁶⁶ (Trans. T.W.)

‘The committee also welcomes the good opportunity coming to the judiciary and jurisprudence in Egypt in respect to either the interpretation or the application; hoping in creating a broad legal space for reasoning and deducing after getting rid of the restraints as to adhere to a certain law, following its legislative provisions, and extracting from its jurisprudence and judiciary.’⁵⁶⁷ (Trans. T.W.)

⁵⁶⁵ Ibid., volume. 1, p.54.

⁵⁶⁶ EMJ (1960). Op. Cit., volume. 1, pp. 116-117; Sanhūrī (1972). Op. Cit., volume. 1, pp.54-55.

⁵⁶⁷ EMJ (1960). Op. Cit., volume. 1, p. 32; Sanhūrī (1972). Op. Cit., volume. 1, p.56.