

CHAPTER VI

PLACE OF ISLAMIC LAW IN SANHŪRĪ'S WORKS

One of the main points that aimed beyond the current study is to throw lights on the Sanhūrī's Codes and their relation with Islamic law. In other words, since the Codes were aimed to be applied in the Arab World, whose vast majority of the population believe in Islam as the way of life, it is significant and essential to have lights thrown on the way through which the Codes have dealt with the Sharī'ah in its faculties and particularities as well, mainly those that flew to the zone of Civil Law or the "*Mu'āmalāt*" part of traditional Islamic law. However, to reach the mentioned aim, it is required to throw light on how Sanhūrī Bāshā contacted Sharī'ah law and in what sense did he cope with it in special reference to his appreciation to Islamic law in the status it had at his time and as he hoped it would be in the future.

To answer these questions and queries, consulting different books and articles of Sanhūrī and getting the precise knowledge about his personal appreciation for Islamic law and his proposal for the establishment of an Islamic Civilized State is quite necessary.

Herein, a special reference to Sanhūrī's Doctorate Dissertation entitled: "*Le Califat*" which was written in French under the supervision of Edouard Lambert, his then companion in the drafting of the Egyptian Civil Code, is essential. However, the personal memorandum book collected and published by his daughter Nādiyāh al-Sanhūrī and his son in law Tawfīq al-Shāwī, is basically important as there are found plenty of provisions throwing light on Sanhūrī's serious dreams and his everlasting hopes for the life of all Arabs and Muslims. These diaries really fill a great vacuum in this respect. Despite consulting a number of

Sanhūrī's works and memorandum writings, the evaluation of the Code should be given an independent study and the features of the enterprise should be assessed and examined as it reflects itself internally more than giving focus to external sources and Sanhūrī's personal attitudes towards the Islamic Sharī'ah.

6.1. Sanhūrī's Perception on the Islamic Law and the State

To elaborate the key points relevant to the mentioned topic, the discussion is divided into two parts, namely one part is determined to discuss the general perception of Sanhūrī on the controversial relation between the Islamic Law and the State, and another part is devoted to the discussion of theoretical as well as practical strategies that Sanhūrī proposed for upgrading the place of Islamic law in the legislation of modern Arab countries.

6.1.1. General Perspective

The first writing and the significant one that Sanhūrī published about the State is his Doctoral Dissertation known as "*Le Califat*" which was published in Paris in 1926.⁵⁶⁸ He reproduced the similar and main ideas briefly in an article published by *Majallat Al-Muḥāmmāt Al-Shar'īyah* in 1929 entitled "*Al-Dīn wa al-Dawlah fī al-Islām*" (The Religion and the State in Islam).⁵⁶⁹ In these two works, Sanhūrī clearly adopted Islam as a religion as well as a State or, in other words, viewed Islam as an inclusive system for both the religion and the State. According to him, the Prophet Muḥammad (P.B.U.H) was sent to mankind to establish the teachings of a religion and construct the rules of a State attached with the worldly affairs. Therefore, the Prophet established two different, although integrated, types of rulings, namely

⁵⁶⁸ E. Hill (1979). Op. Cit., p.149.

⁵⁶⁹ Sanhūrī (1929). Op. Cit., p. 9-17.

those rules that clarify Islam as a divine religion and those that clarify Islam as a State.⁵⁷⁰ A distinction should be created between the above mentioned types of rules. The religious rules are permanent and not subject to change. However, the rules of State should be subject of the interest and the governance of the time.⁵⁷¹

Therefore, the rules of state have two main features:

- These rules are reasonable and their application is attached to an intellectual understanding. The governance of this category is the duty of Muslim intellect in order to conclude the interests that guide the State in the way of application. The evidence for his approach is the actions of the Prophet Muḥammad (P.B.U.H) as he was always consulting his companions and the experts in administering the worldly affairs.⁵⁷²
- The rules of State change with the change in time and place. Therefore, this category of rules follows the social development that could be measured through the social sciences and the norms of social development. He illustrated this with the ruling of compulsory brotherhood between migrants (*Muhājirīn*) and supporters (*Anṣār*).⁵⁷³ The rule lasted from the beginning of the Madīnah era to the battle of *Badr* when the Muslims became victorious and took over the booty left behind by the unbelievers.⁵⁷⁴

Moreover, the Muslim jurists recognized the difference between religious and worldly affairs as they divide jurisprudence between devotions (*‘Ibādāt*) and transactions (*Mu‘āmalāt*).

To Sanhūrī, the term of law in contemporary discipline is true only with transactions as in the traditional Islamic jurisprudence. Therefore, he proposed a new name for this part of Islamic

⁵⁷⁰ Ibid., p. 9.

⁵⁷¹ Ibid.

⁵⁷² Ibid., p. 10.

⁵⁷³ See: Shamsuddin Ibn Qayyim al-Jawziyyah (2002). *Zād al-Ma‘ūd fī Hady Khayr al-‘Ībād*, 3rd edn. Beirut: Mu‘assasat al-Risālah. volume. 3, pp. 56-58.

⁵⁷⁴ Sanhūrī (1929). Op. Cit., p. 10-11.

jurisprudence other than the term of Shari‘ah as the latter governs both parts of devotions and transactions. Therefore, he proposed the term ‘Islamic Law’ as an alternative to the Islamic Shari‘ah.⁵⁷⁵ The new term, however, should include, along with transactions, the discipline known as “Principles of Islamic Jurisprudence” (*Uṣūl al-Fiqh al-Islāmī*) as well as a part from the discipline of theology (*‘Ilm al-Kalām*) which clarifies the issue of *al-Imāmah* as it constitutes the basis of Islamic public law. Hence the private law incorporates transactions and personal statute. The public law covers the rules that apply to public authorities and their relation with individuals. In other words, the private Islamic law covers a civil law, a procedural law and the basis of a commercial law. Islamic public law applies to a constitutional law, an administrative law, and a penalty law, and it is possible to discover general principles to establish an Islamic international public law and an Islamic international private law.⁵⁷⁶

Although there is no clear distinction between public and private Islamic laws in the traditional juridical literature and the history of Islamic jurisprudence, Sanhūrī proposed the Uṣūlī classification of rights to the exclusive rights of God, exclusive rights of men, rights combined from rights of community and rights of individuals while of the two the former preponderate, and lastly rights combined from rights of community and rights of individuals while of the two the latter preponderate; as the basis for distinction between public and private law in Islamic Shari‘ah.⁵⁷⁷ Therefore, some of the rules that are classified under the rights of

⁵⁷⁵ It is noteworthy that Sanhūrī in his later writings retained the term ‘Islamic Shari‘ah’ and did not fulfill his proposed promise, but he widened the scope of Shari‘ah to be equivalent to a socio-legal and cultural civilization built up by various units of oriental religions, as will be further discussed later in this chapter.

⁵⁷⁶ Sanhūrī (1929). Op. Cit., p. 12.

⁵⁷⁷ H. Kamālī (2004). Op. Cit., pp. 348-350.

God and the combined rights while the rights of community preponderate can be considered as public laws and the others as private laws.⁵⁷⁸ As Kamālī concludes:

‘The Right of God is called so not because it is of any benefit to God, but because it is beneficial to the community at large and not merely to a particular individual. It is, in other words, a public right and differs from the Right of man, or private right, in that its enforcement is a duty of the State. The enforcement of a private right, on the other hand, is up to the person whose right has been infringed, who may or may not wish to demand its enforcement.’⁵⁷⁹

However, in his later writings, Sanhūrī recorded that the public law in Islamic jurisprudence is less detailed and less developed in comparison to the private law as the tyrannical political regimes in the history of the Muslims tended to have no rich juristic literature linking the fundamentals of jurisdiction with the political freedom and democratic public rights as well as *Shūrā* and political involvement by the masses. Therefore, the intervention of the State was an obstacle to freedom of writing in this area and so the jurists had developed the private law more as its progress was not intervened by the tyrannical governments as it had never conflicted with the interest of the rulers.⁵⁸⁰

The importance of the new classification, according to Sanhūrī, is that it narrows the gap between the Islamic law in its traditional dress on one hand and the style of modern civilization and methodology of current legal research on the other hand. However, this classification does not mean to have the Islamic Sharī‘ah losing its independency under the shadow of contemporary law, but to facilitate a comparison between the two legal systems and to open a door for developing and advancing the method of research in the Islamic Sharī‘ah in order to adapt to the contemporary legal progress.⁵⁸¹ In addition to that, Sanhūrī concluded

⁵⁷⁸ Sanhūrī (1929). Op. Cit., p. 13.

⁵⁷⁹ H. Kamālī (2004). Op. Cit., pp. 348-349.

⁵⁸⁰ Sanhūrī (1953-1954). Op.Cit., volume. 1, p.44.

⁵⁸¹ Sanhūrī (1929). Op. Cit., p. 12.

that since the Muslims have an Islamic law, they have an Islamic State.⁵⁸² Therefore, he classified the authorities within an Islamic State as three: legislative authority, executive authority and judicial authority.

The legislative authority is the *Qur'ān* and the *Sunnah* and then for the scholarly consensus of the Muslim *Ummah*. Throughout *Ijmā'*, which is the unanimous agreement of the qualified Muslim scholars of any period following the demise of the Prophet Muḥammad on any matter,⁵⁸³ the *Mujtahidūn* represent the *Ummah*. The *Mujtahidūn* are not elected through votes and elections but through the knowledge they have. However, the Caliph has no right to legislate or to be a member in the legislative body, except provided he has the qualifications of a scholarly *Ijtihād*. Therefore, the *Ummah* have the right to legislate as long as this is abiding by the teachings and principles of *Qur'ān* and *Sunnah*.⁵⁸⁴

The executive authority is linked to the government of Caliphate which is a special type of governance distinguishable from other systems of governance by the fact that the Caliph is a civilian ruler and the spiritual chief of the Muslims. However, he does not have the spiritual authorities that privileged the Pope of Rome as he does have no authority to forbid or to permit and has no authority to forbid from the paradise or to give forgiveness to the sinful and transgressing people. Rather, he is to lead the Muslims in prayers and to protect the articles of Islam inside society. Therefore, whilst he directs the religious authorities, he is distinguished more as Caliph and whilst he directs his worldly authorities, he is the Ruler of the Believers (*Amīr al-Mu'minīn*). Another feature of the Muslim Caliph is that he ought to compulsorily apply and comply with the rules of the Sharī'ah, but at the same time he is not

⁵⁸² Ibid., p. 13.

⁵⁸³ H. Kamālī (2004). Op. Cit., p. 169.

⁵⁸⁴ Sanhūrī (1929). Op. Cit., pp. 13-14.

bound to have adhesion to a particular doctrine of jurisprudence. Rather, he has to ask the scholars who represent the *Ummah* to conclude and reach any uniform decision realizing the interest of the time. However, the power of Caliphate should diffuse over the entire Muslim world in order to establish a complete Caliphate. But occasionally and based on particular circumstances it is allowed temporarily to have more than one Caliph when the Muslims are disunited and separated over multiple governments, provided the separation is on the basis of necessity and recognizing each regime as an incomplete Caliphate. Sanhūrī, however, produced a new concept of a complete system of Caliphate which functions on the basis of a decentralized governance if the Muslims agreed to have it as a possible way to a new Caliphate. For him, in the recent time, after the dissolution of the Ottoman Caliphate, it is quite enough to have a new system of Caliphate in which the Muslim countries approximate and understand each other and establish an organization like a United Muslim Nations to supervise and guide the governments. It can, therefore, replace the system of Caliphate especially if they establish an independent foundation to handle the unchangeable and common affairs of religion over the entire Muslim World.⁵⁸⁵

The judicial authority basically is not independent from the executive authority as the Caliph can gather both authorities. However, with the dissemination of Islam over the world, history has recorded the separation of this authority from the executive authority as it gained and achieved gradually its full independence in the end.⁵⁸⁶

However, to extend a bridge between the State and the Legislative Authority in a developed manner, Sanhūrī, following the ideas of some orientalist like Ignaz Goldziher and

⁵⁸⁵ Sanhūrī (1929). Op. Cit., p. 14-15.

⁵⁸⁶ Ibid., p. 15-16.

Eduard Lambert,⁵⁸⁷ called for developing the source of *Ijmā'* to be finally the source through which the Muslim *Ummah* can proceed with the development or reform of Islamic law. He believed that *Ijmā'* passed by different stages in the history of Islamic legislation. It first emerged as something that was agreed on by people and they practiced it unconsciously, then shifted to a stage wherein the *Ijmā'* constituted an intentional agreement departed from the full attention of the capable and qualified Mujtahids. Sanhūrī suggested it to be more developed so that it becomes the key for the development of Sharī'ah through presenting it via a legal institute playing the role of legislation in contemporary time, or more precisely to have an Islamic representative council or parliament holding *Ijmā'* on the basis of *Shūrā* and on behalf of the *Ummah*. According to him, *Ijmā'* then will be the corner stone of a desirable democratic spirit in the *Ummah*. Moreover, this *Ijmā'* should be held by two groups of people, namely the legal professionals and the other experts in different spheres of life such as economists and traders, politicians and military experts. Also, he believes that an *Ijmā'* can abrogate the precedent *Ijmā'* and a successive generation can abrogate the agreement of the succeeded generation. Furthermore, an *Ijmā'* could be held by the agreement of the vast majority instead of by a unanimous agreement⁵⁸⁸ so that Sharī'ah rules can be renewed without jeopardising its fundamentals or going away from its original sources.⁵⁸⁹

He also attributed the rigidity of *Ijmā'* in the late period of Islamic history to political reasons, as the concept was superior to the political circumstances on the ground, or in other

⁵⁸⁷ Ignaz Goldziher (1946). *Al'Aqīdah wa al-Sharī'ah fī al-Islām: Ta'rīkh al-Taṭawwr al-'Aqādī wa al-Tashrī'ī fī al-Diyānah al-Islāmiyyah*, 2nd edn. Trans. Muḥammad Mūsā and others. Beirut: Dār al-Rā'id al-'Arabī. pp. 52-55; *Dā'rat al-Ma'ārif al-Islāmiyyah* (1969). Cairo: Dār al-Sha'b. volume. 2, pp. 240-241; 'Ābid Muḥammad al-Sufiyānī (1992). *Al-Mustashriqūn wa Man Tāba'ahum wa Mawqifuhum min Thabāt al-Sharī'ah wa Shumūlihā Dirāsatan wa Taṭbīqan*, 2nd edn. Jiddah: Dār al-Manārah. pp. 89-95.

⁵⁸⁸ Sanhūrī (1989). Op. Cit., pp. 70-82; Sanhūrī (1936c). Op. Cit., p. 116; Sanhūrī (1962). Op. Cit., pp. 29-30.

⁵⁸⁹ Sanhūrī (1962). Op. Cit., p. 30.

words, the theory of *Ijmā'* was in its conceptual merit much higher and superior than the social development of Muslim communities so it failed in a practical way to generate a fertile source of legislation and social development.⁵⁹⁰

In Sanhūrī's belief, the application of Sharī'ah is the most complicated question. It may be the biggest obstacle before returning to a complete Caliphate system. The complexity of this question goes back to two apparent obstacles he demonstrated, mainly the following:

I. The non-Muslim minorities:

To warrant a continuous, uninterrupted and permanent application of Sharī'ah, the Muslims should provide equal rights to the Muslim and the non-Muslim citizens in a way that none of their rights and religious freedom is jeopardized or reduced.⁵⁹¹ Therefore, in order to make Sharī'ah applicable on the non-Muslim inhabitants he produced a new definition for the concept of Sharī'ah to be comprehensive much more than the classical meaning of it, which is commonly perceived as a major world legal system distinct from both the Franco-German Civil Law and the Anglo-American Common Law systems. Unlike other major legal systems, Islamic law is not an independent branch of scholarship, but one of the facets of the Islamic faith itself. It is on the basis of divine revelations that the Muslim jurists and theologians have pronounced the rules governing relations among men on the one hand and at the same time between man and God on the other. In this way Islam is essentially a religion of law regulating and directing every aspect of human experience.⁵⁹² Rather, Sanhūrī defined the Islamic Sharī'ah from a socio-cultural perception and described it as:

⁵⁹⁰ Sanhūrī (1989). Op. Cit., p. 80.

⁵⁹¹ Ibid., p. 348.

⁵⁹² H. S. Amin (1985). Op. Cit., p. 222.

‘...the law of the east, and the source of its inspiration and its intellect. It was planted in its deserts and it grew up in its hills and valleys. It is a firebrand of the oriental spirit and the lamp of the light of Islam. Within it Islam and east meet each other then the east is enlightened by Islam and the eastern spirit will mix the spirit of Islam until they become united and one. This is the Islamic Sharī‘ah. If it can be properly prepared and its paths made serviceable, we shall have in this wonderful heritage something can give birth to the spirit of originality in our jurisprudence, our judiciary and our legislation, and this new light will shine forth in the world. And we will share others side by side in the legal culture of the world.’⁵⁹³ (Trans. T.W.)

He also states:

‘I shall mean not by Islam – in the context of legal studies - a group of religious rules. Rather, it is a system for civilization depending on a legal order and governance... We have to refresh the concept of Islamic civilization to regain the flexibility it has missed and to consider it not a mere group of religious rules but a wonderful form of civilization that the history offers to it – as Lambert expressed - as the fruit of a common contribution of all the religious units for distant centuries of co-existence and working together under the banner of Islam.’⁵⁹⁴ (Trans. T.W.)

As concluded by Enid Hill:

‘Although he expressed his most sincere attachment and most profound respect for the religion of Islam, it is Islam as culture and civilization with which he concerned. He professes his interest since a young age towards all that is oriental and that he has always had a profound interest in the study of Islamic civilization that he revered and admired.’⁵⁹⁵

II. **Revising the Islamic law to be suitable for the business of time:**

For the Muslims themselves it is not possible, as Sanhūrī believes, to employ the Sharī‘ah law unless after advancing and elevating some of the rulings, especially those that relate to the economic sphere and transactions of immovable properties, to adapt to the requirements of the contemporary civilization.⁵⁹⁶ As such, Islamic criminal justice should be elevated more as it is in its current status, not advanced as to fundamentals and rulings as does the Islamic civil law. However, throughout the discretionary crimes known as “*Ta‘āzīr*”, the

⁵⁹³ ‘Abdul-Razzāq A. al-Sanhūrī (1934). *Nazariyyat al-‘Aqd*. Al-Majma‘ al-‘Ilmī al-‘Arabī: Dār al-Fikr. p.(w).

⁵⁹⁴ ‘Abdul-Razzāq A. al-Sanhūrī (1932). “Taqrīr ‘an al-Mu’tamar al-Dawlī li-al-Qānūn al- Muqāran bi-Lāhāy fī Ijtimā‘ih al-Awwal Sanata 1932”. In Nādiyāh al-Sanhūrī, Tawfiq al-Shāwī (ed.). (1992). *Majmu‘at Maqālāt wa Abḥāth al-Ustādh al-Doctor ‘Abdul-Razzāq al-Sanhūrī*. Cairo: Maṭba‘at al-Jāmi‘ah. volume. 1, p. 29; Muḥammad ‘Imārah (1999). “Al-Sanhūrī wa Iḥyā’ ‘Ulūm al-Sharī‘ah,” *Maj. Al-Mujtama‘*, 12th october 1999, 1371-2, p.44.

⁵⁹⁵ E. Hill (1989). Op. Cit., p. 149.

⁵⁹⁶ Sanhūrī (1989). Op. Cit., p.348.

lawmakers, judges and jurists could adopt the contemporary principles of criminal law in instances that Islamic law has not provided a certain answer respective with those principles, whether in an affirmative or a passive form, neither decisively nor speculatively.⁵⁹⁷ However, as far as the civil code is concerned, “the Sharī‘ah constitutes in its current condition a fertile source for the lawmaker to extract many laws from it.”⁵⁹⁸

It implies that Sanhūrī classified the transaction laws of Islamic Sharī‘ah as finally drafted in *Majallah* and *Murshid al-Ḥayrān* into two categories. The first category constitutes the major part of Sharī‘ah which is totally correct and explicit in its logic. Here in this part, the lawmaker should not hesitate to return, to the greatest extent possible, to the Sharī‘ah and extract the rules from it as it contains principles if they are not superior they are equal to the most modern rules of western legislation.⁵⁹⁹ The second category is the part of Sharī‘ah which needs to be represented again in the light of the comparative law, as mentioned above.

6.1.2. Sanhūrī’s Strategies for the Employment of Sharī‘ah in the Era of Modernity

Before substituting Islamic law, Sanhūrī believed that it is necessary in the work of the re-adaptation of the legal system to the contingencies of the actual social organization to pass through two successive phases: the scientific phase and the practical legislative phase.⁶⁰⁰

6.1.2.1. The Scientific Phase

Sanhūrī appreciated Sharī‘ah for the scientific aspect,⁶⁰¹ as “the most advanced law in the view of men conscious of legal justice, and it is appropriate to be a basis for comparative law. There

⁵⁹⁷ Sanhūrī (1953-1954). Op.Cit., volume. 1, p.45.

⁵⁹⁸ Sanhūrī (1936b). Op. Cit., volume. 1, p. 324; Sanhūrī (1936c). Op. Cit., p .114.

⁵⁹⁹ Sanhūrī (1936c). Op. Cit., p .114.

⁶⁰⁰ Sanhūrī (1989). Op. Cit., p. 349; N. K. al-Zanki (2001). Op. Cit., pp. 81-84.

has not been in legal history a law that stands on such a firm basis of precise legal logic like the Roman law, except the Islamic Sharī‘ah.”⁶⁰² “Although Islamic law needs a more systematic presentation, it nonetheless constitutes, in its current condition, a fertile source for the lawmaker to extract many laws from it.”⁶⁰³

This is regarding the major part of the Sharī‘ah rules. However, regarding the other part of Sharī‘ah, Sanhūrī proposed that the Islamic law must be studied in the light of comparative law. The point of departure is to separate the mere religious part from the aspects of Islamic law that regulate the relations between men and are equivalent to the positive law, and again in the second part to distinct the permanent legal rules from the variable ones. A permanent rule is operative at all times and for all places while the variable rule is temporary and particular. The religious rules are not strictly speaking legal rules rather they have only moral force. The rules of the non-religious part are the domain of law, strictly speaking, and are applicable to all citizens regardless of religion and race. The scientific work needs individual effort and then collective effort. However, those who are entitled to hold comparative studies should be qualified enough to deeply understand and investigate the history, as well as the methodology, of Islamic Sharī‘ah and the juristic schools.⁶⁰⁴

This study of Islamic jurisprudence in the way prescribed, as Sanhūrī expected, will take a long time to bear fruit. He indicated a length of several decades to be able to return the Islamic law to its youth and then to be fertilized by the factors of development and become qualified for direct application.⁶⁰⁵

⁶⁰¹ See also: E. Hill (1989). Op. Cit., p. 165, p. 167.

⁶⁰² Sanhūrī (1936c). Op. Cit., p. 114.

⁶⁰³ Ibid.

⁶⁰⁴ Sanhūrī (1989). Op. Cit., pp. 349-351; E. Hill (1989). Op. Cit., pp. 154-155.

⁶⁰⁵ Sanhūrī (1962). Op. Cit., p.28.

Hereby, Sanhūrī repeatedly advised his students not to think about drafting projects of Islamic codes, unless they have fully studied the Islamic jurisprudence for ten years at the minimum, in order to comprehend it and then codify its rules.⁶⁰⁶

Hence, he individually partook in this proposal and commenced a project of study to compare Islamic jurisprudence and western jurisprudence in aspect of transactions and what is in modern technical legal usage a Civil Law. He authored a quite tremendous compilation entitled “*Maṣādir al-Ḥaqq fī al-Fiqh al-Islāmi Dirāsah Muqāranah bi-al-Fiqh al-Gharbī*” (Sources of Rights in Islamic Jurisprudence: A Comparative Study with the Western Jurisprudence) and put the Islamic jurisprudence in line with the western jurisprudence in the genuine and significant issues, as well as the ambiguous and complex ones. In this book he adhered to draw a sound and scientific research methodology without caring about the very deep details of law and jurisprudence. The book is in the style of modern western jurisprudence, but the sources of the research are the Islamic references. However, the book consulted contemporary sources and some writings of orientalist who had written about the Islamic jurisprudence, even though he was of the belief that the overwhelming majority of the orientalist who wrote about Islamic jurisprudence were not legal professionals. Moreover, he adhered himself to present clearly the difference of style, literature manufacturing and conceptualization between the two prototypes of jurisprudence to retain the special coloration and preserve the original print of Islamic jurisprudence, as ignorance of those differences does not strengthen it but may take it away from its own serious and innovative line. However, he endeavored to determine the tendency of human juristic reasoning (*Ijtihād Fiqhī*) in its successive stages aiming at an explanation of the historical progress of *Ijtihād* as theory and practice.⁶⁰⁷

⁶⁰⁶ M. ‘Abdul-Jawād (1977). Op. Cit., p. 46.

⁶⁰⁷ Sanhūrī (1953-1954). Op.Cit., volume. 1, pp.2-3.

To materialize the stage of collective effort, he continuously called for the establishment of a specialized foundation in the study as well as the teaching of jurisprudence, in which the basis of it will be a comparative study so that Islamic jurisprudence will be studied in the light of comparative law.⁶⁰⁸ In this kind of study, however, the focus should go to two essential matters. Firstly, to study the birth and the growth of Islamic jurisprudence very carefully, and secondly, to comparatively study various doctrines and schools of Islamic jurisprudence, like Sunni Schools, Shiite Schools, Kharijīd Schools, Literalist School (Zāhiriyyah/Sons of Scripture) and others to figure out different views to respective legal questions. The respective views then have to be promoted to general trends after concluding the legal thought of these Schools of Law. Within this movement must be discovered the rules and arts of the Islamic foundation of jurisprudence (*Qawā'id al-Ṣinā'ah al-Fiqhiyyah*). Then it has to be compared to the art of foundation in the western jurisprudence to make clearer the faces of difference and accordance between the two different arts. This surely assists in determining the faculties as well as the particularities of Islamic jurisprudence so that the art of development functions within the self mechanism of Islamic jurisprudence, as to the art of foundation and the styles of its logic.⁶⁰⁹ Therefore, if the rules of Sharī'ah are retained or amended, it will be done in accordance to its nature and in all circumstances there will be a pure product of Islamic jurisprudence that takes no influence from external factors. Hence, he clearly and intensively criticized and opposed those who quote the provisions of western laws and attempt to interpret them to something like Sharī'ah rules without taking into account the origins of the legal art of Islamic jurisprudence, and at the end of a surfacial research, they will conclude that the provisions of the western law are the same provisions of Islamic Sharī'ah.

⁶⁰⁸ Sanhūrī (1962). Op. Cit., p. 28.

⁶⁰⁹ Sanhūrī (1962). Op. Cit., p. 27; M. 'Abdul-Jawād (1977). Op. Cit., p.91; N. K. al-Zanki (2001). Op. Cit., p. 82.

Sanhūrī rejected this method of research as it was never a correct way for any scientific findings and it does not benefit the progress of Islamic law or the integration of western law as well. It is a work artificially easy, but practically useless and even disadvantageous.⁶¹⁰

Therefore, Sanhūrī proclaimed that the essential subjects of study are: (1) history of Islamic jurisprudence, especially before the birth of the legal schools, (2) *Uṣūl Fiqh*, (3) a comparative study between Islamic legal schools, and (4) a comparative study between Islamic jurisprudence on one hand and the modern western legal systems on the other hand.⁶¹¹

In the first International Conference of Comparative Law held in the Hague, in August 1932, Sanhūrī, as part of an Egyptian delegation, played a significant role in the voting to reserve a place at the next conference for the study of Islamic law and then recognizing it as a source for comparative law. Upon that, he called on the government of Egypt, and more precisely his faculty, to establish a Diploma program at postgraduate level to teach Sharīʿah and comparative law, as well as courses relative with history of law and Roman law, or alternatively, to have an independent institute specializing in the Islamic Sharīʿah and comparative law according to the outlines and proposals that he made previously in his book “*Le Califat*”. However, after the foundation of the Arab League, Sanhūrī addressed again his call to handle the establishment of a global Arabic institute for study of the culture and the Arab nationality. He proposed that the institute of Islamic jurisprudence could be a branch of this global institute.⁶¹²

⁶¹⁰ Sanhūrī (1962). Op. Cit., p. 29.

⁶¹¹ Sanhūrī (1962). Op. Cit., pp.27-28.

⁶¹² Sanhūrī (1962). Op. Cit., p. 28; Sanhūrī (1932). Op. Cit., volume. 1, p. 28; E. Hill (1989). Op. Cit., p.158.

6.1.2.2. The Legislative Phase

The essential point here, says Sanhūrī, is to proceed in a prudent and gradual fashion when compiling laws from Sharī'ah. The first terrain could be the law of personal statute by making it susceptible to application to non-Muslims and by the favor of the scientific movement that perhaps precedes the legislative phase. He hoped that the law of personal statute could be presented in a modern style to be made independent from narrow religious considerations. However, this presentation is not possible without giving the lawmakers freedom to select from the Islamic heritage the opinions that most suit the modern social curves in order to be applicable to the non-Muslim citizens.⁶¹³

If this experience achieves success then it is possible to advance to the next phase; to the laws related to immovable properties. Here, countries such as Egypt may face difficulty as they have been for a long time under foreign systems of law. A sudden change would upset and destabilize legal relations. Therefore, it is not possible to substitute foreign legal systems by laws having Islamic or national prints unless to be done gradually and in successive phases.⁶¹⁴

However, the first step can be taken with the drafting of a constitutional principle making the Sharī'ah the common law of the country. It implies that in cases where a special legislative provision is not applicable, judges must adhere to the application of Islamic laws after being set forth in the preceding scientific stage in the best new authoritative form. Thus the courts would become familiarized and habituated to consult the Islamic law when the applied foreign laws in these countries are silent. The second step is to abrogate those elements of the imported laws that appear inferior to the Muslim law after its scientific

⁶¹³ Sanhūrī (1989). Op. Cit., p. 352; E. Hill (1989). Op. Cit., p.155.

⁶¹⁴ Sanhūrī (1989). Op. Cit., pp. 354-355; E. Hill (1989). Op. Cit., p.155.

evolution. The remainder of the imported laws after the foregoing steps should be then replaced by Islamic law to the extent that this is possible without upsetting legal relations in the society.⁶¹⁵

However, when giving the Islamic law a legislative form in a modern style it is preferable to use flexible formulas so that the courts can better adapt themselves to the changes and new progress towards the Islamic jurisprudence, in a way allowing adaptations between permanent rules and changeable needs in the light of the general directives that the new jurisprudence will draw. It is also desirable that there be a relative unity of view between the legislators of different Muslim countries as long as they work from the same source and extract the laws from Islamic jurisprudence. But it is also necessary to take into account the economic particularities of each individual country.⁶¹⁶

A common fund of ideas among different legislative enactments reduces the possibility of conflict of laws, enlarges the space of juristic activity in Muslim countries and strengthens the progress of the judiciary towards innovations as a result of solidarity and exchange of legal experience between them. A modernized Islamic system will come in the interest of legal science worldwide for it could furnish resources for new ideas and new fields for experimentation. The Muslim jurists could thus contribute to universal legal scientific development.⁶¹⁷

However, it is noteworthy that when Sanhūrī suggested a proposal for the New Civil Code of Egypt in 1933, he applied his precedent strategies as he attempted to take from Sharī'ah in the Egyptian enterprise through two instruments, namely elevating the principles of

⁶¹⁵ Sanhūrī (1989). *Op. Cit.*, p. 352; E. Hill (1989). *Op. Cit.*, p.155.

⁶¹⁶ Sanhūrī (1989). *Op. Cit.*, p. 355; E. Hill (1989). *Op. Cit.*, p. 155.

⁶¹⁷ Sanhūrī (1989). *Op. Cit.*, p. 355; E. Hill (1989). *Op. Cit.*, pp. 155-156.

the Egyptian Code by the principles of Sharīʿah via employing the theories that apply to the entire body of law in which the Sharīʿah agrees, such as the material tendency of the Sharīʿah and theory of abuse of rights, and via supporting and preferring the principles that are more agreed by Sharīʿah when the modern legal systems conflict with each other or have different approaches. So, by Sharīʿah the Egyptian lawmaker can resolve the suspended questions and adopt the principles that are more supported by the Sharīʿah. Examples of this category are the liability of minors, liability of risks, assignment of debt, and imprevision theory. The second instrument is to fill the lacunae of the old Egyptian Code by the rules of Sharīʿah such as cases of public property, rights in easement (servitude), the obligations of leaser and lending agricultural lands.⁶¹⁸

Analyzing the application of this strategy and inputting it upon the Iraqi Civil Code is a bit complicated as the former Iraqi Code, *Majallah*, was purely Islamic. Sanhūrī, instead of proposing to promote the new Iraqi Code by the principles of Sharīʿah, advised to extend a bridge between the Sharīʿah and the contemporary laws. In his proposal paper to Iraq published in 1936, “*Min Majallat al-Aḥkām al-ʿAdliyyah ilā al-Qānūn al-Madanī al-ʿIrāqī*” (From the *Majallat al-Aḥkām al-ʿAdliyyah* to Iraqi Civil Code), he clarified the way that should be followed in extracting from Sharīʿah. He proposed that the Iraqi lawmaker ought to look over the Western legal systems and select the most modern and best of them and then to draft a code representing the best legislation. After that he has to approach the code to the Islamic jurisprudence and narrow the gap in between by presenting the Islamic law in a flexible formula so that the new law can be made approachable by taking a broad account of different

⁶¹⁸ Sanhūrī (1936c). Op. Cit., pp. 116-120.

Islamic legal schools and various opinions inside each school. Thus he will be surely able to apply the code to Islamic law in this way and simultaneously will get references from Sharī'ah in the overwhelming majority of the Articles. Hereby, the other rules having no precedent case in Sharī'ah, which usually seems to be rare, have to be revised again. If the rules contradict with the Iraqi condition and its judicial traditions the lawmakers have to select other rules that are more suitable to Iraq. Otherwise, he should attempt to give them exegesis and implications applicable with an opinion in an Islamic school of law at the minimum.⁶¹⁹

As it is evident, Sanhūrī here proposed something contrary to his previous proposals as to gradually print the code with an Islamic coloration and to refrain from any legislative step destabilizing the legal relations. In contrast to this, he bravely proposed that the western model be the main reference and the Islamic law should have only the course of an examiner at the end. This proposal is quite difficult to be understood, especially in the context of Iraqi legislation that applied the *Majallah* decades before Sanhūrī's later Code. However, the idea of applying the Code to any opinion inside the Islamic legal Schools is quite contrary to the principle that he established when he proposed that the study of Islamic jurisprudence should be in accordance to the origins of its own arts and it should be maintained independent enough to produce pure Islamic rules and to avoid an arbitrate selecting treatment with the laws of Sharī'ah in process of adaptation to modern legislation.⁶²⁰ But, the Iraqi Civil Code's drafting committee rejected this proposal and as a result of that, the provisions of *Majallah* were retained as the primary source of the Code. The provisions of *Murshid al-Ḥayrān* were also utilized to overcome the vices and shortcomings of the *Majallah*, and, finally the sources of

⁶¹⁹ Sanhūrī (1936b). Op. Cit., volume. 1, p. 324.

⁶²⁰ Sanhūrī (1962). Op. Cit., p. 29.

Iraqi Civil Code became; *Majallat al-Aḥkām al-‘Adliyyah*, other Iraqi ordinances and laws that were effective with *Majallah* and finally the New Egyptian Civil Code.⁶²¹

Furthermore, Sanhūrī wrote a report to the Iraqi committee in charge of the preparation of the Civil Code and submitted two documents with the report. It appears from the report that Sanhūrī divided the work into two categories. The first category is the part of law that he saw possible to be extracted from Sharī‘ah with a change in drafting style. This part, later on, constituted the largest part of the code and it was about the law of obligations and contracts. The second category which constituted a relatively small part of the Code was related to the part of law that seems to be possible studied comparatively in the way he proposed in his strategies as mentioned before. The latter part was generally about the laws of personal status, the land law and the rights on things. Sanhūrī firstly drafted the first part and provided information about the sources of the Articles from the Western inspired laws and how they apply with the provisions of Islamic law represented mainly by *Majallah* and *Murshid al-Ḥayrān*, in the two attached documents. However, the other part which was almost certainly drafted later is not provided with the same quality of information and the relation to the Islamic law is not explained by him in any special documents, as the historical sources indicate.⁶²² This may refer to the fact that this part was solely taken from the Egyptian Code which he equipped with ‘*Al-Wasīṭ fī Sharḥ al-Qānūn al-Madanī al-Jadīd*’ that provided detailed information about sources of the Code’s provisions and theories.

In addition to that, the Code was not inclusive of the law of personal statute. The report that he put before the committee reads:

⁶²¹ Ibid., p. 18.

⁶²² See: E. Hill (1989). Op. Cit., pp. 160-162. However, his book *Maṣādir al-Ḥaqq* could be made a reference for indication of sources that he relied on in the mentioned part of the code but in scattered and well separated places of the book.

‘I have deliberated on a plan to follow. Then I found it is desirable to postpone provisionally the question of personal statute and the land law and property rights on the basis that we will return to them after we have set down the legal rules of obligations and contracts. It is this law which occupies a large part of the *Majallah*. . . In my work, I followed on two levels. At the first level, I drafted a sample for the laws of sales, selecting it from among many codes, old and new. . . I mentioned beside every individual provision the source that I quoted from associated with the reason why I chose it. And then I compared it with the counterpart provisions of other codes. This is the first document that I present to the committee. The second document contains the final draft that I suggest to be, and I have concluded it throughout comparing the selections of the codes with the provisions of the *Majallah* and the *Murshid al-Ḥayrān*, and those of the Islamic *Sharī‘ah* from a general point of view and in all its schools and doctrines of each school. I applied the provisions of the Code to the rules of *Sharī‘ah* as far as possible. Then, I concluded the final provisions that I present before you.’⁶²³ (Trans. T.W.)

These documents together demonstrate Sanhūrī’s method and plan in working on the “raw materials” during the construction of the New Code. They show practically what he means by comparative study as a tool of codification, and they show how he spelled out the premises leading to a path to an evolved form of the Islamic *Sharī‘ah*.⁶²⁴

After the accomplishment of the code and its transmission to some Arab countries, Sanhūrī wrote an article published in the Iraqi Journal “*Al-Qaḍā’*” in July 1962 entitled “*Al-Qānūn al-Madanī al-‘Arabī*” (The Arab Civil Code) addressing his final plan for the future of Arab Civil Law. He firstly confessed that the Egyptian prototype and the Iraqi paradigm were only attempts for a bigger and more tremendous work that draws up the final civil code that will directly derive from the *Sharī‘ah*. But due to the fact that this aim was distant and surrounded by plenty of difficulties and it takes up time that may cost an entire life as well as the road was unserviceable, he had taken another path to gradually arrive at the aim.⁶²⁵ However, the final phase cannot be approachable unless after two initial steps:

⁶²³ ‘Abdul-Razzāq A. al-Sanhūrī (1936a). “Kitāb Marfū‘ ilā Fakhāmat Ra’īs Lajnat Taḥḍīr al-Qānūn al-Madanī al-‘Irāqī wa al-Wathīqatayn al-Mushtamilatayn ‘alā Lā’iḥat al-Buū‘ fī al-Qānūn al-Madanī al-‘Irāqī al-Muqtarāḥ.” In Nādiyāh al-Sanhūrī, Tawfiq al-Shāwī (ed.). (1992). *Majmu‘at Maqālāt wa Abḥāth al-Ustādh al-Doctor ‘Abdul-Razzāq al-Sanhūrī*. Cairo: Maṭba‘at al-Jāmi‘ah. volume. 2, pp. 63-64.

⁶²⁴ E. Hill (1989). Op. Cit., p. 162.

⁶²⁵ Sanhūrī (1962). Op. Cit., pp.23-24.

- i. A step to conclude the Western legal experience in the final stage of its development and adjust it with the environment that we all live in. This step was reached on by the drafting of the New Egyptian Civil Code.⁶²⁶
- ii. A step to put the conclusion of the Western experience as represented by the Egyptian Civil Code besides the Islamic jurisprudence after its manifestation in the *Majallah* and *Murshid al-Ḥayrān*. This step was materialized by the drafting of the Iraqi Civil Code.⁶²⁷ By this project, two aims have been achieved namely (a) drafting general rules that centered on general theories such as the theory of obligations, and (b) drawing up the road map to the final version of the Arab Civil Code.⁶²⁸

Hence, Sanhūrī estimated to have these two Codes interacted by, and integrated with, each other to complement but not to contradict one another. The first Code is a step to the next one and they are together two subsequent stages for the final phase. Therefore, the consequence of applying these two Codes is to carry on the study of Islamic jurisprudence in the light of the Western civil law. Albeit there are difficulties with the application of the Iraqi Civil Code, but these will finally assist in pushing the incentives towards the final aim. Furthermore, it is remarkable to note that Sanhūrī had realized his proposal by declaring Islamic law a secondary source of legislation in the Code. The Constitution of Syria 1950 stated (Article 2) that “Islamic jurisprudence is the fundamental source of legislation.” Also, the Constitution of Kuwait stated that the Islamic Sharī‘ah is a fundamental source of law. However, the Revolutionary Command Council of Libya issued a decision on 28th October 1971 to establish committees for revising and amending the laws according to the fundamental principles of the Islamic Sharī‘ah. However, the Sharī‘ah only later became the common law

⁶²⁶ Ibid., p. 24.

⁶²⁷ Ibid.

⁶²⁸ Sanhūrī (1962). Op. Cit., p. 21.

of Egypt constitutionally, namely with the Egyptian Constitution of 1980 that describes Sharī'ah as one of the fundamental sources of legislation.⁶²⁹

6.2 The Place of Sharī'ah Principles and Rules in the Code

To signify the place of Sharī'ah principles in Sanhūrī's Codes, there shall be concentration on two levels of survey; a survey for discussing the application of the Sharī'ah principles in the Codes.

Here, shall be mentioned some examples for principles that were clearly inferred and applied by Sanhūrī. Simultaneously, a group of issues will be examined to explore the estimated violation that was committed against the principles of Sharī'ah; and a general survey and assessment to introduce how and in what sense the Codes have coped with the Sharī'ah and to apply some questions and estimated answers in light of the historical contexts and evident proofs.

6.2.1 Application of Sharī'ah Principles and Values in the Codes

Here are examined seven principles to evaluate the place of Sharī'ah within the Code. Therefore, different and various issues to reflect how the Code and its architect coped with Sharī'ah as a source of codification in the project are selected.

⁶²⁹ 'Iṣām A. S. (1996). Op. Cit., p. 72; Muḥammad 'Abdul-Jawad (1991b). *Buhūth fī al-Sharī'ah al-Islāmiyyah wa al-Qānūn: Taqnīn al-Sharī'ah al-Islāmiyyah*. Alexandria: Mansha'at al-Ma'ārif. pp. 127-134.

6.2.1.1 Abuse of Rights (*Al-Ta'assuf fī Isti'māl al-Ḥaqq*)

In his articles entitled “*Tanqīḥ al-Qānūn al-Madanī*” and “*Min Majallat al-Aḥkām al-‘Adliyyah ilā’ al-Qānūn al-Madanī al-‘Irāqī*”, which were published in 1936, Sanḥūrī clearly expressed his appreciation to the theory of abuse of rights as applied in Islamic law. He stated:

‘Theory of abuse of rights in Islamic Sharī‘ah is more progressive than its counterparts in western laws. Contrary to the western laws, the theory in Sharī‘ah is not restricted to subjective criterion only. It rather encompasses material criterion too and confines exercise of rights by the social and economical objective that a certain law is aimed to realize.’⁶³⁰ (Trans. T.W.)

Therefore, in the preliminary chapter of the Code which was devoted for general rules of law and namely in Articles number (4-5) of the Egyptian, Syrian, and Libyan Codes, it is stated:

‘4- A person who legitimately exercises his right is not responsible for prejudice resulting thereby. 5-The exercise of a right is considered unlawful in the following cases: (a) If the soled aim thereof is to harm another person; (b) If the benefit it is desired to realize is out of proportion to the harm caused to another person; (c) If the benefit it is desired to realize is unlawful.’ (Trans.)

In contrast to the Old Egyptian Code, in which individuals enjoy liberty in making contracts, the above mentioned Article constituted a transformation in society so that any unlawful use of a right could end in the nullification or abrogation of the contract. Moreover, the explanatory work to the Code stated that this would influence not only property and contract law, but it can be applied also to personal statute law and public law. However, putting these provisions in the preliminary chapter makes them general enough to expand over entire aspects of the law so that they are not a mere application of concept of unlawful disposition.⁶³¹ Moreover, the collection of preparatory works mentions that the proposed provision would state: “The owner, as far as commits by law, has the right in the use and

⁶³⁰ Sanḥūrī (1936b). Op. Cit., volume.1, p. 320.

⁶³¹ EMJ (1960). Op. Cit., volume. 1, p. 207; See also: G. Bechor (2008). Op. Cit., pp. 167-169.

disposition of his property and its utility without intervention of others provided the disposition agrees with the social function of ownership right". The Article was amended by the legal committee of the Egyptian Senate and the last statements were deleted only because it was more likened to the arts of jurisprudence than a code of law and by the excuse that the applications of the project automatically indicated the mentioned element.⁶³²

The above Article is mainly derived from the rules of Islamic law. The manifestation of the theory in provisions of Islamic law and precedent applications of Egyptian judiciary assisted in making it a general regulation in such manner, since this doctrine is found in the Sharī'ah as a general school whose precision and provisions are in no sense inferior to those of the most modern Western theories.⁶³³

The Article incorporates an objective criterion in addition to a subjective criterion. The objective criterion refers to confining exercise of right by limits of legitimate use for which the law is drawn up and prevention of any excessive damage that may be caused to others by exercising a right.⁶³⁴ The objective and subjective criteria can be examined throughout the three categories itemized in the Article. In the first case, where the sole intention is to cause damage, two elements via two tests for criteria should be proved; the objective test is to show that the person deviated from the normative behavior of a reasonable person, and the subjective test is to show that he intended to cause damage to the other. The criterion for assessment, in the second case for the examination of interests and damages, is objective. In the last case, of the unlawful securing of benefits, the Collection of Preparatory Works to the Code grounded a subjective criterion as noted that the interest will be considered unlawful not

⁶³² EMJ (1960). Op. Cit., volume. 6, p. 16; Al-Mustashār Ādam (1969). Op. Cit. pp. 37-38.

⁶³³ Al-Mustashār Mu'awwaj 'Abdul-Tawwāb (2000). *Al-Marja' fi al-Ta'liq 'alā Nuṣūṣ al-Qānūn al-Madanī*, 5th edn. Alexandria: Mansha'at al-Ma'ārif. volume. 1, pp. 41-44; EMJ (1960). Op. Cit., volume. 1, pp. 207-208; 'Isām A. S. (1996). Op. Cit., p. 92; Al-Mustashār Ādam (1969). Op. Cit., pp. 101-105.

⁶³⁴ Sanhūrī (1972). Op. Cit., volume. 1, p. 47; EMJ (1960). Op. Cit., volume.1, p. 100; 'Isām A. S. (1996). Op. Cit., pp. 89-92; Al-Mustashār Ādam (1969). Op. Cit., pp. 35-38.

only if the individual broke the law, but also if he disregarded public order and morality; such as dismissal of an employee for personal or political reasons.⁶³⁵

The application of this theory can be seen in respect of restrictions imposed on right of ownership. The Egyptian Civil Code (Articles 806-808)⁶³⁶ state:

‘806- An owner must, in the exercise of his rights, comply with laws, decrees and regulations having for their object the interests of the public and of individuals. He must also observe the following provisions. 807- 1. The owner must not exercise his rights in an excessive manner detrimental to his neighbors’ property. 2. The neighbor has no right of action against his neighbor for the usual unavoidable inconveniences resulting from neighborhood, but he may claim the suppression of such inconveniences if they exceed the usual limits, taking into consideration in this connection custom, the nature of the properties, their respective situations and the use for which they are intended. A license issued by a competent authority is not a bar to the exercise of such a right of action. 808- A person who constructs a private canal or drain in conformity with the regulations in force has the exclusive right to its use (Article 808). Neighboring owners may, however, use the canal or drain for the irrigation or the drainage required for their land after the owner of the canal or drain has used it to the satisfaction of his own needs. The neighboring owners must, in such a case, contribute to the cost of construction and of maintenance of the canal or drain, each in proportion to the area of land benefiting thereby.’ (Trans.)

However, the Articles after then up to 824 mention a series of legal and agreed-upon restrictions that confine authority of the owner over the use of his property not only for the interest of the public but also for the benefit of the neighbors.⁶³⁷

In addition to that, if a person causes damage to others to prevent a grave injury threatens him or his property will be responsible for proportionate compensation that may seem equitable and worthy to the damage in eyes of the judge. The Egyptian Civil Code (Article 168)⁶³⁸ states: ‘A person who causes injury to another person in order to avoid greater injury that threatens him or a third party, is only responsible for such damages as the judge deems equitable.’

⁶³⁵ EMJ (1960). Op. Cit., volume. 1, pp. 209-210; G. Bechor (2008). Op. Cit., p. 170.

⁶³⁶ Libyan Civil Code, articles 815-817; Syrian Civil Code, articles 773, 776; Iraqi Civil Code, articles 1051 and 1055.

⁶³⁷ See: Al-Mustashār Ādam (1969). Op. Cit., p. 38.

⁶³⁸ Libyan Civil Code, article 171; Syrian Civil Code, article 169; Iraqi Civil Code, article 213.

The reference of the above mentioned theory as codified in the project can be both the Islamic law and the Western jurisprudence. The Collection of Preparatory Works states that the Code established a form of constitution for use of rights, building up a consistent formula from the principles that are well-grounded in Sharī'ah and those whose foundation can be absorbed from modern jurisprudence in the theory of abuse of rights, but without making a total and blind adhesion to the doctrines of the latter. Thus the Code was rendered to introduce the moral tendency and modern social currents, and to match the lines between the provisions of the Code and the provisions of Islamic jurisprudence in the most promotable characters and most flexible features it desires.⁶³⁹

The indicated Sharī'ah provisions can be either some provisions of the *Majallah* or provisions of *Murshid al-Ḥayrān*.⁶⁴⁰ The *Majallah* recognized this theory in relations between neighbors. Article 26 states: 'To repel a public damage (*Zarar*) a private damage is preferred.'

Application of this theory can be seen in Article 1198 of the *Majallah*: 'Everyone can make an erection as high as he likes and can make what he likes on a wall which is his own "Milk" property, unless there has been excessive damage, his neighbor cannot prevent him.'

The *Majallah* (Articles 1199-1200) clarified "excessive damage" and verified:

'1199- Things are excessive damage (*Zarar Fāḥish*) which damage a building, that is to say, which weaken it and become the cause of its falling down, or, which interfere with the essential requirements, that is to say, the original benefit which is expected from the building, like dwelling in it . 1200- Excessive damage in whatever way it may be caused is to be removed.' (Trans.)

⁶³⁹ EMJ (1960). Op. Cit., volume. 1, p. 211.

⁶⁴⁰ Ibid., volume. 1, p. 210.

In *Murshid al-Ḥayrān* there are some relevant provisions with regards to neighborhood rights and settlement of debtor's debts, namely provisions located between Articles 57 and 63 and Article 164. With regards to neighborhood rights it states:

'57- The owner exercises his right in disposition in his mere property so that he erects his wall and constructs what he likes, unless his disposition causes an excessive harm to the neighbor. 58- Excessive damage is anything that becomes the cause for weakening of the building or its falling down. 59- However, things which prevent the benefits which are not original are not considered excessive damages. 60- Excessive damage is to be removed whither it is old or new. 61- Stopping the light altogether from the neighbor is excessive so that nobody is allowed to establish a building blocking the window of his neighbor in a way preventing him from the light entirely. If he does, the neighbor has the right to ask for its removal to prevent the harm caused to him. 62- Visibility of places which women are frequent in is considered excessive damage so nobody is allowed to create or to leave a window on his neighbor side which women are frequent. If he creates such things, he will be ordered to remove the harm whether by blocking the window or by making a screen, but when one's window as regards the ground is higher than the height of a man, his neighbor cannot make a demand for blocking the window. 63- If a person legitimately exercises his right and his neighbor creates in his side a new building, then he cannot complain any injury or make any demand on the owner of the old house to cut off the view even if the windows locating on the side where the women are frequent. Instead he must put an end to the injury by himself.' (Trans. T.W.)

However, in the settlement of debt of a bankrupt debtor the interests of the debtor should also be considered. Therefore, while settling the debts of a bankrupt individual the court begins with selling the debtor's movable properties. If it is not sufficient the court may sell his immovable properties.⁶⁴¹ *Murshid al-Ḥayrān* (Article 164) states:

'When a debt is due on an owner it is lawful to withdraw his right of ownership over properties that are abundant from his current necessities including his necessary shelter if he does have no properties like the class of property he borrowed. And if the debtor himself refuses to sell his property, the judge sells his property and pays his debt from its price. He proceeds by beginning with easier for sale as regards the debtor, and afterwards putting forward the easier according to this order and as sufficient with amount of the debt.' (Trans. T.W.)

In the above mentioned Articles the aforementioned theory is expressly applied.⁶⁴² This may be the reason why Dr. Kāmil Malash, as provided in the Collection of Preparatory Work, confidently claimed that the doctrine is established by Sharī'ah prior to the Western

⁶⁴¹ The *Majallah* also stated that: "...the judge sells his property and pays his debt...First, beginning with the cash, and, if it is not sufficient, then other property (*'Arūz*) and, if the other property is also not sufficient, he sells his immovable property" (Article 988).

⁶⁴² See: Muḥarram Fahīm Bek (1944). "Al-Sharī'ah al-Islāmiyyah wa al-Taqnīn," *Al-Muḥāmat al-Shar'īyyah*, 6-7, pp. 291-292.

studies attempted in this direction. He says: ‘The Islamic Sharī‘ah includes several questions in which the Western scholars assumed that they were the first, but further studies in the West have shown that it is the Muslims who were the first...Among these, one may notice the question of the abuse of rights.’⁶⁴³

From the foregoing discussion, it is evident that the doctrine has been founded by the Muslim jurists and that the Code has derived this doctrine essentially from the Sharī‘ah.⁶⁴⁴ Hereby, the claim alleged by Guy Bechor, a Jewish writer, is not correct and precise when he claimed:

‘As...apparent in many other cases in which Sanhūrī sought to adopt an innovative legal or social norm that might be expected to encounter resistance, he generally relied on the Islamic Sharī‘ah as a source of legitimacy and sanctity that could not easily be opposed. In my opinion, he adopted this approach regardless of whether the said legal norm was actually drawn from the Sharī‘ah or even found there.’⁶⁴⁵

To support his idea, he quoted the opinion of Dr. Chafik Chehata, a contemporary Egyptian scholar to Sanhūrī, that claimed the idea of abuse of right was limited among the Ḥanafīs, certainly less broad than in the New Code, and did not extend beyond the field of property relations among neighbors.⁶⁴⁶

The quotations from Islamic Jurisprudence provided above show the fallacy of the mentioned claim. Both *Majallah* and *Murshid al-Ḥayrān* extended application of the doctrine to the rights of the bankrupt individual. On the other hand, Dr. Fathī al-Duraynī has authored a

⁶⁴³ EMJ (1960). Op. Cit., volume. 1, p. 100.

⁶⁴⁴ Şubhī Maḥmaşānī (1983). *Al-Nazariyyah al-‘Āmmah li-al-Mūjabāt wa al-‘Uqūd fi al-Sharī‘ah al-Islāmiyyah: Baḥth Muqāran fi al-Madhāhib al-Mukhtalifah wa al-Qawānīn al-Ḥadīthah*, 1st edn. Bairut: D Dār al-‘Ilm li-al-Malāyīn. volume.1, pp. 44-55; Fathī al-Duraynī (1987). *Khaşā‘iṣ al-Tashrī‘ al-Islāmī fi al-Siyāsah wa al-Ḥukm*, 2nd edn. Bairut: Mu‘assasat al-Risālah. pp. 389-402; Majīd Maḥmūd Abū Ḥujayr (2002). *Nazariyyat al-Ta‘assuf fi Istī‘māl al-Ḥaqq wa Nazariyyat al-Zurūf al-Tāri‘ah*, 1st edn. Amman: Al-Dār al-Dawliyyah. pp. 18-50.

⁶⁴⁵ G. Bechor (2008). Op. Cit., p. 173.

⁶⁴⁶ Chafik Chehata (1952), “La Theorie de l’abus des Droits ches les Jurisconsultes Musulmans”, *Revue Internationale De Droit Compare*, 4, pp. 217-224, quoted by G. Bechor. *Ibid.*, p. 174.

book called ‘Theory of Abuse of Rights in Islamic Jurisprudence’ and concluded with the following:

‘This theory, since the ancient era of Islamic legislation, has stood up on its origins within Islamic jurisprudence as to interpretation and application, equally in all collective as well as individual doctrines. Thus, it completed all the criteria, the supporting ideas manifested as principles and subordinates, determinants and dictates, both of theory and application.’⁶⁴⁷ (Trans. T.W.)

6.2.1.2 Unforeseen Circumstances (*Al-Zurūf al-Ṭāri‘ah*)

In his proposals for the Egyptian and Iraqi Civil Codes, Sanhūrī emphasized on the doctrine of necessity and more precisely the principle of excuse in Shari‘ah law for foundation of theory of unforeseen circumstances in the new Code. This is to avoid the rigid criterion of doctrine of uncontrolled force (*al-Quwwah al-Qāhira*) as was applied in the French Civil Code and its Egyptian counterpart (old Code).⁶⁴⁸ On the basis of uncontrolled force a debtor cannot be exempted from contractual obligations unless provided execution of the obligation is impossible.⁶⁴⁹ However, the doctrine of unforeseen circumstances proposes that a contractual party who is struck by unexpected catastrophe is to be bound by the obligation he undertook only to the extent that he suffers no onerous hardship from it. The judge shall return the obligation to a reasonable limit to the extent that the debtor can bear his liabilities while suffering no unaffordable hardship. The judge creates a desired balance between the parties when the balance between them to an agreement is severely disrupted without the fault of the weaker party.⁶⁵⁰

⁶⁴⁷ Faṭḥi al-Duraynī (1988). *Nazarīyyat al-Ta‘āssuf fī Isti‘māl al-Ḥaqq fī al-Fiqh al-Islāmī*, 2nd edn. Beirut: Mu‘assasat al-Risālah. p. 7. In the footnotes provided in the same page Duraynī interprete his intention from ‘Collective & Individual Doctrines of Islamic Jurisprudence’. He prescribed Ḥanafī, Mālikī, Shafī‘ī, and Ḥanbalī schools as collective doctrines. However, he described doctrines of individuals like Laith B. Sa‘d in Egypt, Al-Awzā‘ī in Shām, Ibn Abi Laylā, and Al-Thawrī in Iraq as individual doctrines.

⁶⁴⁸ Sanhūrī (1936b). Op. Cit., volume. 1, p. 321.

⁶⁴⁹ Sanhūrī (1938). Op. Cit., pp. 300-302.

⁶⁵⁰ Sanhūrī (1972). Op. Cit., volume. 1, p. 631.

Sanhūrī, following Lambert, firstly believed that the doctrine of unforeseen circumstances can be established on principle of necessity (*Darurah*) in Islamic law. He quoted Lambert's statement in the International Conference on Comparative Law held in the Hague in 1932 which says:

'Theory of necessity in Islamic jurisprudence is definitely expressing a concept whose origins are existing in International Public Law in theory of changeable circumstances and in French Administrative Law in theory of unforeseen circumstances. It is also availed by English judiciary for flexible criteria it applied on theory of impossible execution of obligation during the war that created pressuring economic circumstances and finally in the American constitutional Judiciary in theory of surprising catastrophes.'⁶⁵¹ (Trans. T.W.)

He referred to legal maxims of '*Al-Ashbāh wa al-Nazā'ir*' as the main reference for the concept such as: "hardship begets facility", "no injury and no equal injury", "injury shall be removed", "necessities render prohibited things permissible", "a bigger injury is to be avoided by a lesser injury", "injury shall be stopped as far as possible" and "a need is seen as a necessity".⁶⁵²

However, later on in "*Maṣādir al-Ḥaqq*" Sanhūrī changed his mind and proclaimed that the doctrine of unforeseen circumstances has no good theoretical grounds in Islamic law similar to that of the western counterpart doctrine. This was for two reasons. One is general and the other is specific. It is generally perceived that Islamic jurisprudence has never been subscribed to general theories of law. It rather treated the matters case by case and propounded just practical solutions, creating therein a hidden current of legal reasoning. And secondly, the Western jurisprudence was compelled to propound a general theory for unforeseen circumstances, because the force of the binding contract in such jurisprudence has been exaggerated. This exaggeration finally pushed the Western jurists to find out solutions reducing and alleviating the force given to contracts dwelling on social justice and

⁶⁵¹ Sanhūrī (1936c), op. Cit., pp. 116-120.

⁶⁵² Zaynuddīn Ibrāhīm Ibn Nujaym (1983). *Al-Ashbāh wa al-Nazā'ir*, 1st edn. Damascus: Dār al-Fikr. pp. 84-100.

solidarity.⁶⁵³ In contrast, the Islamic jurisprudence opened various spaces on the force of contract based on social justice without any need for establishing a new theory for unforeseen circumstances. However, applications of Islamic law convey recognition of the theory in its practical form. He then illustrated the theory with two examples; namely the principle of excuse in recession of lease contract and exemption from liability in catastrophes facing agricultural products (*Waḍʿ al-Jawāʾih*).⁶⁵⁴ However, he selectively applied the interpretation given by Ḥanafī rite for excuses rendering the exemption from obligations of lease contract possible and the interpretation given by the Mālikī School for exemption from liabilities in “*Waḍʿ al-Jawāʾih*”. These two doctrines constituted the most flexible basis from which the deduction of the aforementioned theory can be made possible.

According to the Ḥanafī School of law, lease contract can be rescinded either for an excuse standing in the line of the leased party or in the line of leaser or in relation to the item under lease. The excuse in the line of the item is like leasing a bathroom (*Ḥammām*) in the countryside for a certain period, and then if the residents of the village evacuated the area, the leaser would no longer deserve rental payment. Similarly, if the leaser had to settle tremendous amount of debt and was unable to do so except through the price of the leased item after being sold then it can constitute an excuse hindering execution of the lease contract. The excuse in the line of leased party such as bankruptcy or changing the craft to another or disappearance of the purpose for which the lease contract was concluded.⁶⁵⁵

⁶⁵³ William M. Ballantyne (1987). “The Sharīʿa and Its Relevance to Modern Transnational Transactions”. In Proceedings of *First Arab Regional Conference on Arab Comparative and Commercial Law-The International Approach in Cairo 15-19 February 1987*. London: Graham & Trotman. volume.1. p.11.

⁶⁵⁴ Sanhūrī (1953-1954). Op.Cit., volume. 6, pp. 90-110.

ʿAbdul-Raḥmān b. Muḥammad Muʿawwaḍ al-Jazīrī (2001). *Kitāb al-Fiqh ʿalā al-Madhāhib al-Arbaʿah*, 1st edn. Cairo: Muʿassasat al-Mukhtār. volume. 3, pp. 117-118; ʿAbdul-Razzāq A. al-Sanhūrī (1929). *ʿAqd al-Ijār: Ijār al-Ashyāʾ*. Cairo: Maktabat Dār al-Kutub. p. 209; Sanhūrī (1972). Op. Cit., volume. 1, pp. 633-634; Sanhūrī (1936b). Op. Cit., volume. 1, p. 321-322; Sanhūrī (1953-1954). Op.Cit., volume. 6, pp. 91-96; Muḥammad Amīn Ibn ʿĀbidīn (1979). *Ḥāshiyat Radd al-Muḥtār ʿalā al-Durr al-Mukhtār*, 2nd edn.

The profound Ḥanafī jurist, ‘Alā’uddin al-Kāsānī (d. 587AH), states:

‘Lease contract is rescindable in incidence of unforeseen excuse. This is because need invites rescission of contract with an evident excuse. If the contract is maintained bound with evident excuse, it will burden the excused party with a tort he did not adhere to during the conclusion of the contract. Therefore, rescission is evident, in fact, to refrain from commitment to an injury.’⁶⁵⁶ (Trans. T.W.)

Moreover, Ibn ‘Ābidīn (d. 1252AH), clarifies the concept further and expressed a flexible criterion for its application. He proclaimed: ‘any excuse with which fulfillment of the contract is not rendered except with an injury facing his soul or his property shall render the right of rescission proven.’⁶⁵⁷

The Mālikī School, however, proposes that if a fruit of a tree was sold whilst it was still on the tree and the purchaser received the sold fruit standing on its origins eventually to harvest or cut it off gradually upon maturity and then one third and hence forth of the product was destroyed by an unexpected catastrophe, then the seller should take on the liability of its destruction. This is justified by the rationale that the nature of such a contract requires the seller to secure the safety of the sold item since it is still on the trees. However, there are three opinions within the Mālikī School with regards to interpretation of the destroying cause that renders the liability of the purchaser forgiven as to whether it can be a natural catastrophe like cold weather or human actions that cannot be avoided or prevented by the seller like a military attack or by preventable actions of humans other than the seller, like theft. Moreover, the

Damascus: Dār al-Fikr. volume. 6, p. 76; Ibn Rushd al-Qurtubi (2003). Op. Cit., volume. 2, pp. 353-354; M. M. Abū Ḥujayr (2002). Op. Cit., pp. 52-57.

⁶⁵⁶ ‘Alā’uddin b. Mas‘ūd al-Kāsānī (1998). *Badā’i’ al-Ṣanā’i’ fī Tartīb al-Sharā’i’*, 2nd edn. Beirut: Dār Iḥyā’ al-Turāth al-‘Arabī. volume. 4, p. 53 ; Sanhūrī (1936b). Op. Cit., volume. 1, p. 321.

⁶⁵⁷ Muḥammad Amīn Ibn ‘Ābidīn (1979). *Ḥāshiyat Radd al-Muḥtār ‘alā al-Durr al-Mukhtār*, 2nd edn. Damascus: Dār al-Fikr. volume. 6, p. 81; Sanhūrī (1936b). Op. Cit., volume. 1, p. 322.

Hanbalī School also opined the applicability of “*Waḍʿ al-Jawāʿiḥ*” in the scope of natural catastrophes that human beings were not involved in.⁶⁵⁸

Since the analogous regulation of Sharīʿah decides that the liability of a sold item after its submission lies on the part of purchaser and not on the part of the seller, as the Ḥanafī and Shafīʿī Schools maintained, this application by the Mālikī School should be interpreted on the basis of unforeseen circumstances. Sanhūrī commented.⁶⁵⁹

In the New Egyptian Code (Article 147),⁶⁶⁰ the doctrine of unforeseen circumstances is pronounced:

‘1- The contract makes the law of the parties. It can be revoked or altered only by mutual consent of the parties or for reasons provided for by the law. 2- When, however, as a result of exceptional and unpredictable events of a general character, the performance of the contractual obligation, without becoming impossible, becomes excessively onerous in such 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 to reasonable limits the obligation that has become excessive. Any agreement to the contrary is void.’ (Trans.)

Generally there are four conditions for application of this exceptional doctrine from which the first condition was ignored in the new Civil Code.

- a) The contract should be a future based contract. However, according to the new Code there is no hindrance to apply the doctrine on spot contracts.⁶⁶¹
- b) Incidence of unexpected catastrophe of a general character. Examples for this can be seen in war state, epidemic disease and full destruction of the product. The preparatory works of the project, however, did not confine the catastrophe to a character of “general”, but the reviewing committee added it to ensure the stability

⁶⁵⁸ Sanhūrī (1953-1954). Op.Cit., volume. 6, pp. 104-110; Ibn Rushd (2003). Op.Cit., volume. 2, pp. 290-291; Muwaffaquddīn Ibn Qudāmah (1983). *Al-Mughni*. Beirut: Dār al-Kitāb al-ʿArabī. volume. 4, pp. 215-216; S. Ibn al-Qayyim (2002)op. Cit., volume. 5, pp.738-739; M. M. Abū Ḥujayr (2002). Op. Cit., pp. 57-82; S. Maḥmaṣānī (1983). Op. Cit., volume.2, p. 621.

⁶⁵⁹ Sanhūrī (1953-1954). Op. Cit., volume. 6, pp. 104-105.

⁶⁶⁰ Libyan Civil Code, article 147; Syrian Civil Code, article 148; Iraqī Civil Code, article 146.

⁶⁶¹ Sanhūrī (1972). Op. Cit., volume. 1, Pp. 642-643.

of obligatory force of contract to a great extent. The purpose is to confirm that the unexpected circumstance is not of a private and individual character. Rather it should be of a common character and belong to a considerable group of people like a flood destroying a broad area of land or an unpredictable attack by grasshoppers or spread of epidemic disease.⁶⁶² Therefore, debtor's bankruptcy, demise and instability of job cannot be a basis for exemption.⁶⁶³

- c) The exceptional catastrophe must be surprising and unpredictable. Therefore any catastrophe that is predictable or preventable cannot be a basis for application of the doctrine. The true example of predictable catastrophe is value of currency.⁶⁶⁴ The new Egyptian Civil Code (Article 134)⁶⁶⁵ states: 'When the object of an obligation is a sum of money, the debtor is bound only to the extent of the actual figure of the sum of money stated in the contract, whatever be the increase or decrease in the value of such money at the date of payment.'
- d) The exceptional catastrophe must make the execution of the contract excessively onerous, but not impossible. Therefore, there is a difference between an exceptional catastrophe (unforeseen circumstances) and uncontrolled force. The latter makes execution of contract impossible and henceforth the debtor will be exempted from the burden of the contract and endure no liability for non-execution. The liability, as regards unforeseen circumstances, will be alleviated to reasonable limits and the loss will face both parties so that the debtor will endure a part of the total burden of losses suffered.⁶⁶⁶

⁶⁶² EMJ (1960). Op. Cit., volume. 2, pp. 280-284.

⁶⁶³ Sanhūrī (1972). Op. Cit., volume. 1, pp. 643-644.

⁶⁶⁴ Sanhūrī (1972). Op. Cit., volume. 1, p. 644.

⁶⁶⁵ Libyan Civil Code, article 134; Syrian Civil Code, article 135.

⁶⁶⁶ Sanhūrī (1972). Op. Cit., volume. 1, pp. 644-646; EMJ (1960). Op. Cit., volume.2, p. 281.

Although the criterion depended for an unforeseen circumstance is flexible, the lawmakers have given focus to two elements to be considered. Firstly, an unforeseen circumstance, despite the flexibility that it amounts to, is considered as a public order. Therefore, the two parties are bound by it and in no circumstance should they agree to the contrary. This is stipulated in the above mentioned Article which says: “Any agreement to the contrary is void.” Secondly, the role of the judge here in applying this flexible doctrine differs from the ordinary roles a judge plays. The judge, herein, does exceed the limit of interpreting contracts to play the role of amendment.⁶⁶⁷

To examine the source from which the doctrine was derived, a brief survey of history of previous laws and Egyptian practice as regards the application of the doctrine is deemed necessary. According to ‘explanatory notices’ of the new Code, the doctrine first appeared in medieval legislation by influence of a religious spirit in the ecclesiastical canonic laws and in Islamic law. The French Civil Code rejected it, dwelling on sanctity of contracts. The Egyptian judiciary also rejected application of the theory in both the Mixed and National courts.⁶⁶⁸ The Supreme Court reiterated in 1947 that:

‘Albeit this theory is based on equity, forgiveness and benevolence, this Court is not permitted to precede the lawmaker in its creation. The old Civil Code includes nothing that would permit the judge to contradict obligations established by contract, since this would infringe the principle that a contract makes the law of the parties.’⁶⁶⁹ (Trans.)

However, the doctrine first flourished in public law. It became an indirect condition in international covenants. Then it transmitted to administrative law. French administrative law adopted this theory regarding the issues related to public interest. Later on, the administrative

⁶⁶⁷ Sanhūrī (1972). Op. Cit., volume. 1, pp. 649-650; EMJ (1960). Op. Cit., volume.2, p. 282.

⁶⁶⁸ EMJ (1960). Op. Cit., volume. 2, p. 282; Sanhūrī (1972). Op. Cit., volume. 1, pp. 632-638.

⁶⁶⁹ Sanhūrī (1972). Op. Cit., volume. 1, p. 638; EMJ (1960). Op. Cit., volume. 2, p. 282.

judiciary in Egypt adopted the doctrine and it finally took its place in the New Egyptian Civil Code following the steps of the Polish Code of Obligations and new Italian Civil Code.⁶⁷⁰

The ‘explanatory notices’ of the new Egyptian Civil Code stated that this doctrine is drawn from the Islamic law. It quoted, by way of evidence, the provision of *Majallah* (Article 443) and *Murshid al-Ḥayrān* (Article 677) that state:

‘If a reason emerges that prevents the execution of the contract, the lease is annulled. When a cook has been hired for a marriage festival, if one of the parties, going to be married, dies the contract of hiring is annulled. And in the same way, if a man, who is suffering from toothache, makes a contract with a dentist to pull it out for so many piasters, and after the pain goes away, the hiring is annulled. Likewise by the death of the person, who seeks for a wet nurse, the hiring is not annulled, but by the death of the child or of the milk mother, the hiring is annulled.’ (Trans.)

Despite this, Guy Belcher claimed that the doctrine was derived from the innovations of the French law:

‘Notwithstanding these references, the source of this doctrine was not the Sharī‘ah, but the rules and innovations of French law. Indeed, there would seem to be a significant gap between Islamic law and the doctrine of unexpected events. Islamic law, for example, recognizes totally individual grounds as justification (*‘Udhr*) for the termination of a contract, such as the sickness or bankruptcy of the lease. In contrast, the New Code refers to ‘general events.’⁶⁷¹

Sanhūrī himself recognized some differences between the principle of excuse, as applied in Islamic law, and the doctrine of unexpected events as applied in Western law. In ‘*Maṣādir al-Ḥaqq*’ he concluded:

‘Excuse is an event that was unexpected during conclusion of lease contract. Here, the principle agrees with the doctrine of unforeseen catastrophe in Western jurisprudence. But it differs with it in that an unexpected catastrophe, contrarily to the Western doctrine, can be preventable events. A mere interest appearing in the line of one of the two contracting parties, e.g. intending to travel for a profitable business, is enough to rescind lease contract by excuse. Moreover, excuse in Islamic jurisprudence similar to its counterpart in Western jurisprudence does not make execution of the contract impossible but burdensome and onerous. However, the consequence of excuse in Islamic jurisprudence is rescission or nullification of the contract

⁶⁷⁰ Sanhūrī (1972). Op. Cit., volume. 1, pp. 638-642; EMJ (1960). Op. Cit., volume.2, p. 282.

⁶⁷¹ G. Bechor (2008). Op. Cit., p. 182.

automatically. However, the consequence of excuse in the Western jurisprudence is alleviation of onerous obligations to reasonable limits.⁶⁷² (Trans. T.W.)

From the foregoing statement, it is obvious that the similarity in the applications of excuse between Islamic jurisprudence and the New Civil Code as regards ‘unforeseen circumstances’ refers to one point. It is the degree of severity in the excuse as regards execution of the contract. They both emphasized that an onerous catastrophe can be the basis for the effective excuse. However, the Islamic jurisprudence is more flexible as regards the individuality of the excuse and in the way it permits cancellation of the contract while the New Code allows a judge to reduce the burden of the debtor and not to cancel the contract. However, Sanhūrī wanted any individual and common excuse to be effective similar to the application of Islamic jurisprudence, but the committee for the re-examination of the Code confined the doctrine to events that are of a collective nature.⁶⁷³

Despite all the above arguments, the Shari‘ah can be a reference for the doctrine for it applies a broader concept under which the doctrine falls.⁶⁷⁴ ‘The theory of excuse in Islamic law is of a broad sense. It incorporates what the modern law considers ‘uncontrolled force’ and that it considers ‘unforeseen circumstance’ and that it considers between these two,’ Sanhūrī proclaimed.⁶⁷⁵ This was, in fact, the reason that facilitated the passage of the doctrine in the various parliamentary committees, since it was difficult for the representatives to oppose a doctrine that was ostensibly drawn from sacred Islamic law, as finally Guy Bechor recognized.⁶⁷⁶

⁶⁷² Sanhūrī (1953-1954). Op.Cit., volume. 6, p. 95.

⁶⁷³ EMJ (1960). Op. Cit., volume. 2, p. 282; Sanhūrī (1972). Op. Cit., volume. 1, pp. 643-644.

⁶⁷⁴ Sanhūrī (1972). Op. Cit., volume. 1, p. 638.

⁶⁷⁵ Ibid., volume. 1, p. 634 “the footnote”; Sanhūrī, ‘Aqd al-Ījār, p. 209.

⁶⁷⁶ G. Bechor (2008). Op. Cit., p. 183.

6.2.1.3 Enrichment Without Just Cause (*Al-Ithrā' bi-lā Sabab*)

Enrichment without just cause is considered in the New Civil Code as a source for obligation. The concept is that any person who enriches himself on the account of another person without a legal reason should be bound to compensate the lesser of two values; either the loss he caused to the other person or the profit he gained from his activity.⁶⁷⁷ The doctrine is perceived as one of the most principle rules of law that extracts its legitimacy from principles of equity and natural law. Therefore, it was given an independent position within the sources of obligation in the New Code indicating its independence from the source of illegitimate work.⁶⁷⁸

The Roman law recognized the doctrine in broad applications. This recognition may lay prior to recognition of illegitimate work and contract as two sources of obligation.⁶⁷⁹ In contrast, the English law did not recognize it as a source of obligation except in very narrow and limited borders. The broadest application it recognized was to obligation emanating from undue payment (*Daf' Ghayr al-Mustaḥaqq*) conditional with that the subject matter of undue payment must be an amount of money and the mistake should be one of fact and not one of law. Moreover, it did not recognize right of compensation for voluntary agent (*Fuḍūlī*) against expenses he offered for the interest of another person except in limited cases.⁶⁸⁰

The Old Egyptian Civil Code also did not incorporate a clear and general regulation about this doctrine by the fact that confusion occurred between that term and more specific

⁶⁷⁷ Sanhūrī (1972). Op. Cit., volume., 1, p.1103.

⁶⁷⁸ Ibid., volume. 1, p. 1103.

⁶⁷⁹ Sanhūrī (1953-1954). Op.Cit., volume. 1, p.57; Sanhūrī (1972). Op. Cit., volume., 1, p.1103-1104; Ṣalāḥuddīn al-Nāhī (1958-1959). *Muḥāḍarāt min al-Qānūn al-Madanī al-ʿIrāqī- al-Kasb Duna Sabab wa al-Fuḍālah ka-Maṣḍarayni li-al-Itizām*. Jāmi ʿat al-Duwal al-ʿArabiyyah: Ma ḥad al-Dirāsāt al-ʿArabiyyah al- ʿĀliyah. pp. 10-11.

⁶⁸⁰ Sanhūrī (1953-1954). Op.Cit., volume. 1, pp. 57-58; Sanhūrī (1972). Op. Cit., volume. 1, p. 1108-1109; S. Maḥmaṣānī (1983). Op. Cit., volume. 1, pp. 88-92.

terms such as voluntary agency and undue payment.⁶⁸¹ However, the New Code stepped ahead and characterized the doctrine with three main characters:

- i. The doctrine is made an independent source of obligation.
- ii. It became more general as it covers the rules of voluntary agency and payment not due under its regulation. Hence, the New Code corrected the wrong arrangement that occurred previously as the general was made specific and vice versa.
- iii. It is released from the subsidiary character that put down the doctrine under the pressure of two constraints,⁶⁸² namely, to be the last choice after exhortation of other legal solutions and the enrichment should be outstanding at the time of claim for compensation.⁶⁸³

The New Egyptian Civil Code (Article 179)⁶⁸⁴ regulates enrichment without a just cause stating:

‘A person, even one who lacking discretion, who without just cause enriches himself to the detriment of another person, is liable, to the extent of his profit, to compensate such other person for the loss sustained by him. The obligation remains, even if the profit has disappeared at a later date.’ (Trans.)

The Egyptian jurists indicated three ingredients from which this doctrine is compromised: enrichment without just cause; the creation of a loss on the part of the other; and proof of the causal connection between the enrichment and the loss; for example, if a person builds on his own land utilizing the materials of his fellow and the latter person therefore suffers from a shortage of these materials.⁶⁸⁵

⁶⁸¹ Sanhūrī (1972). Op. Cit., volume, 1, p. 1112.

⁶⁸² Ibid., volume. 1, pp. 1114-1115.

⁶⁸³ Ibid., volume. 1, p. 1111.

⁶⁸⁴ Libyan Civil Code, article 182; Syrian Civil Code, article 180; Iraqi Civil Code, article 240-243.

⁶⁸⁵ Al-Mustashār M. ‘Abdul-Tawwāb (2000). Op. Cit., volume.1, p. 802; G. Bechor (2008). Op. Cit., pp. 202-203.

However, the Code stipulated rules of undue payment and voluntary agency which are perceived in the new context as applications for the principle doctrine.

Regarding ‘payment not due’ the new Egyptian Civil Code (Articles 181-183) ⁶⁸⁶ states:

‘181-1. Whosoever receives, by way of payment that which is not owing to him, is bound to return it. 2. There is, however, no obligation to restitute when the payer knew that he was not under an obligation to pay, unless he was legally incapable or unless he paid under duress. 182. A payment which was not due may be recovered, if it was made in the performance of an obligation whose cause had not materialized or had ceased to exist.’ (Trans.)

A ‘voluntary agency’ occurs when a person of his own accord knowingly assumes the management of another person’s business without the knowledge of the latter and without being bound to do so (Egyptian Civil Code, Article 188).⁶⁸⁷ Here, there must be a union of four conditions: (1) the voluntary agent must not have received a mandate either expressly or tacitly; (2) the act of management must have reference to the actual interest of the other person; (3) there must be intention on the part of voluntary agent to manage the business of the other person; (4) the voluntary agent must be capable of binding himself.⁶⁸⁸

The New Egyptian Civil Code (Article 190)⁶⁸⁹ states: ‘The rules of mandate (*Wakīl*) apply if the person for whom the voluntary agent acts ratifies his act.’

In fact, Sanhūrī in 1962 believed that ‘enrichment without a just cause’ is deemed to have deviated from the Sharī‘ah law. In *Nazariyyat al-‘Aqd, Maṣādir al-Ḥaqq* and *Al-Wasīṭ* he grounded an excellent explanation for his opinion. He differentiates between ‘enrichment without a just cause’ as principle and ‘undue payment’ as application. Sanhūrī concluded:

⁶⁸⁶ Libyan Civil Code, articles 184-186; Syrian Civil Code, articles 182-183; Iraqi Civil Code, articles 223, 136.

⁶⁸⁷ Libyan Civil Code, article 191; Syrian Civil Code, article 189; Iraqi Civil Code, article 240-243.

⁶⁸⁸ Al-Mustashār M. ‘Abdul-Tawwāb (2000). Op. Cit., volume.1, pp. 834-835; pp. 840-841.

⁶⁸⁹ Libyan Civil Code, article 193; Syrian Civil Code, article 191.

‘It is apparent from the provisions of Islamic jurisprudence that undue payment is a source for obligation to very broad borders. If a person falsely pays undue amount of debt to another and then he discovered his mistake, he has the right to refund. The Islamic jurisprudence does not recognize the act of a voluntary agent as a source for obligation. Rather, it considered (*Fuḍūlī*) as a volunteer who does not have right to ask the beneficiary for compensation against his voluntary act. The enrichment without cause, as a general principle, is not recognized in Islamic law...Therefore, it does not constitute a source for obligation but in few instances.’⁶⁹⁰ (Trans. T.W.)

For supporting his conclusion about undue payment, Sanhūrī quoted *Murshid al-Ḥayrān* (Article 202),⁶⁹¹ which reads: ‘If a person asked another to settle a debt on his behalf, and the person himself settled the debt to the creditor and so done too by the agent. The agent has the right to return the paid amount from the creditor and not from the principle.’

However, to support his conclusion about voluntary agency he consulted texts from *Majma‘ al-Ḍamānāt*⁶⁹² which verify that:

1. ‘If a spouse builds the house of his wife without permission, Imām al-Nasafī said: the entire building belongs to her and she is not obliged to pay any expenses because he is considered as a volunteer (*Mutabarri‘*).’⁶⁹³
2. ‘If a debtor expends money on the child or the spouse of the creditor without his permission the debt is not eliminated and he will have no right to ask the beneficiary for compensation.’⁶⁹⁴

Generally speaking, Sanhūrī summarized the situations through which enrichment without just cause can take effect as a source of obligation in Islamic jurisprudence:

⁶⁹⁰ Sanhūrī (1934). Op. Cit., pp. 69-71; Sanhūrī (1972). Op. Cit., volume., 1, p. 1108-1109; Sanhūrī (1953-1954). Op. Cit., volume. 1, pp. 58-59.

⁶⁹¹ Compare it with Iraqi Civil Code (article 237).

⁶⁹² Sanhūrī (1972). Op. Cit., volume., 1, p. 1108; Sanhūrī (1953-1954). Op. Cit., volume. 1, p. 61.

⁶⁹³ Abū Muḥammad b. Ghānim al-Baghdādī (1987). *Kitāb Majma‘ al-Ḍamānāt fī Madhhab al-Imām al-A‘zam Abī Ḥanīfah al-Nu‘mān*, 1st edn. Bairut: ‘Ālam al-Kutub. p. 453.

⁶⁹⁴ *Ibid.*, p. 449.

- A. If the person has undertaken an obligation for another to prevent himself from an injury. For instance, if a son settles a father's debts to remove a pledge imposed over a part of his property being taken by a creditor as custody for the debt, he will not be considered as a volunteer and can settle his right over his father because he was enforced to pay back the debt in order to reach his own right that could not be achieved unless through settlement of the debts due over his father. Also, if he pays back the debts due over the borrower of his property to open a pledge put down over it, he will ask the borrower for the payment he made for him.⁶⁹⁵
- B. If properties of two different persons, each on its right, mixed together accidentally and without willing so by the two persons, the owner of the superseding portion will own all and the owner of the smaller portion will ask him for compensation unless otherwise agreed between them. However, if the values of the two portions were equal, the property will be sold for their account, and they will have equal portions of the price by which it is sold.⁶⁹⁶
- C. If a person has dealing with an incapacitated person, the contract is void, but he will have the right to ask the incapacitated party for compensation to the extent which the latter has been enriched on account of that dealing.⁶⁹⁷

Because of the difficulty showed by Sanhūrī for establishing a linkage between the doctrine and Islamic law, Sanhūrī classified it under the concepts that have insufficient grounds for foundation according to Islamic law.⁶⁹⁸ However, the doctrine, as Bechor concludes, is a characteristic manifestation of the sociological approach of the New Code,

⁶⁹⁵ Sanhūrī (1953-1954). Op.Cit., volume. 1, p. 60; A. G. al-Baghdādī (1987). Op. Cit., p. 454.

⁶⁹⁶ Sanhūrī (1953-1954). Op.Cit., volume. 1, p.60; A. G. al-Baghdādī (1987). Op. Cit., p. 446.

⁶⁹⁷ Sanhūrī (1953-1954). Op.Cit., volume. 1, p. 60; A. G. al-Baghdādī (1987). Op. Cit., p. 448; Muḥammad Qadrī Bāshā (1891). *Murshid al-Ḥayrān ilā Ma'rifaṭ al-Ḥwāl al-Insān fī al-Mu'āmalāt al-Shar'iyyah*, 2nd edn. Cairo: Al-Maṭba'ah al-Amīriyyah. (article 218).

⁶⁹⁸ Sanhūrī (1962). Op. Cit., p. 33.

which emphasizes the element of equity, as opposed to the individualistic character of the Old Code and the French Code Civil, in which the doctrine was not established.⁶⁹⁹

It is worthy that the famous Iraqi lawyer, Ṣalaḥuddīn al-Nāhī, and the Lebanese jurist Ṣubḥī Maḥmaṣānī both rejected the opinion of Sanḥūrī and believed that enrichment without just cause is known by Shari‘ah as a common principle and a general maxim applying to a number of examples available in books of Islamic jurisprudence. To them, the basis of this doctrine is equity which is a common precept between Shari‘ah and modern law. Moreover, the general *Fiqh* maxim says: “Without legal cause it is not allowed for anyone to take the property of another” (*Majallah*, Article 97) and since this maxim is absolute it can be evidence for application of enrichment without just cause in Shari‘ah.⁷⁰⁰ Moreover, as Umer Chapra says, the Shari‘ah texts have given principles whereby a Muslim society can know or deduce what constitutes a ‘justified’ or ‘unjustified’ source of earning or acquisition of property from others. One of the important sources of unjustified earning is receiving any monetary advantage in a business transaction without giving a just countervalue. *Riba* represents a prominent source of unjustified acquisition. The Shari‘ah emphatically instructs Muslims not to acquire each other’s property *bi al-batil* or wrongfully.⁷⁰¹

6.2.1.4 Liability of Risks (*Taḥammul al-Tabi‘ah*)

Liability which follows from a criminal action is known as criminal liability. However, to endure liability for damage that occurred accidentally and without intending its incidence, based on the maxim that says “The detriment is as a return for the benefit” (*Majallah*, Article 87)

⁶⁹⁹ G. Bechor (2008). Op. Cit., p. 202.

⁷⁰⁰ S. al-Nāhī (1958-1959). Op. Cit., p. 14, pp. 204-209; S. Maḥmaṣānī (1983). Op. Cit., volume.1, pp. 56-61, p. 107.

⁷⁰¹ Umer Chapra (1995). *Towards a Just Monetary System*. 1st edn. Leicester: The Islamic Foundation. p. 55.

which means benefit brings liability so that the person who obtains the benefit of a thing, takes upon himself also the loss from it, is known as theory of liability for causing risks or theory of “civil liability/objective liability” in more precise words.⁷⁰² Therefore, a civil liability is a situation wherein a person is obliged to compensate an injury caused by him to another, even though the law does not state the particular action as a normative source of obligation.⁷⁰³ Hereby, if a person caused an injury to a second person during a commercial activity he ought to bear the price of risks he caused to the other, and as such as he is entitled to generate profit from the conducted business. It implies that he has to be responsible for misfortune to others the same as he is entitled to the profit generated by the same activity even if the damage caused to another occurred accidentally and was borne unwillingly.⁷⁰⁴

It can be noticed that Sanhūrī, in his proposal for the Iraqi Civil Code, was more hopeful in making Sharī‘ah the ground of the theory and to prescribe the liability based on the concept of bearing the result of risks associated with benefits (*Tahammul al-Tabi‘ah*), not on a mere concept of fault or assumed fault as in the French Civil Code. But practically the theory has taken its broad implementation from its French origin and only limited applications from the Sharī‘ah part.⁷⁰⁵

In his proposal for the Iraqi Civil Code, Sanhūrī commented on this theory:

‘This theory can be grounded on Sharī‘ah. The Sharī‘ah attributes profit to risk bearing, and does not see an intentional action as a condition for liability of direct destruction of property. The creator of an injury is responsible regardless of his intention. For instance, if a person whilst riding a camel destroyed something by the reason of it, the person is responsible and considered as a direct factor of that destruction. Therefore, he is liable in all situations, or in other words, he is liable regardless of intention or transgression and fault. Therefore, if we

⁷⁰² A. al-Şābūnī (1988-1989). Op. Cit., volume. 2, pp. 264-266.

⁷⁰³ Al-Mustashār Ādam (1969). Op. Cit. pp. 29-34.

⁷⁰⁴ Ibid.; Muşţafā Al-Zarqā’ (1988). *Al-Fi’l al-Ďārr wa al-Ďamān fih: Dirāsah wa Şyāghah Qānūniyyah Mu’aşşalah ‘alā Nuşūş al-Sharī‘ah al-Islāmiyyah wa Fiqihā*, 1st edn. Damascus: Dār al-Qalam. p. 66-68.

⁷⁰⁵ Ibid.

extend this example to contemporary instances such as vehicles, trains and airplanes we can conclude a decisive rule about risk liability in current transportation incidents...Do we have any doubt, after this, that the Sharī‘ah includes elements that always habilitate it for growth and development?’⁷⁰⁶ (Trans. T.W.)

But contrary to this, he applied the theory narrowly and even applied quite different rules in his Iraqi Civil Code as compared to the limited application that can be seen in his Egyptian Code.

The Egyptian Code (Article 163)⁷⁰⁷ states: ‘Every fault which causes injury to another imposes an obligation to make reparations upon the person by whom it is committed.’

The aforementioned provision explored the pillars of civil liability and returned them to three elements: injury, fault and causality between injury and the fault. Therefore, it can be noticed that an assumed fault is considered as the basis of responsibility as the Egyptian Code (Article 164/1)⁷⁰⁸ declares: ‘Every person in position of discretion is responsible for his unlawful acts.’

Moreover, the new Egyptian Civil Code following the Sharī‘ah recognizes some applications of the concept based on risk liability, as clause 2 of the same Article says:

‘When an injury is caused by a person not in position of discretion the judge may, if no one is responsible for him or if the victim of injury cannot obtain reparation from the person responsible, condemn the person causing the injury to pay equitable damage, taking into account the position of the parties.’ (Trans.)

The Iraqi Civil Code (Article 197/2) also decides:

‘When an injury is caused by a minor or an insane who is not in position of discretion it is possible for the victim to ask his father and guardian for the reparation with the condition that they will be facilitated with the right to ask for compensation from the person who created the injury.’ (Trans. T.W.)

⁷⁰⁶ Sanhūrī (1936b). *Op. Cit.*, volume. 1, pp. 322-324.

⁷⁰⁷ Libyan Civil Code, article 166; Syrian Civil Code, article 164; Iraqi Civil Code, article 192-204.

⁷⁰⁸ Libyan Civil Code, article 167; Syrian Civil Code, article 165; Iraqi Civil Code, article 191.

The preparatory collections of the Egyptian Code, however, explored that the approval of this kind of liability adapts to principles of Islamic law, and the rule of this provision even though it disagrees with the practiced regulations in Egypt is supported by the principle of equity and has grounds in applications of Sharī'ah.⁷⁰⁹ The *Majallah* (Article 916) states: 'If an infant destroys the property of another, compensation must be made from his own property. If has no property, there is a delay made until he is in a condition to pay. Compensation cannot be recovered from his guardian.'

6.2.1.5 Contract on Non-Existing Objects (*Bay' al-Ma'dūm*)

It is generally agreed among Muslim jurists that the object of a contract should be in existence at the time a contract is concluded. It is one of the basic conditions for the validity of a contract that the commodity must be in the physical or constructive possession of the seller. This condition has three ingredients. Firstly, the commodity must exist at the time of sale. Secondly, the seller should have acquired the ownership of that commodity. Thirdly, the commodity should have come into the possession of the seller, either physically or constructively. However, there are some exceptions where the jurists allow contracts on future objects such as *Ijārah* (Leasing),⁷¹⁰ *Istiṣnā'* (Manufacturing)⁷¹¹ and *Salam*^{712 713}.

⁷⁰⁹ EMJ (1960). Op. Cit., volume. 2, pp. 356-537.

⁷¹⁰ *Ijārah* is the transfer of ownership of a service for an agreed consideration. In Islamic jurisprudence, the term *Ijārah* is used for two different situations. In the first place, it means to employ the services of a person on wages given to him as a consideration for his hired services. The second type relates to the usufruct of assets and properties. The term *Ijārah* in this sense means to transfer the usufruct of a particular property to another person in exchange for a rent claimed from him. See: Muhammad Taqi Usmani (2002). *An Introduction To Islamic Finance*. Hague: Kluwer Law International. p. 69; Mohd Nasir Mohd Yatim, Amirul Hafiz Mohd Nasir (2006). *The Principles and Practice of Islamic Banking & Finance*, 1st edn. Selangor: Prentice Hall- Perason. p.53.

⁷¹¹ *Istiṣnā'* is a kind of sale where a commodity is transacted before it comes into existence. It is a contract of sale and purchase whereby the buyer places an order with a manufacturer to manufacture a specific commodity at a price payable according to an agreed term of payments with full specification of the commodity. If the manufacturer undertakes to manufacture the goods for him with material from the manufacturer, the transaction of *Istiṣnā'* comes into existence. See: M. T. Usmani (2002). Op. Cit., pp. 88-89; M. Yatim and Amirul H. (2006). Op. Cit., p. 59.

⁷¹² *Salam* is a sale whereby the seller undertakes to supply some specific goods to the buyer at a future date in exchange of an advance price fully paid on the spot. In other words, it is an exchange of specified goods or services for a deferred delivery with immediate payment. M. T. Usmani (2002). Op. Cit., p. 83; M. Yatim and Amirul H. (2006). Op. Cit. p. 65.

⁷¹³ Sanhūrī (1953-1954). Op.Cit., volume.3, Pp. 13-53.

The Iraqi Civil Code referred to this case in two different locations. It decides (Article 129/1)⁷¹⁴ that: ‘The subject of obligation can be non-existing during the time of a contract, provided its existence is possible in future and is determined in a way no speculation and uncertainty are associated.’

However, it was stated in the proposal project of the Iraqi Code (Article 916) that: ‘1- The sold item should be determined in a way negates any excessive uncertainty. 2- It is valid to sell the future properties and rights if they are determined in a way depriving uncertainty and speculation (*Gharar*).’

The aforementioned provisions are different to the provisions of *Majallah* and *Murshid al-Ḥayrān* in some essential legal facts. The *Majallah* provides (Articles 205-207), that:

‘The sale of a non-existing thing is invalid. The sale of fruit which is perfectly to be seen, while it is on the tree, whether it be good to eat or not is valid. To sell individual things which have subsequent product and come to existence time by time, is good, that is to say, in case a quantity of fruit and leafs and vegetables which come forth little by little and do not appear all at once, has appeared, the sale a lump with them of those which have not yet appeared, as dependant on them, is valid.’ (Trans.)

Murshid al-Ḥayrān also verifies (Articles 383-385) this:

‘The sale of a non-existing thing is invalid. The sale of a fruit before its appearance, a plant before its product and a sale of a fetus before separation are invalid. Fruits which appear and ripen, whether it be good to eat or not, can be sold while they are connected to the trees. To sell individual things which have subsequent products and come to existence time by time, little by little, such as fruits, flowers and vegetables is valid provided the overwhelming majority of the product, when the contract was held, was mature.’ (Trans. T.W.)

There is a clear difference between the Iraqi provision and the provisions of *Majallah* and *Murshid al-Ḥayrān*. The provisions of the two latter sources do not allow sale of a non existing item, even if it is to exist in the future. The exceptions made in their provisions referred to the state wherein a part, or even a large part, of the sold product is present and

⁷¹⁴ Egyptian Civil Code, article 131; Libyan Civil Code, article 131; Syrian Civil Code, article 132/1.

deliverable during the contract. Therefore, Sanhūrī found himself before a rule that runs against some types of dealings that the contemporary transaction necessitates as there are situations where people need to deal in things which do not exist during the time of the contract, but they are certain to exist in the future. However, *Salam* and *Istiṣnāʿ* may not provide sufficient ground for these various types of dealings.⁷¹⁵

In his report on the provisions of the Iraqi Civil Code, Sanhūrī provided justifications for the opinion adopted in the aforementioned provision. He connected the prohibition of sale of a non-existing item to the uncertainty and hazard usually associated with this kind of contract. He believes that the purpose of Muslim jurists in this prohibition is not to prevent future sales, provided the object is deliverable and determined sufficiently so no uncertainty or hazard to be associated. Hereby, the prohibition of the sale of a non-existing thing is a practical form for speculative (*Gharar*)⁷¹⁶ sales that are prohibited in *Sharīʿah*. It implies that *Gharar* is the criterion based on which the prohibited and permitted forms of future sales should be discriminated. Therefore, anything that cannot be delivered or is not determined and leads to uncertainty and hazard should be void in contracts. But if a thing is deliverable and determined in a way depriving uncertainty and eliminating risks, the sale is valid.⁷¹⁷

Sanhūrī supported his idea by the approach provided by Ibn al-Qayyim (d. 751AH/1349CE) in this matter, as the latter negates any proofs evident in *Qurʾān* and *Sunnah* and the tradition of the companions showing that the sale of non-existing things is void. According to Ibn al-Qayyim, as the *Sunnah* prohibited sale of some items which are non-

⁷¹⁵ Sanhūrī (1936a). Op. Cit., volume. 2, pp. 86-87.

⁷¹⁶ Gharar means hazard, stake, chance or risk. In the legal terminology, 'Garar' refers to the uncertainty or hazard caused by lack of clarity regarding the subject matter or the price in a transaction. Sale of a thing whose consequence is not known or a sale of a non present item or a sale involving hazard in which one does not know whether it will come to be or not, all amount to Gharar in the view of majority of Muslim jurists. For details see: Muḥammad Ayub (2007). *Understanding Islamic Finance*. England: Wiley. pp. 57-61.

⁷¹⁷ Sanhūrī (1936a). Op. Cit., volume. 2, p. 87-88.

existing it also prohibited sale of some existing items. Therefore, the rational beyond the prohibition is neither existence nor non-existence, but rather the *Gharar* (speculation) which refers to status of un-deliverability, such as the sale of a non-curtailed camel which is not under the control of the vender. Thus, if he can avail it, there should be no objection.⁷¹⁸ Moreover, Sanhūrī clarified that there exist different opinions among the scholars about the sale of non-existing items. For instance, Abū Ḥanīfah and his fellows opined that a non-existing item can never be an object of a contract and a non-existing object at the time of the contract makes it void, just like with prohibited gambling. The exceptions which are recorded in Sharī'ah in this regard are not subject for extension by way of analogy. However, Mālik b. Anas differentiated between commutative contracts and donation oriented contracts (*'Uqūd al-Mu'āwaḍāt* and *'Uqūd al-Tabarru'āt*). He permitted the object of a contract to be non-existing if it is probably to exist in the future, only in contracts of donation.⁷¹⁹ The third opinion is that of Ibn Taymiyyah (d. 728AH) and his disciple Ibn al-Qayyim, which confines the state of prohibition to the presence of elements of uncertainty and inadmissible risk in the sale of non-existing items. Sanhūrī preferred the last opinion and he illustrated it by the application of *Ijārah*, *Istiṣnā'* and *Salam* where the jurists confined their permissibility to fulfilling the condition of certainty and eliminating risks.⁷²⁰ Also, Maḥmaṣānī preferred this opinion, supporting it with the statement of Sheikh 'Izzuddīn b. 'Abdul-Salām (d. 660AH) that verifies

⁷¹⁸ S. Ibn al-Qayyim (2002). Op. Cit., volume. 5, pp. 716-724.

⁷¹⁹ Ibn Rushd (2003). Op. Cit., volume. 2, pp. 229-232, pp. 246-247; Shihabuddīn Abū al-'Abbās al-Qarrāfī (2001). *Kitāb al-Furūq*, 1st edn. Cairo: Dār al-Salām. volume. 3, p. 1051; W. al-Zuhaylī (1987a). Op. Cit., pp. 23-24.

⁷²⁰ Ibid., pp. 88-91; Sanhūrī (1953-1954). Op.Cit., volume. 3, pp. 40-42.

the contract on non-existing item is not something contrary to the principle (*al-Asl*) because the Sharī'ah is fully versed with contracts involving non-existing objects.⁷²¹

In *Maṣādir al-Ḥaqq*, Sanhūrī concluded that *Gharar* in the sale of non-existing items can be assumed with different legal adjustments within three various conditions:

1. Transactions in future legacies. Here, the contract in this assumption is void because of uncertainty and risks that usually occur in such kind of dealings.
2. Transactions in things other than legacies, which are certainly not realizable in future. Here, the dealing will be void if the transaction is associated with uncertainty and excessive and outweighed estimation (*Jizāf*).
3. If the transaction is not extremely estimative and the purchaser pays only the price of the delivered items in gradual steps, then no uncertainty or risk and *Gharar* is expected. Therefore, the contract is deemed valid. Hereby, if the item is certainly to be existent in future and the dealing is not based on a mere estimation it is deemed valid too. In his adjustment, Sanhūrī categorized the provision of the Iraqi Civil Code under this section.⁷²²

Before Sanhūrī's New Codes, contract on non-existing objects was first allowed in the Code of Civil Procedure (Article 64) of the Ottomans as amended in 1914. It made it sufficient for the validity of a contract to have the agreement between the two parties on the main provisions and conditions, even though no mention was made of the minor terms. It recognized as property all specific objects, usufructs, and rights which customarily have been

⁷²¹ S. Maḥmaṣānī (1983). Op. Cit., volume. 2, pp. 326-329; Al-'Izz b. 'Abdul-Salām al-Salamī (2007). *Al-Qawā'id al-Kubrā al-Mawsūm bi-Qawā'id al-Aḥkām fi Iṣlāḥ al-Anām*, 2nd edn. Damascus: Dār al-Qalam. volume. 2, p. 211.

⁷²² Sanhūrī (1953-1954). Op. Cit., volume. 3, pp. 52-53. See also: Wahbat al-Zuḥaylī (1997). *Al-Fiqh al-Islāmī wa Adillatuh*, 4th edn. Beirut: Dār al-Fikr. volume. 5, pp. 3398-3403.

accepted in circulation and permitted contracts whose object was goods of future existence, as Maḥmaṣānī commented.⁷²³ Also, the Jordanian Civil Code (Article 202) and the Emirates' Civil Code (Article 160) follow the same approach and permit the sale of non-existing items provided the elements of excessive speculation and uncertainty are eliminated.⁷²⁴

6.2.1.6 Interest (*As'ār al-Fawā'id*)

Islamic Shari'ah has identified some elements which are to be avoided in transactions. The prohibition of *Ribā*, gambling and *Gharar* is the most strategic factor that demarcates the overall limits which should not be crossed. *Ribā* (interest) implies that excess amount which a creditor settles to receive or recover from his debtor in consideration of giving time to the debtor for repayment of his loan. Conventionally, interest or the excess (increase) in loan is the consideration or compensation for the period of re-payment. Various classical and contemporary Islamic scholars have defined *Ribā* as that "increase" which an owner of valuable property (*Māl*) receives from his debtor for giving him time to repay his debt. *Ribā* is the name of every increase in lieu of which there is no consideration. Since the period is not a valuable property (*Māl*), its return has been declared as unlawful. This interprets why interest (*Ribā*) is prohibited in Islamic law. However, the traditional schools of Islamic jurisprudence have provided the details of prohibited interest including its types and justifications beyond their prohibition.⁷²⁵

With implementation of the conventional banking and financial system in the Muslim World, the whole banking system rested on interest. However, a new debate arose among the

⁷²³ S. Maḥmaṣānī (1987). Op. Cit., p. 45.

⁷²⁴ W. al-Zuhaylī (1987a). Op. Cit., pp. 23-24.

⁷²⁵ M. Ayub (2007). Op. Cit., pp. 43-44, pp. 52-53.

scholars pertaining to the applicability of prohibited *Ribā* to the new financial modules and instruments that the conventional system has innovated.⁷²⁶

Sanhūrī Code(s) allows certain kinds of interest within some constraints and restrictions. However, Sanhūrī defended the Islamicity of his Code before the Legal Committee of Egypt and claimed the compliance of his Code to the rules of Sharī'ah if it is intended to have a selection from different and undetermined schools and doctrines of jurisprudence within the Islamic legal heritage. In his comparative study between Islamic and modern jurisprudence, "*Maṣādir al-Ḥaqq*", Sanhūrī provided consistent detailed information about the prohibition of *Ribā* in Islamic law. He then applied his conclusion to the provisions related to *Ribā* in his Code(s), concluding with that these provisions are within the boundaries and limits he figured out in the subject matter.⁷²⁷ He says: 'The position of Arab Civil Codes from *Ribā* is moderate. Albeit they do not exaggerate in permitting it, they confine it with plenty of constraints too.'⁷²⁸

A) Lines of argument:

Generally Sanhūrī advanced some legal excuses and lines of argument for the application and interpretation of *Ribā*. Although he did not adopt all these arguments, he demonstrates them as apologies for the way of conciliation between Sharī'ah and modern laws that he adopted for *Ribā* in respect of contemporary transactions and financial system. They are briefly as follow:

⁷²⁶ Ibrahim Warde (2001). *Islamic Finance in the Global Economy*. Edinbrugh: Edinbrugh University Press. pp. 32-50.

⁷²⁷ Sanhūrī (1953-1954). Op.Cit., volume.3, Pp.176-249.

⁷²⁸ Ibid., volume. 3, p. 249.

1. There are two types of *Ribā*. The prohibition of *Ribā al-Nasī'ah* (delay) is the final objective. The prohibition of *Ribā al-Faḍl* is secondary and to block the means of the *Ribā* of delay. *Ribā al-Faḍl*, however, was prohibited by prophetic traditions. According to Ibn al-Qayyim, the prohibition of *Ribā al-Faḍl* is to block the means before having the *Ribā* of delay which was objectively prohibited by Qur'an and *Sunnah*. Therefore, the delay *Ribā* is definitively prohibited as the objective (*Taḥrīm Maqṣad*) and the *Ribā al-Faḍl* is speculatively evident to be prohibited because it is a means for *Ribā al-Nasī'ah* (*Taḥrīm Wasīlah*).⁷²⁹ It follows from that, as Sanhūrī claimed, that a *Ribā* in the category of *Ribā al-Nasī'ah* cannot be consumed, except in the condition of serious necessity at the level of *Ḍarūrah*. But the *Ribā* of *al-Faḍl* can be permitted in a state of evident need (*Ḥājah*). It is known in principles of jurisprudence, unlike in the state of *Ḍarūrah*, permission of any prohibited thing on the basis of an existing need is not exclusively specific to those who are really attached to the need but rather the permission expands to others. Based on the aforementioned arguments, Sanhūrī believes that prohibition of *Ribā al-Faḍl* circulates with two main concepts, namely the doubt (*Shubḥah*) and the need (*Ḥājah*). The prohibition will diffuse over the doubted exchanges and the concession will actively operate in state of evident need. The examples of *Ribā al-Faḍl* that were permitted based on need are sale of al-‘Araya, exchange of lawful manufactured gold or silver and lawful jewelry against unmanufactured gold and silver with difference in quantity, as in the Fatwa given by some scholars like Ibn Taymiyyah and Ibn al-Qayyim, and finally exchange

⁷²⁹ Shamsuddin Ibn Qayyim al-Jawziyyah (1973). *A'lām al-Mūqī'in 'an Rabb al-'Ālamīn*. Beirut: Dār al-Jīl. volume. 2, pp. 154-159.

of *Maṣkūk* gold and silver (the measured piece of gold and silver used as currency) against a merely abstract gold or silver with difference in quantity, based on the needs of people. However, Ibn al-Qayyim has prohibited ‘*Inah* sale⁷³⁰ owing to the doubt of *Ribā*.⁷³¹

2. The second line of argument runs on the basis that the Holy Qur'an has prohibited *Ribā al--Jāhiliyyah* which was a particular transaction of loan. When the debtor could not pay off the loan at its due date, the creditor would give him more time against charging an additional amount.⁷³² Other types of *Ribā* which are detailed in *Sunnah* such as *Ribā al-Faḍl* and the delay in exchanging *Ribāwi* commodities with deferment of one of the two exchanged objects are to signify reprehensibility (*Karāhah*) only. This argument is adopted by Sayyid Rashīd Riḍā (d. 1354AH). Despite the fact that Riḍā recognized that Ibn al-Qayyim has extended the rule of *Ribā* of delay as mentioned in Qur'an to the similar type of *Ribā* in exchanging *Ribāwi* commodities as mentioned in *Sunnah*, he criticized him for having said that the *Ribā* of delay is absolutely prohibited irrespective of it being signified in Qur'an or detailed in the *Sunnah*. He believed that the level of prohibition should vary from each another as the *Qur'ānic Ribā* is definitely evident and the *Sunnah Ribā* is speculatively proved. Hereby, Riḍā agrees with Ibn al-Qayyim that only one type of *Ribā* is prohibited objectively. But he differs with him in two aspects of interpretation. Firstly, Rashīd Riḍā believes that the objective of prohibition is the *Ribā* of *al-Qur'ān* and the remaining categories of *Ribā*

⁷³⁰ *Bay' al-'Inah* is a sale of a commodity on credit and repurchasing it for a lesser amount in cash. It occurs when an item is sold at profit on deferred payment, for its subsequent buyback by the original seller at a lesser price. See: International Centre for Education in Islamic Finance INCEIF (2006). *Applied Shariah in Financial Transactions*. Selangor: Intiprint Sd..Bhd, first edition. p. 271.

⁷³¹ Ibn al-Qayyim (1973). Op. Cit., volume. 2, p. 159; Sanhūrī (1953-1954). Op.Cit., volume. 3, pp. 203-216. See also: Muḥammad b. Idrīs al-Shāfi'ī (2002), *Al-Umm*, 1st edn. Bairut: Dār al-Kutub al-'Ilmiyyah. volume. 3, pp. 120-121.

⁷³² Abū Bakr Ibn al-'Arabī (2001). *Aḥkām al-Qur'ān*, 1st edn. Beirut: Dār Iḥyā' al-Turāth al-'Arabī. volume.1, p. 261.

that been detailed in *Sunnah* is only secondary in prohibition, and its prohibition circulates with the objective of the principal *Ribā* namely *Ribā* of *Nasī'ah*. It follows from this that the *Ribā* which was established by *Sunnah* to block the means before consumption of the *Qur'ānic Ribā*. Therefore, it is speculative for two reasons. Firstly, because it is reported by *Sunnah* and its prohibition circulates with the consequence it may lead to and this forms only an estimative factor for prohibition. Secondly, he believes that the value of *Ribā* of *al-Qur'ān* is for definite prohibition, whilst the value of *Ribā* of *Sunnah* amounts only to reprehensibility (*Karāhah*).⁷³³ However, Sanhūrī opposed Rashīd Riḍā in this approach and clearly supported the approach of Ibn al-Qayyim. He said that interpreting the prohibition of *Ribā* mentioned in *Sunnah* as to signify reprehensibility (*Karāhah*) runs against the consensus (*Ijmā'*) of all Muslim jurists.⁷³⁴

3. In spite of the fact that the prohibition of *Ribā al-Faḍl* (giving an increase in the quantity of one commodity in exchange for another) is the opinion of the majority of the Holy Prophet's Companions, it has been reported from 'Abdullāh b. 'Abbās that he had allowed increase in the exchanges of homogeneous commodities provided they were not loaned on the basis of *Nasī'ah*.⁷³⁵ However, Sanhūrī believes the investigation of the jurists regarding retraction of Ibn 'Abbās from his opinion in his later life is uncertain. Whilst Jābir b. Zaid reported Ibn 'Abbās's retraction, Sa'īd b.

⁷³³ Rashīd Riḍā, Muḥammad 'Abduh (2002). *Tafsīr al-Qur'ān al-'Aẓīm al-Ma'rūf bi- Tafsīr al-Manār*, 1st edn.. Beirut: Dār Iḥyā' al-Turāth al- 'Arabī. volume. 3, pp. 100-103.

⁷³⁴ Sanhūrī (1953-1954). Op.Cit., volume.3, pp. 217-222.

⁷³⁵ Muḥammad b. Ismā'il al-Bukhārī (2007), *Ṣaḥīḥ al-Būkhārī*, 5th edn. Bairut: Dār al-Kutub al-'Ilmiyyah. Kitāb al-Biū', Ḥadīth No. (2178, 2179), pp. 389-390; Muslim b. al-Ḥajjāj (2006), *Ṣaḥīḥ Muslim*, 4th edn. Beirut: Dār al-Kutub al- 'Ilmiyyah. Kitāb al-Musāqāt, Ḥadīth No. (1596), pp. 619-620; M. M. al-Jazīrī (2001). Op. Cit., volume. 2, pp.187-188; Sanhūrī (1953-1954). Op.Cit., volume. 3, pp. 227-234.

Jubair (d. 95AH) believed that he insisted on his opinion until he died.”⁷³⁶ Finally, whatever is said about his final opinion, it is evident that Ibn ‘Abbās during a part of his life did not consider that in bullion exchanges (*Ṣarf*) there was any *Faḍl* involved, as long as exchange of one precious metal for another was from hand to hand, from one substance to another. And he used to think that *Ribā* was in those commodities which were sold on credit or by loans (*Nasī’ah*). It has also been reported that ‘Abdullāh b. ‘Umar had also allowed some forms of *Ribā al-Faḍl* but had revoked it when he came to know that it was abolished like *Ribā al-Nasī’ah*.⁷³⁷

4. Another line of argument returns to discriminating between consumptive loans and commercial loans. According to Muḥammad Ma fūf al-Dawālībī, the prohibited "*Ribā*" used in the Holy Qur’ān is restricted to the increased amount charged on the consumption loans to be taken by the poor people for their day to day needs. The Holy Qur'an has declared war against those involved in such exploitative transactions. So far as modern commercial loans are concerned, the Holy Qur’ān has never addressed consumptive usury while prohibiting '*Ribā*'. He argued that it is injustice to claim any additional amount on the principal from a poor person, but it is not the case with a rich man who develops his own commercial enterprise and earns huge profits through borrowing money. Therefore, it is only the consumption loans on which any excess is termed as *Ribā* and not an increased amount charged on the productive loans. Moreover, the basic philosophy underlying the prohibition of '*Ribā*' cannot be applied to these commercial and productive loans where the debtors are not poor people. In most cases they are wealthy and the loans taken by them are generally used for

⁷³⁶ Fakhruddīn al-Rāzī (1938). *Al-Taḥfīr al-Kabīr*. Cairo: al-Maṭba‘ah al-Bahiyah. volume.7, pp. 91-92.

⁷³⁷ M. I. al-Bukhārī (2007). Op. Cit., Kitāb al-Biū’, Ḥadīth No. (2176), p. 389; Sanhūrī (1953-1954). Op. Cit., volume. 3, pp. 227-234; Abū Zahrah (n.d.). “Buḥūth fi al-Ribā”. In *Dirāsāt Fiqhiyyah*. Cairo: Dār al-Fikr al-‘Arabī. p. 21.

generating profits. Therefore, any increase charged from them by the creditors cannot be termed as injustice which was the basic cause of the prohibition. So, the only way to avoid exploitative usury is to confine permissibility of commercial *Ribā* with some constraints and allow it only within reasonable limits. In addition to that, no country can live without being involved in interest-based transactions and it will be a suicidal act to abolish interest from domestic and foreign transactions. Islam, being a practical religion, recognizes the principle of necessity and it is even allowed to eat pork in extreme situations. The same principle of necessity should also be applied to the interest-based transactions, and the laws permitting the charging of interest should not be declared repugnant to the laws of Sharīʿah. Although Sanhūrī considered this opinion as one of two main currents in contemporary Islamic jurisprudence manifested in the debate about *Ribā*, he critically rejected this approach for two main reasons. Firstly, it is practically awkward to differentiate between consumptive loans and commercial loans on the basis of the financial position of the parties. Poverty is a relative term which has different levels and various manifestations. Once it is accepted that interest cannot be charged from the poor, while it is quite lawful to be charged from the rich, as is the case with transactions by governments and companies, what will be the consideration in respect of loans taken by individuals from banks and financial institutions? Could it be that commercial loans are applicable to the constraints determined by law or can it be regarded as consumption loans that amount to prohibition? Briefly, who has the authority to determine the exact degree of poverty required for exempting a person from the charge of interest? Therefore, the only way possible to overcome this complexity is to accept one of two extreme solutions that either to allow all types of interest or to prohibit all of them. Secondly, if we assume

that any differentiation between consumptive and productive loans is possible it is not proper to allow commercial law on the basis of necessity. Rather it can be referred to as the state of need.⁷³⁸ Moreover, some historical proofs show that the commercial loan was practiced from ancient times. In a well established study, Sheikh Taqi Usmani provides some historical evidence showing this mentioned fact. Coming to the case of the Arabian Peninsula itself, no one can deny the fact that trade was the most outstanding economic activity of the Arabs. Their main business was to export their own goods to all the surrounding countries such as Syria, Iraq, Egypt and Ethiopia and import their goods to their own lands. The history of Arab trade-caravans refers back to a period as early as that of the holy Prophet Yaqoob (Jacob or Israel) as was the case with the Arab caravan that picked up Yousuf (Joseph) and sold him in Egypt. Naturally, the commercial activities of the Arabs kept on increasing, so much so that they were identified as a trading nation. The size of Arab caravans may be imagined from the fact that the caravan led by Abū Sufyān (d. 32AH) at the time of the battle of Badr consisted of one thousand camels and had returned with 100% profit (one dinar for every one dinar). Apparently, a caravan of this huge size could not be owned by any single merchant. It was a collective enterprise of the whole tribe and was funded by the contributions of all the members of the tribe like a joint stock company. Keeping this commercial atmosphere in view, one can hardly imagine that the Arabs were not familiar with commercial loans, or that their loans were restricted to consumption purposes. But apart from hypothesis, there is concrete evidence that they used to borrow money for their commercial and productive needs. For instance, all the books of *Qurā'nic* exegeses have mentioned the background of the verses of *Surah al-*

⁷³⁸ See Sanhūrī comments on: Doctor Muḥammad ʿAbdullāh Darrāz (1993). *Al-Ribā fī Manzūr al-Tashrīʿ al-Islāmī*, 1st edn. Beirut: Dar al-Qādirī. pp. 11-23; Sanhūrī (1953-1954). *Op.Cit.*, volume. 3, pp. 222-227; Abū Zahrah (n.d.). *op. Cit.*, pp. 31-33; M. Ayub (2007). *Op. Cit.*, p. 53.

Baqarah dealing with *Ribā*. Almost all of them have reported that various tribes of Arabia used to take interest-based loans from each other. For example, Ibn Jarīr al-Ṭabarī (d. 310AH) says: ‘The tribe of Banū ‘Amr used to charge interest from the tribe of Banū al-Mughīrah and Banū al-Mughīrah used to pay them interest.’⁷³⁹

These loans were not taken by one individual from another. Instead, the tribe as a collective entity used to borrow money from another tribe. Therefore, the loans taken by one tribe from the other were not for the purpose of consumption only; they were certainly commercial loans meant to finance their commercial enterprises. This evidence is more than sufficient to prove that commercial loans were not alien to the Holy Prophet or his companions when *Ribā* was prohibited. Therefore, it is not correct to say that the prohibition of *Ribā* was restricted to consumption loans only and did not refer to commercial loans.⁷⁴⁰

B) Sanhūrī’s Conclusion about Prohibition of *Ribā*:

After a true deliberation on the legal arguments and debates stimulated about the prohibition of *Ribā* and the determinants detailed about it, Sanhūrī concluded his own findings in the subject matter. He concluded the following points:

- 1) The principle in *Ribā* is prohibition. *Ribā* in all its forms and ways of practice should be maintained as prohibited, be it the *Ribā* of *al-Jāhiliyyah* or *Ribā* of *Nasī’ah* (delay), the *Ribā* of *al-Faḍl* or the *Ribā* of loans. The main rationale behind its prohibition is to

⁷³⁹ Abū Ja‘far Muḥammad b. Jarīr al-Ṭabarī (2005). *Jāmi‘ al-Bayān ‘an Ta’wīl Āy al-Qur‘ān*, 1st edn. Cairo: Dār al-Salām. volume. 2, p. 161. See Also: F. al-Rāzī (1938). *Op. Cit.*, volume. 7, p. 106.

⁷⁴⁰ http://www.albalagh.net/islamic_economics/riba_judgement.shtml. See also: Abū Zahrah (n.d.). *op. Cit.*, p.32-33.

protect society from hoarding their livelihood and fluctuating currency values by the act of economic forces and protect people from the evils of fraud and exploitation.⁷⁴¹

- 2) *Ribā al-Jāhiliyyah* is the worst and its prohibition is definitive. Its prohibition is not amenable to any allegorical interpretation or any type of exceptional judgment. However, the *Ribā al-Jāhiliyyah* is a particular transaction in which no increase used to be stipulated at the time of advancing a loan; however, if the debtor could not pay the principal amount at the time of maturity, the creditor used to offer him two options: either to pay the principal or to increase the amount in exchange of an additional term allowed by the creditor. The evil of this *Ribā* returns to the possibility of multiplying the rate of interest by the passage of time and also because the interest automatically becomes a part of the principal loan and amounts to the new range of interest by the second turn and so on. Therefore, the exploitation range is very high. He likened *Ribā al-Jāhiliyyah* with the contemporary practice of usury known as “interest on outstanding interest” or “compounding consideration of interest”. Sanhūrī opines that the prohibition of this type of *Ribā* is objectively intended by the Lawgiver. Therefore, it cannot be rendered permissible, except by a state of necessity like consumption of dead carcass and pork in the case of extreme hunger to save one's life. However, he believes that there are certain criteria expounded by the Muslim jurists in the light of the Holy *Qur'ān* and *Sunnah* to determine the magnitude of necessity and the extent to which a *Qur'ānic* command can be relaxed on the basis of an emergent situation. Therefore, it is unimaginable to decide an issue on the basis of a real and not exaggerated necessity so that the necessity cannot be met by any other means than committing an impermissible act. Be this necessity imaginable in the line of the debtor,

⁷⁴¹ Sanhūrī (1953-1954). Op.Cit., volume. 3, p. 241.

it cannot be absolutely imaginable in the line of the creditor as there is no any imaginable necessity motivating a creditor to consume interest, except to satisfy his own greed and hunger to exploit others and unjustified acquisition of money.⁷⁴²

- 3) Other forms of usury such as a simple ratio of interest fixed to a loan, *Ribā* of delay (*Nasī'ah*) and *Ribā* of increase (*Faḍl*) are prohibited too. But the prohibition here is to serve a final objective. They are prohibited because they are perceived as a means to the final aim of *Ribā* which is the *Ribā* of *Jāhiliyyah*. So, they are prohibited only to close the gates of evil coming from the objectively prohibited usury. Hereby, they are rendered permissible in times of need. However, the need intended here is a preferable benefit estimated from a special form of usury if it be prohibited there will be no way to attain it. Upon this need, a secondary *Ribā* can be rendered permissible as an exceptional case and the prohibition will be confined by the limits of an evident need. Hereby, if that need can be attained through permissible ways or the need itself becomes insignificant or totally dispels, the prohibition will regulate it again.⁷⁴³
- 4) The need varies and differs as be an individual or a societal need. For instance, the sale of 'Araya is permitted by the Prophet Muḥammad (P.B.U.H) for satisfaction of an individual's need. Similarly, *Mālik b. Anas* permitted the sale of *Maskūk* dinar and dirham against unmanufactured gold and silver in different quantities provided the person would lose the caravan or lose the market if he did not.⁷⁴⁴ However, Ibn Taymiyyah and Ibn al-Qayyim opine that the sale of lawful manufactured gold or silver and lawful jewelry against unmanufactured gold and silver increasingly is

⁷⁴² Sanhūrī (1953-1954). Op.Cit., volume. 3, pp.241-242; Ibn Rushd (2003). Op. Cit., volume. 2, pp. 229-232.

⁷⁴³ Sanhūrī (1953-1954). Op.Cit., volume. 3, p. 242.

⁷⁴⁴ Ibn Rushd (2003). Op. Cit., volume. 2, p. 250.

exceptionally permissible. The mentioned concession refers to satisfaction of public interest and the common use of people.⁷⁴⁵

- 5) Based on the aforementioned findings that he concluded, Sanhūrī provides different adjustments for the usury up to the economic system adopted in each single country. He believes that if the system was oriented on capitalism then the *Muḍarabah* and *Qiraḍ* and other classical forms of transaction will not be efficient enough to satisfy the needs of the system. Tremendous enterprises cannot be financed except through loans. Usually the powerful party in this system is the investor and the weak party is the creditor. The weak party needs protection of law. As long as the creditor is an individual and is the weaker party and owing to the fact that the creditor has collected his wealth through his own work and effort, and simultaneously the other party needs financing sources, there should be an exceptional concession for interest within the following determinants: (a) Whatever be the need, interest must not run on outstanding interest (*Mutajammid al-Fawā'id*) as the compounding usury is the abolished *Jāhiliyyah Ribā*. (b) A simple ratio of interest should be allowed only within certain limits being clarified by lawmakers as to the rate of interest, the way of its fulfillment and the extent of which should not be exceeded. In other words, consideration of need is within its real limits (*al-Ḥājatu bi-Qadrihā*). However, if the economic system changed and a socialist system was adopted in the future so that the state will administer the capital then the aforementioned concession ought to be revised. It is possible that no need will be ensured for simple interest under shadow of a socialist order. Therefore, interest will return to its principle rule and is prohibited again.⁷⁴⁶

⁷⁴⁵ Ibn al-Qayyim (1973). Op. Cit., volume. 2, pp. 159-163; Sanhūrī (1953-1954). Op.Cit., volume. 3, pp. 242-243.

⁷⁴⁶ Sanhūrī (1953-1954). Op.Cit., volume. 3, pp. 243-244.

C) Application of Sanhūrī’s Conclusion on Provisions of the Code(s):

In “*Maṣādir al-Ḥaqq*”, Sanhūrī tried to apply the conclusion he made about usury on the approaches made in his Codes in provisions relevant. Through applying his own conclusion onto the relevant provisions, Sanhūrī tried to say that the constraints laid down by the Arab lawmakers are reasonable and comply with the rules of Islamic law. Generally, he commented as follows:

- a) The Codes prohibited any interest running on outstanding interest (*Mutajammid al-Fawā'id*). The Egyptian Code (Article 232)⁷⁴⁷ states: ‘Interest does not run on outstanding interest.’ According to Sanhūrī, this statement prohibited the objectively forbidden usury in an explicit way that accepts no exceptions.⁷⁴⁸ It differs from the rules of the previous Egyptian Code as the latter permitted consumption of interest on outstanding interest with two conditions: (a) the outstanding interest should not be less than annual interest rate. (b) There should be an agreement between the debtor and creditor after freezing of the interest on taking interest over it or the creditor requests compounding consideration of interest before the court.⁷⁴⁹
- b) The New Code(s) narrowed the application of simple interest via a variety of restrictions it imposed on its consumption. However, ‘the restrictions should be under the authority of the lawmakers to extend or narrow, in a flexible manner, the scope of interest. The lawmakers will increase or decrease the constraints based on the range of needs. He may abrogate some of these restrictions in time of need. Contrary to this, if the need for permission is not significant, the lawmakers will have to impose more constraints on

⁷⁴⁷ Libyan Civil Code, article 235; Syrian Civil Code, article 233; Iraqi Civil Code, article 174.

⁷⁴⁸ Sanhūrī (1953-1954). *Op. Cit.*, volume. 3, p. 244, p. 247.

⁷⁴⁹ *Ibid.*, volume. 3, pp. 244-245, p. 247.

interest. The principle here is to avoid interest except to the extent that a significant need requires,⁷⁵⁰ Sanhūrī proclaimed.

- c) It determines a maximum rate of interest so that it rescinds any agreement on an exceeding rate between the creditor and the debtor. If the parties agree to a rate exceeding the determined percentage, the rate will be reduced to the allowed percentage and any surplus that has been paid shall be refunded.⁷⁵¹ The maximum rate however is different from one code to another:

Egyptian Code (Article 227/1): 7% compared to 8% of the previous Code

Iraqi Code (Article 172/1): 7%

Syrian Code (Article 228/1): 9%

Libyan Code (Article 230/1): 10%

- d) The liability for interest is upon an agreement between the two parties. In the absence of an agreement the loan will attract no interest. This regulation is applied in respect of loan contract. The Egyptian Code (Article 542)⁷⁵² states: ‘The borrower is under liability to pay the agreed interest as it falls due; in the absence of an agreement as regards interest, the loan is deemed to be without consideration.’ However, in case of delay in payment the debtor should be bound to pay interest at the rate of four percent in civil matters and five percent in commercial matters, as damages for delay (Egyptian Civil Code, Article 226)⁷⁵³ ⁷⁵⁴.

⁷⁵⁰ Ibid., volume. 3, p. 246.

⁷⁵¹ Ibid., volume. 3, pp. 244-245, p. 247.

⁷⁵² Libyan Civil Code, article 541; Syrian Civil Code, article 510; Iraqi Civil Code, article 692/1.

⁷⁵³ Libyan Civil Code, article 229; Syrian Civil Code, article 227; Iraqi Civil Code, article 171.

⁷⁵⁴ Sanhūrī (1953-1954). Op.Cit., volume. 3, p. 245, p. 247.

- e) The interest falling due on a person for delaying the payment shall run from the date when the claim is made in Court. Ordinary demand for the interest does not make it bound. However, a claim for the debt does not automatically cover the claim for interest. Rather it should be expressly stipulated in the claim (Egyptian Civil Code, Article 226)⁷⁵⁵.⁷⁵⁶
- i. In no case shall the total interest rate that the creditor may collect from the debtor exceed the amount of the capital (Egyptian Civil Code, Article 232).⁷⁵⁷ ‘And this is one of the great maxims which regulate prohibition of *Ribā*. It is preventing compounding usury. However, an evident need can put grounds for an exceptional permission to multiply usury in long-term productive/commercial loans,’ Sanhūrī comments.⁷⁵⁸
- ii. If a creditor, whilst claiming his rights, has, in bad faith, prolonged the duration of the litigation, the judge may reduce the legal or contractual interest or may refuse to allow interest for whole of the period during which the litigation has been unjustifiably prolonged (Egyptian Civil Code, Article 229)⁷⁵⁹.⁷⁶⁰
- iii. In a distribution of the price of expropriated property creditors admitted to the distribution will only be entitled, as from the date of sale by auction, to delay interest on amounts allocated to them in the distribution, if the purchaser is bound to pay interest on the price, or if the Court Treasury is bound to pay interest as a result of the deposit of the price at the Treasury and only to the extent of interest due by the purchaser or by the Treasury, which interest will be distributed amongst all the creditors pro rata (Egyptian Civil Code, Article 230)⁷⁶¹.⁷⁶²

⁷⁵⁵ Libyan Civil Code, article 229; Syrian Civil Code, article 227; Iraqi Civil Code, article 171.

⁷⁵⁶ Sanhūrī (1953-1954). Op.Cit., volume. 3, p. 245, p. 248.

⁷⁵⁷ Libyan Civil Code, article 235; Syrian Civil Code, article 233; Iraqi Civil Code, article 174.

⁷⁵⁸ Sanhūrī (1953-1954). Op.Cit., volume. 3, pp. 245-246, p. 248.

⁷⁵⁹ Libyan Civil Code, article 232; Syrian Civil Code, article 230; Iraqi Civil Code, article 173/3.

⁷⁶⁰ Sanhūrī (1953-1954). Op.Cit., volume. 3, p. 246, p. 248.

⁷⁶¹ Libyan Civil Code, article 233; Syrian Civil Code, article 231; no provision in Iraqi Civil Code.

⁷⁶² Sanhūrī (1953-1954). Op.Cit., volume. 3, p. 246, p. 248.

- iv. If interest is agreed, the debtor may, after six months from the date of the loan, give notice of his intention to terminate the contract and to restate the thing taken on loan, provided that the restitution takes place within a term not exceeding six months of the date of the notice. In such a case the debtor shall be liable to pay the interest due for six months following the notice. He will not, in any case, be bound to pay interest or to perform compensation of any kind by reason of the fact that payment is made before due date. The right of the borrower to effect restitution cannot be forfeited or limited by agreement (Egyptian Civil Code, Article 544).⁷⁶³ And this is wise process for forfeiting the interest even after an agreement between the debtor and creditor.⁷⁶⁴

D) Discussion:

Referring back to the way that Sanhūrī applied his conclusion about *Ribā* to the way *Ribā* is constrained in the Codes mentioned, we can comment as follows:

1. There is a disparity between the theoretical conclusion he created and the way he applied it to the Codes' provisions. Theoretically he refuted any considerable difference between commercial and consumptive loans. But in the justifications he advanced for acceptance of simple rate of interest he apparently depended on discrimination between the weak and powerful parties.⁷⁶⁵ However, whilst he described the law that prohibits the total interest rate exceeding the amount of the capital as a great maxim, he simultaneously commented: 'However, an evident need can put grounds for an exceptional permission to multiply/compounding usury in long-term productive/commercial loans.'⁷⁶⁶ As a matter of fact, giving permission to multiply usury on the basis of need is quite contrary to the

⁷⁶³ Libyan Civil Code, article 543; Syrian Civil Code, article 512; no provision in Iraqi Civil Code.

⁷⁶⁴ Sanhūrī (1953-1954). Op.Cit., volume. 3, p. 246, p. 248-429.

⁷⁶⁵ Sanhūrī (1953-1954). Op.Cit., volume. 3, p. 244.

⁷⁶⁶ Ibid., volume. 3, pp. 245-246.

conclusion he made when referring to *Ribā* of *al-Qur'ān* as the *Ribā* that is objectively prohibited and cannot be given any exceptional concession on the basis of a mere need. According to Sanhūrī himself, this type of *Ribā* can be permitted only on the basis of necessity. However, he believed that the evil of *Ribā al-Jāhiliyyah* returns to possibility of multiplying the rate of interest by the passage of time.⁷⁶⁷ Also, it is noticeable that to Sanhūrī it is unimaginable to decide an issue on the basis of a real and not exaggerated necessity so that the necessity cannot be met by any other means than committing an impermissible act. Be this necessity imaginable in the line of the debtor, it cannot be absolutely imaginable in the line of the creditor as there is no any imaginable necessity motivating a creditor to consume interest.⁷⁶⁸ Therefore, his application contradicts with his conclusion in two senses. Firstly, he did conclude that *Ribā* of *al-Jāhiliyyah*, which is prohibited mainly for the possible evil of multiplying the interest, is objectively prohibited, but in his application he did not consider multiplying interest as the *Ribā* that objectively prohibited. Secondly, he concluded that the *Ribā* of *al-Jāhiliyyah* cannot be permitted but with the state of necessity. However, in his application he opined that a mere need can render it permissible.⁷⁶⁹

2. He believed that one of the constraints the Codes imposed on usury is that the interest should be stipulated in the agreement. So, in case the interest is not stipulated in the agreement the creditor has no right to ask for interest. To the writer's knowledge, stipulating the interest does not make it acceptable. However, the writer believes that Sanhūrī considered it as a constraint on *Ribā* departing from the point of view that confines *Ribā* of *al-Jāhiliyyah* with the state where the interest is not stipulated first at the time of

⁷⁶⁷ Sanhūrī (1953-1954). Op.Cit., volume. 3, pp. 241-242.

⁷⁶⁸ Ibid, volume. 3, p. 242.

⁷⁶⁹ For further discussion on this point see: Abū Zahrah (n.d.). op. Cit., pp. 36-45.

advancing the loan; however, if the debtor could not pay the principal amount at the time of maturity, the creditor used to offer him two options: either to pay the principal or to increase the amount in exchange of an additional term allowed by the creditor. Hereby, some lawyers established a linkage between *Ribā al-Jāhiliyyah* and non-stipulation of the interest in the agreement. However, no Muslim jurist has established this linkage between *Ribā* and stipulation of interest in the agreement to show that *Ribā* prohibited by the Holy Qur'ān was restricted to claiming an amount for giving additional time to the debtor. If an increased amount is stipulated in the initial transaction of loan, it is not covered by *Ribā al-Qur'ān (Ribā al-Jāhiliyyah)*. Original resources of *Tafsīr* clearly show that the claim of an increased amount over the principal had different forms in the days of *Jāhiliyyah*:

- Firstly, while advancing a loan the creditor used to claim an increased amount over the principal and would advance loan on this clearly stipulated condition as is mentioned by Imam al-Jaṣṣāṣ in his *Aḥkām al-Qur'ān*. Imām Abū-Bakr al-Jaṣṣāṣ (d. 380AH) has explained *Ribā* in the following words ‘And the *Ribā* which was known to and practiced by the Arabs was that they used to advance loan in the form of Dirham (silver coin) or Dinar (gold coin) for a certain term with an agreed increase on the amount of the principal advanced.’⁷⁷⁰
- Secondly, the creditor used to charge a monthly return from the debtor while the principal amount would remain intact up to the day of maturity as mentioned by Imam Fakḥruddīn al-Rāzī:

‘As for the *Ribā al-Nasi’ah*, it was a transaction well-known and recognized in the days of -*Jāhiliyyah* i.e. they used to give money with a condition that they will charge a particular amount monthly and the principal will remain due as it is. Then on the maturity date they

⁷⁷⁰ Abū Bakr Aḥmad b. ‘Alī al-Jaṣṣāṣ al-Rāzī (1985). *Aḥkām al-Qur'ān*. Beirut: Dār Iḥyā’ al-Turāth al-‘Arabī. volume. 2, p. 184.

demanded the debtor to pay the principal. If he could not pay, they would increase the term and the payable amount. So it was the *Ribā* practiced by the people of *Jāhiliyyah*.⁷⁷¹ (Trans.)

- The third form is mentioned by Mujāhid (d. 104AH/722CE), but the full explanation of this transaction is given by Ibn Jarīr himself on the authority of Qatādah in the following words:

‘The *Ribā* of *al-Jāhiliyyah* was a transaction whereby a person used to sell a commodity for a price payable at a future specific date, thereafter when the date of payment came and the buyer was not able to pay, the seller used to increase the amount due and give him more time’⁷⁷² (Trans. T.W.)

After presenting the aforementioned statements, Shekh Taqi Usmani, in his precious comments on this argument concluded:

‘The *Ribā* prohibited by the Holy Qur’an ... had different forms which all were practiced by the Arabs of *Jāhiliyyah*. The common feature of all these transactions is that an increased amount was charged on the principal amount of a debt. At times, this debt was created through a transaction of sale and it was created through a loan. Similarly, the increased amount was at times charged on monthly basis, while the principal was to be paid at a stipulated date, and some time it was charged along with the principal. All these forms used to be called *Ribā* because the lexical meaning of the term is increase.’⁷⁷³

This shows clearly that the discrimination Sanhūrī created between *Ribā al-Jahiliyyah* and *Ribā al-Nasī’ah* is baseless. Also, confining the interest by the condition of stipulation in the agreement has no effect on the legal aspect of *Ribā*.⁷⁷⁴ This may be the reason why Sanhūrī, after a decade, recognized that the provisions relevant to *Ribā* in his Code(s) cannot in any way comply with the laws of Sharī’ah based on a correct and explicit methodology of understanding.⁷⁷⁵

⁷⁷¹ F. al-Rāzī (1938). Op. Cit., volume. 7, p. 91.

⁷⁷² Abū Ja’far al-Ṭabarī (2005). Op. Cit., volume. 2, p. 1595.

⁷⁷³ http://www.albalagh.net/Islamic_economics/riba_judgement.shtml.

⁷⁷⁴ For more details and a concret discussion about prohibition of commercial interest (*Ribā* of Conventional Banks) see: W. al-Zuhaylī (1997). Op. Cit., volume. 5, pp. 3741-3764; M. M. al-Jazīrī (2001). Op. Cit., volume. 2, pp. 185-188; Abū Zahrah (n.d.). Op. Cit., pp. 19-21.

⁷⁷⁵ Sanhūrī (1962). Op. Cit., p. 33.

Moreover, the apology Sanhuri advanced for interest is quite outdated. It is imperative that for the reconstruction of the economic system in the Arab and Muslim World, an interest free banking system should be established and run successfully on the Islamic pattern. There is a consensus among Muslim economists today that even without interest a banking system can be set up to discharge all the usual functions and beneficial services performed by the modern banking system based on interest.⁷⁷⁶ In an excellent work entitled ‘Banking without Interest’, Muḥammad Nejatullah Siddiqi presented a careful outline of interest-free banking and described how a banking system would be established on Islamic principles with rendering the fundamental services without which no modern developed economy can be conceived.⁷⁷⁷

It is not realistic to assume that the abolition of interest will reduce capital formation. On the contrary, interest tends to distort the signaling mechanism of the price system, brings about a misallocation of resources and ultimately slows down capital formation. This distortion takes place irrespective of the interest rate. High interest rates have served as an important deterrent to investment in the capitalist system. The rise in interest rates reduces profits, creates a liquidity squeeze by reducing the internal cash flows, forces increased short-term borrowing and rolling over of credits at higher rates, squeezing profits further and leading to bankruptcies. Low interest rates are equally the culprits. While high interest rates penalize entrepreneurs, low interest rates exploit savers, boost consumer spending, heat up speculative activity and promote unproductive investments. Moreover, they induced excessively labor-saving investments which generated unemployment. Low rate interest also contributes to inflationary pressures and unhealthy credit expansion and hurts long-run investment and

⁷⁷⁶ M. al-Zarqā' (2004). Op. Cit., volume. 1, pp. 284-286.

⁷⁷⁷ Muḥammad Nejatullah Siddiqi (2003). *Banking without Interest*, 1st edn. Delhi: Human Welfare Trust Publication. p. 11.

growth in the same way as high interest rates, though through a different cumulative process, as Chapra indicated.⁷⁷⁸

However, according to Irfan Ul Haq the practice of *Ribā*-free banking today is evident. Since Sharī'ah-based banking is already in operation, the evidence available shows that while there are some transitional difficulties, the problems are being solved and virtually all modern transaction needs required by a contemporary economy are being met. As far as the efficiency of an interest-free monetary and banking system is concerned, the evidence available on a nationwide basis in some Muslim countries suggests that it is positive and encouraging. In other words, functionally nothing has been given up or lost in the switch from interest-based banking to Sharī'ah-based banking.⁷⁷⁹

6.2.2 Analysis and Assessment

The project of Sanhūrī that is presented here is perceived to have commenced its first step since 1933 when Sanhūrī - prior to his departure for Iraq and on the occasion of the 50th anniversary of the National Courts – presented a study concerning the revision of the previous Egyptian Civil Code as his contribution to “*al-Kitāb al-dhahabī*” (Golden Book) commemorating that occasion. A lengthier version of this article appeared in ‘*Majallat al-Qānūn wa al-Iqtisād*’ In 1936 titled “*Wujūb Tanqīḥ al-Qānūn al-Madanī al-Miṣrī*” and he wrote and published his second article “*Min Majallat al-Aḥkām al-‘Adliyyah ilā al-Qānūn al-Madanī al-‘Irāqī*” in ‘*Al-Qaḍā’*’ 1936. But the motive behind it long preceded it. Sanhūrī himself viewed the starting point of the project as 1932 when an international conference on

⁷⁷⁸ Umer Chapra (1995). *Towards a Just Monetary System*. 1st edn. Leicester: The Islamic Foundation. pp. 115-117, pp.124-125.

⁷⁷⁹ Irfan Ul Haq (1996). *Economic Doctrines of Islam: A Study in the Doctrines of Islam and Their Implications for Poverty, Employment and Economic Growth*. Virginia: International Institute of Islamic Thought. pp. 131-132.

comparative law was held in the Hague during which Sanhūrī called upon legal professionals to recognize the Sharī‘ah as a distinctive legal system in its own right.⁷⁸⁰

Henceforth, Sanhūrī began concentrating on the Sharī‘ah to be one of the fundamental sources of a new code. However, the Sharī‘ah to him does not imply the merely immutable revelation-based laws of Sharī‘ah; those are infallible and not subject to erroneous applications. But it rather reflects a sense of legal knowledge manifesting itself in an integrated order associated with socio-historical and geo-political variables around which the Islamic Civilization circulated. It is an intellectual civilized formula that does not limit within boundaries of a single religion. It does rather consist of a variety of religious unites and sometimes stands equivalent to the term “East” to the extent of the shadow that this term tends to make. In his book *‘Naẓariyyat al-‘Aqd’* he defines Sharī‘ah in following words:

‘Along the Egyptian Judiciary’s Experience and Contemporary Codes, I did not ignore the Sharī‘ah; the law of the east, and East’s source of inspiration and intellect. It was planted in its deserts and grew up in its hills and valleys. It is a firebrand of the oriental spirit and the lamp of the light of Islam. Within it Islam and east meet each other then the east is enlightened by Islam and the eastern spirit will mix the spirit of Islam till they become united and one. This is the Islamic Sharī‘ah. If it can be properly prepared and its paths made serviceable, we will have in this wonderful heritage something which can give birth to the spirit of independence in our jurisprudence, our judiciary and our legislation, and this new light will shine forth in the world. And we will share side by side in the legal culture of the world.⁷⁸¹ (Trans. T.W.)

The impact of his concept about Sharī‘ah can be clearly touched in his initiatives for making the New Code(s) covers the Personal Law, as the old Code(s) lacked it. His excuse from rendering this matter possible in his Code later is a visional fact which concretely relates to his conception about Sharī‘ah. He wrote in 1936:

⁷⁸⁰ M. Īmārah (2006). Op. Cit., volume. 1, p. 155; E. Hill (1987). Op. Cit., p. 50.

⁷⁸¹ Sanhūrī (1934). Op. Cit., p.(w).

‘The New Code might cover the entire body of a Civil Law...And we do not want the laws of Personal Statute to be extracted from the Western laws. But it should be, in this respect, taken from the Islamic Sharī‘ah after rendering its application to the non-Muslim subjects proper.’⁷⁸² (Trans. T.W.)

After preparation of the Code, he came again to say: ‘There were some difficulties (barriers) before incorporating the family law in the New Code, because the reference of these rules is not only the Islamic Sharī‘ah but it has also other religious references.’⁷⁸³

However, the Islamic Sharī‘ah being a source of the New Code(s) is included under the general tenet that Sanhūrī mentioned before the approval of the Code by the Legal Committee of the Egyptian Parliament: “The legal provisions mentioned in the current project have an independent entity enough to separate from the historical references it was taken from...then the New Code will totally depart the historical reference from which it is extracted, be it any”⁷⁸⁴,⁷⁸⁵ but taking into consideration that the Sharī‘ah is a formal source of the Code(s), this separation would be less effective than the case may be with the other historical sources.

As an extension for the mentioned agenda, in his Egyptian project he relied on the Egyptian Judiciary principles as the first source of interpretation with regards to the provisions taken from the Sharī‘ah and then taking recourse to the references of Islamic jurisprudence was facilitated. Moreover, making it a condition that the concepts and decisions that to be taken from Sharī‘ah should agree with the principle doctrines of the Code(s); creates a gap between the historical sources and the provisions taken from them. This is all only to assert the

⁷⁸² Sanhūrī (1936c). Op. Cit., pp. 59-60.

⁷⁸³ Sanhūrī (1972). Op. Cit., volume. 1, p.26.

⁷⁸⁴ Ibid., volume., 1, p. (H-W).

⁷⁸⁵ T. al-Bishrī (1996). Op. Cit., pp. 19-20.

independence and sovereignty that he intended to have.⁷⁸⁶ However, the Iraqi project proposes taking recourse to the rules decided throughout the judiciary and jurisprudence both in Iraq and then the countries whose laws run closely to the Iraqi laws. The difference may appear when viewing the historical context of both Egypt and Iraq. The Iraqi judiciary and jurisprudential experience is almost Islamic meanwhile the Egyptian judiciary's experience, irrespective of the fact that it was limited to seventy years before enacting the New Code, reflects a partially amended version of French judiciary and jurisprudence than an Islamic legal print.⁷⁸⁷

In addition to that, Sanhūrī did believe that law is a living entity that cannot be limited between the two covers of a book or embodied in numerated texts. The law is a living body that grows up and develops within the environment where it raises. It is more flexible than being seized in rigid texts as long as the life is an everlasting progress and change. Thus no end can be seen for law except to assume the world has reached the last destination of progress that is considered the end of human maturity after which promotion is no more expected.⁷⁸⁸ However, it is not clear whether or not, in his eyes, the said definition is applied to the Islamic Sharī'ah which is understood to have a comprehensive and permanent character of application. But in a diary statement recorded in the Hague on 29th August 1924, he shows indirectly that he was including the Sharī'ah under the same hypothesis. He recorded:

'The *Qur'ān* and the *Sunnah* are the compiled rules of the Islamic law. However, their interpretation should follow a fundamental rule which is to consider a part of their rulings as generally applicable all times. The other part of their rulings is laid down for a particular time and place that they related to. Therefore, the later type of rulings cannot be extended to other cases except with unity of circumstances and causes...The *Qur'ān* and the *Sunnah* enjoined the

⁷⁸⁶ Sanhūrī (1972). Op. Cit., volume, 1, pp. 49-50.

⁷⁸⁷ IJM (1945). Op. Cit., p. 9.

⁷⁸⁸ Sanhūrī (1936c). Op. Cit., p. 3.

Muslims to follow the reason in their livelihood and to follow the dictates of reason and intellect by which the universal law of development is ascertained.⁷⁸⁹ (Trans. T.W.)

According to some Muslim jurists, like Dr. *Faṭḥī al-Duraynī*, Sanhūrī viewed that the same concept of separation is applicable to the rules of Sharī'ah. This belief led Sanhūrī, in his book '*Maṣādir al-Ḥaqq*' suspect the principle of supreme legitimacy '*Al-Mashrū'īyyah al-ʿUlīā*' of Islamic legislation⁷⁹⁰ as he said: 'The concept of legitimacy is not a permanent character. Rather, the perceptions can differ about. It is a progressing concept; the matter that was illegitimate yesterday could be legitimate today and that which was legitimate before can convert illegitimate in consequence.'⁷⁹¹

As a part of this approach, he believed that the source of *Ijmā'* (legal consensus) should play a great role through its institutionalization in developing the Sharī'ah.⁷⁹² The writer opines that perceiving *Ijmā'* as a source of development as approached by Sanhūrī does flow into the current of the concept thereof.⁷⁹³ This is because *Ijmā'* in Islamic Sharī'ah is to ensure the permanency of the legal rulings upon which a scholarly agreement is evident. Therefore, it is a source of legitimacy in Islam that ascertains the permanent rules of law that cannot be subject to change. However, the power of *Ijmā'* refers to the fact that the unity of opinion held up broadly by Muslim scholars over the world, despite the change of circumstances, space and place, demonstrates it as permanent and undisputable. Institutionalizing *Ijmā'* in the current situation of the Muslim nations is going to nationalize the concept more than globalizing the message of Islam. However, *Ijmā'* is different from

⁷⁸⁹ Nādiyah al-Sanhūrī, Tawfīq al-Shāwī (1988). '*Abul-Razzāq al-Sanhūrī min Khilāl Awrāqih al-Shakhṣīyyah*, 1st edn. Cairo: Al-Zahrā' li al-I lām al-ʿArabī. p. 159.

⁷⁹⁰ See the introduction written by Faṭḥī al-Duraynī on the book of: 'Abdūllah Ibrāhīm al-Gailani (1990). *Nazariyyat al-Bā'ith wa Atharuhā fī al-'Uqūd wa al-Taṣarrufāt fī al-Fiqh al-Islāmī*. Amman: Awqāf Ministry. pp. 3-5

⁷⁹¹ Sanhūrī (1953-1954). Op.Cit., volume. 1, p. 65.

⁷⁹² Sanhūrī (1936c). Op. Cit., p.115-116; Sanhuri (1989). Op. Cit., p. 61.

⁷⁹³ A. M. al-Sufiyānī (1992). Op. Cit., pp. 89-95.

Shūrā as the latter is held up within the changeable and disputable matters, while the *Ijmā'* is working for demonstration and preservation of the Muslim unity over all times and places. Changing the nature of *Ijmā'* and prescribing it as a source of change and development is running contrary to the notion and concept of *Ijmā'* itself. Therefore, the writer believes that Sanhūrī's invitation to institutionalization of this source and then making it a source of change and development is quite complementary to his perception of the idea of 'changeable legitimacy' thereof.⁷⁹⁴

To induce the main justifications Sanhūrī offered for taking recourse to Sharī'ah in the New Code one may get the following objectives:

- Extracting laws from Sharī'ah paves the way to sovereignty and independence in juridical, legal, and political authorities of Arab and Islamic countries.⁷⁹⁵
- Sharī'ah is the custom of the Arab countries.⁷⁹⁶
- The Sharī'ah is the path through which the Islamic *Ummah* can be united.⁷⁹⁷
- Scientific considerations following from the readiness of Sharī'ah for application and its high character that making it in some principles and theories prior and preferable to the other legal systems. These considerations could be either promoting the tenets of modern Arab law through examining credibility of the theories by the principles of Islamic Sharī'ah or filling the lacunae of the existing laws. However, there are some legal doctrines arguable and matter of severe debate

⁷⁹⁴ For further reading about *Ijmā'* consult: Muḥammad b. Idrīs al-Shāfi'ī (1999). *Al-Risālah*, 1st edn. Bairut: Dār al-Nafāis. p.268; 'Abdul-Malik al-Juwaynī (1997). *Al-Burhān fī Uṣūl al-Fiqh*, 1st edn. Beirut: Dār al-Kutub al-Ilmiyyah. volume. 1, pp. 262-263; Najm-Aldeen K. Kareem al-Zankī (2006). *Naẓariyyat al-Siyāq: Dirāsah Uṣūliyyah*, 1st edn. Beirut: Dār al-Kutub al-Ilmiyyah. pp. 348-353.

⁷⁹⁵ Sanhūrī (1934). Op. Cit., p. (D).

⁷⁹⁶ Nabil Saleh (1993). Op. Cit., p. 163.

⁷⁹⁷ M. 'Abdul-Jawād (1977). Op. Cit., p.44.

between world legal systems, then the lawmakers can inspire the Sharī'ah for making a preference.⁷⁹⁸

The comment the writer wants to record here is that Sanhūrī never absolutely and without sub-conditions called for implementation of Sharī'ah. In the part of law which was statutory he tied consultation of Sharī'ah with a must condition, which is to be proper with the tenets of the modern law. The Sharī'ah has been given an opportunity when there are lacunae in the Code(s). However, in most cases where Sharī'ah tended to fill lacunae, the experience of Egyptian judiciary, customary practice and principle of equity were consulted too.⁷⁹⁹ While a Senate Committee member argued that the alleged Islamic laws codified in the new project ultimately represent “European law, or in other words Roman law,” Sanhūrī tersely, and somewhat irritably, retorted: “This is Egyptian case law [in conformity with Islamic law].”⁸⁰⁰

In other words, during the long term run of the project, in the theoretical stage and executing stage, Sanhūrī did not release an unconfined and unbridled call for Sharī'ah implementation. Rather, he often emphasized that there are validated rules in Sharī'ah, and it contains theories and principles that if not superseding their counterparts in the modern law, they will stay equal and similar to them. He always formed his stance from a selective approach which aimed at having all schools of Islamic law as one integrated part and to have a selective methodology in coping with it. Therefore, he called for extending legal selections to non-Sunni doctrines of law to pursue a proper conciliation between the Islamic jurisprudence and the modern theories of law. However, as Shalakany emphasized, Sanhūrī never argued

⁷⁹⁸ Sanhūrī (1936c). Op. Cit., p.116; M. Imārah (2006). Op. Cit., volume. 1, p.160-161.

⁷⁹⁹ See M. 'Abdul-Jawād (1991a). Op. Cit., pp. 158-162; A. Shalakany (2001). Op. Cit., p. 234.

⁸⁰⁰ EMJ (1960). Op. Cit., volume. 1, p. 91.

that his Civil Code was unequivocally based on Islamic law, since his paramount aspiration was to modernize Islamic law through contact with comparative law.⁸⁰¹

However, some progress towards Sharī'ah in the project of Sanhūrī can be observed. For example, in his suggestions for the New Egyptian Civil Code, he proposed the Sharī'ah to be the third reference in drafting the New Code. But, it was made the second in the actual performance of the New Code. However, the same progress can be seen with regards to the Syrian and Libyan Civil Codes with reference to the descending order of the legislative sources in absence of a statutory law. Meanwhile, Sharī'ah occupied the third position among the reserving sources of the Egyptian and Iraqi Codes, it occupied - in the Libyan and Syrian Codes - the second rank after statutory law and before the customary practice, which often returns to the Sharī'ah complied customs more than otherwise.⁸⁰² Moreover, a large part of Iraqi Civil Code was extracted from the Sharī'ah laws, with special reference to the *Majallah* and *Murshid al-Hayrān*, as detailed before. The difference between the Egyptian Civil Code and the Iraqi counterpart is so large and broad that the researchers considered them as two different prototypes.⁸⁰³ Sanhūrī himself recognized the existence of this broad gap between the two prototypes. He likened the Egyptian Code to the modern Codes and approximated the Iraqi Code to the Sharī'ah. However, he recognized later in 1962 that neither the Egyptian Code nor the Iraqi Code can truly identify and embody a pure Islamic sample of law. They still reflect a Western legal culture rather than an Islamic one. After the issuance of both Codes, Sanhūrī concluded:

⁸⁰¹ A. Shalakany (2001). Op. Cit., p. 227.

⁸⁰² H. S. Amin (1985). Op. Cit., pp. 222-223.

⁸⁰³ E. Hill (1987). Op. Cit., p. 49.

‘The final aim that we shall endeavor to meet is to promote the Islamic jurisprudence according to the origins of its construction to derive from it a contemporary law that suits the age... And the New Egyptian Code or the New Iraqi Code is not rather than a code that suits the current time of Egypt or Iraq. The everlasting law for Egypt and Iraq and all Arab countries should be only the civil law that we shall derive from the Islamic Sharī‘ah after its promotion/elevation is rendered possible.’⁸⁰⁴ (Trans. T.W.)

In the Egyptian and Iraqi Codes, the principles of Sharī‘ah became a common law for the civil dealings after custom. However, in the Syrian and Libyan Codes Sharī‘ah principles constituted the source of legislation before custom and after the provisions of the Code directly. It is also noteworthy that the meaning of custom varies from one country to another based on the historical background that prevailed in each single country. Custom, for instance, in the Iraqi and Syrian context varies from that which prevailed in Egypt as the latter was implementing the National and Mixed Civil Codes for seventy years before Sanhūrī’s Code took place and customs generated from this application are less Islamic than customs generated from application of Sharī‘ah based laws. In contrast to this, the customs that prevailed in Iraq and Syria almost generated from Islamic culture as the *Majallah* was implemented in these two countries for decades (1876-1949 in Syria and 1876-1951 in Iraq). However, the *Majallah* had never been applied in Egypt and the West Arabia. The difference occurred in the arrangement of the descending order of the legislative sources may return to the effect of the local committees that were established to work with Sanhūrī. If it would be something given to Sanhūrī, it would have no such difference. This implies that the Codes were not an exact copy of Sanhūrī’s views and his own attitude towards the place of the Islamic Sharī‘ah.

However, the actual application of Sharī‘ah in the chain of Codes drafted by Sanhūrī could be classified into two main prototypes of Egypt and Iraq. Sanhūrī considered the

⁸⁰⁴ Sanhūrī (1962). Op. Cit., p. 33.

Egyptian Civil Code - after a decade of its enactment - as a true extract of the modern law rather than of the Sharī'ah law. The Iraqi Civil Code he perceived to be a sample for harmonization between Islamic law and modern law. He proposed the methodology adopted in codification of Iraqi law to be followed up by the Arab lawmakers in the future. This is to come up with the last and final phase of legislation in the Arab world that he mainly expected to be drafted from the Islamic law in light of the style of modern law but within the art of foundation of Islamic law itself after developing the functioning criteria that seems to be necessary. It implies that the place of Sharī'ah in particularities and faculties of the Iraqi Code compared to the Egyptian counterpart is greater owing to *Majallah* being the sample of law before the Iraqi authors in comparison to the old Egyptian Civil Code that constituted a true, however distorted, copy of the French Civil Code. Other Codes were true extracts of the Egyptian prototype with minor amendments as do the Syrian and Libyan Civil Codes. The Iraqi Civil Code was transmitted to the obligation part of the Kuwait Commercial Code. Therefore, it can be understood that the Egyptian Code remained the major paradigm for the Codes that had been drafted by Sanhūrī.

Although Sanhūrī recognized the difference between the two prototypes as regards the extraction from the principles of Sharī'ah, he continuously repeated that the entire Code is applicable to the Islamic Sharī'ah, if it is taken in its entirety to include all the opinions and schools of law in Islamic legal history.

It is historically evident that on 30 May 1948, the Senate Committee opened a session especially for discussion about the project of the New Egyptian Civil Code and members of Egyptian courts, the Bar association and law faculty of University of Cairo were invited. Sanhūrī defended his project and encountered the opposition group in a knowledgeable

manner. The question of utilization of Sharīʿah took up most of the discussion. The Code project was severely attacked in a special issue of *Al-Muḥāmmāh* journal in March 1948. This criticism against the project was signed by members of the Court of Cassation. Al-Mustashār Ḥasan al-Huḍaybī (the second *Murshid* of Muslim Brethren Movement after the demise of Ḥasan al-Bannā), Aḥmad ʿAlī ʿAlawiyyah, Aḥmad Fahmī Ibrāhīm, Muḥammad al-Mughnī al-Jazāʿirī and Muḥammad Ṣādiq Fahmī Bāshā along with other professors and scholars from al-Azhar University, like Sheikh Sharbīnī and Sheikh ʿAtrīs, thought that the project should be based on the Sharīʿah. However, a sample of law of contract which was allegedly based on Sharīʿah was published in the same issue of *Al-Muhamah*, to show how an Islamic Civil Code can be created. It can be inferred from the argument of Sanhūrī in encountering the criticism of this group of legal professionals or their representatives that Sanhūrī was of the belief that his code project can be applied in a way complying with the principles of Sharīʿah whether directly or indirectly. Sanhūrī is quoted as saying during the committee hearing:

‘We have not abandoned one single principle of Islamic law that we could include in the Code without making it. The proof is that the alternative draft code proposed by one of our honorable judges which was alleged to be exclusively derived from Islamic law, turned out to be identical with the present law.’⁸⁰⁵ (Trans.)

He claimed that if it was true that the provisions compiled in Ṣādiq Bāshā’s draft were Sharīʿah rules, then we would have been justified in claiming Sharīʿah origin for the provisions of the draft code itself. He demonstrated the alleged Islamic Code draft of Ṣādiq Bāshā is something consistent with modern codes and his project code as something agreeing with the provisions of Ṣādiq Bāshā’s draft. Sanhūrī, furthermore, was of the belief that he had taken all

⁸⁰⁵ EMJ (1960). Op. Cit., volume. 1, p. 159.

that possible to be taken from the Sharī'ah and had not used the foreign codes when he was able to take provisions from the Sharī'ah.⁸⁰⁶ In the same session, Sanhūrī confessed of that as the matter concerns the subject of contract, he cannot allege that he has extracted the laws from the Sharī'ah. But, the project in its principles and some precepts agree with the rules of Sharī'ah. As regards the rest of subjects under theory of obligations, Sanhūrī confessed of that the project generally did not extract from the Sharī'ah except issues explained in the 'explanatory notices' of the project, e.g., competence, gift, preemption, no inheritance except after the settlement of the debts, sale of a sick by death sickness, deception and implantation of trees in a leased land. He also mentioned that he has taken other general principles and details like lease of *Waqf* property, *Hikr* and lease of agricultural lands. However, as far as the matter concerns the general principles he mentioned that he cannot claim that they are extracted from Sharī'ah with an exception of the abuse of rights. Therefore, when Ḥāmid Bek Zaki concluded that the general part that relates to obligation is taken from the European Codes; however, the Sharī'ah was consulted in some particular issues in this respect; Sanhūrī commented that the general part of the Code is taken from the experience of Egyptian judiciary that agrees with the Sharī'ah.⁸⁰⁷

However, in the Iraqi Code it was possible to take more provisions of law from the Sharī'ah source. Yet, Sanhūrī permanently repeated that the Code, whether the Egyptian or the Iraqi prototype, complies with the Sharī'ah principles and laws.

⁸⁰⁶ See: EMJ (1960). Op. Cit., volume. 1, pp. 82-88; E. Hill (1989). Op. Cit., pp. 169-170; A. Shalakany (2001). Op. Cit., p. 227; T. al-Bishrī (1996). Op. cit., p. 129.

⁸⁰⁷ EMJ (1960). Op. Cit., volume. 1, pp. 90-91.

By this statement, he may have meant that the rules of the Code in consideration of Sharī'ah could be classified into two areas; an area whose rules are derived from the Sharī'ah directly or from its indicated principles and theories, and another area whose rules are mainly extracted from the modern law but will apply to the Islamic Sharī'ah if the latter is presented as a broad and flexible school of jurisprudence incorporating all the opinions and schools of law that emerged during Islamic legal history. This implies that the rules of the Code are either extracted from the Sharī'ah directly or they could be interpreted in a way compliant to Sharī'ah.

According to Shalakany, Sanhūrī's argument for the Islamic identity of the New Egyptian Civil Code is best understood in terms of a *five-prong test of Islamicity*. These five prongs –from the less direct one – are: First, the entire Code is *Islamic-by-default* since none of its precepts is in direct contradiction with Sharī'ah. Second, Islamic law fills the lacunae in the Code whenever there is no statutory law or customary practice to govern the dispute. Third, several precepts of the Code which represent modern law in its latest developments from individualism towards the 'social,' are concurrently presented as Islamic, e.g., constraints imposed on the power of will. Fourth, the Code is Islamic to the extent that it adopted the decisions of recent Egyptian case law which, according to Sanhūrī, had successfully modernized several aspects of Sharī'ah, e.g., gifts, wills and estates. Fifth, the Civil Code is Islamic to the extent that it has incorporated various chunks of Islamic law whether in forms of general theories or in forms of detailed practical solutions from the classical schools of Islamic

law as well as Islamic law provisions that were contained in the old Civil Code. Under this prong we find Code's objective spirit, theory of abuse of right and others.⁸⁰⁸

Besides that, Sanhūrī on some occasions confessed of the difficulty of this application to some rules of the Code as they clearly contradict with the rulings of Sharī'ah and any interpretation that gives them legality from an Islamic viewpoint will violate the supposed scientific method. It will be on the account of the Sharī'ah and the sound arts of its foundation, especially when the understanding of majority for the rules became a common view of the Muslims and became a part and parcel of the public order and considered as morality of the Muslim society. This may be the reason that pushed Sanhūrī in 1962 to pronounce some exceptions and recognize that they in no way comply with the Sharī'ah rulings, such as contract on non-existing objects, interest, and enrichment without just cause.⁸⁰⁹ However, this study concludes the fact that except interest⁸¹⁰ the other subjects mentioned above can apply to the rulings of Sharī'ah if taken in its entirety and with a flexible manner of compliance.

However, to return to Sanhūrī's defense before the Senate Committee and question the case of compliance of Sanhūrī Code with the Sharī'ah, as he proclaimed, is of a significant concern. The question is how Sanhūrī could claim that his Code complies with the Sharī'ah

⁸⁰⁸ A. Shalakany (2001). Op. Cit., pp. 229-230.

⁸⁰⁹ Sanhūrī (1962). Op. Cit., p. 33.

⁸¹⁰ After the Constitution of Egypt 1971 explicitly provided that the Sharī'ah is a principal source of law, the constitutionality of the Civil Code was challenged. The constitutional issue derived from a case was brought before Majlis al-Dawlah by Fuād Gudāh against al-Azhar University to collect an unpaid debt due on the price of some surgical instruments applied to the faculty of Medicine. The Court directed al-Azhar to pay the due amount with interest at the rate of %4. In course of an appeal by the Rector of al-Azhar, the constitutionality of article 226 of the Civil Code was challenged. In 1978 a resolution passed by Majlis al-Sha'b to form a special committee to study proposals for applying the Islamic law. In Constitution of 1980 the role of Islamic jurisprudence reemphasized. Upon that, it was required to have recourse to the rules of the Sharī'ah to the exclusion of any other system of law in order to insure that legislation does not contradict the foundations and principles of Sharī'ah. The Court on 4th May 1985 rejected the plea of the non-constitutionality of the article on the basis that only the legal enactments issued after the new Constitution will be affected. Simultaneously, the *Majlis al-Sha'b* was debating the matter of the application of the Sharī'ah in Egypt pursuant to the submission of the Report of Committee on Religious and Social Affairs, the third section of which was entitled, "Revision of the laws insofar as they are in contradiction with the rules of Sharī'ah." From all the discussions and the documents available on this issue, it is clear that the official standpoints of the Egyptian Courts and Government were to affirm that the majority of Code's articles have their origins in the rules of the Sharī'ah, except in a few rare instances. Therefore, there is no need to revise the laws of the present Civil Code; it is enough to amend the texts that conflict with the Sharī'ah. The Egyptian Government maintained the point that Egypt's legal system is one of stable laws which have their basis in the Sharī'ah, the Civil Code being a good example. Briefly quoted from: E. Hill (1987). Op. Cit., pp. 123-131.

and Sādiq Bāshā's alleged Islamic code complies with the modern laws. Therefore, Sanhūrī's code and Sādiq's code could comply with each other?

To answer the foregoing question we may have to present the controversial question that has arisen about the relation between the Islamic law and the Western law.⁸¹¹ Some of the orientalist who studied Islamic law like Adriaan Reland (1676-1718), Ignaz Goldziher, Joseph Schacht (1902-1969) and Eduard Lambert (the teacher of Sanhūrī) returned the foundation and emergence of this law to the influence of the Roman law.⁸¹² They denied the ascription of the entire laws of Sharī'ah to the *Qura'ān*, *Sunnah* and other subordinate evidence mentioned in *Uṣūl al-Fiqh al-Islāmī*. Departing from the fact that Muḥammad b. Idrīs al-Shāfi'ī (d. 204AH) in his jurisprudential encyclopedia '*Al-Umm*' had emerged with the laws on entire cases of life, they held that it is impossible for a scholar in the second and third centuries of *Hijrah* to independently emerge with the totality of jurisprudence without depending on external sources. Hence, some of them tried to prove that Shāfi'ī had taken the rules from the Roman law and he had learnt the Latin language to be capable in coping with the mentioned law. Therefore, they tried their best to link the concepts of Islamic law and the principles of Roman law. It implies that they totally denied the originality of Islamic jurisprudence. Later on, the Western investigators discovered the originality of Islamic jurisprudence and the failure of the allegations that they created before.⁸¹³ In other words, the last generation of orientalist deconstructed the mentioned allegation and proved that the Muslims had never been capable to attach with any legal books had been left behind by the

⁸¹¹ See: A. J. 'Adūb (2005). Op. Cit., pp. 17-48.

⁸¹² I. Goldziher (1946). Op. Cit., p. 47; Patricia Crone (1987). *Roman, Provincial, and Islamic Law: The Origins of the Islamic Patronate*. Cambridge: Cambridge University Press. pp.1-17, pp.102-106; S. Abū Ṭālib (1990). Op. Cit., p. 280; 'Abdul-Ḥamīd Mutawallī (1983). *Al-Islām wa Mawqif 'Ulamā' al-Mustashriqīn: Ittihāmuhum al-Sharī'ah bi-al-Jumūd wa 'Ulamā' ahā al-Aqdamīn bi-al-Ta'athhur bi-al-Qānūn al-Rūmānī*. Jiddah: Sharikat Maktabāt 'Ukkāz. pp. 44-45, p. 73.

⁸¹³ S. H. Abū Ṭālib (1990). Op. Cit., pp.280-354.

Romans.⁸¹⁴ As mentioned by Muhammad Hamidullah in his book entitled “The Emergence of Islam”, a French professor, Count Ostrorog, published a book, *The Angora Reform*, on this issue in 1928. He wrote that jurisprudence was the gift of the Muslims to the world. The ‘principles of jurisprudence’ belongs to Muslim jurists and until the last century it was not touched upon by any other nation of the world.⁸¹⁵

Some Arab and Muslim modernists, e.g. Aḥmad Amīn, in the last century blindly followed and trusted the allegations created against the originality of Islamic law.⁸¹⁶ Conversely, the conservative scholars reacted to the allegation and, contrarily, proved that the French law is almost a reduplicate of Islamic law presented according to the print of the Mālikī School of jurisprudence. In the time of Sanhūrī, some of the great Muslim scholars sent him some messages to convince him of the opinion. Amongst those scholars is Sayyid ‘Abdullāh ‘Alī Ḥusain (1889-1960) in a book entitled “*Al-Muqāranāt al-Tashrī‘īyyah*”. In the named book, the Sheikh tried to put the provisions of Islamic law according to the approach of Mālikīs along with the provisions of the French Civil Code side by side. But Sanhūrī rejected this view and described it as a simple investigation and something that does not generate any practical benefit to either the Islamic law or the modern law.⁸¹⁷ However, Sayyid Ḥusain was preceded by Sheikh Makhlūf al-Manyāwī (d. 1878) who previously commented on the French Civil Code according to the Mālikī School of law, by the demand of the Khedivī Ismā‘īl (1830-1895).⁸¹⁸

⁸¹⁴ S. H. Abū Ṭālib (1990). Op. Cit., p.280; A. Mutawallī (1983). Op. Cit., p.80.

⁸¹⁵ Muhammad Hamidullah (1999). *The Emergence of Islam: Lectures on the Development of Islamic World-View, Intellectual Tradition and Polity*, Trans. Afzal Iqbal, 3rd edn. Islamabad: Islamic Research Institute. p.85.

⁸¹⁶ Aḥmad Amīn (1975). *Fajr al-Islām*, 21th edn. Cairo: Sharikat al-Ṭibā‘ah al-Fanniyyah al-Muttaḥidah. pp. 246-248.

⁸¹⁷ See the foreword of Muḥammad Sarraj and others on: A. A. Ḥusain (2001). Op. Cit., volume. 1, pp. 19-25; Sanhūrī (1962). Op. Cit., p. 29.

⁸¹⁸ Ibid, volume. 1, pp. 28-30; Makhlūf b. Muḥammad al-Badawī al-Manyāwī (1999). *Al-Muqāranāt al-Tashrī‘īyyah: Taṭbīq al-Qānūn al-Madanī wa al-Jinā‘ī ‘alā Maḥḥab al-Imām Mālik*, 1st edn. Cairo: Dār al-Salām.

In an interesting article written by *Fawzī Adham* about the Impact of the Mālikī legal School on the French Civil Code ‘Napoleonic Code’, the author supported the approach of Sheikh Husāin:

‘The Islamic jurisprudence influenced the Civil and Constitutional laws of France. I did find a scripture in a book entitled “History of Arab Battles” by Amīr Shakīb Arslān (1869-1946) verifies that there existed in Geneva a profound Scholar known as Abu Zit...And he was companion and friend of Francois-Maire Arouet Voltaire (1694-1778), Jean Jack Russo (1712-1778), and Isaac Newton (1643-1727) in England...It is reported that Voltaire was asking him legal questions and calling him as the Great Scholar and the Arab Companion. Also, between him and Russo were exchanged some letters and messages which then were compiled in a particular book.’⁸¹⁹ (Trans. T.W.)

Moreover, the profound Orientalist Rene Sedillot (1906-1999) mentions that the French government asked the legal professionals to translate the book, ‘*Al-Mukhtaṣar fī al-Fiqh*’, authored by al-Khalīl b. Ishāq (d. 1422CE) and the task was handled by Nicolas Perron (d. 1876). In the directive that was given to him was stipulated that the Mālikī doctrine is the concern of the French government owing to the historical relations with the Arabs of Africa. The translation was published in 1847; forty years after the draft of Napoleonic Code to provide a reference for the way that the Napoleonic Code might follow in application.⁸²⁰

After mentioning the previous evidence, Fawzi concluded that the French Civil Code is ‘our own goods’ being returned to us and he advised not to consider the Arab Civil Codes as something anti-Islamic because the historical source of them is not the Napoleonic Code but a mere Islamic source. It seems, however, that the Egyptian lawyer Muḥammad Faṭḥī studied

⁸¹⁹ Fawzī Adham (2005). “Athar Fiqh al-Imām Mālik fī al-Qānūn al-Madanī al-Faransī”. In *A māl al-Nadwah al-lati ‘Aqadathā Kulliyat al-Ḥuqūq Jāmi‘at Beirut al-‘Arabiyyah bi-Munāsabat Mi‘atay ‘Ām ‘alā Iṣḍār al-Taqnīn al-Madanī al-Faransī 1804-2004*, 1st edn. Beirut: Manshūrat al-Ḥalabī al-Ḥuqūqīyah. pp.54-55; Al-Amīr Shakīb Arslān (1960). *Ta’rīkh Ghazawāt al-‘Arab fī Faransā wa Swisrā wa Iṭāliyyā wa Jazāir al-Baḥr al-Mutawassiṭ*. Cairo: Dār Iḥyā’ al-Kutub al-‘Arabiyyah. p. 278.

⁸²⁰ F. Adham (2005). Op. Cit., pp. 80-81.

this question and proved the same theory in his Doctoral dissertation at the Law Faculty in Lyon University 1912 and Gosserand (1855 –1932) was influenced by him, Fawzi added.⁸²¹

To examine Sanhūrī’s position on this question is a complex issue. But there are some texts of him showing that he was influenced by the trend that negates the originality of the Islamic jurisprudence. However, this understanding could be only estimation open to different views and various interpretations. Here, the writer would like to present some of Sanhūrī’s texts and explore the face of approximating the mentioned trend. First of all, when he described the Sharī’ah to be a source for the revision with regards to the Egyptian Code, he assimilated between the Islamic Sharī’ah and Roman law saying: “There has not been in legal history a law that stands on such firm bases of precise legal logic like the Roman law, except the Islamic Sharī’ah.”⁸²² Secondly, he stated - while discussing the sources of Islamic jurisprudence - that it is a pure jurisprudence that is created by the act of the jurists’ minds and then they ascribed their own legal reasoning to the *Uṣūlī* sources, merely because they were humble enough to abstain from self demonstration and self high grading. He delivered in “The Arab Civil Code”, published in 1962, the following statement:

‘It is usually said that the principle sources of Islamic jurisprudence are the *Qur’ān*, Prophetic traditions (*Sunnah*), the consensus (*Ijmā’*) and analogy (*Qiyās*). The *Qur’ān* and *Sunnah* are the super sources of Islamic jurisprudence. However, I mean by super sources that these two sources contain in many instances the general principles that drew up the directions of jurisprudence, but never have they constituted the jurisprudence itself. The Islamic jurisprudence, thus, is the work of jurists. They created it as similar as the Roman jurists and judges created the Roman law. Furthermore, they created a well established jurisprudence as to the clear jurisprudential art and the manifest styles of legal thought. You read the cases of Islamic jurisprudence in its primary books like *Zahir al-Riwāyah* of *Muḥammad b. al-Ḥasan* (d. 189AH/805CE) as similar as to read cases of Roman law in the writings of the Roman jurists of the scholastic age. Then when you go through the stage of classification, order of studies, the arrangements, the deconstruction and reconstruction of the Islamic jurisprudence, you will discover the jurisprudential arts in the most fantastic manifestations and the best of

⁸²¹ Ibid., p. 82.

⁸²² Sanhūrī (1936c). Op. Cit., p .114.

their galleries. With that, those profound and grateful jurists would tell you in a very humble way this is the *Ijmā'* or the analogy or juristic preference (*Istihsān*) or *Istiḥāb* or any other sources they created. And they would tell you that the basis of all their understanding is the *Qur'ān* and the *Sunnah*. In fact, they created a pure jurisprudence that occupies a great page in the record of global jurisprudence.⁸²³ (Trans. T.W.)

The above quoted text can be open to different probable interpretations. One of the understandings that could probably be inferred from it is that he did not believe that the juristic opinions are the product of *Uṣūl al-Fiqh*.⁸²⁴ Also, he might not believe that the *Qur'ān* and *Sunnah* were the origins of these jurisprudential approaches. Rather, they created an independent jurisprudence, but humbly attributed it to the sources they have created (fabricated). However, if you isolate this text from other provisions of Sanhūrī that assure the glory of Islamic jurisprudence, it may be inferred that he did think about the emergence of Islamic jurisprudence in the erroneous way that some orientalist had campaigned against it, especially in attributing the Islamic *Fiqh* to sources other than *Qur'ān* and *Sunnah* and other sources of *Fiqh* known in *Uṣūl al-Fiqh*.

In summary, whatever is to be said on the relation between Islamic law and French law, one point can be concluded on this subject matter. It can be said that the historical relation between Islamic law and the French Civil Code is evident whether the latter had taken from the former as the Muslim scholars believe, or the Muslim jurists took it from the Roman law as some Western thinkers and some secularist Muslims also did believe. It may be the reason why Sanhūrī easily claimed the applicability of his code to *Sharī'ah* and vice versa.

However, many scholars did believe that this claim cannot be true if the arts of foundation between the two legal systems are taken into consideration.⁸²⁵ Therefore, it may

⁸²³ Sanhūrī (1962). Op. Cit., p. 26-27; A. M. al-Sufiyānī (1992). Op. Cit., pp. 89-95.

⁸²⁴ A. M. al-Sufiyānī (1992). Op. Cit., pp. 123-142.

⁸²⁵ T. al-Bishrī (1996). Op. Cit., pp.19-20.

become true only if we are dealing with Sharī'ah in the way that returns the entire Islamic jurisprudential heritage including schools of Sunnis, Shiites, Kḥarijids and others to one historical and scientific way of foundation or more precisely to a single way of thinking about the principles of jurisprudence (*Uṣūl al-Fiqh*). However, it is difficult to prove the authenticity of such claims. The only way to make all schools and proceeded opinions inside the schools a uniform so the faces of difference amongst them will disappear could be simply by alleging that the principles and general evidences that each doctrine or denomination had adopted or created are only fictions or imaginative facts, and that the scholars had demonstrated them as evidence only to show their humbleness and honesty.

The researchers, however, have different opinions about the evaluation of Sanhūrī's project. Western writers who commented on the Code have traditionally downplayed its Islamicity or denied it altogether. Five years after its promulgation, J.N.D. Anderson in 1954 has found the Code authors' claims to Islamicity are exaggerated. Anderson's view has almost categorized the Code as European in origin, with perhaps a slight debt to Islamic law. The debt which the Code(s) actually owe to the Islamic law can best be summarized in four headings. There is, firstly, the inclusion of the Sharī'ah as one of the sources from which an appropriate rule or principle may be derived by the courts in default of any relevant provision in the Code(s); secondly, the Sharī'ah influenced the choice between certain concepts on which modern European Codes are divided; thirdly, a few principles or precepts newly borrowed from the Sharī'ah, whether exclusively or in part; and, fourthly, those provisions or principles

taken over by the previous Code from this source, in whole or in part, and preserved in their original or amended form.⁸²⁶

Also, Joseph Schacht and George Sfier both believed that ‘the Islamic law has not become one of its constituent elements to any greater degree than it had been in its predecessor.’⁸²⁷ More precisely, ‘Sanhūrī opted for a revision of the old Code rather than its replacement by a new one.’⁸²⁸ Therefore, Sfier concludes:

‘The Egyptian *al-Qānūn al-Madani*, which became a model for the Civil Codes of other Arab states from Algeria to Syria, is decidedly French in its orientation. More specifically it is said to draw on the French-Italian draft code of obligations of 1928 and other European codes, such as the German and Swiss, with certain rules clearly of Islamic origin.’⁸²⁹

Referring to Sanhūrī’s descriptions of the Code as an amalgam of existing (old) Egyptian law, Noel J. Coulson viewed the Code:

‘It represents a definite departure from the previous practice of indiscriminate adoption of European law, and may be regarded as an attempted compromise between the traditional Islamic and modern Western systems...on the fact that its provisions were an amalgam of existing Egyptian law, elements drawn from other contemporary codes and, last but not least, principles of the Sharī‘ah itself. As far as the actual terms of the Code itself are concerned, the debt owed to traditional Sharī‘ah law was slight...It may not be too fanciful to see here the embryonic beginnings of a process of the Islamization of foreign elements such as had taken place in the first two centuries of Islam.’⁸³⁰

In contrast, Enid Hill defended – to a long extent - the Islamic coloration of Sanhūrī’s works. Besides the fact that Enid Hill has defined the Sanhūrī’s work as an undertaking was “intended to produce a civil law as Islamic as the legal and social conditions existing at that time in the country permitted,”⁸³¹ she, in parallel, believed that an intermediate assessment is necessary. She opined that to view Sanhūrī as a reformer of Islamic law, misses the point

⁸²⁶ J.N.D. Anderson (1954). Op. Cit., p. 30-32. See also: Herbert J. (1975). Op. Cit., p. 97; E. Hill (1987). Op. Cit., pp. 72-73; A. Shalakany (2001). Op. Cit., p. 202.

⁸²⁷ A. Shalakany (2001). Op. Cit., p. 202 quoted: Joseph Schacht (1960). “Problems of Modern Islamic Legislation,” *Studia Islamica*, 12, p. 122.

⁸²⁸ Sfier (1998), p. 94.

⁸²⁹ Sfier (1998), p. 93.

⁸³⁰ N. J. Coulson (1964). Op. Cit., p. 153.

⁸³¹ E. Hill (1987). Op. Cit., p. 1.

because he worked for a secular Civil Code, but from the position of one committed to Islamic jurisprudence.⁸³² She also said:

‘To view Sanhūrī as a reformer of Islamic law, I believe misses the point, as does also the contention that the contribution of the Sharī‘ah to the New Egyptian Civil Code was small. The point is not that the legal rules in the Civil Code deriving directly and exclusively from Islamic law are limited in number; rather, it is the nature of the activity he first theorized and then applied that is interesting and significant.’⁸³³

‘Although at the time of its passage in 1948 there was considerable criticism that the New Civil Code of Egypt was not sufficiently Islamic, the record of the revision activities...shows...that the New Code was more closely derivative from the Sharī‘ah than al-Sanhūrī’ in fact claimed...⁸³⁴ Al-Sanhūrī’s own claims were relatively modest as concerns the Islamicization of the Code. He never said that he had produced an Islamic Code. It was rather a beginning, the setting of a direction...⁸³⁵ Al-Sanhūrī himself, writing some twenty years later, says that the New Code continues to be representative of Western Civil Culture, not Islamic Legal Culture. [However,] if the New Code had not become comprehensively Islamic it had become Egyptainized...Egyptianization, however, is itself not without a connection to Islamic law.’⁸³⁶

The evaluation of the Code(s) was always a matter of debate among the Eastern (Muslim and Arab) thinkers.

The prominent lawyer named Chafik Chehata had categorized the subjects of the Code for threefold: (1) matters of obligation or personal rights; (2) matters of property rights; and (3) Muslim law as a formal source of the law. It is in Chehata’s area of property rights that Anderson’s “new provisions” and “provisions from previous Code” appear. These are provisions of Islamic law applied directly, Chehata remarked. As concerns the obligations, its historical source is Roman law. But owing to the fact that Roman law did not construct a general theory of obligation, a resort was done to elements furnished by Muslim jurists to elaborate a general theory that can correspond to that elaborated from Roman law. Therefore, derivation from Sharī‘ah in this field is general and not particular to certain Articles

⁸³² Ibid., p. 14.

⁸³³ E. Hill (1989), p. 147.

⁸³⁴ E. Hill (1987). Op. Cit., p. 4.

⁸³⁵ Ibid., p. 81.

⁸³⁶ Ibid., p. 73-74.

incorporated a Sharī'ah legal rule. In general, the Egyptian legislator of 1949 has opted for the objective tendency and through his bias has linked up again with the line of Muslim judicial thought of the past. However, he has not borrowed the solutions directly from the Muslim sources and he had rather chosen solutions in Western codes which are consistent with this conception. As to the sources of the New Code the Islamic law became a formal source in all matters of civil law. Although the Egyptian legislator refers the judge to natural law and rules of equity in absence of the general principles of Islamic law, before turning to natural law the judge must look to that formulation of natural law established for a given society. For a Muslim society, it should be established on Islamic law. For Muslim society, the Islamic law becomes a kind of prelude to natural law in its specific sense. However, the Iraqi Civil Code is distinguished from the Egyptian, Syrian Codes because it has preserved a number of provisions of *Majallah*. While Syria had at least partially been replaced by legislations other than *Majallah* and the *Majallah* never applied in Egypt, it was still fully applied in Iraq.⁸³⁷

Majīd Khaddūrī and Amr Shalakany characterized the Code as being a blend of Western and Islamic principles as it attempted to forge a connection between two projects of identity and redistribution by resorting to the social as conceptual tool of mediation.⁸³⁸ Muḥammad 'Abdul-Jawād, al-Mustashār 'Abdul-Sattār 'Ādam, 'Isām Anwar Salīm, Faiṣal Maḥmūd al- 'Utbān and Muḥammad 'Imārah opined that it is collectively acceptable from an Islamic standpoint. For some of these Muslim thinkers, however, the Code paves the way to implementation of Islamic Sharī'ah.⁸³⁹ Moreover, 'Imārah included it under the project of

⁸³⁷ Chafik Chehata (1965). "Les Survivances musulmanes dans la codification du droit civil égyptien," *Revue Internationale de Droit Compare*, 17, pp. 839-853. See also: Herbert J. (1975). Op. Cit., pp. 98-100; E. Hill (1987). Op. Cit., pp. 77-80.

⁸³⁸ Majid Khadduri (1984). *The Islamic Conception of Justice*. Baltimore: Johns Hopkins University Press. p. 207; A. Shalakany (2001). Op. Cit., p. 205.

⁸³⁹ M. 'Abdul-Jawād (1977). Op. Cit., pp. 43-44; M. 'Abdul-Jawād (1991b). Op. Cit., pp. 165-166; 'Isām A. S. (1996). Op. Cit., pp. 109-129; Al-Mustashār 'Ādam (1969). Op. Cit., pp. 20-21; Faiṣal al-'Utbān (2000). "Al-Sanhūrī wa Mawqifuh min al-Sharī'ah al-Islāmiyyah," *Maj. Al-Mujtama'*, 7th March, 1391-1, pp. 41-42.

Islamization of law and considered Sanhūrī as the fifth Imam of Islamic jurisprudence after the four great profound scholars of Sunni doctrines.⁸⁴⁰

In contrast to this, Muḥammad Muḥammad Ḥusaīn, al-Mustashār Ṭāriq al-Bishrī, Sheikh Ūmar Sulaymān al-Ashqar and ‘Abbās Ḥasani Muḥammad opined that the project has jeopardized the Islamic Sharī‘ah.⁸⁴¹ The opponents criticized Sanhūrī’s Code and his attitude towards Sharī‘ah mainly for the following reasons:

- 1) Sanhūrī’s invitation for developing Sharī‘ah in the style of modern law and for conciliating the differences between the two different legal systems and then researching Sharī‘ah under principles of modern law can be understood as an invitation for amending or even changing the notions of Sharī‘ah so that it becomes distorted and disrespected.
- 2) Giving priority to customary practice over the principles of Sharī‘ah in the Egyptian Code’s sources order in absence of statutory laws, can be tasted as something against the honor and sanctity of the Islamic Sharī‘ah. However, assuming that the Sharī‘ah might not provide proper solutions for some cases, so that the recourse will be possibly done to principles of equity, is quite contrary to the nature of Sharī‘ah as it is perceived to encompass all the principles of equity and requirements of justice.
- 3) Offering the excuse about application of Sharī‘ah that it is not possible to be implemented unless being researched in the light of modern law, reflects a bad

⁸⁴⁰ M. ‘Imārah (2006). Op. Cit., volume. 1, pp. 5-209.

⁸⁴¹ Muḥammad Ḥusaīn (1986). *Ḥuṣūnūnā Muḥaddadah min Dākhlīhā*, 10th edn. Beirut: Mu’assasat al-Risālah. p. 111-118; T. al-Bishrī (1996). Op. Cit., pp.19-21; Ūmar Sulaymān al-Ashqar (1986). *al-Sharī‘ah al-Ilāhiyyah lā al-Qawānīn al-Jāhiliyyah*, 2nd edn. Kuwait: Dār al-Da‘wah. pp. 156-159; ‘Abbās Ḥasani (2000). “Hādihā Huwa Mawqif al-Sanhūrī Bāshā min as-Sharī‘ah,” *Maj. Al-Mujtama’*, 1st Feb, 1386-26, p.42.

evaluation for the Sharīʿah as it ought to be implemented even if such a type of study is not conducted.⁸⁴²

The plight and severe face of the mentioned criticism can be alleviated, if having acknowledged the Sharīʿah in the usage of Sanhūrī does not directly denote the Islamic revealed laws. It is rather used to mean an integrated form of Eastern legal culture that grew up under the light and shadow of Islamic civilization. Also, Sanhūrī was not the author of the Egyptian Civil Code by himself. Rather, he was a reviewer accompanied by his French teacher, Eduard Lambert.

The supporters and defenders of Sanhūrī appreciated the project and fully or partially dismissed the mentioned criticisms. They have taken into account the political context and legal circumstances that surrounded the project and stimulated the incidence of the event. As Muḥammad ʿAbdul-Jawād pictured truly, the Arab countries when inviting him to draft their codes, were - by the act of their interior circumstances, fresh independence and desires to build up the State's pillars inclusive of issuance of laws and necessary ordinances – hurried up creation of the project owing to the fact that they did not have enough time to wait for a Code purely extracted from the Sharīʿah as such a project was expected to take a long time. “Sanhūrī often advised us not to think about any form of Islamic Code before being fully occupied for it for ten years as the minimum, in order to be able to draft it in the style of contemporary Codes,” ʿAbdul-Jawād added.⁸⁴³

⁸⁴² Muḥammad Ḥusain (1986). *Op. Cet.*, p. 111-118; T. al-Bishrī (1996). *Op. Cit.*, pp.19-21; ʿUmar S. al-Ashqar (1986). *Op. Cit.*, pp. 156-159; A. Ḥasanī (2000). *Op. Cit.*, p.42.

⁸⁴³ M. ʿAbdul-Jawād (1977). *Op. Cit.*, pp. 45-46.

However, Muḥammad ʿImārah has a distinguished and special appreciation for Sanhūrī and his Codes. He firstly departed from the preposition that Sanhūrī had clearly called for application of Sharīʿah in his diaries and personal memorandums. He also quoted the texts wherein Sanhūrī is praising and appreciating the Sharīʿah. In addition to that, the gradual progress observed in transmission of the Code to other Arab countries showed a significant proof for the Islamic identity of his works. The role of Sharīʿah was drastically elevated in the Iraqi Code. However, some amendments had been done for the interest of Sharīʿah in the Syrian and Libyan counterparts as regards the place Sharīʿah occupied in the descending order of the sources and some other details.⁸⁴⁴

For the writer, judgment about identity of the Code should not be done based on extraneous proofs and evidence such as the diaries/memorandum of Sanhūrī away from an internal examination of the Code(s). However, in contrast to the assessment of ʿImārah, Sanhūrī's diaries show that the implementation of Sharīʿah was a serious dream of him that was seized to exist in the life of Sanhūrī.⁸⁴⁵ After the issuance of both Codes, Sanhūrī concluded:

‘The final aim that we shall endeavor to meet is to promote the Islamic jurisprudence according to the origins of its construction to derive from it a contemporary law that suits the age... And the New Egyptian Code or the New Iraqi Code is not rather than a code that suits the current time of Egypt or Iraq. The everlasting law for Egypt and Iraq and all Arab countries should be only the civil law that we shall derive from the Islamic Sharīʿah after its promotion/elevation is rendered possible.’⁸⁴⁶ (Trans. T.W.)

Therefore, quoting the texts that he expressed to show his appreciation to Sharīʿah, out of the overall context of all the texts he wrote, is misleading. If Sanhūrī was the person who

⁸⁴⁴ M. ʿImārah (2006). Op. Cit., volume., 1, pp. 5-209.

⁸⁴⁵ N. Sanhuri (1988). Op. Cit., p. 375; Sanhūrī (1962). Op. Cit., pp. 23-24.

⁸⁴⁶ Sanhūrī (1962). Op. Cit., p. 33.

described Sharī'ah as the light and guide to the Arab law and stated that there is some Sharī'ah law applicable right to date, he was also the person who praised the French jurisprudence, in the same context, and described it as “the pillar on which we rely and the light by which we shall find the way, and we are still intensified by its blessings till now.”⁸⁴⁷ In addition to that, evaluating the project from an Islamic perception should take into account the extent to which Sanhūrī had narrowed the application of ‘*Majallat al-Aḥkām*’ in Iraq, Syria and Libya and replaced it by the provisions taken from the modern codes, as Sheikh Muṣṭafā al-Zarqā’ indicated.⁸⁴⁸

Here, as conclusion of the aforementioned discussions, the writer would like to quote the realistic and well-balanced assessment advanced by Herbert J. Liebesny on this matter:

‘The foremost advocate in the Arab world of synthesis between the Sharī'ah and Western law has been ... Sanhūrī ...Codes or statutes based on Dr. Sanhūrī’s ideas and largely drafted by him have been enacted in Egypt, Iraq and Kuwait. The new Civil Codes of Syria and Libya have borrowed large portions of the Egyptian Code. It can thus be said that a new family of civil codes has developed in the Arab World which is less closely related to French Law than was the case with the previous Egyptian legislation...and which is much farther removed from Islamic law than was the *Majallah*.’⁸⁴⁹

However, the writer believes that making a precise decision about the Islamicity of the Code or otherwise, depends to a distant extent on how to apply the interpretation of Islamic law itself. Therefore, the writer emphasizes that the overwhelming majority of the Articles of the Code(s) could be exemplified and coincided by Islamic juridical opinions, if the Islamic law is to be taken in its entirety and interpreted in an extra-flexible way. But the problem with that is the credibility of this art of methodology and the extent of its compliance with the express arts of Islamic jurisprudence. Therefore, it is believed that the change that dramatically occurred to Sanhūrī’s judgments on the Code’s Islamicity between 1942 and 1962, was owing

⁸⁴⁷ Sanhūrī (1972). Op. Cit., volume. 1, p. (W).

⁸⁴⁸ Al-Zarqā’ (2004). Op. Cit., volume. 1, pp. 245-246.

⁸⁴⁹ Herbert J. (1975). Op. Cit., p. 93.

to his realization of the difference between a mere selective methodology based on the concept of eclecticism '*Talfīq and Takhayyur*' and a correct and precise methodology that takes the principles of *Fiqh* and the express arts of its foundation into account. This attitude was motivated by the subsequent experience of relying on the *Majallah* in drafting the Iraqi Civil Code, which perhaps influenced Sanhūrī's view on the potentials of modernizing Islamic law,⁸⁵⁰ as Shalakany demonstrated. Therefore, the claim of Islamicity of the Code(s) can be easily established on the concept of *Talfīq*, while it is difficult to make this claim evident if the arts of foundation of Islamic jurisprudence are truly considered.

⁸⁵⁰ A. Shalakany (2001). Op. Cit., p. 243.