Comparative legal science serves as an important tool for revitalization of Islamic law of contract in the globalized world. The blending of continental civil law rules with Islamic law principles, indigenous customs and commercial practice best conform to local culture and society. The literature of reformulation of contract law (mu'āmalāt) by comparative method within the schools of Islamic legal system and the western legal system has not been sufficiently studied.The underlying problem of this study is how to make the precepts of Islamic law in the realm of contract workable and, together with Western jurisprudence become part of the modern legislation within the contemporary economic exigencies. This study, which is confined to 'Abd al-Razzaq al-Sanhuri's Maṣādir al-Ḥaqq fi al-Fiqh al-Islāmī, attempts to answer the following question: First, what is the method of legal distillation applied in the Maṣādir al-Ḥaqq ? Second, to what extent the influence of Sanhuri's method of contract law in his jurisprudence (fiqh) with the New Egyptian Civil Code (al-Qānūn al-Madānī al-Miṣrī al-Jadīd) ? Third, to what extent Sanhuri's synthesis contributed to modern jurisprudence and legislation particularly in the Middle East? Different to the prevailing views of Islamic law scholars who maintain that Islamic law has been fossilized, stagnant and not being able to be applied, Mhd. Syahnan makes all due effort to show that the remolding of Islamic law has gone even beyond the boundaries of scientific level.

DR. Mhd. Syahnan, MA. is currently a lecturer of Islamic legal studies at Syari'ah Faculty and Graduate Program, State Institute for Islamic Studies of North Sumatra. Born in Kayulaut, Kabupaten Madina on September 5, 1966, he began his education at Mustafawiyah Islamic Boarding School and then continued to the State Institute for Islamic Studies of North Sumatra where he received his undergraduate degree in Islamic law in 1990. In 1991 and 1995 he was awarded scholarships by the British Council and CIDA (Canada International Development Agency) for Master program at SOAS-University of London and at the Institute of Islamic Studies, McGill University respectively. He won the Competitive Fulbright Dissertation Research Award to conduct research at Washington College of Law and Georgetown Law Center while pursuing doctoral studies at Syarif Hidayatullah State Islamic University which he then completed in July 2008. He is also an arbiter of the National Syari'ah Arbitration Council (BASYARNAS) of North Sumatra.

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A Note from the Head of the Office of Research and Development, and Training Ministry of Religious Affairs Republic of Indonesia

As the head of Office of Research and Development, and Training, at the Ministry of Religious Affairs of the Republic of Indonesia, I am proud to welcome the publication of this volume by Dr. Mhd. Syahnan entitled **Modernization of Islamic Law of Contract (A Study of 'Abd al-Razzaq al-Sanhuri's *Masadir al-Haqq fi al-Fiqh al-Islami*)**. The volume came out of a dissertation that Dr. Syahnan submitted to and defended at the State Islamic University, Syarif Hidayatullah, Jakarta, in 2008.

Syahnan examined in the volume three important questions:

1. What is the method of legal distillation applied by al-Sanhuri in the Masadir al-Haqq.
2. To what extent the influence of Sanhuri's method of contract law in his jurispru-dence (*fiqh*) on the New Egyptian Civil Code (*al-Qanun al-madani al-Misri al-Jadid*).
3. To what extent Sanhuri's synthesis contributed to modern jurisprudence and legislation particularly in the Middle East.

Following the procedures of library research and having examined the primary and secondary sources, as well as applying comparative analysis, Syahnan concluded that Sanhuri left mark on the development of civil code in Egypt and in the contemporary Muslim world. According to Syahnan, the chief contribution of al-Sanhuri to the development of law of contract in the Muslim world is two-fold. At the theoretical level, al-Sanhuri was successful in introducing a new method of Islamic legal studies, namely a comparative legal science by which one may pursue the

modernization of Islamic law. Al-Sanhuri explores the mechanism in which legal concepts have been dealt with by various schools of Islamic law and the prominent Islamic jurisprudents, how these concepts have become elaborated, and in what ways they have developed and changed over the course of the centuries and from one legal mind to the next. Similar procedures are also applied to western laws which interalia include Roman, Latin, French, and German laws. These are called internal comparison. The external comparison includes the comparison between Islamic legal schools and those of western ones. Al-Sanhuri covered in his comparative discussion a wide range of issues, but Syahnan limited himself in the description to such issues as the principles of law of contract, material versus personal rights, the subjective elements of intent and the theory of cause, *riba* and interest, *gharar* and the theory of risks, and change of circumstances versus the frustrated performance of contracts. At the practical level, Syahnan argued that al-Sanhuri's method was later adopted by, directly or indirectly, and implemented in Egypt and many modern Middle Eastern countries.

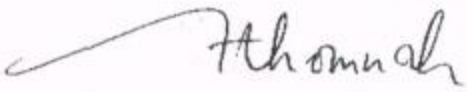
No doubt that this work of Syahnan is of high importance to the development of Islamic legal thought in the modern times, especially on the issue of law of contract. His extensive use of library materials that he had access to from both domestic and overseas libraries, was crucial to his success. His previous experience of training that had combined in himself excellently the tradition of learning from the Mustofawiyah Islamic Boarding School of Purba Baru in North Sumatra, and that from the SOAS-University of London and the McGill Institute of Islamic Studies, had advanced his ability of dealing with those library materials. This is an excellent study worth of reading.

Indeed, there are always rooms for suggestion to further enhance the value of the study. Two of them are worth mentioning

here. *First*, while the study is meticulous and well examined it seems lacking in putting law of contract as one of the most dynamic forms of Islamic legal literatures probably in par with *fatwas*. Other Islamic legal literatures which are probably less dynamic are in the following order: laws promulgated in Muslim countries, the rulings of judges in Islamic courts, the *kutub al-fiqhiyya*, the *hadith al-ahkam*, and the *ayat al-ahkam*. These forms of legal literatures have different characteristics in their elasticity to receive changes and modernization. *Secondly*, the study may need further efforts to deepen its examination to socio-cultural and socio-political settings that had surrounded al-Sanhuri in his writings. For this, the application of more thorough historical and sociological approaches may be suggested.

I do hope that other students and researchers follow the steps of Syahnan in this important path. May Allah bless his efforts and those who are walking on the tracks of *'ilm*.

Jakarta, Nopember 10, 2009
The Head of the Office,



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Bismillahirraḥmānirraḥīm

Praises all due to Allah alone for the endless blessing bestowed for the writer, may peace and blessing be upon the Prophet Muhammad who brought the light of truth to the universe. The idea of writing this dissertation stemmed from my ongoing interest since I was introduced into the field of Arab Comparative Commercial Law while studying at the School of Oriental and African Studies, University of London. In addition, it is my obsession to provide a more comprehensive study on Islamic legal system especially in the realm of mu'amalat as an effort to introduce an alternative solution to the world's economic crises. The research was conducted within a year in various libraries in Washington DC. such as the Library of Congress, Washington College of Law, American University, Georgetown Law Center, Georgetown University.

The stages of writing this dissertation had undergone a challenging process and received help from various individuals since I started the writing during the course of my study at UIN Syarif Hidayatullah Jakarta. In recognition of this I would like to extend my special thanks to Prof. Dr. Fathurrahman Djamil, MA. and Prof. Dr. Masykuri Abdillah my dissertation advisors who have assisted

me from the first step to the end of the project. I am also thankful to the board of examiners for noteworthy critique and comments for the improvement of this dissertation.

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I also would like to extent my gratitude to the Competitive Fulbright Dissertation Research Award Program for the grant to allow me to conduct the research at Georgetown University Law Center and Washington College of Law during August 2003 – February 2004. I am grateful to AMINEF especially to Dr. Richard L. Carhart, the executive director, and Piet Hendrardjo, program officer who painstakingly taking care of every step of my application for the scholarship.

I am deeply thankful to Prof. Teemu Ruskola my advisor at Washington College of Law, American University, for his encouraging and pertinent suggestions regarding the preliminary version of this work, Prof. Mohamed Mattar for his illuminating Trade and investment in the Middle East course, Prof. Lama Abu Odeh and colleagues of Middle East lawyers especially Loay, Judge Alaa El Shimy for all noteworthy discussion and comments. Many thanks also go to McGill alumni in Ciputat; collegues at Graduate School of UIN Syarif Hidayatullah academic year 2000, especially Mahmudi and Ridwan Nurdin; friends at Gg. Telaga Hijau 69 for their continuous support and with whom difficult times as a graduate

student passed by with ease. Although I have received great assistance from a variety of individuals during the years, nonetheless any error and weakness of analysis and presentation appear there in are mine alone.

Heartfelt thank goes to my parents the late Syaikh Abdollah Nasution (Tuan Kayulaut) and Salamah Lubis who showed me how to become a good person. My sincere thank goes to my parents in law the late Abd. Azis Lubis and Aishah Nasution for support and loving care for all my family, especially during the first two years of my stay in Ciputat, may Allah keep their souls in peace. My sincere thank goes to all my brothers, sisters and Siantar group for a very caring and affectionate relationship being in an extended family. Last but not least, my hearty thanks go to my beloved children: Fika, Luthfi and Faiz for their patience and understanding, and to my beloved wife Nurul Fithri Lubis, SE. Ak. who alone has to carry the burden of parental responsibility during the course of my study, and it is for them that I dedicate this work.

Ciputat, 27 Jumadits Tsani 1429 H./ 1st June, 2008

Mhd. Syahnan

ABSTRACT

The main conclusion of this dissertation is that comparative legal science serves as an important tool for revitalization of Islamic law of contract in the globalized world. The blending of continental civil law rules with Islamic law principles, indigenous customs and commercial practice best conform with local culture and society.

Methodology, the finding of this research overrules the view of Ignaz Goldziher in *Introduction to Islamic Theology and Law* (Princeton, 1981) and Joseph Schacht in *An Introduction to Islamic Law* (Oxford: OUP, 1964) in which both maintain that Islamic law has been fossillized, stagnant and not being able to be applied. However, the finding support Hallaq's opinion on his assertion of the continuing development of Islamic law in "On the Origins of the Controvesy about the Existence of Islamic *Mujtahid*s and the Gate of *Ijtihād*," in *Studia Islamica* 63 (1986): 129-41. He argues that the existence of the *fatwa* personal opinion is an indication of the existence of the *mujtahid* in different time and space. However, this research differs from that of Hallaq's to the extent that the results it shows that the remoulding of Islamic law has gone even beyound the boundaries of scientific level.

This research reveals that the principal initiative of this body of the *Maṣādir al-Ḥaqq* functions as an educational tool promoted as an effort to revive Islamic jurisprudence as a living law. In so doing, Sanhuri analyzes the *rationale* of a given concept in Western law as a parameter of his comparison and then studies how such concept dealt with in the four classical Sunni schools of thought. What's more, central to his scheme of reform is the discourse between traditional and modernity. In addition, his method has gone beyond a mere intellectual exercise which is marked by the application of his abstract idea of legal synthesis into the New Egyptian Civil Code.

Although Sanhuri's legal interpretation at a certain level does not abide by the strict standards of *ijtihād* prevailing among the majority of jurisprudents, but nonetheless the synthesis he introduces is based on his well-thought of contemporary legislation and the very principles of Islamic jurisprudence that promote public interest and justice inherent there in. And it is perhaps based on this consideration that he left mark on the development of civil code in the contemporary Muslim world.

In conducting the research, the writer analyzes the works of Sanhuri especially the *Maṣādir al-Ḥaqq fī al-Fiqh al-Islāmī* as the main focus of the study, his other works pertaining to legal reform which include *Le califat: son evolution vers une Societe des Nations Oriental*; *Le restrictions contractuelle a la liberte individuelle de travail dans la jurisprudence anglais*; *Naẓariyyat al-'Aqd* and *al-Wasīṭ: fī Sharḥ al-Qānūn al-Madanī* as primary sources and other relevant references as secondary sources. These references are approached by the method of analytical descriptive and comparative approach. In addition, the issues will be approached in the context of historical, social, political and economic settings in which the thought being developed.

TRANSLITERATION

The system of transliteration of Arabic terms and names in this dissertation follows the scheme for Arabic script employed by the Institute of Islamic Studies, McGill University, with a slight modification.

ا = a	ز = z	ق = q
ب = b	س = s	ك = k
ت = t	ش = sy	ل = l
ث = ts	ص = s̲	م = m
ج = j	ض = d̲	ن = n
ح = h̲	ط = t̲	و = w
خ = kh	ظ = z̲	ه = h
د = d	ع = ‘	ء = ’
ذ = dz	غ = gh	ي = y
ر = r	ف = f	

Short : ـَ = a; ـِ = i; ـُ = u

Long : ـَا = ā ـِيْ = ī; ـُوْ = ū

Diphthongs : ـَيْ = ay; ـَوْ = aw

Long with *tashdīd* : إِيّ and اُوّ, instead of īya and ūwa, we employ iyya and uwwa respectively.

In the case of *tā' marbūṭah* (ة) is written "ah" rather than "a" , unless it occurs within an *iḍāfah* where it is written "*at*".

The *hamzah* (ء) occurring in the initial position is omitted.

A Note from the Head of the Office of Research and Development, and Training Ministry of Religious Affairs Republic of Indonesia

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CHAPTER ONE
INTRODUCTION

A. Background

One of the major legal problems faced by the Muslim societies at the turn of twentieth century is Islamic legal (*sharī'ah*) reform, which provoked continuous political and intellectual controversies. Islam as a religion is a system th

at embodies fundamental precepts of divine origin covering all aspects of life both theology and law for all races in all space and time.[1] Historically, most aspects of law have been prevailing and applied in the realities of individual and social life from its inception further back to the time of the Prophet Muḥammad until contact with Western culture occurred. Islamic law had formally become

[1] According to its very tenets, Islam, probably more than any other religion, has the character of a jural system, which regulates the life, and thoughts of the believer in line with an ideal set of rules regarded as the only correct and valid one. This system, unlike positive law, proceeded from a high divine source embodying God's will and justice. As the expression of the will of God, the *Sharī'ah* is regarded as the most perfect, eternal and just, designed for all time and characterized by universal application to all men. See Abdur Rahim, *Principles of Muhammadan Jurisprudence* (Madras: n.p., 1911), 52-3, 56-8; M. Khadduri, *War and Peace in the Law of Islam* (Baltimore: n.p., 1955), 22-7.

the positive law at the time of the caliphate, sultanate and Islamic kingdom.[2]

However, the supremacy of Islamic law in the Muslim countries weakens with the impact of European imperialism that introduced their secular law and the process of their modern education provided for their subjects, which in turn, resulted in Euro-centrism.[3] During this era, the legal system of the Muslim societies that subjected to the administration of the colonial *master* underwent distinctive transformation in relation to the legal culture of the colonizing power. Thus, in India there existed *Anglo-Muhammadan Law*, and in Algeria is formulated *Le droit Musulman algerien*, both of which are a peculiar blend of common and French law with elements of *shari'ah* respectively.

The colonial master and the ruling elites have always forced the Westernisation process. Foreign borrowings from European legal systems and Westernisation of legal education were politically sensitive and may lead to controversy.[4] This is because such a phenomena apparently came to be associated with subjugation to European powers. Even the conservative circles consider these as reductions of Islamic tradition.

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[2] Studies on Islamic history and reform are numerous, the most notable of which see *inter alia* J.N.D. Anderson, *Islamic Law in the Modern World* (New York: New York State University Press, 1959) and his *Law Reform in the Muslim World* (London: The Athlon Press, 1976). For further references on Islamic Law in the modern World see John Makdisi and Marianne Makdisi, "Islamic Law Bibliography: Revised and Updated List of Secondary Sources," *Law Library Journal* 87 (1995): 136-63.

[3] See A.A. Fyzee, *Outlines of Muhammadan Law*, 4th ed. (Bombay, 1974); Herbert J. Liebesny (ed.), *The Law of the Near and Middle East: Readings, Cases and Materials*, (Albany: SUNY Press, 1975), 111-2.

[4] For discussion on the estimate of the possible connection between the teaching of the European law and the emergence of a particularly Egyptian model of nationalist political expression in the twentieth-century Mediterranian Arab world see, Ron D. Cannon, "Social Tensions and the Teaching of European Law in Egypt Before 1900," *History of Education Quarterly* (Fall, 1975): 299-315.

The end of imperialism threw lights in Muslim countries to formulate their own code, which is both practical and combinative distilled from Islamic tradition and Western law. The emergence of the compilation of *Majallat al-Aḥkām al 'Adaliyyah* was indeed a turning point in the history of modern Islamic law. For the first time Islamic principle of contracts and obligations based on Hanafi school of legal thought were enacted and organized exactly similar to that of the European Codes' model.[5] Furthermore, in 1917, The Ottoman enacted the Family Rights Law (*Ḥuqūq al-'Āilah al-'Uthmāniyyah*) based on Islamic precepts. Different to Turkey, which introduced secularism in its entirety, Egypt since nineteen thirtieth has made Islam as the main source of national law, although confined to matters pertaining only to personal law, which was *in so facto*, adopted as positive law.

Thus, basically, reform of the *shari'ah* law in the Muslim countries has been concentrated mainly in the area of personal status (*aḥwāl al-shakhṣiyyah*), which includes marriage, divorce and inheritance. The method used appears to be that of vastly simplifying and systematizing its appearance.[6] To put it differently,

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[5] For further information on legal nature and arrangement of Majallah, see S.S. Onar, "The Majalla," in M. Khadduri and H. Liebesny (eds.), *Law in the Middle East: Origin and Development of Islamic Law* (Washington: The Middle East Institute, 1955), 292-308; For further analysis within the larger historical context see also Serif Arif Mardin, "Some Explanatory Notes on the Origins of the "Mecelle" (Medjelle)," *The Muslim World* LI(3) (1961): 189-96 which is continued by the second instalment in the same journal LI(4) (1961): 274-9.

[6] The methodology of reform adopted in the Muslim countries in addition to *ijmā'* (consensus), *qiyās* (analogical deduction) and *ijtihād* (personal reasoning) include some new principles such as *takhayyur*/ eclectic choice and *talfiq*/patching together two legal rules. For further discussion on this, and the development of family law in various Islamic countries, see generally Tahir Mahmood, *Personal Law in Islamic Countries* (New Delhi, 1987), 1-14; idem, *Family Law Reform in the Muslim World* (New Delhi: The Indian Law Institute, 1972), 1-9.

the longest-enduring control of *sharī'ah* law was over personal status matters, although even in this area it was for the most part ultimately reformed or systemized in codes. Although a few states substantially reformed their legal and judicial systems in the nineteenth century, in most areas of the Middle East change did not begin in earnest until the early twentieth century. Newer legal systems generally concentrated on constitutions, criminal law, procedural rules, while matters involving Islamic contract law (*mu'āmalāt*) have remained relatively untouched by a true sense understood in modern legislation.

It is worthy of note that during the beginning of the independence era, many of the Muslim majority populated countries made a wholesale adoption to the prevailing legislations of their respective colonial masters. During the span of their developments, the application of these codes in the newly found homeland had received serious challenge on the ground of being alien culturally and psychologically at the least. However, despite increasing demand for reforming the code by giving more weight for the local content including Islamic legal provisions, this effort none has come to the fruition and Islamic law lost its exclusivity as the governing law of contracts.[7]

Interestingly, instead of making necessary revision to the adopted code to make it compatible with the national needs it was common that, under the shadow of the colonizing power, leaders of the Muslim countries introduced a special Islamic regulations

[7] There are at least two categories of the legal systems existed in the Middle East, namely, 1) those countries with no civil code such as that of Saudi Arabia and Oman and 2) those countries with civil code which include Egypt, Syria, Iraq, Kuwait, Qatar, Bahrain, Jordan, Yemen and United Arab Emirates. For further discussion see generally Sayyed Hassan Amin, *Middle East Legal Systems* (Glasgow: Royston Ltd., 1985); see also Nabil Saleh, "The Law Governing Contracts in Arabia," *International and Comparative Law Quarterly* 38 (October 1989): 766-74.

applicable exclusively for Muslim citizen which for some was again seen as the politics of *devide et empera* of the colonial past. To give as example is the case of Egypt whose marked feature of law reform at the end of the 19th century was that every national had its own courts and laws, which created confusion in the legal system.[8] In the Indonesian history too, the citizens before the law were divided into three different nationalities, namely the indigenous or native people, European and non-European that included the Arabs and Chinese. Based on the idea of C. van Vollen Hoven (1874-1933), who was once a professor at the faculty of law Leiden University the Indonesian archipelago was divided into 19 different law areas according to respective cultures, *adat*s and languages. However, the policy of this autonomous community had its own objective.[9]

It seems that reduction of the role-played by Islamic law in response to modern need seems to stem from hesitation - if not incapability – of *ulama'* and Islamist elites to formulate Islamic concepts that may be incorporated into the contemporary national legislation. As such, this scientific community at very general circumstances did not have precise definition of a particular term of Islamic law provisions and fails to take advantage of the rich and

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[8] Thus, in Egypt's history there established severel courts, namely, the Mixed Courts (*al-Maḥākim al-Mukhtaliṭah*) in 1875 with jurisdiction to hear cases involving foreign subjects, the Native Courts (*al-Maḥākim al-Ahliyyah*) in 1883, the Religious Courts (*al-Maḥākim al-Sharī'ah*) for Muslims, and (*al-Maḥākim al-Milaliyyah*) for the Jews and the Christian subjects. See Majid Khadduri and Herbert Liebesny eds. *Law in the Middle East* vol. 1 (Washington: The Middle East Institute, 1955), 330-3.

[9] This division of course also resulted in uncertainty. A.K.J.M. Strijbosch, "Methods and Theories of Dutch Juridical-Ethnological research in the Period 1900 to 1977," in Alison Dundes Renteln and Alan Dundes, eds., *Folk Law: Essays in the Theory and Practice of "Lex Non Scripta,"* vol. 1 (Wisconsin: The University of Wisconsin Press, 1995), 235.

diverse treatise of conventional *fiqh*. What's more, Islamic law is used as a mere political issue or as a slogan rather than as a true method of application. To put it differently, in many an occasion the effort of legal reform by incorporating local content appeared to gain little support from the authorities of respective countries. In the above situation, it is a bare fact that the role-played by Islamic law is gradually marginalized in forming the national law in such field as civil law. What's more, Islamic legal scholar knew only within the domain of their expertise, whereas secular lawyers also lacked the knowledge of their counterpart.[10] In addition, it also arise from the lack of a true comparative study between Islamic with other legal system that will enable the legislature to find an alternative solution to the ever-increasing problem.

In reviewing the legal reform in the field of civil law, in which contracts (*mu'āmalāt*) are included, a figure that deserves to be studied is 'Abd al-Razzāq al-Sanhūrī (1895-1971), an Egyptian jurist, politician and legal reformer.[11] With his long life theoretical and practical achievement, not only did he lay down the principles of reforming law by making synthesis of both Islamic and secular law but also he was also capable of putting his theory into practice while he was entrusted to lead a team to revise the Egyptian Civil

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[10] The expertise arrogance of scholars have been frequently one of the obstacles that make the process of incorporating Islamic and secular law into the national legislation bocome more complex. The obvious example in the context this study is the case of the Middle East. On the one hand, there was an intellectual movement that identified with European traditions while simulatneously maintaining a nationalistic ideology that valued Middle Eastern culture and identity, and the secular nationalist on the other. In contrast to this there existed the Islamists/ fundamentalsit Muslim. See Lama Abu-Odeh, "Modernizing Muslim Family Law: The Case of Egypt," *Journal of Transnational Law* 37 (2004): 1043, 1092-3.

[11] For further account on 'Abd al-Razzāq al-Sanhūrī's biography is exclusively treated Chapter III. Herein after Sanhuri.

Code. In fact, in the history of independent era, no country has made necessary amendment to its civil code of colonial heritage except that of Egypt.[12]

The work that embodies Sanhuri's theory of legal distillation at scientific stage is *Maṣādir al-Ḥaqq fī al-Fiqh al-Islāmī: Dirāsah Muqāranah bi-l-Fiqh al-Gharbī* .[13] This oeuvre tries to make effort to formulate *mu'āmalāt* (social dealings) aspect of Islamic law by means of legal comparativism with Western jurisprudence. Sanhuri urges that *Shari'ah* be made as source for codification both effectively and practically. Different to other lawyers, he is capable of giving universal and permanent characteristic for the legal phenomenon, including Islamic law. As a leading Egyptian authority in modern Arab legislation and a politician, he plays an important role in drafting the present Civil Codes of Egypt (effective in 1949), and a number of other Arab countries.[14]

In general, different from the traditional *fiqh* genre in terms of substance and organization, *Maṣādir al-Ḥaqq* is an examination of a question, which has caught the attention of modern Muslim jurists that is to extract a general theory of legal action from the dispersed

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[12] Egypt's lead in legal reform threw light in the other Middle Eastern countries to draft their own codes considering the close relationship of social, cultural, politics and economic aspects.

[13] *Maṣādir al-Ḥaqq fī al-Fiqh al-Islāmī: dirāsah muqāranah bi al-fiqh al-gharbī*, 6 vols. (Cairo, Jāmi'ah al-Duwal al-'Arabiyyah, 1954-9). This work contains the course of lectures given by Sanhuri in the Department of Legal Studies at the Arab Studies Institute, Cairo. Herein after *Maṣādir al-Ḥaqq*.

[14] The Code was essentially French Civil Code but it gave rooms for *Sharī'ah* as a supplementary source. The proposed draft was to become the blueprint for Egypt's new Civil Code, which then became the model and adopted by Iraq, Jordan, Kuwait and Syiria. Despite criticism, Sanhuri's role in developing the legal systems of the Arab world is undeniable. See Nabil Saleh, "Civil Codes of the Arab Countries: The Sanhuri Codes," *Arab Law Quarterly* 8(2) (1993): 161-7.

elements in the great classical treaties, which do not attempt to synthesize.

Each volume of the *Maṣādir al-Ḥaqq* has a twofold comparative organization. First, internal comparison within the Sunni Islamic jurisprudence and in some instances with other minor schools such as Shi'i, whereby the ruling of a particular school on a given case is compared to the doctrines of different schools of Islamic law. Accordingly, similar procedure applies to Western law which *inter alia* include Roman, Latin, French and German. Second, external comparison by considering legal concepts in European legal system and contrasted it with Islamic law both classical and modern. At this scientific stage, Sanhuri explores the mechanism in which legal concepts have been dealt with by various schools and the prominent Islamic jurisprudents, how these concepts have become elaborated, and in what ways they have developed and changed over the course of the centuries and how these concepts understood by one legal mind to the next.[15]

Sanhuri maintains that his remoulding of Islamic legal doctrines is aimed at reconstructing the legal principles through their adaptation to modern economic and social conditions. Surely, he does not share the opinion that Islamic law is dogmatically fixed and incapable of renewed life and development.[16]

This idea is closely associated with the established doctrine of the 'closing of the gate of independent reasoning' or *insidād bāb*

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[15] In the preface of *Maṣādir al-Ḥaqq*, Sanhuri describes the general purpose and approach applied. He argues that the bases of rights, whether personal or material, are most critical and ambiguous in Western law. Thus, we treat Islamic law using the methods of Western law, investigating whether there is in Islamic law personal rights and material rights as these are understood in Western laws derived from Roman law. See *Maṣādir al-Ḥaqq*, vol. I, 1.

[16] See further J.N.D. Anderson, "Law as a Social Force in Islamic Culture and History," *Bulletin of the School of Oriental and African Studies* 20 (1957): 16.

al-ijtihād which emerged in approximately the middle of the third century of the *Hijra* (late ninth century A.D.), and marked a new phase in the development of Islamic law. It began to gain ground among Muslim legal scholars that only the great jurists of the classical era were entitled to exercise independent reasoning or *ijtihād* on the ground of fear of utilizing it being too loose so that it was closed for public good. Consequently, later scholars should merely follow the masters, being confined to the interpretation of the authoritative manuals of the authoritative manuals of especially of the four major legal schools of thoughts. While in theory legal development was thus largely fossilized, this was, of course, not so in practice, although development doubtlessly was slowed.[17]

In his discussion of the role that Islamic law should play in the revision of Egypt's New Civil Code, he is critical of the static view of the historian, and he is rather inclined to be at the side of impartial jurists who properly describe Islamic law as the only system whose legal logic according to him it equals to that of Roman law.[18] He further maintains that Islamic law has undergone considerable variation and could easily place itself at the level of contemporary civilization. Thus if some orientalists, like Prof. Christiaan Snouck Hurgronje and Ignaz Goldziher have alleged that Islamic law is immutable and incapable of evolution, this is because they have viewed it as historians and not as jurists.[19]

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[17] For a more comprehensive and more recent study that has turned the previous thesis to the opposite see, *inter alia* Wael B. Hallaq, "Was the Gate of Ijtihad Closed?" *International Journal of Middle East Studies* 16 (1984): 3-41. Hallaq argues that Islamic law is still progressive since jurisprudents (*fuqahā'*) who exercize independent reasoning (*mujtahid*), and those qualified to issue legal opinions (*muftīs*) still continue to exist in due course of time.

[18] Al-Sanhuri, 'Le Droit Musulman comme élément de refonte du Code Civil Egyptien', in *Introduction a l'etude du Droit Comparé* (Paris: Librarie Générale de Droit et de Jurisprudence, 1938), vol. II, 622.

[19] Al-Sanhuri, "Le Droit Musulman," 622.

The re-examination of *shari'ah* in the field of *mu'āmalāt* in comparative perspective seems to be very relevant with the emergence of the idea of transforming Islamic law into the national legal system in Indonesia in the last few years. The possibility of it to occur becomes even greater when the government gave special status for the Province of Nanggroe Aceh Darussalam as pilot project to apply *shari'ah* in the region based on Law no. 18, 2001, which then followed by some other region around the nation. Pro and contra emerged both from Muslim elites and non-Muslims alike. However, this locally produced law or what is the so called *Kanun Shari'ah* gives more emphasis on regulating morally related actions than to practical social dealings among communities.

It is based on this context that the research on Sanhuri's legal pluralism is urgently needed. Of numerous works of Sanhuri, *Maṣādir al-Ḥaqq* is chosen as the object of study, because he is an important figure and a master architect of the Civil Code of a number of Arab countries, whose book is written as alternative solution for the transformation of Islamic law into national legislation. This research will try to analyse how Sanhuri distil the legal maxims of Islamic law and recasting them into a mould that shows sophistication and effective characteristic of modern positive law. As a major figure of the intersection of traditional Islamic culture with modernity, Sanhuri has left mark on contemporary Arab world.

B. The Identification of the Problem

The underlying problem of this study is how to make the precepts of Islamic law in the realm contract workable and, together with Western jurisprudence become part of the modern legislation within the contemporary economic exigencies. The literature of reformulation of contract law (*mu'āmalāt*) by comparative method

within the schools of Islamic legal system and the western legal system has not been sufficiently studied.[20] In fact, such a literature is an important Islamic intellectual heritage by which efforts of escavating such principles as fairness, justice and compassion inherent there in could be better understood. This research is confined to *Maṣādir al-Ḥaqq*, written by Sanhuri. Given that the scope of the book is extensive, the research is focused on selected themes.

Specifically, the problems that are raised in this research are summed up in the following statements:

1. What is the method of legal distillation applied in the *Maṣādir al-Ḥaqq*.
2. To what extent the influence of Sanhuri's method of contract law in his jurisprudence (*fiqh*) with the New Egyptian Civil Code (*al-Qānūn al-Madānī al-Miṣrī al-Jadīd*).
3. To what extent Sanhuri's synthesis contributed to modern jurisprudence and legislation particularly in the Middle East.

C. The Objective and Significance of the Research

1. Objective

Based on the problems mentioned above this research is aimed at uncovering the following objectives:

a). To find the method of legal distillation (*istinbāṭ al-aḥkām*) applied in the *Maṣādir al-Ḥaqq*.

b). To uncover the extent to which Sanhuri's method of contract law in his jurisprudence (*fiqh*) have influenced the New Egyptian Civil Code (*al-Qānūn al-Madānī al-Miṣrī al-Jadīd*).

[20] In a general term, studies that focus on comparing Islamic law with other legal system are confined to merely an intellectual excercise and featuring hyphotetical problem which at the most without any real practical application.

c). To find the extent to which Sanhuri's synthesis have contributed to the development of modern jurisprudence and legislation particularly in the Middle East and in the Muslim world in general.

2. Significance

At scientific level, this study of reform model of Islamic law by comparative method introduced by Sanhuri as elucidated in his *Maṣādir al-Ḥaqq* is hoped to function as source of inspirations for academician and legal practitioner in finding alternative solution to the emerging issues and to further the process of *ijtihād*. In addition, the end result of this research is hoped to become revision for reformulation of Islamic law, which has been allegedly fixed and immutable. What's more, it could also throw lights for further research on al-Sanhuri with a different method and approach of study.

At the practical level, this research would be of utmost importance for the countries that are planning to reform their civil codes. The significance of this study can also be felt specifically in Indonesian context where the need to introduce statutes pertaining to contract and obligations at the national level is so required and a growing advocate for this cannot be overemphasized.[21] It is a fact that contract of law thus far is based on Book Three of the Dutch Civil Code as the legacy of the colonial past, *Burgerlijk Wetboek*

[21] Those who consistently voice the necessity to reintroduce new national code are numerous, the most notable of whom are Prof. Bustanul Arifin, Prof. Jimly Ashiddiqy and Prof. R. Subekti to mention a few. Commenting on the problematic application of the provisions of *Burgerlijk Wetboek* Subekti argues that the best solution is to formulate national law of contract/ obligations. "Penyelesaian yang mujarab dan integral adalah tentunya: pembentukan undang-undang hukum perjanjian (nasional)". See his *Perbandingan Hukum Perdata*, 14th printing (Jakarta: Pradnya Paramita, 2000), 38.

(*Kitab Undang-Undang Hukum Perdata*), the content of which does not necessarily run parallel with the legal consciousness of Indonesian society. However, despite continuous call for revising such code, instead the government introduced Islamic business law, although still limited to procedures, to cater the Muslim's need. And it is in formulating substantive laws applicable to all nationalities regardless of race and beliefs, which are still to be decided by the authorities that this research laid its importance that in turn, will contribute to national legal development.

D. Literature Review

In spite of Sanhuri's theoretical and practical activity, his contribution as lawmaker and jurist has received little scholarly attention. Apart from a few articles of a biographical and general nature, his work remains virtually unknown outside the Arab world. Among literatures available are "'Abd al-Razzāq al-Sanhūrī: al-Rajul alladhī Faqadnāh,"[22] written by 'Abd al-Basiṭ al-Jami' and Diyā' Shīt Khattāb's "'Abd al-Razzaq al-Sanhuri, 1895-1971,"[23] each of which seeks to provide a survey of Sanhuri's biographical account. Although they cover almost all aspects starting from his early life, through to the formative stage and the later phase of Sanhuri's life, they are by no means comprehensive. Other writing of similar type is Emad Eldin Shahin's which is prepared for an encyclopedia under the title "'Abd al-Razzāq al-Sanhūrī (1895-1971)[24]. It presented

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[22] "'Abd al-Basith al-Jami'I, "'Abd al-Razzāq al-Sanhūrī: al-Rajul alladhī Faqadnāh," *Majallat al-Qaḍā'* (Baghdad), 27 (1972).

[23] Diyā' Shīt Khattāb "'Abd al-Razzāq al-Sanhūrī, 1895-1971," *Majallat al-Qaḍā'*, 26/3 (1971).

[24] Emad Eldin Shahin. "'Abd al-Razzaq al-Sanhuri (1895-1971)," in J. Esposito (ed.) *The Oxford Encyclopedia of the Modern Islamic World* (London, Oxford, New York: Oxford University Press, 1995), vol. 1, 7-8.

the life of Sanhuri as well as demonstrated his position in a wider context. However, based on the objective of its writing, it is very short and contains a very general explanation.

Enid Hill in her article "Al-Sanhuri and Islamic Law" is perhaps the most readable and widely referred to on introduction of Sanhuri's biography,[25] in which she surveys various aspects of Sanhuri's life and career at very general term. However, the most elaborated part of all include interrelation of the context of formative stage of Sanhuri's thought with the production of two doctoral theses while pursuing further studies at Lyon university, *Le restrictions contractuelle a la liberte individuelle de travail dans la jurisprudence anglaise*,[26] and *Le Califat: son evolution vers une Societe des Nations Orintale*,[27] for which he obtained the doctorate in Law and political science. In addition, this article discusses the process of the revision of the Egyptian Civil Code as well as presents the debate on the Islamicity of the code. Sanhuri's increasing maturity in legal and judicial practice that elevated him to politics is also analysed to a lesser degree. Hill also includes her article with a short discussion of Sanhuri's other works in addition to the two mentioned above namely *Maṣādir al-Ḥaqq* and *al-Wasīṭ*.

However, since it covers a wide variety of topics, it is by no means adequate treatment for Sanhuri's *Maṣādir al-Ḥaqq*,[28] as it is both very short and general. In addition, in terms of the sources she uses in her analysis for the latter case, she relied heavily on secondary sources that can be easily discerned from her exclusive reference to Y Linant de Bellefonds' French Book review instead of to *Maṣādir*

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[25] *Al-Sanhuri and Islamic Law*, Cairo Papers in Social Science, vol. 10, Monograph 1 (The American University in Cairo Press, Spring 1987).

[26] (Paris: Universite de Lyon – faculte de Droit, Marcel Giard, 1925).

[27] (Paris, 1926).

[28] Hill's specific discussion on *Maṣādir al-Ḥaqq* comprises only 2 pages.

al-Ḥaqq itself. This partly explains that the greatest obstacle to the undertaking of further comparative studies arises from the unavailability of source materials written in languages other than Arabic.

However, Hill's article is the only account of al-Sanhuri's biographical sketch available in English. In 1988, this work was republished in a journal and as part of a book,[29] without making any significant revision except for the title and the sub-topic. Nonetheless, this article is important as a preliminary introduction to materials for further study since it provides with sufficient bibliography.

A preliminary remark which is directly related to *Maṣādir al-Ḥaqq*, Y. Linant Bellefonds, at least, can be forwarded. His review "'Abd al-Razzaq al-Sanhuri: *Maṣādir al-Ḥaqq fī al-Fiqh al-Islāmī*,"[30] which was written in French for International Review of Comparative Law immediately after the publication of the latter was intended for non-Arabic speaking readers. It starts with a brief information about the author and then outlines the contents of the published *Maṣādir al-Ḥaqq* from volumes one to five. In addition, it also tries to highlight an overall picture and other aspects of advantages that differentiate *Maṣādir al-Ḥaqq* from other works within the wider spectrum of classical treatise of Islamic jurisprudence. However, due to its nature as a review, this four-page long French commentary is, of course, not aimed at treating the *Maṣādir al-Ḥaqq* in any details.

[29] Such an article under the same title was published in *Arab Law Quarterly* 3(1) (February 1988). And it also became as part of the book entitled "Islamic Law as a Source for Development of a Comparative the 'Modern Science of Codification', in Aziz al-Azmeh (ed.) *Islamic Law: Social and Historical Context* (London and New York, 1988), 146-197.

[30] Y Linant de Bellefonds, "'Abdel Razzak al-Sanhuri, *Masadir al-Haq fil fiqh al-Islami*," in *Revue International de Droit Comparé* 10 (1958): 476-9; idem 11 (1959): 633-9.

Another work that studies an aspect of Sanhuri's thought is "Al-Sanhuri's Reconstruction of the Islamic Law of Contract Defects,"[31] by Oussama Arabi. In this article, the writer attempts to study about the concept of misrepresentation in Islamic legal system. Which specifically concentrates on the rights for options to rescind the contract. Substantially, it covers specifically on the rights for options to rescind the contract. It provides arguments from different jurisprudents as well as projects it to the views of Sanhuri. However, the sources concerning Sanhuri's ideas in this article are not exclusively adopted from the *Maṣādir al-Ḥaqq* but rather from his more extended works such as *al-Wasīṭ*.

Studies that focus on a different spectrum is by Amr Shalakany in his S.J.D. dissertation "The Analytics of the Social: A Comparative Study,"[32] in which he maintains that the relationship between Sanhuri's anti-formalism and his socially conscious legal scholarship is a complex and strongly debated issue. Sanhuri did not think of his project as a codification of Islamic law. Islamic law was only one among many other factors that he took into consideration in order to contextualize the law, taken together with sociological realities, customs, decisions of Egyptian courts and a comparative study of major European and non-European legal systems. Shalakany further asserts that Sanhuri had a social agenda, in the sense that his work on codification was aware of the distributive potentials of his project and its role in addressing social inequality.

Another minor work worth mentioning is Shalakany's article "Sanhuri and the Origin of Comparative Law in the Arab World: (or

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[31] Oussama 'Arabi, "Al-Sanhuri's Reconstruction of the Islamic Law of Contract Defects," *Journal of Islamic Studies* 6(2) (1995): 153-73.

[32] Amr Shalakany, "The Analytics of the Social: A Comparative Study," (Unpublished S.J.D. dissertation, Harvard Law School, 1999).

[33] Eduard Lambert was Sanhuri's teacher at Lyon University in France and who was the then his co-author of the New Egyptian Civil Code.

How Sometimes Losing Your Asalah can be Good for You)" Shalakany focuses mainly on the context of Sanhuri's legal reform, yet in the analysis he also devotes extended thoughts to two other figures: Eduard Lambert[33] and Thariq al-Bishri,[34] a critic of Sanhuri. In this article, although Shalakany acknowledges the benefit of French Arab connection in bringing together modernization and Islamization in respective countries, but in the final analysis he finds that Lambert, Sanhuri and Bishri suffer from similar deficit, a nostalgia for an imagined pure Islamic past. A nostalgia appears as orientalist interest in an exotic, substantively other in Lambert, in attempt to recreate "pure" Islamic law by modernizing it in Sanhuri, and a desire to save Islamic law and keep it pure from European influence in Bishri. However, Shalakani is not so much interested in analysing how comparative law became operative in the legal reform in Egypt, but rather he examines the historical context and provides a critical alternative to the most common reading of Sanhuri. Accordingly, the negative tendency of tone and sympathy of Shalakany casts doubt on his subjectivity in overall reasoning, but nonetheless the value of this work stand on its own right.[35]

Majid Khadduri is perhaps the only scholar who analyzes Sanhuri in the frame of free thought and secularism. Khadduri takes the controversy of the caliphate which was launched by 'Ali 'Abd

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[34] Thariq al-Bishri, is one of the most eminent legal historians of contemporary Egypt. For details of argument on the issues of shari'a and secular law, see generally al-Bishrī's *Al-Mas'alah al-Qānūniyah Bayn al-Sharī'ah al-Islāmiyyah wa al-Qānūn al-Waḍ'ī* (Cairo: 1996).

[35] I have a privilege to discuss this issue with colleagues of Middle East lawyers especially Mohammed Loay and an Egyptian Judge Alaa El Shimy while conducting this research at Georgetown Law Centre and Washington College of Law during the years 2003-2004, which came out with illuminating thought and noteworthy comments. For example, it is interesting to find that according to them most of Shalakani's studies on Sanhuri are contrary to the prevailing views held within the Egyptian lawyers.

al-Rāziq as his point of departure. He concludes that the reason for the failure of Raziq and the success of Sanhuri may be attributed to the fact that the latter started to apply his method to that part of the law where it aroused little or no opposition from conservative elements.[36]

Finally, Nabil Saleh wrote on "Civil Codes of the Arab Countries: The Sanhuri Codes,"[37] focusing on the legacy left by al-Sanhuri for the Gulf States as written codes. In this article Saleh argues that in contrast to the case of French Civil Code which was mainly the product of Napoleon's will, or the policy of secularism and reform of the legal system in Turkey in the 1920 which was imposed by Kamal Ataturk, rather the Civil Code of Egypt was enacted by the people's representatives inspired by Sanhuri's ideas.[38] Unfortunately, Saleh's idea is expressed in only a few pages; one cannot expect to get a clearer picture of what he actually should come out with. However, one thing is certain, as he asserted that though the Arab legislators have been trying to make several attempt to revise the code, yet it has not received necessary revision up to the present time.[39]

A study that focuses on the sociological aspect leading to the revision of the Egyptian Civil Code is written by Guy Beachor as a Ph.D. thesis in Tel Aviv University in 1998 entitles "The Egyptian

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[36] See Majid Khadduri, *Political Trends in the Arab World* (Baltimore: Johns Hopkins University Press, 1970), 239-44; compare with other article on a somewhat similar issue, *The Islamic Conception of Islamic Justice* (Baltimore: Johns Hopkins University Press, 1984), 208-10.

[37] Nabil Saleh, "Civil Codes of the Arab Countries: The Sanhuri Codes," *Arab Law Quarterly* 8(2) (1993): 161-7.

[38] Nabil Saleh wrote "Civil Codes," 161.

[39] In relation to Sanhuri's legacy in the field of legal reform can also be found in Edge, Ian. "Comparative Commercial Law of Egypt and the Arabian Gulf," *Cleveland State Law Review* 34 (1985-86): 129-44.

Civil Code: In Search of Social Order, 1933-1949". While arguing that the Egyptian Civil Code of 1949 seeks to minimize the polarized Egyptian society and to forge a new community based on the concept of compassion, forgiveness and fairness, Beachor traces and analyse the initial description of the character of the New Civil Code way back to the jurisprudence of its draftsman, Sanhuri.[40] Part of this theses was published in *Journal of Islamic Law and Society* as "To hold a hand of the weak: The Emergence of Contractual Justice in the Egyptian Civil Law."

As mentioned above, it appears then, that the available literature reviewed has not dealt with al-Sanhuri's method of legal pluralism which is synthesized in *Maṣādir al-Ḥaqq*. This research will try to make an attempt to study a different dimension from the literatures mentioned above.

E. Methodology

This study is a library research, which is framed as an historical study of ideas. Presentation of al-Sanhuri's thought and career is maintained by focusing the discussion on the context and development of Islamic law in Egypt at the turn of the 20th century.

Based on this approach, steps to be followed in this research are:

First, collecting the data or literature which comprises of primary sources and secondary sources. The works of Sanhuri constitute the primary sources of this study, and thus a close reading of his multi volume *Maṣādir al-Ḥaqq fī-l-Fiqh al-Islāmī: Dirāsā Muqārana bi al-Fiqh al-Gharbī* (Cairo: 1954-1959) will be undertaken. His other published books will also be referred to such books as *Le restrictions*

[40] See generally Guy Beachor, "The Egyptian Civil Code: In Search of Social Order, 1933-1949" Ph.D. Dissertation (Tel Aviv University, 1998), part of which was published in *Islamic Law and Society* 8(2) (2001): 179-200.

contractuelle a la liberte individuelle de travail dans la jurisprudence anglaise (Paris: Universite de Lyon-faculte de Droit, Marcel Giard, 1925); *Le Califat: son evolution vers une Societe des Nations Orintale* (Paris, 1926), *Sharḥ al-Ijār, Naẓariyyat al-'Aqd, al-Qānūn wa al-Iqtiṣād, al-Wasīṭ: fī Sharḥ al-Qānūn al-Madānī al-Jadīd* (Cairo, 1952-1970), 12 volumes.

In addition to the above sources, Sanhuri's important article in various journals and his autobiography concerning legal reforms and social issues will be consulted in order to have a clearer picture of his thought. Attention will also be paid to other books and journal articles by other authors dealing with politics, history, culture, economy and social sciences which are considered supporting to the discussion. With regard to the reference tool throughout the presentation of this dissertation, Kate L. Turabian's *A Manual for Writers* will be consistently used.[41]

Second, the analysis presented here describes and interpret the work under review by using the method of analytical description. Since the main issue in this research in the legal sphere whether Islamic or Western, literary and semantic approach will be used. Given that the title of the book under study is in itself a comparison, it is unavoidable that comparative approach will also be used.

On the other hand, this research may also be expanded to the history of legal thoughts of jurisprudents. In addition, How al-Sanhuri's theoretical method operates at the practical level in drafting the Civil Code in Egypt and Iraq will be analysed, because it is only by this method that the totality of al-Sanhuri's theory will be more valuable, and most importantly his thought can be better understood.

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[41]Kate L. Turabian, *A Manual for Writers of Term Papers, Theses, and Dissertation* 5th ed. (Chicago: The University of Chicago Press, 1987).

F. The Structure of the Study

In dealing with the issue, the research will consist of six chapters.

Chapter one provides an introduction to the study, which includes the background and the subject matter of study, identification and limitation of the problem, the significance of the research, review of literature available in the field, methodology as well as the structure of the study.

Chapter two analyzes Sanhuri's background consisting of his early life, his education from Khedieval law school to further study at Lyon University in France. His career as politician, lawyer and a teacher as well as his achievement and works will also be discussed. These aspects are important to be taken into account as they underpin the future course of Sanhuri's career academically, socially and politically which shall be referred to frequently throughout the study.

Chapter three seeks to provide an overview of the comparative study of law and the legal systems. In so doing this section will attempt to trace the historical development of comparative law, which constitutes the concept, function and aim, as well as the method of comparative law. In addition, given that legal comparativism is the most significant means of Sanhuri's scheme of reform, this section also will trace the historical origin of comparative law in the Middle Eastern world.

Chapter four will analyze method of comparison of the *Maṣādir al-Ḥaqq*. It analyses various aspect of such an oeuvre including discussion pertaining to composition and structure which is then followed by methodology of comparative law and new concepts introduced into *Maṣādir al-Ḥaqq*. This part will also analyse the position of Sanhuri's method of legal comparativism in formulating law within the wider spectrum of modern comparative law.

Chapter five analyzes some specific themes of how comparative theory operates in the six-volume *Maṣādir al-Ḥaqq*. The topics treated by Sanhuri in these works are extensive, but nonetheless though it might seem arbitrary, the choice of the preceding themes perceived to represent the most important issues in the whole work. The selected themes cover such topics as discussion of Islamic law of contract and its principles; real/ material rights versus individual rights; subjective element of intent/ *niyyah* and the theory of cause; usury/ *ribā* and interest; theory of risk/ uncertainty and *gharar*, frustrated performance of contracts or the change of circumstances/ *naẓariyyah al-ḥawādith al-ṭāri'ah*).

Chapter six provides an examination of the legacy of Sanhuri towards the development of modern legislation in the Muslim world at large and in the Arab countries in particular. Thus, the role-played by Sanhuri in drafting the new civil code of Egyptian and his scheme of legal reform in this code will be discussed. Likewise, his involvement whether directly or indirectly in the process of drafting codes for other Arab countries will also be taken into account. At this juncture, the significance of Sanhuri's legal pluralism and critique of his theoretical frame will be presented.

The last chapter draws an overall conclusion that constitutes a general summary and reflection of the research.

CHAPTER TWO
A BIOGRAPHICAL SKETCH OF 'ABD AL-RAZZĀQ AL-SANHŪRĪ

This chapter is an attempt to elucidate the bibliographical sketch of 'Abd al-Razzāq al-Sanhuri. While outlining the stages of Sanhuri's intellectual life, several aspects, they are the milieu in which he lived in, social, political and intellectual currents will be taken into account. These aspects will be discussed and analyzed in order to determine the extent to which these factors had shaped his thought and how these factors had influenced the future course of his life and career. In so doing, the discussion then begins with Egypt at the turn of the 20th century whichfollowed by his upbringing and early education as youth; it then continues to explore the wonder years as a student of law both in Egypt and the University of Lyon. His career as a teacher, academician and politician will be discussed. Finally, it ends with analyzing his activities in legal drafting of civil code of a number of countries, and not the least, is his writing and teaching activities to which the whole of his life finally rest.[1]

[1] The sources for this biography are greatly derived from the following eclectic list: *Al-Mawsū'ah al-Arabīyyah al-Muyassarah* (Beirut: 1965), 1024; D.Sh. Khattab, "'Abd

A. Egypt at the Turn of the 20th Century

Conquered by the Ottoman Empire 1517, Egypt remained dominated by the semi-autonomous Mamluks until it was finally invaded by the French in 1798.[2] Led by Napoléon Bonaparte, the expedition subjected Ottoman Egypt to a direct confrontation with the dynamic civilization of Europe. However, due to the wake of the popular upheaval the French were expelled in 1801, and Egypt was then ruled by Muḥammad 'Alī (1804-1841).[3] During his reign (1805-1849) as *wālī* of the country, 'Ali introduced Western method of modernization into the administrative, economic and military structures. As such, although he appeared to be as a vassal of the Ottoman Empire, he was able to pull Egypt even further out of the Ottoman control. The position of Egypt became more important with the completion of the Suez Canal in 1869, as a focal point of world transportation, although it simultanously fell into debt. Supposedly to protect its investments, Britain seized control of Egypt's government in 1882, but nominal allegiance to the Ottoman

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al-Razzaq al-Sanhuri, 1895-1971" *Majallat al-Qaḍā*, 26(3) (1971); 'A.B. Jāmi', 'Abd al-Razzāq al-Sanhūrī: al-rajul alladhī faqadnāh" in *Majallat al-Qaḍā'* (Baghdad), 27 (1972); A.F. Mursi, 'Ustādh al-Asātidha' in *Al-'Id al-Mi'awi li Kulliyat al-Huquq* (Cairo, 1972); M.M. al-Qulali, 'Kalima' in *Majallat Majma' al-Lughah al-'Arabiyyah* 29 (1972): 270-82; Emad Eldin Shahin. "'Abd al-Razzāq al-Sanhūrī (1895-1971)," in J. Esposito (ed.) *The Oxford Encyclopaedia of the Modern Islamic World* 1 (Oxford: Oxford University Press, 1995) 7-8; Muḥammad Imārah, *Al-Duktūr 'Abd al-Razzāq al-Sanhūrī: Islamiyat al-Dawlah wa al-Madaniyah wa al-Qānūn* (Cairo: Dar al-Rashad, 1999); Enid Hill, *Al-Sanhuri and Islamic Law*, Cairo Papers in Social Science, vol. 10, Monograph 1, (The American University in Cairo Press, Spring 1987), is perhaps still the best work available in English for a general introduction to al-Sanhuri's biography.

[2] See Raymond Baker, "Egypt," in John L. Esposito, ed., *The Oxford Encyclopedia of the Modern Islamic World*, vol. 1 (New York, Oxford: Oxford University Press, 1995), 429-430. Herein after quoted as Raymond Baker, "Egypt."

[3] For a concise but informative account on Muḥammad 'Alī's role in the Egyptian history, see Raymond Baker, "Egypt," 430.

Empire continued until 1914. Partially independent from the UK in 1922, Egypt acquired full sovereignty following World War II with true self-rule occurring in 1953 with the rise to power of General Abdul Gamal Nasser.[4]

The legal system in Egypt is based on Shari'ah and civil law derived from French Civil Code and European influencies. The law of persoanl status is the primary area where shari'ah is today applied, with criminal and civil law being derived primarily from the French heritage. *Sharī'ah* however, remains a source of guidance to the secular Courts in the absence of any specific legal provisions. In fact, during the 1970s and 1980s Muslim political activists fought with some success to advance the impact of *sharī'ah* in adjudication, reversing for example a liberal law of personal status expanding the rights of women and achieving the passage of a constitutional amendment making the *sharī'ah* in principle, the sole source of legislation.[5] The pressure of the Muslim political activists on the Goverment to adopt *sharī'ah* completely was rejected on the basis that 95 per cent of Egypt's laws were already consistent with or derived from Islamic law. In 1985 the People's Assembly rejected demands for the immediate adoption of *sharī'ah* but supported a recommendation to review all statutes and change the ones that conflicted with Islamic law.[6]

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[4] Ali E.Hillal Dessouki, "Egypt," in Reeva S. Simon et al., *Encyclopedia of the Modern Middle East*, vol. I (New York: The Middle East Institute of Columbia University, 1996), 609-612.

[5] See Ann Elizabeth Mayer, "Modern Legal Reform," in the *Oxford Encyclopedia of the Modern Islamic World*, Vol. 2, (New York and Oxford: Oxford University Press), 471.

[6] The process which continued for years, necessitated the review of approximately 6000 laws and 10,000 peripherial legal acts.

Legal Authority in the State of Egypt

In the Mid-19th century, Egypt's modernizing ruler, Muḥammad 'Alī Pāshā, began the process of attacking the legitimacy of the *ulamā*'s role in legal affairs in Egypt. In a departure from tradition, he refused to seek the jurist's council in state affairs, ceased channeling religious taxes to them, and silenced their participation in the political process. Nonetheless, wary of the sentiments of the masses, Muḥammad 'Alī continued to pay lip service to the dominance of Sharī'ah over the Egyptian legal process, alternatively threatening *ulamā'* to issue a *fatwa* supporting his reform movement. This co-optation has been disastrous for the reputation of the *ulamā'* and their institutions in Egypt.

By the later half of the 19th century, the expansion of the government into non-religious functions had over whelmed the society and eventually paved the way for widespred legal reform. Egypt would emerge as a nation-state based on Western political institutions and theories overhauling its entire legal system.

Under the presidency of 'Abd al-Nāsir (1952-1970),[7] nationalism replaced religion as the binding ideology of the state. Liberal-nationalists also challenged the role of the *ulamā'* in the state, but even more explicitly then Ali had done. Islamists movements, like the Muslim brotherhood, were brutally suppressed under Nasir's reign.[8] While institutions like al-Azhar were subject to government reform, with secular studies added to the curriculum, the *'ulamā'* successfully staved off such attempts in their local schools, *madrasah*, thereby creating a parallel religious authority alongside the state apparatus, and gaining credibility among the people.

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[7] See generally, Raymond Baker, "Egypt," 433-5

[8] For further discussion on this issue, see *inter alia* Gilles Kepel, *Muslim Extremism in Egypt: The Prophet and the Pharaoh* (Berkeley, 1986) is a helpful though one-sided guide to Egypt' radical militants.

Sadat and the Rise of Political Islam

President Anwar Sadat's (1970-1981) struggle to separate his policies from that of his communist/ nationalist predecessor included the large-scale co-optation of Islam into politics and the exploitation of popular religious sentiment. Self-proclaimed as the 'the Believer President' Sadat was often described by his '*zabīb*' the callus on his forehead from constant praying. Sadat increased the Islamic presence in the public sphere, adding Islamic courses to the education system from primary school to university, and increasing religious programming in the media. The government opened thousands of new mosques throughout the country, forging ties with Islamic scholars in every level of government.

Under Sadat's presidency, Al-Azhar University was chosen to be the 'bastion of official Islam'[9] and government funds were funneled into university expansion programs. The Shaykh al-Azhar soon became the Islamic 'stamp of approval' for several of Sadat's more controversial policies and programs, including the Egyptian-Israeli peace treaty, family law reform and ultimately, suppression of the Islamic fundamentalists movements that he had previously encouraged.

Sadat's most significant capitulation to the Islamist campt was his introduction of Sahri'a as 'a' primary source of legislation in the Egyptian constitution of 1972. In 1980, in order to further appease the growing voice of the *ulamā'*, Sadat introduced an manendment into the constitution elevating Shari'a's role as 'the' primary source for legislation.

Sadat's financial and political support of religious revivalism soon backfired. Secularism began to lose its political capital in the

[9] John L. Esposito, *Islam and Politics* (Syracuse, New York: Syracuse University Press, 1991), 236.

1970s, and the Islamic resurgence advocated from the reinstatement of Shari'a as the law of the land. Some credit the widespread Islamic revival in the Middle East to the gradual reassertion of national identity upon the removal of imperial influence, and to the degree to which authoritarian, 'top down' reforms were implemented by secular elites, without economic or social benefit to the masses.

Whatever the cause, Sadat's response to the gaining power of Islamist movements was to begin to suppress them, while at the same time retaining the veneer of piety, by having al-Azhar rubber stamp unpopular government reforms and policies. However, what was done could not be undone. On October 6, 1981, Anwar Sadat was assassinated by a member of a splinter group of the Muslim Brotherhood, the organization that he had supported at the start of his presidency.

Of Sadat's legacies, the one that has most profoundly impacted the legal system in Egypt is the 1980 amendment to the constitution naming Shari'ah as 'the' primary source for legislation.[10] Subsequent attempts by the Supreme Constitutional Court of Egypt to limit recourse to Shari'ah law through a narrow interpretation of Article 2 represent the judiciary and executive's attempts to hold Islamist forces at bay. It also permeates Tantawi's argumentation in the al-Azhar *fatwa*. It is this wider issue, of the role of Sari'ah in state legislation that is the core contention, above and beyond the particulars of *ribā* and finance. It is for this reason that Tantawī's fatwa led to a great agitation in the Islamic legal community, exacerbating the issue of Islam and legal authority.

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[10] See generally in W.M. Ballantyne, *Commercial Law in the Arab Middle East* (London: Lloyd of London Press, 1986), 31; idem "The Constitutions of the Gulf States a Comparative Study," *Arab Law Quarterly* 1(2) (1986): 158-76; cf Masykuri Abdillah, "Eksistensi Hukum Islam dalam Sistem Hukum Mesir Dewasa ini," *Mimbar Agama & Budaya* XVII(i) (2001): 1-23.

Future reform seem to be focused on constitutional reform, particularly with regard to private and investment laws which appears to run slowly. Muslim political activists continue to lobby for the Govenrment to adopt Shari'ah completely, but legal refom in this area seems to becoming more liberal with the introduction in the year 2000 of an amendment to the Law of Personal Status giving more rights for women.

B. Early Life and Education

It cannot be overstated that in writing any kind of biography, let alone of an intellectual sort, the context of the figure under discussion has to be placed in perspective in order to have a better understanding. As far as I am aware of Sanhuri's biographer available in English, none has done in the direction, which demonstrates the background of his traditional in to modern thought, and the shift from one position to another occurred there in.

Born in Alexandria, Egypt in 1895, 'Abd al-Razzāq al-Sanhūrī was raised and educated in a complex political and social environment at the turn of the twentieth century Egypt.[11] He began his education at Kuttab or the lower Qur'anic elementary school, but his father died before completing his study that he had to be transferred to Ratib Basha primary school, an institution that was subordinated to Jam'iyah Khairiyah Islamiyah. He then continued to al-'Abbasiyah elementary school and graduated in 1913.

During the secondary school 1908-1913 he began to be fascinated by literature and linguistic. He reads a highly reputed works as those of al-Ashfahānī's *al-Aghānī*, al-Qālī's *al-Amālī* and

[11] Fārūq 'Abd al-Barr,. "'Abd al-Razzāq al-Sanhūrī, Qāḍiyan li al-Ḥuqūq wa al-Ḥurriyyah," *Majallat al-Qānūn wa al-Iqtiṣād* 30 (special edition, n.d.): 466-467.

Ibn Abd Rabbih's *al-'Aqd al-farīd* to mention a few.[12] In addition, at the very process of his inquiry for knowledge and nurturing his worldview he also consulted various libraries of different field of specialties that he got interested in history and that the fact that poetry was an established culture amongst the Arab society, Sanhuri put a large amount of poetry into his memory. He had a great admiration for al-Mutanabbi 303-354 (915-965) to the extent that he became prejudiced of him.[13]

As it is for the best and ambitious high school graduates, their first choice is to pursue their study to law school, and in case of Sanhuri is not an exception.[14] In the same year (1913) he continued to the Khedevial school of law (Madrasah al-Ḥuqūq al-Khidwiyyah)[15] in Cairo and obtained his License in 1917. Due to the delicacy of the social condition, he worked for finance ministry as in order to be able to afford his study need until he completed his study in 1917.

During his study at the law school (1913-1917) he was preoccupied by literature, moved consistently and contemplate on the sense of his Islamic nationalism and patriotism. His exposure to the thought of such great figures as Musthafa Kamil Basha (1874-

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[12] So great the talent of Sanhuri in Arabic literature that one of such prominent scholar of language and literature as Abbas Hasan (1900-1978) comments that: "Sanhuri is better suited to become talented in literature than in law." However, it appears that he destined to become expert in both field of specialties. See Muḥammad Imārah, *Al-Duktūr 'Abd al-Razzāq al-Sanhūrī*, 254.

[13] Muḥammad Imārah, *Al-Duktūr 'Abd al-Razzāq al-Sanhūrī*, 254.

[14] On the history and development of prepatory school in the context of the education of Egyptian lawyers of the beginning of the twentieth century, see Donald M. Reid, *Lawyers and the Politics in the Arab World, 1880-1960*(Chicago: Bibliotheca Islamica, 1981) especially chapter one.

[15] The present day Cairo University originated from Muḥammad Ali's School of Languages, and after undergoing several reorganizations, in 1925, it became the Faculty of Law of the Egyptian University.

1908 / 1291-1326)[16], Sa'd Zaghlul and Jamal al-Din al-Afghani[17] gave rise to the genesis of his tendency toward nationalism and pan Islamism that had greatly influenced his thought in its formative stage. So great the impact of these figures that Sanhuri tells us that the generation of which he became apprentice of nationalism was Musthafa Kamil, prior to being becoming the student of Sa'd Zaglul. In addition, I am indebted to other figures in my Islamic consciousness, I recall them al-Kawakibi, Jawish and Farid Wajdi, where as for 'Abduh and Jamal al-Din, although I am not present during their life time, they left only a few books which would be impossible for me being influenced by their thought, nonetheless, they both left significant impression on myself for they are claimed Islamic intellectual as great contemporary reformer.[18] Once, at the age of 15, Sanhuri told his colleague, I ponder in life to determine being becoming the personality of between Musthafa Kamil and Sa'd Zaglul, he asserts that the distinction between the two is that the former departs from the stand point as a nationalist and thus his greatness came from his nationalism, whereas the latter destined to become great figure out of which his nationalism emerged.

For a time, while studying at Law school he wrote poetry of gentle and profound quality which depict his concern on the Egypt social condition in general, and against the augmentation of Islam during the first world war against imperialism in 1916, when colonial

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[17] Based on overwhelming evidence Jamāl al-Dīn al-Afghānī (1838/39-1897) who was born and raised in a Shi'i family is one of the most influential figures since the late 19th century Muslim world. His popularity and impact in the Muslim countries owing mainly to his reflection on the concept of nationalism, Pan-Islamism, he is being a charismatic both orator and teacher, as well as his world wide visits to most Muslim countries. See John L.Esposito et. Al. (eds.) *The Oxford Encyclopaedia of the Modern Islamic World* (Oxford University Press: 2001), vol. I, 23-26.

[18] See Sanhuri, *Al-Awrāq al-Shakhṣiyyah*, Lyon, March 15, 1923; December 5, 1923.

forces advanced toward the territory of Ottoman Empire and destroyed it. The colonial authority came to a secret agreement to divide the Empire and its legacy, and banish the Islamic nationalist leaders.[19]

Furthermore, it is very suggestive that his close reading of the Egyptian press influenced Sanhuri's political and social consciousness. He was intrigued by the principle of dignity and the importance of preserving dignity for every human being irrespective of the social class, fortune or gender. On this issue Sanhuri comments: "However, in partaking national awakening it is not only confined to freeing from colonizing power, but also should penetrate the human freedom and even the liberation of Egyptian women."[20] Perhaps his concern on this issue emanates from an established image of women and how they were treated within Egyptian society. However, given the pressure and the restriction of their rights, some of the Egyptian ladies participated in series of peaceful rally against the suffering. [21]

With the same token, right from the outset, Sanhuri was particularly conscious of social injustice. He was deeply struck by the noticeable gap between the rich and poor, a reflection of the social circumstances characterizing Egyptian society in the 1940s and 1950s. Observing the social tragedy suffered by the poor living condition of people, and on this issue he says:

> "Last week, it came to my sight, something that I could not forget until now, hardly night can depict, that I saw in the dark corner of the street

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[19] Sanhuri, *Al-Awrāq al-Shakhṣiyyah*, December 5, 1923.

[20] Muḥammad Imārah, *al-Duktūr*, 26.

[21] Reading from news paper, Sanhuri states: "I have read quite a lot from this demonstration and I apprise for myself some of its detail, but what impressed me most is peaceful demonstration done by Egyptian ladies, and I come to realize that the Egyptian women of today is part of the Egyptian society who sense the agony and lament by it." See Muḥammad Imārah, *al-Duktūr*, 26-27.

children who lived in the site of earth, each one rest on the arm of his other college, they sleep as if they embraced each other. These ill-fated were not capable of having comfortable mattress, that the street provide them, they cannot afford it except uneasy to lay on it, thus they sleep on the street, people passed by come and forth hardly aware of their existence, and those are who are well off with their negligence slept for their own satisfaction, and that they are unaware that there are on earth the miserable.[22]

Upon the completion of his degree he was given position assistant prosecuting attorney and within the next three years he had privilege to become a lecturer at school of shari'ah judges. During his study at the Khedevial law school, he was acquainted with Eduard Lambert, the French Dean of the school, but then he give up his deanship due to a conflict with the British authorities. However, it is not clear as to which segment of the authority that put pressure leading to his dismissal.[23] By 1920 Sanhuri took several posts from assistant dean to assistant rector, and then shifted to teaching civil law/*qanun* at the school of Islamic justice in which he is one of the most important founder of Egyptian higher learning since its establishment in who has a great influence for the contemporary reform of Islamic thought.[24]

In Manshura, during his post in the Prosecutor's Office (parquet), a great Egyptian nationalists outbreak occurred in 1919 in order to free the nation and pushing the occupation forces out of the Nile bank, but this did not prevent Sanhuri from the procession in the

[22] Muḥammad Imārah, *al-Duktūr*, 28.

[23] Cf. Amr Shalakany, "Sanhuri: The Historical Origin of Comparative Law in the Arab World," in Annelis Relis (ed.), *Rethinking the Masters of Comparative Law* (Oxford & Portland/ Oregon, Hart Publishing, 2001), 169.

[24] See Muḥammad Imārah, *Al-Duktūr 'Abd al-Razzāq al-Sanhūrī: Islamiyat al-Dawlah wa al-Madaniyyah wa al-Qānūn* (Cairo: Dār al-Rashad, 1999), 27.

process of national revolution and who called for striking in the condition that his task is realization of senior official being protested, and asked them to be imprisoned. This is not peculiar for Sanhuri, before the 1919 while he was employed at the prosecutor's office he wrote in his biography on the obligation of the youth in facing the community and their movement.

Commenting on this issue Sanhuri asserts that every youth should understand to carry out parts of the responsibility/ accountability for it when it fall, and it is not sufficient only with displeasure or regret. Based on this consciousness, it is incumbent to stand still to act justly to partake in the road to progress. Sanhuri then took part into the revolution which led by Sa'd Zaglul that he was forced leave the city of Manshura to Ashut, in Upper Egypt.[25]

With the current political stake in Egypt in 1920, Sanhuri departed for France to pursue further study at graduate level. At this time, Egypt was in the process of searching to improve the judicial system there, which was inter alia resulted in join cooperation between the University of Lyon and the Egyptian authority, and Sanhuri's departure gained its momentum. Since the formative stage of his intellectual life, it is evident that Sanhuri is concerned and wrote for the reform movement and revivalism of the Orient and his country and for the religion and civilization. upon his return to Egypt, he would hope to dedicate his life for the future direction of the country, and sought to establish a special school the objectives of which, are among others, new method of studying Islamic legal science, promoting for Islamic unity, cooperation of commercial property movement of Egypt, reform movement of teaching and learning, refinement of Arabic language, working towards supremacy of community as against to individual, the establishment of the

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[25] Muḥammad Imārah, *al-Duktūr*, 30.

Oriental League of Nations, hoping that Egypt become as Italy of the West in the age of renaissance, and that labor and farmer organization be a democratic association.[26]

While studying at Lyon university, Sanhuri came under the supervision of Eduard Lambert who had been director of Khedivial School of Law in Egypt until 1907, and whose expertise in comparative law, to a lesser or greater extent shaped Sanhuri's thought. Sanhuri produced two theses, *Le restrictions contractuelle a la liberte individuelle de travail dans la jurisprudence anglais* and *Le califat*[27] for which he was awarded dual doctorate degrees in law and political science from the University of Lyon. In addition, he also obtained a diploma from the Institut des Hautes Etudes Internationales in Paris.

C. Writings and Scholarship

Sanhuri produced several treaties and scores of articles written throughout the span of his lifetime covering variety of issues such as social, Islamism, Arab nationalism, law to legal reform. However the common threat of most of his *oeuvre*, as we shall see underpins his concern on the legal related subject. Due to its diverse and numerous quantities of the works, in what proceeds will be confined to discussing those, which are considered relevant for the purpose of this section, by attempting to provide a general overview and the significant of each work.

The prolific writings of Sanhuri took shape in the 1920s while pursuing his doctoral studies at Lyon University in two different fields of law and political science respectively, out of which appeared

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[26] See *Al-Awrāq al-Shakhṣiyyah*, Lyon, especially January 21, 23, 1922; February 25, 1922; May 8, 1922; August 1, 1923; September 10, 1923 and October 9, 1923.

[27] For the discussion on the importance of these two work at the formative stage of Sanhuri's thought see *infra* note

the first dissertation entitled *Le restrictions contractuelle a la liberte individuelle de travail dans la jurisprudence anglaise* published in 1925;[28] and the second on the establishment of a modern day caliphate entitled *Le Califat: son evolution vers une Societe des Nations Orintale* published in 1926.[29] In addition to these he produced several treaties of nonpareil and meticulous treatment of different aspects of law in his *Syarḥ al-Ijār, Naẓariyyat al-'Aqd, al-Qānūn wa al-Iqtiṣād, al-Wasīṭ: fī Sharḥ al-Qānūn al-Madanī, Maṣādir al-Ḥaqq fī al-Fiqh al-Islāmī*, and others,[30] upon which many Arab states base their present legal systems.

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[28] Hereinafter *Le restrictions contractuelle.* (Paris: Universite de Lyon – faculte de Droit, Marcel Giard, 1925). (*al-Quyūd al-Ta'āqudiyyah al-Waridah 'alā Hurriyat al-'Amal fi al-Qaḍā al-Injilizī*).

[29] Librairie Orientalist Paul Geuthner, 1926, hereafter *Le califat.*

[30] The details of Sanhuri's other works are provided in the following list. *Al-Dīn wa al-Dawlah fī al-Islām*/ Religion and Sate in Islam, published in *Majallat al-Maḥāmāt al-Shar'iyyah* 1(1) (Cairo 1929). Contains Sanhuri's exposition on Islamic unity and distinction between religion and state; *Taṭawwur La'ihah Tartīb al-Maḥākim al-Shar'iyah* in *Majallat al-Mahamāt al-Shar'iyyah* 1(2) (1929); *Al-Islām wa al-Sharq*/ Islam and the East, in *Ṣahifah al-Siyāsah al-Usbu'iyyah* (October 1932), is an exposition in response to the youth regarding the issue of Islam in relation to the Eastern league. *'Aqd al-Ijār*/ Contract of Lease, treatise written for students of law faculty 1929; *Al-Imtiazāt al-Ajnabiyyah* appeared in *Majallat al-Qānūn wa al-Iqtiṣad* (Cairo 1930); *Al-Sharī'ah al-Islāmiyyah*/ Islamic Law, an article prepared for the International Conference of Comparative law, in the Hague 1932; *Taqrīr 'an al-Mu'tamar al-Duwalī li al-Qānūn al-Maqārin*, originally in French, and the Arabic version appered in *Majallat al-Qaḍā' al-'Irāqiyyah* (1932/3?); *Al-Mas'uliyyah al Taqṣiriyyah*, in collaboration with Ḥilmī Bahjat Badwī in *Majallat al-Qānūn wa al-Iqtiṣād* (Cairo 1932); *Al-Sharq wa al-Islām, - Wujūb al-Tanqīh al-Qānūn al-Madanī wa 'alā Ay Asās Yakun Hādhā al-Tanqīh.* Sanhuri wrote this in conjuction with the 50 years of *al-Maḥākim al-Ahliyyah* in 1932, then published in *Majallat Al-Qānūn wa al-Iqtiṣād* VI(1) (Cairo 1933). In the realm of comparative studies among others are *Min Majallat al-Aḥkām al-'Adliyyah ilā al-Qānūn al-Madanī al-'Irāqī* (Baghdad, 1936). The study being conducted in this work is on the application of *Majallah* in Iraq since the time of Ottoman Empire to the then, through synthesis, what became the civil code of Iraq; *Murshid al-Ḥairān fī al-Mu'āmalāt al-Shar'iyyah 'alā Madhhab al-Imām al-A'ẓām Abī Ḥanīfah al-Nu'mān, Mulā'iman li 'urf al-Diyar al-Miṣriyyah was air Umam al-Islāmiyyah*, written by Muḥammad Qadri Bāshā 1237-1306/ 1821-1888; *Al-*

The core issues that Sanhuri brought to a fore in these two dissertations are centered on individualism *vis a vis* socialism and modernity *vis a vis* tradition. However, these two works represent the formative stage of his thought each of which are characterized by being well research and but nonetheless featured by his considerable insight on his perspective for Islamic institution and Islamic legal concern.[31]

Being the precursor of the formative stage of Sanhuri's legal thought, as a whole, *Le restrictions contractuelle* is framed in terms of individualism *vis a vis* socialism dichotomy. Taking the English doctrine of restraints of trade of its theme of discussion, Sanhuri delves into the term "standards" as a means of advancing the "social" in the modern Western law. In addition, the dissertation introduces ideological proposition for the re-distributive role of law in bringing about social justice. By articulating the sociological approach, it seeks to advance a reciprocal element between individual and social justice.

At the methodological level, the dissertation apparently reflects the author's criticism of the prevailing *l'ecole de l'exegese*, the classical formalist legal thought of France. This, in turn, suggests that by placing himself at one extreme of the two contradicting groups of the established jurist of *l'ecole de l'exegese* versus the progressive jurists of *juristes inquiets*, the dissertation implies Sanhuri's intellectual alliance or at least his favour to the latter.

Following the completion of *Le restrictions contractuelle*, Sanhuri presented another dissertation, *Le califat*, in 1926. Reading

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Qānūn al-Madanī al-Miṣri/civil code of Egypt; *Nabiy al-Muslimīn wa al-'Arab* in *Majallat al-Hidāyah al-'Irāqiyyah* (Baghdad, 1936); *Muqāranah al-Majallah bi al-Qānūn al-Madanī al-'Irāqī* (Baghdad, 1936); *'Ilm Uṣūl al-Qānūn*/ Studies for Law students (Baghdad, 1936); *'Aqd al-Bay'*/ Concerning legislating Iraqi civil code (Baghdad, 1936).

[31] Cf. Hill, "Islamic Law as a Source," in Aziz al-Azmeh (ed.) *Islamic Law: Social and Historical Contexts* (London: Routledge, 1988), 149.

through this work, it is evident that this work is an intellectual exercise underpins twofold-facet discourses of modernity *vis a vis* tradition, the primary doctrinal objective of which concerns with the modernization of the well established form of Islamic caliphate of the past.

In elaborating his theory, Sanhuri argues that it is inconceivable why the institution of the caliphate could not continue and develop towards an international organization of the Orient similar to that of the League of Nations,[32] in the sense that the caliph would become the head and the central figure of the congration of Islamic states, presiding over a body whose jurisdiction remain supreme on the religious matters, whereas in the realm of civil and the exercise of executive and legislative would be the prerogative of the heads of state and government.

It is worthy of note that there is a continuous methodological thread in the two dissertations in that tendency of the anti- formalist interpretations on the nature of law and legal reasoning. One of the most important aspect that Sanhuri demonstrated in *Le califat* is his newly invented concept of the distinction between the 'sacred' and the 'temporal' aspects of Islam, the idea of which alien or even unacceptable to the conservative circle of Muslims. On the psychological level of the author, the underlying factors that motivated the study of Le *califat* seems to be as against the backdrop of searching for identity in the post colonial era, which preoccupied the mind not only Sanhuri but also the other intellectuals and the community at large.[33]

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[32] A. Sanhoury, *Le Califat: son evolution vers une Societe des Nations Orintale* (Paris, 1926).

[33] The most notable of this polemics is one with 'Ali 'Abd al-Rāziq who advocates the idea of the separation of religion and state. In relation to discussion of the debate with Sanhuri see James Jankowski, "The Eastern Idea of the Eastern Union in Interwar Egypt," *The International Journal of African Historical Studies* 14(4) (1981): 648-51;

Other work noteworthy of mentioning is *al-Wasīṭ: fī Sharḥ al-Qānūn al-Madanī,*[34] commentary to the Egyptian civil code of 1949 is probably the most important civil law treatise ever produced in the Middle East history up to the present time, which most respected Arab lawyers would frequently refer to and become collection in their libraries. *Al-Wasīṭ* constitutes the comprehensive treatise of the civil law of Egypt providing the answer to the questions of its systematization and the *rationale* of the manner in which it had been structured. In addition, as a person who is responsible for its drafting Sanhuri explains in this work how the code has been Egyptionized and how it should be interpreted.

Finally, *Maṣādir al-Ḥaqq fī al-Fiqh al-Islāmī: Dirāsah Muqāranah bī-l-Fiqh al-Gharbī* written by 'Abd al-Razzaq al-Sanhuri (1895-1971) is a work which try to make effort to formulate *mu'āmalāt* (social dealings) aspect of Islamic law, which represents work of the 'scientific stage.'[35] The significance of this work lies in its to extract a general theory of legal action from the dispersed elements in the great classical treaties, to become a synthesis of new avenues in modernizing law. *Maṣādir al-Ḥaqq, which* is the main focus of this research, will be discussed exclusively in the following chapter.

D. Career

1. Teaching

Upon his return to Cairo in 1926 Sanhuri began teaching constitutional law but then was assigned to teach Civil Law, a subject

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Madjid Khadduri, *Political Trends in the Arab World* (Baltimore: The Johns Hopkins Press, 1970), 244.

[34] (Commentary of the Civil Code) comprises of 15000 pages in ten volumes written between the years 1950s through to 1970.

[35] *Maṣādir al-Ḥaqq fī al-Fiqh al-Islāmī: dirāsah muqāranah bī al-fiqh al-gharbī*, 6 vols. (Cairo, Jami'ah al-Duwal al-'Arabiyyah, 1954-9). This work contains the course of lectures given by al-Sanhuri in the Department of Legal Studies at the Arab Studies Institute, Cairo. Thereinafter *Maṣādir al-Ḥaqq.*

in which he became specialized. It was also owed to his expertise the design of this course. Sanhuri in his teaching and interaction with his students is beyond doubt explained himself with clarity and variety of methods that his student loved him and signified him with "he is presenting with seven readings" as an analogy for his ability and precision.[36]

What make Sanhuri attracted by his students, it seems, is not only confined to appealing academic ties but also his ever-ending perspective and future strategy as a mode and etiquette in the troubled and searching for identity. He said:

> "My advice to my students, they should stand with manhood, and I meant by this is that their courage should derived from themselves, and not from the outer appearance, and I advised them not to surrender when facing injustice, I have nothing less important advice than strive for acquiring freedom and liberty, that allowing for injustice prevail and uprising against liberty are indication of personal weakness, they have to purify themselves from these two characters, so that they became man who preserve in themselves strong personality that enables them to fight against hardship."[37]

During the 1930s increasing Arab cooperation was particularly visible in the realm of education. The number of Egyptian academician traveled to Arab countries is increasing to teach and advise on educational issues. The educational mission sent seems to be importance in fostering a more Arab inclined attitude in Egypt. It was in this mission that Sanhuri, together with a number of other Egyptian academicians, was invited by the Iraqi government following the independence to reform the law and judiciary of the country. He served in Baghdad for a year as Dean of the Law College

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[36] Muḥammad Imārah, *Abqariyyah*, 38.

[37] Muḥammad Imārah, *Abqariyyah*, 39.

the experience of which play important role to his better understanding of the Arab legal institutions.

At the same time of the year he was invited by the Iraqi government to prepare a draft of what was then the Iraqi civil code. This project prompted him to return to his original theme to modernize Islamic law to fit the legal development of an Arab state. It appears that it is in the legal reform that Sanhuri's contribution will endure, although he made some ventures in politics that which elevated him to cabinet rank.[38]

Sanhuri also gained extensive international experience during this period, when he was invited by many Arab countries, such as Iraq, Syria, Libya and others to draft what were the later became known to be the civil codes of the respective countries.[39] During this later phase of his career he devoted most of his life to teaching, research, and writing, one of which is *Maṣādir al-Ḥaqq fī al-Fiqh al-Islāmī* a culmination of his experience and understanding of the Arab legal system, in the form of synthesis of theory and practice Eastern and Western legal systems, which will be exclusively discussed in detail in the following chapter.

2. From Academic to Politics

From the outset of his life and career, Sanhuri was struggling in Egypt political situation, which initiated in the 1919 nationalist revolt when he was a junior assistant (*wakīl*) in the *niyābah* in Manshura. He joined the Wafdi's movement and organized a

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[38] Majid Khadduri, *Political Trends in the Arab World* (Baltimore: The Johns Hopkins Press, 1970), 40.

[39] In 1943 Sanhuri completed the draft of civil code of Iraq, and in 1949 Syria adopted his draft code.

successful strike of employees in his office, and consequently results in his transferal to a further province, Assiut in Upper Egypt.[40]

His alleged involvement in politics also became apparent in 1934 when he was being accused by the government of forming a group of students under the banner of being a literary and cultural group was seeking political objective, to which he denied.[41] This allegation also led to his temporal suspension from the university. Three years later, he joined the secessionist group (from Nahhas and the *Wafd*) established by Nuqrashi, and Ahmad Mahir and in the subsequent government posts represented the Saadist party.

Upon his return from Iraq in 1936 he was appointed Dean of the Faculty of Law at Cairo University. However, within the year due to deep feeling of hatred of Sanhuri, Nahhās pursued him vindictively over the years. In 1937 Nahhās fired him from his deanship and the civil code committee. Nahhās's cabinet fell the same year, and Sanhuri bounded back on the new civil code committee and as secretary general of public instruction and royal counselor. Nahhas forced him out once more in 1942, and sanhuri fled to Iraq where he worked on an Iraqi civil code. Nūri al-Sa'īd reluctantly agreed to Nahhās'a demand that he forgo Sanhuri's services but refused to extradite him to Egypt. Sanhuri returned after 1944 to represent the Sa'dist Party as a minister of education in various anti-Wafd cabinets. Finally he became the Council of State, an advisory judicial body.

As far as the education program is concerned, there is available information on Snahuri's concern on this regard during his tenure as *wakīl* at the department of Education and the Ministry of Justice in 1939 and 1944 respectively. In addition he presumably had

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[40] See Diya' Shīt Khaṭṭāb, "Al-Maghfūr lah al-'Allāmh 'Abd al-Razzāq al-Sanhūrī, 1895-1971," *Majallat al-Qaḍā* 26(3) (1971): 4; Cf. Hill, *Islamic Law*, 177.

[41] The interview of his defence was published in *al-Aḥrām* on August 1943.

greater opportunity to impose the education projects during his service as minister of Education representing the Sa'dist Party in various anti-Wafdi cabinets.[42]

To place Sanhuri in the perspective of the career of the 19th century career of Egyptian lawyers, it worth mentioning that Sanhuri is one of the first to use the new academic road to political prominence.[43] Around the late 19th century generation, scores of young lawyers chose to join established parties and hoped to inherit the mantles of the older politicians. Others turned to radical extra-parliamentary movements like Young Egypt, the Muslim Brotherhood, and the communists. But suffice it to say that the career pattern fall either administrator-lawyers or politician-lawyers.

The path of new academic to politics was virtually non-existent prior to the war, because teaching professions at the high school levels were greatly dominated by the British. However, during the 1920s, when professorships in the Egyptian University and educational administration took up by the Egyptians, they became exposed and caught the attention of the prime ministers selecting their cabinets. It is important to note that approximately a quarter of Nasser's ministers had begun their careers in academia. Of the first five Egyptian deans of the Cairo law school, Sanhuri and two others paved their ways to cabinet. As mentioned earlier that upon his return to Egypt in 1926, Sanhuri gained recognition as professor of civil law. His role was evidently important to link between Egyptians and other Arab lawyers, a role, which he benefited from his tenure in deanship in Cairo as well as Baghdad.

Sanhuri was also a statesman who paved his way from being involved in various activities and was appointed President of the

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[42] See Khattāb, 'Abd al-Razzāq al-Sanhūrī'; Donald M. Reid, *Lawyers and Politics*, 155; Hill, *Islamic Law*, 178.

[43] Khadduri, *Political Trends*, 240-44; Ziadeh, *Lawyers*, 137-47- 56.

newly established Council of the State (*Majlis al-Dawlah*) in 1949. With this position, Sanhuri made an effort to cooperate with the with the Revolutionary Leaders hoping that this will gather more energy to contribute to the development of his country. His achievement in running these courts are remarkable the most important of which are:

> "Establishing the right of the judicial power to exercise supervision over the constitutionality of the law. 'The judicial power, while it supervises the legislative power, does not undertake to legislate'. However, 'if legislation is in opposition to the Constitution, it is its duty not to apply it'. Supporting the freedom of the press and expression against government orders to ban publications or cancel or deny publishing license. Offering legal redress of grievances for those who claimed to have been wronged by administrative or gather governmental action."[44]

To this end it appears then, that despite the fact of its newly established institution, Sanhuri has been successful in elevating its independence, and most importantly it portraying the judicial reform of Egypt.[45] The function of the *Majlis al-Dawla* continues to the present time not only to hear cases on alleged illegal government action and the violation of rights and liberties, but it broaden authority to issuing *fatwa* or advisory opinions, a function of which had been long accredited to Shari'a court judges or *qādī*. In addition, it has also be consulted its opinions to review draft legislation prior to submission to the Peoples's Assembly whether approved (or disapproved). However, he came into conflict with this them, which forced him for early retirement in 1954.

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[44] Cf. Hill, *Islamic Law* in Aziz al-Azmeh (ed.) *Islamic Law: Social and Historical Contexts* (London and New York: Routledge, 1988), 179.

[45] Y Linant de Bellefonds, "'Abdel Razzak al-Sanhuri, *Maṣādir al-Ḥaqq fi al-fiqh al-Islāmī*", *Revue International de Droit Comparé* 10 (1958): 476.

An agreement of hiring Sanhuri to become dean of the Baghdad law college was reached in 1935, the primary mandate of which is for reform and expansion.[46] Similarly, in 1946 he went to Syria to draft plans for a full pledged Syrian University.[47]

When Egypt finally regained full control over its judicial system in the 1930's, though with some controversy, the proposal to construct the *Majlis al-Dawlah* was revived. The authority of the *Majlis al-Dawlah* was to render legal opinions on proposed legislation and draft legislation when requested by the government. It worth noting that jurisdiction and boldness of the newly established body gradually increased which led to its adversary. This is evident in the newly elected Wafdist government attempt to put Sanhuri out of the *Majlis al-Dawlah* in 1950. The Wafd's move against him was not based on a particular decision but rather the claim of his political affiliation with the Sa'dist party that in turn would have disqualified him from taking the position.

New disputes between the *Majlis al-Dawlah* and the government under Sanhuri's leadership emerged on March 1951 due to its boldness such as that of 1951 case in which the institution involved in very sensitive ground by deciding that it had jurisdiction to examine military decision to dismiss an officer.

When the Free Officers took power in the 1952 revolution, the *Majlis al-Dawlah* supported the new regime and became the legal adviser that provide legal formula for the establishment of the Revolutionary Command Council (RCC) following the forced abdication of King Faruq. While in the service of these government

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[46] For details on the process of choosing Sanhuri to fill the position, see Donald M.Reid, *Lawyers and Politics*, 335.

[47] For further development of this university see Donald M.Reid, *Lawyers and Politics*, 181. Chapter six of this dissertation is solely devoted to Sanhuri's role in drafting the codes for these coutries.

posts he was also preparing on the revision of civil code that upon its completion he preceded to work on al-Wasit, and simultaneously, his writing and activities in both treaties and various articles continued.[48]

In addition, Sanhuri also headed scores of Egyptian delegation to various conferences, such as that of the second international congress of comparative law at the Hague, conference on Palestine in London in 1949, to the United Nations, and in the following year, he was a member of the Egyptian delegation to the security council forwarding Egypt complaint against the United Kingdom.[49] The founding of an Arab University, which was the then Institute for Higher Arab Studies was indebted to Sanhuri's initiative following the formation of the Arab League in 1945. Sanhuri was appointed the director of legal section to this newly established institution in which he involved in academic activities.[50]

Sanhuri also has a great concern on developing Arabic language that he views to make it compatible with the development of his time. To this end, he became a member of the academy or *majma'* in 1946 in which he partake in conferences and worked on projects.[51]

E. Principal Thought

1. Sanhuri's Islamic Thought

In the beginning of the 19th century Egyptian political and social currents, the quest for Islamicity of a figure is taken into account very seriously, especially those involved in the religiously related

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[46] These articles are published in popular journal such as *al-Balāgh*, *al-Hilāl*, and *al-Siyāsah*. He was, for a short period January –May 1937 editor of the journal *al-Qānūn wa al-Iqtiṣād*. See Hill, *Islamic Law*, 178.

[49] Hill, *Islamic Law*, 178.

[50] Hill, *Islamic Law*, 179.

reform issues. Relying on his autobiography, Sanhuri started to write at the early age, but his departure for France to study law at the age of 26 gave him more inspiration and perspective of his Islamic view. It appears that 'being a way from home' coupled with experience living in a foreign country gave vent both to his mind and pent to flow in his biography regarding faith in God in philosophical perspective. This, in turn, gave more value for it as the principal foundation of his Islamic *weltanschauung*, because it does not only rest on a mere notion but rather it portrays the reflection of Islamic thought which was the outcomes of privilege of believing in God.

For Sanhuri, the quest for the existence of God is by reflecting to his self own creation. He said: "Verily I boundlessly believe in God, You exist because created me," "O God, I came from You and I will return to You."[52] In addition, the faith and believing in God, according to Sanhuri is not only a source of the true happiness for the inner self with regard to human but at the same time is the source of strength against difficulties and challenge which surpass to revive material power contagious for human being.

Another point on faith, says Sanhuri that it is compliment to knowledge. He further asserts that knowledge will attest the faith and logically it has to be in faith,[53] and thus knowledge emanates, in the order of importance, from intellect, natural disposition and intelligence. Sanhuri believes that intellect (*'aql*) is the greatest blessing bestowed by God to human. However, due to the limit of the human intellect, human cannot acquire the actual happiness by

[51] See generally M.M. al-Qulali, 'Kalima' in *Majallat Majma' al-Lūghah al-'Arabiyyah*, 29 (1972): 270-82; Hill, *Islamic Law*, 179.

[52] See *al-Awrāq*, Lyon, October 28, 1921.

[53] *al-Awrāq*, Lyon, October 28, 1921.

mere means of his/ her own intellect, so that mind and intellect have to go in par to achieve faith in God.[54]

However, reliance solely on intellect, according to Sanhuri, will rest human in mere assumption and relativity both of which are the extreme limit of human *ijtihād* or individual judgment either in legal or theological question, based on the interpretation and application of the four *uṣūl*. Further more, Sanhuri says: "we are not capable of living by a mere intellect or *'aql*, for intellect itself is cognizant of its weakness in perceiving the secret and what surrounding it, which certainly be with the zeal of faith."

In contrast to positivism, the secular philosophy of Enlightenment, which claim the supremacy of intellect has misled human, a character of liberation of intellectual talent which are the same as the whole human natural disposition, is a relative perception. Thus, it will remain and continue in need of what behind intellect and the one beyond human intellect. Sanhuri maintains the necessity of compatibility of mind for intellect and the need for moral in which the dimension of revelation intervene. "The bond that relate us and God is the mind and intellect, and the compassionate intellect encourage firm ethics, steers by intellect, guides by knowledge, such is the example of the uppermost personality in this life. I hope that may God bestow me strength to do good deeds, and make my mind, ethics, intellect and actions aid for me.[55] Therefore Sanhuri denounce such positivist philosophers as August Compte (1798-1857) for his allegation that human happiness is achieved without religion.

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[54] On this Sanhuri says: "Oh God, I believe that You exist, and the truth of Your Apostle, You have bestowed me intellect by which I must adjudicate on the worldly affairs according to Your command, and there I am to fulfill." "The intellect is a potency derived from the essence of God, thus reliance on intellect is trust in God." See his Muḥammad Imārah, *'Abqariyyah*, 25.

[55] Biography, Lyon, August 23, 1925.

2. Modernism and Legal Reform

As has been demonstrated earlier that in the view of Sanhuri Islam and state are a separate whole. In other words, Islam is a way of life or *al-dīn* and at the same time a state, but he simultaneously makes a distinction between the two. He elaborates that the notion of Islam consist of dogma (*'aqīdah*) and laws (*sharī'ah*) the former of which is signified only for Muslim, whereas the latter which consist of worship and regulation pertaining social dealings, the method of which is expounded by the jurist is part of the civilization of human kind, and the principal of the dimension of its culture is discernable. Thus Sanhuri maintains that the Qur'an and the Sunnah (prophetic tradition) are not law in the strict sense of the word but they are directives from which Islamic jurisprudence and philosophy, general theory and method from which law is drawn. It worthy of note that there is a consistent stance of Sanhuri on reform during his life which is reflected and traceable thorough out in his writings and fall under the axes of modernism/tradition.

In *Le Califat* as the hallmark of ideological modern discourse, Sanhuri openly argues that Islamic system to become operative for the contemporary life especially those pertaining to certain provisions dealing with economic matters and real estate requires adaptation measures to the need of modern civilization. He further contends that until this adaptation has been completed, the legal systems presently applied in the Muslim countries should remain in effect since Islamic law is not equipped for immediate application. In elaborating the theory toward the process of re-adaptation of this legal system to the needs present day society he proposes two successive stages: the research phase and the legislative phase.[56]

[56] See generally *Le Califat*, 578-583.

With regard to the former it should consist of scholarly investigations aimed at a study of Islamic law in the light of modern comparative law. We believe that the point of departure for this research should be a separation of the religious from the temporal portion of Islamic law

Where as the legislative phase it will be essential to proceed prudently and gradually. Personal status law that is already based on the Islamic system as far as the Muslims are concerned could furnish the first area of legislative experimentation of Islamic law in the personal status field to non-Muslims]. The research phase will precede the legislative phase, adapting the personal status law to modern needs and divorcing it from religious considerations. Therefore, the legislator by making the changes in the Islamic system suggested by modern social science will be able to make this system more acceptable to non-Muslims. Sanhuri further asserts that:

> "Whatever remains of the foreign systems once ... those elements of the imported laws [have been abrogated] which appear to us to be inferior to Islamic law after its evolution through research ...should be replaced by Islamic law when and if such a replacement is possible without endangering the stability of legal relationships."[57]

The underlying magnitude of restoring the regular caliphate Sanhuri asserts should ultimately be preceded by an evolution of Islamic law. However, Sanhuri's theoretical views became operative only in a decade later when he had an opportunity to put them into practice in the revisions of the Egyptian and Iraqi civil codes.[58]

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[57] *Le Califat,* as quoted in Liebesny, 93-94.

[58] For details on the analysis and historical background on the revision of the Egyptian Civil Code see *supra* chapter V of this dissertation.

A significant turning point in his realm of thought of legal reform came became closer to reality when he had an opportunity to express himself for the urgent need to resort to Islamic law for in enacting codes of law, legislation and reforming judiciary at the 50th anniversary of the national courts of Egypt (*Maḥākim Ahliyyah*) and secondly and the congress of international comparative law in the Hague in 1932 and in 1937.[59] In reforming the Egyptian Civil Code it was proposed that three sources should be considered: they are Islamic law, the decision of the Egyptian courts since the promulgation of the old civil code, and the various modern western codes.

At this juncture, Sanhuri is positive that his ambition for Islamic legal reform and the call for the supremacy of Islamic law will come to fruition by the time his intellectual pursuit is persecuted. On this, which was his dream since his youth, he aknowledged that he devoted most of his lifetime to education in formal institution, and spent some other portion in the school of life which finally became as firm bases in facing the real life[60]

At the age of ten he was raged by affection and in love of emotion and pride. It appears that he is keen on the young dream and acquire nobility. He asserted further that:

> "Where as today my compassion come near exhaustion and dry out, and I have relinquish my imagination to become reality, and I come to a point where I can see honor provided that I am beneficial, be it for myself, family, country and human being."[61]

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[59] For further on this issue see generally, Fārūq 'Abd al-Barr, "'Abd al-Razzāq al-Sanhūrī Qadiyan li al-Ḥuqūq wa al-Ḥurriyyah al-'Āmmah," in *Majallat al-Qānūn wa al-Iqtiṣād*, 30 (special ed., n.d.): 465-471.

[60] "I was trained (spent) the first twenty years of my life as student at school, and I was trained (spent) the next twenty years in the school of life, so have I gained experience from this test what would suffice for taking off support college years and to enter the real life."Muḥammad Imārah, *al-Duktūr*, 41.

[61] Muḥammad Imārah, *al-Duktūr*, 41.

This state of social and psychological awareness of his time, reveals how serious Sanhuri in bringing out the importance of uplifting his community that penetrate every aspects of his activities throughout the span of his life.[62]

From the above statement, it can be implied that for Sanhuri Islamic jurisprudence is not only confined to a problem of religion. The Qur'an, as a Divine message and the prophetic traditions are sources par excellence for Islamic jurisprudence from which the jurists, representative of community and craftsmen of *fiqh* develop it foundations, in the form of statute of law by utilizing the authority and benefiting from consensus.[63] However, some scholars have criticized Sanhuri on his distinction of Islam in the realm of religion and state, or to be precise on the legal aspect to be religious and non-religious. Majid Khadduri for instance, receives an impression that Sanhuri's position on the issue as being secular in outlook, and even characterized the latter's contribution in the Egyptian legal reform as secularization of Islamic law.[64]

Also central to Sanhuri's thought is the necessity to revive Islamic jurisprudence. His biography reveals that he has agenda and a dream that has to be fulfilled pertaining to his nation, the ummah, his Islamism, reforming and legislating Islamic jurisprudence, reviving the Islamic law with new method of *ijtihād*. It appears that he was moved by the prevailing and incompromising mainstreams in the Egyptian society. On the one hand, there is those

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[62] Muḥammad Imārah, *al-Duktūr*, 42.

[63] Muḥammad Imārah, *al-Duktūr*, 237.

[64] Majid Khadduri, Political Trends in the Arab World: The Role of Ideas and Ideals in Politics (Baltimore and London: The Johns Hopkins Press, 1970), 239; see also the critique of al-Bishri in Amr Shalakani, "the Critique of the Social," in *Journal of Islamic Law and Society*.

who hold the view on the rigidity of *sharī'ah* and thus there is no dynamic inherent in it, and thus there is no room left for excercising personal reasoning except to follow the rulings of the classical treatise of the jurisprudents. He was also conscious about the deteorating situation of the lower segment of the society which he depicted as the *fallāh*.[65]

As far as legal modernization is concerned, as is evident in Sanhuri's *Le Califat*, treats almost completely with procedure. His views about Islamic law substantively are to be found elsewhere, namely in the introduction where he considers the public law of Islam. Sanhuri presents his study as being a branch of public law. 'There is obviously a muslim public law, but the Muslim jurists do not make the neat distinction between public and private law found in modern law,' as 'the public law in the Muslim system is much less developed than private law.'[66]

Sanhuri maintains further that the legislative power rests, in theory, with God alone in his revelation, the Qur'an. Then it rests in the tradition of the Prophet inpired by God in his words and in his acts. But as the Prophet, being mortal, had a limited life, it is necessary to look for a guide that will continue to direct the nation. This guide we find in the agreement of the Muslim community is the the core of the democratic spirit'.[67]

The prophet has said that the Muslim community never cooperate in committing mistake, says Sanhuri. 'What is more

[65] On this issue he asserted: "There are two things I would like to establish before I die. First, to open the gate of *ijatihād* in the Shari'a, for it will return to be the living source of legislation in the East; and second, to hold the hand of the Egyptian *fallāḥ*, to relieve him of his agony." See Nadia Sanhuri and Tawfiq al-Shāwī (eds.) *'Abd al-Razzāq al-Sanhūrī min Khilāl awrāqih al-Shakhṣiyyah* (Cairo: al-Zahrā' li al-I'lām al-'Arabī, 1988), 190.

[66] Sanhoury, *Le Califat*, 4.

[67] Sanhoury, *Le Califat*, 6-7.

democratic than to affirm that the will of the nation is the expression of the will of God Himself ?' Only the nation can legislate – he underscores – the same basis as what of modern parliamentary regimes, with the difference however that the representative of the Muslim nation are not elected. They designates themselves through their personal capabilities in the juridical science (*ijtihād*). The Muslim government is a government of learned men.[68]

Dispite divergent view of the of the extent to which the principle of consensus as the basis for a representative of regime of Muslim government Sanhuri concludes that consensus encompasses the whole judicial domain. However, in order to take part in the consensus it is necessary to be a *mujtahid* that is, to be a person learned in the juridical method, 'the science of roots'. If there is contrary view, that of the majority suffices for agreement. A juridical solution adopted by consensus can be annulled by the same consensus. The consensus of the succeeding generations can annul solutions of their predecessors.[69]

The consensus, thus understood, says Sanhuri, 'is the true source of Muslim law, and that which pervades the various ages and milieu, and permits accommodation to them, in spite of its apparent subordination to the fisrt two sources.' The Ḥanafi school, Sanhuri notes, considers custom as a source of law 'not by virtue of the principle of consensus, but according to another principle, that of *istiḥsān* (judicial preference).[70]

How to apply consensus in the future ? One could have responded, he says, 'by a representative regime'. Sanhuri cites an

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[68] Sanhoury, *Le Califat*, 7.
[69] Sanhoury, *Le Califat*, 8-11.
[70] Sanhoury, *Le Califat*, 13.

authority that all Muslims should participate in the consensus, modifying it slightly, to say 'the agreement of the representatives of Muslims in matters in which they are competent.[71] This allows, obviously, for the *mujtahidūn* to be in effect the law-givers.

The point made by Sanhuri is the exact antithesis of the current form-based approach in Islamic finance, and indeed in all aspects of adherence to classical juristic opinions on various subjects. The following is Sanhuri's recipe for a viable and contemporary Islamic jurisprudence :

I think the the foundation upon which revival of Islamic shari'a may be built has to proceed as follows:

First, distinguishing pure religious doctrinal belief from shari'a as a law orginizing and regulating relations among human beings (fiqh, or science of detailed rules, or branches of knowledge).

Second, whithin the domain of fiqh, the part dealing with law, separated from the part dealing with creed and acts of ritual worship, should be considered, and from it inferred general principles of Islamic shari'a which principles – by virtue of their generality- can be validly applied in every time and place. Those principles are considered foundations of Islamic shari'a.

Third, Those foundations are immutable (by virtue of being principles and foundations), but the applications differ (first) accross time, and (second) accross nations and communities. Thus, there must be foundations of Islamic shari'a that are unchanging, and details of Islamic Shari'a that change with time and place. It is thus meaningful to assert that the foundations are the same, but the "Islamic Economics" and "Islamic finance" arose: driven by individuals who failed to understand the principles of Islamic shari'a.

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[71] Sanhoury, *Le Califat*, 16-17.

3. The Easternism, Between Identity and Empowerment

During the period between the two world wars concept of "Easternism" or "Oriental"[72] interconnectedness and solidarity developed considerable popularity in Egypt. "The Eastern idea" as designated by its proponents, notions of the essential unity of the East and of the utility of closer inter action: its peoples were particularly becoming a trend in the 1920s ranging across the spectrum of Egyptian opinion.

As has been stated earlier, written for a Ph.D. theses *Le Califat* addresses the issue of *al-Khilāfah* which came to the fore following the unilateral abolition of its institution by the republican Turk.[73] It is undeniable that further logical consequences brought about by this contemporary situation in Egypt there emerged tension of secularism on the one hand, and traditionalism on the other reached its peak to the extent that no reconciliation has been reached. It is very suggestive that Sanhuri was to seek for the common ground, which will be acceptable for both mainstreams. Thus central to Sanhuri's scheme of thought is the issue of the restoration of the institution of the caliphate.

A detailed proposal for such an "Oriental Society of Nations" was put forth by Sanhuri in his book *Le Califat: son evolution vers une Societe des Nations Orientale*. Arguing that Eastern nations were just just as capable as Western ones of institutionalizing meaningful cooperation such as that found in in the Western-

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[72] Defenitions of the East and notions as to what unified it differred from one thinker to another. For discussion on the historical development of the idea of the "Eastern Union" in a wider context of the Arab world, perhaps an example worth considering is James Jankouski, "The Easter Idea and the Eastern Union in the Inter war Egypt," *The International Journal of African Historical Studies* 14(4) (1981): 643-66.

[73] In fact, Sanhuri commented on the issue a month later, see his biography (12-4-1924).

sponsored League of Nations, Sanhuri proposes the establishment of a league composed of "independent oriental states" which would promote peace and cooperation among Eastern nations through organizing subsidiary bodies to coordinate practical cooperation in specific spheres of life such as labor affairs.[74]

Even Sanhuri's proposal for an Oriental Society of Nations, however, illustrates the conceptual and practical difficulties which the Eastern idea encountered in the interwar period. It was made in a work on the Caliphate, a specifically Islamic institution, with Sanhuri suggesting that such a league, once established, should work for the revival of the Islamic Caliphate.[75] Although Sanhuri recommended that such a provisional Caliphate should keep religious and political authoriry separate, nevertheless his Oriental league of nations in effect would have been an Islamic league of nations. It appears that it was also an excessively utopian proposal, as he himself concluded about the League, what Sanhuri was propounding was "a noble idea" rather than blueprintfor immediate implementation. It led to nothing concrete. In 1932, Sanhuri himself recognized that Eastern political cooperation would have to wait until each Eastern nations had attained its individual independence, holding that obly then "will it natural that each of these different nationalisms thinks about cooperation and solidarity, on the basis of a form of unity which is still being groped after.[76]

The proponent of radical secularism advocated by 'Alī 'Abd al-Rāziq[77] was considered as threat for the religion to a lesser or

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[74] Sanhoury, *Le Califat*, 596-604.

[75] Sanhoury, *Le Califat*, 605-607.

[76] Abd al-Razzāq al-Sanhūrī, "al-Islām wa al-Sharq," *al-Siyāsah*, proceded to no. 2931 (14 October 1932): 16-17.

[77] For a comprehensive analysis of 'Abd al-Rāziq's arguments and the major criticism of them, see *inter alia* Leonard Binder, *Islamic Liberalism: A Critique of Development Ideologies* (Chicago: 1988), especially chapter 4; Mamdūḥ Haqqī, *Al-Islām wa Uṣūl al-*

greater degree, by the religious cleric that led to violent reactions which consequently contributed combined with the deteorating social conditions, to the emergence of the revival of grass root religious movements such as that of the Muslim Brotherhood, and numerous others which emerged in Egypt from the late 1920s onwards. Nonetheless, though being challenged, secularization effort proceed in regions over which beyond the direct control of the religious leaders. Thus, there are two on-going contradicting changes in the Arab society, the religion on the one hand, and the secular on the other.

One of the most important issues put forward in *Le Califat* is the question of authorities of both civil and religion. The abolition of the institution of the caliphate in March 1924 by republican Turkey, resulted in the clear cut distinction between religion and society, the idea of which then developed by 'Ali 'Abd al-Rāziq and his supporters.[78] In contrast to Rāziq, who claimed that political authority was not an integral part of Islam, Sanhuri viewed the restoration of the caliphate a necessity, signifying the unity of Muslims and with the same token the preserving of the Islamic law.

It is obvious then, Sanhuri asserts that there is a confusion. Political authority is an integral part of Islam. The confusion comes in the calipahte, 'between the institution itself and the designation of the person who fills it. Historically, the caliphate has always been considered necessary to ensure the excecution of of the laws of Islam. About the person holding the office , there has been much of

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Ḥukm: Ba'th fī al-Khilāfah wa al-Ḥukūmah fī al-Islām: Naqd wa Ta 'liq (Beirut, 1966); Albert Hourani, *Arab Thought in the Liberal Age, 1798-1939* (London, 1962), 183-192, provides an excellent summary of the main arguments of Al-*Islām wa Uṣūl al-Ḥukm* and its relationship to 'Abduh and the Islamic reform movement in Egypt.

[78] 'Abd al-Rāziq was roundly condemned in Egypt and elsewhere for his secularism. For details see Sanhoury, *Le Califat*, 48; cf. Madjid Khadduri, *Political Trends*, 239; Farhat Ziadeh, *The Rule of Law and Liberalism*, 94-96.

divergence of opinion.[79] It has not been the institution, says Sanhuri, that was responsible for tyrannical regimes, but exploitation of the religious character of the calipahate by despots; and the Muslim themselves have tolerated the tyrannical regimes ruling completely contrary to the laws of Islam.[80]

Having argued his case that the Caliphate is obligatory a s well as desirable under present circumstances, and having refuted 'Ali al-Rāziq's thesis that Islam does not concern political power, he sts forth his own ideas. Since it is impossible today to envisage the establishment of the regular Caliphate (i.e.)that of the first four caliphs), an 'irregular' caliphate is justified by the condition of which Muslim world is actually in. However, such a regime should always be considered temporary.[81] The future regular Caliphate must be a flexible system. Muslim law does not impose a particular form of government; thus what he is proposing is a means to satisfy the law while adapting to actual conditions, taking account of the lessons of history.

History teaches us, says Sanhuri, that combining religious and political function in the same hands has caused the gradual absorption of the religious prerogative by the political ones. Muslim doctrine teaches that htese two prerogatives are distinctive without being separable. Therefore he recommends that the excercise of religious prerogtives be conferred on a body that is distinct and independent from the body charged with the excercize of political prerogatives. Both bodies should be placed equally under the caliph, who reunites in his person the two prerogatives, providing a balance that prevents the absorption of one by the other.[82]

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[79] Sanhoury, *Le Califat*, 38.
[80] Sanhoury, *Le Califat*, 48.
[81] Sanhoury, *Le Califat*, 49.
[82] Sanhoury, *Le Califat*, 570-571.

Taking into account of the nationalist and separatist tendencies, he proposes an 'organization of oriental nations' beginning with a structure (of caliph, general assembly, and supreme council) that would embody the religious function only. Later, a similar body would be constructed with the exetive functions, united at the top in the person of the caliph.[83] Before this executive (or political) structure can be constructed, however, before the regular caliphate can be established with the caliph uniting in his person (and symbolically the structure, one understands) political and religious function, there must be an 'evolution' of Islamic law. The caliph, to be executor and guardian of the law, must have a law to execute and guard. 'However, the great legal system has fallen into a state of stagnation by virtue of not having undergone the necessary evolution. We must thing of restoring the application of the principles, of creating a renaisance of Islamic law, distinguishing between the religious part and the temporal part.'[84] Sanhuri then proceeds to discuss in some detail how this renovation can be accomplished.

Thus, his first ideas directly concerning the revision of law come in the context of producing an evolution of Islamic law in order for the caliphate in a modern 'regular' version to be established. The actual discussion is precedural rather tahn substantive, without being linked to any particular country or context, but it is a precedure which reappears in later work, and certain aspects, although more fully developed in later writings, still retained basic characteristics of his original plan.

Before it is possible to substitute Islamic law, it is necessary, in the work of readaptation of the legal system to the contingencies

[83] Sanhoury, *Le Califat*, 527-576.

[84] Sanhoury, *Le Califat*, 571.

of the actual social organization, to pass through two successive stages: the scientific stageand the legislative stage. And science is at the base of all progress.[85] While contending in the capability of the Eastern Nation in comparison to the western ones in institutionalizing cooperation such as that found in the Western-sponsored league of nations, Sanhuri proposed the establishment of a league composed of "independent Oriental states" which would promote peace and cooperation among its members. The primary aspect that were primarily seen crucial in the institution is to coordinate practical cooperation are pertaining to such as economy, language and legal but safe political aspect for, according to Sanhuri it is dependent on the stability of all these standards that the domain of politics can be proceeded.[86]

From the above discussion, it is evident that Sanhuri's educational background, the mulieu in which he lived in, his career as lawyer and politician, and the political situation in his time all are determining factors which had shaped the formative through to the later stage of his thought.

[85] Sanhoury, *Le Califat*. 604.
[86] Sanhoury, *Le Califat*, 596-604.

CHAPTER THREE
THE DEVELOPMENT OF COMPARATIVE LAW

The emergence of comparative studies in the Middle East appears to have emerged run parallel with the coming of the colonization in the region. During the middle of the 19th century C.E., the need was felt in Islamic countries to reform Islamic law and to codify it for easy access to the rules applicable to any given situation. The enactment of the Ottoman *Majallat al-Aḥkām al-'Adliyyah* (Compendium of the Rules of Justice) was the precursor of a revival of academic interest in Islamic law. The teaching was no longer confined to religious institution, most importantly al-Azhār, but rather the new secular universities taught courses on the sharī'ah and encouraged comparative studies involving the subject.[1]

[1] Literature that deals with the approximate era and origin of comparative legal studies available in English is limited. Perhaps the most important of them *inter alia* J. Heyworth-Dunne, *An Introduction to the History of Education in Modern Egypt*, 1st edition. (London, 1939); Donald M. Reid, *Lawyers and Politics in the Arab World.* (Minneapolis and Chicago: Bibliotheca Islamica , 1981); Nathan J. Brown, *The Rule of Law in the Arab World, Courts in Egypt and the Gulf* (Cambridge: Cambridge University Press, 1998); Enid Hill, "Comparative and Historical Study of Modern Middle Eastern Law," *The American Journal of Comparative Law* 26 (1977-1978): 279-304; Ron D.

This chapter will seek to discuss the historical origin of Comparative law in the Arab countries. Since the present dissertation takes its core approach of study in comparative basis, this part, then will firstly discuss the nature, scope and the method of comparative law in general. It will also attempt to analyze the recent debate on the subject with the emergence of globalization. At this juncture, this chapter will proceed to analyze the historical development of comparative law in the Middle East. In so doing, the discussion then will lead to the exploration of the historical circumstances in which comparative law took root in the Middle East. It will be argued that there was a close interrelation between codification and comparative law, so that it is inconceivable not to discuss about the *taqnīn* process in the framework of Islamic legal system.

A. Defining Comparative Law

In order to have a better understanding of the development and uses of comparative law in the modern world, it is necessary to examine the nature, origins and scope of the term itself. To this end, the primary question to be asked is what is the nature of comparative law, is it a subject resembles that of other branch of law like family law or commercial law, or is it a method ?[2] Comparatists have divergent view in designating comparative law. Some of them reject such term maintaining that it is being a misnomer, and instead they search for new terms as "Comparative Legal History," Comparative Legal Traditions," Comparative Legal

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Cannon, "Social Tensions and the Teaching of European Law in Egypt Before 1900," *History of Education Quarterly* (Fall) (1975).

[2] For more details see Rudolf B. Schlesinger, et al. *Comparative Law: Cases, Texts, Materials* (6th ed.) (New York: Foundation Press, 1998), 1; K. Zweigert and H. Kotz, *An Introduction to Comparative Law* (1977), 1-10.

Systems," "Comparative Jurisprudence," the "Comparative Study of Law," "Comparative Legislation." Accordingly, Edwin Patterson prefers to describe it by its French equivalent – *droit compare*. These terms does not only qualify the term "comparative law" more meaning but they also pointed to which aims the comparatists set out to pursue. In response to the question above, as an academic pursuit, comparative law does not have a core content of subject areas and does not denote a distinct branch of substantive law. Similarly, as Zweigert and Kotz put it, it describes 'an intellectual activity with law as its object and comparison as its process.'[3]

Conventionally, comparison of the numerous legal systems existing in the world has been focused on three major legal families, namely the civil law system, common law and other legal systems.[4] Therefore, the Comparative law may be defined to describe the systematic study of particular legal traditions and legal rules on a comparative basis. To qualify as a true comparative law enterprise, it also requires the comparison of two or more legal systems, or two or more legal traditions, or selected aspects, institutions or branches of two or more legal systems. Thus, in other words, comparative law is primarily a method of study rather than a legal body of rules. Nevertheless, the method theory has been advocated by such eminent commentators as Pollock, Gutteridge and David.

However, this view does not share by a number of other eminent comparativists, like Salielles, Rabel, Rheinstein and Hall who argue that comparative law should be seen as a social science, so that the data obtained should be seen not just as part of its method, but as

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[3] See K. Zweigert and H. Kotz, *An Introduction to Comparative Law* (1977), 2.

[4] The legal system of the countries in the world constitutes of no less than 42. Before the break of the Soviet Union, its socialist legal system had been recognized as the third major legal system adding up to civil and common law system. K. Zweigert and H. Kotz, *An Introduction to Comparative Law* (1977), 3.

forming part of a separate body of knowledge. It would appear that this social science theory has lost ground in more recent times. Yet, another view has been to accept both interpretations so that it may be seen both as a science in its own right, and as a method.[5]

There is no generally accepted framework for comparison, although most writers appear to assume that the comparative methods, which should be employed, are obvious. The basic concept, its aims, and its *raison d'etre*, as well as methodology, have attracted somewhat disparaging critical comment. Rabel, for instance, declares that "Comparative law can free the kernel of legal phenomena from the husk of their formulae and superstructures and maintain the coherence of a common legal structure... ."[6] In its later development in modern era, comparatists incorporated a wide variety of disciplines in approaching comparative law, so that such scholars as Alan Watson maintains that it is: "...the study of the relationship between legal systems or between rules of more than one system ... in the context of a historical relationship ... [a study of] the nature of law and the nature of legal development."[7]

From this assertion it may be understood that modern comparative law acknowledges the significance of interconnectedness between law, history and culture prevailing within respective legal systems, or between rules of more than one system. Accordingly, legal history and 'step beyond into jurisprudence' may be perceived as the essential ingredients of comparative law as an academic discipline in its own right, and

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[5] Winterton, "Comparative Law Teaching," *American Journal of Comparative Law* 23 (1975): 71.

[6] Grossfeld, *The Strength and Weakness of Comparative Law* (1990), 53.

[7] Alan Watson, *Legal Transplant* (1974), 6-7.

thus a mere comparison of rule *per se* does not constitute comparative law.[8]

B. The Function and Aim of Comparative law

1. As an Aid to Legislation and Law Reform

It appears that the initial utilization of the comparative method for legislative purposes goes back as early as when Greek and Romans visited cities, which they perceive, could provide them with models of laws that were worth enacting in their respective country.

Instances in which legislators borrowed foreign ideas are numerous, but it suffices to mention a few which perhaps the most significant are: the Prussian company law of 1843 which was formed taking after the model of French Commercial Code of 1807; the Internal Revenue Code of the United States has inspired German legislators in adopting the doctrine of proper allowances for dealings between connected enterprises. A number of ideas in the Swiss Law of Obligations of 1881 to a lesser or greater degree has also been adopted in the German Civil Code.[9]

More over, during the span of the first half of the twentieth century history of developing countries, adoption and adapting to Western or socialist law whether voluntarily or by force occurred. One obvious reason for this process has been colonialism and

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[8] The importance of legal history in approaching rules has been supported by many a scholar like Dawson, Lawson, Marryman and Rene David. Peter de Cruse, *Comparative Law in a Changing World* (London: Cavendish Publishing, 1999), 6. Similarly, the need of sociological approach in comparative law has also been discussed by F.J.M. Feldbrugge, in his "Methods of Sociological Research in Comparative Law," *Netherlands Reports to the VIIIth International Congress of Comparative Law, Pescara 1970* (Deventer, The Netherlands: 1970), 61-71.

[9] For details on the subject, see generally Grossfeld, *The Strength and Weakness of Comparative Law* (1990), especially Chapter III.

numerous wars, which resulted in hybrid systems, exist side by side with native customary law. Another reason has been the international relation that have resulted from Western influence which have led to expatriate Western academics setting up institutions of learning, or helping in the drafting of new laws more suited to the changing social and economic conditions of the particular society.

In view of the growing needs of conducting research on a wide range of comparative legal studies, a national institution known as the American Law institute was found in 1932, the primary task of which to hold meetings and conferences as well as conducting research on various aspects of legal related issues.

2. An Instrument of Construction

Another function of acquiring knowledge of the positive law with comparative approach is as an instrument of construction.[10] At the practical level comparative method has been of the utmost important to fill the lacunae in legislation or in case law of the courts and judicial process. It also functions as a tool in acquiring historical origins of a particular legal rules and concepts which have been inherited or transplanted from other jurisdictions. Through this method, it is perceived that it will throuw light in finding alternative solutions to the emerging problems. The case of European Community set the best example, of which Court of Justice (ECJ) with the affinity of legal history and derivation, judges are bound to draw upon their own experience as lawyers within the member states.[11]

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[10] This function is particularly advocated by those whom Riles calls the Categories Schools designating the three communities in comparative law, the other two of which are The Context, and the Discourse Schools consecutively. See Annelise Riles, "Wigmore's Treasure Box," 231-250.

[11] See Peter de Cruz, *Comparative Law in the Changing World* (London: Cavendish Publishing, 1999), 21.

In relation to the importance of comparative law as a means of construction Steiner suggest that what is clear to one person, may not be clear to another.[12] However, the European Court of Justice of the European Communities (ECJ) has been very careful to point out that different aspects should be taken into consideration in assessing whether the effect of a provision is clear and obvious; the various linguistic versions of the provision should be compared; comparability of legal concepts must be examined; every Community law provision must be placed in its context and interpreted in the light of the provisions of Community law as a whole, in the light of the objectives of Community law and its state of evolution at the date on which the provision involved is to be applied.

Different to unification, which contemplates the substitution of two or more legal systems with one single system, harmonizations of law arises exclusively in comparative law literature, and especially in conjunction with inter jurisdictional, private transactions. Harmonization seeks to 'effect an approximation or co-ordination of different legal provisions or systems by eliminating major differences and creating minimum requirements or standards.'[13]

Thus, comparative as a tool for reconstruction help to promote the clarification and simplication of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.

C. Survey of the Method of Comparative Law

The question of method has been the main concern of the comparatists and the source for on-going debate to the present time.

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[12] For detail, see Steiner *EEC Law* (1990), 268.

[13] Kamba, "Comparative Law: A Theoretical Framework," *ICLQ* 23 (1974): 501.

Due to its diverse methodologies which arise from different perspective underlying the paradigms of comparative law what follows will be focused on predominant methodologies.[14]

During the span of the history of the discipline of comparative law it is established that there was a clear-cut distinction between the pre-modernist nineteenth century and the advent of modernism in the early twentieth century. Precisely, comparative law studies in the former have not necessarily cosmopolitan in which comparativists were engaged in suspicious and unscientific typologies of legal systems of the world on the basis of a rudimentary evolutionary type of social and legal development. Accordingly, they worked with little actual knowledge of the legal systems they studied.

In addition, it appears that comparative law functioned as a means of strengthening the authority of the colonizing powers as a grand producer of rationalizations for the expansion of Euro-American interests and law throughout the world.[15] Consequently, at the methodological level, law is signified in an exceptionally narrow definition "a limited conception of law as the edicts of legislatures or courts alone that too often led to the conclusion that those who had no such institutions had no law."[16] Thus, it is not an

[14] Most often than not, scholars would rather deal with paradigm than trying to provide the ultimate defenition of comparative law. See generally Gunter Frankenbersg, "Critical Comparison: Re-Thinking Comparative Law," *Harvard International Law Journal* 26 (1985): 426-7; See also Annelise Riles, "Wigmore's Treasure Box: Comparative Law in the Era of Information," *Harvard International Law Journal* 40 (1999): 221-2.

[15] See Riles, "Wigmore's Treasure Box," 227.

[16] Works that cover discussion the extent to which Orintalism interfere the realm of law in the modern era are numerous, perhaps the most notable of which are Teemu Ruskola, "Legal Orientalism," in *Michigan Law Review* 101 (2002): 179 *et seq.*; Wael B. Hallaq, "The Quest for Origins or Doctrine ? Islamic Legal Studies as Colonialist Discourse," *UCLA Journal of Islamic and Near Eastern Law* 2 (2002): 1-31. In the latter article Hallaq sets forth a premise that while Orientalism (within or without the discipline of legal studies) is admittedly multifaceted and quite diverse in both its methodological

exaggeration to assert that comparative legal study during the early period consisted principally of the "pigeon holing" of legal systems into clearly differentiated traditions.

In the twentieth century, however, it was soon perceived that this method was fundamentally unsatisfactory, a sense of what the actual law was like in its operation was needed. Comparative legal study is now beginning to go beyond mere formal analysis of legal systems. It became more "scientific" and more "dynamic" and abandoned its evolutionary framework in favor of a more functionalist understanding of the law. In other words, the dynamic fashion means by studying the reception and foreign borrowing of legal principles, the effect of political and economic forces on the law, the impact of law on social institutions, and the creation of the law through judicial decisions, legislation, and executive actions. This type of legal study seeks to discern what law is prevailing within a society.

Stemming from this vantage point, therefore, the methodological debate in comparative law at this stage is simply a question of what and how much context we include, or what kind of scientific methods we choose.

As far as the paradigms of comparative law are concerned, comparatists have developed a variety of methodologies in accordance with the requirement of changing conditions in social, political and economy. Among the numerous methodologies, perhaps the most predominant of them is encyclopedic comparison.

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approaches and positive findings, its constitutive tenets are by defenition shared by the great majority of its exponents and, quite possibly by all of them. He further maintains that justification and rationalization underlie the tenor of Orientalist writings on the so-called modern reforms. The discussion about the mythic "close of the gate of ijtihad" is one of the colonialist enterprise to displace the shari'ah if not demolish it all together. See page 5.

This method which was based on the proposition of Leibniz' design for a *Theatrum legale mundi*, is the comparative depiction or representation of the laws of all peoples, places and times. John Henry Wigmore[17] adopted this method and applies it into scholarly practice. Similarly, toward the end of the 1980s the international Encyclopedia of Comparative Law followed Wigmore's lead.[18]

The second method is Constructive Comparison, which constitutes the only prescriptive approach to comparative law. This method of comparison varies from reasoned speculation of Aristotle pertaining to the ideal constitution based on a comparison of the constitutions of the Greek city states via Montesqieu's *De l'esprit des loix* to more current endeavor leading to modernization, unification and improvement of the international legal order through comparative legislation.[19]

The third method is Comparative Historical Reconstruction the primary objective of which was to uncover the origins and developments of institutions, forms and categories of modern law and the evolutionary principles of law. In addition, it is also aimed at providing a comprehensive account of legal pluralism or rather to find out 'the appropriate law' that satisfied the cultural demands of a particular phase of human social development. To put it

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[17] While criticizing Wigmore's scholarship enterprise such comparativists as Annelise Riles acknowledges that perhaps some of the former's ideas, or at least the challenges that he poses to comparativists, may serve as sources of inspiration for our current disciplinary problem. Likewise, by any standard, Wigmore is a canonical figure, some even credited him with the founder of American comparative law. See Riles, "Wigmore's Treasure Box," 228, 260.

[18] *The International Encyclopedia of Comparative Law* is unquestionably the most ambitious and prestigious enterprise in global comparison. The contribution of hundreds of scholars up to 1980s amounts to more than fifteen volumes.

[19] K. Zweigert and H. Kotz, *An Introduction to Comparative Law* (1977): 44-5, as quoted in Gunter Frankenbersg, "Critical Comparison: Re-Thinking Comparative Law," *Harvard International Law Journal* 26 (1985): 427.

differently, Comparative Historical reconstruction then is the enterprise of legal ethnologists[20] and the more philosophically oriented school of historical jurisprudence.[21]

The fourth method is combination-plus. Strictly speaking, it is not a paradigm or ideal type because it draws from and cuts across the other approaches to comparative law.[22]

The Fifth method is comparative functionalism, which claims to have solved the problem of establishing a neutral referent for comparison.[23] A more systematized picture of this general theoretical orientation is drawn in the following table.[24]

	Philosophical	Analytical/ Doctrinal	Historical	Sociological
Theory of Law	Ideal body of (natural law) Law as universal reason	Law as a body of coherent precepts	Law as the realization of the Volkgeist or instincts for survival	Law as answer to needs of society and as instrument for social change
Method of comparison	ideal construction comparative legislation	Compare rules of different systems and formulate general principles or revise doctrines	Look into the past to disclose the principles of the law today	Functionalist analysis (analogous problems equal equivalent solutions)

[20] For an account of ethnological studies, see M.B. Hooker, *Legal Pluralism: An n Introduction to Colonial and New-Colonial Laws* (1975), 6-54. For a more recent studies on this genre see, Baudouin Dupret et. al. (eds.), *Legal Pluralism in the Arab World* (The Hague, The Netherlands: Kluwer Law International, 1999).

[21] Gunter Frankenberg, "Critical Comparisons: Re-thinking Comparative Law," *Harvard International Law Journal* 26 (1985): 427.

[22] Gunter Frankenberg, "Critical Comparisons," 427.

[23] Gunter Frankenberg, "Critical Comparisons," 428.

[24] Gunter Frankenberg, "Critical Comparisons," 428.

Goal	Ideal State: universal principle of justice Rational legislative science	International-ization of law Precepts for al cases	Universal legal history/ jurisprudence Practical improvement of the law	Rationalizing the law Lawful change of society
Academi c label/ School	Philosophy: Elegant Jurisprudence Applied Comparative law	Analytical/ Practical Jurisprudence	Legal Ethnology/ Historical Jurisprudence	Functionalism Law and Development
Politics of Law	Idealism or Humanism Reformism	Positivism/ Utilitarianism	Evolutionism / Social Darwinism	Social Engineering Modernization

Different to Frankenberg's proposition mentioned above, Riles on the other hand, discusses three methodological positions that constitute three groups of scholars working under the disciplinary umbrella of comparative law, namely schools of Categories, Context and Discourse respectively.[25]

With regard to the former, the Categories School, which is occasionally designated as "mainstream" or "traditional," is characterized in their predominant role in the writing of all most important case-books and treaties in the realm of comparative law.

The primary concern that matters for this group of scholars are such questions as how norms are similar or different from one jurisdiction to another, how such a norms are borrowed or transplanted, and how they are expressed in differing or similar kind of rules. How are the doctrines of contract law similar or

[25] See Riles, "Wigmore's Treasure Box," 230-250.

different from one jurisdiction to another, for example ? What is the functional equivalent of a particular doctrine in another jurisdiction ?

As far as The Birth of Modern Comparative Law It has been widely accepted that the International Congress of Comparative Law held in 1900 in Paris, marked the beginning of modern comparative law.

Lamberts asserted that: "comparative law must resolve the accidental and divisive differences in the laws of peoples at similar stages of cultural and economic development, and reduce the number of divergences in law, attributable not to the political, moral or social qualities of the different nations but to historical accident or to temporary or contingent circumstances."[26]

At the turn of the 21st century that brought with it the era of globalization has been one of the source for the renewed interest in comparative law. This can be discerned from new enthusiasm of scholars of constitutional law and others to comparative cases and materials. Similarly, in the process of decision-making, the American courts, for instance, have begun to consider the value of comparative materials.[27] In addition, [a new generation of legal scholars who a decade ago might have been drawn to jurisprudence, interdisciplinary studies of the law, or constitutional law, and who are outsiders to the organized community of comparative law

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[26] Eduard Lambert " Proces-verbaux des seances et documents, Congres international de droit compare (1905).

[27] See *inter alia* Roger Miner, "The Reception of Foreign Law in U.S. federal Courts," *American Journal of Comparative Law* 43 (1985): 581, in which he criticizes his colleagues on the Second Circuit bench and throughout the federal judiciary for their irrational fear of foreign law; Richard J. Cummins is also advocating the centrality of comparative law in legal education that should provide students with necessary training for work either as a corporate coulcel or as a lawyer, in his "International Practice and Comparative Legal Studies," *Journal of Legal Education* 35 (1985): 421.

scholars, are enthusiastically claiming comparative law for themselves.[28]

However, the inclination to globalization, as consequence, resulted in absurd effect that lead to as to the purposes and methods of comparative law.

D. The Development of Comparative Law in the Middle East

The emergence of the contemporary movement to reform Islamic legal system in the Muslim countries by codification gives an impetus for consciousness of the importance of comparative studies. To give the precise date on the origins of comparative law in the middle East is a matter of conjecture. However, as has been asserted, since comparativism run parallel with the urgent call for the process of codification, therefore it is undeniable that discussion should be directed to the framework of historical context of codification in general.

1. Initial Idea of *Taqnīn*/ Codification

The impetus to make Islamic law both more unified and applicable to the actual life throw light for renewed consciousness of Islamic legal scholars to introduce codification, the idea of which is undeniably owing very much to the thought of Ibn Muqaffa'.[29]

The idea of Ibn Muqaffa's idea on *taqnīn* is also applied by the Ottoman Empire in the form of codification of Islamic law based

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[28] Marie-Claire Belleau, "The 'Juristes Inquiets': Legal Classicism and Criticism in Early Twentieth-Century France," *Utah Law Review* (1997): 379.

[29] Bearing the full name Abū Muḥammad ibn al-Muqaffa' (102 H/ 720 CE – 139 H/ 756 CE) he is a man of Arabic literature and played an important role in effort to translate various works in Persian and Indian Literatures into Arabic. Abū al-'Abbās Shams al-Dīn Aḥmad Ibn Khallikān, *Wafayāt al-A'yān wa Abnā' Abnā' al-Zamān*, vol. 2 (Qum, Iran: 1343 H), 151.

on the Hanafi school although confined to matters pertaining to civil and not covering religious and penal law.[30]

In his letter to the Caliph al-Manṣūr[31] regarding this matter, Ibn al-Muqaffa' wrote: What the Amīr al-Mu'minīn sees, regarding the matter of those two cities; Baṣra and Kufa and other cities and regions, of the differences of these contradictory rulings which has reached great proportion regarding rulings pertaining to life, chastity and property. The rules concerning life and chastity allowed in Baṣra is forbidden in Kufa, such disagreements are taking place in the heart of Kufa, something is allowed in one area but not in the other. However, al-Manṣūr did not act according to this letter although he was influenced by it. His influence made him to make the *fuqahā'* and the *muḥadditsūn* to record what has reached them until people had references to which they could refer. The reason for al-Manṣūr for not acting upon the opinion of ibn al-Muqaffa' in laying down a constitution and canons for the state, which would have brought the people together on specific rulings/ *aḥkām* was what happened between him and Mālik.

Further more, Ibn Sa'd narrated in *al-Ṭabaqāt* that Mālik ibn Anas said: "when al-Manṣūr went on pilgrimage he said to me: I have decided to order people to follow the books which you have written. They will be copied, then I will send a copy to Muslim populated cities and I will order them to act in line with it and not

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[30] It is worthy of note that Ibn Muqaffa's oeuvre in the realm of *fiqh* cannot be found since he is not a jurisprudent (*faqīh*). His only view pertaining to *fiqh* is that of *taqnīn*, and therefore, despite his ardent voice for the need of codifying of Islamic law, and of course not to deny his mastery in Arabic, he is well suited to be called an analyst of *fiqh*.

[31] Abd Allāh ibn Muḥammad ibn 'Alī ibn al-'Abbās Abū Ja'far al-Manṣūr, the second Abbasid Caliph was born in Jami'iya near Ma'ān in 714 CE. and died in Bi'r Maymūn while performing pilgrimage in 775 CE. He is knowledgeable of *fiqh* and *adab*, leading in philosophy and monarchy, loving the learned persons/ *'ulamā*. In addition, he is also responsible for establishing the city of Baṣra. Al-Ṭabarī, *Tārīkh al-Ṭabarī*, vol. 9, 292.

refer to any other works. So, I said o Amir al-Mu'minin ! do not do this. The people already hold opinions, and they have heard *ḥadīth* narrated reports, every one took what he had already abided by. Let the people of respective county decide for themselves.

Consequently, the schools and opinions were not unified and people exercised *ijtihād* and personal reasoning (*ra'y*) as a means of finding rulings they deemed correct. And the choice remained for judges and rulers to judge with what they perceived as appropriate, and therefore each *imām* of the school has students who came to study the former's opinion and explain his school. In addition, the outlook towards this disagreement that took place changed and it became a science on its own right which they called the science of controversy (*'ilm al-ikhtilāf*).

2. Comparative Studies in the Realm of Islamic Jurisprudence

It appears that it may be pointed out to the time prior to the 19th century in which learned Islamic scholars had underwent comparative studies in various field of knowledge.[32] In the realm of law, in particular, there were many a jurists who wrote treatise on Islamic law in line with comparative basis such as that of *Al-Fiqh 'alā al-Madhāhib al-Arba'ah*. The genre of this works that connote comparativism is generally called *muqāranah* or *muqāranat al-madhāhib* and others. The comparatist jurists provide rulings or *ḥukm* from diverse classic Islamic legal treatise of a given case. In their handling of this questions under discussion, the jurisprudents/ *fuqahā'* refer to multiple normative arguments.

In such a way, the genre of this kind of study elucidate the divergent views of jurisprudents or *fuqahā* of different schools of

[32] In the field of theology or *kalām*, for instance, *al-Milal wa al-Niḥl* of Shahrastani.

thought to given problems. It also provide explanation of arguments used of respective rulings or *ḥukm* and while comparing between the argument, it gives criticism, and take stand of the most favorable view based on the reliability and the strength of arguments, the final objective of which is for the good of the community and to avoid harm.

Interestingly, in many instances, the jurisprudents discuss the rational of each view, and take stand of the most widely accepted or authoritative opinion. This is not to deny of course the possibility of scholar who only describe the opinion and left the readers to decide of what rulings are the favored most. In sum, seems to be, that legal comparativism in this period was limited within the realm of divergent opinion of the established schools of Islamic legal thoughts.

Although this type of comparativism has been found in the works of such great jurists as Shafi'is *al-Umm*, Sarakhsi's *al-Mabsūṭ*,[33] Ibn Rushd's *Bidāyat al-Mujtahid*, Ibn Qudāma's *al-Mughnī*,[34] these works, however, are not recognized to be the sort of what is intended in the genre of comparative law manner. The reason is because, it simply mentioning the different opinion, discussing it as a means of affirming the reliability of the view of the master who wrote the book.

However, the contemporary movement of what is the then known as modern trend in comparative law between civil codes and Islamic law became concrete as a response to the necessity

[33] In his book, al-Sarakhsi systematically expounds al-Shaybani's (d. 804) compilation of the legal doctrines of the two founders of the Hanafi school of law, Abū Ḥanīfah (d. 767) and Abū Yūsuf (d. 798). See Khalil al-Mays, *Fahāris al-Mabsūṭ* (Beirut: Dār al-Ma'rifah, 1980), 7-10.

[34] Muwaffaq al-Dīn Ibn Qudāmah, *Al-Mughnī 'alā Mukhtaṣar Abī al-Qāsim 'Umar al-Khiraqī*. Rashid Rida, ed., 12 vols. (Cairo: Dar al-Manar, 1341-48/ 1922-30).

which directly touches upon reform in the form of codification, to push the contemporary movement of codification of the tenets of Islamic law and to exhibit the advantages of Islamic law and its superiority over other systems and affirmation of its ability to actualize balance between individual and communal interest.

The subsequent development of comparative study may be suggested to occur as consequence of the colonization throughout the Middle East. The colonization brought with it tremendous changes to the colonized subject in most avenue of life from the questions of authority, politics, economy, law and education.

The most notable reform movement in the modern history of the Muslim world was resulted in *Tanzīmāt*, which introduced for the first time series of legislation imported from Europe to be implemented municipally in the Empire. Under this reform program, it was at once aimed at modernization and an effort to prevent the disintegration of a pluralistic empire in terms of religion and ethnicity. Accordingly, it was also an attempt to offset these delicate extremes of the Ottoman, partly to impress the western Capitulatory Powers and partly to reform the Empires's legal system. Thus, legal reforms in the Muslim world began towards the mid nineteenth century in the Ottoman Empire under a series pf regulatory enactments known as *Tanzīmāt*.[35]

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[35] Although the precise date of the beginning of this reform movement is commonly agreed to have begun with the proclamation of the quasi-constitutional Charter of Gülhane in 1839, its terminal date however, is a matter of speculation. For further discussion on *Tanzimat*, see generally Stanford J. Shaw and Ezel Kural Shaw, *History of the Ottoman Empire and Modern Turkey*, vol. 2, *Reform, Revolution and the Republic* (Cambridge, Cambridge University Press, 1977); see also a short but informative article by Şerif Mardin, "Tanzimat," in John L. Esposito et al., eds., *The Oxford Encyclopedia of the Modern Islamic World* (New York, Oxford University Press, 1995), vol. IV, 183-186.

Several codes were compiled, the most important of which was *Majallat al-Aḥkām al-'Adliyyah*,[36] briefly known as the *Majallah*, or *Mejelleh*, promulgated in 1877. It has been widely accepted that the emergence of the codification of *Majallat al-Aḥkām* during this century marked the approximate beginning of comparative studies although still limited within the boundaries of Hanafi school.[37] Further implication of this stage of development gave more impetus on this mode of study for Muslim scholars, especially those of Azhar university in actualizing comparative study so that it has sponsored seminars and congress on the subject.

In the international congress of comparative law held in Lahai in 1932 it gave room for preparedness Islamic law as a subject of their discussion. In its similar meeting in 1950, the congress regarded Islamic law as an element of comparative of jurisprudence and proposed to establish weekly series on Islamic law.[38]

In term of the sources, the *Majallah* is derived from the Shari'a provisions of numerous classical treatise of the Hanafi school that had been the official school in the empire since the beginning of the sixteen-century. In case view of on particular problem varies, the most suited view to the contemporary commercial requirement

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[36] Increasing interest in studying the positive law in Islamic legal system is evident in such works as Ali Haydar, 'Alī. *Durar al-Hukkām Syarḥ Majallat al-Aḥkām*. Tr. Into Arabic by Fahmī. The *Majallah* has also been translated into English that enables access for wider non-Arabic speaking readers, the most notable of which is Judge C.A. Hooper's translation as *The Civil Law of Palestine and Trans-Jordan* (London: Sweet and Maxwell, 1936-1938.

[37] In addition to *Majallat al-Aḥkām al-'Adliyyah*, other field of law were also codified which include *Majallat al-Iltizāmāt wa al-'Uqūd*.

[38] The First series was convened in Paris in 1951, in which Islamic law was characterized as a great system of jurisprudence and that the value of its subjects are beyond questions. See 'Abd al-Nāṣir al-'Aṭṭār, *Taṭbīq al-Shari'ah al-Islamiyyah*, 52.

and common practice was taken.[39] In addition, it is characterized with modest language and confined to a single opinion in order for it tobecome easier for both reference and application.

Therefore the *Majallah* was intended to become universal civil code distilled from the rulings or *ḥukm* of the *fuqaha*'s treatise. It was a short form of a civil code, based on the law of It contained an extensive general part and sets of provisions on various contracts, non-contractual obligations, and certain procedural matters. The *Majallah*, then, marked the beginning of codification in the history of Islamic legislation in the true sense of the word.[40]

The noticeable result from such codification of the *Majallah* provided not only uniformity or standardization of the law as there was only a single solution to a single problem, but it also make reference to the Shari'a relatively easier. Following the disintegration of the empire, the *Majallah* survived in various newly independent territories at varying degree. It was then replaced by respective national Codes, but nonetheless it marked as a corner stone in the development of Islamic civil codes, the form of which is drafted along the line with Western model.

However, since the *Majallah* was compiled as an incident of the general legal reform in Turkey which started with the Hatti Sherif of Gulhane in 1839. The difficulty then, as now in the general Arab context, was to preserve "Islamic institutions while the

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[39] A notable example of this case is article 207 of the *Majallah*, which validates the sale of non-existent fruits. Such an article was based upon the isolated view of Muhammad Hasan al-Shaybani, which diverged from the prevailing view among the Hanafi jurists. See C.A. Hooper, *The Civil Law of Palestine and Trans-Jordan*, vol. I (Jerussalem, 1933), 9.

[40] Many scholars hold this view, see *inter alia* Ṣubḥī Maḥmaṣṣānī, *Falsafa al-Tashrī'*, 64, 65; Muṣṭafā al-Zarqā', *Al-Madkhal al-Fiqh al-'Ām*, 199; Shafiq Shaḥātah, *Al-Ittijāhāt al-Tashrī'iyyah*, 19; Muḥammad Muṣṭafā Shalabī, *Al-Madkhal fī al-Ta'rīf bi al-Fiqh al-Islāmī*, 158.

Ottoman Empire was changing from an Islamic to a Western society."[41]

Indeed, in the process of the codification of the *Majallah*, the comparative method involved in that of selecting the material from diverse treatise of the Hanafi schools. Although, on the main, it was based on various rulings, the views of other mazhab, to a lesser extent were also incorporated. In addition, in terms its procedure and the style, it can be discerned that it was structured in line with the style of code in general, all of which cannot be denied that comparison was operative at every stage of its making.

Taking into account the important of the *Majallah*, a number of jurists wrote commentary in comprehensive manner. Chief among these were Ali Haidar's *Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām* which was originally written in Turkish which then translated into Arabic by Fahmi al-Husayni; similarly, commentary by Salim Baz Rustam al-Lubnani, commentary by Shaykh Khālid al-Atasi, a Damascus mufti.

In 1891 Muḥammad Qadrī Pāshā[42] made a similar attempt to push the reform ahead in which he individually produced *Murshid al-Ḥayrān*,[43] a treatise in the form of code covering important areas

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[41]Khadoury and Leibesny, *Law in the Middle East* (Washington: Middle East Institute, 1955), 292.

[42] See Qadri Pasha's unique career, which combined traditional training in Islamic law and modern legal studies in Europe, in Muḥammad Ḥusayn Ḥaykal, *Tarājim Miṣriyyah wa Gharbiyyah* (Cairo, 1929), 109-18; cf. Tawfiq Askarūs, "Muḥammad Qadrī Pāshā," *al-Muqtaṭaf* 48 (1916): 253-63.

[43] The full title of this treatise is *Murshid al-Ḥayrān ilā Ma'rifat aḥwāl al-Insān* (*A Guide to the Confused leading to Knowledge of the Condition of Man*), the aim of which is an attempt to codify Islamic law for Egypt along the lines of the better known Ottoman Civil Code or the *Mecelle*. It remained in manuscript form only until 1889. By that date, Qadri had left government politics, and offered the work as a scholarly contribution only. See Ron D. Cannon, "Social Tensions and the Teaching of European Law in Egypt Before 1900," *History of Education Quarterly* (Fall) (1975): 303.

of civil law such as contracts, land ownership, properties and agencies based on Hanafi school of law. In addition, he also wrote a code exclusively dealing with *waqf* or endowment *Qānūn al-'Adl wa al-insāf li al-Qadā' 'Ala Mushkilāt al-Awqāf.*

Being intended to becoming as a nationalistic reminder of the existence of Hanafi law in the field of contracts, though it was never implemented, it was considered as authoritative textbook in government schools. Although these works set a precedent for the process of codification in the civil and commercial law, substantially, however, no significant changes brought by either *Majallah* or Qadri Pasha's codes.

However, Egypt from 1875 onward had gone even further than the Ottomans in adopting the French laws in promulgating their penal, commercial, and maritime codes, and in setting up a secular legal system.[44] What Egypt is said to have imported from the West, was actually borrowed from Egypt by Napoleon who proudly claimed for his code, "My real glory is not the 40 battles I won, for Waterloo's defeat will destroy them. What will live forever is my civil code."[45]

The most important codification of civil law in the Middle East came after independent. During the 1940's, it was the outcome of the work directed by Sanhuri who advanced the process of reform

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[44] The history of the influence of European civil and commercial law in the Middle East is fairly well documented. See generally Herbert J. Liebesny, *The Law of the Near and Middle East: Readings, Cases and Materials* (Albany, New York, 1975); see also Ian Edge, "Comparative Commercial Law of Egypt and the Arabian Gulf," *Cleveland State Law Review* 34 (1985-86): 129-144, which discusses briefly the themes of this influence which are important for the later period of reform.

[45] See Muzaffar Hussain, "Islamic Law and the Modern Age," *Hamdard Islamicus* XXII(1) (1997): 1-2.

a step forward in which a compromise between Shari'a and secular laws was reached.[46]

The emphasis of the need of comparative study between Islamic law and secular law continued to be voiced after the death of Sanhuri which was evident in the first meeting of Dean of Law faculty of Arab Universities held in April 1973 in the University of Beirut.[47] It is held that the importance of faculty of law in the Arab universities that it should study Islamic law with its distinct characteristic as an official source for codification in most Arab countries, and as historically source for legislation in all countries in the region.

In the following year the second meeting of this council was held in Baghdad, which came to very important recommendations. Of the various recommendation put forward, the most significant among others are: 1) to seriously concentrate on studying Islamic law since the final end of Arab identity requires that of looking back to the Shari'a and having full confident in it as a main source for a unified Arab legislation, 2) principal source, 3) to establish center or institution that will deal with a standardized Shari'ah and codification throughout Arab world.[48]

This board is aimed at setting up a comprehensive study of both shari'ah and legislation that will be valuable for positive law legislator. In addition this body is also expected to breakthrough views required by Arab states and the official committee and giving suggestion, and to systematically arrange the work of the board close examination to shari'ah in the Arab world.

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[46] The role played by Sanhuri in drafting the New Egyptian Civil Codes will be discussed in Chapter Six.

[47] M. Farūq Nabhān. *al-Madkhal li al-Tasyrī' al-Islāmī* (Beirut: Dār al-Qalam, 1981), 361. Herein after quoted as Nabhān. *al-Madkhal.*

[48] Nabhān. *al-Madkhal*, 362.

As a matter of fact the study of comparative law has paved the way for such regional legal surveys through the better knowledge and the better appreciation of foreign laws by the lawyers of a given legal system. From this point of view the study of Islamic law, the common law of the Middle Eastern countries, is of special interest.

E. Sanhuri and Comparative law

The issue discussed thus far, has elucidated the historical development of codification in Islamic legal system as well as examined the extent to which comparative law interjected into the whole process, but the comparative method used was still limited to the realm of Islamic law. Considering the fact that during the first half of the 19th century, Egypt was in search of appropriate legislation, the process of which involved two contradicting interests, the Islamist vis a vis the secular. In addition, the situation became even more complex with the deteorating political and economic conditions.

The development of comparative law in the Middle East owed chiefly to the role played by Sanhuri.[49] The use comparative law method is an essential means for legal development Sanhuri's scheme of reforming the legal system of the Arab world, which also a corner stone of the historical origin of comparative law in the region. In order to have a better view of how Sanhuri got acquainted with comparative law, this exposition is an attempt to look at the historical origins of the introduction of comparative law to the Arab land. Thus, it is at this juncture that comparative study manifested itself in wider context in the time of 'Abd al-Razzāq al-Sanhūrī.

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[49] See Nabil Saleh, "Civil Codes of Arab Countries: The Sanhuri Codes." *Arab Law Quarterly* IIX(ii) (1993): 161-7.

As has been mentioned earlier in chapter two Sanhuri, like most highly motivated secondary school graduate, started his legal studies at *Madrasah al-ḥuqūq al-Khidiwiyyah* in Cairo from which he obtained *licence en droit* in 1917. During the span of its history the School itself had become the target of dispute between the French and British administration in Cairo.[50]

Directed by the noted 'Abd al-Rahman al-Tahtawi (1801-73), the School of Administration and Languages was transformed into a law school, which also marked the beginning of law studies in the country. However, the directorship was soon entrusted to Victor Vidal (1833-89) a Frenchman who had won the favor of the French oriented Khedive Isma'il.[51] Under Vidal, the school underwent some important reorganizations of the curriculum and broadened the law courses offered comparable to that of French law schools. In 1886 the institution officially became the school of law.[52] However, one of the problem in taking the French model for granted is that the French law schools of the time narrowly expounded the Napoleonic codes in a highly theoretical way without relating law to society through either a historical or an analytical approach.

Under the pressure of the European opposition, 'Ali Mubarak, the Minister of Education at the time, made an attempt twice to appoint an Egyptian to succeed Victor Vidal upon the latter's death in 1889. However, Mubarak's effort came to nothing for the French

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[50] Reid, Donald M. *Lawyers and Politics in the Arab World* (Minneapolis and Chicago: Bibliotheca Islamica, 1981), 17.

[51] Reid maintains that the main reason for Vidal's appointment was due to his participation in Egypt display at the Paris exposition of 1867 and tutoring Crown Prince Tawfiq in administrative law. See Reid, *Lawyer and Politics*, 18.

[52] Despite necessary changes made by Vidal to the school, however, there were some weaknesses of its French models in that "the French law schools of the time narrowly expounded the Napoleonic codes in a highly theoretical way without relating law to society through either a historical or an analytical approach." *Lawyer and Politics*, 18.

once again secured their appointment by means of diplomatic pressure in 1891. It was Charles Testoud of the Grenoble law faculty, who succeeded Vidal, and who projected his creative mind for the betterment and shifting perception of the legal education then gaining ground in France.[53]

As the British consolidated their grip on Egyptian affairs in the 1890s, they waged a drawn-out battle against the French for control of the law school. France finally lost the battle in 1907 when Edouard Lambert, the school's French director, quarreled with the British advisor to the ministry of education and resigned. Despite bilateral negotiation of foreign ministers of both countries, W.H. Hill, a young Englishman of no particular distinction, replaced Lambert. British directors ran the school until Egyptians took over in 1929.[54]

Thus, Lambert became the last French dean of the Khedivial Law School, and his resignation and departure for France caused an outcry from both French and Egyptian nationalists. In the following years, he was followed by to France by over fifty of his Egyptians, forming the core of what Sanhuri was later to call "*l'ecole Lambert Egyptienne.*"[55]

Upon his return to France, Lambert reassumed once again his original post as professor of civil law at the University of Lyon, and made an excuse of his come back as being preoccupied by a caveat for mentoring a large adopted family of Egyptian students who followed him to Lyon. Professor Lambert's teaching on Egyptian students continued uninterrupted until it was discontinued by the First World War. Nonetheless, Lambert was very proud of his association with his Egyptian students.

[53] Reid, *Lawyer and Politics*, 19.

[54] Reid, *Lawyer and Politics*, 19-20.

[55] Amr Shalakany, "Sanhuri: the Historical Origins of Comparative Law in the Arab World," 170.

It is worthy of note that the Egyptian who followed him to Lyon were not just any Egyptian student, they were the future ruling elite of their country. No one was aware of this crucial fact more than Lambert, and he did not take lightly the prospect of mentoring the elite. Reflecting thirty years after the British had forced him out of Egypt, he insisted that he had always understood his responsibilities towards Egyptian law students as one of preparing them for the active social and political tasks, which awaited them as the future ruling elite of their country.

Thus, the newly invented discipline called comparative law suddenly posed as a serviceable tool in the actual struggle of a colonized people to modernize their nation. Political activism thus joined with intellectual evangelism, and comparative law was transformed at the hands of Lambert and his students. Surrounded by an Eager Egyptian following in Lyon, Lambert's first strategic step was to provide an institutionalized space in which he and his students could be affiliated, and in which the new discipline of comparative law might be pursued. Towards this end, he submitted a proposal to the University of Lyon for the incorporation of a comparative law institute at the faculty of law.[56]

However, it was rejected by the government because Lambert's effort seemed to be supporting anti colonialism which was perceived in contradiction to the foreign policy at that time, instead in November 1907 Lambert made public the establishment of *Seminaire Oriental d'Etudes Juridiques et Sociales* which was financially independent from the university. It took the University of Lyon another fourteen years to transform the *Seminaire* into the more status senior status of a comparative law institute. In 1921,

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[56] Reid, *Lawyer and Politics*, 19-21; Amr Shalakany, "Sanhuri: the Historical Origins of Comparative Law in the Arab World," 170-1.

Lambert became the head of the *Institute de Droit Compare*, the very first of its kind to be established in France, a position that conferred on him a reputation of the foremost comparativist in the country.[57]

It is conceivable that while pursuing their further study in Lyon under the supervision of Lambert, the Egyptians produced comparative law scholarship the prime spins around two major concerns. On the one hand, several doctoral dissertations were occupied with the modernization of certain aspects of Islamic law such as the doctrine of *abus de droit* (abuse of rights), the political structure of the caliphate or such general areas of private law as the sources of obligation and testamentary law. On the other hand, a very different set of dissertations dealt with specific questions of Western jurisprudence which preoccupied progressive legal thinkers in France at that time, most notably the role of standard in the socialization of French private law.[58]

Upon their return home, the majority of Lambert's students did indeed return to Cairo to oversee" the transfer of the Royal School of Law from English to national hands. Egypt became an independent constitutional monarchy in 1923, the young elite assumed their place in the modern bureaucracy, and by 1936 Lambert's star student Sanhuri had succeeded his mentor to the deanship of the Khedieval Law School-now the Royal Faculty of Law. In his capacity as dean, Sanhuri established a comparative law institute in Cairo comparable to the one in Lyon, and invited his mentor to deliver the institute's inaugural lectures.[59]

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[57] Amr Shalakany, "Sanhuri: the Historical Origins of Comparative Law in the Arab World," 172.

[58] Amr Shalakany, "Sanhuri: the Historical Origins of Comparative Law in the Arab World," 172.

[59] See generally Farūq 'Abd al-Barr, "'Abd al-Razzāq al-Sanhuri Qādiyan li al-Ḥurriyāt al-'Ammah," *Majallat al-Qānūn wa al-Iqtiṣād* 30 (special edition, n.d.): 507-509.

Having left Egypt in July 1907 after clashing with British authorities in the ministry of education, Lambert thus triumphantly returned to the country for the first time since his departure thirty years earlier. The lectures was delivered in March 1937, and in concluding them Lambert understandably declared Sanhuri to be, "in one word, the man of science best equipped to establish in Cairo an [institute of comparative law] equivalent to the one I established in Lyon.

Later that year, both student and mentor were appointed as the only two members of the legislative committee entrusted by the Egyptian government to draft the new Egyptian civil Code. The Mixed Courts regime had been abolished by the 1937 International Treaty of Montreal, and the country's legal establishment was seized with nationalist fervor at the restoration to full judicial sovereignty.[60] Lambert and Sanhuri were thus responsible for writing the core document that would be credited with reunifying the universe of Egyptian private law. Their new civil code was promulgated in 1949 and soon assumed a high illustrious career as the single most hegemonic piece of postcolonial legislation in the modern experience of Arab legal systems.[61] The code was to be copied, usually ver batim, by numerous Arab countries in the wake of their independence movements, and Sanhuri's *al-Wasīṭ*, his master commentaries on the code and his *Maṣādir al-Ḥaqq* are today probably the most important civil law treatise, which no self-respecting lawyer's library could be without.

Thus it may be asserted that the comparative study manifests itself in the present form in the time of 'Abd al-Razzāq al-Sanhūrī

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[60] M.H. Davis, *Business Law in Egypt*, (London: Kluwer Law and Taxation Publisher, 1984), 30.

[61] See in general Nabil Saleh, "Civil Codes of Arab Countries: The Sanhuri Codes." *Arab Law Quarterly* IIX(ii) (1993): 161-7.

who laid its very foundation in which he made a thorough study concerning various views on a particular case within the boundaries of Islamic law and, at the same time, the are compared to secular civil law. Interestingly, the comparative studies discourse became even more intense with its introduction in higher learning at the university level around the world.[62]

F. Comparative Law in Modernity *vis-a-vis* Tradition Discourse

It seems that one of the most noticed discourse in the Arab post-colonial condition is the modern *vis-a-vis* traditional discourse. Such discourse is conceptually structured into two different sides of a coin. On the one hand, it confines have pre-colonial "tradition", and the post-colonial "modernity" on the other. On the main, it preoccupied with understanding and evaluating the numerous transformations under the banner of modernization, which have had a great impact on the Arab world since the mid-nineteenth century.

The impact of the discourse has far-reaching consequences covering a wide range of aspects of life from law and economics to music, poetry and architecture. Accordingly, due to its diverse ideological commitments, under the rubric of this discourse, it is undeniable that it gives rise to variety of frame of thoughts from the Islamist[63] to the liberal secularist, all advocating competing

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[62] Ever since, the comparative law method had become the subject of interest of many a scholar to acquire degrees at graduate level. See I'bānī, *Al-Ḥarakah al-Fiqhiyyah al-Islāmiyyah*, 385.

[63] I prefer to use the term Islamist/ Islamism here to refer to the phenomenon widely known in the West as "Islamic Fundamentalism." The term 'fundamentalism" was invented and self-applied by a party of American evangelical Protestants in 1920 which referred specifically to the theological position of biblical inerrancy developed between 1910 and 1915. See James Barr, *Fundamentalism* (Philadelphia: Westminster Press, 1978), 2. In

approaches to resolving tension between modernity tradition.[64] Undoubtedly, there are two conflicting factors between those who reject modernization in its totality and those who advocate a full-fledged adoption of everything modern. However, although the coverage of the investigation of this discourse is very extensive, its main threshold is chiefly derived from its obsession with questions of identity.

In short, the basic question whether Arabs today can lead an existence, which is both "modern" and "authentic". The question is obviously premised on the idea that "modernization" is invariably an agent of "alienation." To be precise, "modernization" is often equated with "Westernization" and thus viewed as an inorganic process forced upon the Arab world as the aftermath of a colonial encounter, which the latter lost. "Modernization thus means the loss of "authenticity" in favor of social structures, cultural

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more recent times, the terms have been loosely applied to a wide variety of religious groups or movements, which seek the authority of scripture as a basis for socio-political mobilization. However, the complexity and disparaging connotations of such terms often resulted in polemics. See *inter alia*, J. Paul Rajashekar, "Islamic Fundamentalism," *The Ecumenical Review* 41(i) (1989): 264-84; William Shepard, '"Fundamentalism" Christian and Islamic,' *Religion* 17(iv) (1987): 355-78.

However, Sheperd's attempt never clarified what the categories imply, in terms of enhancing an understanding an understanding of what are culturally, geographically and historically, distinct phenomena. Hence, it was criticized by Bruce Lawrence and Azim Nanji, in *Religion* 19 (1989): 275-80, 281-4, respectively. See also the response of Shepard to these critiques in the same journal pages 285-92. The debates continued, however, in Shepard's comment on Lawrence's 1989 *Defenders of God*, which appeared, together with his reply, in *Religion* 22 (1992): 279-85; 284-5.

[64] For further discussion of various aspects of the discourse, from culture to law and questions of development see al-Sayyid Yasin et. al. (eds), *Al-Turāth wa Ta'hadiyyat al-'Aṣr fī al-Waṭn al-'Arabī aw al-Aṣālah Wal-Mu'āṣarah* (Beirut: 1985), which perhaps the most comprehensive collection of articles written by some of the most prestigious Arab intellectuals today. See also Albert Hourani, *Arabic Thought in the Liberal Age 1798-1939* (Cambridge, 1995), in which he approaches the issue from a more humanist intellectual history.

performances, value systems, and political institutions, which are of alien (read Western) extraction."[65]

With regard to the question of law in particular, the above abstract terms take on the relatively more concrete concerns of "legal reform." As has been discussed in the previous chapter that right from the outset of his career as academician and practitioner, Sanhuri had shown his firm belief, throughout his writings,[66] of the ability of Islamic law to be applied in the modern situation so that it requires revitalizing. He perceives that this can be achieved by comprehensive study and by approaching it through comparatively.

[65] Amr Shalakani, "The Historical Origins of Comparative Law in the Arab World,", in Annalis Riles, 156.

[66] See generally Chapter II, 29-33.

CHAPTER FOUR
THE *MAṢĀDIR AL-ḤAQQ* AND LEGAL COMPARATIVISM

In the previous chapter it has been evident that Sanhuri's background and the milieu in which he lived contributed to the formation of his life and career, intellectually, politically and psychologically and the influnce of these underlying factors in the production of *Maṣādir al-Ḥaqq* is not an exception. It has also been stated that *Maṣādir al-Ḥaqq* is not a treatise of jurisprudence in general sense as understood in *fiqh* genre. In fact, it has a distinctive discourse between ancient and modern. In what follows will seek to provide an introduction to the *Maṣādir al-Ḥaqq* by first tracing the historical background of its writing and second analyzing the composition and structure. In addition, the discussion will be followed by analyzing the methodology on how comparativism operate in this ouvre. By so doing, the significant of the *Maṣādir al-Ḥaqq* as a distinct work of the 19th century *fiqh* treatise can be properly appreciated.

A. General Introduction

As the title of the book under discussion indicates that *Maṣādir al-Ḥaqq fi-l-Fiqh al-Islāmī: Dirāsāh Muqāranah bi al-Fiqh al-Gharbī*

is an Islamic law treatise that discusses sources of rights or obligations in comparison with contemporary Western jurisprudence. It is originated from the course of lectures given by Sanhuri in the department of Legal Studies at the Arab Studies Institute, Cairo during the span period of 1953-1958 when he has drawn from political life.[1] Due to this very nature, adding up with his long life experience as a legislator and practition lawyer, it is suggestive that this work can be regarded as a well thought and mature product in his career, the core object of its discussion of which spins around contracts or obligations.

In order to place *Maṣādir al-Ḥaqq* in wider spectrum, it is necessary to discuss the develoment of contract within the *fiqh* genre in general. Historically, the general theory of contracts and obligation was not known in classical Islamic law. The principal sources for a more straightforward structure of the law of contract are regulated by the general precepts enshrined in some of the outward verses of the Qur'an[2] and the Prophetic traditions.[3] Another foundation of contract is the classical law of obligations in which each 'contract' normally received a separate and detailed examination. The concept of 'contract' is elaborated in such a way in the treatises and manuals of the early jurists, or what is the so

[1] Emad Eldin Shahin. "'Abd al-Razzaq al-Sanhuri (1895-1971)," in J. Esposito (ed.) *The Oxford Encyclopedia of the Modern Islamic World* 1 (Oxford: Oxford University Press, 1995): 7-8.

[2] Many verses of the Qur'an were quoted to show that Muslims have been commanded to fulfill their contracts and undertakings being free from *riba*, speculation, in just, and fair manner. Among others are: "O you who believe, fulfill your undertakings," (V:1); "and fulfil the covenants of Allah," (VI: 153); and keep the covenants. Lo ! of the covenants it will be askesd," (XVII: 34).

[3] Among notable Prophetic tradition that support this is the narration that he was reported to have said that an imposter has four characteristics, one of which is that he does not fulfill his undertakings.

called nominate contract such as that of sale or *bay'* which the then becomes as a root model in the succeeding development.

In addition to these commentaries, the *fiqh* treatises may also deal with contractual models which normally discussed in the literature of *shurūṭ* which literally connotes 'conditions'. The *shurūṭ* genres are the legal formularies which judges and legal specialists have followed in the course of their tenure, and it is concievable that it changes according to time and space.[4] From this discussion, it is evident that there is no book that deals with general theory of contracts in major treatise of this genre.

However, a comprehensive system of contracts was attempted only in the modern period as a logical consequence of the recognition of the law as a separate discipine. It is also owed to the growth of *fiqh* legal manuals in the post ninth century *vis a vis* the common law jurisprudence throughout the centuries. It is at this juncture that *Maṣādir al-Ḥaqq* which deals with theory of obligations and contracts in well-constructed treatise was produced by Sanhuri.[5] In setting forth his idea of reform Sanhuri attempt to break through the established genre of the classical treatise of *fiqh mu'āmalah.* Stemming from the stand point of modern legislation, he maintains that Islamic law lacks of geometrical classification of contracts, which as consequence, lead to assertion that Islamic law does not

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[4] For more elaborated discussion on *Shurūṭ* work, see generally Jeneatte A. Wakin, *The Function of Document in Islamic Law* (Albany: State University of New York Press, 1972).

[5] Apart from Sanhuri, other modern scholars who wrote on systematic *fiqh* treatise, although with different emphasis and perspective among others are Ṣubḥī Maḥmaṣānī; Shafīq Shiḥātah, *Naẓariyyat al-Iltizāmāt fī al-Sharī'ah al-Islāmiyyah*; Abu Zahrah *Al-Milkiyya wa Naẓariyyat al-'Aqd* (*Ownership and the Theory of Contract*); Muṣṭafā Aḥmad Zarqā', *Al-Fiqh al-Islāmī fī al-Tsaubihi al- Jadīdah* (*Islamic Law in its Modern Cloak*) (Damascus: 1958-1959). Different volumes have different editions.

recognize a general theory of contract in the sense that is understood in the Western jurisprudence.[6]

He is critical about the unsystematic structure of the existing manuals of the the classical jurists in which each contract received a separate and defuited examination. Whereas, the word *'aqd* which literally means to tie has been metaphorically used to signify varius kinds of transaction. Muslim jurists neither make a clear cut distinction of the category of contract nor do they provide rationale of order of importance and intercontectedness of one with the other.

To support his view, he opts to choose an example of a marked work of Kasānī's *Badāi'*,[7] a Hanafi jurist in which he discusses *'aqd* in the following order: 1. *al-ijārah* (hire), 2. *al-istiṣnā'* (contract of manufacture), 3. *al-bay'* (sale), 4. *al-kafālah* (guarantee), 5. *al-ḥawālah* (transfer of debt), 6. *al-wakālah* (agency), 7. *al-ṣulḥ* (compromise/ conciliation), 8. *al-sharikah* (partnership), 9. *al-muḍārabah* (limited partnership), 10. *al-hibah* (gift), 11. *al-rahn* (pledge), 12. *al-muzāra'ah* (temporary sharecropping), 13. *al-mu'āmalah* (transaction), 14. *al-wadī'ah* (deposit), 15. *al-'ariyah* (loan of fungible materials), 16. *al-qismah* (partition/ fair distribution of share), 17. *al-waṣāya* (bequest), 18. *al-qarḍ* (loan).[8]

With this order at hand, Sanhuri pauses two questions, namely, first, how these contract are categorized in an logical manner, and second are there any other kinds of contract apart from the ones mentioned by Kasani, or in general whether Islamic law recognizes the principle of freedom of contract, so that it is admissable with offer and acceptance, contract by way not in contradiction with

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[6] *Maṣādir al-Ḥaqq*, vol. 1, 78

[7] Abū Bakr al-Kāsānī, *Kitāb Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, (Cairo: 1327-48 A.H.) cited in *Maṣādir al-Ḥaqq*, vol. 1, 78.

[8] Abd al-Razzāq Aḥmad al-Sanhūrī, *Maṣādir al-Ḥaqq fī al-Fiqh al-Islāmī, Dirāsah Muqāranāh bi al-Fiqh al-Gharbī*, 1 (Cairo, 1954-9), 78.

public order and moral. This view apperas to be as outcome of his reflection to ever-increasing categories of contract developed in Western jurisprudence.

As it is common in the fiqh genre to treat a particular issue on matters pertaining to *'ibādāt*, *munākaḥāt* and *mu'āmalāt*, the *Maṣādir al-Ḥaqq*, on the other hand, is a treties that concentrate exclusively on *al-ḥuqūq dhāt al-qīmah al-māliyah* or rights that have monetary value, namely personal and material rights protected by law as known in the western legal system.[9]

B. Composition and Structure

Before discussing at some length the method of the book, it is appropriate to provide a reasonably detailed summary of its contents. The *Maṣādir al-Ḥaqq* consists of six volumes. Viewed from the perspective of *fiqh* genre, its systematization is not similar to those of archetypal type of presentation of *mu'āmalāt* found in legal manuals of Islamic law in general. This is perhaps in line with the intention of Sanhuri to systematize it in a manner that could be easier to be referred to by contemporary readers.

Thus the treatise has a short introduction in part one,[10] outlining the scope as well as the main purpose of the book. The author also provides a general introduction as general guideline in approaching the issues that are discussed throughout the ouvre.[11] In this volume Sanhuri begins with discussing what he terms as the personal and

[9]Sanhuri, *Maṣādir al-Ḥaqq*, Vol. I, 1.

و ينحصر البحث فى الحقوق ذات القيمة المالية، وهى الحقوق الشخصية والحقوق العينية كما تسمى فى لغة الفقه الغربى،

[10] The edition used in this dissertation of *Maṣādir al-Ḥaqq fī al-Fiqh al-Islāmī: dirāsah muqāranah bi al-fiqh al-gharbī* is that published in Cairo by Jāmi'ah al-Duwal al-'Arabiyyah, 1954-9, six volumes in two tomes.

[11]Sanhuri, *Maṣādir al-Ḥaqq*, I, 2-3.

material/ real right. the principle of the unity of the contractual sessions or the theory of the meeting place *majlis al-'aqd*, as well as the agreement of the offer and acceptance.

The second volume discusses primarily on the question of contract formation. It answers the questions how a contract should be cocluded and thus deals with conformity of intention or agreement in the meeting place or *majlis al-'aqd*. In so doing, it analyses the general theory of the session which includes the limitation, the aim and conclusions which arises from from the session. It also discusses the right of options which fall under a very broad purview of misrepresentation.

The third volume treats exclusively on the object or subject matter of obligation/ *maḥal al-'aqd*.[12] The object of obligation is something that the creditor is liable to perform. It is clear then that the object is an essensial element of in obligation but not in contract. However, its importance could not be clearly identified except in obligation which emanates from contract. Thus, the uncontractual object of obligation is under the court authority to determine, whereas in the case of contractual object of obligation will be decided by both of the contracting parties both of who under the obligation to keep in confirmity with and comply with conditions required by law. If such is the case then, normally, mention has to be made simultaneously with *'aqd*.

This volume then analyzes essential elements of the object of contractual obligation which inclede at least three requirements, namely: first, the object has to be existent or possible to exist if it is an act or refraining from doing something; second it has to be well defined or capable to be defined and, third it is possible to be contracted. in addition, almost half of the volume discusses the

[12] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. III (Cairo: Dār al-Nahḍah al-'Arabiyyah 1956).

notion of *ribā* which is directly interconnected to the status of the object of obligation and consequently to economic and social system. Sanhuri traces the notion of usury in both Islamic and Western legal system. In so doing, he is able to pinpoin its evolution and from which he embark on the answer to unclear issues.

In volume four, the author gives us an exhostive exposition under the rubric of the theory cause and nullity or frustration (*buṭlān* or *ibṭāl*).[13] It starts with discussing the notion of the subject under discussion within the ambit of historical context in western law. Accordingly, it then followed by tracing the concept in Islamic jurisprudence.

Book five covers two major discussion of the effects of contracts first in respect to person and second in respect to subject.[14] The underlying reason for this structure stems from the fact that Islamic law, unlike western law, does not attempt to put the issue together in one theme, but it rather scattered in diversed legal manuals of the jurisprudents.

Book six discusses the effect of contract pertaining to subject matter.[15] The author summarizes the effect of contract regarding the subject into two distinct division; first, the two contracting parties are liable for what spells out in the contract, and second, a party to the contract fails to comply with his oligation emanating from the contract, it becomes a responsibility. This is what the so called the question or issue of contract. These questions of contracts are scattered in different Islamic jurisprudence and not systematically treated in a single chapter. Based on this reason the pattern to be followed as model for this subject is the Western legal system.

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[13] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. IV (Cairo: Dār al-Nahḍah al-'Arabiyyah, 1957).
[14] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. V (Cairo, Dār al-Nahḍah al-'Arabiyyah 1958).
[15] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. VI (Cairo, Dār al-Nahḍah al-'Arabiyyah 1959).

C. Sources used

By looking closely to the text of *Maṣadir al-Ḥaqq* , it is evident that each section of the analysis uses two level of comparisons. First, It makes comparison of a particular issue within the boundaries of Islamic law of various schools of legal thoughts including Shi'ah and Zahiri but mostly those of the Sunni's. Second, it compares a certain problem amongst different system of the Western laws, and it is to the outcome of these two comparisons that Sanhuri makes all due effort to analyze.

However, in the final analysis he will take stand to a more appropriate and suitable view to the contemporary need. Indeed, Sanhuri's method of legal interpretation is not by making direct investigation to the provisions of the principal sources, as commonly practiced by scholars of early Islam (*mujtahid*), but rather relying on the works of the classical jurists. This is perhaps as logical consequencies of the main objective of his comparative enterprise.[16] However, these works of jurists are not only taken for granted by him, but rather he analyze each reason behind the question why a particular ruling be made for a given case, and it is in this endevour the significance of his work lies.

In so doing, Sanhuri make use of reference to works which he characterizes as *al-ummahāt al-kutub al-mu'tamadah* or authoritative sources. In constructing his ideas throughout the book, he uses books of both classical and modern writers. One cannot predict the degree of the difficulty of identifying the relationship between the two mainstreams of thoughts. Thus we will find refererence is made to the early treatises of different schools such as that of the prominent Maliki jurists Shihāb al-Dīn al-Qarāfi's (d.

[16] Sanhūrī provide a concise general guideline on which the whole studies to be based at the very beginning of his work in book one. See his *Maṣādir al-Ḥaqq* vol. 1, 1-3.

1285), *Al-Furūq*[17] and al-Ḥaṭṭāb's (d. 1547), *Muwāhib al-Jalīl Sharḥ Sīdī al-Khalīl.*[18]

As for the Shafi'i jurists' tretises that are most repeatedly referred to include the work of Muḥammad al-Khatīb al-Shirbīnī (d. 977 A.H.) *Mughni al-Muḥtāj ilā Ma'rifat Al-fāẓ al-Minhāj*;[19] Jalāl al-Dīn al-Suyūṭī (d. 1505), *Al-Ashbāh wa al-Naẓā'ir*;[20] Ramli's *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj*; *Al-Sharqāwī ala al-Taḥrīr.* The works of the Hanafi jurists used are also numerous, the most important of which are: *al-Mabsūt*, an encyclopedic work synthesizing the major Ḥanafi sources literature written by a distinguished Ḥanafī jurist of the 5th century A.H. in Bukhara, Shams al-Dīn al-Sarakhsī;[21] *Kitāb Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* [22] that constitutes a historically most original statement of Hanafi Law was written by Abū Bakr al-Kāsānī (d. 1189), one of the greatest Hanafi legists of the 6th century A.H.; *Al-Ashbāh wa al-Naẓā'ir* [23] written by Ibn Nujaym (d. 1563) bearing similar title with al-Suyūṭī's *Al-Ashbāh wa al-Naẓā'ir* but whose content is adapted to Ḥanafi doctrine; and 'Alamkīr's *Al-Fatāwa al-Hindiyyah.*[24]

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[17] Shihāb al-Dīn al-Qarāfī, *Al-Furūq*, 4 vols. (Cairo, 1344-46 A.H.)

[18] Six vols. (Cairo: Sa'ādah Press, 1928).

[19] Beirūt: Dār al-Fikr, n.d.).

[20] (Cairo: Muṣṭafā Muḥammad Press, 1936).

[21] He died in 1090. In his book, al-Sarakhsi systematically expounds al-Shaybani's (d. 804) compilation of the legal doctrines of the two founders of the Hanafi school of law, Abū Ḥanīfah (d. 767) and Abū Yūsuf (d. 798). See Khalīl al-Mays, *Fahāris al-Mabsūṭ* (Beirut: Dār al-Ma'rifah, 1980), 7-10.

[22] 7 vols. (Cairo: 1327-48 A.H.). Al-Kasani studied under 'Alā' al-Dīn al-Samarqandi (d. 1144) and was instructed in the latter's *Tuḥfat al-Fuqahā'*, an authoritative exposition of Hanafi legal doctrine. W. Heffning and Y. Linant de Bellefonds, *Encyclopaedia of Islam*, 2nd ed., s.v. "Kāsānī,"

[23] (Cairo: al-Ḥusayniyyah Press, 1322 A.H.). In his treatment of of the principal maxim of the Sharī'ah Ibn Nujaym incorporates similar maxim used by al-Suyūṭī.

[24] 6 vols. (Cairo: al-Maymaniyyah Press, 1323 A.H.).

The treatise of the Hanbali jurists most commonly quoted in the *Maṣādir al-Ḥaqq* among others include: the juristic chef d'oeuvre of Muwaffaq al-Dīn ibn Qudāmah (d. 1223) *al-Mughnī*,[25] the content of which provides a comparison with the doctrines of the other schools of *fiqh* – and detailed presentation of Hanbali law on the lines of the Hanbali al-Khiraqi's (d. 945) celebrated legal digest, *al-Mukhtaṣar*. Muwaffaq al-Dīn is also the author of *al-Muqni'*, a summary of his *al-Mughnī* ; *al-Sharḥ al-Kabīr 'ala al-Muqni'* – published on the margin of Muwaffaq al-Dīn, *al-Mughnī* - a famous commentary on the latter's treatise written by Shams al-Dīn ibn Qudāmah (d. 1284);[26] Taqi al-Dīn Aḥmad ibn Taymiyyah's (d. 1328) multi-volume treatise of jurisprudence, *Fatāwā ibn Taymiyyah*;[27] *I'lām al-Muwaqqi'īn 'an Rabb al-'Ālamīn* concerning legal methodology[28] and was written by Ibn Qayyim al-Jawziyyah (d. 1350), an outstanding disciple of Ibn Taymiyyah and who pursued his master's renovation of Hanbalism in both domains of private and public (constitutional) law.

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[25] 12 vols. (Cairo: 1341- 48 A.H.). For detail on this see Abū Shāmah, *Tarājim Rijāl al-Qarnayn*, (Cairo, 1366 A.H.), 139-42.

[26] Shams al-Dīn was the first Hanbali legist to become a chief judge, *qāḍi al-quḍāt*, of Damascus. He studied under Muwaffaq al-Dīn ibn Qudāmah, and Ibn Taymiyyah is among his promenent disciples. See Ibn Kathīr, *al-Bidāyah wa al-Nihāyah fi al-Tārikh*, 14 vols. (Cairo: Sa'ādah Press, 1932), 13: 302.

[27] 5 vols. (Cairo: Kurdistan Press, 1326-29 A.H.) Ibn Taymiyyah lived in Cairo and Damascus under the early Mamluks. In his legal thought, Hanbali law attains the culmination of its development, which had made a fresh start with the Damascene legist Muwaffaq al-Dīn ibn Qudāmah (d. 1223). He is also the author of *Al-Siyāsah al-Shar'iyyah fi Iṣlāḥ al-Rā'ī wa al-Ra'iyyah* (Cairo, 1322 A.H.), a fundamental work that deals with the principles of Islamic government.

[28] 4 vols. (Cairo: al-Muniriyyah Press, n.d.). His other important treatise is *Al-Ṭurūq al-Ḥikmiyyah fi al-Siyāsah al-Shar'iyyah* (Cairo, 1317 A.H.) on the theory of constitutional government. See Henry Laoust, *Le Traité de Droit Public d'Ibn Taymīya* (Beirut: Institute Français de Damas, 1948), Introduction, xl.

In addition, occasional reference is also made to the works of contemporary jurisprudents and scholars. Sanhuri maintains that the importance of this source features in at least two main reasons namely, first the arrangement of its presentation is more systematic, and second the language used is closer to the understanding of readers in recent time. The most notable of this sort of works among others are: Muṣṭafā Zarqa, *Al-Fiqh al-Islāmī fi al-Thaubihi al- Jadīd* (Islamic Law in a Modern Cloak)[29]; 'Ali al-Khafif, *al-Ḥaqq wa al-Zimmah wa Ta'thīr al-Mawt Fīhā*; idem, *Aḥkām al-Mu'āmalāt al-Shar'iyyah*; Shafiq Shahatah, *Naẓariyyat al-Iltizamāt fī al-Sharī'ah al-Islāmiyyah*. Muḥammad Abū Zahrah, *Al-Milkiyyah wa Naẓariyyah al-'Aqd* Ownership and and the theory of Contract;[30] Shaykh Ṣiddīq al-Ḍarir, *Al-Gharar wa Atharuh fī al-'Uqūd fī al-Fiqh al-Islāmī*.[31]

In explaining a concept or terminology which are alien to Islamic legal system are presented as they should be in their origin. Interestingly, Sanhuri translate the concept under scrutiny as closely as possible to the appropriate Islamic legal term. When he sees relevant to a particular discussion, terms such as *acte juridique et fait juridique, pacta sur sunvanda, caveat emptor etc.*, are clearly explained and their application within the two systems, namely the Islamic *vis a vis* the Western law systems are compared.

In addition to the legal manuals of early Islamic jurisprudents, Sanhuri also makes frequent reference to the exisitng compilation and codification. Thus, *Majallah al-Aḥkām al-'Adaliyyah* is frequently referred to which may stem from the fact that it is

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[29] Muṣṭafā Aḥmad Zarqā', *Al-Fiqh al-Islāmī fī al-Tsaubih al- Jadīdah* (Damascus: 1958-1959). Different volumes have different editions.

[30] (Cairo: Dār al-Fikr al-'Arabī, 1939).

[31] (Cairo: Dār al-Nashr al-Thaqafah, n.d.).

universally accepted that this is the only statutes in Islamic legal system. Another reason is because it has been recognized by most Islamic countries during the independent era as the most authentic as well the most comprehensive code ever existed in which all aspects of Islamic civil law are covered.[32] Thus, historically many of Islamic countries has adopted *the Majallah al-Aḥkām* in their codes with varying degree of modification. Sanhuri also refer to another minor compilation *Murshid al-Ḥayrān.*

Although it had never had legal force, it is *in so facto* pioneering codification in the Islamic legal history which was widely used in various high learning institution as a theoretical work. Similarly, Sanhuri makes use of contemporary Arab civil codes such as those of Egypt, Syiria, Iraqi, Jordan and Kuwaiti Civil Codes to mention a few.[33] This is of particular interest because it analyzed the *Maṣādir al-Ḥaqq* in a wider spectrum, it discusses how the theory elaborated to be put in practice. In short, suffice it to say that differences in method of presentation and organization depending on the problem at hand. What's more, he also makes use of his own multi-volumes *al-Wasīṭ* and *Naẓariyyat al-'Aqd* as they comprize explication of the New Civil Code of Egypt.

Accordingly, the use of ancient and early views as component of comparison in the *Maṣādir al-Ḥaqq* are also evident in the sources on law and ethics, the most noticeable of which are: Code of Roman Law/ *Qānūn Aquilia al-Rūmānī.*[34] A question may arise what is the

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[32] Enacted in 1876 during the reign of the Ottoman Empire, *the Majallat al-aḥkām al'Adaliyyah* was arranged in line with western law pattern.

[33] Of numerous reference to Iraqi Civil Code in *Maṣādir al-Ḥaqq*, see *inter alia* Sanhuri's discussion on consent, I, 133-34, on *naẓariyat al-buṭlān*, IV, 286-88, *taqūm al-manāfi' wa wujūb al-ta'wīd*, VI, 189-90; as to Egyptian Civil Code, his discussion on *ribā'* or interest, III, 272-75, on transfer of inhereted debt ? V, 94-113, on the system of chategorizing of bequest in the New Egyptian Civil Code, V, 113-118.

[34] The first reference to the Code of Aquilia appeared in the *Maṣādir al-Ḥaqq*, vol. 1: 55.

significant of incorporating Roman law in the scheme of Sanhuri's enterprize of comparative law. It appears that the role played by Roman law in the historical development of Western law is undeniable.

There have been several reasons why Roman law was favoured in the Middle Ages, namely first it regulated the legal protection of property and the equality of legal subjects and their wills, and second it prescribed the possibility that the legal subjects could dispose their property through testament. Although Roman law is no longer applied in contemporary legal practice as being replaced by modern codes like the French *Code civil* of 1804, it is conceivable that many rules deriving from Roman law apply. In other words no code completely broke with the Roman tradition. But rather, to a large extent, the rules of Roman law which had been transmitted and expressed in the national language, were replaced in a statutory framework which provided a modern, systematic order. For this reason, knowledge of Roman law is indispensable to understand the legal systems of today.[35] Thus, logically Sanhuri has a reasonable ground to take Roman law into his consideration as an aspect of his legal comparativism.

Other work worthy of mention is *Lois civiles dans leur ordre naturel*[36] written by Jean Dumat (1625-1696) a French juristconsult.

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[35] Patricia Crone in her book *Roman, Provincial and Islamic Law* argues that Roman law had influenced the formation of Islamic legal system based on her findings through historical evidence. However, this view has been dismissed by Wael Hallaq, see his article "Use and Abuse of Evidence: The Question of Roman and Provincial Influences on Early Islamic Law," *Journal of the American Oriental Society*, 110 (1989): 79-91; reproduced in W. Hallaq, *Law and Legal Theory in Classical and Medieval Islam* (Aldershot: Variorum, 1994), article IX, 30-41.

[36] Jean Domat was born at Clermont in Auvergne in 1625 and died in Paris in 1696., Domat is principally known from this elaborate legal digest *Lois civiles dans leur ordre naturel* published in 1689 in three volumes. In addition to *Lois Civiles*, Domat made in Latin a selection of the most common laws in the collections of Justinian I, under the title

This work is one of the most important works on the science of law that France has produced, in which Domat endeavoured to found all law upon ethical or religious principles, his motto being "*L'homme est fait par Dieu et pour Dieu*". A highly-regarded civil law treatise *Traité des obligations* written by Robert Joseph Pothier (1699-1722) a French jurist and legal scholar who specialized in French and Roman law, is also often consulted in the *Maṣādir al-Ḥaqq*.

Following the footsteps of his father and grandfather Pothier destined to become expert in law both in theory and practice. In 1720 he was appointed judge of the presidial court of Orléan where he was born and died. His work *Traité des obligations* (1761) has been translated into English by William David Evans (1767-1821) as *A Treatise on the Law of Obligations* (Philadhelphia: Robert H. Small, 1826) in two vols. Few edition of the translation soon after emerged which according to legal experts such translation introduced Pothier to English lawyers, which "did considerable service to the development of the English law of contract."

Pothier was responsible for the editing and co-ordination of the text of the Pandects, his *Pandectae Justinianae in novum ordinem digestae* (Paris and Chartres, 1748-1752) is known as a classic study of Roman law. He wrote many learned monographs on French law, and much of his work was incorporated almost textually in the French *Code Civil*. He also invented the rule limiting recovery in the case of improper performance of a contractual obligation to those damages which are foreseable. Owing to this great achievement his theories on the law of contract were influencial in

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of *Legum delectus* (Paris, 1700; Amsterdam, 1703); it was subsequently appended to the *Lois civilles*. Most of these works have been translated into English. See: http//en. wikipedia.org/ wiki/Jean_ Domat".

England as well as in the USA.[37] The contemporary treatise such as that of the prominent Francois Geny and Salleil are also referred to in the *Maṣādir al-Ḥaqq*.

As regards to the Western jurisprudence, Sanhuri takes into account ideas of such prominent philosophers as Immanuel Kant, especially with his works in this context are *Metaphysics of Morals* and *The Science of Right*, [38] David Hume and J.J. Rousseau.[39] The primary reason for the inclusion of their thought in the former's scheme appears to have stemmed from the fact that their thought have shaped the legal development in West.

In addition, reference is also made to books of contemporary Islamic jurisprudence and their discussion, namely the current Islamic legal expetise that write on Islamic jurisprudence, using the latest method and language that may well serve as well as conform to the understanding of todays readers. This group of scholars are those of jurisprudents who dedicated their lives and contributed to development of Islamic law. Sanhuri points out to name as Muḥammad Qadrī Pāshā whom in his view is pioneering in this trend.[40]

Interestingly, when deemed necessary, Sanhuri even uses materials written by western scholars. However, it appears that he is very selective in referring to this materials since according to him although there are many western scholar on Islamic law, they

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[37] See *inter alia* Cohen, *Bibliography of Early American Law* 3657; Holdsworth, *A History of English Law* XIII: 467. Pothier's other treatises include: *Du Contrat de vente* (1762); *Du Contrat de bail* (1764); *Du Contrat de société* (1765); *Des Contrats de prét de consomtion* (1766); *Du Contrat de depot et de mandat* (1766); *Du Contrat de nantissement* (1767).

[38] This work has been translation into English by W. Hastie (Britannica Great Book Series, 1952), vol. 49.

[39] J.J. Rousseau, *Contract social* (first published in 1762).

[40] Sanhuri, *Maṣādir al-Ḥaqq*, 2.

are mostly orientalist but not a jurist or lawyer, and only few of them a jurist but not an orientalist, and rarely can we find an orientalist lawyer.[41] Thus, he is very critical of the Orientalist such as that Schacht and Ignaz Goldziher both of whom studied sharī'ah in the historian perspective rather than the jurists.

Given that Sanhuri live in the beginning of the twentieth century his synthesis may be of a great value for the development of legal reform. Nonetheless, although one might argue that his finding contradict to the basic tenets of Islamic law making process (*uṣūl al-fiqh*), his synthesis appears to be more just and that they are more widely accepted and that compatible with the modern society. Thus, it is not a exaggaration to take into account the synthesis of Sanhuri in reforming the civil or commercial code of a country toward reform.

In short, from the sources consulted whether Islamic or Western jurisprudence whether classical or modern, it can be maintained that Sanhuri's *Maṣādir al-Ḥaqq* present a theory of pluralism that accounts for the totality of the cosmos. His vision of the law is thus comprehensive. He aims to balance and explain their interaction and mutual reliance.

D. Method of Comparison

In order to understand the significance of Sanhuri's comparative jurisprudence, it is important to discuss about the question of method. The reasons that underlie the importance of method in his scheme, first appears to be the fact that due to the wide range of his theoretical excursions into the diverse systems of both Islamic and Western legal tradition. Method of comparative analysis such as this is evidently utilized in his six-volume *Maṣādir al-Ḥaqq* and his

[41] Sanhuri, *Maṣādir al-Ḥaqq*, 2.

twelve volume *al-Wasīṭ fī Sharḥ al-Qānūn al-Madanī al-Jadīd*.[42] The second reason for the prominence of method in sanhuri's work more important than the above-mentioned reason is on the question of applicability and relevance to contemporary legal norms and practices.

Muqāranah which is translated in English as comparison, in the conventional fiqh genre, an Islamic law comparativist introduce viewpoint of various jurisprudents from a different schools of thought within the domain of the four established sunni schools. In some instances, the writer make an attempt to look at interrelation by utilizing *tarjīḥ* as a means sorting out with the best possible answer or ruling to a given problem.[43]

In contrast to this method of comparativism, a few comparativist only provide a mere ruling of issue in hand without making any effort to analyse them but instead the readers are left out to determine which argument of the scholars is considered the most acceptable according to the standard norms of Islamic law.

The primary objective of his scheme of reform then as he explicitly mentioned then: "to treat Islamic law using the methods of Western law."[44] The method of comparison in employed in the *Maṣādir al-Ḥaqq* at scientific level may be observed in the following chart.

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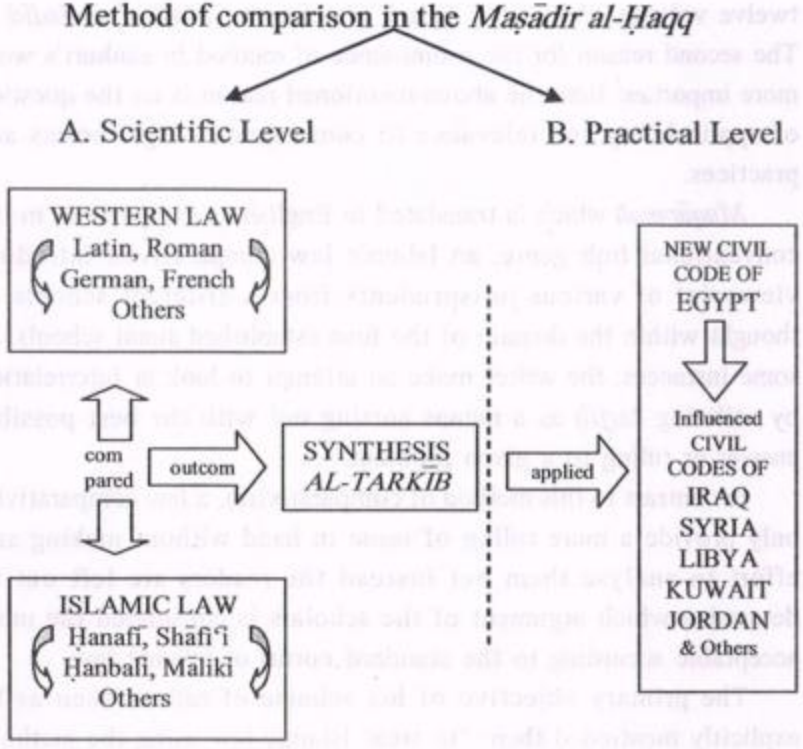
[42] In terms of content, *al-Wasīṭ fī Sharḥ al-Qānūn al-Madanī al-Jadīd*, (Cairo: 1952-1970) is a commentary to Egyptian Civil Code of 1949. For further discussion on the relation of the theory expounded in the *Maṣādir al-Ḥaqq* and the New Code, see *infra* cahpter six.

[43] The best example for this category is *Al-Fiqh 'ala al-Madhāhib al-Arba'ah.*

[44] The Arabic text reads, "*wa nu'ālij al-fiqh al-Islāmī bi 'asālīb al-fiqh al-gharbī*", Sanhuri, *Maṣādir al-Ḥaqq*, I, 1. His use of Western law conception in dealing with Islamic law was not free from criticism especially from traditional muslim scholars, and thus it requires not only profeciency of the subject of both legal system but also a high commitment for legal reform.



By a close examination of the *Maṣādir al-Ḥaqq* in the way of presenting the various sources, it might be maintained that Sanhuri's method of legal interpretation is approached by applying *takhayyur* or eclectic, one of the methods commonly used by scholars in legal reform.[45] Similar claim has also been put forward by a few scholars in commenting Sanhuri's application of such a method in the New Egyptian Civil Code which according to them lead to confusion.[46]

[45] See Fazlur Rahman; J.N.D. Anderson. As for Indonesian context on the thought of the possibility of applying eclecticism in legal reform discourse see generally, Qadri Azizi. *Eklektisisme Hukum Nasional* (Yogyakarta: Gama Media, 2002).

[46] For detail on this issue, *see* Natan Brown, "Shari'a and State in the Modern Muslim Middle East", *International Journal of Middle East Studies* 29 (1997): 359-76; J.N.D. Anderson, *Law Reform in the Muslim World* (University of London, 1976), 88-9.

However, in response to this assertion, Sanhuri holds that his reference to the Arabic word *takhayyur*, which renders the meaning *éclectique* in the legal term, is frequently utilized to deal with European jurisprudence. In so doing, he employs a relative approach between the Latin and the Germanic Codes, and thus, for him *takhayyur* is intended to mean a synthesis that will eliminate chaos and provide harmony between modernity and tradition, and between East and West, appropriate for Egyptian society.

In general, there are two principal elements in Sanhuri's method in treating Islamic legal doctrines: (1) a descriptive, objectivist dimension, (2) a normative, historical dimension. It nothworthy of note that Sanhuri's background as practitional lawyer adding up his commitment to his profession as a modern Egyptian jurist and law maker supersede the purely descriptive dimension. In addition, it is equally interesting to observe that his commitment to modern French jurisprudence in particular and to Western law in general, as well as to the needs of the contemporary monetary transactions it embodies, influence sanhuri's treatment of Islamic legal thought.

The proposed approach may arise to two important implications, on the one hand to undergo comparative studies between various legal systems, requires mastery of all necessary knowledge of respetive system, let alone between Islamic and western ones, for the distinction that inherent therein is too obvious; and the comparativist in such political situation, on the other hand, in this case Sanhuri may be challenged by both those who support and against the reform.[47]

Different to the conventional fiqh genre, in term of approach and method, the *Maṣādir al-Ḥaqq* focuses on the exposition of an

[47] For further information on the political circumstances that time, see Majid Khadduri, *Political Trends in the Arab World* (Baltimore: The Johns Hopkins Press, 1970), 240-1.

inquiry which has caught the attention of jurists of modern time. Methodologically, it tries to extract a general theory of legal action from the dispersed elements in the great classical treaties which do attemp to synthesize.[48] It is in this aspect that distinguishes Sanhuri's work from others is the manner in which the work is approached. Thanks to his long experience in Western jurisprudence he has an ability, lacking in other writers, to give to legal phenomena, including those of Muslim law, a universal and permanent character, thought by some to be missing from muslim law.

Al-Sanhuri has maintained throughout his writings, it is possible that there may be found principles of justice in Islam that can be considred more just than principles in corresponding legal areas in the laws of the West. He says: 'The construction of the jurists of Islam in this area of agency-which is what the fifth volume in part treats that dates, remember, from the 10th century AD. are not only more advanced than the last stage of Roman law, but in many respects they show themselves superior to the systems that until now have been those prevailing in the West.

In order to understand the main thrust of the book under discussion, it is necessary to pay attention to the introduction to the first volume, in which Sanhuri explicates his scheme of rights or obligation that should be confined only to the ones having monatery value. He further explains in the preface that:

> "*Maṣādir al-Ḥaqq* are the bases from which right, legally speaking, derives; this right is a benefit having a monatary value (*qīmah māliyah*) which the law protects. We are not concerned here with public rights or

[48] The claim of the absent of the existence of the general theory in Islamic law has been a comon phenomenon amongst the Islamic legal scholars. Among the few are M.E. Hamid, "Islamic Law of Contract or Contracts? *Journal of Islamic and Comparative Law* (1969): 1-10; Mohamad Ali Baharum, *Misrepresentation: A Study of English and Islamic Contract Law* (Kuala Lumpur: Al-Rahmaniyah, 1988).

right connected to personal status because, legally speaking, they do not have a monetary value. Such rights are personal and material, as they are dominated in Western jurisprudence."[49]

The distinction between personal rights and material rights is essential in Western Law; this distinction is the spinal column of Western laws as they derive from Roman law. The bases of rights, whether personal or material, are most critical and most ambiguous in Western Law. We are therefore dealing with one of the most important and most critical subjects of Western law, attempting to treat it in Islamic law. In doing this, we place Islamic law side by side with Western law in what is essentially important and in what is critical though hidden. We treat Islamic law using the methods of Western law, investigating whether there is in Islamic law personal rights and material rights as these are understood in Western laws derived from Roman law.[50]

It has to be born in mind that the discourse of *Maṣādir al-Ḥaqq* may be seen as having one general theme, dialectic between traditionalism and modernity in the changing world, between Eastern and Western legal system, which runs counter to the classical and

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[49]Sanhuri, *Maṣādir al-Ḥaqq* I (Cairo, 1954-9), I. The text read as follows:

مصادر الحق هى الأسباب التى تنشئ الحق قانونا. والحق مصلحة ذات قيمة مالية يحميها القانون. فلا يدخل فى بحثنا إذن لا الحقوق العامة ولا الحقوق المتعلقة بالأحوال الشخصية، لأنها، وإن كانت حقوقا، ليست بذات قيمة مالية، و ينحصر البحث فى الحقوق ذات القيمة المالية، وهى الحقوق الشخصية والحقوق العينية كما تسمى فى لغة الفقه الغربى، ... .. فالتمييز بين الحق الشخصى والحق العينى تمييز جوهرى فى الفقه الغربى، بل هو بمثابة العمود الفقرى فى القوانين الغربية التى اشتقت من القانون الرومانى ... ... وبذلك نضع الفقه الإسلامي إلى جانب الفقه الغربى فيما هو هام جوهرى، وفيما هو دقيق خفى. ونعالج الفقه الإسلامى بأساليب الفقه الغربى...

[50] Sanhuri, *Maṣādir al-Ḥaqq* I (Cairo, 1954-9), I.

medieval *fiqh* genre. Reading through the books one may find the choice of language used appears to be distinct from the one written by classical jurists in the sense that it is much closer to the mind set of contemporary readers.

Footnotes are also supplied in support of the body text. It appears that these footnotes often go beyond mere quoting the sources Sanhuri referred to. In few instances he even went further in datails by either providing explanation or giving comment on a given issue, and sometimes he combines the two altogether.[51]

Methodologically, the extent to which material used for the comparative analysis varies from one case to another, and it appears that there is a fairly consistent organization for each exposition. In any case, most chapters begin with a discussion of Western law which include Latin, Roman, German and French legal material. It then followed by discussion of Islamic law. This kind of organization is understandable from the main purpuse of the ouvre as has been put forward by Sanhuri, "we treat Islamic law by using the method of Western law."[52]

Such methodological differences may be discerned according to the issue at hand. To give an illustration, in a case where there is a wealthy amount of material in Western law for discussion, and a much smaller amount in Islamic law, the former will be analyzed first, and visa versa. In another instance, however, both laws presented simultaneously when both system of law have an agreement of the issue discussed. In addition, in some places Western law is put forward at the very beginning of the discussion which function as a point of departure, and then he goes on to consider

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[51] In many instances the footnotes exceed half a page in length, see generally, vol. I. 18-19, 21, 23, 25, 34, 40, 43, 54, 76; III, 52-55, 177, 184; IV, 52-53, 64, 77, 182, 183-186, 234, 239, 240, 244-245, 249, 257, V, 82, 167-68, 260.

[52] Sanhuri, *Maṣādir al-Haqq*, I, 1.

the case in the light of relevant Islamic law as an effort to make comparison clearer at certain point.[53] Wherever the view of a school or a jurist is mentioned in discussion, it represent the view of Islam, as Islam accepts any view held by any qualified jurist.

An overall judgement of the book, it is a treatise that makes all due effort to bridge the dicotomy of traditionalism and modernism. With regard to the design of the discussion is elucidated though briefly but seems to be very important since it underlies the totality of the entire work, as follows:

First, proper scientific method.[54] In discussing information of *fiqh* jurisprudence and statute, they will be delt with scientifically correct. Featuring at the most of the modern approach to contemporary issues, it is aimed, Sanhuri argues, at founding a systematic and more objective study.

Second, the discourse to be followed in book is the method or the style of western jurisprudence.[55] This method of approaching the issue is in contrast with those commonly used by jurists. The sources to be used to support the discussion are the primary sources in Islamic jurisprudence. Reference will be made to variety of authoritative books (*mu'tabar*) of different schools of thoughts, and they will be cited precisely as they appear in those works. Precision is perhaps the most important features of his works for throughout the book he makse a clear cut distinction that which of his own ideas from that of the others.

Third, objectivity also characterizes the *Maṣādir al-Ḥaqq* in analyzing a given concept to respective systems.[56] Sanhuri claims

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[53] The organization such as this is evident in the discussion of personal and material rights. See vol. I: 4 et seq.

[54] Sanhuri, *Maṣādir al-Ḥaqq*, vol. I (Cairo, 1954-9), 2.

[55] Sanhuri, *Maṣādir al-Ḥaqq*, vol. I, 2.

[56] Sanhuri, *Maṣādir al-Ḥaqq*, vol. I, 2.

to reveal the concept, style and formation of both Islamic and western legal systems fairly, without taking side on either one, but rather it will be shown that differences to the extent that Islamic law has its own characteristic. In so doing, he is able to see the relationships of a legal mind in one concept and the other in a more objective way.

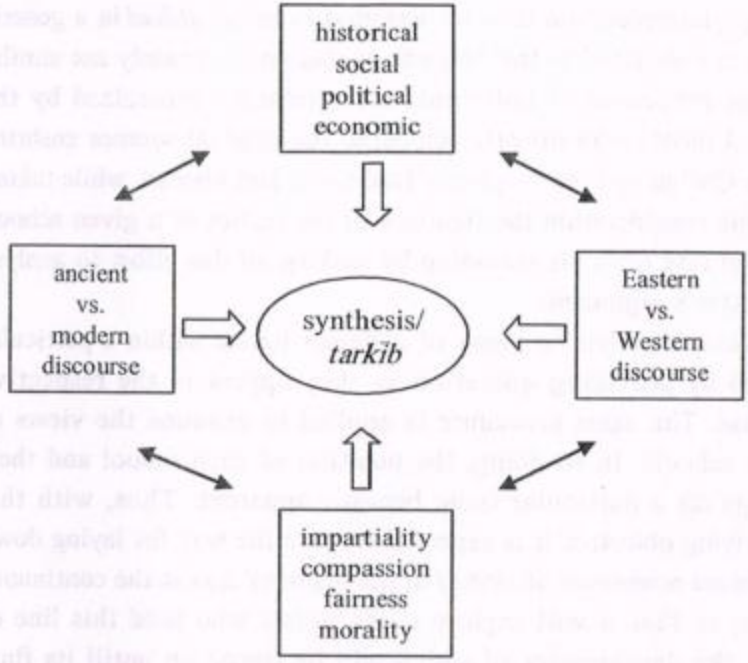
In addition, he also maintains that the book does not aim at making harmony between Islamic and western systems in an imaginary and faulty analisys. Because, Sanhuri emphasizes that, Islamic law is a great legal system with its unique formulation compared to other existing legal systems in the world. Therefore he argues further that it requires our sincere intellectual integrity to preserve this important jurisprudence of its values and features.[57]

In addition Sanhuri's legal interpretation is not restricted into a particular school of Islamic law but rather chooses the most suitable view with the current situation, since for him it is admissable to hold on a view of any school of Islamic legal thoughts,[58] by considering the social condition and the circumstances of the present need. Thus, it can be asserted that there are a number of dimensions and defining factors that feature Sanhuri's comparative enterprise as formulated in the diagram below. Thus, his scheme is featured by impartiality and fairness, or in other word not being

[57] Sanhuri, *Maṣādir al-Ḥaqq*, vol. I, 3.

[58] The reformists in the Muslim world signify the phenomenon of Islamic legal reform as *lā madhhabī* not being confined to any school, the most notable of which is the call for the creation of Indonesian *madhhab* echoed by such scholars as Hasbi Ash Shiddiqy and Ibrahim Hosen. Whether there is a direct influence of Sanhuri's idea on the creation of Indonesian school or not, which is beyond the scope of the context of discussion, would be of interest for further study. See Mohamad Atho Mudhhar, *Islam and Islamic law in Indonesia* (Jakarta: Religious Research and Development and Training, 2003), 184-186. In this book Mudhhar further naintains that the discusion of Islamic law in Muslim societies is more to do with socio-historical factor than religio-doctrinal.

confined to any particular schools of legal thought, but rather taking various dimentions such as social, political, economics and moral, all of which according to him underly the whole process of deciding the appropriate ruling for the best interest of the community.



It is predictable, however, that for some scholars this method of legal distillation is in contradiction with the prevailing view within the majority of jurists, since he patches together (*talfīq*) the opinions of various schools. However, it can be argued that Sanhuri's method of legal distillation accommodated the very principles of the final end of the law itself, that is the public interest, or what is to be known as *maṣlaḥah* in Islamic law.[59]

[59] See as an example about Sanhuri's handling of *ribā* and interest in *Maṣādir al-Ḥaqq*, 269-77.

The final objective of Sanhuri's scheme of legal reform is aimed at determining the future direction of *ijtihād*, that is the necessity to revive Islamic law as it has been commonly established among some scholars that it had been fossillized.[60] However, if his method of legal interpretation is to be accepted to mean *ijtihād* in a general sense as elaborated in the *Maṣadir al-Ḥaqq* it is certainly not similar to that procedure of individual interpretation excercized by the learned jurists who directly consulted the original sources enshrine in the Qur'an and the Prophetic Traditions. But instead, while taking into his consideration the treatises of the jurists of a given school, Sanhuri sets forth his reasoning by making all due effort to analyse the latter's arguments.

Thus, he refers to views of different jurists within a particular school by providing quotation as they appear in the respective treatise. The same procedure is applied to examine the views of other schools. In so doing, the position of each school and their rulings on a particular issue become apparent. Thus, with this underlying objective it is expected to pave the way for laying down the future orientaion of *ijtihād* in the realm of *fiqh* at the continuous phase, so that it will explore those jurists who hold this line of view, the development of which will be traced up untill its final stage. In addition, Sanhuri also asserts that he would like to ascertain the direction of the development to which is leading.

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[60] Sanhuri, *Maṣādir al-Ḥaqq*, vol. 1, 3; Nadia Sanhuri and Tawfiq al-Shāwī (eds.) *'Abd al-Razzāq al-Sanhūrī min Khilāl awrāqih al-Shakhṣiyyah* (Cairo: al-Zahrā' li al-I'lām al-'Arabī, 1988), 190.

CHAPTER FIVE
THE PRINCIPLE IDEAS OF COMPARISON IN THE *MAṢĀDIR AL-ḤAQQ FĪ AL-FIQH AL-ISLĀMĪ*

The development of legal rules, principles and norms in the Muslim society, to a larger or lesser degree, on one hand, arouse from the continuous dialogue between Islamic *sharī'ah* rules and principles, with the social norms and contemporary development, on the other.[1] This chapter will attempt to discuss how such Muslim jurists and scholars as Sanhuri initiate and develop his theory in his

[1] Studies that focus on Islamic legal norms and the social discourses as their object are numerous chief among few, see *inter alia* Ahmad, Ali. "The Role of Islamic Law in the Contemporary World Order." *Journal of Islamic Law and Culture* 6 (2001): 157-71; J.N.D. Anderson, "The Shari'a and Civil Law," *Islamic Quarterly* (1954): 29-46; idem, "Law as a Social Force in Islamic Culture and History." *Bulletin of the School of Oriental and African Studies* 20(1/3) (1957): 13-40; Guy Beachor, "The Egyptian Civil Code: In Search of Social Order, 1933-1949" (Ph.D. dissertation, Tel Aviv University, 1998); Amr Shalakani, "The Analytics of the Social in Private Law Theory" (Unpublished S.J.D. dissertation, Harvard University Law School, 2000).

treatment of the field of Islamic law of contract in response to the emerging needs of modern development.

Since the scope of cases treated by Sanhuri in the *Maṣādir al-Ḥaqq* are extensive, for the purpose of the discussion will be confined to first, Islamic law of contract and its principles; second, real rights versus individual rights; third, subjective element of intention/ *niyah* and the theory of cause; forth, usury/*ribā* and interest; fifth uncertainty/ *gharar* and the theory of risk and; sixth, the change of circumstances and frustrated performance of contracts. The selection of the cases might seem arbitrary but nonetheless, they represent the salient features of complex treatment of the Islamic jurisprudence of the past and that they are now becoming central in the Islamic law and may remain to be so in the forseeable future.

A. Law of Contract and Its Principles

1. Historical Development Law of Contract

Stemming from the fact of distinctive features in terms of historical backgrounds, basic ideas, characterization of contracts are fundamentally different under Roman, French and Islamic law. As consequence, in each respective countries the treatment of contractual subjects at the theoretical level differs to the highest degree from the practical application of the conclusion of a contract. At the very general term, law of contracts in Roman and French law fall under the purview of *obligations*. However, this concept may not necessarily be applied to Islamic and English law on the ground that the a general category of *obligation* in these two systems is absent.

The Latin term *obligatio* is a generic word of *ligare* which in its original menaing connotes "to enchain" but gradually came to mean to unite, to unite, to bind or to tie together.[2] However, in adddition

[2] Parviz Owsia, *Formation of Contract: A Comparative Study under English, French, Islamic and Iranian Law* (London: Graham and Trotman, 1994), 155.

to this meaning it also denotes the burden, the debt, assumed by or imposed on a person. Its etymological significance is closely related to the Arabic term *'aqd* (contract) in Islamic law which means a tie, or a knot, binding the parties together.[3] The Justinian's codification, which comprises of *ex contratu, ex delicto, quasi ex contractu* or *quasi ex delicto*, has been adopted by the French law with the same categorization which consequently developed the general theory of obligation.

However, this theory of obligation has been revised with the influnece of the BGB and introduced into it the concept of 'juridical act' or 'act in the law' or 'legal or juridical transaction' which was termed in French as *acte juridique*. Contrasted with it is *fait juridique* , being any event, whether intentionally created, inadvertently occurring, or otherwise happening.[4]

It is worthy of note from the outset that Sanhuri's discussion on contract is dealt with under the sephere of juridical act the concept originated in the French notion of *acte juridique*. The concept of *acte juridique* includes *'aqd* / obligation and the autonomy of will/ *al-irādah munfaridah*. Every single principle in contract should conform the autonomy of will except in the case where it requires only a unitary will instead two confirming will. Islamic jurisprudence does not perceive the importance of making distinction between *'aqd* and the autonomy of will as it does in Western law.

However, in the Western law, specifically in the French, there has not been a comprehensive theory for *taṣarruf al-qānūnī* (*acte juridique*) and *al-wāqi'ah al-qānūniyyah* (*fait juridique*) to which

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[3] Hans Wehr, *A Dictionary of Modern Written Arabic*, ed. J. Milton Cowan (Beirut: Librairie du Liban, 1980), 627.

[4] Owsia, *Formation of Contract*, 156.

2. Modern Development

The modern development of the western law may be traced back to the beginning of the seventeenth century. Historically, in the development of Roman law, jurists of the church played an important role in resorting to moral and religions as consideration to be incorporated into the legal reform process. As such, it became so influential in shaping their mindset that they reached a general maxim that should any given contract is concluded for an illegal objective has to be nullified, primarily because performing something unlawful is considered a sin. In fact, the sin lies in committing oneself to an illicit contract, although it is not a sin detract oneself from that obligation. Thus it can be argued that the invention of the the theory of cause in what is the then known in its wide and modern understanding owes very much to the Ecclesiastics era.

In its succeeding development, the judiciary and jurisprudence in France followed their lead and cause came to be understood as the driving motive for concluding the contract: thus contracts aiming at the illegal exercise of influence were cancelled; debts for the purpose of gambling were not recognized because of its illegality; and motive affected donnations and testaments, so that an illicit motive made them null and void.[8]

B. Real/ Material Rights versus Personal Rights

Before discussing further on right as elucidated in the *Maṣādir al-Ḥaqq*, which is categorized into real and individual, it is deemed necessary to analyze its precise usage in the legal domain. Western jurisprudence makes a clear cut distinction between 'right' (*ḥaqq*) and 'overall freedom' (*rukhṣah*). The former is defined as "a benefit having a material value protected by law" and the latter is "the

[8] Sanhuri, *Maṣādir al-Ḥaqq*, vol. IV, 13.

undertaking and obligation. The notable thing among the incidents of (principles governing) contract is a basic rule which was established by the jurisprudents (*fuqaha'*), which decrees that offer and accepatnce alone suffice to create a contract: the amazing thing here is that, for all the simplicity of this rule, for all its being one of the axioms of modern law, it was never established as a general rule by Roman law, for all its long history, even in the last stages of that development of law.

It suffices, to make this view carry, for us to recall that the contract in Europe only became consensual under the influence of various factors, the most important being the Christian religion and the laws of the Church, which enjoined fulfilment of commitments (faithfulness to covenants), so that (the principle of) a person's being bound by his word came to accord with the mores of religion: ... Islamic Shari'a, and the legality (lawfulness ?) of contract depends customarily (ordinarily) on the Qur'an and the Hadith. "Keep the bond (covenant) of Allah if you enter into it, and do not renounce the faith after affirming it, for you have made God you surety (sponsor)"; and the Prophet said: "There is no refuge (protection) for him who is not trustworthy, and no debt owed to (religion in) him who has not bound himself (entered into a covenant, cannot be relied upon).

From the above exposition it may be concluded that the concept of contract in French law follows the expanded theory and conversely in the English law follows the limited theory. In comparison to these tendencies, Islamic law, however, are both narrower on the one hand but broader on the other. The basic concepts not only determine the 'essential conditions' for the formation of a contract but also affect the respective approach of the legal systems to the question of nature of a contract.

the sources of rights in general will arrive. Sanhuri defines the former as pure intention from which causes certain juridical effect provided by law. The latter on the other hand is defined as physical course of action which occurs with or without human's faculty, such as sale.[5]

It is widely accepted among the modern legal scholar that Islamic law does not recognize a general theory of contract but instead each social dealings in the treatise of traditional jurisprudents is treated separately in great details. Although a precise definition of contract is absent, however, the Arabic word "*'aqada*" which literally means "to tie", "to join" have been used to denote contract which has an underlying idea of conjunction as it joins the intentions and declarations of two parties.[6] Such concept is most consistently related to *al-bay'* or transactions that are concluded by offer and acceptance, whether from one side or both sides.

In defining *'aqd* Sanhuri adopts the terminology formulated in *al-Murshid al-Ḥayrān* to the effect that a contract is a state in which offer from one party and acceptance from the other are met which which have effect on the subject matter.[7] From this defenition, it can be inferred that first, *'aqd* that should stand on will fall in the category of *acte juridique*; that second it is specifically included in *taṣarruf al-qānūniyyah* because it constitute of the will of two parties; and third this defenition clarify the subjectivist tendency of Islamic law.

In Arabic usage the terms *mīthāq* and *'ahd* also has similar meaning with generic word *'aqd* and convey the sense of

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[5] Sanhuri, *Maṣādir al-Ḥaqq*, vol. I, 70-134.

[6] The use of such term is found in the Qur'an *inter alia* in Sūrah 5: 1, God Almighty said: "Oh you who believe: "Fulfil your commitment, for you are answerable therefor."

[7] Article 262 of *al-Murshid al-Ḥayrān* as quoted in *Maṣādir al-Ḥaqq*, Vol. I, 73, stipulates that: "*'al-'aqd 'ibārah 'an irtibāṭ al-ījāb al-ṣādir min aḥad al-'āqidayn biqabūl al-ākhar 'alā wajh yathbut athruh fī al-ma'qūd 'alayh.*"

right to exercise one of the general freedoms or permission envisaged by the law in respect of a general freedom."[9] Therefore, a person may, within the confines of the law, work, change of residence, perform a contract, own proverty, etc. In this sense, by reference to the freedom of ownership it can be differentiated that *rukhṣah* is the general freedom to own proverty; whereas right (*ḥaqq*) is ownership of proverty.

In addition, Western law recognizes the middle position between *rukhṣah* and *ḥaqq*. Such concept is called by jurist Von Tuhr as formative right (*droit formateur*) who designate it as "a position which gives to a person by virtue of a special legal situation, the right to create a legal effect by his sole volition."[10] The middle position therefore, as to ownership, is the right of a person to acquire ownership. To clarify the case in point, the example put forward in the *Maṣādir al-Ḥaqq* deserves to be quoted in full:

> "A man sees a house and wishes to purchase it. Before the seller issues an offer to him, he has the right of ownership in the abstract in the house, as he does in everything else – this is a mere *rukhṣah*. After he accepts the seller's offer, he has property in the house, a right. Before acceptance and after the offer, he is in the middle position between *rukhṣah* and *ḥaqq* with regard to the house. He does not have a mere *rukhṣah* to acquire the house like all other things – but he has not yet acquired ownership in the house. This is more than *rukhṣah* and less than *ḥaqq*. By acceptance, i.e.. by his sole volition, he can become owner of the house."[11]

However, the western law does not reach the extent that it can clarify the notion of middle position. As Sanhuri points out that

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[9] Sanhuri, *Maṣādir al-Ḥaqq*, I, 4.

[10] Von Tuhr is prominent western jurist, vol. I, 19-21. Quoted in *Maṣādir al-Ḥaqq*, I, 5.

[11] Sanhuri, *Maṣādir al-Ḥaqq*, I, 4.

Western jurisprudence only in its more emancipated forms has dealt with this, and refers to modern German law. Again, the main example given is where one is in receipt of an offer.

1. The middle position is known to the Shari'ah

Shihata in his work, 'General Theory of Obligations in the Islamic Shari'a', gives the example of a joint debt , that is to say a debt due to more than one creditor – if one of the creditors takes something of it, the others have rights in the things taken, which constitutes this middle position.

> "The thing taken is the property of the possessor personally, but his partner creditor has an established right in the thing taken, by virtue of which the partner creditor has the right to a portion of what his partner took, even if he cannot follow the thing taken into the hands of a third party. The owner of such right, does not have a right of ownership, but a right to acquire ownership."[12]

Shiḥātah found parallels in the *sharī'ah*: e.g. the right of one against whom a criminal offence has been committed to take the offending slave: on payment he becomes the property of the victim; but if the owner disposes of the slave before payment, then the right of the victim lies in damages. However, Sanhuri does not agree with Shiḥātah in classifying this right as *quasi in rem*, yet he does agree that this constitutes the 'middle position'. "He who has the "*rukhṣah*', 'owns the right to own'. The man in the middle position has the cause giving a right to demand vesting of ownership."[13]

Al-Qarafi denies absolutely that the owner of the *rukhṣah* is in any way an owner, and says that the second, i.e. the possessor of

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[12] Shihata, 'General Theory of Obligations in the Islamic Shari'a' (*Al-Naẓariyyah al-'Āmmah li al-Iltizāmāt fī al-Sharī'ah al-Islāmiyyah*), 265-7 quoted in Sanhuri, *Maṣādir al-Ḥaqq*, vol 1, 5.

[13] Al-Qarafi, *Al-Furūq*, vol. 3, 20-1, quoted in Sanhuri, *Maṣādir al-Ḥaqq*, vol. 1, 8.

the *droit formateur*, is subject for debate. As to the *rukhṣah*, the examples are too obvious to ennumarate – the mere general right to own obviously cannot confer any ownership or lesser interest in a specific thing unless something is done about it. The *sharī'ah* itself recognizes no right here, but the *droit formateur*, the middle position, is different. In discussing this issue, some of its aspects lead to controversy whether right confer ownership in the situation where a person has a cause giving the right to demand ownership?[14]

In order to make the discussion clearer it is necessary to provide examples given in the Islamic *sharī'ah*. The first example is where booty is taken (*haizat*) thus giving the warriors (*mujahidin*) cause to demand division thereof and obtain ownership. The question that arises from this case is whether they are considered owners or not. At least there are two theories that worth mentioning in this regard. According to Shāfi'ī jurisprudence 'they own by the possenssion and taking', whereas in the view of Mālik 'they only own after th division of the spoils'.[15] Other example is the case of partner in *shuyū'* (joint ownership) in which his/her partner sells, then he has the right to demand the thing by pre-emption. Accoding to the majority view of the scientific community of *sharī'ah* there is no dispute in this regard, or in other words he is not an owner.

The last example worthy of note is the case in which a poor man has come to demand ownership from the treasury (*the bayt al-māl*) by virtue of poverty or other legal reasons etc. If he steals from the treasury, is he considered the owner and, on the principle that an owner cannot steal his own property, not subject to the hadd, because he has cause to demand ownership: or is his hand cut off because he is not considered an owner ?[16]

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[14] Sanhuri, *Maṣādir al-Ḥaqq*, vol. I, 5-7.

[15] Sanhuri, *Maṣādir al-Ḥaqq*, vol. I, 7.

[16] Sanhuri, *Maṣādir al-Ḥaqq*, vol. I, 7.

There are at least two theories in this regard namely that according to the Islamic law it can be argued both ways. The first theory is that he or she who owns the general freedom or right to own (the *rukhṣah*) does not own. The second theory is he who has a cause giving him the right to demand ownership –dispite differences of theory and doctrine – in general this position does not confer ownership untill the transaction is completed. On this basis, the poor man does not own from the treasury until he is given , and if he steals he is liable to the *ḥadd*.[17] However, it is difficult to extract a general principle because there is two much controversy and divergent view of the jurisprudnts.

What concerns us in the *shari'ah* is the right (*ḥaqq*) not the *rukhṣah*, nor indeed the *droit formateur* (*al-ḥaqq al-munshi'* /the middle position). At the Shari'a, rights are divided into personal rights and real rights, but not in those terms – *dayn* (personalty) and *'ain* (realty). The distinction is difficult , and will be dealt with only superficially in this dissertation, and now we should proceed the discussion on right.

2. The Theory of *Dhimmah* (Legal Personality) in Islamic Law

In the Western law, right is derived from Roman law whether personal or material. Personal right or obligation is a bond between an creditor and debitor, in the sense that a creditor may demand the debitor to give something or to do something or refrain from doing something for the former. The material right, on the other hand, is an authority provided by the law for a person to own. In discussing right Islamic law the most important term to be taken into account is *dhimmah*. The word *dhimmah* in *fiqh* conveys the idea of legal

[17] Sanhuri, *Maṣādir al-Ḥaqq*, vol. I, 7.

personality as understood in modern law. A precise understanding of this similarity is evident from an examination of a few terms in *fiqh* as well as in law.

3. Personal right or Obligation/ *iltizām*

It is generally accepted that the concept of right in Western law whether personal or material/real is derived from Roman law. Since Islamic law in a general term does not reconize such concept, Sanhuri makes an attempt to approach the issue from the Western law perspective. The personal law is defined as the tie between two parties the creditor and debitor by which the former will have the right against the latter to deliver something to do or not to do something. The real/material right on the other hand is a capacity provided by law for someone for a thing. Sanhuri's entreprise of comparative law in this issue spins around two fundamental questions, namely to analyze whether Islamic law deals with personal and real/material right as understood in Western law.

Sanhuri maintains that the main reason for the absent of such concept in Islamic law is because what is the so called personal right/ *iltizām* in Islamic law normally includes numerous legal dealings that can be distinguished one from the other. In addition, the jurists of Islamic law did not make sufficient effort to introduce these ties in a systematic way as what is the so called personal right/ *iltizām*. The inconsistent use of the term right or *al-ḥaqq* also contributes to the vagueness of this concept in Islamic law.[18] At one time it is used to signify right in general term be they material and non-material and within the category of which included both the right of God and man. On the other hand, some other time it is also used to designate right of *irtifāq*, and it may also refer to *iltizām*

[18] Sanhuri, *Maṣādir al-Ḥaqq*, vol. 1, 9.

or obligation as a consequences of contract which is regarded as the effect of contract/ *ḥukm al-'aqd*. Thus, the effect of the contract/ *ḥukm al-'aqd* in such as sale is the transfer of ownership of the things sold, where as its obligation/ *ḥuqūq al-'aqd* is to deliver the object and to pay the price.

In another instance, the jurists also used the term "*al-iltizām*" to mean a situation in which a person make a commitment for obligation for his freedom of will, and rarely was it used for obligation as an effect of contract. However, should there any obligation arises from other than contract or contract responsibility or obligations as the effect of responsibility in general these are called *ḍamānāt*/ liability for loss. Thus, from the above discusssion it is clear that there are at least two legal concepts that are closely represented the term obligation in Wsetern law namely *iltizām* and *ḍamān*. However, for the purpose of the discussion, for a practical reason and to avoid confusion the term *iltizām*/ obligation in its Western concept will be consistently used. In Islamic law *iltizām* which constitutes several different ties distinguishable from one another consist of at least four categories, namely obligation of debt, object, work and guarantee.

In Islamic law the legal capacity/ *dhimmah* commences since the inception of the life of human being namely the embryonic stage. Although at this point he/ she has legal position, but he/she has no power to hold responsibility as transactions. However, he is deemed capable to hold rights for his own interests in such as inheritance, receiving bequest and charity. Due to such restricted nature of capacity so that the jurists call it deficient receptive legal capacity/ *dhimmah qāṣirah/ nāqiṣah*.[19]

[19] In Islamic law treatise the jurists have categorized the legal personality into four different stages which constitute 1) embryonic/ *marḥalah al-janīn*, 2) childhood/ *marḥalah al-ṣaba*, 3) discerment/ *marḥalah al-tamyīz* and 4) puberty/ *marḥalah al-bulūgh*. See 'Abd al-Ḥamīd Maḥmūd al-Ba'lī, *Ḍawābiṭ al-'Uqūd fī al-Fiqh al-Islāmī*, vol. 1. (Cairo: Maṭābi'

When one was born his life then undergoes several stages until he finally attain intellectual maturity. Simultaneously, in due process one's *dhimmah* is gradually complete so that he has both the capacity and liability in social dealings, religious observance and criminal law. In addition, the legal personality of a person will remain as long as he is alive and will automatically cease with his death. However, the jurist have different view on termination of *dhimmah* due to death. The Maliki and some Hanbali jurists maintain that *dhimmah* will automatically cease with the death, and in circumstances in which the deceace left after inheritance, if he/ she has obligation will be dependent upon it, otherwise he/ she will be righted off.

The Shafi'i and some of the Hanafi assert that the *dhimmah* of a person continues after his death so long as he has not yet fulfilled his debt or obligation. Based on the arguent above these jurists proclaim that the deceased will be obliged to perform his debt/ liabililty even after his death. A notable example given is in the case when some one during his lifetime sells something, but it was then returned due to defect after his death, and so he is liable/ within his *dhimmah* for returning the counter value of the thing sold.[20] Similarly, when a person dig a hole in the public street and after his death, some one was thrown into it that causes the lost of the latter's property, then the deceased's *dhimmah* is the liability for the lost. In addition, this jurists also assert that the deceased's obligation will remain dependent upon *dhimmah* even if he has not left anything behind and also no party will guarantee the former's liability. However, in this circumstances, it is permissible to guarantee an obligation after death.

al-Ittiḥād al-Dawlī li al-Bunūk al-Islāmiyyah, n.d.), 17; Wahbah al-Zuḥailī, *Al-Fiqh al-Islāmī wa Adillatuh* (Damascus: Dār al-Fikr, 3rd ed., 1989), 123-5; Sanhuri, *Maṣādir al-Ḥaqq*, vol. 1, 16.

[20] Sanhuri, *Maṣādir al-Ḥaqq*, vol. 1, 16-17.

The Hanafi jurists on the other hand maintain that *dhimmah* will terminate with the death which is evident from the possibility of the deceased left behind him either the property or guarantee for his obligation. In the case when the deceased does not left any property or guarantor of his obligation, the duty to fulfill such an obligation will be released from him. In contrast to the view of jurist mentioned above, according to the Hanafi jurists it is not admissabble to guarantee the debt after the death. Should there be any *al-tarikah al-mustaghriqah* will ratain based on the ruling of the possession of the deceased.[21]

From the above exposition, it is evident that the concept of *dhimmah* in Islamic law is different from that which is understood in Western law in the following aspects. First, in Islamic law *dhimmah* is an attribute that enables a human being to acquire rights and obligations both in material and non-material. In Western law, however, it only pertain to material rights and obligations. Second, even in the realm of material, the *zhimmah* in Islamic law begins with person and terminates in material, whereas in Western law is just the opposite. Third, *zhimmah* in Islamic law does not make the material become collective which eliminates its aspects as in the Western law. Similarly, the material does not become collective in Islamic law even in the case of detention and death-illness and even after the death.

Thus it can be concluded that the essential difference of *dhimmah* in Islamic and in Western law is that in the former it is seen as juristic personality and not as collectivity of material. This is the primery reason by which the contemporary Islamic jurists base their characterization of *dhimmah* according to the concept of juristic personality as found in Western law. And thus, they hold

[21] Sanhuri, *Maṣādir al-Ḥaqq*, vol. 1, 17.

the object as long as it remains in its state of existence although it's *ruqbah* is not being owned."[25] Based on this definition, it can be inferred that the right of usufruct is characterized with two of the three aspects of ownership, namely the right to use and occupy. There are three conditions of ownership of usufruct, namely contract/ *'aqd*, bequest, and charitable donation.

3) Right of *Ruqbah*

4) Right of *Irtifāq*

5) Consequence of Right in Original Real Rights

b) *al-ḥuqūq al-'ainiyyah al-tab'iyyah* In Islamic law recognizes *al-ḥuqūq al-'ainiyyah al-tab'iyyah*

From the above discussion it is evident that Islamic law recognizes a number of real contingency rights known to the Western law. And what remains is not other than formal pledge and special right both of which are not recognized in Islamic law. Interestingly, however, Islamic law recognizes a type of material right which is fundamentally categorized as personal right but then it turns out to become material/ real right. This circumstance is evident in the state of being detained, death-sickness and death itself. To elaborate, if a debitor is detained or being in death-sickness or dying and he has wealth, then his duty/ obligation will be depended on this welth, and this form of right consequently transform from personal to material right, in view that it leads to the totality of speciality of materila right or to be precise the speciality of right of pledge all of which centers around the the wealth of the debitors, and it depends on the abstract sense of the wealth and not with real/ material itself. The creditors then have the right on such wealth to whom ever party it is tranferred might be. In addition, although there are some parties eligable for the wealth such as

[25] Sanhuri, *Maṣādir al-Ḥaqq*, vol. 1, 28.

thus he can take advantage of the things, the fruits, offsprings possesed, as well as transact with the thing in all admissable dealings."[22]

From the above definition it can be inferred that ownership right in Islamic law as well as in Western law constitute three aspects namely, first the benefit of things owned, second benefit of fruit and third ability to transact with the wealth. However, Sanhuri argues that ownership right is not absolute as indicated in the *Murshid al-Ḥayrā* but it is rather conditional on the fact that it does not cause harm for the neighbor. The provision on this can be found in article 57 of the *Murshid al-Ḥayrān* itself which states that "It is the right of the owner to utilize what he posseses in what ever ways he wishes as long as someone else does not have the right on it. And thus, one can build a high wall, build as he wishes as long as it does not lead to causing serious harm for the neighbor."[23]

In addition, join ownership is also known to Islamic law. A notable example is once again is explained in *Murshid al-Ḥayrān* which states that:

> "If the wealth is owned by two or more parties each of them has the right of taking benefit according to his share, and the use should not cause harm for the other partner, and he has the right as for sale, benefit as long as the amount is known even without the consent of the partners."[24]

5. Right of Usufruct

In his explanation on the issue of *ḥaqq al-manfa'ah* Sanhuri refers to article 13 of *Murshid al-Ḥayrān* which states that "the admissable benefit is the right of usufruct in using and exploiting

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[22] *Murshid al-Ḥayrān*, article 11 quoted in Sanhuri, *Maṣādir al-Ḥaqq*, vol. 1, 27.
[23] Sanhuri, *Maṣādir al-Ḥaqq*, vol. 1, 27.
[24] Sanhuri, *Maṣādir al-Ḥaqq*, vol. 1, 27.

C. Subjective element of Intention/ *niya* and Theory of Cause

In the previous chapter it has been discussed that in Sanhuri's scheme of analysis there are two levels of comparisons, namely the comparison within the variuos school of Islamic legal thought, and the comparison with other legal system. In dealing with intention, Sanhuri makes an attemp to analyze contemporary French theory of the motivating cause or *la cause* within the modern structure of contract.

Although it has been established that *niyah* or intention is so central in Islamic law, however, in practical term it is inconceivably put more emphasis on *ibādāt* or ritual law than to *mu'āmalāt* or the mundane social dealings.[28] Given the fact that *niyyah* is an essential condition for the validity of retual laws, on the contrary, in the realm of *mu'āmalāt* intention and motive are less apreciated.[29]

"will" – In the presentation of Sunni law 'will' (*irādah*) is frequently used as compassing all three elements of 'intention', 'consent' and 'choice'. "Will in Islamic law", says Sanhuri[30] with reference to Sunni schools, "is composed of two elements: *ihktiyār* (choice) and *riḍā* (consent). If the will perishes, both element perish together ... In duress ..., according to Islamic law, the element of *riḍā* is lacking but the element of *ikhtiyār* exists...". *Ikhtiyār*, in this

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[28] The provision of obligation is enshrined in the Prophetic tradition *innama al-a'mā bi al-niyyāt* (any action is measured by its intention).

[29] For the latter point, it is true in the Hanafi School of legal thought as has been investigated by Chefik Chehata who come to the conclusion that "motive is so little taken into consideration that the sale of an object is clearly considred to be valid even if the ends it serves are illegal. See Chefik Chehata, *Théorie Générale l'Obligation en Droit Musulman Hanéfite* (Paris Editions Sirey, 1969), 70. Cf. Oussama Arabi, "Intention and Method in Sanhuri's Fiqh: Cause as Ulterior Motive," in *Islamic Law and Society*, 4 (2) (June 1997): 201.

[30] Sanhuri, *Maṣādir al-Ḥaqq*, vol. II, 202.

inheritance and bequeaths but to fulfill the right of the creditors becomes the priority. Only in the case where there is the right of pledge or to protect certain thing can this right be carried out first other than the creditors'.[26]

Based on the above explanation, it can be inferred that there are at least two rights concerning the wealth of the obligator who are being detained, death-sickness or dying both of which are: first the right of *al-ghuramā'* the object of which is the abstract sense of the wealth, and second the right of either the obligator or his heirs on the object of the wealth itself. The former is contingent real/ material right comparable to that of the right of pledge where as the latter is the original real right which is the right of ownership that remains for the creditor as long as he is alive or it is transferred into his heirs if he has died.

Accordingly, it can be concluded then that right in Islamic law from the perspective of its relation to the real/ material or *dhimmah* comprises of five levels, namely: first, right related to the real or object itself, that is the principle real right such as that of ownership and *irtifāq*; second right related to the real or object itself, but is not necessarily meant principle real right like *al-iltizām bi al-'ayn*; third right which is related to the abstract sense of the wealth of the debitor and is not necessarily connected to the essence of the, and this is the kind of right of the creditors towards the wealth of their being dying, death-illness or detained debitors; fifth, right which is dependent upon *dhimmah* and not on thing in the sense that it is duty/ obligation related tothe *dhimmah* of the creditor during his lifetime if it is in his state of good health and he is not being detained.[27]

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[26] Sanhuri, *Maṣādir al-Ḥaqq*, vol. 1, 33.

[27] Sanhuri, *Maṣādir al-Ḥaqq*, vol. 1, 34-35.

2. The Position of the Theory of Cause in Roman Law

From the previous discussion, it is evident that during the scholastic time the concept of cause was known in some kinds of contracts in a limited extent. These contracts are those in which the will manifests itself as a factor of the various motives that form the contracts. Consequently, whenever the intention is apparent, the cause also emerges. However, the concept of cause in Roman law is presented in the objective concept rather than subjective motive, and thus it is maintains that the cause embodies in contract itself and extranous of it. In other word, a contract and motive are tied together in a single contract regardless of whatever the driving motive might be.

> Parallel to this develoment also occured in contemporary French law ... Such is the case also in modern [French] law where formalism is practically absent, and where the theory of cause developed and flourished ... The traditional theory [based on ancient Roman law] failed to face up to practical life .... And the French judiciary expressly went beyond it, breaking the barriers erected by this theory between cause and motive.... Thus the judiciary conferred on the theory of cause a flexibility it did not previously enjoy, wielding it into a productive and indispensable theory. The cause, from the judiciary's viewpoint, is the motive behind the contracting party's obligation. Given that the will has become free to establish the obligations it desires, and given that the will must be driven by a motive, it is only natural that the objective that the will contemplates realizing be one which is not prohibited by law and not in violation of public order [*ordre public*] and morality [*bonnes moeurs*].[32]

In order to appreciate better the extensive comparative enterprise of Sanhuri on the one hand, and his concern for

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[32] Sanhuri, *Maṣādir al-Ḥaqq*, vol. IV, 5, 23-24.

context, may either be equated with, or be taken to compromise, the Shi'ah notion of intention (*qaṣd*).

Comprison of concepts – The element of consent (*riḍā*) may be considered to be the same in Shi'ah and Sunni law, but the element of *ikhtiyār* to have a wider meaning in Sunni than in Shiah law, embracing in fact both the Shi'ah elements of 'intention ' and 'choice'. "*Ikhtiyār*", according to an oft-quoted Sunni saying, is the intention to choose one of the two possible sides of a thing oscillating between existence and non-existence...', namely, the intention to choose between doing and not doing a thing. "Therefore, if the person is independent in his intention, his 'choice' is valid; but if not, it is corrupt."[31] In other words, if a person is independent, free from duress, in froming his intention he has his 'choice' and consequently his contract is valid and binding, but if he is not independent and free from a material external pressure, then the element of 'choice' is lacking and his contract is voidable.

1. The Subjective Theory of Cause in Western Law

In his exposition of the theory of cause, Sanhuri delves into historical origin and development of the concept expounded in Roman, Church, contemporary German and French jurisprudence in a great length. From the wide range of dimension of analysis, in the context of the present study, it suffices to consider two key theories as a point of departure to analyze Sanhuri's treatment of Islamic law; namely, first, the modern notion of cause as the subjective motive for contract in the Modern French law, and second, the source of that notion in the Ecclesiastical law of mediaval Churchman. In fact, these two theories evidently assume a principal role in Sanhuri's analysis of Islmic legal notions.

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[31] Sanhuri, *Maṣādir al-Ḥaqq*, vol. II, 202.

Defenition

Islamic law does not lay down a general theory of cause or motivation (*sabab*) in any of its legal manuals of the established schools (*madhhab*) but rather it proceed in accordance with creative usage fundamental principle. The theory of cause (*sabab*) in Islamic legal system is treated in different extent by jurists of respective school of thoughts (*madhāhib*).

Islamic jurisprudence facing the theory of *sabab* contradicts with opposite motives. First, in this regard it is closer to the German than to Latin jurisprudence. Second, from different perspective, Islamic law however, is an understanding in which elements of good moral.

Literally the term *al-sabab* is translated into English into various meanings among others of which are reason, cause, motive and occasion.[34] Its technical usage in modern Arabic can signify different connotations as "subjective motive" like in the example of *al-'alam sabab al-ṣurākh* (the waving of the flag is the cause of screaming). In Sanhuri's usage, it can also mean the subjective motive behind an act in such instance as *ṭalab al-'ilm sabab al-safr* (the desire for acquiring knowledge is the cause of travel).[35]

While making all due effort to discuss how classical jurists deals with the issues of cause in their treatises, accordingly, Sanhuri is trying to show how the modern notion of case in Arab civil legislation instilled in the ways to be much in line with the consept of modern French jurisprudence. The case in point is as provides in article 136 which states that "If the obligation has no cause (*idhā lam yakun li'l-iltizāmi sabab*) or if its cause violates public order ore morals, the contract is invalid."

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[34] Hans Wehr, *A Dictionary of Modern Written Arabic*, 392.

[35] Sanhuri, *Maṣādir al-Ḥaqq*, vol. IV, 29.

modernizing Islamic law on the other, require that it be comprehended in the framework of his perception of the modernizing Egypt and France during the first half of the 20th century, that it is necessary to adjust to the current legal practice, the contemporary social theory and judicial practice. By the same token, he maintains that formulation of jurisprudence and legal thought should be adaptable to the rulings and principles that are applied by working magistrates and judges. To this end, Sanhuri makes this adaptability as his methodology.

At the practical level, the best example of this method is evident in Sanhuri's insertion of the contemporary French theory of cause or *la cause* into the New Egyptian Civil Code of 1949 justify by taking into account both the process of the current civil legislation and the practice of juridical structures in the country. In this regard Sanhuri's comment deserves to be quoted in full:

> "The New Egyptian Civil Law adopted the modern theory of cause as a heritage from the previous Civil law and from the practice of the Egyptian judiciary. The jurisprudence and judiciary in Egypt, prior to the promulgation of the New Civil Law, had already prepared the ground for ... admitting the new fertile theory."[33]

To make Sanhuri's extensive comparative enterprise and his great concern to refrom Islamic law worthwile it is important to understand them in the light of modern jurisprudential practice. Failing to viw them within this perspective the reach comparative material exposed in the *Maṣādir al-Ḥaqq* would have been of no value. At this juncture, it can be forwarded that here interject the tradition and modernity discourse.

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[33] Sanhuri, *Maṣādir al-Ḥaqq*, vol. IV, 28. Compare with Oussama Arabi, 204.

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While making all due effort to discuss how classical jurists deals with the issues of cause in their treatises, accordingly, Sanhuri is trying to show how the modern notion of case in Arab civil legislation instilled in the ways to be much in line with the consept of modern French jurisprudence. The case in point is as provides in article 136 which states that "If the obligation has no cause (*idhā lam yakun li'l-iltizāmi sabab*) or if its cause violates public order ore morals, the contract is invalid."

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[34] Hans Wehr, *A Dictionary of Modern Written Arabic*, 392.

[35] Sanhuri, *Maṣādir al-Ḥaqq*, vol. IV, 29.

intention would invalidate the sale. Thus I reprehend the purchase of the swordby a man if he plans to kill with it. Yet its sale by the vendor to the man who kills unjustly with it is not prohibited, for he might not kill with it; consequently, I do not invalidate the sale. Similarly I reprehend the sale of grapes by the vendor to a erson whom he sees is making wine from it; but I do not void the sale of the grapes, because they were sold legally (*ḥalālan*). Just as the buyer of the sword might not kill any body with it, so the buyer of the grapes might not make wine.[38]

The theory of Cause in the Ḥanbali and Mālikī School

As has been mentioned, in the view of Sanhuri the theory of cause in the jurisprudence of Ḥanbalī and Mālikī, especially in the Ḥanbali's, is very closely similar to that of the Latin jurisprudence which later developed by the modern French jurisprudence. According to this jurisprudence the cause designates dominant motive of the contract whether or not it is identified in such a contract on condition that it is made known to the other party. Based on this condition, provided that the main purpose of the contract is legal, the contract is valid. However, if it is due to an illegal cause, then the contract is invalid.[39]

The fact that the Ḥanbali school is tradition centristic it gave more weight on religious piety and ethical aspects as the prequisity to determine the validity or invalidity of any legal actions. Therefore, Sanhuri maintains that Ḥanbali jurisprudence leans on subjectivist tendency which may be equated with conscience of jurists of the Medieval Church which in fact initite the birth of modern French law. The underlying common denominator of their concern lies in the Divine law which becomes as prameter of

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[38] Al-Shāfi'ī, *al-'Umm*, vol. III, 65; quoted by Sanhuri, *Maṣādir al-Ḥaqq*, vol. IV, 57-58.

[39] Sanhuri, *Maṣādir al-Ḥaqq*, 71.

In order to have a better understanding of how *al-sabab* or ulterior motive is dealt with in Islamic law, it is worthy of note that there are two tendencies in this regard. First, Islamic law is a law with a noticeable objective tendency, giving weight to the expression of the will and not to the will as such, i.e. prefering the apparent, not the latent. Thus, from this point of view, it is closer to the German than to the Latin law. Second, Islamic law, on the other hand, is a law in which ethical, moral and religious factors predominate, implying the significance of motivation, as the latter is the measure of the honesty and purity of intentions.[36]

Sanhuri mentiones a number of significant instances of the application of this principle by both the Egyptian and French judiciary: [In Egypt] the Mixed Court of Appeal (January 27, 1909...) ruled the sale of weapons, the importantio of which to Egypt is prohibited, is invalid due to the illegality of the causee, if the vendor knew about this prohibition; it also ruled (May 5, 1929 ...) that a loan contract is invalid when the borrower intends to use the loan for gambling, if the loaning party knew of this intention ... [In France] if a sale or a lease contract is concluded for a house which the buyer or the lesee wants to run for prostitution, and the vendor or the landlord knows of his intention, then the contract is invalid (The Court of Appeal of Paris, December 26, 1899).[37]

4. The Ḥanafī-Shafi'ī Marginalization of Ulterior Motive

The principle I follow is that any contract which is valid in appearance, I do not nullify (*anna kull 'aqd kana ṣaḥīḥan fī'-ẓāhir lam ubṭilhu*) on grounds of suspecting the parties: I validate it by the validity of its appearance; I take their intention to be reprehensible (*akrah lahumā al-nīya*) if-were it made explicit-that

[36] Sanhuri, *Maṣādir al-Ḥaqq*, vol. IV, 52.

[37] Sanhuri, *Maṣādir al-Ḥaqq*, vol. IV, 29-30.

D. Usury/ *Ribā* and Interest

1. Historical background

The issue of *ribā* has been one of the most heated debate in the twentieth century not only in the Middle East but also in the Muslim world in general.[41] In his discussion on the subject within the system of obligations and contracts, Sanhuri classifies *ribā* along with other 'vices of consent', which, in the French terminology, nullify a contract. In this regards, *ribā* together with *gharar* are considered to be a major constraining factors that are repugnant in the Shari'ah and becomes obstacles in the financial transactions of modern time.[42] In his scheme of interpretation, he begins his discussion on the sphere of *ribā* in Islamic law and then continues to analyze how such concept originated and developed in different legal tradition. From this, it will be possible to determine what should be the position of Islamic law on this important issue of modern time. Although classical jurisprudents (*fuqahā'*) were in agreement on the prohibition of *ribā* , but they differed on methodological points in interpreting the precepts of the Qur'an and the Prophetic tradition.

2. Specification of Usurious Articles

Although the Prophetic Traditions are also explicit about the prohibition of *ribā*, however they are not unanimous about what exacly constitute *ribā* and what sorts of contracts come under the Qur'anic prohibition. There are at least three principal types of

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[41] Studies on the debate on *ribā* are numerous, chief among the few are I.Z. Badwi, *Naẓariyyat al-ribā al-Muḥarram* (Cairo: al-Majlis al-A'la li al-Ri'āyat al-Funūn, 1964); Nabil Saleh, *Unlawful Gain and Legitimate Profit in Islamic Law.* (Cambridge: Cambridge university Press, 1986); J. Mandaville, "Usurious Piety: the Cash Waqf Controversy in the Ottoman Empire," *International Journal of Middle East Studies* 10 (1979): 289-308;

[42] Sanhūrī, *Maṣādir al-Ḥaqq fī al-Fiqh al-Islāmī, Dirāsah Muqāranah bi al-Fiqh al-Gharbī* vol. III (Cairo, 1956), 14.

ascertaining the siritual purity of the individual. To support his view Sanhuri quotes the Ḥanbali jurist , Ibn Qayyim al-Jawziyyah who maintains that:

> Should the law take into account only the manifest meaning of expressions and contracts even when the purposes and intents (*al-maqāṣid wa al-niyyāt*) appear to be otherwise ? Or do aims and intents (*al-quṣūd wa al-niyyāt*) have an effect which requires paying attention to them and taking them into consideration ? The evidence of the law (*adillat al-shar'*) and its rules concur that intentions in contracts do count and that they affect the validity and invalidity of the contract, determining whether the contract is legal or illegal.[40]

From the discussion above, it is evident that Sanhuri is trying to make an effort to formulate the subjectivist French legal motive of *la cause* and applied the Arabic term *al-sabāb* in the *Maṣādir al-Ḥaqq* on the groud that such a concept does not necessarily render the same meaning as in its French counterpart. In other word, Sanhuri's discourse in this respect is that his reading of the threatiese of the classical authors, bring the notion that alien to their thought.

Utilizing the centrality of intention (*niyyah*) in the realm of worship – a rudimentary aspect of religious experience of Muslim epitomized in law - as his main footing, Sanhuri maintains that it is inconceivable that the insistence on sincerity of intention will have a legal effect in the other aspect of life, that is in the social dealings and mundane transactions or *mu'āmalāt* among man. Although in the analysis, Shāfi'i and Ḥanafi marginalized the ulterior motive in contract law, Sanhuri convincingly show that the other two Sunni legal school of thought took the licitness of motive as a necessary feature of the validity of contracts.

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[40]Ibn Qayyim al-Jawziyyah, *I'lām al-Muwaqqi'in 'an Rabb al-'Ālamīn*, 4 vols. (Cairo: al-Munīriyyah Press), vol. 3, 96-98; quoted in Sanhuri, *Maṣādir al-Ḥaqq*, 76-77.

As a consequence, manifest *ribā* (*ribā al-nasī'ah*) cannot become lawful except in the case of pressing necessity (*ḍarūrah mulji'ah*), like that which allows the eating of carrion. On the contrary, hidden *ribā* (*ribā al-faḍl*) can become lawful in case of need (*ḥājah*) only, which is obviously governed by less stringent conditions than 'pressing necessity'.[46]

3. *Ribā* in Different Traditions

To place the discussion concerning *ribā* in a wider spectrum, Sanhuri excurses the different historical orientation in which the practice of its sphere is restricted. In the history of mankind, *ribā* has been known since ancient time and regulation of taking interest are as old as making laws. Perhaps the earliest account of the prohibition of charging interest went back to approximately 1750 B.C. provided in the Babylon Code of Law. During the ancient Egypt the taking of compound interest (*majmū' al-fawā'id*) in excess of the principal was deemed illegal as enshrined in the provisions of the Code of the 24th Dynasty King Bocchoris (c. 730 - c. 715 B.C.). What's more, the Greek and Roman law reveal that *ribā* was recognized in both traditions.[47] Christianity and Judaism have also restricted or prohibited charging interest.

However, due to economic pressure the sphere of *ribā* in Christianity was gradually restricted and thus allowing only taking benefit in certain circumtances which appears to be based on the following consideration.[48] First, St. Thomas allows charges for actual services provided in a loan/ *qarḍ* (*damnum emergences*). Thus a

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[46] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. III, 206.

[47] Sanhūrī, *Masadir al-Haqq*, vol. III, 206.

[48] Sanhuri, *Maṣādir al-Ḥaqq*, vol. III, 221. In his analysis of the argument on this issue Sanhuri relies on the view of Shukrī Qardāḥi. For details see the latter's work *al-Qānūn wa al-Iqtiṣād*, vol. II, 167-71.

hadīth on *ribā*. The first type is the most accepted or reliable sayings of the Prophet on *ribā*, reported in most compilations of the hadith, and states that *ribā* exists when six articles of the same kind are either bartered unequally or not delivered immediately: these articles were identified as gold, silver, dates, salt, barley and wheat.

The second type of hadiths, citing Ibn 'Abbas, a companion of the Prophet, report that there is no *ribā* except in deferment, namely *ribā fī al-nasī'ah*, in delivery and/or payment.[43] The third type of *hadīth* relate to the last *hadīth* on *ribā* in which the Prophet, in his sermon on the occasion of the last pilgrimage, explicitly prohibits the pre-Islamic *ribā* and refers to it as the *ribā* of 'Abbas Ibn 'Abd al-Muttalib. This report asserts that only the recovery of the original sum or property is licit at maturity, thus ruling out the receipt of any excess. There are also other reports recorded in the *hadīth* texts on other commodities such as meats, fruits, and slaves that indirectly refer to illicit "increases".[44]

In general, however, except for the aforementioned three types of reports of the sayings of the Prophet, other reports are not unanimous and are not equally relied on by jurists. As regards loans, debt or borrowing there are several *hadīth*s that are often relied on by the jurists for their discussion of the subject. One could infer from some of these reports that riba in an exchange arises because one of the parties to a transaction demands the delivery or repayment of a larger quantity. However, some of the traditions insist that if a party to a contract voluntarily gives the other a bonus, the act is prohibited for a sale but acceptable for a loan. In addition, the Traditions is contradictory on the possibility of the reduction of the amount of a debt if the loan "is voluntarily paid before it falls due".[45]

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[43] Sanhūrī, *Masadir al-Haqq*, vol. III, 250.
[44] Sanhūrī, *Masadir al-Haqq*, vol. III, 250.
[45] Sanhūrī, *Masadir al-Haqq*, vol. III, 197.

both the lender and borrower may make an agreement on penal stipulation/ *poena conventionalis* that has to be fulfilled by the borrower on condition that if the loan is blocked up as agreed and thus extra amount should be compensated as a result of the latter's failure to meet the agreement on time.[52] However, the Churchmen went back and forth in legitimizing this condition which they finally dismissed for fear of commiting hidden excessive *ribā*. Minor benefit, though tolerated by the Church in certain circumstances was also not allowed to be made as pre-warning condition, but it was acceptabe if it was aimed at provoking the borrower to pay his loan in due time.

Another situation in which the lender was entitled to obtaining real benefit out of the capital was when the civil legislation or the customary practice pridided so, and thus the benefit condenced in the legal support/ *titre legal.*[53] The underlying reason for this exception is that statutes and custom which allow benefit have been measured according to the economic circumstances. Thus, the borrower has the right to demand the benefit judging against the loss arises from the loan, and the benefit that he misses. In this case, it is stipulated that the benefit should be moderate and not excessive. From the above, it is evident that the sphere of riba was restericted gradually in Christianity according to church law. Benefit was allowed in some cases under the pressure of economic practices.

The practice of cahrging compensation with restrictions in the above-mentioned era undeniably threw light in justification for charging interest in legislation. The later followed the jurisprudencial theory which justified the charging of interest arguing that money *per se* indeed could not produce benefit but as guaranting means it

[52] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. III, 218.
[53] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. III, 218.

credit-lender could charge for such actual work or effort as he did carry out which include any fair administrative charges. The Catholic Church, in a decree of the 5th Lateran Council (Session 10, 4 May 1515) expressedly allowed such charges in respect of credit unions run for benefit of the poor known as *qarḍ al-ḥasanah* (gratuitous loan) or *montes pietatis*.

Accordingly, in the 13th century Cardinal Hostiensis enumerated therteen situations in which charging interest was not immoral.[49] The most important of these was *lucrum cessans* (profit given up) which allowed for the lender to charge interest "to compensate him for profit foregone in investing the money himself."[50] This idea is very similar to opportunity cost. Many scholastic thinkers, such as Pierre Jean Olivi and St. Berdardino of Siena, who argued for a ban on interest charges also argued for the legitimacy of *lucrum cessans* profit. However, the borrower and the lender must have predetermined attachment to one another which include that the borrower did not have any other means to acquire benefit other than what he had borrowed. However, this conditions were rarely fulfilled since in the Middle ages big corporation which require capital for benefit have not yet been well established and that the economic system in this era was not based on capitalist system.[51]

In addition, slight compensation was also tolerated as a guarantee for the risk of loss of the thing borrowed (*periculm sortis*). This exception, however, could only be well received at the end of the 14th century considering its momentum and being in contradiction with the early teaching of the Church. Accordingly,

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[49] Raymon Roover, "The Scholastics, Usury, and Foreign Exchange," in *Business History Review* (Autum 1967): 41.

[50] Murray Rothbard N, *An Austrian Perspective on the History of Economic Thought* (Auburn, Alabama: Ludwig von Mises Institute, 1995), 46.

[51] Cf. Sanhūrī, *Maṣādir al-Ḥaqq*, vol. III, 218.

adopted in a number of Eoropean, Latin-American and Middle Eastern countries, either in the form of simple translation or with considerable modification. However, the state introduced Law number 3 September 1809 regulating the formal rate of interest that specify the maximum legal interest rate at which loan can be made. Interestingly, this law differentiates interest rate on purely private or civil transactions from that of the commercial transaction which cannot exceed 5% and 6% respectively.[57] In its further development, the regulation that was repealed by law No. 12 January 1886 while keeping is law then followed by the introduction of several laws may be deemed as committing crime of forbidden *ribā al-faḍl*.

4. Interest in the Modern Legislation

In order to understand the position of the Arab legislation concerning the charging of interest it is necessary to consider the provisions of Egyptian Civil Code of 1949 which became the model for other countries in the region. Under the original code which was adopted from the French *Code Civil* exchange with interest was legal provided that two conditions were met namely first, the minimum term of the accumulated interest should be running a year; and second, such interest accrual is permitted if it is based on an express stipulation in the contract between lender and borrower. If the two preconditions are not fulfilled, the final resort to decide the case is the court decision.

However, with the introduction of the New Civil Code the practice of charging interest becomes more restricted. According to the provision of the New Code interest on interests (*fawā'id 'alā mutajammid al-fawā'id*) is legally prohibited'.[58] In circumstances

[57] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. III, 221.

[58] Article 232 of the New Egyptian Civil Code. *Lā yajūz fawā'id 'alā mutajammid al-fawā'id*.

fall under benefit. To elaborate there are two interdependent aspects that have to be fulfilled for money being productive namely labor on the one hand and the principal on the other. Thus, they argued that both labor and the principal are entittled for compensation in the form of reward and interest respectively. They further argued that the owner of the capital share with the laborer.[54] Based on this argument they concluded that interest (in this form) is not categorized as forbidden *ribā* but rather it is a legislated compensation for productive assets on the ground that since any productive goods is entitled for compensation so are money and other exchanges are warranted for benefit.

At this juncture, however, the theory did not cover the case of capital venture agreed by both the creditor as the owner of the capital and the laborer which suffers from loss. Thus, in this regard those who support the theory which justify the compensation in practicing *ribā* propose two legal devices (*ḥiyal*).[55] The first legal device is by way of in which the creditor and laborer establish an *sharikah tauṣiyyah* (limited partnership). The second legal device is the concept which originated from Islamic jurisprudence *'aqd al-mukhāṭarah* (contracu mohatrae).[56]

The sphere of usury in European History was gradually restricted by means of exception and legal device. The French revolution brought with it a reform that allowed taking advantage. The prevailing practice then gave rise to endorsing the legality of charging of interest in the French *Code Civil* of Napoléon which was enacted in 1804, and during the 19th century was voluntarily

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[54] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. III, 219.

[55] For detail see Shukrī Qardāḥī, *Al-Qānūn wa al-Akhlāq*, vol. III, 181-188; see also Sanhūrī, *Maṣādir al-Ḥaqq*, vol. III, 219.

[56] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. III, 220.

the full six months.[63] The contracting parties can agree on a different rate of interest, whether in return for a delay in payment [this is related to Art 226] or in any other situation [which includes the loan for interests], on codition that this rate does not exceed 7per cent, and any surplus already paid must be returned [to the borrwer].[64]

Since *ribā* in the general system of obligations and contracts nullify a contract, in this perspective, riba is considered to be a major constraining factor bearing on the freedom of contract. Since the acceptance by the Egyptian Civil Code of interest from verious contracts, and mainly loan, Sanhuri's understanding of riba is qualified by necessity to abide by the dispositions written in the code.

The whole defense of Article 227 is based on a subtle syllogism. The rationale of the syllogism lies in the fact that "riba is forbidden" and that there are three main reasons for the prohibition:

The first two reasons derive from simple public policy considerations. The third reason sheds light on the question of *ribā al-faḍl*, which according to the hadith, is defined as the prohibition of the sale with an increase (*ribā*), of two commodities of the same kind. For Sanhuri, this classification is an important element in the articulation of the syllogism. *Riba al-Faḍl* according to Sanhuri is forbidden in classical Islamic law as a prohibition 'of means' (*saddan li al-dharī'ah*).[65] It is not forbidden *per se*, because it is meant to stand in the way of the more fundamental riba of the jahiliyyah, *ribā al-nasī'ah*. *Ribā al-nasī'ah*, however, is absolutely prohibited. It is prohibited per se. There are consequently different degrees of prohibition, and some are less absolute than others. The forms of

[63] Sanhūrī. *Maṣādir al-Ḥaqq*, vol. III, 272-274.

[64] New Egyptian Civil Code, art. 227.

[65] See Sanhūrī, *Maṣādir al-Ḥaqq*, vol. III, 277.

where the contracting parties, the borrower and lender do not reach agreement whether a given loan should charge with interest, the code stipulates that loan in such situation will be deemed free from interest.[59]

In case of delay after the payment is due, an interest of 4per cent in civil, and 5per cent in commercial, transactions will eventually be owed by the defaulting borrower. In this case however, procedural rules are favorable to the debtor. A summons by the creditor, even if official, would not be sufficient for the legal interest to start running. The lender-creditor must file his complaint with the court, and specify in the writ brought to the tribunal that his right is not limited to the principal (*ra's al-māl*), but that it extends to the interest arising from the delay.[60]

The totality of interests due will not be superior to the principal. But this disposition, adopted proably in line with the Qur'anic injunction prohibiting 'the eating of money times over' (*la. ta'kulū amwālakum aḍ'āfan muḍā'afa*, Qur'an: III, 130, is not taken into account for long-term productive investments.[61] If the creditor proves bad faith in claiming the debt, the judge is aloowed to reduce the legal interest and even completely dispense with it.[62]

If the borrower decides to repay the loan befor it is due, article 544 allows him to proceed without requiring the lender's agreement. Accelerated repayment cannot be precluded in the contract. But the borrower can exercise his right only six months to execute this intention. The debtor however, incurs the interest on the debt for

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[59] New Egyptian Civil Code, art. 542.

[60] New Egyptian Civil Code, art. 226 provides that "in case of delay after the payment is due, an interest of 4per cent in civil, and 5per cent in commercial, transactions will eventually be owed by the defaulting borrower."

[61] New Egyptian Civil Code, art. 232.

[62] New Egyptian Civil Code, art. 229.

2. Excessive and Minor *gharar*

Most jurists hold similar views that excessive uncertainty which termed *al-gharar al-kathīr* , concerning the object of sale renders the transaction invalid. Similarly, scholars agreed that minor *gharar* or (*al-gharar al-yasir*) is tolerable and thus permitted.

From the point of view of magnitude, *gharar* has been divided into three types, they are excessive *gharar* , which vitiates the transaction, minor *gharar* , which is tolerated, moderate *gharar* (*al-Gharar al-mutawassiṭ*), which falls between the other two categories. It is this third type which is most susceptible to being evaluated differently and wrongly placed in the category of one or the other of two extremes. Excessive gharar may originate, as Ibn Rushd had explained, in ignorance and a lack of information about the nature and attributes of an object, in a doubt about its quantity, or in a lack of exact information concerning the price or the unit of currency in which the price is paid, or the terms of its payment Ibn Rushd has further added that certain type of sale which partake in excessive *gharar* have been expressedly forbidden on the authority of *hadith*.[74]

This include the sale of the offspring of an unborn animal (*ḥabal al-ḥabala*), the sale of fruit prior to its ripening, those sale termed *mulāmasa*, *munābadha* and *al-ḥaṣṣāt*; two bargains in one (*al-bay'atayn fī bay'ah*), that is two different prices are quoted, one prompt, one deferred; sale of what is in the loins and wombs (*al-maḍāmin wa'l malāqiḥ*), and so forth.[75]

The Maliki jurist, al-Qarāfī, has drawn a certain distinction between *gharar* and that which is unknown (*al-majhūl*), and commented that the scholars have often used this concepts interchangeably, even though they are not always the same thing.

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[74] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. III, 10.

[75] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. III, 11.

ribā that are prohibited for themselves can only be executed in case of absolute necessity. But those forms of *ribā* which are prohibeted because they can constitute a first step towards the original *ribā al-nasī'ah* do not fall under the same prohibitive regime. They, unlike *ribā al-nasī'ah*, can be tolerated in case of need.

But for Sanhuri *ribā al-nasī'ah* merely means anatocism. It is the combined (*murakkab*) interest, which makes money deriving from interest as important as the original capital. This, he adds, has been forbidden by the Egyptian legislator in article 232 of the Civil Code.

However, in Sanhuri's elaborate syllogism, it is impotant to bear in mind that the original ban on riba falls in the category of sales. It is in sales that the vice *ribā* operates, as is testified in the juxtaposition of the good sale, allowed by the scripture, and the bad *ribā*, forbidden in the same verse 275 of the second sura. 'Loan' writes Sanhuri, is not in Islamic jurisprudence one of the root (*aṣl*) *ribawī* contracts. It is the contract of sale which is the root, and a loan will be measured against a sale'.[66] But the opposite is not true. The sale contract cannot be measured against the category of loans.

Following the syllogism, the root and the derivative cannot be addressed in the same manner, and the prohibition attached to a root contract is more absolute than the prohibition attached to a derivative transaction. Consequently, what is not forbidden pers se will yield, as in the example of *ribā al-fadl*, to need. Need, and not necessity, as in the root contract, will open the way to the alleviation of the prohibition. And in a capitalists society like Egypt, the need for loans is overwhelming, and common. It is of the essence of the economic system. As long as it does not become anatocism, as in

[66]Sanhūrī, *Masadir al-Haqq*, vol. III, 239.

both concluded that gharar in them is negligible and the sale in both cases is therefore valid.[77]

5. The Subject-Matter of Contract (*Maḥall al- 'aqd*)

The Existence of the Subject

Matter Imām Mālik has drawn distinction between contracts of exchange (*'uqūd al-mu'āwada*) and charitable contracs (*'uqūd al-tabarru'*), the latter being contracts which do not involve the exchange of countervalues, such as gifts or bequests. The Imām has thus maintained that the existence of the subject-matter is a requirement in the former but not in the latter.

To Ibn Taymiyya, the sale of a non-existent object is unlawful only if it involves gambling and the misappropriation of the property of others (*muqāmara wa akl al-māl bi'l bāṭil*), but it otherwise lawful.[78] As for the claim that the sale of a non-existent object is generally forbidden, Ibn Taymiyya points out that there is neither textual ruling nor general consensus to support this view. Ibn Qayyim has also elaborated that the *sharī'ah* prohibits *gharar*,[79] and also, therefore, all those types of sale that involve *gharar*, such as sale in which an inability is feared, on the part of one or both parties, to fulfill their obligations. A sale is therefore unlawful if it involves *gharar* and the possibility of a dispute arising between the parties, regardless of the existence or non-existent of its subject-matter.

With reference to the future availability or otherwise of its subject-matter, the sale of the non-existent (*bay' al-ma'dūm*) is envisaged as one of the following three types.The first model is where the subject-matter exists in essence, and then comes to completion thereafter. This category includes the sale of crops and

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[77] 'Abd al-Razzāq Aḥmad al-Sanhūrī, *Maṣādir al-Ḥaqq* vol. III (Cairo, 1954-9), 15.

[78] Ibn Taymiyyah, *Naẓariyyat al-'Aqd*, 211.

[79] Ibn Qayyim, *I'lām al-Muwaqqi'in*, vol. II, 9.

prohibition (*taḥrīm*) but even after such limitations, the need for interest does not arise except under the current capitalist order. Should the current economic order be replaced by a socialist system – which we need appear to be dopting – in which capital is owed by the state and not by private individuals, we should then re-evaluate the need (*ḥājah*) for interest, which may totally vanish under socialism and therefore allow us to restore the original prohibition of *ribā*.[68]

5. Conclusion

From the above discussion, it may be concluded that from reading Sanhuri's comparative enterprise *ribā* or usury is a concept often associated with religiously based financial/ exchange ethics. In Christian tradition usury has always evoked the notion of money demanded in excess of what is owed on a loan, disrupting a relationship of equality between people, whereas interest was seen as referring to just compensation to the lender. However, the sphere of interest in Christianity was gradually restricted, and thus allowing the charging of interest in particular circumstances. In the Islamic legal tradition on the other hand, the lack of clarity of the prohibition of property susceptible of *ribā* found in both Qur'anic provision and tradition provide a wide room to re-interpret its meaning. These reasons seem to becoming an underlying justification for Sanhuri to discuss the issue of *ribā* comparatively whithin religious tradition in addition to Islam. As such, Sanhuri is opening the new nuance of the meaning of *ribā*, prohibited within Islam, as both usury and interest and sufficiently distinguishing these concept.

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[68] *Masadir al-Haqq*, III, 271-77; 277. Cf. Amr Shalakany, "Between Identity and Redestribution," *Islamic Law and Society* 2 (January, 2001): 231.

above, clearly validated the sale of non-existent objects which do not involved *gharar*.[81]

The subject matter of the contract is, in other words, certain to become available in the future, Futures trading thus fulfils the criteria as articulated by Ibn Taymiyya, Ibn Qayyim and Sanhuri in that the parties' ability to meet their obligations in the future is not in question.

The third model. This is the third eventuality discussed by both Ibn Qayyim and Sanhuri in the context of *bay' al-ma'dūm*. Both authors have held that when the subject matter of a contract is non-existent at the time of contract and its existence in the future is also doubful, the sale involves *gharar*, excessive uncetainty and risk. Sanhuri further maintains that :

"You will observe that each of these three matters had a profound effect on detailed provisions to the extent that, in many such, the Islamic jurisprudence distanced itself from the requirements of the transaction. If it were possible to clarify our understanding of these three matters in accordance with the development of civilization, then much of the reasoning which stops the Islamic jurisprudence from going along with the requirements of such development would disappear."[82]

6. The Sale of the Unseen (*Bay' al-Ghaib*)

In traditional Islamic law a contract to be valid requires that its subject-matter must be signified specifically in terms of its essence, quantity and value, and the parties' knowledge of these at the time of contract must such that it precludes material ignorances (*al-jahāla al-fāḥisha* that could lead to a dispute.[83]

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[81] Sanhuri, *Maṣādir al-Ḥaqq*, vol. III, 44-45.
[82] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. III, 14.
[83] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. III, 16.

to something specified, it should exist. From this two things can be distinguished: 1) the two contracting parties have intended to conclude a contract on something exists at the time of the contractual session and, 2) they have agreed to conclude on something which has not existed but possible to exist in the future.[71] In the Modern legislation of the Arab countries such as that of the Iraqi Civil Code provides that the subject matter of an obligation may be non-existent at the time of contracting, provided its future existence is possible, and provided it is determined in a way which dispels want of knowledge (*jahl*) and risk (*gharar*).[72]

1. Defenition of *Gharar*

Al-Sarakhsī has stated that *gharar* in a contract or transaction exists when its consequences are hidden and unknown to the contracting parties (*al-gharar mā yakūnu mastūr al-'aqibah*).[73] For *gharar* to have legal consequences, it must fulfill four conditions. The first of these is that it must be excessive, not trivial. A slight *gharar*, such as *gharar* in the sale of similar items that are not identical at one and the same price, is held to be negligible. Second, it must occur in the context of cumulative contracts (*'uqūd al-mu'āwaḍāt al-māliyyah*), thus precluding *tabarru'āt*. Third, *gharar* must affect the subject-matter of contract directly, as opposed to what may be attached to it (i.e., in a cow, it is the animal itself that is the object, not its unborn calf). Fourth, the people concerned should not be in need of the contract in question. Should there be a public need (*ḥajat al-nās*) for it, *gharar*) even if excessive, will be ignored.

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[71] Sanhuri, *Masadir al-Haqq*, vol. III, 7.

[72] Article 129(1) of the Iraqi Civil Code.

[73] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. III, 9.

the third is an'object that is non-existent at the time of the contract but shall possibly exist in the future'.

In his argument, Sanhuri classifies the above three types of objects into five hypothetical categories; namely: (1) the object that exists at the time of the contract; (2) the object that partially exists at the time of the contract and fulfill its total existence at a later time; (3) the object that does not exist at the time of the contract but will inevitably exist in the future; (4) the object that does not exist at the time of the contract but it will possibly exist in the future; and (5) the object that does not exist of the time of the contractand is impossible to exist in the future. There is no disagreement between classical Muslim jurists and modern legal writers that the sale of the object of the first category is valid and that the sale of the object of the fifth category is invalid. The sale of the objects in categories (2), (3) and (4) has been subject to disagreement in the sense discussed throughout the exposition.[86]

In Sanhuri's view as well as most modern Middle Eastern writers, the sale of the first type of objects – that are permanently non-existent – is absolutely prohibited and renders the contract of sale invalid.

The latter two types are termed by modern scholars as selling future products and almost all modern secular scholars, including Sanhuri, validate the selling of such future products provided that their production is either inevitable or highly probable.[87]

Al-Sanhuri relies in his discussion on the intention of the parties. He says if the parties intended that the subject matter has not yet existed or existed but has been destroyed before the contract then the contract of sale is invalid. If, however, the parties intended that the subject matter will possibly exist.

[86] Sanhuri, *Maṣādir al-Ḥaqq*, vol. III, 14-53

[87] Sanhuri, *Maṣādir al-Ḥaqq*, vol. III, 14-53.

3. Sale of the Unseen (*gha'ib*) and the Non-Existent (*ma'dūm*)

With regard to the sale of the unseen, or the sale of what is not visible (*bay' al-ghā'ib*), such as sale of nuts in their shells, or that of crops not yet grown to maturity, or the sale of fish in a pond, the schools of law have held different viws on the subject, on the ground of their respective perception of *gharar*.[76] Whereas Imām Shāfi'ī considered *gharar* as to be excessive, Imām Mālik viewed it to be negligible. Abū Ḥanīfa, on the other hand, held that there is no problem regarding *gharar*, so long as the buyer is granted the option of viewing (*khiyār al-ru'ya*).

4. Contract Sale of Goods Not-Existent

Sanhuri concurs with Ibn Qayyim and elaborates that the conventional fiqh is somewhat too restrictive on this issue, and re-evaluation is therefore warranted. Sanhuri is particularly critical of the prohibition of that variety of *bay' al-ma'dum* in which the object of sale is non-existent at the time of contract, but it is certain to come into being in the future. Sanhuri thus divides bay' al-ma'dum, in teralia, into four categories as follows: firstly, when the object exists in essence but comes into completion thereafter; secondly, when the object, although non-existent at the time of contract, is certain to exist in the future; thirdly, when the object is non-existent at time of contract, or exist in essence, but whose existence in the future is uncertain; and finally, when the object is non-existent at the time of contract and cannot be expected to exist in the future. Of these four types, only the last two present situations in which gharar is deemed to be excessive and would, therefore, invalidate the contract. As for the first two Ibn Qayyim and Sanhuri have

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[76] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. III, 11.

al-ṣalāh), and has also forbidden the sale of *mu'awamah* which conveys the sale of fruits and agricultural products before their existence because such sale involves *gharar*.

Admittedly, Sanhuri's argument may be seen as a successful attempt to reduce the effect of *gharar* by pre-determining the price as well as the quantity by referring to the statement "such anamount for such a quantity". However, it must be born in mind that Sanhuri has neglected two important facts. The first is the requirement that the subject matter must be precisely determined.[92] In Sanhuri's proposal, *gharar* still be effective because the total quantum of the revenue that the land might produce is uncertain: it is uncertain whether the revenue of the land will be more or less than the required amount. If, however, Sanhuri's view is interpreted to mean that the contract of sale of agricultural products is valid if the price is specified per unit, such as 20p per 1Kg, then this proposal might be valid in principle. This is bacause the total price and the quantity sold will be easily ascertained by reference to the price per unit, provided that the total quantum of the land produce is not of material importance to the buyer. However, the second point neglected by Sanuri makes even this interpretation of his proposal invalid.[93]

The second is that the notion of *gharar* is not only concerned with the inability to define the price and quantity of the subject matter but also, and more importantly, the quality and description of the subject matter. The sale of a future agricultural product of a particular land will always depend on the future outcome of the land and such outcome is usually riddled with uncertainty as to the quality and description of the agricultural products, which has been invalidated by the majority of the scholars as discussed above.[94]

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[92] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. III, 41.
[93] Sanhūrī, *Maṣādir al-Ḥaqq*. vol. III, 41.
[94] Sanhūrī, *Maṣādir al-Ḥaqq*. vol. III, 42.

fruits prior to their ripening, or of produce which ripen in consecutive waves. Despite the element of uncertainty and *gharar* in the sale of these objects, the sale is basically valid provided that the produce in question has emerged to the extent that it has become beneficial. The jurists have, however, disagreed as to whether such sales are absolutely valid, or valid only if the crop is plucked and removed. While some have stipulated that the produce should be left *in situ* untill it ripens and that this should naturally be with the permission of the seller, others have differred.

In the second type, the subject-matter does not exist at the time of contract, but is certain to exist in the future. In this connection, Sanhuri has discussed the views of the majority on this issue, which he finds to be unnecessarily restrictive.

Having referred to several works of authority in the established legal schools of thought, Sanhuri concludes that there is a consensus among the *mazhāhib* that the sale of something which does not exist at the time of contract is null and void, even if it is certain to exist in the future. Sanhuri continues: "We find the *fiqh* which was developed during the era of imitation (*taqlīd*) to be restrictive, for there is in it a departure from the basic norms. sale of the non-existent object was forbidden because of *gharar*, not because of it being non-existent. Yet the jurists began to adopt non-existence of the subject matter as the cause of prohibition in its own right. This is so even if the object is certain to exist in the future.[80]

Sanhuri is critical of the majority position because it has 'moved the *fiqh* of Islam away from the realities of transaction and commerce', and he states that public welfare requires a move a way from this rigidity. To support his view, he then refers to the views of Ibn Taymiyyah and Ibn Qayyim who have, as discussed

[80] Sanhuri, *Maṣādir al-Ḥaqq*, vol. III, 33.

1. The Concepts of Changing Circumstance in Western Law

As a basis for making comparison of the changing circumstances in Western and Islamic law, it is necessary at the outset to analyze its various concepts in respective legal systems. *Frustration* in the law of contracts in Common law designates as "the destruction of the value of the performance that has been bargained for by the promisor as a result of a supervening event." It is worthy of note that there are some points to be considered in frustrated obligations. First, a contract isn't frustrated just because it becomes difficult or expensive to perform. That is a risk that you take when you enter into a contract and what is looked for is some sort of physical impossibility. Second, the supervening event must be beyond the control of both parties. Third, the event must be unforeseeable by both parties. The legal effects of frustration is that the contract is automatically brought to an end at the time of the frustrated event, which is based on the principles of the common law that when frustration occurs in general it discharges the parties from performing their contractual duties *in futuro*.[98]

Another concept worth considering is *Imprévision*[99] which in the German concept is known as *Unmoeglichkeit*. This concept is much more than *frustration* in the common law sense, because in

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[98]See Jeffrey Lehman and Shirelle Phelps (eds.) *West's Encyclopedia of American Law*(2nd ed.) vol. 5, 12; Cf. Puelinckx, "Frustration, Hardship, Force Majeure, Imprévision, WegfallderGeschaftsgrundlage, Unmoglichkeit, Changed Circumstances," *Journal of International* 3 (1987): 47.

[99]In France it was again the administrative judiciary, *Conseil d'Etat*, which intervened, and applied this doctrine to French administrative law. This legal precedent was known as the *Gas Company of Bordeaux* case and its influence on French law in general was remarkable, although the *Code Civil* itself was not altered. The old Egyptian *Ahli* and Mixed courts had rejected this doctrine as well, prior to the promulgation of the New Code.

There is divergence views among the Muslim jurists as to the validity of a sale in which the subject-matter is absent and cannot be seen at the time of contract. There seems to be general agreement that a sale by description alone involves a certain measures of uncertainty and *gharar*. However, the jurists have differed as to whether the *gharar* in question is trivial (*gharar al-yasīr*) or exorbitant (*gharar al-kathīr*). The Hanafi school has thus validated *bay' al-ghā'ib* generally, that is, even without the description of the object of sale, because in a sale of this kind, the buyer automatically reserves the right to view the object. The sale is finalized when it is confirmed, but otherwise collepses, and the buyer is not bound by it until he views the object, notably the requirement that the subject matter of a contract must be in existence and its specification. The main understanding of non-existent subject matter which was traditionally understood in its letter was reduced to be that of impossibility of carrying out the agreement of a contract or if it is possible, such subject matter must be tainted by grave obscurity as regards to its existence and specification.

Sanhuri has taken the challenge by grasping Ibn Taymiyya's and Ibn Qayyim's proposition and trying to break the deadlock that the classical scholars had produced. In fact, Sanhuri deplores the fact that classical Muslim scholars have given inadequate awareness to the possible existence of a future object before they issued their prohibition. Sanhuri, therefore, differentiates between three types of objects: the first is an 'object that is permanently non-existent',[84] the second is an 'object that is non-existent at the time of the contract but shall necessarily occur in the future,'[85] and

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[84] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. III, 14. For instance selling a house that has already been destroyed by a flood or fire, or selling a car that was completely destroyed by fire.

[85] Such as selling a car that will be produced at a later date or selling a house that will be built later.

In analyzing the historical development of intervening circumstances, Sanhuri traces it in the confine of the principles of *force majeure* or *cas fortuit* within the shari'a meaning. Although these two principles would affect the performance of the contracts in varying degree, the Shari'a does not distinguish circumstances to be categorized as *force majeure* and *cas fortuits*. Despite the fact that the theory of necessity, on the main, applies in the area of ritual religious obligations, some modern jurists use the generic meaning of *'udhr* or excuse and *al-jawāiḥ* or under the theory of necessity (*ḍarūra*).

However, due to the different connotation of the term in each legal system, care should be taken not to make generalization and rather discusses particular cases with each characteristic.

It is noteworthy that although there is a general tendency to speak of the chenge in circumstances as a principle of law, it would be more accurate to treat such changed circumstances as a cause giving rise to an effect and not as a legal principle in the strict sense.

One of the difficulty in discussing the change of circumstances (*naẓariyya al-ḥawādith al-ṭāri'a*) in Islamic legal system is that it does not have a coherent theory similar to that developed in the contemporary western law. The underlying reason for this may be explained in at least in two arguments as follow:[101]

First, while an absence of a general theory of change of circumstances would be expected in view of the fact that Islamic law has no general theory of contract. As has been previously mentioned the lack of a general theory of contract and the separate and individual treatment of each contract by the jurists may lead

[101] Abd al-Razzāq Aḥmad al-Sanhūrī, *Maṣādir al-Ḥaqq fī al-Fiqh al-Islāmī, Dirāsah Muqāranah bi al-Fiqh al-Gharbī*, vol. VI, 95-6.

Although he advocates a distinction between the case where the non-existent object will certainly come into existence, thus excluding the danger of *gharar*, on the one hand, and the case where the future existence of the object is a mere possibility, thus involving the notion of gharar, on the other hand, Sanhuri validates both types.[88]

The validity of the second type in Sanhuri's view is similar to the validity of a contract of sale which is temporarily suspended by the condition that the object will exist in the future provided that gharar is eliminated by providing sufficient description of the quality and quantity of the object.[89]

Al-Sanhuri's views stated above have been echoed by almost all modern secular Middle Eastern lawyers,[90] and also were reflected in the majority of modern civil laws of the Arabian states.

7. The Sale of Future Fruits and Agricultural Products

Al-Sanhuri in his *Maṣādir al-Ḥaqq* addresses the hypothesis that if the seller sells whatever agricultural revenue that his land might produce in return for a predetermined price, such as a particular amount for a particular quantity, this kind of sale should be valid on the ground that the fact of uncertainty here is of an immaterial nature.[91] It seems that al-Sanhuri has not been aware of the fact that the Prophet (pbuh), has explicitly forbidden the sale of fruits and agricultural products before they show a sign of readiness (*badu*

[88] Sanhuri, *Masādir al-Ḥaqq*, vol. III, 7-8, 14-15.

[89] Sanhuri, *Maṣādir al-Ḥaqq*, vol. III, 75.

[90] Sanhuri, *Maṣādir al-Ḥaqq*, vol. III, 14-53, 7-8, 14-15; Among the modern works on the subject perhaps the most important are Jamil Syarqawi, *Naẓariyyat al-'Āmmah lil-Iltizām*, Book 1, (Cairo: Dār al-Nahḍah al-'Arabiyyah, 1992), 199-228; M. Sayyid Khalifa, *Naẓariyyat al-Ḥaqq* (Asyout, Egypt: Asyouth University, 1994), 249; 'Abd al-Wadūd Yaḥya, *Al-Mujaz fī al-Naẓariyyah al-'Ammah li al- Iltizamāt, al-Maṣādir, al-Aḥkām, al-Ithbāt* (Cairo: Dār al-Nahḍa al-'Arabiyya, 1995), 115-118.

[91] Sanhuri, *Maṣādir al-Ḥaqq*, vol. III, 41.

2. Views of Schools on Rescission of Lease for Excuses (*a'dhār*)

The four main schools of Islamic law have a divergent point of view of rescinsion (*faskh*) of a contract of lease due to excuses (*a'dhar*). Generally speaking, the Hanafi's take a wide view, whereas the other three schools, Maliki's, Shāfi'i's and Ḥanbali's incline to a somewhat narrower view of change of circumstances.

Hanafi's view

The Ḥanafi school was the only school that principally recognized the notion of *a'dhār* in classical Islamic law and applied it to leases and contracts services in particular. Sanhuri maintains that according to this school a contract of hire may be terminated as a result of excuse which may fall into one of the three categories recognized in this school namely, first excuse that arises on the part of the lessee (*musta'jir*), for example his bankcruptcy or change of profession; the second is that which might affect the lessor (*mu'ajjir*) i.e. incurring debts facing him to sell the leased property to free himself; the third, is that which might affect the leased object.[104]

To clarify the case in point it is necessary to analyze the provisions of the Ḥanafi-inspired *Majallat al-Aḥkām* regarding the concept of *a'dhār*.[105] According to this codification, in a situation whereby the performance of a given contract becomes impossible due to circumstances or events which give reasonable ground to the extend that such contract cannot be concluded, and thus legally

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[104] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. VI, 97-8.

[105] *Majallat al-Aḥkām*, art. 443 provides that:"If any event happens whereby the reason for the conclusion of the contract disappears, so that the contract cannot be performed, such a contract is terminated."

The prohibition on selling something not in existence stems from the the principle of *gharar* (uncertainty, risk, which is to be avoided at all costs) not from the non-existence of the thing itself. It is the degree of *gharar* which is important.[95]

F. The Change of Circumstances/ Frustrated Performance of Contracts

In every legal system, and the Middle Eastern countries are not excluded- the performance of the obligations to a valid contract can be frustrated by events beyond their control. These events are juridical facts, which may have, under certain conditions, considerable impact on various designated legal principles and rules. Each legal system normally treats the change of circumstances in wider scope of legal doctrines with different cocepts. Roman lawyers had a concept of *casus* or supervening impossibility of performance which excuses performance and a concept of *vis maior* or supervening overpowering cause. The common and the French law developed the concept of *Frustration* and *theorie de l'Imprévision* respectively. In addition, the pre-eminent civil law, the German law has developed concepts of *Unmoeglichkeit* which literally means impossibility, and *Wegfall der Geschaeftsgrundlage* or disappearance of the contracts' foundation.[96] In Islamic law the concept of changes of circumstances, as found in the exposition of *Maṣādir al-Ḥaqq*, is treated in *naẓariyya al-ḥawādith al-ṭāri'a*.[97]

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[95] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. III, 14 et seq.

[96] For details on *force majaure*, see Jeffrey Lehman and Shirelle Phelps (eds.) *West's Encyclopedia of American Law* (2nd ed.) vol 4 (USA: Thomson Gale, 2005): 454; and on *frustration* is also to be found in the same Encyclopedia, vol. 5, 12; alternatively see also, Puelinckx, "Frustration, Hardship, Force Majeure, Imprévision, WegfallderGeschaftsgrundlage, Unmoglichkeit, Canged Circumstances," *Journal of International* 3, (1987): 47.

[97] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, 95-118.

disastrous events found in Western law.[109] In addition, the adoption of the doctrine by the civil codes is deeply rooted in sound philosophical argument to avoid overstatement and stringency in the interpretation of contracts, *ḥusn al-niyyah*/ good faith, and equality the final objective of which is to enhance the binding and legal effect of a given contract and make it more fair.[110]

More over, the Syrian Court of Cassation ruled that the sanctity of a contract should be subject to consideration of justice, particularly when certain exceptional and unforseen events materialize. See reproduced version of the case in Tu'mah, *Al-Taqnīn al-Madānī al-Surif* (1992), vol. 1, 643.

In addition, the Iraqi Court of Cassation expalined that, "the main purpose of the theory of intervening contingencies is to help the aggrieved contracting party to continue performing his contractual obligation; also to minimize the hardship inflicted upun him by the supervening event. It is important however, the aggreved party should have been and still is , performing his obligations according to terms of the contract and his good faith.[111]

In sum, based on close reading to various legislation of the Modern Arab states it becomes apparent that the rationale underlying the intervening contingencies adopted in the codes spins around

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[109] See *The Egyptian Explanatory Memorandum of the Civil Code*, commenting on a similar provision of the Egyptian Civil Code (Art. 608), asserts that this rule has been derived from Islamic law and that it is an application of the doctrine of intervening contingencies, Vol. IV, 598.

[110] The *Egyptian Explanatory Memorandum of the Civil Code* explicitly states that "the reason behind the adoption of this doctrine is to avoid exaggeration and rigidity in the interpretation of contracts; good faith, equitable considerations and the customary requirement of honesty in business transactions are factors that modify the binding effect of a contract and make it more just." Vol. II, 370.

[111] For details see The Explanation of the Iraqi Court of Cassassion in *Majallat al-Qaḍā al-Muqārin* 2 (1968): 218, 222.

contrast to the common law doctrine of *frustration*, it covers all cases of impossibility of performance of a party's contractual obligations, even if the performance is impossible because of negligence, fault or negligence of employees. *Frustration* is thus just one part of the German doctrine of *Unmoeglichkeit*. The consequencies of excused performance by *Unmoeglichkeit* and *Frustration* are the same: the parties are in general discharged from performing their contractual duties.

The other concept is *Wegfall der Geschaeftsgrundlage*. This notion is essentially one of charged circumstances, and is a good example of the use of equitable principles in the German Law. The approach of the German Courts this doctrine is certainly more flexible than the approach of the Common Law courts under *frustration* and *force Majeure*. The court firstly readapts the contract to the changed circumstances. The judge is allowed to complete the contract and he can also change the terms or terminate it. The system is thus flexible and the consequencies are quite different from those at the Common Law.

In the context of the discussion is concerned, Sanhuri treats the issue under two main headings of rescinsion of contract first because of excuse and second rescinsion of contract due to change of circumstances.

In Islamic law *naẓariyya al-ḥawādith al-ṭāri'a* is defined as circumstances which radically disturb the equilibrium of a contractual obligation, making the performance excessively onerous for one of the contracting parties. This definition is very similar to that of the French administrative law concept of *imprévision*.[100]

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[100] For detail on the issue in comparative perspective see *inter alia* Smit, "Frustration of Contract: A Comparative Attempt at Consolidation," *Columbia Law Review* 58 (1958): 286-315; Dawson, "Judicial Revisions of Frustrated Contracts: Germany," *Boston University Law Review* 63 (1983): 1039-1098.

With this wide meaning of *a' dhār* in the realm of contract lease that this contract is concluded based on benefit gradually. For any single benefit is to be found new contract, and the benefits in lease contract are not acquired at one time but rather step by step, and thus the objection due to excuse therein by the degree of fault of defact happens prior to delivery. More over, occuring defect perior to delivery in chapters of sale logically give right for rescission for a party to the contract.[113]

5. Disastrous Events (*al-jawā'iḥ*)

Another related concept pertaining to intervening exigencies in Islamic law is that of *al-jawā'ḥ*. In his discussion on this respect, Sanhuri groups together the Sunni school of thoughts into two main categories, namely those who recognize the doctrine and those who marginalize it. The former group represents the Mālikī and Ḥanbali who recognize the relevance of natural disaster or *al-jawā'iḥ* to contracts for the sale of crops and fruits on trees, whereas the latter group represent the Ḥanafī ans Shāfi'ī who do not subscribe to such a theory which basically arise from the fact that they do not validate those type of contract sale.

Sanhuri defines *al-jāiḥah* (pl. *al-jawā'ih*) as a situation in which fruit suffers from misfortune from heaven such as cold, or from plant disease like rotten and drought are considered irresistable events without controversy of views among the jurists (*mā yuṣibu al-thamaru min al-samāi ka l'barad aw min āfāh ka l''afn wa l''aṭsh yu'tabaru jāiḥah bilā khilāf*)[114]

A great majority of Mālikī jurists maintain that *al-jawā'iḥ* is circumstance that is beyond human control. According to this

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[113] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. VI, 101-102.

[114] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. VI, 110.

one to the conclusion that Islamic law, like Roman law and others, is one of contracts rater than contract. This is in the sense that in order to qualify as a contract, a transaction must fit in one of the recognized contracts.

Second, that Western law necessitate to lay down a general theory of intervening contingencies (*al-ḥawādith al-ṭāri'a*) since the force of the binding contract has mounted to the extent that it appeal for the expedient of reduction/ reductionist therein in accordance with the exigency of justice which arise from both the influence of school of individualism, and the reductionist which is affected by the shool of social security.[102]

In Islamic law however, since the requirement of justice is permanently predominant when it contradicts with the binding force of the contract, and thus, in the light of this requirement it makes it possible to open different breaches for the binding force of the contract instead of the Islamic jurists calling for laying down a theory that can be referred to in justifying such requirement. This is in view that as long as the exigency which interpolate to which custom in this justification.

Although Islamic legal system does not develop a general theory for change of circumstances for the two reasons mentioned above, this does not preclude the fact that it recognizes a variety of practical examples for this theory in many of different cases. In his effort to analyze the historical development of the doctrin of change in circumstances, Sanhuri delves into the Islamic law theory of *al-ḍarūra al-shar'iyya* (legal necessity) and treat exclusively two instances which falls under the headings of excuse (*'uzhr*) in the contract of leases and contracts of services, natural disaster (*al-jawā'iḥ*) in contracts for the sale of crops and fruit on trees.[103]

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[102] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. VI, 96.

[103] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. VI, 96.

or there is some impediment in the area to access to the land leased for agriculture, etc.; this gives the lessee the right to avoid (the contract), because it is a preponderating matter which precludes the lessee from benefitting from the use of the thing; this option is treated as deprivation of the thing. As if he hired a beast to be ridden , or to carry a load to an appointed place, and the road is cut by fear of some event, or he intends to go to Mecca and the people did not go on the pilgrimage that year by that road – in each of these cases the hiring is avoided.[117]

If (the hirer) likes to leave the matter until the use of the thing can be enjoyed, he may do so, because the right belongs to both (i.e. hiror and hirer), is not against them; so that if the fear is peculiar to the hirer, as, for example, that he alone fears the nearness of his enemies to the place leased, or their presence on the road, then he has no right to avoid (the contract) because this is an excuse peculiar to him, which does not prevent enjoyment of the use totally or in very general sense of the word.

An example is his illness: if he is confined or ill or loses his money or his goods are damaged, this does not give the right to avoid the hiring, because he has abandoned the enjoyment of the use of the thing for a reason peculiar to him, which does not absolve him from the necessity of paying the hire, just as if he had abandoned the same voluntarily.[118]

If the agricultural holding is flooded or perishes by fire or locusts or frost or other cause, then the hiror is not liable in damages nor is there any option in the hirer – this was provided by Aḥmad Ibn Ḥanbal and we know of no dispute there in, it is also according to the school of Shāfi'ī. Because the damage is outside the contract,

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[117] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. VI, 115.

[118] Ibn Qudāmah, *Al-Mughnī*, vol. 5, 418, quoted by Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, 109.

its termination is preferred.[106] However, it appears that this is very much akin to the English law concept of 'frustration,'[107] rather than to the Modern Arab contract law doctrine of intervening contingencies. And it is into the notion of this intervening events that the discussion will briefly procede.

3. Modern Arab Contract Law

It is interesting to note that a number of the civil codes of the Arab countries give rooms for the application of the concept of *'udhr* to lease contracts. The most notable of this is as regulated in the Jordanian Civil Code. According to this code, each party to the contract is given option to request for abrogating the contract should there arises excuses (*a'dhār*) that may prevent the contract either from being performed or its performance from being completed.[108] With regard to the derivation of the doctrine of the rule, by analyzing the *The Egyptian Explanatory Memorandum of the Civil Code* it may be argued that it is based on the tenets of Islamic law principles as an application of the concept of intervening contingencies or

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[106] *Majallat al-Aḥkām* provides the following example: first, a cook is hired for a wedding party, but one of the spouses dies, and so the contract of hire is terminated; second, a person suffering from toothache makes a contract with a dentist to remove his tooth for a certain fee. The contract of hire is terminated in view that it cannot be categorized as a contract of hire *per se*.

[107] For discussion on the concept of 'frustration' in English law, see Noel J. Coulson, *Commercial Law in the Gulf States*(London: Graham & Trotman, 1984), 82. Coulson defines 'Frustration' as "a situation in which a contracting party, through the arising novel and unanticipated circumstances outside his control, finds the performance of his contractual obligations either to be impossible or to entail an unforeseen burden in the way of extra work or expenditure."

[108] Article 801 of the Jordanian Civil Code reads: "If any excuse (*'udhr*) arises preventing the performance of the contract or the completion of the the performance thereof, either of the contracting parties may request that the contract be abrogated as the case may be."

at Hambali law if the fruits perish completely then the price may be demanded back from the seller and so on pro rata to the loss.

Based on the foregoing discussion one might come to the conclusion that despite the fact that the traditional Islamic legal system has its own mechanism to deal with events or circumstances unforseen at the time of contract, it would be logically interesting to determine the extent to which the concept of intervening contingencies (*naẓariyyat al-jawā'iḥ*) influence its contemporary form. Although it is true that there is no such general principle of classical Islamic law, it would be interesting to assert that what Sanhuri's effort in synthesizing both the Islamic and Western law in the *Maṣadir al-Ḥaqq* is of utmost important. What's more, it is conciveable that in response to the exigencies of the ever-increasing problems of modern life which brings with it alien concept, does not contradict with the provisions of the Shari'ah since the views of any of the schools of Islamic legal thought can justifiably be referred to.[121]

The doctrine of unforseen circumstances in contemporary legislation of Arab countries, on the main, is expressed in the same term which understandably as result of the origin derivation of the French law le theorie de l'imprévision. Article 146 (2) of the Iraqi Civil Code says that " Where there arise unforseen circumstances which are due to 'exceptional events which have a widespread and general effect' and which result inability to perform a contractual obligation as originally envisaged 'even though performance is not intrinsically impossible,' and the contracting party shows that

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[121] The method of reform undertaken by contemporary jurists in the realm of Islamic law varies, one of which is *talfiq* or patching various views together. This concept is also known as eclecticism. This means of reform has been frequently used in the span of Islamic history, the most notable of which is in codifying the Ḥanafi inspired *Majallat al-Aḥkām al-'Adliyyah* during the Ottoman era.

preserving justice and good faith. *'Uzhr* than may be invoked in case of contingency which renders continuing performance of a contract harmful for one of the contracting parties.

4. The Principles that constitute Rescission of Lease Contract for Excuse

From the previous discussion, it is evident that excuse or *a'dhār* is circumstances which have not happened at the time of the contract of lease concluded. This case resembles that to the doctrine of intervening contingencies found in Western law. However, in contrast to the intevening contingencies, something that are possible to control, so a mere excuse may be benefit for ether one of the contarcting parties, in cases such as that it is clear that a party's travel for fulfillment of right for booty is sufficient to rescind the lease which arise from excuse. Whereas in Islamic law, *a'dhār* or excuse, like in Wester law, does not make the performace impossible, but rather overburden it. The legal consequencies of excuse that it can either rescinds the contract lease or revokes it automatically. The intevening contingencies in Western law, however, derives the overburdened obligation to reasonable limits.[112]

The notion that constitutes excuse in Ḥanafī law does not necessarily mean intervening occurance per se, and the impossibility to resist it, but rather excuse that would be inflicted on one of its parties, and which was not envisaged in the lease contract. Thus, in case where a party to a contract fails to perform his obligation due to harm which is beyond his calculation at the time of lease was concluded, this party is not forced to enter into the contract and he is entittled to right of rescission.

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[112] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. VI, 101-102.

CHAPTER SIX
THE LEGACY OF 'ABD AL-RAZZĀQ AL-SANHŪRĪ'S THOUGHT IN THE DEVELOPMENT OF MODERN LEGISLATION IN THE MUSLIM COUNTRIES

This chapter seeks to show the impact of Sanhuri's reform of the synthesis of Islamic law provisions *vis-a-vis* Western law on the development of legal system in the Middle Eastern countries. It has generally been accepted that his involvement in drafting the Civil Codes of most countries in the region is seminal although with varying degrees from country to country. This chapter then will attempt to analyze the extent to which the role played by Sanhuri in drafting Egyptian Civil Code. The reason for choosing the case of Egypt is because it eventually became model code for respective countries of the Middle East in drafting their codes. In addition, this chapter also will elucidate the legacy of his legal thoughts in other countries, namely Iraq, Syria, Libya and Kuwait respectively. In so doing, the widespread of Sanhuri's thought in the Middle East will be better understood.

school, it is an irresistible character of the events such as cold, drought, plant disease and locust, each of which may devastate either the market value of the sold crops or fruit prior to its harvest.[115] However, they have divergent opinion pertaining to whether human action such as an army at war might qualify as disastrous event to which they hold to the positive, that is that they could.

In addition, similar to the Mālikī, in the Ḥanbalī school the underlying criterion of *al-jawāiḥ* is the irresistable character which also designated as an epidemic like high winds, drought and other acts of God. This, in turn, eliminates the case of theft, in view that it can be avoided by displaying a certain degree of caution.

Accordingly, The views within the two schools also varies as to the application of this theory considering first, the nature of the damaged objects either in crops, fruits or others, and second the time the disaster occurred. The Maliki holds that the doctrine of *al-jā'iḥah* is to be applied only when at least one third of the fruits or crops was damaged, the case of which would validate the buyer's right to claim for a proportionate reduction in price. In somewhat different to this view, the majority of Ḥanbali jurists maintains that any amount of effect of *al-jā'iḥah* would entail the buyer right to claim for a reduction of the value of the objects (crops and fruits) damaged by occurance beyond the contemplation of the parties at the time the agreement was made. Likewise, in case in which the crops were entirely destroyed, both schools holds the opinion to terminate such contract sale.[116]

In the case where there occurs a general apprehension which prevents the dwellers of that place wherein the thing hired is situated,

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[115] Sanhūrī, *Maṣādir al-Ḥaqq*, vol. VI, 111.

[116] Muwaffaq al-Dīn Abī Muḥammad bin 'Abdillah bin Muḥammad Ibn Qudāmah, *Al-Mughnī*, (1972 ed.), vol. IV, 216 as quoted in Sanhūrī, *Maṣādir al-Ḥaqq*,vol. 6, 115-116. Herein after Ibn Qudāmah, *Al-Mughnī*.

Islamic law but presented in a modern form. This code, containing systematized sections and articles, improved upon the disorderly state of the rules of law in the writings of early Muslim jurists which, up to that time, were the only available source of those rules. This code, promulgated in 1870 and known as *Majallat al-Aḥkām al-'Adliyyah*, was in application in all parts of the Otooman Empire at the time of its dowfall following World War I.

In sum, an overall picture of the existing legal systems of the Arab countries towards the end of the First World War may be divided into two broad categories, namely: first, countries which applied the *Majallah* in its entirety which include Syria, Iraq, Palestine and Jordan; and second, countries that had adopted a Western French code, such as Egypt, Tunisia, Algeria and Morocco.

The emergence of the Egyptian Civil Code of 1948 does not grow in a vacum but rather it had been attested through a span of a decade in such political and cultural climate of the nineteen century Egypt. In 1936, Sanhuri, together with the French jurist Eduard Lambert, was entrusted to head the Commission for drafting a Civil Code.[3] It was approximately four years later that the committee completed its task as Sanhuri made it public in a lecture given under the auspices of the Royal Geographic Society reviewing the work on the code and emphasizing that it was openend for discussion. The outcome of the project resulted in six volume *al-Qānūn al-Madānī: Majmū'āt al-'amal al-taḥḍiriyyah* published by the Ministery of Justice.

Once again, in 1945, headed by Sanhuri a committee was formed to study the comments and proposals, make necessary

[3] Sanhuri led committee was the third one to revise the Egyptian Civil Code. The first was formed in March 1936 and the second in November 1936 but they were dissolved for an unobvious reason three months later and in May 1939 respectively. For a more detail discussion see Ziadeh, 1968, 137, 141; Enid Hill, "Al-Sanhuri and Islamic Law," *Arab Law Quarterly* III(1) (1988): 182.

performance will involve 'enormous loss,' then the court may 'after weighing in the balance the interests of both parties, adjust the obligation to reasonable limits if justice so requires.

local tradition in which the Shari'a was significant. To this end, the Islamicity of the code had been of a heated debate both among the Egyptian circle as well as Islamic legal scholars. Anderson, for insatance, has sufficiently considered the debt owed by the civil code to the Shari'a.[7] To the other side of the coin, some also question whether the code is Islamic or not, or rather to what extent the code is in accordance with the principles of Islamic law.[8]

Methodologically, the Egyptian Civil Code was an equally well-informed comparative work. This is evident from Sanhuri's claim as the drafter of the code that its chief provisions are an outcome of the prevailing Egyptian law or material from the old codes, elements drawn from contemporary legal codes, and the principles of Shari'ah. He also explains that the principles of the shari'ah were designated as a general source of law in cases in which no specific provision of the Code or usage was applicable.[9]

It drew on several legislations and constituted a focus of the most advanced Civil law tradition of the time. This approach is a golden thread of Sanhuri's *weltanschaung* in reforming the law and legal system of the Middle Eastern countries. Such ideas have been advocated by him from the outset in his *Le Califat* and in fact elaborated it in his *Maṣādir al-Ḥaqq* and most importantly applied them in drafting the above civil code.[10]

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[7] For further discussion on the issue see *inter alia* J.N.D. Anderson, "The Shari'a and Civil Law, *Islamic Quarterly* (1954): 29-46; Ṣubḥi Maḥmaṣṣānī, *al-Mujtahidūn fi al-Ḥaqq* (Beirut: Dār al-'Ilm li al-Malāyīn, First ed. 1979). See also Enid Hill, "Islamic Law as a Source for Development of a Comparative Jurisprudence, the Modern Science of Codification", in Aziz al-Azmeh (ed.) *Islamic Law: Social and Historical Contexts* (London and new York, 1988), especially pages 171- 177, in which Anderson's ideas is analyzed.

[8] See J.N.D. Anderson, "The Shari'a and Civil Law," 31-45; Cf. Enid Hill, "Islamic Law," 173-174 in which she relies on Anderson's line of argument in her analysis on the issue.

[9] For details on this issue, see Herbert J. Liebesny, *The Law of the Near and Middle East* (Albany: SUNY, 1975), 98-99.

[10] For details, see Sanhuri's *Le Califat*, 4 *et seq.*

and the property of the hirer is damaged thereby, it is as if one hires a shop and his goods catch fire therein. However, if one is precluded from cultivating the land or the water is cut of therefrom, then the hirer has the option because this is of the thing (hired) itself and if the water is so deficient as not to suffice for the cultivation, then he has the right to avoid, because this is a defect.[119]

The foregoing short extracts illustrate that the principles of the Ḥanbalī school approximate more to those of imprévision in Western civil and administrative law. In order to analyse the issue at hand further, it is worthy of pursuing the instances of the sale of fruits on the tree. A variety of literature in Islamic law are availbale pertaining to the occurance of *al-jawā'iḥ* in which damage occurring to the fruits by such as rot, storm, etc. prior to harvest time.

Both the Mālikī's and the Ḥanbalī's take wide view of *al-jawā'iḥ*, the other two schools have not established the theory as such. According to them if the fruit has been sold or on the tree and thereafter perishes , the risk is on the buyer. The Ḥambali's and Maliki's take the contrary view – the risk of *al-jawā'iḥ* remains with the seller; however, where appropriate there is a reduction in the price and here again we find the emphasis upon the buyer. Thus, it can be argued that mere permission to handle does not confer liability of receipt (of the goods), as the benefits (*manāfi'*) of hire, where dealing in the thing hired is granted to the hirer and if it is damaged that is then the risk of the hirer.[120]

Where the damage is due to the acts of third parties then according to the Hanbali school the buyer has the option to rescind the contract and ask the seller to return the price; or stay with the contract and demand the value from the faulty party. In *al-jawā'iḥ*

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[119] For further discussion on this issue, see Sanhūrī, *Maṣādir al-Ḥaqq*, vol. VI, 110.
[120] See Ibn Qudāmah, *al-Mughnī*, vol. IV, 216.

In short, the contribution of the chief drafters, Sanhuri and Lambert, in the revision of the New Civil Code may be observed in at least three main aspects. First, in lying down the philosophical foundation of the code. The expertise of both authors in Western and Islamic jurisprudence enables them to produce a synthesis of law which is derived from the heritage of Egyptian jurisprudence while keeping in pace with the modern life. Second, in formulating the expressed wording of the provisions of the code. By close reading to the code, it is evident that there is a consanguity of the choice of expression found in the New Code and the original *Code Civil.* Similarities of conception and wording can also be found with *Majallat al-Ahkam al-'Adliyyah* and *Murshid al-Ḥayrān.*[12]

It appears then, the author tried to take the best aspects that can fit the contemporary requirement of Egyptian society. Third, in systematizing of the subject matter. Although it is true that there had been some codifed provisions of Islamic law available thus far in the current era, the most important of which as the two mentioned above, however, these cannot be perceived as legislation understood in its modern sense. Thus, the drafters had attempted to vest all due effort to make the revised code more systematic.

Accordingly, the Egyptian Civil Code of 1948 was the first and a successful product of the reconciliation process. The author succeeded in bringing together in harmony the principles of the Shari'a and the provisions of the European Civil Codes. It proved

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be evident in the long run. See Chafik Chehata, "Les Survivances Musulmanes dans la Codification du Droit Civil Egyptian," in H.J. Liebesny (ed.), *The Law of the Near and Middle East*, 98-9.

[12] Although *Majallat al-Ahkām al-'Adliyyah* and *Murshid al-Ḥayrān* cannot be regarded as a code in the modern sense of the words, they had become important reference for the judges legislature at the beginning of the turn of the 20th centuri Islamic world. And it is very suggestive that these two codification had been frequently referred to in Sanhuri's enterprise of legal synthesis.

revisions and more importantly prepare a draft for submission to the legislature.[4] It took more than a decade to achieve, and after several revisions, the draft Code was enacted in 1948 and coming into force in 1949. They integrated much of the material from the old codes with the jurisprudence of the Egyptian courts, with many rules taken from the Shari'ah, and with articles derived from a variety of modern code.

It is worthy of note that Sanhuri and his fellow drafters were attentive in the process of drafting to what they term as the Egyptian cultural heritage, that is Islamic law to which he later emphasized of including any significant injunction of the tenets of Shari'ah into the legislation, by considering their rationale in the contemporary statutes and jurisprudence.[5] On the other hand, Sanhuri aknowledged too that the provisions of such proposed Law is based on the decisions of the Egyptian courts and on the existing legislation, the extent of which mounts to approximately more than 75 per cent.[6]

Although in the first assertion Shari'ah is taken into account in the draft Law, whereas in the second the rulings of the Egyptian courts and the existing legislation are the basis of Law, however, these two statements are not necessarily contradictory. This is because the decision of the Egyptian courts were also inspired by a

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[4] Ziadeh, 143; cf Hill, "Al-Sanhuri and Islamic Law," 182.

[5] In his words, Sanhuri stresses: "I assure you that we did not leave a single sound provision of the syari'a which we could have included in this legislation without so doing .... We adopted from the Shari'a all that we could adopt, having regard to sound principles of modern legislation; and we did fall short in this respect." See *al-Qānūn al-Madanī: Majmū'at al-A'māl al-Taḥḍiriyyah*, vol. I, (Cairo, 1949), 85, as quoted in J.N.D. Anderson, "The Shari'a and Civil Law (The Debt Owed by the New Civil Codes of Egypt and Syria to the Shari'a), *Islamic Law Quarterly* (1954): 30.

[6] Sanhuri asserts that "I put it on record now that three-quarters or five-sixths of the provisions of this Law are based on the decisions of Egyptian courts and on the existing legislation." See Anderson, "The Shari'a and Civil Law," 70.

and Turkish cultures, the country has been home to both Shiite and Sunni centers of religious study.

Perhaps the most important phase of development in Iraqi legal history occurred when the need of reform was immediately felt after gaining independence from Britain in 1930. The Egyptian jurist 'Abd al-Razzāq al-Sanhuri was entrusted the task of drafting a project for the revision of the Iraqi Civil Code by the Ministry of Justice, and started to work on the project in Bagdad in 1936. It was at the suggestion of Sanhuri that a committee was formed to draft a civil code for Iraq based on Islamic and European, primarily French, legal principles. By the time the committe neared the end of its work in the mid 1940s, it had access to an additional source of law, namely Sanhuri's draft of the new Egyptian Civil Code.[15] However, the project, for unclear reasons, was interrupted, until Sanhuri finally returned to Baghdad in 1943 to complete the proposed draft, which was then promulgated in 1951 and became effective in 1953.[16]

Once again Iraq which already have had some jurisprudential experience, like most Arab countries, adopted Civil Law and Criminal Law Codes, which were adapted from the French and Germanic legal systems. One of the most notable features of the code is that it balanced and merged elements of Islamic and French law in one of the most successful attempts to preserve the best of both legal systems. In addition, the emergence of the code also reflects the country's determination to made an ambitious effort to adopt a system of law that was efficient, modern, and at the same time, Islamically legitimate. To put it differently, the Iraqi Civil

[15] See gerally Zuhair E. Jwaideh, "The New Civil Code of Iraq," *George Washington Law Review* 22 (1953-1954): 176, 179-80.

[16] Subḥī Maḥmaṣānī, *Falsafat al-Tashri' fi al-Islam*, 5th edn. (Beirūt: Dār al-'Ilm li al-Malāyīn, 1980), 123, 134-5.

A. His Role in Drafting the 1949 New Civil Code of Egypt

It cannot be overstated that Sanhuri played a major role in drafting the Egyptian Civil Codes.[1] A few words about the historical background of reform in the Middle east are essential for a better understanding of the the overall picture. Historically, during the first half of the nineteenth century Arab countries the application of Islamic legal precepts by the judiciaries still reigned supreme, in which they were derived directly from the original sources, namely, the *Qur'ān*, the Prophetic traditions (*ḥadīth*), the consensus of early learned jurists (*ijmā'*), and analogy (*qiyās*).[2] The rules thus deduced were set down in the writings of the jurists of the various schools of Islamic law and it is to their treatise that the judge had to refer in order to locate the legal solution to any given case.

A rapid "Westernization" process was undertaking in Egypt under Khedive Ismail in the next second half of the nineteenth century. This process led to the adoption of a modern civil code modelled along the lines of the French *Code Napoléon.* Since 1883 this civil code has been applied in Egypt in lieu of the rules of Islamic law. French law was also enforced in those countries of North Africa that were under French domination. The rest of the Arab world, because it was in closer affiliation with the Ottoman Empire, did not follow the example of Egypt.

However, during the latter half of the nineteenth century the Ottoman goverment promulgated a civil code derived directly from

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[1] This assertion is well recorded by such scholars as Subḥī Maḥmaṣānī, *Almujtahidūn fī al-Ḥaqq* (Beirut: Dār al-'Ilm li-l-Malāyīn, 1979), 233-258; Nabil Saleh, "Civil Codes of Arab Countries: The Sanhuri Codes," *Arab Law Quarterly* IIV(2) (1993): 161-7.

[2] For authoritative sources on the nature and function of these sources within the confine of Islamic legal system see among others, Wael B. Hallaq, "*Uṣūl al-Fiqh*: Beyond Tradition," *Studia Islamica* 63 (1986): 172-202; Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964).

Where there is a difference between the Egyptian and the Iraqi Codes, it is due to legal circumstances proper to Iraq, mainly the governing by Ottoman *Majallah* or Iraqi contract law until the *Majallah*'s replacement by the present Civil Code. More article of the Iraqi Civil Code are in fact directly inspired by the Shari'a, since the *Majallah* was able to instil in the Iraqi system a serious and longstanding tradition of Islamic law (more so than in Egypt, where civil codes which were directly modelled after France had been in place since the 19th century.[18]

It is reasonable to argue then that in term of the sources referred to in the process of codification comprise of a variety of reference, the product of which resulted in the synthesis of all sources. In commenting on this complex process Sanhuri says: "Thus the position of Islamic law is preserved, and the ties are maintained between the past, the present, and the future."[19]

However, he applied different approach to different country. Sanhuri made no attempt to draft entirely new civil code in a revolutionary manner for these countries, but rather it was moderate in temper and pragmatic in approach.[20] Sanhuri comments further: "After working on the Egyptian code, which represents the pick of world codes, I work on the Iraqi code. I would compare the *Majallah*, which was in force in Iraq, with the Egyptian code. If I found a

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[18] Taking the model of Egyptian counterpart, the Iraqi Civil Code was largely by Sanhuri but retaining considerably more of the principles of the *Majallah*, and thus of the Shari'ah, than do the Egyptian and Syrian Codes. See J.N.D. Anderson, "Law Reform in the Middle East, *International Affairs* 32(1) (1956): 50.

[19] Commitee's report on the revision of the Iraqi Civil Law, 1951; President: 'Abd al-Razzāq Aḥmad al-Sanhūri Pāshā.

[20] For discussion of New Egyptian Civil Code in a wider context, see Gamal Moursi Badr, "New Egyptian Civil Code and the Unification of the Laws of the Arab Countries," in *Tulane Law Review* 30 (1955-1956): 299-304; J.N.D. Anderson, "The Shari'a and Civil Law, " *Islamic Quarterly* (1954): 29-46.

The integrated New Egyptian Civil Code (*Al-Qānūn al-Madanī al-Jadīd*) was promulgated in 1949, replacing two earlier Codes, the Mixed and *ahli* codes, is an eclectic compilation drawing mostly on Islamic, Sunni, and French Law and, to a negligible extent, earlier Egyptian judicial decisions and a number of other sources.

As far as the draft code is concerned, Sanhuri said that it was derived from twenty civil codes representing countries in Europe, Asia, Africa, and the America; from the jurisprudence of the Egyptian courts; and from the shari'ah, along the lines he had suggested in his article on the subject. Historically, the Arab states share a common threat of religious and cultural heritage. In most Middle Eastern countries, constitutional provisions have been adopted making Islam the state religion and referring to Islamic law as *maṣdar al-asāsī* or *al-maṣdar al-asāsī* "a" or "the" main source of law.

Whatever the views on the influence of Islamic law to the new Egyptian Civil Code might be, it is a real fact that the code for the first time recognizes Islamic law as a source of law in matters which the code fails to provide. Article 1 of the code reads: "In the absence of a provision of law applicable, the Judge will decide according to custom and in absence of custom in accordance with the principles of Islamic law". This provision has never been provided by the previous Civil Codes. It is therefore worth noting here that the Islamic Shari'a has a unique and significant place in the Egyptian Civil law which cannot be overlooked in matters relating to obligations and contracts.[11]

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[11] Although some legal scholars maintained that article 1 (2) of the ECC has no practical effect, Chafik Chehata, an Egyptian jurist, observes that "However, how can a provision of this kind (stipulating the subsidiary application of Shari'a law) be applied in practice ? Some have maintained that this is a purely theoretical statement without meaning for the legal practice." He argues that the intention of the drafters of the code was not to apply Islamic law but rather to make reference to Shari'a in its basic principle that is to say to its spirit. But he concedes that the practicality of the above provision will

1. Sources of Law

The provision of the Iraqi Civil Code make it abundantly clear that the written provisions of the Civil Code are dominant. When the written law is silent on a certain topic, Iraqi court will decide matters in accordance with normal custom and usage. Should there be no applicable custom or usage to which the court can turn, then an Iraqi court may look to Islamic Shari'ah to decide the merits on an issue. Otherwise, courts may look to the principles of of equity in making decisions. In all instances, Iraqi courts may be guided by Iraqi jurisprudence and the jurisprudence of other countries with legal systems which are similar to the Iraqi legal system.[24] This hierarchy of sources is clearly based on the European civil law model.[25] However, as he did in the Egyptian civil code, Sanhuri infused this Western legal hierarchy with Islamic legal principles by allowing that Islamic law may be a subsidiary source of law.[26]

In referencing Islamic law, the Iraqi Civil Code notes that, absent a codal provision or customary law, a court may look to Shari'ah but may not be bound by any particular school of jurisprudence. Jwaideh notes that this was probably included as an assurance to the Shi'ah population that resort to Islamic jurisprudenceis "not limited to the Hanafi school of law as it was in the *Majallah*. In comparing the sources of law to the corresponding Egyptian articles, Kristen Stilt agrees that the main diffrence [in the Iraqi Code] from the Egyptian code is the provision that the principles could come from any school, which is in explicit recognition and inclusion of Sunni and Shi'ite jurisprudence. In Egypt Sanhuri had objected to

[24] Iraqi Civil Code, art. 1 (3).

[25] See LA Civil Code, art 1, cmt (b) (2006).

[26] Zuhair E. Jwaideh, "The New Civil Code of Iraq," *George Washington Law review* 22 (1953): 181.

to be the precursor and prototype for a number of other civil codes in Arab countries in particular and other Islamic countries at large. The Egyptian Civil Code, almost word by word, has been adopted in both Syria (1949) and Libya (1953). Sanhuri himself drafted the Iraqi Civil Code (1951). In addition, The Code in a varying degree also influenced the Kuwaity Civil and Commercial Code (1981), the Civil Codes of Jordan (1976) and Yemen (1979),[13] and it is to the respective countries that the discussion will procede.

B. The Impact of his Legal Thought in Other Countries

1. Iraqi Civil Code

The superiority of the New Egyptian Civil Code was immediately recognized. Given the similarity of social conditions and the common historical background, Egypt's lead in drafting the new Civil Code soon attracted the attention of lawyers in other Arab states that also considered to adopt the same rules of law. The first country that turned its recourse to the New Egyptian Civil Code was Iraq when it wanted to reform its civil law during the 1930s. [14]

Historically, Iraq has had a long and rich jurisprudential experience. Before Saddam came to power, the country, along with Egypt, was one of the most influential in the development of the legal institutions and substantive laws of the Arabic speaking world. A high level of education was enjoyed by the Iraqi elite, and Iraqi legal thought was characterized by a lack of chauvinistic nativism. Being geographically at the intersection of Arab, Persian, Kurdish,

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[13] See generally Ann E. Mayer, "Law, Modern," in *Encyclopedia of the Modern Middle East*. Reeva S. Simon et. al. (eds.), vol. 3 (New York: McMillan, 1996): 1079-80.

[14] "Iraq Update," at http://www.gulf-law.com/iraq_law.html Stilt, Kristen A. "Islamic Law and the Making and Remaking of the Iraqi Legal System," at http://findarticles.com/p/articles/mi_qa5433/is_200401/ai_n21356922/

legislature in the Explanatory note to the New code based on the ground of the common traditions, similar customs and closely related social conditions prevailing in both countries.[29] All these reasons would provide room for the application of the Egyptian code in Syria. In addition, the adoption of the civil code of Egypt in Syria is deemed necessary that will pave the way to establish a close cooperation in legal matters and allow a fruitful exchange of ideas and decicions betwen the the jurists and courts of both countries. It is further stated that "... the modelling of the Syrian Code fulfills an important purpose aimed at by the Arabs at present, i.e. the unification of the laws of the Arab countries.[30] Arab lawyers have been trying hard to reach this goal, and the present code is indeed a practical step forward on the way to legal unity among the Arab countries.

Constituting of 1130 articles, as compared to the 1149 of the Egyptian Civil Code, the New Syrian Civil Code was promulgated on May 18, 1949 and came to effect on June 15 in the same year by Decree Law No. 84 of 1949. It is worthy of note that in fact both codes follow similar general pattern and enact the same specific provisions with an exception for a few minor modifications. The logical consequences of such new legislation it is predictable that it would firts, supersede the old civil legislation composed mostly of the *Majallah* and second, the land laws promulgated during the French mandate. Another feature of the new Syrian code is that it represented in a coherent and systematized manner, which perhaps due to its process of drafting in a cooperative and well planned manner. In short, the drafting of the Syrian code is undeniably influenced by the Egyptian civil code to a lesser or greater degree.

[29] Explanatory Note of the Syrian Civil Code, 9.

[30] The effort of the unification of law of Arab countries generated by Sanhuri's idea has attracted the attention of many a Western scholar as Wiiliam Ballantyne, a professor of Arab law in the University of London, who terms this process as Lex Arabica Mercatoria.