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Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971 [Part II]

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## AL-SANHURI AND ISLAMIC LAW

The Place and Significance of Islamic Law in the Life and Work of 'Abd al-Razzag Ahmad al-Sanhuri Egyptian Jurist and Scholar 1895–1971\*†  
Enid Hill‡

### VII. THE NEW EGYPTIAN CIVIL CODE

#### Drafting, Opposition and Consensus

A committee to revise the Egyptian Civil Code was formed in March 1936, and al-Sanhuri was appointed to it. The ostensible reason for establishing the committee was recognition of the necessity of unifying—and accordingly revising—the two existing civil codes in anticipation of the end of the Mixed Courts in 1949 and their absorption into one national court system. This committee was, however, disbanded after three months for reasons that were “not entirely clear”, after it had adopted the few preliminary principles that formed the first four articles of the code (Ziadeh, (1968), pp. 137, 141).

A second committee was formed in November 1936 which set out rules governing guarantees and *shuf'a* (pre-emption). This committee was also dissolved—in May 1938—before finishing its work. A third committee was formed in late 1938, limited to al-Sanhuri and Lambert, whom al-Sanhuri had brought into the project pursuant to the opinion of the Ministry of Justice that the codification would “best be accomplished by two individuals” in its first stages. An account of the work of the committee is contained in a seven-volume publication of the Ministry of Justice: *al-Qanun al-madani: Majmu'at al-'mal al-tahdiriya*, (n.d.—probably 1949) pp. 5–9 and *passim* (See Ziadeh, p. 141).

On 24 April 1942 the completion of the draft was publicly announced by al-Sanhuri at a lecture given under the auspices of the Royal Geographic Society where he summarised the work on the Code and opened the matter for public discussion (al-Sanhuri, 1942). The draft code, he said, had been constructed using comparisons of more than 20 modern codes, the jurisprudence of the Egyptian courts, and the Islamic *Shari'a* (Ziadeh, (1968), p. 142).

The draft code was to be open for comment for three years. In 1945 a committee of five headed by al-Sanhuri studied the comments and proposals, made some revisions, and prepared a draft for submission to the legislature. A special Senate committee was created to study the draft code (p. 143).

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‡ This study would not have been possible without the various forms of help and encouragement I received from many people.

On 30 May 1948 the Senate committee began a special session and invited members of the Egyptian courts, the Bar Association, and members of the law faculty of Cairo University. Reports say that al-Sanhuri was "single-minded" in defending his code and countering opposition, in the course of which he "demonstrated a truly phenomenal knowledge of both the *Shari'a* and comparative jurisprudence", and that the opposition in the Senate was "ephemeral" (p. 144).

Ephemeral or not, "the question of the utilisation of the *Shari'a* . . . occupied a sizeable part of the committee's time" (p. 145). A special issue of *al-Muhamah* (the journal of the Egyptian bar Association) in March 1948, containing "a bitter attack" on the proposed code, had been circulated among the members of the Senate committee. The journal's criticisms were endorsed by members of the Court of Cassation, including Hasan al-Hudaybi (who later became head of the Muslim Brethren following Hasan al-Banna's death) and one, Muhammad Sadiq Fahmi, who had been instrumental in forming the opposition group of mainly Azhari professors and in circulating the journal among the Senate committee members. He was also chief spokesman for the opposition in the committee hearings. Ziadeh has summarised the attack of this group on the draft code:

On the one hand, it was maintained that the old code, which, with some exceptions, had been based on French law, was in need only of some modification here and there, and that it was only right and proper to preserve the "legal culture" already occurring to Egypt. On the other hand, it was maintained that should a complete recodification be allowed, such recodification should be based on the *Shari'a*. (p. 143)

"The charges seem inconsistent", comments Ziadeh, and explains this inconsistency by the fact that the opposition group was composed both of secular lawyers trained in the French legal tradition and professors of Islamic law at al-Azhar.

One gets a sense here, however, that there is more than meets the eye. As will be referred to in part IX, al-Sanhuri certainly had political enemies, especially among the Wafd Party. It was not to be the last time that a *modus vivendi* for opposition was to be forged between Wafdist politicians and members of the Muslim Brotherhood. What is more interesting, however, is the contention contained in this statement of opposition that when and if a recodification took place it should be one based on the *Shari'a*, while a caveat was added by al-Hudaybi that "all legislation should be based on the Koran" (p. 143).

The call for recodification to be "based on the *Shari'a*", as well as al-Hudaybi's reservation, is a demonstration *par excellence* of the basic difference between al-Sanhuri's approach to an islamisation of Egyptian law and that of the Islamic movements. The difference is not superficial. However much the exigencies of politics may bring together those of a basically secular orientation with the proponents of religious revival, there cannot, it appears, be an acceptance on the part of the latter of any approach to the revival of Islamic law not based full-square within religion.

Al-Sanhuri's approach was clear. The version of his call to revise the Code printed in French is almost identical with the earlier prescription in *Le Califat* as concerns the way scholarly and scientific work should precede renovation of law in Arab Islamic states:

The point of departure (to restore the original energy of the rules of Islamic law) must be . . . the separation of the religious part of Muslim law from the temporal part. The religious part, which we avoid in our examination, should remain the monopoly of the Muslim theologians. (al-Sanhuri, (1938b), p. 623).

The Arabic version, however, uses a different phraseology to express his distinction between the religious and the secular (or temporal)—a meaning with which a Western audience has no trouble. The Arabic version is reproduced below, since how al-Sanhuri phrased his secularism within the idioms of the Arabic language is instructive in the context of what has been discussed above.

We do not deny that the *Shari'a* is in need of solid scientific renovation, in order to rescue it from intellectual stagnation and allow it to break with the limitations to which the latter-day jurists were tied.

We proposed in *Le Califat* that this undertaking be based on a study of the *Shari'a* according to the new scientific method of comparative law. This new study is based on the distinction between religious rules and legal (*qanuniyya*) rules; it is not the former but the latter that is our concern here. We make a distinction between a rule which associates religion with Islamic jurisprudence, and which depends on faith and is respected in the heart, and a rule resting on a foundation of pure legal logic. It is the latter that comes within the purview of our scientific investigations. (al-Sanhuri, (1936d), p. 113).

The issue for the opposition, however, seems to have been more methodological than substantive, as was demonstrated during the course of the Senate debate. In the same issue of *al-Muhamah* that contained the statement of opposition referred to above, was a "sample law of contract" alleged to be based on the *Shari'a*, "to show how it could be done".

Al-Sanhuri reviewed the provisions that had been derived from the *Shari'a*s and insisted that had it been possible to derive more, he would have gladly done so. He then took up the sample draft of the law of contracts prepared by the Fahmi group and demonstrated, principle by principle, that, although the sample draft purported to be based on the *Shari'a* it was in point of fact based on modern codes. "If it were true," he declared, "that the provisions in the Sadiq sample draft—which agree with the provisions of the draft code—were *Shari'a* rules, then we would have been justified in claiming *Shari'a* origin for the provisions of the draft code itself" (Ziadeh, (1968), pp. 145–146, from Ministry of Justice publication, pp. 88–93).

Without wishing to detract from this performance of al-Sanhuri and the *tour de force* that it undoubtedly was, it would seem that something unintended happens when the *Shari'a* is put into an alien format. Something of its substantive identity would seem to merge with the alien methodology of form—unless, that is, there is an al-Sanhuri to provide the theoretical exposition as to the principles underlying the legal rules and their genealogy.

In any case, al-Sanhuri's performance drew the teeth of the opposition and in the Senate chamber "only one deputy raised the question as to whether the *Shari'a* had been sufficiently utilised", and the "draft law was enthusiastically received". On 15 October 1949, the day when the Mixed Courts came to an end, al-Sanhuri's revised code became the law of Egypt (Ziadeh, p. 146).

## VIII. IS THE REVISED CIVIL CODE ISLAMIC?

**Assessments of Scholars and Critics**

The issue of basing Egypt's laws on the *Shari'a* is an old one. Qadri Pasha, as earlier noted, did his condifications of Islamic law in the 1870s in anticipation of their use as the law of new national courts established in 1883. The Egyptian rulers of that time, however, opted to prepare a code based on the Code Napoleon although it appears that more of Qadri Pasha's code was included than is usually realised (*supra*, part VI).

When the project of the revision of the code was first in the air in the mid-1930s calls were again raised for the codification of the *Shari'a* (see Ziadeh, pp. 20, 136–139). The Muslim Brethren, in particular, since their founding in 1928 (and until their abolition as a party in 1954), continuously had as a prominent goal that the *Shari'a* become the law of Egypt (p. 137; see also Harris (1964), chapter IV). And there continue to be calls today to make the laws Islamic. Draft codes, purportedly based on the *Shari'a*, were prepared by a commission set up in 1978, but no definitive action on them has been taken. It would appear that concern with making the laws of Egypt Islamic, or “more Islamic”, is endemic.

The issue of islamisation of law is, perhaps, pre-eminently an issue of nationalism, at least on one level. Whereas al-Sanhuri was certainly himself a nationalist, worked in various nationalist causes (see part IX), and was conscious of his work on the revision of the code as a contribution to Egyptian, as well as Arab, nationalism (see part XII), on the popular level the law must be *recognisably* Islamic. If the *Shari'a* rules become embedded in the modern, abstract language of codes so that they lose their identity except to the legally erudite, islamisation has not, for all practical purposes, taken place. The verdict on the popular and fundamentalist level as to whether al-Sanhuri's civil code is Islamic—or sufficiently so—must clearly be in the negative.

For legal scholars, al-Sanhuri's claim that:

We adopted from the *Shari'a* all that we could adopt, having regard to sound principles of modern legislation; and we did not fall short in this respect (Anderson, (1954), p. 30 quoting Ministry of Justice p. 85)

was, of course, taken seriously, and the new code was examined in terms of what its debt to the *Shari'a* purported to be. However, just as certain standards and expectations of his critics were evident at the time of the debate on the revised code, so also are other kinds of standards and preconceptions operating among those who view al-Sanhuri's work through Western eyes.

The main commentary in English on the new Egyptian civil code remains that of JND Anderson (1954) where “the debt to the *Shari'a* of the civil code” is categorised as being of four kinds:

- (1) The *Shari'a* is “one of the sources from which an appropriate rule or principle may be derived by the courts in default of any relevant provision” in the code or custom (*'urf*) (as provided in Art. 1 of the Code);
- (2) The *Shari'a* “influenced the choice” between “certain concepts on which European codes are divided” (e.g., objectivity as opposed to subjectivity in obligations);

- (3) "A few principles or provisions" were "newly borrowed from the *Shari'a*, whether exclusively, chiefly, or in part";
- (4) There were "principles or provisions taken over by the previous legislation from the *Shari'a* in whole or in part and preserved . . . in their original or amended form". (Anderson, (1954), p. 31)

Anderson quotes (as does also Ziadeh, p. 144) the remark made by al-Sanhuri before the Senate committee in 1948 that "three quarters or five-sixths of the provisions of this law are based on the decisions of the Egyptian courts and on existing legislation" (Anderson p. 30, quoting from the Ministry of Justice p. 70). Although the context of this remark was the refutation of a criticism that the multiplicity of foreign sources would cause problems in referring to the historical sources in order to solve a legal problem, it would appear to indicate—and this is the sense of Anderson's use of the quotation—that "the debt to the *Shari'a* of the new civil code" was small. A recently expressed view in Egypt by a legal scholar is also that the rules taken from the *Shari'a* were "of limited scope . . . and many of these had been in the old code" (Al-bishri, (1985), p. 629).

Al-Sanhuri himself, writing some twenty years later, says that "the new code continues to be representative of Western civil culture, not Islamic legal culture" (al-Sanhuri, (1962), p. 12). His view was that Egypt's Western-based civil law had become part of the country's legal culture and therefore "a sudden return (to Islamic law) would have been difficult and would have caused disturbances and confusion" (p. 13).

If the new code had not become comprehensively Islamic it had, however, become Egyptianised—not only in the extensive referencing of "the jurisprudence of the Egyptian courts" but also in the method of codification itself. The rules incorporated from foreign codes had been eclectically chosen on the basis of al-Sanhuri's analysis of their suitability to Egyptian conditions and his notion of justice distilled from his comparative studies, including the *Shari'a*, and, one can presume, his own legal and judicial practice in Egypt. As he told the Senate committee, the legal rules taken from foreign codes "have an existence independent of the sources from which they are taken" (Ziadeh, p. 144, quoting Ministry of Justice pp. 70–71). Moreover, some of the rules of foreign origin taken from the old code had already been filtered through the Egyptian environment in their application by Egypt's judges to controversies arising within the environment.

Egyptianisation, however, is itself not without a connection to Islamic law. In his call for the revision of codes at the time of mounting efforts in the country to achieve national independence, al-Sanhuri had said:

It is incumbent on us first and foremost to Egyptianize the jurisprudence and make it completely Egyptian . . . and in this . . . the Islamic *Shari'a* is before us . . . since it is the most important element in the intellectual development growing in our land; . . . and this heritage can be a means of breathing the spirit of independence into our jurists and legislators. (quoted in al-Bishri, p. 628)

Al-Sanhuri had repeatedly emphasised that law was "a living thing" continuously "growing and taking nourishment from its environment". Judicial interpretation of law is certainly one way of making adjustments in law to its environment—both to



changing social and economic conditions as well as being a way of incorporating a country's customs and traditions into its formalised law. Al-Sanhuri's first scholarly work (1925) had been an investigation of how legal evolution had occurred in an area of English judge-made law. Concerning al-Sanhuri's use of Egyptian judicial decisions:

By taking account of the decisions of the Egyptian courts and opinions of the jurists, al-Sanhuri represented the environment of transactions in real life, so that legal rule could come from the manners of the people, their way of life, and their modes of interaction. (al-Bishri, p. 629)

Egypt certainly has deep roots in her Islamic past, including the legal relations of that civilisation. Thus, to the extent to which Egypt's judges took account of the legal and social relations embedded in the culture, parts of that legal tradition would have been preserved. But it must also be remembered that, for much of the time since 1876, Egypt's legal history had included foreign judges applying essentially foreign law in mixed courts, and al-Sanhuri was as aware of this as anyone. Nonetheless, it is undeniable that he viewed the jurisprudence of the Egyptian courts as centrally important to the revision of the code. Certainly, theoretically, the use of these Egyptian decisions could have served as a conduit of legal customs and traditions, Islamic or otherwise, into the codified law. The validation of this proposition must, however, await a detailed examination of the context and content of the court decisions cited by al-Sanhuri in his commentaries on the new code.

Nonetheless, the "debt to the *Shari'a*" that Anderson cites as being in explicit form is not inconsiderable. Briefly summarised it is:

*Principles or provisions taken from the previous legislation*, which concern: the disposition of death property during sickness; *ghubn* (lesion—inadequacy of price or other defect in a purchase); risk in purchasing; planting or building on leased land; ownership of different stories in the same building or a party wall; *shuf'a* (pre-emption rights); gifts; the principle of no inheritance until after payment of debts.

*Provisions "newly borrowed" from the Shari'a*, which concern: the duration of the meeting at which a contract is concluded; legal capacity; lease of *waqf* property; contract of *hikr* (rent for land or building for an extended period); termination of lease on death of lessee and termination of lease "for serious and unforeseen circumstances;" release of debt by unilateral declaration.

Anderson also includes influences of the *Shari'a* in the guiding of "choice of certain concepts . . . when European codes are divided" as follows:

An objective rather than a subjective tendency; principles applicable to the abuse of rights, using both subjective and objective tests; legal consequences of exceptional and unpredictable events; provisions regarding assignment of debt. (Anderson, pp. 31–45).

The complete legislative history of the new code is contained in the Ministry of Justice publication previously cited, published shortly after the Code was passed into law. In addition to the explanatory memorandum accompanying the new code and the Senate debate verbatim, these volumes contain a detailed account, article by article, of the code indicating changes from the old code, discussions in the drafting committees,

and discussions of the sources of individual articles and intent. Only by going through these seven volumes will it be possible to assess whether Anderson has picked up all the explicit and implicit “debts to the *Shari’a*”. It would also be interesting to compare the final result with al-Sanhuri’s own extensive detailing of possibilities of further incorporation of Islamic rules of law in his 1936 article proposing the revisions.

Anderson’s listing does, however, conform fairly closely with a brief summary of the Islamic rules in the code that al-Sanhuri included in an article written later (al-Sanhuri, (1962), p. 12). The main divergences concern the way in which areas of law are defined. There also seems to be some difference of opinion as to whether a couple of the rules or principles come from the old code or were newly added, but this difference may be more apparent than real due to different levels of specificity at which areas of law are identified in the two articles.

Al-Sanhuri also points in this article to another feature of the new code, namely an innovation of “flexibility”. The new code, he says, had substituted “flexible standards” in place of “inflexible rules”, so that “solutions can change when conditions change” (al-Sanhuri, (1962), p. 14).

Chafik Chehata, once with the Faculty of Law in Cairo University, subsequently Professor associated with the *Faculté de droit et des sciences économiques* of Paris, has also written on the new Egyptian code, first in a series of articles in the *Journal des Tribunaux Mixtes* during the 1940s (Chehata, (1946–48)), then concerning specifically “*les survivances musulmanes*” in it (Chehata, (1965)). His categorising of the areas of the *Shari’a* influence is different from Anderson’s as is also his general assessment as to the extent of the debt.

Chehata’s primary concern is with areas of law in contrast to Anderson’s primary division into kind and source of influence. Chehata’s basic division is threefold: (1) matters of obligation or personal rights; (2) matters of property rights; and (3) Muslim law as a formal source of Egyptian law. It is in Chehata’s area of property rights that Anderson’s “new provisions” and “provisions from previous legislation” appear. These are provisions of *Shari’a* law, Chehata remarks, “applied directly”.

As concerns the subject of obligations, “its historical source is Roman law . . . (but) a general theory of obligation was not completely constructed by the Romans”. The theory of obligation found in those modern legal systems based on Roman law was developed from various elements in Roman law by means of glossing. “In Muslim law”, continues Chehata:

valuable elements are furnished to us by the scholars of jurisprudence, allowing us, in our turn, to elaborate a general theory that can correspond to that elaborated from Roman law. (p. 844)

This is what Chehata himself tried to do in his *Théorie générale de l’obligation en droit Musulman hanéfite* (1936).

Such was also the intention of al-Sanhuri as he worked on the new Civil Code of Iraq (see *supra* part V and al-Sanhuri, (1936c)), in various works concerning theory of contracts and of obligation, and of course in his subsequent study of the sources of legal rights (1954–1959). Thus it is not sufficient to point to particular provisions in specified articles that directly incorporate a *Shari’a* legal rule to comprehend what al-Sanhuri was trying to do in making the new code “more Islamic”. The principles



underlying legal right or obligation in Islamic law influence what rules are selected from various modern codes. Al-Sanhuri has indicated that this was his intention and Chehata confirms that it is indeed to be found in the new code:

In general, the spirit that dominates the subject (of obligation) in Muslim law is an objective tendency . . . . The Egyptian legislator of 1949 has opted for this objective tendency and through this bias has linked up again with the line of Muslim judicial thought of the past. Although he has not borrowed directly from the Muslim sources which inspire this tendency, by recognizing the bias underlying legal solutions, has chosen those solutions in Western codes which are consistent with this new conception. (Chehata, (1965), p. 844)

All commentators on the new Egyptian Civil Code refer to the provisions in Article 1 providing that, in the absence of an appropriate text in the law, the *Shari'a* is, after "custom" (but before "natural justice and the rules of equity") to be a source of law. Chehata refers to the making of Islamic law a "formal source in all matters of civil law" as "the most important innovation of the Egyptian Civil Code." Thus:

for Muslim society . . . the Muslim law (the spirit which animates it and the fundamental reasoning behind its injunction) becomes a kind of prelude to natural law, strictly speaking,

and he predicts that:

after some time has elapsed there will be, through the practice of the courts—helped of course by the new Egyptian legal doctrine—a new reception of Islamic law. (p. 853)

The *Shari'a* may, however, actually be more than a "prelude to natural law" in this first article of the Egyptian Code. Preceding reference to the Islamic *Shari'a* in the first article the judge is enjoined to "decide according to custom". The contention has been made that in Egypt "custom" (*'urf*) is for the most part, Islamic law.

In Egyptian society are found many customs (*'adat*) which are practices known to people in their transactions, and which are suitable tools for interpreting the will of contracting parties. (al-Bishri, (1965), p. 630)

But there is "no widespread legal consciousness" that they constitute "a required or determinate rule". Custom (*'urf*) in its technical meaning is known usually "only insofar as it is a rule that comes from the *Shari'a* . . . either from the works of Islamic jurists or rooted in their sources (*masadir*)" (p. 630). That is, judicial interpretation in referring to custom (as *'urf*) would be in point of fact referring to Islamic law.

Both the Libyan and Syrian codes, in the corresponding articles, specify resort to the *Shari'a* before customs. One Western scholar has hypothesised that "the variants in phrasing" in these codes indicate "a somewhat different approach" to the *Shari'a* as a source of law (Liebesny, (1975), p. 95). However, considering the extensive correspondence between legally relevant "custom" and the *Shari'a* in the Egyptian context alluded to above, the practical effect of this reversed priority in directing the judge to a source of law outside the Code may, in fact, be negligible.

Something of significance does, however, suggest itself. Certainly al-Sanhuri was aware of the subtleties of the legal meaning of *'urf*. What, then, has he done? One

could look at it in two ways. Either he has made the new code *appear* to be less susceptible to evolution in an Islamic direction (through the courts' jurisprudence) than it actually is (being but another instance of clothing Islamic substance in "modern" form); or, he has provided for a more populist—and Egyptian—interpretation of Islamic law before the *Shari'a* is to be opened up in its entirety. Perhaps he intended both.

What then can be said of al-Sanhuri's revised Civil Code—is it or is it not Islamic?

Al-Sanhuri's own claims were relatively modest as concerns the islamisation of the Code. He never said that he had produced an "Islamic Code". It was rather a beginning, the setting of a direction. "The Egyptian legislator believed", he was to write twenty years later; "that a step had been taken toward returning to the Islamic jurisprudence" (al-Sanhuri, (1962), p. 13).

How then, to assess this beginning step? How does one estimate the extent of the incorporation and/or influence of Islamic law on this Code? Does one count articles, calculate ratios, seek underlying principles of legal right? Or does form so overwhelm substance as to make the quest ultimately meaningless? Is the genius of Islamic law, after all, its historical form and method? Is it indeed inseparable from its original foundation and thus inseparable from religion? Or—inasmuch as al-Sanhuri's Civil Code has weathered the years well, has proved itself a very respected and serviceable code—does it really matter whether it is or is not, or to what extent, Islamic?

Now that is a question for which there is a very certain answer: Yes, it does matter.

The issue of Islamic law is first and foremost a political question. It is part of the continuing struggle taking place in the wake of the expansion of Western capitalism and with it the spread of Western culture. Today the issue is "dependency"—economic, political, cultural—while in al-Sanhuri's day it was called "the national question"—political independence and national sovereignty. Given the centrality of law to a nation-state's political symbolism and cultural identity, it would seem mandatory that the law come from "the nation's womb"—a phrase used in 1936 (just as the first revision committee met) by a judge of the supreme *Shari'a* court, whose call for the restoration of the *Shari'a* was, he said, not for religious reasons but from the "dictate of patriotism".

A nation is distinguished from other nations by its individual characteristics, chief among which is its jurisprudence . . . Upon my life, the (existing) legislation is not of the nation's womb. (quoted in Ziadeh, p. 140)

Al-Sanhuri's patriotic sentiments are not in question. Whereas the project of the revision of the Civil Code was no "restoration of the *Shari'a*" pure and simple, from its inception to its promulgation it *was* inspired by concerns of nationalist politics.

Nor was it al-Sanhuri's only political act. Activities involving him in issues that concerned Egypt's political independence and national status began when he was young and continued for much of his life. These activities were many and various, at times embroiling him in the party politics of his day, at times allowing him to utilise his legal talents. After the Civil Code, his other major contribution to the building of national legal institutions and a modern legal culture in Egypt was his work on the *Majlis al-dawla*.

## IX. NATIONAL AND INTERNATIONAL POLITICS

**Politician and Minister**

Al-Sanhuri was caught up in the currents of politics in Egypt from the beginning of his professional life. He was a young assistant (*wakil*) in the *niyaba*<sup>12</sup> in Mansura at the time of the (1919) revolution. He joined the Wafdist movement and organised a successful strike of employees in his office and, as a result, was transferred to distant Asyut, in Upper Egypt (Khatab, (1971), p. 4).

In 1934 al-Sanhuri was again involved in politics, or allegedly so. He was temporarily suspended from the university when the government accused him of questionable political activities, namely forming a group of students which, under the guise of being a literary and cultural group, was pursuing political aims (Castro, (1984), pp. 85–86). Al-Sanhuri defended himself in an interview published in *al-Ahram* on 19 August 1934, where he denied the accusation of having founded a political group.

When al-Sanhuri returned from Iraq in 1936 he was appointed Dean of the Faculty of Law at Cairo University. Within the year, however, he left the university “for political reasons”. It is safe to assume that these “political reasons” were connected to his longstanding controversies with the Wafd and his association with Ahmad Maher and Nuqrashi. He left the Wafd when they did in 1937 and joined them when they formed the Saadist party, which party al-Sanhuri represented in various ministries thereafter.

A series of government appointments ensued for al-Sanhuri over the next twelve years, including that to the Mixed judiciary of Mansura (1938–1939), interspersed with the practice of law in 1942 and 1945/46. Whenever a Wafdist cabinet came in, he was predictably put out or transferred.

Nahhas hated Sanhuri and pursued him vindictively over the years. In 1937 Nahhas fired him from his deanship and the civil code committee . . . (and) Nahhas forced him out once more in 1942. (Ried, (1981), pp. 154–155).

Al-Sanhuri is listed as being a deputy (*wakil*) in the Ministry of Education (1939) and in the Ministry of Justice (1944). He was appointed Minister of Education representing the Saadist Party in a cabinet under Ahmad Maher and Nuqrashi (1945–1946). Then he was briefly a Minister of State (Royal Counsellor) and in 1947, when Nuqrashi succeeded Islamic Sidqi as Prime Minister, he was again appointed Minister of Education. There is scant documentation of his activities in these government posts. One eulogist says that “he set out huge projects of education including a program for eradicating illiteracy” (Khatab, 1971).

A contemporary employee in the Ministry of Education recalls that it was during al-Sanhuri’s time that the school system of Egypt became unified. Another contemporary in the Ministry claimed that under him it was “a model of the ministries at that time” and quotes al-Sanhuri as saying, on the occasion of his departure:

I succeeded with most of my projects there. I only fell down in two matters: (eliminating the

<sup>12</sup> See E Hill *Mahkama!* (1979a), chapters 1 & 2 for an explanation of the Egyptian *Niyaba* as an institution—its historical development, structure and functions. See also Hill (1979b), pp. 116–134.

practices of) private lessons and giving rooms in the Ministry to senior employees. (Allam, (1986), p. 160)

Irregularities on the lower levels of government life, it would seem, were just as intractable as the various corruptions on a larger scale with which government and country were plagued.

During this period also he was, of course, working on the revision of the Civil Code and he continued writing legal treatises. But he also appears to have written for several popular political journals such as *al-Hilal*, *al-Siyasa* and *al-Balagh*. At the same time his legacy to the Law Faculty continued in the use there of materials he had prepared earlier, namely a basic text book for law students, *Usul al-qanun* (Principles of Law) (al-Sanhuri, (1941)).

From January to May 1937 he was editor of the journal *al-Qanun wal-iqtisad* (Law and Economy) al-Sanhuri, (1937)). In 1937 also he headed the Egyptian delegation to the Second International Congress of Comparative Law at The Hague where he again defended the *Shari'a*.

In the section for *droit oriental* at that Congress the rapporteur noted "the high quality of the discussions" and that, for the first time, discussion had taken place in Arabic. The Congress voted to invite delegates from "all universities where there are professors or scholars who are interested in Islamic law" to attend the next conference. The Congress also adopted a resolution stating that "Islamic law is able to adapt itself to the needs of life" (Congrès, (1937), pp. 53–54). Al-Sanhuri presented a paper entitled, "*La responsabilité civile et pénale en droit musulman*" (al-Sanhuri, 1937)).

By the 1940s al-Sanhuri had become prominent in public life and his name began to appear among the members of Egyptian delegations sent abroad to represent Egypt and to negotiate matters of national political concern. In 1946 he is noted as having headed the Egyptian delegation to a conference on Palestine in London and in the same year an Egyptian delegation to the United Nations. But it is the 1947 representation made to the UN that had historical impact. Al-Sanhuri was a member of that delegation, one of the "distinguished jurists" who accompanied Nuqrashi, "an honest man". The latter, as Prime Minister, led this delegation which presented "Egypt's complaint" against England, an effort on the part of the Egyptian government to transfer the ineffectual negotiations with Britain over continued occupation and the question of national independence for Egypt (as well as for the Sudan) to an international forum. At the UN it was the question of the occupation by Britain of the Sudan under the aegis of the Anglo-Egyptian Condominium of 1899—with which Egypt had had little to do since the 1920s—that was the center of the complaint. The UN adjourned Egypt's request *sine die*, a defeat for Egypt in her first attempt to use the new forum of international diplomacy, and for Nuqrashi a personal defeat which was turned into a success as it fueled increased anti-imperialist demonstrations at home and he was given a hero's welcome when he returned (see Berque, (1972), pp. 600–603; 655–656; and *passim*).

One of al-Sanhuri's "research interests", notes a recent bibliographical entry, was "negotiations on the Egyptian question" (Allam, (1986), p. 159).

Also during this period al-Sanhuri was involved with establishing the Institute of

High Arab Studies, a creation of the Arab League. He became head of its legal division where he gave lectures and supervised theses (see MIDEO, (1954), (1957). The Institute still exists, as an adjunct to ALESCO—The Arab League Educational, Scientific and Cultural Organisation.

This was the closest he came to seeing the establishment of an Arab university—an aspiration he seems to have held, alluded to here and there in the brief accounts of his life.

In 1946 he became a member of the Group (*majma'*) of the Arabic Language whose conferences he participated in and for whom he worked on projects developing the Arabic language, notably in the committee concerning law and economics (see *Majallat al-majma'* (1953, etc.; Allam, (1968), p. 158). In one of their meetings, in 1948 he gave a presentation on the Arabic language by likening it to the law (al-Qulali, (1972); *Majallat al-majma'*, (1953), pp. 111–115).

For these twelve years, then, al-Sanhuri was active—very active—on the stage of national politics and its intellectual life. He joined the Saadist Party, the party of Ahmad Maher and Nuqrashi, formed in 1938 following their expulsion by Nahhas from the Wafd cabinet in late 1937. It was “the *effendis'* party, that of . . . technicians and managers” (Berque, (1972), p. 630). But Ahmad Maher was murdered in February 1945 in the parliament buildings a month after the elections that had given his party a sufficient plurality to form a government. Maher had just obtained approval from parliament to declare war on the Axis in order to ensure Egypt's participation in the United Nations. Maher was succeeded by Nuqrashi who was himself assassinated three years later, after issuing an order for the dissolution of the Muslim Brotherhood, a measure taken under the imposition of martial law to counter the rising terrorism in the country that had erupted following the declaration of the State of Israel and the Palestine war. Al-Sanhuri's political fortunes paralleled those of his country during these times. He too suffered from what the country and its politics were enduring—the repeated collapse of governments.

Political intrigue and the tripartite jockeying for position and power between Wafd, Palace and British, and its exacerbation during the years following the Second World War, had distorted Egypt's politics and often undermined both genuine and cosmetic efforts of reform. Palace and cabinet intrigues had their counterparts in the streets. Demonstrations and strikes, terrorism and violence, seemed to have become an integral part of Egypt's political culture.

Al-Sanhuri's political fortunes were still, however, on the rise, and in March 1949 he was appointed to the top position in the newly formed *Majlis al-dawla*. The circle had in a sense been completed. He resigned his party affiliation and resumed the mantle of jurist.

But the political forces in Egypt of those days did not let anyone remain politically neutral for long, and certainly not an Egyptian-Arab nationalist who had worked for over twenty years to promote Egypt's intellectual and legal independence and her participation in international fora. It was inevitable that the politics of the country would not bypass even the respected juridical personality that al-Sanhuri Pasha had become—especially such a figure, who used the weapons of legal language and principles of right against his political opponents.

## X. CONSTITUTIONALISM AND POLITICS

**President of the Majlis al-Dawla**

His appointment as *ra'is* (president)—that is, chief justice—of the *Majlis al-dawla* (the hierarchy of administrative courts and body that issues advisory opinions) in 1949 provided al-Sanhuri with an excellent position from which to develop the spirit of independence in Egypt's judiciary and adherence to law in the whole structure of the government. It was an institution which had only shortly before been established—in 1946.

Al-Sanhuri affirms that the *Majlis al-dawla* is patterned on the French *Conseil d'État* (al-Sanhuri, (1950), p. 1). Even among countries with a defined administrative law and specialised tribunals to apply it, the French *Conseil d'État* is “a unique institution” (David, (1972), p. 131). Dating back to 1799, it has grown up as a separate judicial structure exercising far-reaching and independent supervision over officials, agencies and their functionaries; that is, over all that touches the execution of the law and its abuse. It is not the guardian of the constitution explicitly, but as guardian of the execution of law it becomes involved with issues that in other systems are dealt with as constitutional cases.

When the French administrative apparatus first acquired independence from the judicial power in 1790, René David (doyen of French legal scholars) tells us, “it understood the danger of arbitrary action and corruption that menaces those holding power”, and it introduced “a self-limitation of its powers”. The institution designed for this purpose was to become the *Conseil d'État*, and remains the means by which the French administrative apparatus is regulated. From the President of the Republic to mayors, ministers and prefects and all who are associated with executive power, “all are subject in France to having their activities submitted to criticism and censure by the *Conseil d'État*” (David, (1960) I, p. 32).

Al-Sanhuri recounts something of the past history of the Egyptian *Majlis al-dawla* and fifty years of attempts to establish it in his prefatory article to the first issue of the journal of the *Majlis al-dawla* in 1950:

The establishment of the Egyptian *Majlis al-dawla* was preceded by other efforts in the past. The first attempt was in 1879, followed by a second try in 1883, but that too was destined not to have a successful outcome. The governmental Judiciary Committee opposed the system of a *Majlis al-dawla*. (al-Sanhuri, (1950), p. 2)<sup>13</sup>

It should be remembered that the Egyptian Ministry of Justice had in its midst a personage known as the “judicial adviser”. The post was established from the early days of the occupation and filled by an Englishman until 1936, from which vantage

<sup>13</sup> In an article published in France, al-Sanhuri gives a little more background on these early attempts. The first time the Egyptian legislator tried to give the country a *Conseil d'État* was by a decree of 23 April 1879 . . . It was to have three functions: legislative, consultative and adjudicative. But for reasons connected with the situation of the public debt and the state's finances, this law was not executed.

In the organic law of May 1883, the legislator also anticipated the creation of a “*conseil d'etat*” whose functions were limited by the decree of 22 September 1883 to being consultative and legislative only, and excluding that of adjudication. But this reform, for political reasons, was also suspended by the decree of 13 November 1884. (al-Sanhuri, 1952 : 578).



point considerable influence on the government was exerted, judiciary committees not excluded. There is no way the British would have looked kindly on the establishment of a *Majlis al-dawla* in their midst. It would have been yet another feature of French law, the bane of the British in Egypt and, moreover, an institution quite incompatible with the needs of an occupation régime, given its ethos and *raison d'être* as guardian of rights and liberties from administrative abuse.

However, al-Sanhuri, writing in 1950, praises the previous work of the Judiciary Committee. Its work, he tells us, had been "re-examined" in 1923. That was the year, be it remembered, of the Egyptian Constitution which set up an independent parliamentary system of government, and British hegemony, at least ostensibly, began to diminish. But there is an additional reason why al-Sanhuri chooses to view the Judiciary Committee (at least in "re-examined" form) in a favorable light. Whereas it did not have all the attributes of a *Majlis al-dawla* (functions of *fatwa* and the legislation only), it "contributed great service to the country", and was "the primary basis on which the present *Majlis al-dawla* was set up" (al-Sanhuri, (1950). pp. 2-3).

A new judicial institution for Egypt, which clearly and admittedly was patterned closely on the French *Conseil d'État*, nonetheless can be seen to have grown from something already existing in the country. And al-Sanhuri has a point. The *Majlis al-dawla* of Egypt *did* take on the functions of issuing advisory opinions (*fatawa*), and of advising on and drafting legislation (although it was to become much more than that). Something new coming out of something old—that was a favorite theme of al-Sanhuri's, something he continuously stressed in his legal work, and the title of a piece he wrote for the popular magazine, *al-Hilal* in 1949. The editors had asked him to write on "the new" for a special issue concerning "al-Jadid", but, he says, he could not write on "the new" unless he added "the old", because "the new comes out of the old" and "the new of today will be the old of tomorrow" (al-Sanhuri, (1949), p. 6). It had been new circumstances that had allowed the *Majlis al-dawla* to be born:

After the Montreux Treaty and especially after the cancellation of the capitulations (and after the departure of the last English Judicial Adviser), a *Majlis al-dawla* became possible in Egypt and the Committee drafted a law in 1939 proposing the establishment of a *Majlis al-dawla*, followed by a more complete draft in 1941. (al-Sanhuri, (1950), pp. 2-3)

Then there was trouble. From the moment the 1941 proposal was reported in the newspapers, "a violent storm of protest arose".

It was described as a state within a state, as a fourth power, in addition to having legislative and executive and judicial powers, . . . it would be a power above all the others . . . Its power to cancel executive decisions would violate ministerial responsibility before Parliament, it would take away the legislative supremacy of the cabinet, . . . it would interfere in controversies between ministries and it would stir up the employees and corrupt the work of agencies and authorities of government . . . (And in addition) it would transcend the jurisdiction of the courts and have power like no other organization ever had before . . . and, it would violate the Constitution (!). (p. 28)

The *Majlis al-dawla* was nonetheless founded in 1945 "as an initiative of the parliament itself", says al-Sanhuri, and adds: "Certainly there was great courage shown by those who introduced that law and supported it" (pp. 28-29). What al-Sanhuri's own

role was in the drafting of the law and its final success is not clear. There was, however, a configuration of persons in political posts at the time that suggests al-Sanhuri's hand not far in the background. Throughout 1945 Nuqrashi was in the government as Saadist prime minister of a coalition cabinet, and al-Sanhuri was Minister of Education. Al-Sanhuri himself had been Deputy Minister in the Ministry of Justice in 1944, a time when the project of establishing the *Majlis al-dawla* was almost certainly under discussion. Moreover, the successor to Nuqrashi as Saadist prime minister, Ibrahim Abd al-Hadi, was still in that office when al-Sanhuri was appointed to the top post in the *Majlis al-dawla*.

Whatever may have been the background of the politics involved, one cannot imagining a position in Egypt at that time more suitable for al-Sanhuri's particular talents, penchant for creation of legal institutions, and long-standing interest in public law.<sup>14</sup>

In the words of a French Islamic legal scholar:

He succeeded in giving this institution, still in its first years of existence, a real independence *vis-à-vis* the government, and made it the symbol of judicial reform in the country. (Bellefonds, (1958), p. 476)

Once in the position of *ra'is Majlis al-dawla*, he undertook, to make it into "a towering fortress of the protection of rights and the guardian of liberties" (Mursi, 1980). His decisions in these courts are remembered, notably for:

- (1) Furthering the right of the administrative judiciary power to exercise supervision over the constitutionality of law. "While the judicial power supervises the legislative power, it does not undertake to legislate." However, "if legislation is in opposition to the constitution, it is its duty not to apply it" (al-Qulali, (1972);
- (2) Supporting the freedom of the press and the expression against government orders to ban publications or cancel or deny publishing licenses; and
- (3) Offering legal redress of grievances for those who claimed to have been wronged by administrative or other governmental action (al-Qulali, (1972); Mursi, (1980).

The establishment of the right of judicial supervision over the constitutionality of laws was, says al-Sanhuri, "the most important decision that the Egyptian judiciary has issued in the modern age" (al-Sanhuri, (1950, p. 11) and "a point of real transformation in the position of the Egyptian courts in this matter, in view of the position occupied by the court of the administrative judiciary (*al-gada' al-idari*)" (p. 10). Although the decision was issued on 10 February 1948, before al-Sanhuri came onto the court, he immediately reinforced this newly defined competence of the courts in the first issue (January 1950) of the journal of the *Majlis al-dawla*, of which he was

<sup>14</sup> In 1949 there was a major revision of the *Majlis al-dawla* with which al-Sanhuri seems not to have been happy, further suggesting that he had had a close connection with the 1946 law. "Under the law of 1946", he writes, "the sections of the Egyptian *Conseil d'État* had links with each other, whereas the law of 1949 has not been fortunate in the modifications in this respect". The changes brought about created separate administrative structures for opinions and legislation on the one hand and litigation on the other. In doing this the 1949 law has, he says, "set up a barrier between the sections". The *Conseil* has thereby "lost much of its homogeneity" and "there is no longer the collaboration indispensable between the different sections" (p. 578).

editor. Two long articles on the subject were contained in this issue and he himself discusses the matter at some length in his introduction.

"The right of supervision over the constitutionality of laws is not found in the French *Conseil d'État*, "he writes, but:

if the French judiciary stick to old opinions that say it is not permitted for them to look at the constitutionality of law, we do not have to accept these texts in Egypt . . . We must liberate ourselves from the noose of imitating others . . . We see that the conventions in France are different from those of Egypt. (p. 12)

He explains the matter to a French readership somewhat differently:

Although the principle of nonaccountability of acts of legislative power is admitted in Egypt as in France, the *Conseil d'État* of Egypt, in contrast to French jurisprudence, has recognized the right of examination of constitutionality of laws and, *a fortiori*, of decree-laws, even after their ratification by the parliament.

The decree-law, before being ratified by parliament, constitutes an act of executive power; thus the decree-law comes within the formal and organic competence of the Egyptian *Conseil d'État* to annul executive decisions; and therefore it has authority to annul a decree-law as it has to annul all other administrative decrees. (al-Sanhuri, (1952), p. 580)

The authority to annul executive decrees by an administrative judiciary is not synonymous, certainly, with the right to void laws which originate in the legislature. In this article comparing the Egyptian and French *conseils d'état* al-Sanhuri does not, however, discuss the basis for the extension of the power of judicial review in Egypt over legislative acts. He tells his French readership:

That which contributed to asserting the supervision of the constitutionality of laws is the absence, in Egyptian legislation, of texts susceptible of being interpreted, as in France, in a sense that forbids the judge to consider constitutionality. (p. 580)

The nature of this power, and the reasoning which underlies its assertion is discussed in the two articles in the journal of the *Majlis al-dawla* referred to above. Al-Sanhuri summarises them in his introduction.

According to al-Sanhuri, the judge's role is to interpret the laws and see that they are executed—constitutional laws and ordinary laws. All laws carry the presumption of executability. However, if the judge finds two laws in conflict (including the constitution, which has a certain presumption of priority), he cannot apply both of them. He does not, however, void one of the laws. He refrains from applying it to the case he is judging. "The judgment looks first at the constitutionality of decree-laws and goes from there to the constitutionality of law itself" (al-Sanhuri, (1950) pp. 11–13). The decision, he says, "is long and complex", and he proceeds to give his own reasoning as to what the right rests on. "There is no doubt that the administrative judiciary may void a decree-law for its non-constitutionality." If we stop there "the matter is simple". However, al-Sanhuri is of the opinion that the judiciary—whether administrative judiciary or the regular judiciary—has the duty to be the supervisors of the constitutionality of "law itself", that is of parliamentary legislation whether the legislative power exercised is strictly defined or discretionary, and in regard to both the form and the substance of the law.

The *Mahkamat al-naqd* (Court of Cassation) had actually preceded the administrative court in issuing a judgment of the matter but its ruling on the constitutional right was “extemporaneous”, says al-Sanhuri, and then an appeal court issued a contrary decision. The latter stated categorically that the legislature was the sole authority as to the constitutionality of its legislation. It is this opinion that al-Sanhuri counters when giving his own reasoning as to the right and the duty of the judicial authority to review the constitutionality of laws.

“The issue is not whether law is an act of legislative sovereignty or not, nor whether the legislature is using defined or discretionary power.” The fact of the matter is rather that “the administrative judiciary does not actually nullify administrative regulations, leave alone legislation. An opponent of a law may not ask the court to declare the law void from its inception, but rather may ask that it not be applied.” Al-Sanhuri reasoned:

Is it possible for judges to apply legislation when their opinion as to its constitutionality differs from that of the legislature? The basis of this right (of substituting their opinion for that of the legislature) is not, however, found in any text of the Egyptian Constitution nor is it a general principle. Judging the constitutional correctness of legislation, objectively speaking, is judicial work. And if it is said that the principle of the separation of powers is violated, it may be answered: The judiciary exercises supervision over parliament’s opinion (about the constitutionality of legislation) *not* by initiating legislation—as that would be interference with the legislative power—but by a judicial act.

The applicable constitutional principle is that powers should be exercised in accordance with the Constitution. The parliament contradicts this principle if it issues legislation that opposes the Constitution, and rather than apply unconstitutional laws the judges record this violation. Thus it is permitted that judges look at the constitutionality of laws—indeed it is their duty to do so—in order to prevent application of legislation which, in their estimation, infringes the constitution.

Administrative judges and regular judges are equal in this competence. And if it is said this reality is not equivalent to an authority to nullify an administrative order and certainly not authority to nullify a law, the answer is: It is not nullifying a legislative command as the judicial decision does not nullify the law in question. Rather, the decision limits itself to the impossibility of applying the law in the case at hand. (al-Sanhuri, (1950) p. 15–16)

If this does not seem to be the full power of “judicial review” it comes close. Confirmation of the authority that this judicial decision conferred on the Egyptian judiciary and reinforcement of its independence of executive and legislative power is found in the fact that, even after 18 years of pressure on the judiciary from the new régime, that régime still found it necessary to establish a special high court directly under executive authority to rule on questions of constitutionality. The precipitating instance, of course, had been the wholesale dismissal of judges in the “massacre of the judiciary” in 1969 by an act of the President of the Republic, and the subsequent issuing of a court decision declaring the executive action illegal.

The Constitutional Court established in 1970 (although in the first years it did not carry the title of a constitutional court) remains outside the regular judicial structure, and its judges are appointed directly by the executive and not pursuant to the advice of the High Judiciary Council upon which sit members of the judiciary. However,

although constitutional questions now are submitted to the Constitutional Court, issues concerning civil rights are still usually taken to the *Majlis al-dawla* by virtue of its continuing function as protector of citizens from arbitrary and unwarranted government action. Thus whereas refusal to apply laws for reasons of unconstitutionality is no longer formally possible, the *Majlis al-dawla* retains its authority to review executive action, and it continues to be adviser to both the executive and the legislature. Laws, before they are submitted to the People's Assembly today must still be passed on by the *Majlis al-dawla*.

The *Majlis al-dawla* is considered by some to have a greater independence *vis-à-vis* executive power than the regular judiciary, although some of this independence was eroded by law in 1972, when the composition and competence of the High Judiciary Council was altered in regard to judicial appointments. The *Majlis al-dawla* retained its essential ethos, however, and a hard-fought struggle in 1984–1985 has restored a measure of its independence in the appointment of judges *vis-à-vis* the Ministry of Justice, representative of executive power.

Al-Sanhuri headed the *Majlis al-dawla* from 1949 until the political “crisis of March” in 1954. The Wafd government tried to put al-Sanhuri out of the *Majlis al-dawla* in 1950, but he fought back saying:

Between me and them (the politicians of the Wafd) is the constitution and the law of the *Majlis al-dawla* . . . How can I allow the government to deal arbitrarily with the *Majlis al-dawla* when it is the body supposed to impose just treatment of people when the government wrongs them? (Mursi, (1980))

Several of the eulogies reproduce a statement ascribed to an unnamed English journalist of the time, who is quoted as saying: “There is no judge in England like him!” (al-Qulali, Mursi, Khattab).

Among the charges levelled against him was the claim that his former political affiliation prevented his taking a position as judge. Al-Sanhuri replied that there was nothing in the Constitution or the laws that forbade him being president of a judicial body after having been minister for a political party, that he had severed his party connections and there was nothing that interfered with his independence as a judge. Moreover, he is quoted as saying, “The history of the Egyptian judiciary is full of names of judges who have been ministers and affiliated with political parties” (Mursi, (1980). The reference here, comments Mursi, is obviously to Abd Al-Aziz Fahmi, once head of the Liberal-Constitutionalist Party, who became president of an appeals court and then President of the Court of Cassation, the highest judicial office of the regular judiciary.<sup>15</sup>

Al-Sanhuri inaugurated the publishing of the journal of the *Majlis al-dawla* in 1950, and he wrote a lengthy introduction explaining the background of the *Majlis al-dawla*, introducing the articles of that first issue and indicating what the journal intended to publish in future. It was to have three sections, he said: the first for research and

<sup>15</sup> Abd al-Aziz Fahmi is remembered today by the legal/judicial professions as Egypt's most eminent judge. He had gone to Paris with Saad Zaghlul, was a member of the drafting commission for the 1923 Constitution, and Minister of Justice. Al-Sanhuri wrote a eulogy to him that was published in the *Majallat Majlis al-dawla* in 1951.



studies, the second to concern connections between judicial decisions and jurisprudence in administrative law, and a third section for documents. He is listed as *ra'is al-tahrir* (editor) on the cover of this first issue.

When the revolution came in 1952, al-Sanhuri supported the Free Officers and was legal adviser and draftsman for the Revolutionary Command Council, by virtue both of the function of the *Majlis al-dawla* as legal adviser to the government and his own personal support for the Revolution.

It was the *Majlis al-dawla* under al-Sanhuri that provided the *fatwa* setting out the legal foundation for Decree law No. 121 of 1952, by stipulating the procedure to be followed when the heir to the throne was under age following an abdication. Existing law covered only the case of an under aged successor following the *death* (not abdication) of the king. Had the latter procedure been followed, it would have meant calling the Wafdist parliament back into session to administer the constitutional oath to a "regency organisation". The decree-law allowed a "temporary regency organisation" to have the oath administered by the Council of Ministers. The 1923 Constitution, Article 23, required the Permanent Regency to take its oath before the parliament (Shakra, (1985), pp.173–175; esp. 173n. 2).<sup>16</sup>

The fact of power after the 1952 revolution did not translate immediately or easily into another basis of legitimacy. First the parliament went, then the parties, then the Constitution. While the old laws remained, new laws became superimposed, and the independence of the judiciary became subordinated to concerns with the independence of Egypt. But neither old laws nor judiciary completely lost their vitality. The judiciary was to resist cooptation as a body and only in 1969 did the final onslaught come, by an executive decree which was challenged and reversed by the judiciary itself.

During the first 18 months of the Revolution, when al-Sanhuri was still in place in the *Majlis al-dawla*, the old legalities were stretched but they were not ignored, and the *Majlis al-dawla* became involved with allowing approval of the decree-law restricting political parties. Muhammad Naguib's memoirs indicate that al-Sanhuri was opposed to this law but "yielded to the persistence of Suliman Hafiz", his deputy, and the argument that "the parties have been corrupted, which negates the real meaning of parliamentary democracy". However, al-Sanhuri hedged his agreement by including the proviso that "the government would not interfere unless it was necessary . . . and such interference would be under the direct supervision of the *Majlis al-dawla*" (Shakra, (1985), pp.300–301).

<sup>16</sup> Shakra takes the material for his discussion on this issue from: 'Abd al-Fattah Hasan, *Dhikrayyat siyasiyya* (Political Memoires) (Cairo (1974) pp. 137–139); Wahid Ra'fat, *Fusul* (Decisions) (Cairo n.d., pp. 123–130); Ibrahim Farag, *Dhikrayyat siyasiyya* (Political Memoires) (Cairo (1983) pp. 83–84); 'Abd al'Azim Ramadan, *Nasir wa azmat maris* (Nasser and the Crisis of March) (Cairo n.d., pp. 27, 30–31); Ahmad Hamrush, *Qissat thawrat 23 yulyu* (The Story of the July 23rd Revolution) (Cairo n.d., p. 235). Both Ra'fat and Ramadan, it is pointed out, exercise hindsight in criticising the Decree-law of 1952 as being a beginning of the erosion of constitutional government. Ra'fat had been the head of the section of the *Majlis al-dawla* that had issued the *fatwa* on which this decree-law was based. Ramadan, Hamrush, and Hasan all quote Suliman Hafiz, al-Sanhuri's deputy in the *Majlis al-dawla*, as saying: 'I, together with al-Sanhuri, brought about the victory we wanted from 'Ali Maher' (quoted in Shakra, (1985), pp. 175–176). 'Ali Maher, party and Palace intimate and sometime strongman of Egyptian politics, had been installed by the Free Officers as head of a civilian cabinet to run the government.



Al-Sanhuri is said to have been working on the draft of a new constitution for Egypt during the early period of the Revolution, (Gami'i, (1972)). He was known to have been among the proponents of a return to constitutional rule and continued to be a defender of the *Majlis al-dawla* against government interference. The issue of return to civilian rule became part of the power struggle both within the Revolutionary Command Council (RCC) and outside, and erupted into what has gone down in the history of Egypt as "the Crisis of March" of 1954.

On 26 March 1954 the Bar Association had a turbulent meeting where demands were made for a return to civilian government. On 29 March the RCC announced that it would continue to function until the end of the "transition period" in January 1959 (Ziadeh, (1968), pp. 156–157). On 29 March also, al-Sanhuri was ousted by force from the *Majlis al-dawla*.

Mass demonstrations erupted, reaching their peak on 29 March and demonstrators surrounded the building of the *Majlis al-dawla* in Giza. Al-Sanhuri was attacked by some of the demonstrators "who had been misled by biased information circulated by some opportunists", according to a statement by the Minister of Interior. They "drew blood" and al-Sanhuri was taken home by Salah Salem. Nasser visited him later in the evening to check on his condition (*al-Ahram*, 30 March 1954).

It is believed that "some army elements" had incited the mob and instigated the attack (Ziadeh, (1968), p. 156). It is claimed that the reason for the assault on the *Majlis al-dawla* and al-Sanhuri at that time in particular was the publication in *al-Akhabar* (newspaper) that the *Majlis al-dawla* was "about to issue decrees (*sic*) against the Revolution . . . (and) it had been rumoured that Dr al-Sanhuri was to become Prime Minister for the four months until the election of a constituent assembly" (Shakra, (1985), p. 590). Whatever was fact or fiction from that murky episode, on 16 April 1954:

the names were published of 38 leading politicians who, because they served as ministers between February 6, 1942 and July 23, 1952 and belonged to the Wafd, Liberal-Constitutionalist, or Saadist parties, are deprived of their political rights for 10 years. (*The Times*, London, 17 April 1954)

They were "held to blame for the state of corruption which pervaded Egypt's political life" from the date when the British government had sent tanks to the Palace to impose a Wafd government on King Farouk. Al-Sanhuri's name was, of course, among them.

## XI. SYNTHESIS OF THEORY AND PRACTICE

### The Major Treatises

The incident at the *Majlis al-dawla*, followed by the decree naming al-Sanhuri as one of those whose "political rights" were taken away, effectively ended his public life. Thereafter, he worked at home on *al-Wasit*, the first volume of which had appeared in 1952, and for a time continued to lecture at the Institute of High Arab Studies.

He was also called upon to assist with the drafting of more Arab codes and basic

legislation. In 1953 he had gone to Libya for that purpose, as Libya wanted to abolish its Italian code. In 1959 he went to Kuwait, where he decided against providing a civil code, but included much of what had constituted other civil codes in the Kuwaiti commercial code, provided a maritime law, a law of compensation, and a law establishing the primary courts.

He also worked on the constitutions of Sudan and Bahrain. He was asked to go to the UAE to draft their federal legislation but ill health prevented him from travelling to observe local circumstances, something he considered necessary for the drafting of legislation.

Out of his lectures at the Arab Studies Institute on comparative law came *Masadir al-haqq fi al-fiqh al-islami*, a six-part work which is now published in two volumes (al-Sanhuri, (1954–1957)). The title, in the words of Linant de Bellefonds, who translates it into French as “*Les sources du droit subjectif*”, is “somewhat confusing”. He explains that it is “a study of the rules which the free will (*volonté*) should take into account when that will is applied to positive law (*quand celle-ci est appelée à avoir des effets juridiques*)” (Bellefonds, (1958), p. 477).

The work, continues Bellefonds, is an examination of a question that has engaged the attention of modern Muslim jurists, namely to extract a general theory of legal action from the dispersed elements in the great classical treatises which do not attempt to synthesise. That which distinguishes al-Sanhuri’s work from others is the manner (*l’esprit*) 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 that of Muslim law, a universal and permanent character, “thought by some to be missing from Muslim law” (p. 477).

Al-Sanhuri, in his preface to the *Masadir*, explains what he means:

*Masadir al-haqq* are the bases from which right, legally speaking, derives; this right is a benefit having monetary value (*qima maliyya*) which the law protects. We are not concerned here with public rights or rights connected to personal status because, legally speaking, they do not have a monetary value. We are confining ourselves to rights having monetary value. Such rights are personal and material, as they are designated in Western jurisprudence. (al-Sanhuri, (1954), p. 5)

He explains further;

In Western law there is an essential distinction between personal right (*al-haqq al-shakhsi*) and material right (*al-haqq al-'aini*). It is the spinal column in Western law which derives from Roman law, and the source of this right, whether personal or material, is the most precise of subjects, although it is most vague in Western law. We will attempt here to specify them in Western law and then deal with them in Islamic law. That way we will put Islamic law beside Western law as regards those features that have central importance . . . . We will deal with Islamic law in the way we deal with Western law to see whether personal and material right in Islamic law is to be found in the sense known in that Western law which derives from Roman law, and whether we can attribute all these sources to legal conveyance and legal fact in the meaning known in Western law. (p. 5)

Bellefonds, both at the beginning of his review of this and again in closing, recommends that the work be translated so that it “can be put in the hands of all jurists” (Bellefonds, (1958), p. 478). Since this has not occurred we can, perhaps, consider it a

heretical notion. The "heresy" is, of course, to suggest that basic areas of concern to Western jurisprudence could benefit by comparison with the Islamic *Shari'a*, or that there might possibly be something valuable in the *Shari'a*, not just for orientalist scholars but for Western jurists.

Bellefonds comments further on the value of al-Sanhuri's work in another review written when the fifth volume was published. As al-Sanhuri has maintained throughout his writings, this reviewer comments, perhaps there may be principles of justice in Islam that can be considered "more just" than principles in corresponding legal areas in the laws of the West.

The constructions of the jurists of Islam in the area of agency . . . are not only in advance of the last stage of Roman law, but in many respects they show themselves superior to the systems presently prevailing in the West. (Bellefonds, (1959), p. 638)

Another noteworthy feature of this work of al-Sanhuri referred to by Bellefonds concerns obligation. Al-Sanhuri, he says, takes the opportunity in reference to this subject:

to excavate the Muslim notion of usury and indicate its evolution, providing a study which is probably the most valuable that we have on this question;

and Bellefonds reminds us that Muslim law is "particularly complex in its intention to prevent all chance and illicit profit in legal relations" (Bellefonds, (1958), p. 477).

The matter of usury in Islamic law seems to engender great interest in Islamic law circles in both East and West. Bellefonds' comments quoted above are particularly interesting in the light of comments on the subject by another scholar, Majid Khadduri, one who straddles both East and West. In reference to how al-Sanhuri dealt with the problem of the prohibition of "usury" in Islamic law, Khadduri notes:

Drafting the Iraqi Civil Code, Sanhuri consciously avoided grappling with the problem of interest, partly because it was not dealt with in the *Majalla*, the code that had been in force in Iraq, and partly because it would arouse the opposition of scholars who considered it contrary to Islamic standards. In practice, however, interest had already become part of the economic system, notwithstanding that its use in business transactions had yet to be justified. In Egypt, the situation was somewhat different from Iraq as its former civil code, a replica of the French Civil Code, took interest for granted. (Khadduri, (1984), p. 208)

When al-Sanhuri revised the codes "in accordance with Islamic standards" he should, according to Khadduri, have justified interest "on Islamic grounds". It is his claim that al-Sanhuri did not do so. Some people, Khadduri continues, agree that:

a distinction between usury as a transaction between money lenders (*murabin*), and interest as a transaction between economic institutions . . . and investors must be made . . . Sanhuri, accepting without hesitation the distinction between interest and usury, recognized interest but he failed to provide a rationale for it. (p. 209)

Dr Khadduri approaches the matter of the use of Islamic law for the civil codes from the point of view of the revision being "in accordance with Islamic standards." It is my contention that such a description of al-Sanhuri's purpose does not begin to encompass the complexity of the method of comparative law which he had developed and with which he was working. His method, moreover, contains a certain dialectic.

He not only posited Islamic standards against the existing code, but also included usage of that code in Egypt—its interpretation and application by the Egyptian courts. In addition, he considered the most recent innovations of Western legal thinking as it concerned the requirements for “justice” of particular “modern” conditions.

In this most sensitive matter of usury/interest as referred to by the abovementioned two commentators on al-Sanhuri’s work, one can demonstrate, I believe, al-Sanhuri’s method and the distinction he makes between the “scientific stage” of work and the “legislative stage” in the refurbishing of Islamic law for modern use. The *Masadir* represents work of the “scientific stage” essentially. There, as Bellefonds expresses it, he “excavates”; that is, he explores the ways in which legal concepts have been dealt with by various schools of Islamic law and the great Islamic scholars of jurisprudence, 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. That there is a progression or development in thinking of the Islamic scholars (if only by virtue of having to apply concepts to new circumstances) is taken for granted. In “excavations”—archeological or legal—one finds each succeeding construction built upon structures which were developed previously. The plight of Islamic law in “modern times,” as I read al-Sanhuri’s formulation of the issue, is not that it *did not* historically progress and not that it *cannot*, but rather that great legal minds stopped working on legal problems in the light of new circumstances and thus the law ceased to evolve.

Therefore, it would seem that it is not an issue of “the theoretical question of the harmony between Western and Islamic legal standards” that Khadduri claims al-Sanhuri does not resolve (p. 209n) but rather a concern with turning again to developing the Islamic legal concepts, this time in the light of new (“modern”) conditions. That there is no “harmony” is not the point. We should not expect there to be one. Otherwise Islamic law would not be distinctive and “one of the world’s great legal systems”, and the exercise of developing a comparative law within al-Sanhuri’s frame of reference with Islamic law as a main pillar would have no meaning.

Therefore, in order for the theoretical status of “usury” to be grappled with under modern conditions one must understand the variations of circumstances and contexts under which it has been dealt with in the past. If al-Sanhuri “readily accepts” that “interest” is distinguishable from “usury” then his excavations presumably must have shown him that “interest” neither *has* nor *can* be considered to be the evolution of the concept of “usury,” and the rationale for “interest” rests elsewhere. And that is where the examination of “modern” systems enters.

As Bellefonds notes, each volume of the *Masadir* has a twofold comparative organisation. There is an internal comparison between the doctrines of the different schools of Muslim law and relationships between them, and then a consideration of legal concepts in “the great European legal systems, ancient and modern” (Bellefonds, (1958), p. 477).

Some concepts of what constitutes “just” legal relations are the same or similar, some different. Some concepts appear in one system and do not appear in another. How was Roman law glossed and later revised for use in the European codes? A study of modern legal systems moreover implies a concern with how these states dealt with

their own “legislative stage”. Usury and interest are distinguished in modern Western law; usury was condemned by both historical systems. The record of where and when and how the distinction appeared in those systems and where it has, is the stuff of which al-Sanhuri’s “comparative-historical method” is composed.

The *Masadir*, as the record of al-Sanhuri’s work in his prescribed “scientific stage”, is colossal in scope:

Rarely are modern scholars of jurisprudence emboldened to compare the Muslim system to that of other civilizations. The gulf separating them appears too large. It takes all the learning of al-Sanhuri to succeed in constructing a bridge between them. (Bellefonds, (1958), p. 478)

The “bridge” as should be noted, is not “harmony”, as such but identification of theoretical and actual legal relationships and concepts of law—or of justice—which each reflects. Comparison on a basis of theory is an entirely different proposition than casuistic comparisons. And it is the former wherein is to be found the core of al-Sanhuri’s method. Al-Sanhuri’s work on the modern codes had indeed, as Bellefonds notes, “served him well” (p. 478). It certainly sensitised him to the matter of theoretical structures underlying isolated legal concepts and therefore connecting them.

Then there is the matter of the rich detail that has been produced in the course of the development of theory.

Most modern writers, when dealing with the classical writers, are not able, as al-Sanhuri is, to separate sharply between that which is their own innovation and that which has been taken from elsewhere. If one day this work is translated the Western reader will be amazed by the richness of information concerning, notably, developments pointed out by the author in German, Roman, Latin, etc. legal systems, that his method of discovering relationships with the Muslim system have led him to study. (p. 478)

Where the *Masadir* records the dialectic between ancient and modern, Eastern and Western legal systems, *al-Wasit* contains another kind of dialectic, or rather, a new, more advanced, synthesis of theory and practice that the new Civil Code of Egypt—and by extension those of other Arab states—represents.

Al-Sanhuri had been working on the synthesis of theory and practice, in fact, throughout his life, and his work had a pattern. As he tells us in the introduction to the first volume of *al-Wasit*, it is the middle work between the summary work (*al-Wajiz*) and the fully elaborated work (*al-Mabsut*). Perhaps the title is best rendered *Middle Commentary*.

But there never was a *mabsut*. Al-Sanhuri is quoted as saying in 1968:

*Al-Wasit* became more elaborated than I had anticipated. I wanted it to be of medium length but it became the long elaboration. I do not believe there is more in me. (Mursi, 1980)).

It forms, however, *the* comprehensive treatise on Egypt’s civil law, written by the person who was most knowledgeable by far as to the meaning and intention of the provisions of the new code, how and why it had been set out in the way it had, and how it should be interpreted; how it was unique and independent as a code, and how the civil law of Egypt became, in a word, Egyptianised.

It is possible to trace how he had begun preparing this work from his first writings in Arabic. He tells us in the introduction of *al-Mujiz* (1938) that he had not intended to issue the *mujiz* until after he had come out with the *mabsut*, for which he had already brought out the first part, *Nazariyyat al-'aqd* in 1934. However, he was to decide that the need for a *mujiz* was at least as great. He had in mind, he says, "a concise volume, not an abridgement, to make it detailed but without elaboration, to meet general needs as well as those of the judiciary". Because he was particularly cognisant of the needs of the latter, "many judicial decisions were included in the notes", although he restricted himself "to Egyptian court decisions", that is, to what he believed was needed by the practitioner of law.

There is no difference between the two books (*Nazariyyat al-'aqd* and *al-Mujiz*) except that in the abridgement the issues have been made more concise. Whoever reads *al-Mujiz* can proceed to the *mabsut* which is more detailed. The *mujiz* paves the way for the *mabsut*. (al-Sanhuri, (1938c), p. 1)

In 1966 he published another shortened version, *al-Wajiz*,<sup>17</sup> which is the first three books of *al-Wasit* summarised. In it, however—and this is how it primarily differs from the *mujiz*—the theory of obligations in Egyptian jurisprudence is revised according to the changes in the new Civil Code.

In these volumes 'Abd al-Razzaq al-Sanhuri—scholar, law-giver, and jurist—has produced for Egypt and the world a scholarship of comparative jurisprudence on civil law unrivalled in breadth and scope, wherein Islamic law is prominently featured, dealt with in terms of theory and as contemporary practice, and is placed beside and treated on a par with "the great legal systems ancient and modern".

But the world does not know about these works, and few in Egypt indicate that they realise, other than in very general terms, what they comprehend.

## XII. THE LEGAL TERRAIN OF ARAB UNITY

### Towards an Arab Civil Code

Whereas there has been an almost complete scholarly silence in Egypt on al-Sanhuri, an article he published in 1962 about the possibility of a uniform Arab civil code has occasioned recent comment in a paper by Tariq al-Bishri, an Egyptian scholar and author who is also a senior judge in the *Majlis al-dawla*. This paper (al-Bishri, (1985)) considers "the legal question" as regards the status of the Islamic *Shari'a* versus that of the positive law. It was presented at a colloquium on "The Heritage and Contemporary Challenges to the Arab Nation" held in Cairo during September 1984 under the auspices of the Center for Arab Unity Studies. The application of Islamic law con-

<sup>17</sup> *Al-wajiz* and *al-mujiz* have almost the same meaning: "summary" or "outline" or a synonym thereof, indicating a shortened or abbreviated work.



tinues to be an issue in contemporary Egyptian politics, while “the heritage” (*al-turath*) is a topic of research and discussion engendering much interest in Egypt’s intellectual circles.

In his introduction to *al-Wasit* al-Sanhuri had expressed a hope that the time would come when the jurists of the Arab countries would co-operate in producing an Arab civil code “underpinned by Islamic jurisprudence and the laws of all the countries that have participated in the Arab civilization” (al-Sanhuri, (1952) w). In 1962 he wrote:

I believe that Arab unity is a natural thing as the Arab peoples are one nation; . . . the strongest support of Arab unity is cultural unity, and the most important basis for unifying culture is a unified legal culture. (al-Sanhuri, (1962), p. 7)

To know what may be possible for development in the future “a thorough study of the past is necessary” and then, “an examination of the present” (p. 7). In his detailing of the task ahead, there are strong echoes of the project for the future he had outlined more than 35 years earlier in *Le Califat*.

The “thorough study of the past” that al-Sanhuri recommends in 1962 has two aspects, which in turn are each divided into stages: (1) a study of the “founding of Islamic jurisprudence”, first “in the ages before the time of the founding of the four main schools”, then “a consideration of the traditional views and the different trends in legal thinking including the rules underlying the work of the Islamic jurists”; (2) then comes the work of comparative study of the different schools, not only the four main ones, but others as well “to ascertain what is similar and what different in legal thinking”. Then comes the work of comparing them with modern Western jurisprudence:

to see where the Islamic jurist stopped in developing the law, whether in the basic rules or in the detailed provisions. Then these details should be developed on the basis that the Islamic jurists set, using their wording, style and logic. When Islamic jurisprudence needs development, develop it, but when it conforms to the civilization of the present age, leave it as it is. (pp. 27–28)

Such studies will be arduous, he says, and will take “scores of years” before there can be “a renaissance like that which occurred in Roman law”, so that Islamic law “will be suitable for the modern age” (p. 28). He emphasises that such an activity does not involve simply taking precepts of Western law and “trying to make them come from Islamic law or claiming that Western law is Islamic law” (p. 29).

This article indicates two things. Firstly, al-Sanhuri has remained firm in the essentials of both the task ahead and the method for making the *Shari’a* “suitable for the modern age”. Secondly, it also indicates that al-Sanhuri does not consider himself to have completed the task as specified. There is still plenty of work remaining to be done by others.

The “past” as al-Sanhuri specifies it, also includes the experiences of Arab countries. There are three situations: (1) those states which continued with an “unwritten” (i.e. uncodified) version of the Islamic *Shari’a* (Saudi Arabia and Yemen); (2) those states which were under Ottoman control during the second half of the 19th century, where the *Majalla* was applied (Syria, Palestine, East Jordan, Iraq and Libya) and

where this law remained the civil law after the fall of the Ottoman empire and the advent of the French and British mandates (and in the case of Libya, Italian rule). Only Lebanon, he says, changed its civil law to one patterned on the French code; and (3) those states which borrowed French law (Egypt, Lebanon, Tunisia, Algeria, and Morocco) (pp. 8–10). The implication here is that there is not such great legal diversity in the Arab world as might be assumed. Moreover, prior to the 19th century, he points out, uncoded Islamic jurisprudence was applied throughout the region (p. 8).

In terms of legal reform, says al-Sanhuri, the Arab world has passed through two stages: (1) the codification—albeit partial—of Islamic law concerning civil matters (which he specifies as concerning financial transactions (*mu'amalat al-maliyya*) and covering real and personal rights) in the codifications of the *Majalla* and the *Murshid al-hayran*; and (2) the new civil codes of Egypt and Iraq. This second stage constitutes “the present” for al-Sanhuri, in terms of both theory and practice.

The Iraqi code takes the *Majalla* as its main source, supplemented with several recently enacted Iraqi laws (mainly the Land Law and other laws regarding property rights) and is closer to the *Shari'a* than is the Egyptian Civil Code which took as its basic starting point the old Egyptian civil codes. However, the new Egyptian code was needed for the Iraqi code to be completed. The new Egyptian code served as a model, al-Sanhuri says, in terms of the divisions used to organise the Iraqi material, and for the additional legal rules needed to fill in certain areas of the civil law, texts were taken from the Egyptian code (pp. 18–20).

It should be remembered that in his initial efforts to produce a new Iraqi code (*supra* part V) al-Sanhuri had begun with a synthesis of “modern Western codes”, and his work on these codes had been completed by the time he returned to the Iraqi code in 1943 after his completion of the draft of the Egyptian code. By the same token, his work on the Iraqi code, together with his scholarship and teaching of comparative law using the *Majalla* and the *Murshid*, had provided him the basis for his work on the Islamic law provisions in the Egyptian code. The experiences gained from his initial work in Iraq, comments the abovementioned Egyptian scholar:

opened Islamic jurisprudence for him as it had not been opened for him before; . . . there he was confronted with the problems of its applications, and its intricacies, procedures, and instrumentalities. (al-Bishri, (1985), p. 633)

The Iraqi code, says al-Sanhuri, was “the first modern code to join together Islamic jurisprudence and modern Western law on an equal basis”, and it was “the most important experience in modern civil codification” (al-Sanhuri, (1962), p. 24). The new Iraqi code therefore “takes great strides” in al-Sanhuri’s “second stage”.

In it we put together the codified provisions of the Islamic law and set them beside Western law, as represented in the new Egyptian code . . . and this paves the way for the third and final stage, the re-birth of Islamic jurisprudence, . . . for the day when this jurisprudence becomes the source for modern civil provisions, when it becomes as well-adapted to the currents of the civilization of the present age as the most modern and progressive codes. (pp. 22–23)

Before this can happen, however, the detailed work of developing Islamic jurisprudence (indicated above) must take place.

Islamic law is as much an archaic law as is Roman law, but it is no less precise in its logic, or in strength of expression, or in being able to develop. (p. 23)

The outlines of the future dialectic are thus able to be detected, if al-Sanhuri's specifications are followed: Islamic legal theory versus Western legal rules, and when the Western rules reflect a different underlying theory they are to be eliminated and new rules put in their place, rules that are reflective of Islamic legal theory.

The goal towards which I am striving is that there will be an Arab civil code derived primarily from the Islamic *Shari'a*. (p. 23)

In light of the fact that al-Sanhuri's work would seem to straddle the two issues which, more than any others, energise scholarship and politics in Egypt and the Arab world—Arab unity and the application of Islamic law—the virtual oblivion into which al-Sanhuri's work has fallen may, perhaps, seem surprising. Certainly the political showdown with the leaders of the 1952 Revolution over the sanctity of the judiciary and the return to a rule of law and constitution that ended his public life in 1954 has had something to do with this. But there is also, it would seem, another consideration. From his earliest writings on the Caliphate, throughout his later scholarship and code draftings, al-Sanhuri's work had a determined secular orientation. He consistently maintained that Islam as civilisation is separable from Islam as religion, and that the development of Islamic jurisprudence concerned the former.

Al-Sanhuri's secularism certainly differs from that of someone like 'Abd al-Raziq. In the context of the debate of the 1920s (*supra* part III) 'Abd al-Raziq maintained that the Caliphate had *no* basis in law, while al-Sanhuri presented the Caliphate as part of the public law of Islam. However, present trends which call for the renewed application of Islamic law, generally do not accept that Islamic law can be separated from religion. Exemplifying such trends, Tariq al-Bishri remarks:

To the end, the matter for him remained strictly defined within the framework of pure, uncontaminated jurisprudence, without connecting this jurisprudence with religion and its sources and origins in the Koran and the Sunna. (al-Bishri, (1985), p. 633)

The charge of not connecting Islamic jurisprudence with religion is certainly correct. Nothing additional about this needs to be said. But that he was operating in a realm of "pure jurisprudence" unconnected with its sources in the Koran and Sunna, I believe, is not tenable, inasmuch as that is precisely from where the Islamic *Shari'a*, as developed by the legal scholars of Islam, originally derives.

This complaint concerning al-Sanhuri's secular bias does, however, signify the dominant approach to the revival of Islamic law today and why it is often associated with "Islamic fundamentalism". Fundamentalism—semantically and actually—signifies going back to origins. In the context of Islamic law, it means ignoring the centuries of legal development and the jurisprudence of the scholars in favor of direct interpretation of the original sources.

The fundamentalist approach is for the masses, the method of al-Sanhuri is for those learned in the law. Our age is for the masses, not for jurist-scholars, and that perhaps is the real reason why one eulogy to al-Sanhuri was entitled: "The Man Whom We Forgot" (Gami'i, (1972)).

EPILOGUE  
ISLAMIC LAW AND CIVIL CODE

### Recent Developments

'Abd al-Razzaq al-Sanhuri may have been relegated to the status of minor political actor, half forgotten, by the historical memory of Egypt. The Civil Code, however, remains the basic law of Egypt, and al-Sanhuri's multi-volumed commentary is still the authoritative basis for its interpretation.

The issue of islamising the laws, however, is also very much part of the present scene. Although more or less dormant during the 1950s and 1960s, the issue was to re-emerge at the beginning of the 1970s. Inevitably, the question of the Islamic content of the Civil Code also appeared.

First came a new constitution in 1971, the first constitution in Egypt's modern history which provided explicitly that "the *Shari'a* is a principal source of (Egypt's) law" (ARE, (1985a), p. 998; Habachy, (1985), p. 105). In 1971, however, constitutionalism was at a low ebb, and little attention was paid at the time to the particular innovation in Article 2. Al-Sanhuri had, after all, included similar language in the first article of the Civil Code. Then there was a movement on three fronts: The constitutionality of the Civil Code was challenged in the courts, committees of the *Majlis al-sha'b* (parliament) began drafting "Islamic codes", and Article 2 of the 1971 Constitution was amended.

The constitutional issue derived from a case which was brought before the *Majlis al-dawla* by one, Fuad Gudah, against al-Azhar University to collect an unpaid debt of some LE 592, being the balance owed on the price of surgical instruments supplied to the Faculty of Medicine. The court held for the plaintiff and directed al-Azhar to pay the amount owing *together with interest at the rate of 4 per cent*. The Rector of al-Azhar appealed. In the course of the appeal proceedings, the constitutionality of Article 226 of the Civil Code was challenged. Article 226 specifies that interest shall be charged on debts from the date a judicial claim is submitted. In the plea of non-constitutionality it was contended that Article 226 was in conflict with the *Shari'a* since the *Shari'a* forbids the payment of *riba* (usually translated as "interest"). In its session of 3 April 1978 the High Administrative Court suspended its hearings and sent the case to the Constitutional Court (ARE, (1985a), p. 993).

Also in 1978, in its session of 17 December, the *Majlis al-sha'b* passed a resolution forming a special committee to study proposals for applying the rules of the *Shari'a* and for their codification (ARE, (1982), p. 33).<sup>18</sup> On 20 June 1982 special committees were formed to review the work of the committees for codifying the *Shari'a*. On 1 July 1982 reports of special committees were submitted together with draft codes which were on that date referred to the Legislative and Constitutional Committee (ARE, (1982), pp. 32–41; ARE, (1985b), p. 35). The draft codes were printed as appendices to the transcript of that session of the *Majlis* and included the following:

<sup>18</sup> There was an indication by Mumtaz Nassar, speaking in the *Majlis al-sha'b*, 4 May 1985, however, that work in this direction of some kind may have begun earlier: "Since 1976 the *Majlis al-sha'b* began the preparation of studies with the formation of committees and gathering materials, a number of the studies which . . . (concerned) legislating the *Shari'a* in all the texts of the present laws". (ARE, (1985b), p. 18)

- Draft Law of Civil Transactions (more than 1,000 articles);
- Draft Law of Evidence (181 articles);
- Draft Law of Litigation (513 articles);
- Draft Law of Criminal Penalties (635 articles);
- Draft Law of Maritime Commerce (443 articles);
- Draft Law of Commerce (776 articles); (1985b), p. 19)<sup>19</sup>

No further action was taken in the *Majlis* until 4 May 1985.

Meanwhile, in May 1980 the Constitution of 1971 was amended. Passed by the *Majlis al-sha'b* and submitted to referendum on 22 May 1980 the language of Article 2 of the 1971 Constitution henceforth was to read:

Islam is the religion of the State and Arabic is its official language. Islamic jurisprudence is *the* principal source of legislation. (ARE, (1980), p. 7) (emphasis added)

The purpose of this amendment, said the special committee which had drafted the amendment in a report submitted to and approved by the *Majlis al-sha'b* in July 1979, was "to require the *Majlis al-sha'b*, when seeking a rule of law, to have recourse to the rules of the *Shari'a* to the exclusion of any other system of law" and in order to insure that "legislation does not contradict the foundations and general principles of the *Shari'a*" (quoted in ARE, (1985a), p. 997). The General Committee of the *Majlis al-sha'b* in a report approved on 15 September 1981 was more specific as to the meaning of the amendment:

This amendment means that it is no longer possible in the future to enact any legislation which contradicts the rulings of Islamic law. It also means the necessity of reviewing the laws which were in effect before the application of the Constitution of 1971 and the amending of them to bring them into conformity with the rules of the *Shari'a*. (quoted in ARE, (1985a), p. 998/Habachy, (1985) p. 105)

However, the Report cautions that:

the change from the legal system presently existing in Egypt, . . . to a completely Islamic legal system will require patience and proceeding with the utmost care as regards practical considerations . . . . If the legal system in its entirety is to be changed, a suitable period of time is needed to allow the compilation of these laws and to organize them within the framework of the Koran and Sunna, and the opinions of the Muslim jurists. (p. 998/p. 105)

On 4 May 1985, the decision of the Constitutional Court in the al-Azhar case was announced. Simultaneously, the *Majlis al-sha'b* was debating the matter of the application of the *Shari'a* in Egypt.

In rejecting the plea of the non-constitutionality of Article 226 of the Civil Code the Court said:

Only the legal enactments issued after the coming into effect of the obligation to conform to Islamic Law are affected; . . . legal enactments which ante-dated the amendment are not affected by the obligation to conform because they were in existence before that limitation became due for implementation. (p. 997/p. 104)

<sup>19</sup> As summarised by Deputy Sheikh Salah Abu Isma'il during the debate of 4 May 1985. Although these draft codes appeared as part of the proceedings of the *Majlis al-sha'b* and bear their imprint, circulation has been extremely limited.

The “true purpose of the 1980 amendment to Article 20 of the Constitution”, said the Court, is that it is intended to be “a limitation on the power of the legislative authority” as to the sources from which it should draw its rules of law (p. 999/p. 105).

Otherwise, the implication would be that “all past legislation which contradicts *Shari’a* principles should be scrapped”, said the Court, and such a situation would “clearly lead to contradictions and confusion in the judicial process in a manner which would threaten stability”. Moreover:

had the legislator of the Constitution wanted to incorporate the principles of the *Shari’a* into the Constitution specifically, or had he intended that these principles be enforced by the courts without the need to formulate them as specific legislative texts according to the set procedures of the Constitution—he did not lack the authority so to provide, clearly and explicitly. (p. 999/p. 105–106)

However, restricting the applicability of the constitutional amendment to future legislation “does not exempt the legislator from responsibility for the past laws”, continued the Court, especially those “in contradiction to the principles of the *Shari’a*”. It is, moreover, the legislator’s responsibility “to take the initiative in sifting out any infringement of the aforementioned principles from the texts of these laws”. Ultimately, in order that there be harmony between past and future legislation, “they all must agree with these principles” (pp. 999–1000/p. 106).

In assessing the significance of this decision, Saba Habachy, friend and contemporary of al-Sanhuri, has highlighted two features for particular comment. In denying retroactive effect to the amendment to Article 2 and interpreting the change to mean that the *Shari’a* is to be the main source of *future* legislation, “the responsibility for implementing Article 2 of the Constitution as amended (has been) shifted from the judicial to the legislative authority” (Habachy, (1986), p. 240). He also notes that the Court has quoted a “significant phrase” from preparatory reports concerning the proposed amendment to Article 2 of the Constitution. This phrase deprecates:

the change from the present legal system of Egypt which goes back more than one hundred years and its replacement by a complete system of Islamic law.

The source of the quoted language is the Report of the General Committee of the *Majlis al-sha’b* at the time the Amendment was being considered (see above). The Court, comments Dr Habachy, “recognises . . . the necessity of change of law in the *Shari’a* according to the requirements of time and place” (p. 240).

The language quoted by the Court, referred to above, carries the further implication, of course, that the present legal system is also part of Egypt’s legal heritage.

But the prime significance of this decision, although based on a legal technicality and adding nothing to the “centuries-old argument” concerning interest, is, for Dr Habachy, “that it has saved, not merely Article 226, but the entire new Egyptian Code of Professor Sanhuri of which the article in question is a part” (p. 240).

The saving of al-Sanhuri’s Civil Code with one fell swoop of the judicial pen went largely unnoticed because, on the same day, Egypt’s Constitutional Court announced another decision, anxiously awaited for many months and much more publicised. It was a case concerning family law, also brought as a constitutional challenge on the strength of the amended Article 2 of the Constitution, this time to the Personal Status



Law of 1979 ("Jihan's Law") which was declared unconstitutional. This law had done such unspeakably "un-Islamic" things as allow a divorced wife to continue to live with her children in the apartment of marriage, and give a wife the right to apply for a divorce when her husband married another woman.<sup>20</sup> The Egyptian general public was at that moment in history considerably more interested in apartments, divorces and polygamous marriages than in the saving of the Civil Code.

Nor was there, generally speaking, public consciousness of the debate that same day in the *Majlis al-sha'b* on the same issue—the meaning of the Constitution's amended Article 2. The *Majlis al-sha'b* debate took place pursuant to the submission in that session of the Report of the Committee on Religious and Social Affairs, the third section of which was entitled, "Revision of the laws insofar as they are in contradiction with the rules of the *Shari'a*". The Report interprets the constitutional amendment as meaning:

that the present laws should be reviewed in stages, in a scientific manner, and those features revised that contradict the principles of the *Shari'a*, a matter on which all parties and political orientations agree.

When the present legislative texts are reviewed:

what is not in contradiction with the principles of the *Shari'a* should be left alone, while that which does contradict the rules and principles of the *Shari'a* should be revised, having concern for legislative stability, and the judicial and jurisprudential heritage; and the revisions should be in harmony with the conditions of society. (ARE, (1985b), p. 13)

The Report speaks of the Civil Code as "the basic law and support of the legal system of the State" and refers to a decision of the *Mahkamah al-naqd* (Court of Cassation) in its session of 27 July 1980:

which affirmed that the rules of the present Civil Code were enacted after lengthy study and reflection. Moreover, the majority of them have their origin in the rules of the *Shari'a*, except in a few rare instances, as is confirmed in the explanatory memorandum (of the Code) where the origin of these rules in Islamic jurisprudence is stated . . . : (Therefore) there is no need to revise the rules of the present civil law; it is enough to amend the texts that conflict with the *Shari'a*. (p. 14)

A number of deputies spoke. Comments ranged from expression of support for the part of the Report that spoke of the application of Islamic legislation not requiring abolition of all other laws, to the calling of attention of the deputies to the fact that the draft Islamic codes had been languishing in committee since 1982. All attested to their support for the *Shari'a* and several spoke of the "purification of the laws".

The government had a position paper on the issue, and at the close of the debate the Government's communication was read. There were six points, the general sense of which is as follows:

- (1) Egypt's legal system is one of stable laws which have their basis in the *Shari'a*, the Civil Code being a good example;

<sup>20</sup> The decision of unconstitutionality was, however, based on technical rather than substantive grounds. The Court said in its opinion that reform of family laws was not of sufficient urgency to justify the use of exceptional presidential decree-law powers delegated by the legislature for use in emergencies or while the *Majlis al-sha'b* was in recess.

(2) The judiciary in Egypt is firmly established with its system embedded in the constitution and the laws which agree with the principles of the *Shari'a*; it would be no small matter to rebuild such a system and much of value in past efforts would be destroyed in the process. Therefore it is preferable to work on developing what already exists, according to the *Shari'a*;

(3) The principles of the Islamic religion call for a society of equality, justice, sufficiency, tolerance and other qualities of which we can be justly proud in front of the whole world; and our work is to assure such a society;

(4) There is consensus on the principles of the *Shari'a* concerning civil transactions; only in some details is there controversy, and the controversial issues must be studied carefully;

(5) Egypt has never been isolated from the world and interacts with what happens today throughout the world; we must find ways to surmount the present burdens of our international commodity transactions (amounting to more than fifty per cent of GNP), so that we may benefit from them;

(6) All sects of Egyptian society accept drawing our legislation from the *Shari'a* and the application of *Shari'a* principles concerning such things as utility, necessity, and the avoidance of harm. (ARE, (1985b), p. 35)

A motion to approve the Report of the Committee on Religious and Social Affairs and the statement of the Government was passed by a show of hands. A motion to bring the draft codes presently in the Legislative and Constitutional Committee to the floor was not submitted to a vote because, the Speaker explained "yet again", there were presently no draft laws or proposals for draft laws before the present session of the Assembly, any such matters before a previous session having died with the ending of that session. If any member wished to submit proposals for draft laws, he must first "clear the road" of the restrictions prescribed by the parliamentary procedures (p. 35).

That is where the matter presently rests. Action on substitute codes is in abeyance, "Dr al-Sanhuri's Civil Code" remains the basic civil law of Egypt, and the present government—the executive and the legislature—has given formal recognition to the efforts of al-Sanhuri to construct a law that would be in accord with the *Shari'a* in spirit and in as many particulars as "modern conditions" permitted.

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