BETWEEN IDENTITY AND REDISTRIBUTION: SANHURI, GENEALOGY AND THE WILL TO ISLAMISE *

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Abstract

Is Sanhuri’s Egyptian civil code Islamic? I examine here the distributive aspects of this identity question and argue that the code’s Islamicity rests on a genealogical study of its drafter’s “will to Islamise.” From his doctoral theses onwards, Sanhuri’s intellectual genealogy is one of discursive and existential division between two different projects, namely, the identity project of modernising Islamic law and the redistributive project of engineering modern law to promote social justice. In the Egyptian civil code, Sanhuri meant to bring together those two projects under a single normative order. To this end, he resorted to the Franco-American concept of the “social”—a hodgepodge of socialist doctrine and sociological jurisprudence. Although initially promoting the code as “Islamic,” he eventually reneged on this claim as the “social” was displaced by revolutionary turns in Nasser’s Egypt.

[The draft code] is a great victory for Islamic law . . . all its articles could be easily argued to represent principles of Islamic law.

Sanhuri, 1942**

In truth, the new Egyptian civil code is a faithful representative of Western civilian culture.

Sanhuri, 1962***

HOW DOES ONE MEASURE THE SUCCESS of twentieth-century projects designed to reconstruct Islamic law along modern lines? To my mind, a reconstructive project in Islamic law loosely comprises any jurisprudential exercise preoccupied with the modern displacement of Islamic law by Western-inspired legislation. In response, the project adopts an agenda for “legal reform” and sets out to “modernise” a

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particular field of Islamic law. For the purposes of this article, the project is deemed successful only if the “modern” legal artifact it advances is equally considered to be “Islamic.” Stated in these very general terms, reconstructive projects in Islamic law cover a wide range of legal scholarship; examples extend from the discrete micro-engagements of redrafting an Islamic marriage contract,\(^1\) or devising ribā-free financial instruments,\(^2\) to the more comprehensive projects of codifying Islamic contract law.\(^3\) Any of these projects faces the same question, namely, how to measure the “Islamicity” of the resulting artifact? Beyond which compromising threshold does the project’s “modernisation” agenda render its final artifact too hybrid, too crossbred, in short too “Western” to deny it the prefix “Islamic”?

I address this very broad and notoriously problematic inquiry by examining the specific case of the Egyptian jurist Abdel-Razzak al-Sanhuri (1895-1971), and his most celebrated artifact, the 1949 Egyptian civil code. Undisputedly the master re-builder of Arab law in the twentieth century, Sanhuri’s code instituted a particular type of legal consciousness with near hegemony in the juridical field. Western scholars commenting on the code have traditionally downplayed its Islamicity or denied it altogether.\(^4\) Five years after its promulgation, J.N.D. Anderson set out to examine the “debt” which Sanhuri’s modern artifact “owed” to Islamic sharī‘a.\(^5\) In the most exhaustive and enduringly influential study on the subject to this date, Anderson audited the code’s Islamicity with entries under four different categories and is widely understood to have found “the code authors’ claims to Islamicity exaggerated.”\(^6\) Anderson’s view has secured an almost uniform following and the code has generally been dismissed as decidedly European in origin, with perhaps a “slight” debt to Islamic law.\(^7\)

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3 The earliest attempts here would be the Ottoman Majallah and Qadri Pasha’s Murshid al-Hayrān.
4 I refer exclusively to the English language discourse on the subject.
With empirical zeal, Anderson set out to calculate the number of articles in the code that are derived from Islamic law. There are two problems with such an approach. First, this seemingly empirical approach obfuscates the investigator’s bias for a particular reading of Islamic law laden with metaphysical premises. More specifically, this reading is premised on the existence of an *Islamic essence* as a static metaphysical concept, one that literally exists outside of history, precedes Sanhuri’s modernisation project and is certainly external to his will. This premise blocks any discussion of Islamic law as a subjective concept in a historically dynamic project. Accordingly, Anderson approached Sanhuri’s code with the assumption that its Islamcity could be verified objectively without the need to examine Sanhuri’s creative agency in determining what makes a legal document Islamic. Second, Anderson’s metaphysical bias legitimates an ideologically conservative agenda in legal reform. It transforms the act of codification into a functional exercise in modernisation and focuses exclusively on the identity aspects of legal reform. The code is never discussed as a distributive instrument that allocates wealth and power. Anderson thus disregards the fact that any reconstructive project that aims to “modernise” Islamic law is by default a “redistributive” project that produces winners and losers.

I will propose an alternative method for assessing the Islamcity of the code. My approach is consciously anti-metaphysical, not in the

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Code of 1949 may say, Islamic law has not become one of its constituent elements to any greater degree than it had been in its predecessor”; George Sfier, *Modernization of the Law in Arab States* (Austin and Winfield, 1998), 93. For an overview of the literature, see Vogel, *ibid.*, 168, summarising the situation and concurring that “[i]n the event, the substance of the law was overwhelmingly European in origin;” Enid Hill, “Al-Sanhuri and Islamic Law,” *Cairo Papers in Social Science*, 10 (1987), 71-83 [hereinafter *Sanhuri*]. 8 The accountant’s zeal is better demonstrated in Anderson’s later observation that Sanhuri’s Iraqi civil code “betrays a consciously greater debt to the Shari’a than does the Egyptian or the Syrian legislation,” ultimately due to the code’s retention of more articles from the Ottoman Majalla; see “Law as a Social Force in Islamic Culture and History,” *Bulletin of the School of Oriental and Asian Studies*, 20 (1957), 32.

sense of denying the existence of an Islamic essence, but rather in its insistence that assessing the Islamicity of a reconstructed artifact can be settled more meaningfully through a genealogical investigation of how its Islamic essence was constituted from the perspective of its drafter. In the case of the Egyptian civil code, this requires a genealogy of Sanhuri’s “will to Islamise,” a genealogy that explores his changing perspective on what makes a legal document “Islamic,” and underscores the external forces that constantly shaped, subverted, and reshaped his perspective of an Islamic essence.\(^\text{10}\)

I will advance a twofold argument. First, Sanhuri’s judgment on the civil code’s Islamicity changed dramatically between 1942 and 1962.\(^\text{11}\) While initially celebrating the code as an Islamic document, he ended up by refuting its debt to Islamic law.\(^\text{12}\) Second, Sanhuri’s change in opinion should be understood in light of his legal consciousness, which was divided internally between questions of identity and redistribution. Starting from his days as a doctoral student in France,\(^\text{13}\) Sanhuri invariably was invested in two distinct projects, namely, the identity project of modernising Islamic law and the redistributive project of employing modern law to advance social justice. The Egyptian civil code represents an attempt to resolve this state of discursive and

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\(^{10}\) I use the term “genealogy” advisedly. It denotes a particular historiography, deeply indebted to Nietzschean philosophy, and politically committed against the search for origins, “because this search assumes the existence of immobile forms that precede the external world of accident and succession.” If guided by a genealogical sense, a historical search for origins, Islamic or otherwise, will “not discover a forgotten identity eager to be reborn, but a complex system of distinct and multiple elements, unable to be mastered by the powers of synthesis.” See Michel Foucault, “Nietzsche, Genealogy, History”, in *The Foucault Reader*, ed. Paul Rabinow (New York: Pantheon Books, 1984), 78, 94-95. For an introduction, see Gilles Deleuze, *Nietzsche and Philosophy* (New York: Columbia University Press, 1983). Nietzsche’s most systematic use of the method was most probably his *On the Genealogy of Morals*, trans. Walter Kaufmann (New York: Vintage Books, 1969).

\(^{11}\) See quotes at supra p. 201.

\(^{12}\) Sanhuri’s view changed over the years and at certain moments in time he seems to have contradicted himself. Before the Egyptian Senate in 1948, Sanhuri adopted two positions: On the one hand, he appeased the Bar’s concern for the stability of the legal order by arguing that three-quarters or four-fifths of the code represents Egyptian case law; on the other hand, he defended the code’s Islamicity by claiming that all its articles are Islamic. See *The Egyptian Ministry of Justice, Al-Qanun al-Madan*: Majm’at al-‘Amal al-Tahdiriyah (Cairo: 1949), vol. 1, 70, 157-59 [hereinafter Preparatory Works].

\(^{13}\) See *Al-Sanhuri min khilal Awrâqhi al-Shakhshiyya*, ed. Nadia al-Sanhuri and Tawfik al-Shawi (Cairo: Al-Zahraa li’il-l‘am al-‘Arabi, 1988) [hereinafter Sanhuri’s memoirs]. In numerous entries, Sanhuri vows to establish a socialist party for workers and peasants upon his return to Egypt, while in several other entries he affirms his dedication to the modernisation of Islamic law along scientific lines.
existential division. Sanhuri sought to produce a legal document that is both “Islamic” and “modern”. To this end, he resorted to the category of the “social” as a conceptual tool of mediation between his two projects. In the civil code, this act of mediation takes place under an abstract equation whereby: Islamic law = the “social” = modern law. Sanhuri’s final statements on the un-Islamicity of the code reflects a collapse in the potentials of the “social” as a tool of mediation between the two projects of identity and redistribution, a collapse precipitated by the revolutionary turns of the Nasser era.

The essay is divided into four parts, meant concurrently as an argument for, and a chronicle of, the changing relationship between Sanhuri’s preoccupation with the two projects of identity and redistribution. Part I will locate the genealogy of these two preoccupations in Sanhuri’s doctoral scholarship; part II will trace the genealogy through Sanhuri’s later contributions to the recueils of his two principal mentors; part III will argue that the 1949 Egyptian civil code attempted to forge a connection between these two projects by resorting to the “social” as a conceptual tool of mediation; and part IV will locate Sanhuri’s changing view on the Islamicity of the civil code in the displacement of the “social” by exploring the nature and repercussions of the Sanhuri/Nasser schism. The examples I offer will be drawn largely from Sanhuri’s work on contract law theory; I use extensive block-quotes to demonstrate this genealogy and allow the reader something of a first hand encounter with the text.14

Finally, with respect to methodology, I employ the two dyads of “modernity/tradition” and “individualism/socialism” as distinct analytical frameworks under which I locate, cluster, and illustrate Sanhuri’s discursive engagement with his two competing projects. Under the modernity/tradition dyad, I will account for Sanhuri’s project of modernising Islamic law; the dyad expresses a tension between pre-colonial Islamic law and post-colonial transplants of Western codes, and finds its practical implications in the debate on legal modernisation and secularism as championed by the nationalist elite.15 Under the

14 To my mind, the obsessively fastidious quality of block quotes is further justified by Nietzsche’s insistence that the colour of genealogy is an archival, hieroglyphic grey. See the Preface to On the Genealogy of Morals.
15 I use the term modernity/tradition as the most current English title for the Arabic discourse on al-Turāth/al-Hadātha. In my opinion, Sanhuri’s views on the debate between secular and Islamic law is a heteronomous intervention in this larger discourse which is subject to its disciplinary mechanisms. The most comprehensive research undertaken by some of the most prestigious Arab intellectuals today, and discussing the various strands of the discourse, remains al-Turāth wa-
individualism/socialism dyad, I account for Sanhuri’s engagement with the project of socialising modern law;\(^{16}\) the dyad expresses the tension between individual and collectivist stakes in law, and finds its practical implications in the debate over how far the modernising nationalist elite are willing to instrumentalise law in the redistribution of wealth and the promotion of social justice.\(^{17}\) Finally, by the “social” I refer to a particular ideological concept that served both as a slogan and a political agenda for resolving the individualism/socialism tension at the beginning of the twentieth century.\(^{18}\) In the specific context of Franco-American jurisprudence, the starting point of the “social” was the extreme formalism and individualism of the private law regime. In response, the “social” proposed a double agenda of sociological insights and socialist doctrines. Accordingly, a fundamental premise of this article is the crucial importance of reading Sanhuri’s Islamic law scholarship, both methodologically and politically, in light of the Franco-American tradition of anti-formalist legal thought.


\(^{17}\) The two dyads are a deliberately exaggerated application of structuralist methodology. They are warranted by the discursive state of Sanhuri’s scholarship, which lends itself attractively to binary representation, and are meant to emphasise his phenomenological condition of internal division. It is not my aim, however, to suggest that a quintessentially inescapable contradiction exists between questions of identity and redistribution, nor that redistribution is a worthier cause than projects of the “merely cultural.” The stakes in both causes are often complexly related. See Judith Butler, “Merely Cultural,” *New Left Review* (January/February 1998), 2-27. Nonetheless, the present article is deeply indebted to Duncan Kennedy’s structuralist/poststructuralist method in legal historiography, especially the development and later qualification of the “fundamental contradiction.” See Duncan Kennedy, “The Structure of Blackstone’s Commentaries” *Buffalo Law Review*, 28 (1979), 205-382; idem, “Roll over Beethoven,” *Stanford Law Review*, 36 (1984), 1-55. Works that have influenced this method include George Lukacs, *History and Class Consciousness* (1968); Jean Piaget, *Six Psychological Studies* (1967); C. Levi-Strauss, *The Savage Mind* (Chicago: Chicago University Press, 1966). For a discussion of Kennedy’s historiography in intellectual legal history, see W. Fischer, “Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History,” *Stanford Law Review*, 49 (1997), 1065-1111.

Part I. Genealogical Introduction: Two Theses:

Between 1921 and 1927 Sanhuri pursued his doctoral studies at the University of Lyon. Towards this end, he produced two doctoral dissertations: the first, published in 1925, was entitled *Les Restrictions contractuelles à la liberté individuelle de travail* [hereafter *Les Restrictions contractuelles*]; and the second, entitled *Le Califat, son évolution vers une société des nations orientales*, was published in 1926 [hereafter *Le Califat*]. The subjects Sanhuri chose to investigate in these two dissertations mark the starting point of the genealogical trajectory on which his two competing preoccupations will be outlined along the axes of individualism/socialism and modernity/tradition.

1.1. Individualism/Socialism in *Les Restrictions Contractuelles*:

The significance of *Les Restrictions contractuelles* for the development of Sanhuri’s legal thought may be traced on three levels: Methodologically, the dissertation represents a strong critique of the formalist legal thought of the classical French *école de l’ex-gâse*, and frames the major outlines of the anti-formalist and sociological legal method that Sanhuri later applied in drafting the 1949 Egyptian civil code; politically, *Les Restrictions contractuelles* makes a clear ideological argument for the redistributive role of law in bringing about social justice; and, finally, as an intervention in the institutional politics of French legal academia, the dissertation signifies Sanhuri’s intellectual alliance with an emerging group of progressive law professors involved in a generational battle against the formalism and moral individualism that characterised the legal scholarship of the older and well established jurists of *l’école de l’ex-gâse*. Briefly stated, the topic

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19 Paris: Marcel Giard, 1925 [hereinafter *Restrictions*].
20 Librairie Orientalist Paul Geuthner, 1926 [hereinafter *Le Califat*].
of *Les Restrictions Contractuelles* was the study of “standards” as a policy instrument for advancing the “social” in modern Western law. Although Sanhuri never defined the “social” as such, he nonetheless used the term to signify one of two notions, either (1) a particular set of anti-formalist insights associated with sociological jurisprudence, or (2) a progressive corpus of legal doctrines that may be loosely characterized as “socialist.”

1.1.1. The Social as Sociological Jurisprudence:

From the very first pages of *Les Restrictions contractuelles*, it becomes evident that Sanhuri consciously experienced his methodological commitments as part of a trans-Atlantic school of sociological jurisprudence, in which the scholarship of Roscoe Pound in the United States and François Gény in France feature most prominently. Sanhuri’s methodological debt to these two jurists is best discerned in his subscription to the following three sociological insights: (i) an anti-formalist appreciation of the evolving nature of law; (ii) an acute sense of the historical evolution of law as a distributive mechanism between competing individualist and collectivist stakes; and, (iii) a hostility towards the mechanical pretensions of legal logic as embodied in French and American classical legal thought. In the very first pages of the introduction to his dissertation, Sanhuri defined his field of legal investigation accordingly:


Although Sanhuri relied on the English doctrine of *Restraints of Trade* to illustrate his argument, the doctrine will not be discussed in any detail here. Instead, I chiefly concentrate on Sanhuri’s abstract study of “standards” as such, an omission I believe justified by his assertion that “si nous avons choisi ce sujet [i.e. restraints of trade] pour le traiter en detail, ce n’est que pour examiner de plus près, et sur un terrain purement pratique, la notion de ‘standard.’” Sanhuri, *Restrictions*, 26.

Edouard Lambert, Sanhuri’s thesis supervisor, enjoyed a long standing friendship with Pound and both men came to view one other as intellectual allies in the common project of critiquing the legal formalism of French and American classical legal thought. See Paul Dubouchet, *La Pensée Juridique avant et après le code civil* (L’Hermès, 1994), Chapitre XII, “Roscoe Pound et Edouard Lambert”, 169-88. See also the letters exchanged between Lambert and Pound, Harvard Law School Archives, *The Roscoe Pound Correspondence 1907-1964*, in particular the letter dated October 24, 1923, in which Lambert relates to Pound the scholarship Sanhuri authored on standards, to which Pound replies on November 9, 1923, stating, “I shall await with much interest the work of Mr. Sanhoury on standards. That subject grows in importance with us every day.” My gratitude goes to Marie-Claire Belleau, who drew my attention to these letters.
Si l’on cherche à pénétrer plus complètement les réalités sociales et économiques [du droit], on constate qu’on est en face d’un conflit entre l’intérêt de l’individu et l’intérêt de l’entreprise; en d’autres termes, on se trouve obligé d’aborder une des faces d’un phénomène délicat: la lutte des classes ou le conflit entre le travail et le capital.\textsuperscript{24}

The conflict between social and individual values is thus the very essence of law, its resolution not merely an exercise in legal logic but rather a question of clear distributional consequences, and the specific context for his analysis, the English doctrine of \textit{Restraints of trade}, is no exception. What makes the latter doctrine interesting, however, is the sociological mode in which it resolves this seemingly ubiquitous conflict in its latest \textit{lutte des classes} manifestation:

Le droit est, en réalité, une science qui a pour but de concilier des idées contradictoires; chaque principe fondamental de cette science est une transaction, un compromis. Du fait que le droit, par sa définition même, régit les rapports sociaux, chaque problème juridique soulève nécessairement un conflit de principe, et met en jeu des intérêts essentiellement opposés . . . Ce qui est spécial à cette théorie [i.e. restraints of trade], ce n’est pas tant l’idée de conciliation elle-même, que la façon dont cette conciliation doit se réaliser.\textsuperscript{25}

The need for law to evolve and accommodate the ever changing conditions of society is affirmed as yet another fundamental anti-formalist insight of sociological jurisprudence. To this effect, Sanhuri employs the most celebrated sociological \textit{bon mot} of trans-Atlantic legal realism at the time, affirming that law is not simply mathematics: “Le droit . . . n’est pas une science mathématique ou il faut des formules et des équations. C’est la science sociale par excellence et tout effort tendant à trop le systématiser et à trop le dogmatiser, le condamne à la stagnation.”\textsuperscript{26}

1.1.2. The “Social” as progressive doctrine:

It is clear that the insights of sociological jurisprudence do not imply any political commitment to a leftist or progressive social agenda. However, reading through the dissertation, one soon realises that Sanhuri’s championing of standards is not motivated only by an a-political concern for legal methodology. Instead, he sets out to contrast “standards” against “rules,” enumerating the advantages of the former

\textsuperscript{24} Sanhuri, \textit{Restrictions}, 5.
\textsuperscript{25} \textit{Ibid.}, 8.
\textsuperscript{26} \textit{Ibid.}, 69.
in an argument quite representative of leftist legal academia at the time. First, standards were understood to herald a return from contract back to status and thus from individualism to a more collectivist legal order. Second, standards, due to their concrete embeddedness in resolving everyday questions of law, were understood to allow for a greater measure of individualisation of justice, as opposed to the impersonal justice dispensed by rules. Finally, standards were generally advanced as better conductors of the socialist spirit in law. Leftist lawyers and academics were thus intellectually and politically invested in the defence of standards, and this phenomenon cut across both French and American scholarship at the time.27 By defending standards against rules, Sanhuri was defending no less than the interests of the proletariat:

Une réaction se fait sentir, aujourd’hui, contre l’esprit individualiste et matérieliste qui a marqué le droit pendant tout le cours du XIX siècle . . . La pénétration de l’esprit socialiste dans la législation [sic] moderne est trop connue pour que nous ayons a insister ici. Presque toute la législation industrielle et toutes les institutions modernes sont imprégnées plus ou moins de cet esprit, qui s’affirme de plus en plus avec l’importance croissante du prolétariat industriel.28

In what is almost certainly a reference to Sir Henry Maine’s notorious statement on the move of modern Western law from “status to contract,”29 Sanhuri prophesies the rise of standards as signifying the return to a more socialist “status” regime:

Avec les mouvements économiques et philosophiques du XVIII siècle, et la prédominance du principe de l’autonomie de la volonté, le contrat a pris le place du statut. Nous assistons aujourd’hui à une réaction; avec le développement de l’industrie et du commerce, les status réapparaissent sous une forme économique plus souple. Ces status nouveaux sont régis principalement par des standards.30

Accordingly, by defending a move towards standards, Sanhuri was unequivocally situating himself on the left of the legal academy;31 the

27 However, much like the “social” itself, standards also were advocated by conservative legal scholarship on a moral basis. See generally Veronique Ranouil, *L’Autonomie de la volonté, naissance et évolution d’un concept* (Paris: PUF 1980); Morton Horwitz, *The Transformation of American Legal Thought* (Oxford University Press, 1992), Chapter 2 “The Progressive Attack on Freedom of Contract and Objective Causation.”
31 The notion that the socialisation of law through standards entailed a historical “return” to a status regime was very popular when Sanhuri wrote his
different methodological and political implications entailed in this move may be summarised thus:

<table>
<thead>
<tr>
<th>Rules</th>
<th>Standards</th>
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<tr>
<td>contract</td>
<td>status</td>
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<tr>
<td>individualism</td>
<td>socialism</td>
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<tr>
<td>bourgeoisie</td>
<td>proletariat</td>
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<tr>
<td>autonomie de la volonté</td>
<td>collective labour contracts/public utilities</td>
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<td>logic</td>
<td>experience</td>
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<tr>
<td>abstract justice</td>
<td>individualised justice</td>
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<td>rigidity</td>
<td>flexibility</td>
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<td>immobility</td>
<td>evolution</td>
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1.2. *Modernity/Tradition in Le Califat:*

A year after finishing *Les Restriction contractuelles*, Sanhuri submitted his second doctoral dissertation, *Le Califat*, in 1926. At heart, *Le Califat* is an exercise in modernity/tradition discourse. Its professed doctrinal aim is to modernise the traditional institution of the Islamic caliphate, and develop it towards an international organisation modelled after the newly established League of Nations. On a deeper and more personal level, *Le Califat* appears to be an existential exercise in which Sanhuri confronts the anxieties of post-colonial identity and strives to resolve his own conflicting feelings for the West. The dissertation is dedicated, in full humanist rigour, “[a] tout oriental qui sait concilier ses attaches religieuses, nationales et raciales avec les liens de sa Grande Patrie: l’Orient, et avec ceux d’une Patrie plus grande encore: l’Humanité.”

On the methodological level, *Le Califat* is indebted to the anti-formalist interpretations on the nature of law and legal reasoning which Sanhuri had argued earlier in *Les Restrictions contractuelles*. Sanhuri asserts already in the *avant propos* the fundamental distinction between “sacred” and “temporal” aspects of Islam, and unequivocally locates his study of Islamic law in the realm of the latter:

Je parle tres souvent de l’Islam, au cours de ce travail. Dans ma pensée, il ne s’agit pas d’un corps de croyances strictement confessionnelles. Envers l’Islam religieux, j’eprouve, dans ma qualité de musulman, l’attachement le plus sincère et le plus profond respect. Mais c’est de l’Islam culture, et non pas de l’islam cultuel, que je me pré-occupe dans cette étude . . . il [i.e. l’islam] est aussi une civilisation. Ceux qui croient à ses dogmes sont les adeptes de la R/ligion; ceux qui adhèrent a sa culture sont les citoyens de la Patrie.\textsuperscript{32}

This paves the way for an expanding set of distinctions around which his dissertation develops, and allows him to propose the secular development of the caliphate as a modern League of Nations, an institution of politics, not religion, based on a cultural, rather than cultist, history of Islam. A short list of these distinctions would include:

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<th>SACRED</th>
<th>PROFANE</th>
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<td>God</td>
<td>Caliph</td>
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<tr>
<td>Religion</td>
<td>Politics</td>
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<tr>
<td>Religious</td>
<td>Temporal</td>
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<tr>
<td>Faith</td>
<td>Civilisation</td>
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<tr>
<td>Confession</td>
<td>Homeland (patrie)</td>
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<tr>
<td>Believers</td>
<td>Citizens</td>
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<tr>
<td>Islam as cult</td>
<td>Islam as culture</td>
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However, Le Califat is above all an exercise in nationalist activism on two main fronts: (1) the nationalism of an anti-colonial project which finds in the caliphate an institutional framework for its empowerment, and (2) the nationalism of the modernising elite which aims to transform the “colony” into a modern nation-state. Sanhuri’s program for the reconstruction of Islamic law is thus manifested on these two fronts.

1.2.1. Anti-formalism in the service of anti-Colonialism:

Le Califat was written at a very significant juncture in the history of the Islamic caliphate. The sultan of the Ottoman Empire had been caliph to the majority of Arab Muslims up to the end of the First World War, when the newly-established Republic of Turkey decided unilaterally to abolish the institution of the caliphate. Thus Arab subjects of the Ottoman empire found themselves in 1924 without a caliph for the first time in centuries. This coincided with their own submission to formal

\textsuperscript{32} Le Califat, l’avant-propos de l’auteur, xv.
colonial mandates under the auspices of the newly-established League of Nations. One can therefore appreciate the sense of urgency with which Sanhuri writes the first line of Le Califat: “Pour la seconde fois, dans l’histoire de l’Islam, le monde musulman se trouve sans Calife... La question du Califat est alors devenue d’une actualité brûlante.”

Le Califat thus became the anti-colonial vehicle of a budding, pan-Oriental, nationalist movement whereby a medieval, inept, and historically despotic institution may develop into a modern beacon of anti-colonial struggle and nationalist regeneration. More interestingly, aided by an anti-formalist appreciation of Islamic law, Le Califat aspires to resolve one of the most basic and enduring contradictions of post-colonial nationalist movements, namely, how can the “colony,” in its anti-colonial struggle, adopt from Europe a model of political community, and yet, concurrently, retain its distinct national identity?

The contradictions of modern “Oriental” nationalism may thus be articulated: while nationalist movements promise to liberate the Muslim world from European colonialism, they also threaten to dissolve a unified Muslim front into competing nation-states, do away with the caliphate, and rob the ancient institution of its role in subsuming this emerging plethora of Muslim patries and preserving their Islamic identity. Surveying the present conditions of twenty-five Muslim countries, Sanhuri invariably concludes that nationalist movements are uniformly responsible for “l’indifférence relative avec laquelle ont été accueillis les débats du récent Congrès Islamique du Califat tenu au Caire.” In response to this dilemma, Le Califat submits concrete proposals for transforming the medieval institution into a pseudo League of Nations, a modern political affiliation that would accommodate the contradictory drives of unity and diversity which animate Oriental nationalism. To thus reconceptualise the caliphate, Sanhuri required nothing less than a leap of methodological faith, a leap that was facilitated by his anti-formalist appreciation of the nature of Islamic law in general, and the caliphate in particular.

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33 Ibid., xi.
34 On Sanhuri’s views of the despotic and inept characteristics of the caliphate, see Le Califat, 48.
36 Sanhuri, Le Califat, 512. A controversial book by the Azharite sheikh, Ali Abdel-Razek, was banned around the same time the Congress was held due to its claim that the caliphate was not an essential component of the Islamic polity. See Albert Hourani, Arabic Thought in the Liberal Age, 183-92.
37 I use the term “anti-formalist” advisedly. The newly established League of Nations in Geneva had posed a serious challenge to classical international legal
lignes d’un programme d’avenir” is based on distinguishing the sacred from the temporal aspects of Islam, isolating the latter and subjecting them to a program of forced development. Ultimately, the caliph is reduced to a mere figurehead who “réunirait ainsi par une jonction finale dans sa personne les deux sortes d’attributions [religieuses et politiques], sans empêcher qu’elles restes distinctes dans leur fonctionnement pratique.”

Thus the contradictions of Oriental nationalism are resolved. The anti-colonial struggle of the nationalist movements is expected to flower into modern, independent nation-states fashioned after those of Europe. The Islamic identity and heritage of these nation-states is then preserved through their membership in a modern League of Oriental Nations which acts as the descendant and successor of the medieval caliphate. This elaborate scheme is understood to be logically possible within the structures of Islamic law, and in no way compromises the authenticity of the Islamic caliphate.

1.2.2. Anti-formalism in the service of modernisation:

Towards the end of Le Califat, Sanhuri elaborates a program for the “[a]pplication des principes du droit musulman” which goes through an initial “phase scientifique,” followed by a second “phase législative.” While Sanhuri’s program is not very elaborate (a mere six pages in a dissertation of 608 pages), it is nonetheless very significant since it was reproduced again in a more elaborate form in two subsequent articles, and was largely carried by Sanhuri as he “took up his own challenge when he began his career in the Law Faculty of Cairo thought in the early 1920’s, bringing on a successful anti-formalist reconceptualisation of international law in order to account for this anomalous institution. In fashioning the new caliphate after the League of Nations, Sanhuri was thus appealing to an anti-formalist spirit that characterised the League of Nations as such. As for his reinterpretation of Islamic law, the term “anti-formalist” applies here in the same way it may be used to describe the scholarship of Rashid Rida on the same subject. For the anti-formalist readings of the League of Nations under international law, [see A. Alvarez, “The New International Law,” Grotius Society (April 16th, 1929) 35-51; Nathaniel Berman, “Modernism, Nationalism, and the Rhetoric of Reconstruction,” Yale Journal of Law and the Humanities, 4 (1992), 351-80.]

38 See in general, Le Califat 535-607.
39 Ibid., 571.
40 Ibid., 578-84.
University [and] started his research and scholarly writings on comparative law (the ‘scientific phase’) [and] then turned to the ‘legislative phase’ with his work on revising the Iraqi and Egyptian codes." Enid Hill provides an excellent analysis of Sanhuri’s program as articulated in *Le Califat*, which I will largely draw upon and paraphrase hereafter. In the first scientific stage, Sanhuri argues that we must start by distinguishing the sacred from the temporal aspects of Islamic law, distinguish further within the latter between permanent and variable legal rules, and then direct our attention to a scientific and collective study of these variable rules in light of comparative law. This should be followed by a legislative phase whereby the conclusions of the scientific study are articulated according to the modern principles of codification. Codification should proceed gradually, and Sanhuri proposes a “common law solution” whereby Islamic law acts as a default source in the presence of gaps. Sanhuri also advocated the articulation of Islamic law under “more flexible formulas,” a clear allusion to his work on standards. Both these proposals were adopted when Sanhuri set out to draft the new Egyptian civil code.

### Part II. Genealogy Pursued: Two Mentors:

Between the completion of his doctoral work in 1926 and his government appointment to draft the new Egyptian civil code in 1938, Sanhuri contributed two important articles in French to the *Recueil d’études* of his two major intellectual mentors in France, Edouard Lambert and François Gény. Both jurists exercised a great deal of methodological influence on Sanhuri’s scholarship, Lambert as his thesis supervisor, and Gény as the leading *juriste inquiet* to whom, in Lambert’s somewhat jealous words, Sanhuri “paraît avoir été particulièremment sédiut.” It therefore comes as no surprise that Sanhuri’s two contributions to his mentors’ *recueils* confirm his ongoing intellectual preoccupation with the two competing projects of socialising modern law and modernising Islamic law. I will briefly discuss these two articles to the extent they depart from his earlier doctoral work.

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43 Ibid., 35-39.
44 Edouart Lambert, preface to Abdel-Razzak al-Sanhuri, *Les restrictions contractuelles*, at x.
45 Between 1926 and 1938, Sanhuri wrote two treatises on contract law in Arabic as well as a major article on the need to redraft the Egyptian civil code, part
2.1. Geny’s Recueil: The Individualism/Socialism Contribution:

The publication of François Gény’s three-volume *Recueil* in 1935 represented a major event for all legal scholars who had participated for over thirty years in the critique of *l’école de l’exégèse*. Sanhuri’s contribution to the *Recueil* was an article fittingly entitled “*Le standard juridique.*” While the article largely reproduces the arguments Sanhuri elaborated in his first doctoral dissertation, it nonetheless offers some new insights that are useful in constructing a genealogical account of the various intellectual influences on his legal methodology, and their later influence on his project of modernising Islamic law. Sanhuri starts the article by recognising the methodological debt that he owes to his various mentors, making it clear that his scholarship on legal standards is merely a continuation of a renegade movement in legal scholarship, with its genealogical fountainhead in the French jurist Saleilles, who:

Dans son ouvrage célèbre *L’Individualisation de la peine...* a écrit il y a maintenant plus de trente ans, ‘Il se produit aujourd’hui un mouvement général ayant pour objet de détacher le droit des formules purement abstraites qui, pour le vulgaire tout au moins, paraissait le soustraire au contact de la vie. Il n’est pas douteux que le droit civil, tôt ou tard, subira une transformation de ce genre.’ [emphasis in original text]

From Saleilles, the methodological influences on Sanhuri extend in a transatlantic trajectory to include Gény, Lambert, and Hauriou in France, and Pound in the United States, thus bringing together the insights of the *juristes inquiets* as well as one of the most celebrated American legal realists. These scholars are characterised as members of a long-standing alliance, unified in their common objective of “attacking” the formalism and individualism of the classical schools of legal thought in France and the United States. Sanhuri jubilantly concludes that this attack had been so devastating that “[o]n s’est déjà complètement affranchi de la méthode, jadis prédominante, de l’école des interpretes du Code civil.”

of which he translated into French and contributed to Lambert’s *Recueil*. I will not discuss Sanhuri’s two Arabic treatises here, given their limited contribution to the methodological excursion which is the purpose of this study. For a full bibliography of Sanhuri’s scholarship see *Hill, Sanhuri*, 138-39.

46 For an introduction to Gény’s methodology and his significant role in the development of French anti-formalist legal thought, see *Du Bouchet, Penseé juridique*, chap. xi, “Gény et l’école du droit libre.”

47 Sanhuri, *Le Standard*, 144.


2.2. Lambert’s Recueil: The Modernity/Tradition Contribution:

Sanhuri’s contribution to Lambert’s Recueil is essentially a French translation of the last section of his 1935 article in Arabic on the need to modernise Islamic law in redrafting the Egyptian civil code.\footnote{Sanhuri, “Le Droit musulman comme élément de refonte du code civil égyptien,” Recueil d’études en l’honneur d’Edouard Lambert, vol. III (Paris: Librairie générale de Droit et de Jursiprudence, 1938) 621-42.} When the article was contributed to the Recueil in 1938, Lambert and Sanhuri already had been appointed by the Egyptian government as the only two members of the committee charged with drafting the new civil code. The article itself, however, is largely an expanded version of Sanhuri’s program as set out in Le Califat, and its more substantive contributions will be discussed at greater length in Part III of this article where we will discuss the new Egyptian civil code of 1949.

Part III. Genealogy Concluded: Two Agendas, One Code:

In my view the Egyptian Civil Code of 1949 represents an amalgam of two agendas, meant to resolve two sets of tensions: the two competing dualities of modernity/tradition and individualism/socialism.\footnote{I rely here on the following materials: Abdel-Razzak Al-Sanhuri, “Wujūb Tanqīḥ al-Qānūn al-Madani al-Miṣri,” (On the Necessity of Redrafting the Egyptian Civil Code) Majallat al-Qānūn wa’l-Iqtisād, 6 (1936) 1-142 [hereinafter Redrafting the Code]; “Mashrū’at Tanqīḥ al-Qānūn al-Madani al-Miṣri,” (The Draft Egyptian Civil Code) Majallat al-Qānūn wa’l-Iqtisād, 12 (1942) 550-70 [hereinafter The Draft Code]; citation of these two article will reflect their page numbers as collected in Majmū‘ at Maqālāt wa-abhāth al-Ustūd al-Duktūr Abdel-Razzak al-Sanhuri, ed. Nadia al-Sanhuri and Tawfiq al-Shawi (Cairo: Cairo University Press, 1992); al-Wasīṭ fi Sharh al-Qānūn al-Madani al-Jadid (The Intermediate Treatise on the New Civil Code) 10 parts (Cairo: 1952-1970) [hereinafter al-Wasīṭ]; Egyptian Ministry of Justice, al-Qānūn al-Madani: Majmū‘at al’Amal al-Tahdīriyah (The Civil Code: Preparatory Works), 7 vols. (Cairo 1949) [hereinafter Preparatory Works].} Throughout the different stages of drafting the code, defending it before the Egyptian senate, and finally commenting on it in his treatise al-Wasīṭ, Sanhuri invariably describes the code as both embodying the “latest achievement of modernity,” namely the “social,” while concurrently representing “the great victory of Islamic law.” While these competing claims confirm his longstanding engagement with the two agendas of identity and redistribution, I argue that the novelty of the code lies in Sanhuri’s attempt to forge a theoretical connection between these two agendas, a connection based on the ingenious equation that
modern law = the “social” = Islamic law. I will illustrate this argument in two steps. First, I will discuss the individualism/socialism dimension of the code to demonstrate how “modern law” is equated with the “social;” second, I will move on to the modernity/tradition component of the code in order to demonstrate how Sanhuri equates the “social” with Islamic law. A familiarity with the Franco-American tradition of anti-formalist legal thought is indispensable to grasp this equation, as Sanhuri relies on a particular reading of the philosophy of legal history that was popularised at the beginning of the twentieth century. While this reading appears to belong exclusively to the Western history of private law, Sanhuri expands its relevance to include Islamic law by adopting a universal interpretation of the nature of law as a humanist artifact.

3.1. The Individualism/Socialism Code:

A recurring claim which Sanhuri makes about the civil code is that it embodies the “latest achievements of modernity, refinements of our times, and civilisation of our age.” A closer investigation of this modernity par excellence reveals that it is quite simply the “social” packaged as a code. For organisational purposes, I shall group the different elements that inform the “social” impulse in the Code under two main components, each mirroring its earlier articulation in Sanhuri’s doctoral work: (1) the “social” as the promotion of socialist doctrine, and (2) the “social” as an artifact of sociological jurisprudence. The legal modernity that Sanhuri sought to emulate was not merely a technical endeavour of providing a sophisticated normative order for the material advances of Islamic society; rather, it was a highly politicised modernity, conceived as the direct result of ideological battles.

3.1.1. The Social as Socialist Doctrine:

After Sanhuri finished work on the civil code and submitted its first draft for comments in April 1942, several members of the legal community criticised the draft as premature, given the prevailing conditions of World War II. These critics argued that drafting the code should be postponed until the war came to an end and the future direction of human civilisation was settled. Their concerns were hardly overstated;

52 See The Draft Code 172, and, to the same effect, 173, 177, 184, 186; see also al-Wasit, vol. 1, 98; Preparatory Works 18, 24.
53 The first public debate over the Code took place at the Royal Geographic Society on April 24, 1942.
when Sanhuri submitted the draft code for comments, the Nazi army was on Egyptian soil and the country seemed poised for German occupation. Sanhuri, however, had very set views on the issue:

I do not share the concerns of those people who demand the delay of revising the civil code . . . our only course of action now is to anticipate the eventual triumph of socialism after the end of the war, and prepare for its social and economic repercussions. As you will notice, the proposed civil code manifests this modern sign of the times.

A colloquial summary of the above quote might read as follows: Sanhuri has seen the future, it is socialism, and it has been codified in his proposed law. The doctrinal repercussions of socialism receive a more concrete articulation in the specific context of contract law and the position of autonome de la volonté:

The draft does not sacrifice the collective interests of society for the interest of individual freedom, nor does it consecrate autonome de la volonté as the locus of all contractual relations. By contrast, the draft code attempts to achieve a balance between the interests of the individual and the collective. By the same token, the draft code does not allow the strong party in a contractual relation to injure the interests of the weaker party under the guise of individual freedom; the code does not licence individuals, regardless of their economic and social power, to abuse weak parties. . . In this manner our draft code has come to champion social justice and embody the latest achievements of the twentieth century, the refinements of our times, and the civilisation of our age.

I will now offer a brief elaboration on the above passage by discussing how the “social” was incorporated in the fields of contract and tort law.

i. The Critique and Rehabilitation of Autonome de la Volonté:
In describing how the civil code incorporated several of “the general tendencies of the modern codes,” Sanhuri places recent developments

54 Only two months earlier, the British forces of occupation, fearing pro-Axis sentiments, had almost forced King Farouk to abdicate the throne; the entire country was in a state of panic until the Allies prevailed at al-'Alamein in November 1942. See Berque, Egypt Imperialism and Revolution, 559-82.
56 In Arabic, Mabda' Sulṭān al-Irādah. I use the French term, however, since both the doctrine and the Arabic terminology are derived from French jurisprudence. Sanhuri’s critique of autonome de la volonté builds on a long tradition of critique by progressive jurists; see Ranouil, L’Autonome de la volonté.
57 Sanhuri, al-Wasît, vol. 1, 184-86.
58 Ibid., 74.
in *autonomie de la volonté* at the forefront of these tendencies. In summarising the development which the principle had undergone from the nineteenth century to the moment of drafting the code, Sanhuri establishes what may be described as a “rise-and-fall narrative”:

This principle [of *autonomie de la volonté*] has occupied an important position in modern laws due to the hegemony of individualist tendencies resulting from the development of the economic system. However, continued economic development has led to the emergence of large-scale enterprises and an ensuing imbalance in the economic powers [of contracting parties]. All this has paved the way for the emergence of socialist schools of thought in opposition to the reigning individualism of the time. As a result, the principle of *autonomie de la volonté* came under vociferous attacks, and its adversaries subjected it to a meticulous critique. However, a group of moderates have lately set out to achieve a balanced reconstruction in this field.

The question thus becomes what is Sanhuri’s critique of *autonomie de la volonté*, and what is the nature of the “balanced” reconstruction that he clearly advocates? The first thing to notice here is the complete absence of internal critiques of gaps, conflicts, or ambiguities within the classical theory of *autonomie de la volonté*. Instead, Sanhuri offers only two types of external critique, the first ideological and the second practical. In the first mode, *autonomie de la volonté* is presented as an internally coherent theory that was simply “taken to an extreme by its protagonists.”

The ensuing ideological critique is thus one of balancing against recent socio-economic developments:

The individualism behind *autonomie de la volonté*, may be accounted for by the economic conditions of the eighteenth and nineteenth centuries. However, the further development of these very same economic conditions has led to the large-scale enterprises of today, which have in turn given birth to collective labour movements and the rise of the socialist spirit to challenge the individualism of the past.

In the second mode of critique, Sanhuri argues that *autonomie de la volonté* is practically incapable of accounting for contemporary developments in contract law where the enforcement of obligations “is today premised more on social solidarity as opposed to the individual will.” With these two critiques in mind, Sanhuri moves on to describe the newly compromised position of *autonomie de la volonté* in the

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articles of the Egyptian civil code. Although the principle continues to occupy a central position in the conceptual structure of the code, its scope has nonetheless been subjected to “a set of limitations by which the law today restricts the field of autonomie de la volonté. The law recognises such autonomie, and yet limits its scope to a reasonable circle whereby la volonté is balanced against justice and the public good.”

Towards this end, the code adopted a wide variety of provisions, taking “the side of the weaker party to protect him and restore economic balance to the values exchanged by the contractual relationship;” the most typical example here would be labour contracts, “which are now teeming with rules aimed at protecting workers and granting them rights that they were previously denied, such as the right to unionise and the right to strike.”

ii. Examples of the Individualism/Socialism Balance:
I will briefly reflect on three doctrinal examples to illustrate how the civil code set out to socialise modern contract law. The “social” spirit of these doctrines is further significant if we keep in mind that Sanhuri relied on these very same doctrines to argue the “Islamicisation” of Egyptian contract law, an argument which built on his deep-seated humanist reading of the history of legal individualism.

a. Unconscionability:
At heart, the doctrine of unconscionability requires judges to intervene in “procedurally just contracts” in order to restore “substantive balance” where there is a disproportionate exchange in economic values. The Egyptian civil code addresses the issue under the doctrine of istighlāl or “exploitation,” developed in Article 129. Sanhuri explains this article through a cyclical reading of private law history:

Unconscionability is a social problem that laws have not yet been able to resolve in a satisfactory way since the problem is ultimately one of economic and moral considerations of a fickle nature. When the legal system is a product of a civilisation founded on individualist values, the system will pay less attention to the question of unconscionability due to the hegemony of autonomie de la volonté in its doctrinal structures.

63 Ibid., 149.
64 Ibid., 149.
65 Ibid., 115.
However, if civilisation departs from individualist values, and the doctrine of *autonomie de la volonté* gradually loses ground, the legal system will then intervene to put an end to unconscionability.\(^{67}\)

Sanhuri thus advances a general theory about the historical development of the philosophy of legislation. The image proposed is that of two diametrically opposed civilisations, one individualist, the other socialist, which in turn entail two diametrically opposed legal responses to the question of unconscionability. The history of law from the Roman Empire to the present day is then accounted for, in humanist terms, as a continual to-and-fro between those two poles: Whereas “the Romans were saturated by an individualist spirit which . . . enforced unconscionable contracts . . . the rise of Christianity in medieval Europe led to the fall of the individualist spirit and allowed ecclesiastical jurists to constrain the application of *autonomie de la volonté* and expanded the scope of unconscionability as a legal reason for refusing the enforcement of contracts”; however, “in the wake of the French revolution, the individualist spirit grew strong once more . . . to the extent of enforcing unconscionable sale of property contracts. The French civil code incorporated this spirit, and the old Egyptian civil code followed suit.”\(^{68}\) Sanhuri’s new code responded to the civilisational fall of individualism in the twentieth century by adopting the modern subjective theory which expands the scope of unconscionable terms that may be refused enforcement by the judge.\(^{69}\) The progressive nature of the article caused a controversy in the Egyptian Senate and the article was almost deleted despite the insistent argument that “in terms of its practicality, all socialist legal systems have already adopted similar articles due to the economic imbalance of contemporary transactions.”\(^{70}\)

b. *Unforeseen Events:*

Closely related to the doctrine of unconscionability in the civil code is the doctrine of *al-ḥawādith al-ṭari‘a* or “unforeseen events” under which the judge may intervene to restore economic balance, alter the contractual obligations of the parties, or exempt the prejudiced party of his contractual obligations altogether. Much like Article 129, Sanhuri accounts for Article 147/2 as the latest enactment of the aforementioned historical oscillation between individualist and socialist civilisations:

\(^{67}\) Sanhuri, *al-Wasît*, vol. 1, 356.

\(^{68}\) Ibid., 356-57.

\(^{69}\) Ibid., 357-58.

\(^{70}\) Ibid., 199.
Given that the theory of unforeseen events expresses a strong moral imperative, namely, protecting the prejudiced party when contractual balance has been disrupted, it is hardly surprising that the theory has had a stronger historical presence in religious legal systems. It has appeared in the Middle Ages in canonical law, and has had an unequivocal imprint on Islamic jurisprudence.\footnote{Ibid., 633.}

However, with the rise of \textit{autonomie de la volonté} and the “will theory” conception of contract obligations as being founded on mutual consent, the doctrine of unforeseen events “was dealt a mortal blow at the hands of the \textit{civilistes} of old French law, and disappeared altogether under the pressure of \textit{pacta sunt servanda}.”\footnote{Ibid., 634.} According to Sanhuri, the doctrine thrives today only because of its public law rehabilitation at the hands of the French \textit{Conseil d’état} in the wake of World War I.\footnote{Ibid., 639-41.} It is important to read this positive image of public law impressing on private law in the context of the influence on Sanhuri by the legal thought of the French \textit{juristes inquiets}; celebrating public law was a classic move meant to legitimate the redistributive interventions of the state in market relations, and, as such, was defended by many progressive legal thinkers at the time.

c. \textit{Interest in Contract Law:}
The last example of the incorporation of the “social” in contract law is the numerous constraints by which the code limits the scope and extent of interest rates on contractual obligations and accordingly departs from the individualist spirit that characterised the old Egyptian civil code.\footnote{The most important examples are articles (226) and (227), which provide for a lower capping on interest rates than previously stipulated in the old code; Article 229 empowering the judge to reduce interest rates or eliminate interest from the contract altogether; Article 232 prohibiting compound interest, which had been previously sanctioned; and finally Article 542, which stipulates that if the parties do not agree on an interest rate in loan agreements, the loan is considered interest free. \textit{See Preparatory Works}, 576-86, 588-89, 595-97; Sanhuri, \textit{Maṣādir al-Ḥaqq fi al-Fiqḥ al-İslāmî}, vol. 3 (Cairo: Arab League Publications, 1956), 253-77; Khalil, \textit{Ribā in Sanhuri’s Code}, 30-33.} The importance of these provisions will become more evident when we discuss how Sanhuri located in Islamic law the same “social” spirit that informs these articles, arguing that a complete departure from capitalism towards a socialist economic system would concurrently expand the scope of these articles and insure the unmitigated application of the Islamic law on \textit{ribā}. 

iii. The “Social” in Torts:

If the hallmark of the “social” in contract law is the move away from autonomie de la volonté, then, by the same token, Sanhuri argues that the hallmark of the “social” in tort law is the move from a subjective to an objective theory of delictual liability, that is from a regime based on the subjective state of mind of the tortfeasor, to a regime based on the objective ramifications of the tortfeasor’s actions “even if he literally exercised no agency in bringing them about.”

As he did with contract law, Sanhuri contrasts the individualist spirit of Roman law with the socialisation of contemporary law, and accounts for the move towards objectivity in torts as caused by the latest economic developments of his age. The “spreading mechanisation of the means of production and transportation in our age” did not only imply the need for a technically sophisticated law; it also signalled the need to increase the protection of the weaker party and expand the scope of delictual liability. Examples here would include labour accidents, insurance, various respondeat superior situations, and consumer protection. Here Sanhuri makes it clear that he is following the latest developments of modern legal thought; the genealogy starts with famous protagonists of the “social” in French law, such as Saleilles and Gosserand, and continues with the ongoing work of other progressive jurists of civil law under the latest theory of “risque social.”

3.1.2 The “social” as Sociological Jurisprudence:

The second mode in which Sanhuri incorporated the “social” into the code was by adopting three major insights of sociological jurisprudence: (i) the code contains gaps; (ii) the code delegates to judges the application of discretionary standards in order to fill these gaps and individualise justice; and (iii) codification is animated by case law.

i. The Code Contains Gaps:

Contrary to the claims of l’école de l’exégèse, Sanhuri advances the classic anti-formalist argument that “law simply cannot be subsumed between the covers of a book or in a collection of articles . . . a valuable insight we owe to the historical school of jurisprudence, with Savigny

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76 Ibid., 766.
77 Ibid., 774, fn 1.
78 Ibid., 766-71.
at its helm.”79 Accordingly, when Sanhuri first proposed the revision of the code, he advanced as an example the most anti-formalist article known in the world of modern codifications, namely Article 1 of the Swiss Civil Code. This controversial article states that in the absence of a particular provision governing the dispute, the judge should decide the case according to such law as he would have deemed proper to legislate. For Sanhuri, the article’s “most daring quality lies in its unabashed honesty . . . since legislating is indeed part and parcel of the actual work of any judge, Swiss or otherwise, and there is no way of stopping the judge from such legislative activism.”80 Although the article was never adopted ad verbatim in the new civil code, it continues to be the main inspiration for its Egyptian counterpart, which requires the judge to apply customary law, followed by Islamic law, in the absence of an applicable code provision.81

ii. Judicial activism and standards fill the gaps and individualise justice:
The second mode in which Sanhuri codifies the insights of sociological jurisprudence lies in the great number of legal standards that are left to the discretionary application of judges as an internal response to the inevitability of gaps in the code, thus implementing the insights he had advocated in his first doctoral dissertation. Sanhuri repeatedly claims that that the code’s legislative committee frequently had to choose between “rules” and “standards” and consistently opted for the latter whenever possible.82 The choice is explained thus:

[R]igid rules inevitably lead to either formal mechanical justice or blatant disregard for the letter of the law. Besides, legal experience has shown that rigid rules eventually lose ground before the practical needs of society [while] discretionary standards . . . allow law to develop and accommodate the never ending development of social activity.83

iii. Codification must be animated by case law:
The question of codification implies that there is some law out there susceptible to more concrete articulation. In his major writings on the

79 Sanhuri, Redrafting the Code, 41.
80 Ibid., 126.
81 Preparatory Works, part I, 188.
82 Sanhuri, The Draft Code, 184; al-Wasît, vol. 1, 89-93; Preparatory Works, part I, 24; see also Fathi Wali, “The Role of the Judge in Civil Procedure,” a seven page article submitted to The Conference on Fifty Years of the Egyptian Civil Code, organised by the Egyptian Ministry of Justice, Cairo 1998.
83 Preparatory Works, part I, 24; see also to the same effect, Sanhuri, The Draft Code, at 184.
subject, Sanhuri argued that law in its uncodified form may be located in one of three major sources: (1) comparative law; (2) Egyptian case law; or (3) Islamic law. While the new civil code relied on all three of these sources, case law took precedent over the other sources. By emphasising the primacy of case law, Sanhuri was thus following one of the major insights of sociological jurisprudence in general, and of his thesis supervisor, Edouard Lambert, in particular. The latter had earlier criticised François Gény’s seminal treatise on *Méthodes d’interprétations et sources en droit privé* for not placing much emphasis on the importance of case law, and given that Lambert and Sanhuri were the only two members of the final committee drafting the code, it is natural that the sociological insistence on the importance of case law became a major guideline in the process of codification. But codifying case law was also a matter of legal nationalism, since case law represented the “Egyptianisation of a foreign law transplanted to this land in haste.” More precisely, new codification should be guided by case law since “it is the judiciary that applies the code to the problems of everyday life, and thus fixes its many pitfalls of draughtsmanship.” Sanhuri used the same argument in the Senate deliberations to counter the charge that the new code would disrupt the stability of private transactions; to this end, he argued that “three-quarters or four-fifths of the norms in this draft code represent the codification of Egyptian case law and the current [i.e., pre-1949] code.” This comment has often been cited to refute Sanhuri’s alternative claim about the “Islamicity” of the code. It is to this claim of Islamicity and its relationship to the “social” that we now turn our attention.

3.2. *The Modernity/Tradition Code:*

In the preceding section I argued that the “modernity” whose “latest developments” were represented in the new Egyptian civil code was essentially the “social” in its two manifestations of sociological jurisprudence and socialist doctrine. However, Sanhuri advanced a second major claim about the code during its adoption, namely, that the document represented “an outstanding victory for Islamic law.” During the Egyptian Senate deliberations, the question of the code’s “Islamicity”

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86 *Ibid*.
87 *Preparatory Works*, part I, 70; see also 157-58.
88 *See Hill, Sanhuri*, 73.
came to a head in a special issue of *Majallat al-Muhāmah*, the journal of the Egyptian Bar Association, which contained a bitter attack on the draft code for, among other things, not being Islamic enough. The issue was circulated to members of the Senate committee along with an “alternative Islamic draft” containing contract law articles that supposedly were exclusively derived from Islamic law. A heated debate ensued. Sanhuri retorted that he “would yield pride of place to none in his love for Islamic law,” and proceeded to refute the claims of his detractors, principle by principle, as articulated in the alternative Islamic code draft. In the end, the code was indeed adopted with Sanhuri’s assurances that we have not omitted one single principle of Islamic law that we could have included in the code without adopting it. The proof is that the alternative draft code proposed by one of our honourable judges and which he alleged was exclusively derived from Islamic law, turned out to be identical to the present law.

Since its adoption, the question of the code’s Islamicity has been the subject of long-standing scholarly debates; it is therefore important, before we go any further, to distinguish the project pursued here from alternative approaches to this question. Two points need to be stressed. First, Sanhuri never argued that the Egyptian civil code was unequivocally based on Islamic law—understandably so, since his paramount aspiration was to modernise Islamic law through contact with comparative law. Second, the examination of Sanhuri’s project in modernising Islamic law may be approached from a variety of internal and external perspectives. Some external readings of his project concentrate on *talfiq* as the paradigmatic tool of legal modernisation adopted by the Arab nationalist elite, a tool that ultimately yielded a

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90 The opposition was mainly backed by Azharite ‘ulamā‘. Law professors, members of the bar, and judges were all invited to participate in the debate, and Sanhuri’s detractors included Hasan al-Hudaibi, the future head of the Muslim Brothers; see Hill, *Sanhuri*, 67.


94 See Sanhuri, *al-Wasāt*, vol. I, 48, fn 1, where he explicitly states the limited extent to which the code has adopted Islamic law, and affirms his belief that the time will be ripe for the adoption of Islamic law as the exclusive source of codification only after there has occurred “a strong scientific renaissance in its study under the auspices of comparative law.”
neo-patriarchal normative order. Others have chronicled the debates surrounding the adoption of the civil code in the public sphere, the interaction between secular and religious forces in society, and the marginalisation of the ‘ulamā‘ in political decision making. Alternatively, Sanhuri’s modernisation of Islamic law has been read from a variety of internal perspectives, investigating concrete questions of private law doctrine, and discussing how his functionalist selections of Islamic law were made to coincide with modern European legislation.

Although these different perspectives offer insightful readings of the code’s “Islamicity,” they generally yield a flat interpretation of Sanhuri’s legal consciousness. Specifically, they all ignore the question of Sanhuri’s internally divided preoccupation with questions of identity and redistribution—precisely the subject of this essay. Having demonstrated in the preceding section that a particular strand of modernity, namely the “social,” was incorporated in the code, I will now argue that Sanhuri harnessed the “social” in the modernisation of Islamic law—the “social” being understood here as both a methodological choice as well as an ideological agenda. I realise that this argument can become obscure and long-winded. Thus, for purposes of clarity, I divide the argument into two steps. I will first discuss Sanhuri’s response to the question of “how is the code Islamic?”; and then offer my own reading of how the “social” was used by Sanhuri to further the modernisation of Islamic law.

1. How is the code Islamic?
Sanhuri’s most general statement on the subject remains his lecture before the 1942 meeting of the Royal Geographic Society. In response to the question of “how is the code Islamic?”, Sanhuri made the following remark:

Before we go any further [in discussing the draft code], we must first call attention to the groundbreaking intervention the draft code has pursued in favour of Islamic law. Article (1) of the code requires the

96 See Ziadeh, Lawyers; see also Hill, Sanhuri, 50-83.
judge to fill the gaps and lacunae that exist in the code by resorting to the principles of Islamic law. Occasions where the judge will be faced with such gaps in the code are bound to be numerous, and so the judge will be required to decide various disputes in accordance with the principles of Islamic law. The code is a great victory for Islamic law, especially if we keep in mind that all its articles could easily be argued to represent principles of Islamic law. And so, notwithstanding the existence of gaps in the code, our judge only has two options: either he applies codified articles that do not conflict with Islamic law, or he applies the very principles of Islamic law. In addition to all that, the draft code has also directly incorporated Islamic law by codifying both its general theories and its detailed normative solutions.\textsuperscript{99} [emphasis added]

Sanhuri’s argument for the Islamic identity of the new civil code is best understood in terms of a five-prong test of “Islamicity.” These five prongs are: First, the civil code is Islamic to the extent that it has incorporated various chunks of Islamic law in several forms; it has codified both (i) general theories and (ii) detailed practical solutions from the four classical schools of Sunni law, as well as Islamic law provisions that were contained in the old civil code. Under this prong we find provisions that extend from general theories of Islamic law, such as its objective spirit, to detailed normative solutions in such areas as unconscionability, contract formation, performance and termination.\textsuperscript{100} The codification of Islamic law comprises both (i) principles of Islamic law that were contained in the old code, and (ii) additional principles that were introduced in 1949.\textsuperscript{101} Whether the very act of codification adulterates the authenticity of Islamic law is a question Sanhuri never seemed to address in writing. We may infer, however, that the answer is in the negative, on the assumption that codification itself represents the modernisation he sought for Islamic law. Secondly, the code is Islamic to the extent that it adopted the decisions of recent Egyptian case law which, according to Sanhuri, had successfully modernised several aspects of Islamic law. Under this prong we find Islamic law provisions on gifts, wills and estates.\textsuperscript{102} Third, several

\textsuperscript{99} Sanhuri, \textit{The Draft Code}, 179.
\textsuperscript{102} It should be noted that only some rules on gifts and estates were codified. The law on wills was not included in the civil code, as a separate personal status law had been promulgated earlier. For a discussion of the codification of personal status law, \textit{see} Ziadeh, \textit{Lawyers}, 116-27.
provisions of the code which, Sanhuri argues, represent modern law “in its latest developments” from individualism towards the “social,” are concurrently presented as Islamic. In contract law, this category includes most of the doctrines that constrain the reach of *autonomie de la volonté*. Fourth, Islamic law fills the gaps in the code, according to Article 1, whenever there is no code provision or customary law to govern the dispute. Fifth, the entire code is *Islamic-by-default* since none of its provisions is in direct contradiction with Islamic law.

2. *Islamic Law and the “Social”:* 
Sanhuri does not stop at merely claiming the Islamicity of the code. The most interesting facet of his thought is his attempt to bridge the “social” component of the modern code with his other competing preoccupation, modernising Islamic law. I argue that Sanhuri did this either (i) by positing that the “social” is synonymous with Islamic law (the “social” as socialist doctrine), or (ii) advances the Islamicity of the code (the “social” as sociological jurisprudence). I will briefly discuss each of these postulates.

3.2.1. The “social” as Islamic law:
In the preceding section I demonstrated how such doctrines as unconscionability, unforeseen events, and restrictions on contractual interest, act to restrain the individualist potentials of *autonomie de la volonté*. Sanhuri identified these three “social” doctrines as Islamic. In order to understand the process by which such socialist doctrines of modern law were equated with Islamic law, it is imperative that we consider Sanhuri’s philosophy of legal history and investigate the manner in which it facilitates the equation of the “social” with various doctrines of Islamic law. Having adopted a cyclical interpretation of legal history under which private law doctrines are forever oscillating between “individualist” and “socialist” civilisations, Sanhuri explained the three above-mentioned doctrines as marking a departure from the individualist spirit of Roman and nineteenth-century Western laws, and heralding the modern embrace of a more socialist civilisation that harks “back” to medieval and ecclesiastical law. But Sanhuri did not confine the cyclical dyad of individualist/socialist civilisations to an exclusive reading of Western legal history; rather, he interpreted the dyad as a

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humanist philosophy of universal scope and extended its application to include the history of Islamic law as an example of a socialist civilisation. Thus, progressive reforms of the “social” in Western law equally entail a move backward, in the historical sense, towards the socialist spirit of medieval Islamic law. The affinity between Islamic law and the “social” thus transcends the vulgar constraints of doctrinal functionalism and assumes a more inclusive civilisational narrative under which numerous Western doctrines can be argued to be Islamic even if they lack literal doctrinal analogues in Islamic law. Accordingly, detecting the commonality of “altruistic/moral tendencies”\(^{105}\) between the Ecclesiastical and Islamic doctrines of unconscionability\(^{106}\) and unforeseen events,\(^{107}\) Sanhuri proceeded to cluster all these doctrines under the same camp and contrast them uniformly against the legal individualism of nineteenth-century Western law. The same clustering manoeuvre was enacted, all the more poignantly, when Sanhuri discussed the civil code’s limitations on contractual interest. While these limitations represented the most recent victory of the “social” on the individualism/socialism dyad, they nonetheless posed a serious modernity/tradition conundrum, given the Islamic ribā prohibition. Sanhuri’s cyclical reading of legal history came to his aid in this matter. First, he justified the Islamicity of interest articles in the code according to “emergency” justifications, under the doctrines of ḍarūra and maṣlaḥa.\(^{108}\) Then, he cautioned that the “emergency” doctrine is justified only in a capitalist economy in which banking and finance cannot be regulated in strict compliance with Islamic law. Socialism, by contrast, would do away with ribā:

Under a capitalist economic system—such as the present one—where capital is controlled by private individuals and institutions, as opposed to the state . . . limited interest rates are permissible (jāʿiz) as an exception from the original prohibition (taḥrīm) . . . but even after such limitations, the need for interest does not arise except under the current capitalist order. Should the current economic order be replaced by a socialist system—which we indeed appear to be adopting—in which capital is owned by the state and not by private individuals, we should then re-evaluate the need (ḥājah) for interest, which may totally vanish under socialism and therefore allow us to restore the original prohibition of ribā.\(^{109}\)

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\(^{105}\) Ibid., 633.

\(^{106}\) Ibid., 356-57.

\(^{107}\) Ibid., 632-39.


\(^{109}\) Ibid., 271-72; see also 277.
The same humanist reading of legal history applies equally to the objective spirit of the civil code. While an objective spirit signifies the “socialisation” of delictual liability according to the latest “modern” doctrines advocated in German law by such major theorists of the “social” as von Gierke,110 “the draft [Egyptian] code followed the Germanic codes because their provisions conform with Islamic law.”111 The “social” in torts is thus equated with Islamic law: “The objective spirit of the code is a sign of its modernist nature . . . Should we then inquire about the spirit of Islamic law, we discover that it equally exhibits an unequivocal objective spirit.”112 The same civilisational argument also applies to the code’s preference for flexible standards over rigid rules. Standards, which socialise modern law and individualise justice, are Islamic because they exhibit an objective spirit. Such is the case regarding the code’s articles on unconscionability, unforeseen events and abuse of right, where: “[w]e also notice that standards used in Islamic law equally exhibit an objective spirit which follows the customary interpretations of the people.”113

To summarise, Sanhuri’s cyclical reading of private law history is illustrated in the chart below. The two civilisational poles should be read from a humanist perspective in comparative law, and understood to have universal bearing on both Western and Islamic legal systems. The three major characteristics of modern law that Sanhuri adopted in drafting the code—a socialist tendency, objective spirit, and preference for standards over rules114—are all made to coincide with Islamic law.

<table>
<thead>
<tr>
<th>INDIVIDUALIST CIVILISATION</th>
<th>SOCIALIST CIVILISATION</th>
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</thead>
<tbody>
<tr>
<td>Roman Empire</td>
<td>Medieval Christianity and Islam</td>
</tr>
<tr>
<td>Nineteenth century Europe</td>
<td>Contemporary socialist movement</td>
</tr>
<tr>
<td>passive judge</td>
<td>active judge</td>
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</tbody>
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*normative repercussions in contract law:*

- **autonomie de la volonté**
  - limited scope of unconscionability
  - limited effects of unforeseen events
  - expansive interest provisions

- **social law**
  - expanded scope of unconscionability
  - expanded effects of unforeseen events
  - constrained interest provisions

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**normative repercussions in tort law:**

<table>
<thead>
<tr>
<th>subjective theory of torts</th>
<th>objective theory of torts</th>
</tr>
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<tbody>
<tr>
<td>intentional torts</td>
<td>strict liability</td>
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<tr>
<td>rigid requirement of breach of care</td>
<td>flexible requirement of damages</td>
</tr>
<tr>
<td>individual error</td>
<td>social risk</td>
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3.2.1 The “social” in service of Islamic law:

Sanhuri incorporated three major insights of sociological jurisprudence into the civil code, namely, the existence of gaps, the active role of the judge in filling these gaps through standards, and finally the codification of case law. Sanhuri harnessed the same insights to further the Islamicisation of the civil code, allowing Islamic law a larger scope of application than it otherwise would have enjoyed under the formalist école de l’exégèse conception of a complete and gapless codification.

First, Article 1 of the civil code is based on the anti-formalist premise that legal statutes can never be completely systematised; Sanhuri instrumentalised this sociological insight by “requiring the judge to fill the gaps and lacunae that exist in the code by resorting to the principles of Islamic law.”\textsuperscript{115} However, the practical significance of this article has been the subject of heated debate since its adoption by the Senate legislative committee. One member of the committee who opposed the code used the French adjective “fantaisie” to dismiss its “Islamicising” potentials;\textsuperscript{116} another opponent described the article’s impact as “more sentimental than practical”;\textsuperscript{117} while a third opponent of the article warned against its failure to specify a particular school of Islamic jurisprudence for the judge to follow in case of lacunae, thus opening the door to future conflicts in court decisions.\textsuperscript{118} By contrast, supporters of the article defended its “Islamic potentials” by marshalling two, somewhat contradictory arguments: on the one hand, the article directs the judge to apply custom before Islamic law, but such customary law quite often represents Islamic law as enmeshed in usage, particularly in rural areas;\textsuperscript{119} on the other hand, the article advances the application of Islamic law more profoundly than is suggested on the face of it, since the reference to customary law is a


\textsuperscript{116} Preparatory Works, 93.

\textsuperscript{117} Anderson, *The Shari‘a and Civil Law*, 30; see also *Hill, Sanhuri*, 71-83.


\textsuperscript{119} Preparatory Works, 92.
“symbolic gesture” of no practical significance. In all cases, the article may be viewed as the direct predecessor of Article 2 of the 1971 Egyptian constitution that requires the application of Islamic law as the primary source of law in the land, a provision which, in its turn, has received a much debated application at the hands of the Egyptian Supreme Court.

Second, the emphasis of sociological jurisprudence on case law led Sanhuri consciously to set out and codify the rulings of numerous Egyptian court decisions; he argued that such case law would advance the Islamicisation of the code to the extent that it represented successful attempts by Egyptian judges to modernise particular doctrines of Islamic law. However, this unorthodox sociological reading of Islamic law did not go unchallenged. While a Senate committee member argued that such codified case law ultimately represents “European law, or in other words Roman law,” Sanhuri tersely, and somewhat irritably, retorted: “It’s Egyptian case law in conformity with Islamic law.” Sanhuri’s response, however, should not be cynically dismissed as a clever rhetorical manoeuvre before a Senate debate. Since his 1935 article on redrafting the code, Sanhuri had been arguing for the need to codify Islamic law as developed by the secular Egyptian courts; his claim before the Senate committee thus was in harmony with his longstanding views on the subject. Describing the situation in 1935, Sanhuri had noted:

Questions of gifts, wills, and estates are governed concurrently by the old civil law and Islamic law, and were therefore left under a most confusing and unstable legal regime. These matters have been left almost undiscussed by the legal jurists in their legal treatises. By contrast, the courts have had to intervene and rule upon these matters due to their practical, everyday contact with such questions of law. This has produced a most rewarding case law on the topic, a case law that has successfully endeavoured to resolve the initial schism between the conflicting rules of Islamic law and civil law on these matters. Accordingly, when codifying these legal questions in the future, our legislature would benefit greatly if it consulted the case law of the past fifty years. [emphasis added]

The law of estates probably represents the most significant example of case law that finally made it into the code. The tension between

120 Ibid.
122 Preparatory Works, 91.
123 Sanhuri, Redrafting the Code, 116.
Islamic law and the French civil code on the topic may be summarised as follows: Islamic law requires the settlement of all the deceased’s debts from the estate itself prior to making any distribution to the heirs. By contrast, French law conveys the estate, with its outstanding debts, to the heir, who then assumes full liability even if the debts exceed the balance of the estate. Egyptian case law (mostly that of the Mixed Courts) opted for an “intermediate approach” intended to modernise Islamic law and accommodate the needs of modern society. To this end, the courts adopted the traditional Islamic law principle while limiting its scope, in order to protect the interest of *bona fide* third parties. The principle and its exceptions were finally codified in Articles 897 and 988 of the civil code. Another significant example is the Egyptian courts’ position regarding the Islamic law of wills. According to the four major schools of Sunni jurisprudence, prospective heirs under the rules of intestacy may not benefit from the same estate by devise. To circumvent this prohibition, it became a customary practice to disguise wills as nominal sale contracts. Egyptian courts, appreciating the need to reform Islamic law, generally upheld these camouflaged-wills, and Sanhuri argued in 1935 that a reformed code must take such case law into account. However, very few personal status provisions were ultimately included in the code.

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**Part IV. The Displacement of the “Social”**

On the afternoon of March 29, 1954, a crowd of demonstrators approached the Majlis al-Dawlah (*Conseil d’état*) building in Giza, feverishly chanting “Long live the Revolution” and “Down with the reactionaries.” A member of the police force asked Sanhuri, then president of the *Majlis*, to address the demonstrators and appease their concerns. Acceding to this request, Sanhuri stepped out of his office and was subsequently attacked by the demonstrators. Colleagues from the *Majlis* finally wrested their bleeding director from the demonstrators and rushed him to the hospital. The next day, before the public

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prosecutor investigating the case, Sanhuri accused Nasser of arranging this “contrived” attack. When Nasser paid Sanhuri a hospital visit later in the day, the bed-ridden jurist refused to receive him, openly instructing his wife to show him to the door.128

Sanhuri’s humiliation on the steps of Majlis al-Dawlah is more than a telling anecdote about Nasser’s future hostility towards “rule of law” institutions in Egypt.129 For Sanhuri to assert the “Islamicity” of the civil code, he first needed to mediate between his competing agendas of modernising Islamic law and socialising modern law; this conceptual prerequisite was fulfilled through his humanist/cylical reading of the “social” in private law history. Following the 1952 revolution, a verifiable “paradigm shift” occurred in the Egyptian ruling elite’s approach to questions of identity and redistribution.130 A “schism” developed regarding the ideologically sanctioned mode of addressing these two questions, as the approach associated with the Nasser era came to displace the approach associated with Sanhuri and his generation.131

128 See Ahmad Fawzi, Siyar wa-Hikâyat Sittat Rajul Fikr wa-Qânûn [The life and times of Six Men of Law] (Baghdad 1985), 47-67; see also Sanhuri Memoirs, 284, fn 1, where Sanhuri’s wife confirms in a private interview that her husband had indeed refused to receive Nasser and accordingly she proceeded to “shut the door in his face.” The question of whether Nasser was behind the attack on Sanhuri, and whether the mass demonstrations that overtook Cairo were spontaneous or arranged by the military, is a much debated and controversial episode in the history of the 1952 Revolution. For the purposes of this study, these questions are of marginal importance. What concerns us here is that Sanhuri suspected Nasser’s involvement in the attack as an episode in the development of the schism under consideration.


130 I borrow the term “paradigm shift” from Thomas Kuhn. A “paradigm” is essentially a set of scientific and metaphysical beliefs forming a theoretical framework to validate theories. Contrary to the empiricist view that scientific change is smooth and cumulative, Kuhn maintained that progress occurs by “revolutions” whereby older paradigms are overthrown by incommensurate ones. His analysis was later extended to the ideological premises of modernity in general. See Kuhn, The Structure of Scientific Revolutions (Chicago: University of Chicago Press, 1962); idem, “Second Thoughts on Paradigms,” in The Structure of Scientific Theories, ed. Frederick Suppe (Urbana: University of Illinois Press, 1974).

131 Two points need to be stressed. First, I use the names “Nasser” and “Sanhuri” in order to describe two “paradigmatic” ideal-types, not to reduce the course of post-1952 Egyptian legal history into a personal feud between an army colonel and a legal jurist. My purpose is to instrumentalise their celebrated names in order to make the idea behind the ideal type more discernible. Second, there is nothing historically unique in the Nasser/Sanhuri “paradigm shift;” indeed, with hindsight, it appears all-too-classic in the larger world history of leftist politics. The schism over activism and redistribution is reminiscent of the post-World War I schisms in the German Social Democratic party whose ramifications imbued leftist
Accordingly, I propose that we interpret Sanhuri’s altered verdict on the code’s Islamicity in light of how the post-1952 “paradigm shift” deprived the “social” of its potentials as a conceptual tool of mediation. I will chronicle the principal elements in the Sanhuri/Nasser schism as they developed along the dyads of individualism/socialism and modernity/tradition.

4.1. *The Individualism/Socialism Schism:*

In its final configuration, the schism between the Nasser and Sanhuri visions of how law should be instrumentalised in questions of redistribution may be located on two levels regarding (i) the configuration of the desired “social” and (ii) the mode of its realisation: First, whereas Nasser eventually adopted a radical-revolutionary vision of how the interests of the collective should be balanced against those of the individual, Sanhuri opted for a less confrontational vision based on gradual internal reforms, configured into a coherent legal theory, and introduced under the sanctioned lens of liberal legislation. For Sanhuri, the “social” was to be incorporated into the core of the civil code to internally constrain the individualist scope of *autonomie de la volonté*. For Nasser, this vision of the “social” was not sufficiently far reaching to address the problems of redistributing wealth and achieving social justice in any substantial way; instead, the “social” for Nasser would eventually mean completely suspending or “freezing” the application of numerous civil code sections in favour of a more aggressive “social” championed by special legislation. Second, while Nasser came to view the institutional mechanisms of liberal legislation, with the traditionally privileged role played by lawyers, as serious impediments to achieving his vision of the “social,” Sanhuri, by contrast, was invested in a “social” whose achievement rested on due-process and deep anti-authoritarian commitments.

However, this schism should not lead us to think of Nasser and Sanhuri in terms of a progressive left pitted against a conservative right. Both men were ideologically committed to leftist projects,
although Sanhuri’s brand of leftism is best located in the European social-democrat tradition, while Nasser’s relates more to an alternative radical/revolutionary strand. It also should be noted that the schism, as articulated above, was hardly predictable when the Free Officers carried out their coup d’état on July 23, 1952. Instead, the schism developed gradually and did not assume its final shape until the mid-sixties. In tracing the historical events of the schism, a major distinction should be made between the early days of the revolution and the post-March 1954 crisis. When the army officers carried out their coup d’état, Sanhuri was president of the newly-established Majlis al-Dawlah, and, initially, he was overwhelmingly supportive of the officer’s movement. Indeed, on July 31, 1952, less than a week after the coup took place, the Majlis lent invaluable assistance to the legitimacy of the revolutionary regime in the first constitutional challenge it faced. Following King Farouk’s abdication of the throne, a Regency Council was installed to rule on behalf of the Crown Prince, Ahmad Fouad II, until he attained the age of majority, as stipulated by the 1923 Constitution. However, while the constitution required that a new sovereign ascending the throne pledge an “Oath of Allegiance” before the parliament, the article was restricted to ascension in the wake of the old sovereign’s death as opposed to his abdication. In 1952, applying the constitutional requirement would have meant that the dissolved parliament of the old regime, with an outstanding Wafdist majority, would be recalled to session, which may have posed numerous complications to the Free Officers. The question of whether to re-call the dissolved parliament was addressed in the notorious “Regency Case,” and the Conseil refused a demand for the reinstatement of the former parliament, and decided the case in favour of the provisional legitimacy of “revolutionary jurisprudence.” The Conseil ruled that the Regency Council would pledge its oath of allegiance before the revolutionary cabinet.\textsuperscript{132} Shortly thereafter, Sanhuri was appointed to the newly-established government committee charged with drafting a new law to reform land ownership in Egypt. Sanhuri’s entry in his diary on August 12, 1952, coincidentally his birthday, was overwhelmingly positive: “[I]t gladdens me most that today I will be attending the first committee meeting to discuss the future limitations on land ownership in Egypt. God has willed that I participate in this great and momentous project on this

\textsuperscript{132} See Roel Meijer, \textit{The Quest for Modernity: Secular Liberal and Left-Wing Political Thought in Egypt, 1945-1958} (Amsterdam: Amsterdam University Press, 1996), 168. [hereinafter \textit{Quest for Modernity}].
blessed day.”

The Officers’ movement thus appeared to augur a new era of social justice, which must have pleased Sanhuri greatly, and also presented him with an opportunity to strike back at his old political opponents in the Wafd party. By the same token, Nasser’s initial attitude towards Sanhuri and the *Majlis* was very promising; in one of his first statements about the relationship between the officers’ movement and the *Majlis*, Nasser described the two as allies in the struggle against the corrupt old regime and the *Majlis* “therefore never lost the affection of the people, [something which] the revolution has always appreciated.”

By March 1954, however, the power struggle in revolutionary Egypt between General Mohammed Naguib, president of the newly-declared Republic of Egypt, and Colonel Nasser, the country’s prime minister, had reached its height. At the time, Naguib had become the rallying figure for political actors who demanded social reform through an elected democratic government, and the restoration of civilian rule. Nasser, who suspected that an elected government would be unable to carry out the political and social reforms the country needed, clearly favoured a more “revolutionary” approach based on an authoritarian path to securing “social gains.” The power struggle came to a final stand-off in March 1954. Counter-demonstrations overtook Cairo, including the one in which Sanhuri was attacked for allying himself with Naguib and supporting the democratic road to social reform. Nasser’s camp prevailed in the struggle, and the schism was resolved in favour of the “revolution.”

On April 15, 1954, a new law came into force which denied politicians of the pre-1952 regime the right to hold any government posts for a transitory “purification” period. Sanhuri’s tenure at the *Majlis* was thus terminated. Thereafter, he was denied the right to leave the country until 1961 when he visited Kuwait to draft its laws. Special courts, such as the “People’s Tribunals,” effectively limited the jurisdiction of the *Majlis*, and finally, in 1955, the government relocated eighteen judges employed at the *Majlis* to external judicial posts. The reason behind this action appears to be that the eighteen judges were close to Sanhuri or sympathised with his views on strict review of administrative actions taken by the government. The *Majlis*, fearing that the government’s next step would be its complete abolition, adopted a

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133 Sanhuri Memoirs, 381.
134 Meijer, *Quest for Modernity*, 166.
much softer review of government actions. By the mid-1960s, increasing demands were made for the extension of socialist reforms to include the judiciary, a criticism of the classic liberal doctrine of the separation of powers. The final blow came with the notorious “massacre of the judiciary” in 1969.136

4.2. The Modernity/Tradition Schism:

Unlike Sanhuri, Nasser did not attempt to locate the “social” in either Egypt’s Islamic past or in contemporary Western practices. Nasser’s regime was secular in its understanding of tradition, and therefore little interested in legitimating its power by appealing to projects of Islamic revivalism. Instead, the “social” was now located in the budding promise of a “Third World” project, based on a forward looking, scientific, and socialist path of development, as opposed to Sanhuri’s “Orient” in which tradition represents an immutable repository of ancient wisdom and a glorious past with lessons that may be of use if they are modernised and their affinity with the Western “social” highlighted. Naturally, Nasser’s regime made its own appeals to Arab history, but such appeals were meant to legitimate the present order, as opposed to mining the past for a development agenda. This schism is perhaps best captured in Albert Hourani’s acute observation that

“[t]he shari’a indeed had been abandoned with astonishing speed and completeness . . . If [post-1952] thinkers and statesmen recognised a norm by which their acts could be judged, it was not to be found in the past but in the future . . . this was symbolised by the change in postage stamps, which no longer showed mosques or sphinxes or kings, but workers and peasants in heroic attitudes, shaking their hands at fate.”137

Nasser’s socialist-nationalist project of modernisation replaced Sanhuri’s Orient-nationalism. “Dependency” became the major preoccupation, and addressing it entailed a much more confrontational attitude towards the West than envisioned in Sanhuri’s statement that “[s]eule une évolution lente peut assurer l’avenir de l’Orient.”138 One may say that Bandung replaced Paris as the consciousness of modernism, and an “import substitution” model of industrialisation and social reform

136 See Brown, Rule of Law 84-92. No judges were physically “massacred;” rather, the term is a metaphor for Nasser’s aggressive encroachments on the independence of the judiciary.
137 Albert Hourani, Arabic Thought in the Liberal Age (Cambridge: Cambridge University Press, 1995), 350.
138 Sanhuri, Le Califat, 550.
jostled the traditional nationalist preoccupation with political independence and a Western path of development. While Nasser’s alternative was socialism, it was nonetheless officially non-Western; it was “Arab socialism,” a different approach, sensitive to the particular conditions of Third World development. Hourani is again worth citing:

[T]he Egyptian revolution of 1952 was significant [as] it brought to power men who, although fully alive to the need for accepting the techniques of modern industry, and living in the universe of modern political discourse, yet refused to accept a privileged position of the West . . . Welfare was no longer defined . . . in terms of individual freedom, but rather of economic development, a rise in general living standards, and the provision of social services.139

Finally, it must be emphasised that the modernity/tradition schism is not meant to pit Sanhuri against Nasser in the simple terms of pitting Islam against secularism. Both Sanhuri and Nasser were secularists: both were committed to a fundamental distinction between the religious and the temporal, and both awarded exclusivity to the temporal in the public sphere. The schism merely reflects the different voices in which the temporal may speak, and hence the different conception of the social that the temporal may advocate. According to Sanhuri, the “social” may be located in a concurrent temporal reading of both the civilisational dimensions of Islamic law, as well as the “latest modern developments” in Western law; the “social” under Nasser was conceived as independent from either of these two sources.

4.3. The Legal Repercussions of the Schism:

The schism along the dyads of individualism/socialism and modernity/tradition produced a different concept of the “social” that soon replaced the one advanced earlier by Sanhuri. Doctrines such as unconsciability or unforeseen events were no longer sufficient to champion the “social,” and the relationship between the revolutionary regime and the “legal field” may be brutally summarised as follows. Between 1952

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139 Hourani, *Arabic Thought in the Liberal Age*, 348-51. We can account for this new conception in numerous historical events that distinguished the generations of Nasser and Sanhuri. For example, on the international and regional levels, the schism reflected post World War II changes in the Western balance of power, the success of national liberation movements, the rise of Arab nationalist ideology, and the Palestine conflict; on the domestic level, the schism reflected the political marginalisation of both the Muslim Brotherhood and the communists, the regime’s “loss of the Sudan” (Sanhuri had advocated the union of Sudan with Egypt). See Sanhuri, *Qadiyyat Wādī al-Nīl* [The Nile Valley Question], in *Articles and Research*, 201-510.
and Sanhuri’s death in 1971, the regime’s conception of the relationship between law and development oscillated between the following two positions: First, law was viewed as only marginally relevant to an “import substitution” model of economic development, and as such was relevant only in an instrumental sense, i.e. in terms of special legislation championing “social justice” by disenfranchising the landed and commercial bourgeoisie through expropriation, rent control, maximum land holdings, etc. Under this image, the role of the civil code in socialising the law was largely perceived as inadequate, and therefore its application was either suspended in favour of special legislation, or efforts were made to replace it altogether with an exclusively socialist code. The social no longer meant protecting the weaker party in a contractual relationship by constraining the scope of autonomie de la volonté as the expression of Western/Islamic socialism; instead, the “social” now implied extra-legal processes of mass redistribution of wealth. The role of the “social” as articulated in the civil code thus became largely inconsequential.

Alternatively, Nasser’s regime entertained a second and more aggressive view of the legal field as inevitably hostile to “progressive” development, due to the liberal spirit with which it is imbued. In this view, most of the suggested “socialist reforms” of the judiciary were meant to contain the political potentials of the judiciary and subjugate it to the executive, which finally culminated in the “massacre of the judiciary” of August 1969. Furthermore, the engagement of lawyers in politics was drastically curtailed; no longer the staple of ministries and parliament, they were “reduced to the status of legal technicians,” while doctors, engineers and military personnel took over the public sphere. This was accompanied by a dramatic decline in the prestige of legal education, as centralised educational schemes expanded admission to law schools while reducing the qualifications for admission.

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143 For a general discussion, see Brown, *Rule of Law*.
144 Ziadeh, *Lawyers*, 159; see generally 148-59.
Conclusion:

Whereas in 1942, Sanhuri advanced the draft Egyptian civil code as a victory for Islamic law, he later qualified this assessment, downplayed its Islamic identity, and finally declared in a private interview his existential preference for the more Islamic Iraqi civil code. In Part IV of this article, I argued that Sanhuri’s changing opinion of the code’s Islamicity is better understood in light of the displacement of the “social” as a conceptual tool of mediation. However, several alternative interpretations may be offered. Perhaps Sanhuri overemphasised the Islamicity of the code in 1942 as a calculated tactic to outmanoeuvre his political adversaries. Perhaps the subsequent experience of relying on the *Majallah* in drafting the Iraqi civil code influenced Sanhuri’s view on the potentials of modernising Islamic law. Perhaps his political marginalisation under Nasser triggered his rigid dogmatism in judging the code’s Islamicity. Perhaps the change reflects the archetypal conservatism in opinion that accompanies old age and overemphasises the experience of the religious at the expense of the temporal. In short, alternative readings are abundant.

However, I shall resist the scholarly temptation to balance my “model of mediation” thesis against these alternative readings. I resist because I do not wish to confuse what I believe is most at stake in offering a genealogical reading of Sanhuri’s scholarship. Viewed as an author, Sanhuri “is a certain functional principle by which in our culture, one limits, excludes, and chooses; in short, by which one impedes the free circulation, the free manipulation, the free composition, decomposition, and recomposition of fiction . . . The author is therefore the ideological figure by which one marks the manner in which we fear the proliferation of meaning.” To my mind, the meaning whose proliferation is most at stake here is the meaning of a successful reconstructive project in Islamic law. I began this article by arguing against Anderson’s approach in assessing the Islamicity of Sanhuri’s code and claiming that to verify its Islamicity we need to shift our

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146 *See* the debates over the code’s Islamicity in the Senate, *Preparatory Works*, 84-100.
attention to Sanhuri the author. As it turns out the author, Sanhuri, had different opinions at different times. A genealogical examination of his “will to Islamise” cannot exclusively settle the question of the code’s Islamicity. It does, however, highlight how Sanhuri’s perspective on what makes a legal document Islamic was inextricably connected to a particular agenda in redistributing wealth and power in the private law sphere. In other words, the genealogical study of Sanhuri’s “will to Islamise” is not meant to settle the code’s Islamicity—rather, it is useful only to the extent that it demonstrates that to reconstruct identity is to redistribute wealth and power. It is therefore more useful to ask who wins and who looses by each article in Sanhuri’s code as opposed to asking whether the code itself is Islamic or not. Thus, different opinions about the success of reconstructive projects in Islamic law may be better understood in terms of ideological disputes over the acceptable limits of redistributive projects. As for Sanhuri’s internal divisions, on both discursive and existential levels, they are in no way peculiar to him. They exemplify a general post-colonial condition, as well as a particular dilemma that many Arab intellectuals on the political left continue to feel for Islamic revivalism to this day.


