

Social Function of Property in Islamic Law: Egyptian Civil Code Article 802^{*}

Hüseyin İÇEN

Res. Asst., İstanbul Sabahattin Zaim Uni. Faculty of Business & Management Sciences
Arş. Gör., İstanbul Sabahattin Zaim Üniversitesi İşletme ve Yönetim Bilimleri Fakültesi

PhD Student, İstanbul University Social Sciences Institute

Doktora Öğrencisi, İstanbul Üniversitesi Sosyal Bilimler Enstitüsü

İstanbul/TÜRKİYE

hsynicen42@gmail.com | orcid.org/0000-0002-3368-3878

Abstract

In the modern period, the concept of property has been the subject of many studies. Determining the philosophical and legal foundations of the concept of property in the contemporary period is essential for analyzing the development of the notion. Another important term that stands out in the studies on property is *social function*. The subject

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of this study is to examine the development of the theory of *social function* from the perspective of Islamic law in Article 802 of the Egyptian Civil Code and its aftermath. In fact, the concept of *social function* concerning property is identified with the French jurist Léon Duguit (d. 1928). Duguit claimed that property is not only an individual right but also involves duties to society. This approach emphasized the social aspect of property and suggested that property owners have particular responsibilities for the general social welfare. The *social function* was discussed at the codification stage in the Arab-Islamic world with ‘Abd al-Razzāq Ahmad al-Sanhūrī (d. 1971) and adopted by Muslim jurists. Sanhūrī presented comparative studies in modern and Islamic law and played an important role in drawing the property framework at the codification stage. Muhammad Abū Zahrah (d.1974) and ‘Alī al-Khafif (d.1978) analyzed the *social function* theoretically and explained it from an Islamic perspective. Although Muhammad Abū Zahrah and ‘Alī al-Khafif discussed the *social function* theory within an Islamic framework, this paper proposes that these explanations were a reaction to Duguit's theory. It shows that the theory is an object of debate in the context of both Western legal philosophy and Islamic law. A detailed theoretical and practical examination of *social function* concerning property in Islamic law has not been identified in contemporary literature. This paper aims to examine the introduction of the *social function* theory into Islamic law and its formulation in law-making and literature with respect to specific actors.

Keywords: Islamic Law, Property, *Social Function*, Codification, Léon Duguit, ‘Abd al-Razzāq Ahmad al-Sanhūrī.

İslâm Hukukunda Mülkiyetin Sosyal Fonksiyonu: Mısır Medeni Kanunu Madde 802**

Öz

Çağdaş dönemde mülkiyet kavramı birçok çalışmaya konu olmuştur. Mülkiyet kavramının modern dönemdeki felsefî ve hukukî temellerinin tespiti, kavramın gelişimini incelemek açısından önemlidir. Mülkiyet ile ilgili çalışmalarda öne çıkan bir diğer önemli

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Bu çalışmaya katkıda bulunanlara teşekkürlerimi sunarım. Duguit hakkında bilgi sahibi olmamı sağlayan Hasan Hacak'a minnettarım. Ayrıca, bu konudaki çalışmalarında bana destek olan Nail Okuyucu'ya da şükranlarımı iletmek isterim. Makalemin ilk taslağını okuyup değerlendiren Oğuzhan Tan'a ve makaleyi baştan sona inceleyerek düzeltmelerini ileten Hakime Reyhan Yaşar'a teşekkürlerimi ifade etmeden geçemeyeceğim. Ayrıca, çalışmaya gösterdiği ilgi, makalenin farklı bir versiyonunu okuyup yorumlarını e-posta yoluyla ileten Paul Babie'ye de teşekkür ederim.

kavram *sosyal fonksiyon*dur. Bu çalışmanın konusu *sosyal fonksiyon* teorisinin İslâm hukuku açısından Mısır Medeni Kanunu Madde 802 ve sonrasındaki gelişimini ele almaktır. Aslında mülkiyetle ilişkisi bağlamında *sosyal fonksiyon* kavramı Fransız hukukçu Léon Duguit (ö. 1928) ile özdeşleşmiştir. Duguit, mülkiyetin yalnızca bireysel bir hak olmadığını, aynı zamanda topluma karşı sorumluluklar içerdiğini savunmuştur. Bu yaklaşıma göre mülkiyetin toplumsal yönü vurgulanmış ve mülk sahiplerinin genel sosyal refah için belli sorumluluklarının olduğu ifade edilmiştir. *Sosyal fonksiyon*, Arap-İslâm dünyasında Abdürrezzâk Ahmed Senhûrî (ö. 1971) ile kanunlaştırma aşamasında tartışılmış ve İslâm hukukçuları tarafından benimsenmiştir. Senhûrî, modern hukuk ile İslâm hukuku alanında mukayeseli çalışmalar ortaya koymuş ve kanunlaştırma aşamasında mülkiyetin çerçevesinin çizilmesinde önemli bir role sahip olmuştur. *Sosyal fonksiyon*u teorik olarak Muhammed Ebû Zehre (ö.1974) ile Ali el-Haffî (ö.1978) incelemiş ve İslâmî bir bakış açısıyla açıklamışlardır. Her ne kadar *sosyal fonksiyon* teorisi Muhammed Ebû Zehre ve Ali el-Haffî tarafından İslâmî bir çerçevede ele alınmış olsa da bu makalede söz konusu açıklamaların Duguit'in teorisine tepki olarak geliştiği ifade edilmiştir. Bu durum, teorisinin hem Batı hukuk felsefesi hem de İslâm hukuku bağlamında önemli bir tartışma konusu olduğunu göstermektedir. Çağdaş literatürde *sosyal fonksiyon* kavramının mülkiyetle irtibatlı olarak İslâm hukuku açısından teorik ve pratik şekilde detaylı bir incelemesi tespit edilememiştir. Bu çalışmanın amacı *sosyal fonksiyon* teorisinin İslâm hukukuna taşınmasını ve teorisinin kanun yapımıyla literatürdeki ifade ediliş biçimini bazı aktörler ile ilişkili olarak ele almaktır.

Anahtar Kelimeler: İslâm Hukuku, Mülkiyet, *Sosyal Fonksiyon*, Kanunlaştırma, Léon Duguit, Abdürrezzâk Ahmed Senhûrî.

Introduction

The 19th and 20th centuries witnessed changes in Islamic legal thought. The origins of these changes can be traced back to philosophical approaches, reforms, the impact of Enlightenment, and codifications in the West. Developments in legal philosophy have influenced law-making in many parts of the world, including countries where Muslims live. Positivism, which impacted codification, is one of the legal developments. It is a philosophical movement that accepts methods based on scientific experimentation and observation. It rejects metaphysical explanations as a method. Legal positivism is an expression of positivism in law. It claims to create a law that is free from metaphysical principles. In legal positivism, the law's core is the state, social life, and rules. Also, it refuses metaphysical notions. Like legal positivism, sociological/realist positivism proposes to alienate law from metaphysical concepts. It also offers to put the law based on society. The views of Auguste Comte (d. 1857) about positivism and Émile

Durkheim (d. 1917) concerning social solidarity have been seen in some kinds of sociological positivism. Léon Duguit, who developed the *social function* theory by transforming and combining the views of Comte and Durkheim in sociological positivism, impacted the codifications of some countries. This study's subject is the influence of the public jurist Duguit on the codification of Islamic law in the modern era and Shari'ah-based explanations of the theory of *social function*. Although Duguit impacted codifications with his *social function* theory, his sources may not have been only Comte or Durkheim. For this reason, instead of saying that he has a direct influence, it might be stated that the codification of Islamic law and Duguit's theory overlap and there is no impression. This study aims to draw attention to the similarities between Duguit's *social function* theory and the terms used in the codifications of Islamic law. Additionally, the description efforts of Islamic jurists to gain the theoretical background to the theory is one of the original aspects of this study.

The codification in 20th-century Arab countries, as an extension of the reflections on contemporary Islamic law, is an essential phenomenon for our study in terms of containing the *social function* of property. Analyzing the stages of the codification of the Egyptian Civil Code and the sources used in this process is vital in tracing the *social function* theory on Islamic legal thought. In his *social function* theory, Duguit suggested distancing law from metaphysical principles. He implemented the concept of social solidarity to present the law scientifically. While the most original form of his theory is centered on property, Duguit's conception of property is practically reflected in many regulations. He defined ownership as a *social function* rather than as a subjective and absolute right. It is necessary to look at the theory of *social function* from a holistic perspective. Previous studies have provided some remarks on Muslim scholars' adoption of the *social function* theory. Unlike previous studies, this research focuses on the adoption Duguit's theory as a reaction within Islamic law. By “reaction”, it is meant that in Islamic law, the scholars theorized the social function in accordance with Islam and without abstracting it from metaphysical features. In previous studies, it can be stated that there are two tendencies on this issue. Although more than one researcher is involved in each approach, the trends can generally be summarized as two approaches. The previous approaches touch on the following: one suggests that Duguit left Muslim jurists and scholars under his influence,¹ while the other asserts that it was just an

¹ The views of the authors referring to this view can be sorted as follows: Hasan Hacak indicated that the notion of *social function* belonged to Léon Duguit and that it had an influence on the Arab and Islamic world. See. Hasan Hacak, “İslâm Hukuk Düşüncesinde Özel Mülkiyet Anlayışı”, *The Journal of M.U. İlahiyat Faculty (International Journal of Theological and Islamic Studies)* 29 (2005), 117. According to him, the concepts used by the authors of Islamic law are under the influence of Duguit. Hacak, “İslâm Hukuk Düşüncesinde

overlapping of opinion between Duguit and Muslim scholars rather than any effect.² On the other hand, this study is distinguished because it draws attention to the intellectual similarities and effects between Duguit and al-Sanhūrī. In addition, practical and theoretical examples are investigated together in this study. A practical example is the development of Article 802 of the Egyptian Civil Code on the theme of *social function*. The theoretical example is that Abū Zahrah and ‘Alī al-Khafif attended the al-Sanhūrī and Duguit relations chain. However, they rounded off the Islamic law explanations circle of this chain. There are some reasons for favoring the explanations of these two Islamic jurists. This is because these two Islamic jurists were either al-Sanhūrī's students or contemporaries who discussed the same issues in the literature.

The first section of this study focuses on the views of some representatives of legal positivism in relation to legal philosophy and its connection to sociological positivism. Then, Léon Duguit's views on the *social function* of property as an expression of sociological positivism are discussed. In this context, the causes and sources of legalization movements in Egypt and the developmental stages of the Egyptian Civil Code, have been briefly reviewed. After all these, the development and sources of Article 802 of the Code, which is one of the most clearly expressed articles on property, have been addressed. In the development of Article 802 of the Egyptian Civil Code, this paper traces the theory of the *social function* of ownership within the framework of al-Sanhūrī's book, *al-Wasīf fī Sharḥ al-Qānūn al-Madani al-Jadīd*. Such an examination is essential to examine the role of sociological positivism in Islamic legal thought in the modern period. The views of Comte and Durkheim have also been analyzed in the context of their relations with Duguit. It underlined the statements on *social function* made by al-Sanhūrī and two of al-Sanhūrī's contemporaries, Abū Zahrah and ‘Alī al-Khafif

Özel Mülkiyet Anlayışı”, 119. Halit Çalış asserted that the *social function* of property has been adopted by some contemporary authors in Islamic law. See. Halit Çalış, *İslâm Hukukunda Özel Mülkiyete Getirilen Sınırlamalar* (Konya: Selçuk Üniversitesi, Sosyal Bilimler Enstitüsü, Doktora Tezi, 2001), 71-72. Bechor analyzed *social function* in connection with the concept of social solidarity. See. Guy Bechor, *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932 to 1949)* (Boston: Brill, 2007), 99-106. Assaf Likhovski also suggested that Duguit's concept of social solidarity is reflected in the works of Egyptian scholars. See. Assaf Likhovski, “Jurisprudence and Nationalism in the British Empire in the Early Twentieth Century: India, Egypt, and Palestine Compared”, *The English Historical Review* (Forthcoming) (2023), 20-21.

² Paul Babie, whom I contacted by e-mail as one of the editors of a comprehensive study on Duguit, can be considered a representative of the second approach. His interpretation can be described as follows: it would be to say that it is not Duguit who influenced Islamic law; rather, Islamic law, which is much older than Duguit's theory, coincides with what Duguit claims. Thus, what can be said is that Duguit's theory deals with much older, religious, Islamic thought on the nature of property and obligation.

could have been in the same line with Duguit. Nevertheless, it cannot be ignored that there are some differences between them.

1. Representatives of Trends in Legal Positivism: John Austin and Hans Kelsen

Positivism is a philosophical and scientific school of thought that regards what actually exists as the source of actionable knowledge and bases its research and explanations on this reality.³ It has excluded metaphysical and religious knowledge. Auguste Comte has formalized positivism in a systematic framework.⁴ According to positivism, social life encompasses law and is its foundation. Law is not just a matter of will or a rule-making phenomenon. It is a sociological and psychological reality. Positivism defines the concepts of law and the state as realities determined by external facts and social rules.⁵ The sociological school of law links the formation and content of law to real-life events. Accordingly, the nature of law is determined not by codes but by practices and customs within social life. In addition, real-life practices and traditions must also be considered in the formulation of legal norms.⁶ Although there are some differences in detail regarding the positivist approach in law, these perspectives have certain common aspects. However, the details of the common points are not included in this paper, as it is considered to exceed the study's limits.

In legal positivism, law latches on to the state, society, or normative system. In this respect, the law is articulated through the concepts of the state in analytical legal positivism, society in sociological positivism, and the hierarchy of norms in normativist positivism. There are three forms of legal positivism.⁷ These are analytical, sociological, and normativist legal positivism. This section discusses the leading representatives of analytical and normativist positivism and their views. The next chapter provides detailed information about sociological positivism. In seeking the relationship between sociological positivism and other forms of positivism that originate from the same roots, this section focuses on analytical and normativist legal positivism. In analytical legal positivism, the law should be isolated from natural law and metaphysical elements. It asserts that law is the will of the legislator. And it is also called voluntarist positivism because it arises from the lawmaker's will. According to this type of legal positivism, moral values and rules, such as customs, cannot be the subject of law.

³ Niyazi Öktem - Ahmet Ulvi Türkbağ, *Felsefe, Sosyoloji, Hukuk ve Devlet* (İstanbul: Der Yayınları, 2012), 381.

⁴ Orhan Münir Çağıl, *Hukuk Başlangıcı Dersleri* (İstanbul: İstanbul Üniversitesi Hukuk Fakültesi Yayınları, 1963), 311; Yıldırım Torun, *Hukuk Felsefesi* (Ankara: Orion Kitabevi, 2012), 263-264.

⁵ Çağıl, *Hukuk Başlangıcı Dersleri*, 335.

⁶ Çağıl, *Hukuk Başlangıcı Dersleri*, 336.

⁷ See. Torun, *Hukuk Felsefesi*, 268-276.

Therefore, in social life, law should not be based on unwritten rules, but on principles determined by superior reason. Arguably, its most important characteristic is that in social life, the law is not formed by itself but by the will of the legislator.⁸

John Austin (d.1859), one of England's leading names of analytical positivism, benefited from utilitarian legal theory and Jeremy Bentham (d.1832). Austin advocated for setting aside natural law and moral principles.⁹ Austin believed that all rules are fundamentally orders. These orders mean to do something or to avoid it. Failure to comply with orders results in inevitable damage. Therefore, such commands must be obeyed. The recipient of these orders has a responsibility or obligation/duty. The concept of command has a dual relationship with the idea of obligation. In other words, if there is a command, there is an obligation.¹⁰ From Austin's perspective, all legal duties derive from the orders of the sovereign.¹¹

Austin argued that there are critical distinctions between positive law and divine law, as well as between positive moral and metaphorical rules.¹² This differentiation is one of the main features of his views on positivism. Austin has criticized the concept of justice in the natural law theory. He asserted that the concept of law should derive from a superior authority. He maintained that there is no relation between positive law and justice. In other words, the realization of justice cannot be considered the objective of positive law. Austin stated that the characteristic of the legal state is a situation in which a rational individual determines to regulate the actions and attitudes of another person over whom he has sovereign authority. He posited that the sovereign will, which establishes the rules of positive law, must be politically superior. He has called it an "independent political society". Furthermore, Austin pointed out that a person of high rank can be a judge if members of social life depend on someone or persons.¹³

⁸ Ayhan Ak, "İslam Hukuku Perspektifiyle Hukuki Pozitivizmin Analizi", *Journal of Islamic Law Studies* 37 (2021), 40; Torun, *Hukuk Felsefesi*, 267.

⁹ Torun, *Hukuk Felsefesi*, 268.

¹⁰ Adnan Güriz, *Hukuk Felsefesi* (Ankara: Siyasal Kitabevi, 2019), 289.

¹¹ John Austin, *Lectures on Jurisprudence Or The Philosophy of Positive Law* (London: John Murray, Albemarle Street, W, 1920), 194.

¹² Austin, *Lectures on Jurisprudence Or The Philosophy of Positive Law*, 62.

¹³ For Austin's views on independent political society and sovereignty, see. Austin, *Lectures on Jurisprudence Or The Philosophy of Positive Law*, 82-83. For Hart's criticisms to some of Austin's basic views, such as sovereignty see. Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (Malden, Mass.: Wiley-Blackwell, 2010), 231.

In analytical or voluntarist positivism, Austin has proposed that positive law should be distinguished from positive moral rules.¹⁴ He argued that positive law cannot be grounded based on principles of justice. Instead, according to him, positive law must be derived from the highest authority within a given society. This supreme authority may consist of a person or a group. Moreover, the state of law is based on commands issued by persons in a superior position. Those who do not comply with these orders may be punished.¹⁵ Austin's analytical positivism represents one view within the framework of legal positivism. Another proponent of analytical positivism was Jeremy Bentham, who predated Austin. He aimed to build the law on the principle of utility.¹⁶ Bentham's contributions to analytical positivism in England are also crucial for the systematization of the concept of utility.¹⁷

Another type of legal positivism is normativist positivism. The views of Hans Kelsen (d.1973) are prominently associated with normativist positivism. In this framework, laws are established by statute.¹⁸ In other words, one rule leads to the formation of another.¹⁹ Kelsen developed the idea of pure law as a kind of positivist law²⁰. In pure legal theory, Kelsen, like Austin, emphasized the concept of duty in relation to the concept of right.²¹ According to Kelsen, legal theory should be free from politics, ethics and sociology. He asserted that experimentation is not necessary for forming law; rather, he thought it is essential. He stated that legal theory is a science and thought that it should not be considered an expression or will. For Kelsen, law is normative, not natural.²² Kelsen maintained that legal positivism should exclude the legal order from religious justification.²³ In Kelsen's thought, the basis of normativist legal positivism is the hierarchy of norms. At the lowest level, there are court norms that operate the law. Court decisions are based on the law. Laws are also the general norm enacted by the

¹⁴ On positive moral rules and the examples he cited, see. Austin, *Lectures on Jurisprudence Or The Philosophy of Positive Law*, 65.

¹⁵ Güriz, *Hukuk Felsefesi*, 290.

¹⁶ For details of Bentham's opinions, see. Emine Cengiz, "Haz ve Acının Matematiği: J. Bentham'ın Faydacı Ahlakının İmkânı", *Dört Öge* 15 (2019), 142.

¹⁷ See. Torun, *Hukuk Felsefesi*, 293-295; see. Ayşen Furtun, *Hukuk Felsefesi Dersleri* (İstanbul: Beta Basım Yayım, 2013), 96-99.

¹⁸ Hans Kelsen, *What Is Justice? Justice, Law and Politics in the Mirror of Science* (Berkeley, Los Angeles, London: University of California Press, 1971), 219.

¹⁹ Torun, *Hukuk Felsefesi*, 275.

²⁰ Patterson, *A Companion to Philosophy of Law and Legal Theory*, 345.

²¹ Kelsen, *What Is Justice?*, 276.

²² Güriz, *Hukuk Felsefesi*, 311.

²³ Hans Kelsen, *General Theory of Law and State* (Cambridge: Harvard University Press, 1949), 116.

lawmaker. All laws, customs, and traditions are based on the constitution. The highest norm is the constitution itself. The higher-level norm enforces the lower-level norms.²⁴

Another type of legal positivism, sociological or realist legal positivism, and its most prominent representative, Léon Duguit's *social function* theory, will be the focus of the forthcoming chapter. Duguit's theory of social function can be understood within the broader context of legal positivism, including the theories of Austin, Bentham, and Kelsen. While analytical positivism endeavors to extract law from natural law and metaphysical elements, Duguit developed his theory from a sociological perspective, emphasizing the role of social structures and practices in shaping legal norms. Normativist positivism, on the other hand, emphasizes the hierarchical organization of legal norms within the legal system. By emphasizing the importance of social solidarity and cooperation in determining legal obligations, however, Duguit's theory challenges the strict hierarchical view of law. So, whereas analytical and normativist positivism emphasize the authority of the state or legislator in the law-making process, Duguit's sociological positivism broadens the perspective by acknowledging the social context and common interests as the basis of legal principles. Duguit's *social function* theory can be regarded as a synthesis of positivist principles and a sociological understanding of law.

2. Possible Intellectual Successor of Comte and Durkheim:

Léon Duguit and *Social Function* of Property

Sociological or realist positivism is a type of legal positivism. In sociological positivism, law is fixed to the social structure. Sociological positivism has emerged as a structure of thought opposing the natural law theory.²⁵ The natural law school is a theory based on the social contract. As a result of the natural law theory being criticized in many respects and its principles being rejected, some jurists accepted that positive law is the real law. Many philosophical currents, political situations, and ideological tendencies have significantly shaped and explained the nature of positive law. Due to the further development of these influences in many countries, positive legal theory has been interpreted differently in countries such as England, France and Germany.²⁶ While a comprehensive review of these interpretations is beyond the scope of this discussion, a brief overview is presented below.

After the successful conclusion of the French Revolution and the overthrow of the monarchy, a fixed and immutable code was deemed necessary, forming the

²⁴ Kelsen, *What Is Justice?*, 221-222.

²⁵ Ak, "İslam Hukuku Perspektifiyle Hukuki Pozitivizmin Analizi", 39; Torun, *Hukuk Felsefesi*, 273.

²⁶ Güriz, *Hukuk Felsefesi*, 275.

foundation of positive law in France. The most important feature of this fixed code is that it stands out as a natural law. While the French Civil Code was being constructed, it was stated that the origin of legislation was natural law theory. The jurists of this period approached property as a natural right. In this theory, property is not seen as a natural consequence of a contract or positive law, but as a right inherent in human beings and arising from being human.²⁷ After the French Revolution, the dominant view in France was that law was the highest form of natural law. The idea that the legislator constructed natural law under positive law was accepted in this country.²⁸

Legal positivism is recognized in contrast to natural law. Comte, a leading figure in scientific positivism, influenced this movement and law by advocating empiricism rooted in observation and experimentation. He believed that scientific ideas should come from the method of experiment and observation.²⁹ Comte divided the history of human thought into three periods. According to him, human ideas were formed through three stages. In the positive phase, the last period, a man tried to explain all the phenomena in nature based on observation and experiment. In this period, apriorist terms were discarded and scientificity came to the fore.³⁰ In this respect, Comte was against the theory of natural law.

Comte was convinced that man should not have natural rights. He asserted that no one could have rights other than those authorized by the administration. He believed that the concept of right is metaphysical. Comte claimed that things that exist through experiment and observation are factual.³¹ Comte proposed that all generations while surviving, would contribute to the progress of civilization by producing more than enough for themselves and passing on the accumulated amount to subsequent generations. He has stated that private property must be isolated from individualism.³²

It can be said that the foundations of Duguit's ideas and his contribution to sociological legal positivism can be sought in Comte.³³ Some of Comte's ideas in this direction were accepted by Léon Duguit and he developed them into as a sociological legal

²⁷ Güriz, *Hukuk Felsefesi*, 280.

²⁸ Güriz, *Hukuk Felsefesi*, 281.

²⁹ Michel Bourdeau, "Auguste Comte", *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta - Uri Nodelman (Stanford: Metaphysics Research Lab, Stanford University, 2023).

³⁰ Wolfgang Friedmann, *Legal Theory* (London: Stevens Sons Limited, 1960), 178-179. Hamide Topçuoğlu, *Hukuk Sosyolojisi (Sosyoloji Açısından Hukuk)* (Ankara: Güzel Sanatlar Matbaası, 1960), 358-359.

³¹ Cahit Can, *Hukuk Sosyolojisinin Antropolojik Temelleri ve Genel Gelişim Çizgisi* (Ankara: Seçkin, 2002), 164.

³² Topçuoğlu, *Hukuk Sosyolojisi (Sosyoloji Açısından Hukuk)*, 364.

³³ Yasemin Işıktaç - Umut Koloş, *Hukuk Sosyolojisi* (İstanbul: İstanbul Bilgi Üniversitesi, 2015), 70.

positivism.³⁴ Comte was the pioneer of positivism. Duguit, on the other hand, adapted the positivism founded by Comte to practice in law. However, another thinker, Durkheim, was also crucial for Duguit.³⁵ According to Durkheim, social life will be complete only with social solidarity. He emphasized that law and social solidarity could be the same thing.³⁶ Duguit's notion of *social function* is compatible with the concept of social solidarity promoted by Durkheim.³⁷ In conclusion, it may be argued that Duguit benefited from Comte and Durkheim in integrating sociology and law.³⁸ This chapter does not go into further details of the relationship between the views of Comte, Durkheim and Duguit. Because it is beyond the scope of this title to discuss the literature that concludes that the relationship between these three, Duguit was inspired by Comte and Durkheim.³⁹ Instead, this chapter focuses on Duguit's conception of the *social function* of property/ownership.

It has been stated above that the theory of natural law was the basis of the French Revolution. In natural law, property is considered a subjective right. In this theory, property is constructed as a subjective right focusing on individualism. In

³⁴ Friedmann, *Legal Theory*, 178.

³⁵ Friedmann, *Legal Theory*, 179. For an indication of the influence of Durkheim as well as Maurice Hauriou on Duguit's scholarship, see. Paul Babie - Jessica Viven-Wilksch, "Léon Duguit and the Propriété Function Sociale", *Léon Duguit and the Social Obligation Norm of Property: A Translation and Global Exploration*, ed. Paul Babie - Jessica Viven-Wilksch (Singapore: Springer, 2019), 11; Geir Stenseth, "The Importance of the Social Function of Property—Norway", *Léon Duguit and the Social Obligation Norm of Property: A Translation and Global Exploration*, ed. Paul Babie - Jessica Viven-Wilksch (Singapore: Springer, 2019), 129; Peter D. Burdon - James G. Stewart, "Can Social Property Survive Under Neoliberalism?: A View from Australia", *Léon Duguit and the Social Obligation Norm of Property: A Translation and Global Exploration*, ed. Paul Babie - Jessica Viven-Wilksch (Singapore: Springer, 2019), 357.

³⁶ Can, *Hukuk Sosyolojisinin Antropolojik Temelleri ve Genel Gelişim Çizgisi*, 201; Öktem - Türkbağ, *Felsefe, Sosyoloji, Hukuk ve Devlet*, 307.

³⁷ For social solidarity, traces of which can be seen in Duguit's *social function* theory, see. Bechor, *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932 to 1949)*, 99.

³⁸ P. Babie and J. Viven-Wilksch have stated that they reached this conclusion from the translation of the sixth Buenos Aires lecture. See. Babie - Viven-Wilksch, "Léon Duguit and the Propriété Function Sociale", 13.

³⁹ Regarding the influence of Comte and Durkheim on Duguit in the literature, see. M. C. Mirow, "Léon Duguit and the Social Function of Property in Argentina", *Léon Duguit and the Social Obligation Norm of Property: A Translation and Global Exploration*, ed. Paul Babie - Jessica Viven-Wilksch (Singapore: Springer, 2019), 270; Daniel Bonilla, "Liberalism and Property in Colombia: Property as a Right and Property as a Social Function", *Léon Duguit and the Social Obligation Norm of Property: A Translation and Global Exploration*, ed. Paul Babie - Jessica Viven-Wilksch (Singapore: Springer, 2019), 189. For expressions about Comte being seen as Duguit's predecessor in Russia see. Katlijn Malfliet, "The Social Function of Property: Russia", *Léon Duguit and the Social Obligation Norm of Property: A Translation and Global Exploration*, ed. Paul Babie - Jessica Viven-Wilksch (Singapore: Springer, 2019), 146.

individualism, the person is regarded as a being who existed before social life and is isolated from it. This is apparent in the idea of Rousseau, one of the main representatives of natural law, that property is the most sacred rights of citizens.⁴⁰ The subjective right of individualist thought means that property right existed before social life. In this respect, the property right is an authorization given to the person as an absolute right.⁴¹ A property owner can freely use it and derive all kinds of benefits from it as a fundamental right. Since the property owner's authorization is absolute, he/she can use the property as he/she wishes, even to someone else's disadvantage. Duguit stated that this form of property, which found meaning in natural law thought, was revived with the French Revolution.⁴²

There was a need to transform the concept of individual and sacred property, which could adversely affect social life and individuals. The transformation must be either by changing the owner of the property right or by changing the nature of the property. The change in the nature of the ownership has led to the emergence of the theory of "property as a *social function*". Property as a *social function* is not only an absolute right; it also has a social character. As a *social function*, property requires respect for other owners. With the transformation of the ownership concept to a *social function*, a notion such as expropriation became one of the practices prevalent. As a *social function*, the individuality of private ownership is not harmed. There is individual property, but the relationship between the individual who owns the asset and the property subject also includes the "public interest" phenomenon.⁴³ An individual must consider the public interest when disposing of his estate. For example, property owners cannot freely increase the rent of leased assets. In another example, joint stock companies cannot make dispositions as they wish. They can't collect from citizens as they desire.⁴⁴

Duguit did not agree with the view defended by the natural law theory, which considers the human being as an entity separate from social life and argues that the person is born with rights at birth. The physical structure of all human beings can be scientifically analyzed. According to these examinations, it is clear that man cannot live alone and needs society. Therefore, he suggests that a man cannot exist before social life. Observational scientific methods do not recognize the existence of a person who is cut off from social life. On the contrary, scientific methods assert that man can live in

⁴⁰ Güriz, *Hukuk Felsefesi*, 193.

⁴¹ Léon Duguit, *Hak Kavramı ve Devletin Dönüşümü Üzerine Üç Konferans* (İstanbul: Pinhan, 2019), 31.

⁴² Léon Duguit, *Les Transformations generales du Droit prive depuis le Code Napoleon* (Paris: Librairie Felix Alcan, 1912), 156.

⁴³ Öktem - Türkbağ, *Felsefe, Sosyoloji, Hukuk ve Devlet*, 286.

⁴⁴ See. Öktem - Türkbağ, *Felsefe, Sosyoloji, Hukuk ve Devlet*, 287.

society, not alone.⁴⁵ Duguit believed that the scientific method in the social sciences, which could include the legal sciences, was unique and that metaphysical concepts should be eliminated in this field.⁴⁶

Duguit argued that social values are formed by the continuous fulfillment of the social phenomena created by mutual bonds between individuals. If there is social solidarity, people can have social value. In addition to social solidarity, he has aimed to adopt the concept of social duty instead of subjective rights as the basis of the rule of law.⁴⁷ Social solidarity imposes legal duties on individuals and state administrators.⁴⁸ In Duguit's thought, the natural law idea, identified with the individualist tendency, is deficient, as noted above. He has argued that the concept of right must be rejected and that there are legal situations instead of rights. The rule of law is to be ensured in this way, which causes solidarity in social life. Duguit regarded the property right to be a *social function* endowed to human beings. A rule that prohibits an action becomes a rule of law when the constituents of social power permanently approve this rule. Harmful acts were forbidden by law long before the state approved positive law. Consequently, Duguit thought that the rules of law already existed in the person's mind before the positive rule of law was formulated and that the positive law had transferred this into written articles.⁴⁹

Duguit agreed that during the French Revolution, in accordance with natural law theory, property became an absolute right. But he was convinced that in the modern period, property was transformed from a subjective right into a *social function*.⁵⁰ Property is no longer emphasized in terms of allocation for individual and social purposes. The social protection of this allocation also provides the property with a legal character. Property was freed from the absolute nature between the period of the Roman Empire and the French Revolution. In Duguit's time, it has gained the characteristic of social responsibility as a requirement of labor and social solidarity.⁵¹ In Duguit's thought, this feature of property is its *social function*. Social solidarity is crucial for this function. Overall, ownership is a *social function* surrounded by a duty to make use of assets for the

⁴⁵ Güriz, *Hukuk Felsefesi*, 295; Torun, *Hukuk Felsefesi*, 273-275.

⁴⁶ Léon Duguit, *Kamu Hukuku Dersleri*, çev. Süheyp Derbil (Ankara: Ankara Üniversitesi Hukuk Fakültesi Yayınları, 1954), 13-14.

⁴⁷ Güriz, *Hukuk Felsefesi*, 296.

⁴⁸ Işıktaç - Koloş, *Hukuk Sosyolojisi*, 73.

⁴⁹ Güriz, *Hukuk Felsefesi*, 300.

⁵⁰ Duguit, *Les Transformations generales du Droit prive depuis le Code Napoleon*, 160.

⁵¹ Duguit, *Les Transformations generales du Droit prive depuis le Code Napoleon*, 158.

purpose of social solidarity.⁵² Eventually, property is not an absolute and inviolable right; rather, it is founded on the utility principle for social purposes.⁵³ Hence, the legislator can restrict property for social interest in accordance with social requirements. In other words, the owner has a power of request, determined by the obligation to demand, rather than an absolute power to command what he/she possesses.⁵⁴ For example, if a landowner does not cultivate his land and does not fulfill the responsibilities required of him in the social structure, the state may take certain measures to ensure that this landowner fulfills his function in social life. These transactions can be listed as taxes, production under rules, or the utilization of capital by the state instead of the owner.⁵⁵

Comte's influence on Duguit, based on scientific and social foundations, has been discussed. Comte's influence on his theory of property is evident in establishment of property on the notion of social cooperation and solidarity, based on experience and observation. The link between the social function theory and the sociological positivism becomes clear at this point. As stated above, sociological positivism was born as a reaction to natural law theory. The theory of *social function* also emerged as a reaction to subjective rights in the natural law theory. The idea of freeing property from metaphysics and making it based on experiment and observation can be considered one of the common goals of both sociological positivism and *social function* theory.

It can be inferred that Duguit's approach to ownership as a *social function* is based on the idea of fixing the law within the social structure. In this respect, it is thought that he emphasized the *social function* theory as an expression of sociological positivism. Duguit's conception of *social function* as an expression of sociological positivism has influenced the laws of his own country, France, as well as those of South American countries, Arab countries, and the Soviet Union.⁵⁶ Among the Arab countries, Egypt and Syria are the most notable. He traveled to Buenos-Aires⁵⁷, New York, Colombia, and Cairo and gave lectures there. In the following, based on the *social function* theory of ownership, I have outlined the trends regarding property in Islamic law in the contemporary period.

⁵² Duguit, *Hak Kavramı ve Devletin Dönüşümü Üzerine Üç Konferans*, 26.

⁵³ Güriz, *Hukuk Felsefesi*, 307.

⁵⁴ Bahir Güneş Türközer, *Toplumsal Gerçeklik Olarak Hukuk (Léon Duguit Sistematigi)* (Ankara: Mars Ticaret ve Sanayi A.Ş., 1996), 297.

⁵⁵ Duguit, *Kamu Hukuku Dersleri*, 75.

⁵⁶ Hacak, "İslâm Hukuk Düşüncesinde Özel Mülkiyet Anlayışı", 117.

⁵⁷ Babie - Viven-Wilksch, "Léon Duguit and the Propriété Function Sociale", 12-13.

3. Social Function in Property-Related Tendencies in Islamic Law in the Modern Era

In modern times, it has become inevitable that many notions discussed in the Western world are referred to by Muslims in Islamic countries. The nature of property, one of these concepts, has been the subject of many debates in the 20th century in connection with the concept of rights. The tendencies of contemporary Islamic jurists, who endeavor to examine these disputes from the perspective of Islamic law, are crucial. During this period, Western-based positivist ideas that influenced Islamic jurists had a defining role in debating the origin and nature of property. Individualist and social perspectives on the nature of property came to the fore. After giving information about these two approaches, this section discusses the *social function* theory, referred to as "*al-waḥīfah al-ijtimā'iyah*"⁵⁸ in Arabic literature.

The individualist approach to property is based on the fact that all the rights that an individual has are derived from the person's being a human being. In the individualist perception of property, the law must protect human rights. In this respect, according to the individualist perception of the property, a person can never be hindered or limited while using his/her rights.⁵⁹

In the individualist property approach, property rights are accepted as absolute and individual rights. Those who adopt an individualist understanding of property claim that property rights are an absolute and sacred.⁶⁰ Even if there is a possibility of harming someone else, the person can use on his/her belongings as he/she wishes.⁶¹ The communal approach includes communism and socialism. Social solidarity is emphasized in these views. Contrary to an individualist approach, in communism, the superior sovereignty of the state is accepted in terms of property. In communism, private property and many rights of individuals were abolished.

In the socialist approach, there are also views in which private property is not completely rejected. In some aspects, these views are close to the theory of *social function*. The prominent theorist of the *social function* approach is Duguit. In Duguit's theory, social solidarity is realized through two elements. The first of these is solidarity.

⁵⁸ See for these statements. 'Abd al-Razzāq Ahmad al-Sanhūrī, *al-Wasīṭ fi Sharḥ al-Qānūn al-Madani al-Jadid* (Bayrūt: Dār Iḥyā' al-Turāth, ts), 8:554; Faṭḥī al-Duraynī, *al-Ḥaqq wa-Madā Sulṭān al-Dawlah fi Taqyīdih* (Bayrūt: Mu'assasat al-Risālah, 1984), 216.

⁵⁹ al-Duraynī, *al-Ḥaqq wa-Madā Sulṭān al-Dawlah fi Taqyīdih*, 40.

⁶⁰ al-Duraynī, *al-Ḥaqq wa-Madā Sulṭān al-Dawlah fi Taqyīdih*, 46.

⁶¹ Sa'īd Abū al-Futūḥ Muḥammad Basyūnī, *al-Ḥurriyah al-Iqtisādiyyah fi al-Islām wa-Atharuhā fi al-Tanmiyah* (al-Mansūrah: Dār al-Wafā', 1988), 68.

According to Duguit, solidarity implies that members of society have to live together, that is, in social solidarity. The second is the division of labor. Solidarity is built on the division of labor in society. In this context, ownership is not an absolute right; rather, it is a right that has a *social function* aspect. In this respect, the right to property imposes certain responsibilities on its owner to society's benefit. This approach suggests that many limitations can be put on property rights.⁶²

Many Islamic jurists⁶³, who pointed out the social aspect of ownership, approached ownership as a right with a *social function* (*al-waḥīfah al-ijtimā'iyah*) instead of rejecting the right aspect of property like Duguit. They accepted that personal property imposes specific responsibilities on people. There are many Qur'anic verses, *hadith*, and sayings of the Companions on which contemporary Islamic jurists, who approach ownership as a right with a *social function*, base their views on it.⁶⁴ In this chapter, instead of including the views of all Islamic jurists who recognize property as a right and draw attention to its *social function*, the views of 'Abd al-Razzāq Aḥmad al-Sanhūrī, who is relevant to our subject and who had an active role in the drafting of the Egyptian Civil Code have been indicated.

Al-Sanhūrī, one of the leading Islamic jurists of the last century, is an Egyptian scholar who completed a significant part of his education life in France. He wrote a commentary (*sharḥ*) on the Egyptian Civil Code titled *al-Wasīṭ*. Al-Sanhūrī studied in France, completing his studies with a supervisor named Edouard Lambert (d. 1947). The fact that his supervisor was French and his knowledge of French may be the first point confirming that he was aware of Duguit's views. The similarity between al-Sanhūrī's and Duguit's ideas is described below in the process of drafting the *social function* theory in the Egyptian Civil Code. It can also be said that Abū Zahrah and 'Alī al-Khafīf's approaches to this theory is also due to al-Sanhūrī. Moreover, the reference to Duguit's name in *al-Wasīṭ* when discussing the *social function* (*al-waḥīfah al-ijtimā'iyah*) theory of ownership and the quotation of his books prove the paper's claim. Duguit stayed in Cairo between 1925 and 1926, gave conferences, and played a role in revising the Cairo

⁶² Basyūnī, *al-Ḥurriyah al-Iqtisādīyah*, 47.

⁶³ 'Abd al-Qādir 'Awdah, Edip Serdengeçti, Maḥmūd Shaltūt, Muṣṭafā al-Sibā'ī, Sayyid Quṭb, Bāqir al-Ṣadr, Aḥmad al-Shalabī, 'Abd al-Ḥamid al-Mutawalli, Faṭḥī al-Duraynī, et al. have drawn attention to the social aspect of property in their works.

⁶⁴ For the evidence accepted as the basis of this view, see. 'Abd Allāh ibn 'Abd al-'Aziz al-Muṣliḥ, *Quyūd al-Milkīyah al-Khāṣṣah* (Bayrūt: Mu'assasat al-Risālah, 1988), 193-210.

University Faculty of Law curriculum.⁶⁵ All these events strengthen the idea that al-Sanhūrī was aware of the concept of *social function*.

As evidenced above, Duguit did not accept the concept of subjective right⁶⁶ and dismissed the property as an absolute right. Drawing attention to the *social function* conceptualized by Duguit, al-Sanhūrī stated that property is not only a *social function* but also an individual right and a *social function* concurrently.⁶⁷ According to al-Sanhūrī, property rights can be limited under *social function*. In addition, it is understood from his statements that the property of large landowners in Egypt should be restricted. These extensive lands should be converted into smaller lands and divided among small landowners. It can be concluded that al-Sanhūrī also approached property through the filter of its *social function*. While interpreting the concept of ownership, al-Sanhūrī had ideas that overlapped with the theory of *social function*. The similarity between *social function* theory and al-Sanhūrī's property approach has become increasingly apparent in the law-making process in Islamic countries. Because, as pointed out above, al-Sanhūrī was dominant in law-making in Egypt and in several other Arab countries.⁶⁸ It can be said that the traces of Duguit's approach to ownership as a *social function* rooted in social solidarity, free from metaphysical phenomena and based on experimentation and observation, were transferred to the laws of Islamic countries through al-Sanhūrī. The next section discusses the article on property in the Civil Code in Egypt, which may be an example of this claim in the codification of Islamic law.

4. Developing the *Social Function/al-Waḥīfah al-ijtimā'iyah* of Property in the Egyptian Civil Code: Article 802

Despite France's de facto withdrawal from Egypt, good relations with Muḥammad 'Alī Paṣḥa (d. 1849) and interactions with consuls suggest that relations with France continued after the French occupation. Perhaps as a result of these interactions, France was accepted as a model for the codification stages in Egypt.⁶⁹

⁶⁵ Leonard Wood, *Islamic Legal Revival Reception of European Law and Transformations in Islamic Legal Thought in Egypt, 1875-1952* (Oxford University Press, 2016), 203-204. Duguit was, according to first-hand accounts, delighted with his arrival and assignments at what was initially called the University of Egypt and later Cairo University. These statements are based on the following source: Duguit, *Kamu Hukuku Dersleri*, 1-7.

⁶⁶ Öktem - Türkbağ, *Felsefe, Sosyoloji, Hukuk ve Devlet*, 310.

⁶⁷ al-Sanhūrī, *al-Waṣīṭ*, 8:549-550.

⁶⁸ These include the laws or constitutions of Iraq, Sudan, Bahrain, Libya and Kuwait. See. Murteza Bedir, "Senhūrī, Abdürrezzâk Ahmed", *Türkiye Diyanet Vakfı İslâm Ansiklopedisi* (İstanbul: TDV Yayınları, 2009), 36/523-525.

⁶⁹ Muhammed Hamidullah Ağırakça, *19. Yüzyıl Mısır'ında Kanunlaştırma Hareketleri* (İstanbul: Marmara Üniversitesi, Sosyal Bilimler Enstitüsü, Doktora Tezi, 2011), 141.

Alternatively, taking advantage of French law and expressing it in the Egyptian way may have been a reaction to the occupation. Also, it can be claimed that the reasons for this were that the easiest and most accessible resources came from there or that lawyers received training in France. Although British domination increased in Egypt after the occupation, it is obvious that relations with France were decisive in terms of the legal codes.

Muḥammad ‘Alī Paṣḥa sent many students to European countries for the development of Egypt. Because of Muḥammad ‘Alī Paṣḥa’s particular interest in France, he sent most Egyptian students to this country. The students who were sent to Europe, especially to France, started to work at the levels appointed by the state upon their return and had a say in state affairs. During their stay in France, these students studied sources in the fields of law, culture, and literature. Students who went to France from Egypt translated French laws and codes into Arabic when they returned to their home countries.⁷⁰ In addition, one of the effects of Western countries on Egypt was that the establishment of mixed courts was left to their approval.⁷¹

Having indicated such influences on the legalization movements in Egypt, it needs to touch on the origins of legalization. The effect of the French students' code translations on Egyptian codification was described above. It is a fact that French codes were recognized in Egypt through this channel. In this respect, French codes and law can be considered one of the sources of Egyptian codification in the 19th century.⁷² In the following, the extent to which the theory of the French public jurist Duguit was incorporated into the drafting of Article 802 of the Egyptian Civil Code is discussed. It should be noted in advance that Duguit, along with a number of other jurists whose names will be enumerated later, was referenced in *al-Wasīṭ* in the explanation of the article on property in the Egyptian Civil Code. There are some facts as to why France is at the forefront in influencing Egyptian legislation. This fact is recognized in France's expertly drafted laws. As pointed out above, the translation of French laws into Arabic by students who traveled to France is also a factor. In addition, the influence of France on Ottoman Westernization was also strong. Besides, concepts such as equality, liberalism and justice that emerged in France were among the views of intellectuals in the Ottoman Empire and in regions such as Egypt.

⁷⁰ Albert Hourani, *Çağdaş Arap Düşüncesi*, Çev. Hüseyin Yılmaz - Latif Boyacı (İstanbul : İnsan Yayınları, 1994), 90.

⁷¹ Ağırakça, 19. Yüzyıl Mısır’ında Kanunlaştırma Hareketleri, 145-146.

⁷² Ağırakça, 19. Yüzyıl Mısır’ında Kanunlaştırma Hareketleri, 152.

By the 20th century, Egypt had made significant progress towards independence. In this century, the work on amending the civil code, one of the main legal works in Egypt, stands out. One of the 20th century's most important Islamic jurists, al-Sanhūrī's role in preparation of the Civil Code is referred to below. French laws and codes were also among the sources of the Egyptian Civil Code. However, these laws were not the only source. Egypt is a country where most of the population is Muslim. It was inevitable that Islamic law and the customs and traditions of the society would be among the sources of this law more than French law. How much of the Code is rooted in Islamic law and how much is based on foreign sources is beyond the scope of this study. However, as stated, the Civil Code of Egypt is also based on Islamic law and the customs of the Muslim community. Al-Sanhūrī, an Islamic jurist who held a senior scholarly and practical position in Egypt in the modern period, is notable for playing an essential role in drafting the law.⁷³ Examining his views on the Egyptian Civil Code enables this study to uncover the traces of sociological positivism in modern Islamic legal thought within the framework of Duguit's theory.

It has already been indicated that it is important efforts to amend the Egyptian Civil Code, but before proceeding with this, a bit of information about the Code should be provided. The Civil Code in Egypt was revised in 1948 and implemented in 1949. The Code replaced the Mixed Civil Code of 1875 and the National Civil Code of 1883.⁷⁴ The primary sources of the Civil Code in Egypt, implemented in 1949, can be counted as Egyptian court jurisprudence, Islamic law, and comparative law.⁷⁵ French codes generally fall under the concept of comparative law. As stated above, translations from French codes and students traveling to France for study significantly influenced Egyptian codification. When commissions to amend the Code failed, al-Sanhūrī and his supervisor, French lawyer Édouard Lambert, were tasked with amending it. The fact that Lambert was a European expert in comparative law⁷⁶ strengthens the argument that the Civil Code in Egypt can be a model for comparative law. In 1942, the Civil Code was drafted by al-Sanhūrī and Lambert, revised, and submitted to the Senate in 1948. I have touched on a few aspects of the Civil Code in Egypt before moving on to what happened

⁷³ Examples include the position of deputy public prosecutor and the presidency of institutions such as the *Majlis al-Dawla*, which serves as the Constitutional Court and the Council of State. See. Bedir, "Senhūrī, Abdürrezzâk Ahmed", 36/523-525.

⁷⁴ Soliman Morcos - Wadie Farag, "Yeni Mısır Medeni Kanunu (Kaynakları, Vasıfları ve Gelecek İçin Vâdettiği İmkânlar)", çev. Coşkun Üçok, *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 10/1 (1953), 742.

⁷⁵ Morcos - Farag, "Yeni Mısır Medeni Kanunu (Kaynakları, Vasıfları ve Gelecek İçin Vâdettiği İmkânlar)", 745.

⁷⁶ Wood, *Islamic Legal Revival Reception of European Law and Transformations in Islamic Legal Thought in Egypt, 1875-1952*, 16.

during the preparation of this law. Two features of the Code attract attention. First, the Civil Code contains ideas of solidarity rather than freedom of will. It could be stated that the Civil Code in Egypt, which tends to be socialized in this respect, aims to protect the interests of the society rather than those of the individual. Property rights are no longer seen as rights given for the individual's benefit in this code but as *social functions*.⁷⁷ The second feature of the Civil Code was to act from the objective legal principles of Islamic law. Although it is based on an objective approach, subjectivity is not completely excluded.⁷⁸ Duguit's views on the nature of the right also addressed the distinction between objective rights and subjective rights conception.

The content of Egyptian Civil Code Article 802, which regulates ownership, was formed through various processes. The stages of the formation of the content of this article have been followed from the statements in al-Sanhūrī's commentary (*sharḥ*) on the Civil Code, *al-Wasīṭ*. The latest version of Article 802 is as follows: "The owner of a thing [item] has the right to use, benefit from, and dispose of it within the limits of the law."

The resources in the development of this article, in which the property right is expressed in its most general form, are essential. In order to mention these sources, the explanations about the preparation stages of the article were investigated. According to al-Sanhūrī, the *social function* theory was taken into consideration when drafting this article. Ownership includes a social obligation to which the owner must pay attention. As far as *al-Wasīṭ* is reviewed, there is a difference between the wording of the first draft of Article 802 and the final version. This difference is the expression of the *social function* (*al-waḥīfah al-ijtimā'īyah*), which is not present in the article's final version.⁷⁹ Accordingly, the statements in the draft version of Article 802 are as follows:

*A person who owns something may use, utilize, and dispose of it as long as it is within the limits of the law. The person cannot be subjected to the interference of another person [in doing so]. However, this is conditional on the social function of the property.*⁸⁰

⁷⁷ Morcos - Farag, "Yeni Mısır Medeni Kanunu (Kaynakları, Vasıfları ve Gelecek İçin Vâdettiği İmkânlar)", 748.

⁷⁸ Morcos - Farag, "Yeni Mısır Medeni Kanunu (Kaynakları, Vasıfları ve Gelecek İçin Vâdettiği İmkânlar)", 750.

⁷⁹ Bechor also provided these remarks. However, he may not have considered it noteworthy that the reason for omitting the *social function* from the article was to complicate the explanation of Shari'ah. See. Bechor, *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932 to 1949)*, 105.

⁸⁰ al-Sanhūrī, *al-Wasīṭ*, 8/546.

It is understood from these statements that the *social function* of ownership was clearly stated in the preparatory stages of Article 802 on the property right. The concept of *social function*, which can be considered a reflection of sociological positivism, is actually evident in the Egyptian Civil Code's rule regulating property. This concept rejected the metaphysical features of property and was a concept based on experimentation and observation, like social solidarity, it was common in the legal debates of the time. However, the expression “*social function*” in the first version of Article 802 was removed from the text in its last version. The final version of this article was determined without this concept. Al-Sanhūrī referred to the removal of these statements from the text of the article as follows:

At the Senate executive committee session, the president objected to the article on the social function/al-waḏīfah al-ijtimā'īyah of property [currently the first version of article 802]. In addition, the chairman stated that philosophical views were depicted in this interpretation [in the expression social function]. However, government representatives objected, saying that this title [social function] is generally used in new enactments. They also noted that this concept [social function] is a new trend in describing property rights. They stated that this concept demands the social function that the owner must comply with. Thus, the law protects the social function. However, if anyone exceeds this limit, the law does not protect them... This was then approved in the Senate session. However, in the next sessions, the expressions “social function of the property right” were removed from the text. Because the phrase [social function] is ambiguous in jurisprudential [Shari'ah] explanations...⁸¹

Al-Sanhūrī's statements describe the stages of the formation of Article 802, which expresses the scope of the concept of property. When this article was drafted, the *social function* (*al-waḏīfah al-ijtimā'īyah*) was explicitly included in the first draft of the Code. The Senate initially agreed to it. This gives the impression that *social function* theory was considered when drafting the article's text. However, it was not stated in the article. It may be said that al-Sanhūrī and his mentor Lambert approved of Duguit's theory as an expression of sociological positivism while drafting this article of the Civil Code. However, while al-Sanhūrī emphasized the *social function* aspect of property, he did not accept this concept in the same way as in Duguit. He differs from Duguit because he accepts that property is an individual right besides its *social function*.⁸² Duguit, however, rejected the individual and subjective right. This paper would argue that al-

⁸¹ al-Sanhūrī, *al-Waḏīf*, 8/492-495.

⁸² al-Sanhūrī, *al-Waḏīf*, 8/549.

Sanhūrī's view on property and Duguit's *social function* theory cross over at certain points.

After discussing the preparation stages of the article about property and making the evaluations, al-Sanhūrī concluded that property is not only a *social function* but also an individual right and a *social function* at the same time.⁸³ These statements reinforce the claim that al-Sanhūrī adopted the theory of ownership, which has a *social function*, as a reference when drafting this article of the Civil Code. This assumption suggests that al-Sanhūrī recognized Duguit's theory of *social function* with a somewhat different interpretation. However, it should not be ignored that Duguit's aim was to explain property in a scientific manner and to express it sociologically and rationally. Moreover, Article 802 of the code indicates that al-Sanhūrī cited Duguit, Rothe, Josserand, Floret, etc., as sources for his view of *social function*.⁸⁴ The relation of these names with philosophical movements supports the study's claim. In fact, this confirms that property in the Civil Code of Egypt was defined in Western terms and had some features of traditional/Islamic law in addition to the social function theory.⁸⁵

5. Shari'ah Explanations of Social Function: Muḥammad Abū Zahrah and 'Alī al-Khafif

Duguit emphasized social solidarity in defining property as a *social function*. He stated that one cannot have individual rights before society to save property from metaphysical explanations. In the modern period, Islamic jurists emphasized the social aspect of property when analyzing this notion. Rather than accepting Duguit's theory precisely, they generally stated that Allah is the actual property owner. In this section, the focus is on the views of al-Sanhūrī's student Muhammad Abū Zahrah and al-Sanhūrī's contemporary 'Alī al-Khafif on property. While the Civil Code of Egypt was being prepared, the expression "*social function* of the property right" was removed because its explanation in terms of Shari'ah was unclear. Abū Zahrah and 'Alī al-Khafif contributed to the ownership as a *social function* by giving a Shari'ah background. The explanations of Abū Zahrah and 'Alī al-Khafif on this issue can be seen as a reaction to Duguit. The following statements of Abū Zahrah are important regarding this chapter's claim: "All Shari'ah rights have been granted to His servants by Allah. He gave these rights not absolute but limited."⁸⁶

⁸³ al-Sanhūrī, *al-Wasīṭ*, 8/549.

⁸⁴ al-Sanhūrī, *al-Wasīṭ*, 8/545.

⁸⁵ Farhat J. Ziadeh, "Law of Property in Egypt: Real Rights", *The American Journal of Comparative Law* 26/2 (1978), 239.

⁸⁶ Muḥammad Abū Zahrah, *al-Takāful al-Ijtimā'ī fī al-Islām* (Qāhirah : Dār al-Fikr al-'Arabī, 1991), 19.

According to Abū Zahrah, property in Islam is not unlimited. God has bestowed property on His servants. Individual property is limited so that people do not cause turmoil in social life. Some of Abū Zahrah's statements differ from Duguit's approach. Abū Zahrah emphasizes the "grant of Allah" as the origin of individual property right. However, Duguit acknowledges that individual property can only exist after society. Abū Zahrah differed from Duguit in that he did not see social solidarity as the origin of property right. The reason for this may be sought in the difference between Islamic and modern law sources, and the verses and hadiths about ownership can only be explained in this way. However, Abū Zahrah also emphasized social solidarity. He continued with the following statements:

We see that some people who write about Islamic issues say that property is a social function [al-waḏīfah al-ijtimā'iyah]. We do not see any barriers to the use of these expressions [social function]. However, those who use these expressions should know that this assignment [tawḏīf/social function] is given by Allah, not by the head of state or the judge.⁸⁷

In this part of his book, Abū Zahrah stated that the scholars who wrote about Islamic issues referred to the *social function* of property. Abū Zahrah did not cite any names in this chapter. However, his work mentioned some practices and sayings of the Prophet Muhammad (pbuh) and Caliph Omar (ra) to put the *social function* on a Shari'ah grounds.⁸⁸ From this, it would not be wrong to think that he accepted that the *social function* theory already existed in Islam. According to Abū Zahrah, people come together and mingle through social solidarity.⁸⁹ Although Abū Zahrah emphasized social solidarity, he did not consider society to be the source of property rights as in Duguit's theory. He clearly indicated that property was given to human beings by Allah and that the task of *social function* was given by Allah's providence.

As for 'Alī al-Khafif, he talked about the approaches related to the essence of property while examining the development of ownership. According to the first approach, property can be limited for the benefit of society. Ownership is not a right but a social duty (*social function*) for those who hold this view. In this opinion, the person who owns the property fulfills the *social function* of representing the society.⁹⁰ The first approach is that a person disposes of property in his capacity as "Allah's caliph".⁹¹ In

⁸⁷ Abū Zahrah, *al-Takāful al-Ijtimā'ī*, 19.

⁸⁸ For example, see. Abū Zahrah, *al-Takāful al-Ijtimā'ī*, 19-20.

⁸⁹ Abū Zahrah, *al-Takāful al-Ijtimā'ī*, 21.

⁹⁰ 'Alī al-Khafif, *al-Milkiyah fi al-Shari'ah al-Islamiyah ma'a Muqaranatihā bi-al-Qawānīn al-'Arabiyyah* (Qāhirah: Dār al-Fikr al-'Arabī, 1996, ts), 33.

⁹¹ al-Khafif, *al-Milkiyah fi al-Shari'ah al-Islamiyah*, 34.

this approach, the subject of property (*al-māl*) is attributed to Allah, and the servants are in the position of caliph. ‘Alī al-Khafif has cited many Qur’anic verses where goods are attributed to all people/society. In addition, he concluded that it is *haram* to step away from social obligations (*al-waḥīfah al-ijtimā’iyah*) by quoting examples from many Quranic verses.⁹² From these statements, it emerges that according to those who accept the first view, property is not a right but only a *social function*. In the second view, individual property was accepted, but in some cases, it may be limited to society. ‘Alī al-Khafif explained this approach with examples from some law practices.⁹³ ‘Alī al-Khafif has discussed the development of property from the past to his time in *al-Milkīyya fi al-Sharī’a al-Islāmiyya ma’a Muqāranatihā bi al-Qawānīn al-Arabīyya*. He stated that there were those who argued that property was not recognized as a right, but he did not mention their names. In his book, he has emphasized Islam’s approach to property as follows:

*From the beginning, the Islamic Shari’ah has approached property as individual or social. Spending in the way of Allah, giving alms to the poor, helping the debtor, the stranded, etc., are all done out of property that is owned. So are Zakat and other commands... All these are proofs of individual ownership.*⁹⁴

Based on the above statements, ‘Alī al-Khafif attempted to prove the existence of individual property in Islam. He noted that both individual property and social property are among the concepts recognized by Islam. Further in his book, ‘Alī al-Khafif referred to the *masjid* as evidence of community ownership:

*The masjids well illustrate Islam’s recognition of social ownership. Masjids are for Allah... What is meant by the verses on this subject is that masjids exist for Muslims to pray. This is also seen in the waqfs [foundations]. The income and benefits of the waqf are for the benefit of all Muslims... All this shows what social property means in the light of Islam. Social property belongs to all Muslim community members, not to a group of individuals...*⁹⁵

‘Alī al-Khafif stated that collective property is accepted in Islam. However, in Islam, collective property is not limited to some groups but is offered to the whole society. In short, communal property is a feature that is common to all. ‘Alī al-Khafif, while analyzing the evolution of property, mentioned its individual and social forms.

⁹² al-Khafif, *al-Milkīyyah fi al-Sharī’ah al-Islāmiyyah*, 35.

⁹³ For examples of application in the laws, see. al-Khafif, *al-Milkīyyah fi al-Sharī’ah al-Islāmiyyah*, 37.

⁹⁴ al-Khafif, *al-Milkīyyah fi al-Sharī’ah al-Islāmiyyah*, 38.

⁹⁵ al-Khafif, *al-Milkīyyah fi al-Sharī’ah al-Islāmiyyah*, 39.

He listed the arguments of those who disregarded the right aspect of property and acknowledged its *social function*. This made it possible to discuss the *social function* of ownership on a legal basis. In addition, his statements about property under the heading "Limitation of Property" are as follows:

*It is an important principle in the Shari'ah that the source of all rights is the Shari'ah of Allah. Allah is the giver of rights. He is also the one who makes the protection of rights obligatory and who puts the intermediaries for this protection...*⁹⁶

‘Alī al-Khafif's explanations are similar to those of Abū Zahrah. He also indicated that the property right was "given by Allah". He pointed out that the rights and judgments in the Shari'ah are limited to not causing harm based on certain Quranic verses and hadiths. Rights must not be used to harm other people. ‘Alī al-Khafif pointed out that when the property is a right and privilege for its owner, it is also considered a social duty [*al-waḏifah al-ijtimā'iyah*].⁹⁷ In other words, the property right has a dual character. Also, it can be thought that he draws attention to the right-duty relationship. After these theoretical explanations about property, he analyzed the examples of limitations of property in-laws.

The explanations of Abū Zahrah and ‘Alī al-Khafif about the *social function* theory can be accepted as an indication that this concept is discussed on a Shari'ah basis in the Islamic legal literature. In their books, these two scholars examined the *social function* of property, one of the debates of their time, within a Shari'ah framework. Both authors differ from Duguit's views on the source of the right, based on the idea that "Allah gives the right in Islam". However, their concern with the notion of *social function* in terms of investigating the nature of property in Islam and their treatment of this issue based on Shari'ah shows that Duguit's theory is also reflected in modern Islamic jurisprudence studies.

Conclusion

Auguste Comte's efforts to isolate subjective rights from metaphysical features and establish it scientifically also shaped Léon Duguit's view of the concepts of rights and ownership. Adapting sociological positivism, a type of legal positivism, to the law, Duguit sought to explain the law through social facts and alienate it from metaphysical principles in this way. Duguit's approach, which emphasizes social solidarity as the basis, has effectively shaped his views on the *social function* of property. It can be asserted that Duguit developed Comte's contribution to positivism in a way that adapts

⁹⁶ al-Khafif, *al-Milkiyah fi al-Shari'ah al-Islamiyah*, 87.

⁹⁷ al-Khafif, *al-Milkiyah fi al-Shari'ah al-Islamiyah*, 88.

positivism to law. Duguit noted that the theory of the *social function* of property could be seen as a reaction to the French Revolution. In this theory, property was no longer absolute and sacred; it can be described as long as it is associated with society. Durkheim's notion of social solidarity can be characterized as merged with *social function*. In this respect, property is defined based on experiment and observation, stripped of its metaphysical features.

Muslim scholars accepted the *social function* aspect of property. It can be noted that al-Sanhūrī was the most prominent of these scholars. Al-Sanhūrī acknowledged the *social function* aspect of the property and tried to adapt it to the legislative enactments. He and Édouard Lambert played an active role in amending the Egyptian Civil Code. Their drafts were submitted to the Senate. Article 802 originally included the term "*social function*". However, this phrase was subsequently removed upon objections later on. Even though this phrase was removed from the article, some scholars at that time explained the concept of *social function* in terms of Islamic law. It can be said that the *social function* in legalization, which is the practical aspect of Islamic law, came to life with al-Sanhūrī. While this study does not aim to establish a direct interaction between practice and theory, it is noteworthy that the two developed in line. Duguit aimed to distance property from metaphysical features. Perhaps Abū Zahrah and 'Alī al-Khafif's explanations can be considered as an indirect reaction to him. As a matter of fact, Abū Zahrah emphasized that the source of the right to property originates from Allah. It is possible to say that Abū Zahrah also embraced the term social solidarity. Similarly, 'Alī al-Khafif stated that Allah bestowed all rights. He underlined the importance of society in the matter of social property. However, it can be claimed that neither of them viewed the source of rights as society.

This paper aims to demonstrate that sociological positivism has some effects on Islamic law studies in the contemporary period, for example, article 802 of the Egyptian Civil Code. Duguit's theory forms the basis of views on the *social function* of property within Islamic legal discourse. However, Islamic jurists accepted this concept with some changes rather than adapting it to their own work. In the Arab world, works of French jurists, foreign legal systems, and various philosophical movements serve as sources for codification efforts. Some of the perspectives adopted by the students who studied in Europe and returned to their home countries were also determinative in terms of enactment movements. The active role of Sanhūrī, who was educated in France, in Egypt's codification efforts is analyzed in the study as a critical situation in which the influence of the views of French jurists and thinkers on the codification of Islamic law can be traced. Accordingly, one of the study's important findings is that the concept of *social*

function was considered during the preparation of the article of the Egyptian Civil Code describing property.

As a matter of fact, in the Code, property was regarded both as an individual right and as having a *social function*. This dual feature could support the possibility of Duguit's influence on the Code. Furthermore, contemporary Islamic law studies focus on the *social function* of property within the framework of the Shari'ah. Indeed, Abū Zahrah and 'Alī al-Khafīf's explanations of the *social function* of property from the perspective of the Shari'ah are examples of the discussion on this concept based on Islamic law. However, it can be claimed that this concept is not accepted by Islamic jurists, as is the case with Duguit's approach. Islamic jurists believed that individual property is "granted by Allah to His servants". Abū Zahrah and 'Alī al-Khafīf's discourse on the concept of *social function* based on Shari'ah is noteworthy for introducing this concept into Islamic law. This paper contributes to understanding the legal evolution of the *social function* of property, especially its application in modern Islamic law. In addition, it provides a perspective on the concept of *social function* in the theories of property and the codification of Islamic law in the contemporary era.

Ethical Statement/Etik Beyan: It is declared that scientific and ethical principles have been followed while carrying out and writing this study and that all the sources used have been properly cited./Bu çalışmanın hazırlanma sürecinde bilimsel ve etik ilkelere uyulduğu ve yararlanılan tüm çalışmaların kaynakçada belirtildiği beyan olunur.

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