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Pre-emption and Private Land Ownership in Modern Egypt: No Revival of Islamic Legal Tradition*

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Abstract

This essay examines "Islamic" influence on modern law, with special reference to the introduction of pre-emption (*shuf'a*), ostensibly of Islamic origin, into modern Egyptian legislation. In Egypt, the institution was maintained, not as part of the Islamization of laws, but for practical purposes, namely the "establishment of full landownership," which led to the creation of new forms of pre-emption. The Pre-emption Laws of 1900-01 assigned the right of pre-emption to the "usufructuary" and the bare owner, probably as part of the late nineteenth-century policy of transferring state landownership to individuals defined in official law as "usufructuaries." With the disappearance of state landownership as its theoretical basis, this type of pre-emption was reinterpreted by jurists in general terms of the establishment of landownership. The New Civil Code of 1949 assigned the right of pre-emption to both parties to a long lease (*ḥikr*), as an indirect attack on the family *waqf*.

Keywords

pre-emption, Egypt, Islamic law, modern law, private/state landownership, usufruct, *raqaba*, *manfa'a*, *waqf*, *ḥikr*

Introduction

This essay is a critical study of "Islamic" influence on modern laws, with special reference to the introduction of pre-emption (*shuf'a*) into modern Egyptian legislation.

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The New Civil Code, in force since 1949, defines pre-emption as a person's privilege (*rukhṣa*)[1] to substitute himself in a sale of immovable property (or a share thereof) in place of the purchaser in certain cases and subject to certain conditions (Art. 935), by paying the price and costs, such as the registration fee. The survival of the institution in a modern society cannot be explained simply by its ostensible Islamic origin. In classical legal contexts, pre-emption was associated with many problems. Nevertheless in Egypt, pre-emption has been maintained from the beginning of legal modernization down to the present.

Modern Egyptian authors usually give the following account of the history of pre-emption, divided into three stages: (1) The first Egyptian civil code, promulgated for the Mixed Courts (The Mixed Civil Code of 1876), and its counterpart for the National Courts (the National Civil Code of 1883), included pre-emption as one of the causes of the acquisition of ownership and established the rules governing the institution. (2) Subsequently, the Pre-emption Law, a special law that replaced both Codes on this issue (promulgated in 1900 for the Mixed Courts and in 1901 for the National Courts) brought about radical changes in the institution, including the assignment of the right of pre-emption to the usufructuary or bare-owner, unlike in Islamic Law. (3) Finally, the New Civil Code took over the Pre-emption Law with a partial amendment, including, again, the creation of a new right of pre-emption, i.e. that of both parties of *ḥikr* or long lease (see 2.1.1-2.1.3 below).

This account is misleading, and, as a result, none of the authors can explain the meaning of the right of pre-emption of the usufructuary or bare owner, a right apparently of no practical use in Egyptian legal life. In fact, a start toward the introduction of new kinds of pre-emption was made during the first stage, as a response to changes in Egyptian

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[1] The term *rukhṣa* is often rendered as "opportunity." See The Egyptian Civil Code: Promulgated by Law No. 131 of 1948 in force since 15 October 1949/ English translation by Perrot, Fanner & Sims Marshall (Alexandria: Journal du commerce et la marine, 1952), 169; Farhat J. Ziadeh, *Property Law in the Arab World. Real Rights in Egypt, Iraq, Jordan, Lebanon, Libya, Syria, Saudi Arabia and the Gulf States* (London: Graham & Trotman Limited, 1979), 46. However, "privilege," which is the opposite of a "right" in Common Law terminology, is a more appropriate translation in this context. I am very much indebted to an outside reader for this point.

land policies. It will be argued that the assignment of the right of pre-emption to the usufructuary or bare owner was a by-product of the land policy which, beginning with the reform of Muḥammad ʿAlī (re. 1805-48), allegedly paved the way for the creation of modern private landownership in Egypt during the nineteenth century.

According to classical Islamic legal theory, most agricultural land is *mīrī* or state owned, over which individuals enjoy only usufruct rights. This theory, which authorizes the state to collect land tax (*kharāj*) to the utmost extent, regulated the land and tax policies of pre-modern states. In Egypt, this theory formed the basis of a drastic reform introduced by Muḥammad ʿAlī, who sought to consolidate his power and to increase tax revenues. The conventional view of Egyptian history, which credits Muḥammad ʿAlī with the creation of modern Egypt, posits that his reform paved the way for a transformation of individual usufruct rights into modern landownership during the nineteenth century. According to this view, Muḥammad ʿAlī himself and his grandson Saʿīd (re. 1854-63) expanded individual rights through the laws of 1847-58, which allowed cultivators to dispose of their land or to pass it on to their heirs. In 1896, their rights were finally recognized as full landownership. While exposing the fiction of this progressive scheme, Cuno argues that "the creation of private landownership was not a century-long process."[2] Rather, the reform of Muḥammad ʿAlī was basically the revival of the pre-modern policy and brought about no substantial change in the legal status of cultivators of state land as "usufructuaries"; the main purpose of the laws of 1847-58 was not to expand the usufruct of individuals, but to facilitate its redistribution in favor of the state. No start toward the privatization of *kharāj*-paying land was made until the early 1870s under Ismāʿīl (re. 1863-79), who obtained the title of Khedive or Viceroy in return for ceding control over Egyptian finances. Subsequently, a series of new laws sought to convert state land into private properties under different conditions.

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2) Kenneth M. Cuno, *The Pasha's Peasants. Land, society and economy in Lower Egypt, 1740-1858* (Cambridge: Cambridge University Press, 1992), 203. See also 204-07 on the origin of this progressive scheme, which was established by Yacoub Artin in his *La Propriété foncière en Égypte* (Cairo: Imprimerie nationale du Boulaq, 1883) and developed from a social-economic viewpoint by historians like Gabriel Baer in his *A History of Landownership in Modern Egypt 1800-1950* (London, New York, Toronto: Oxford University Press, 1962).

As part of this legislative trend, pre-emption was no doubt introduced by the government in order to encourage "usufructuaries" to purchase full title to land, as suggested by some decrees of the 1880s. The Pre-emption Law likely had the same purpose: unlike classical Islamic legal doctrine, it recognized the usufructuary and the bare owner as pre-emptors. However, the *raison d'être* of this kind of pre-emption no longer existed at the time of the promulgation of this law, since its theoretical basis of state landownership had disappeared, officially, in 1896. The Pre-emption Law was reinterpreted by jurists as introducing a new pre-emption system promoting what they called "the establishment of full landownership" or "the reintegration of real interests belonging to separate persons into a full ownership right over land." These phrases associated the institution with specific legislative purposes. The New Civil Code, which sought to remove obstacles to modern landownership, gave the right of pre-emption to both parties of a long lease, following the policy of regulating family *waqf*.

Modern Egyptian lawgivers adopted pre-emption as a means to an end. As a result, the innovations introduced by both the Pre-emption Law and the New Civil Code transformed the institution into one that has no essential connection to its Islamic counterpart, despite the fact that this type of modern legislation, which contains elements of Islamic law, is usually discussed in terms of the reconstruction or revival of religious law. For example, the New Civil Code of Egypt has been studied mainly in relation to the legal theory and/or the legislative methods of its main architect, ʿAbd al-Razzāq al-Sanhūrī (d. 1971). The discussion has focused on the placement of the Code in a middle position between modernization and Islamization; the Code is regarded as a product of the "concern with making Islamic law suitable for 'modern' use"[3] or as a step toward Islamization of laws that "partially rectified"[4] the trend of modernization. Such an approach blurs the distinction between Islamic law, on the one hand, and fragments of that law that were incorporated into statute law at the discretion of legislators. As a result, scholars have not critically examined the "Islamic"

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3) Enid Hill, *Al-Sanhuri and Islamic Law*, Cairo Papers in Social Science, vol. 10 (Cairo: The American University Press, 1987), 3.

4) Oussama Arabi, *Studies in Modern Islamic Law and Jurisprudence* (The Hague, London, New York: Kluwer Law International, 2001), 190.

nature of the Code. Nor have they clarified the reasons why a particular feature of Islamic law was incorporated into the Code—except to legitimize the Code in the name of *sharīʿa*. Recently, Bechor successfully exposed the pseudo-Islamic nature of the Code by analyzing the record of its preparation (*al-Qānūn al-Madanī*) and Sanhūrī's monumental commentary upon the Code (*al-Wasīṭ*). Insofar as his study draws almost exclusively on accounts contained in these two sources, he can conclude only that Sanhūrī often had to camouflage his innovations as "Islamic" so that they would find general acceptance.[5] As for pre-emption, he overlooks its general purpose, i.e. the establishment of full landownership, for which the makers of the New Code not only maintained the institution, but also allowed themselves to create a new kind of pre-emption.

The following discussion is divided into three parts. In Part 1, I provide a brief sketch of pre-emption in Islamic law, mainly according to Ḥanafī doctrine, and explain certain key principles and concepts. In Part 2, I describe the changes in the institution in modern times, following the conventional account, pointing to its problems; I speculate on the origin of the usufructuary's or bare owner's right of pre-emption that can be traced back, at the latest, to the 1880s, when the conversion of *mīrī* land into the private property of its theoretical usufructuaries accelerated. In Part 3, I discuss a new meaning attached by the makers of the New Civil Code to the establishment of full landownership as the general goal of the new pre-emption system.

1. Pre-emption in Islamic law

1.1. Definition of the Right of Pre-emption and Its Scope in Ḥanafī Doctrine

Modern Egyptian lawmakers generally rely upon Ḥanafī doctrine, following the legal tradition established under Ottoman rule, which lasted from 1517 until the beginning of the British protectorate in 1914. For this reason, it is appropriate to use Ḥanafī doctrine as our point of

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5) Guy Bechor, *The Sanhuri Code, and the Emergence of Modern Arab Civil Law* (Leiden, Boston: Brill, 2007), 173. See also 182-83, 187-88.

reference. I also consult *fatwa*s issued by Muḥammad al-ʿAbbāsī al-Mahdī (d. 1897), chief *mufti* of Egypt from 1847 until 1896.[6]

The object of pre-emption is an immovable property or a share thereof. According to Ḥanafīs, an immovable property (*ʿaqār*) refers, as a rule, to land. Any trees or buildings located on the property are treated as movables. It is only in specific cases that a building may be regarded as an immovable, as we shall see below. Ḥanafīs diverge from other Sunnī jurists in assigning the right of pre-emption to the following four categories of people, in the following order: (1) Co-owners (*shurakāʾ*), in case of a sale to a third party of a share of land held in common. (Non-Ḥanafī jurists limit the exercise of pre-emption to this specific case.) (2) Those who hold a small share in the land sold, e.g., former co-owners of land who continue to hold in common a partition wall and the ground beneath it. By contrast, those who share the wall without the ground beneath it cannot exercise pre-emption, since the wall is treated as movable property and, therefore, does not form part of the land.[7] (3) Holders of a servitude (*ḥaqq al-irtifāq*), such as a right of way or an irrigation right over the land sold, e.g., former co-owners of land who, after division, continue to share pathways or canals in common with the vendor. The enjoyment of public roads or waters does not give rise to pre-emption.[8] (4) Adjoining neighbors or owners of lots that adjoin the land sold. Anyone who satisfies this condition may exercise pre-emption, including former co-owners of the land who do not fall within the last two categories, e.g., co-owners of a wall.[9]

Although Ḥanafīs regard co-owners primarily as pre-emptors, they also assign pre-emption to those who can be assimilated to them in one sense or another.[10] The distinction in this regard between Ḥanafīs and other Sunnī jurists flows from differences over the purpose of

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6) Muḥammad al-ʿAbbāsī al-Faqīh al-Ḥanafī al-Azharī al-Miṣrī al-Mahdī, *al-Fatāwā al-mahdiyya fī al-waqāʾiʿ al-miṣriyya,* 7 vols. (Cairo: al-Maṭbaʿa al-Azhariyya al-Miṣriyya, 1301/1883-84).

7) Badr al-Dīn Maḥmūd b. Aḥmad b. Mūsā b. Aḥmad b. al-Ḥusayn al-ʿAynī, *al-Bināya sharḥ al-Hidāya*, 13 vols. (Beirut: Dār al-Kutub al-ʿIlmiyya, 1420/2000), 9:287.

8) Ibid., 9:275; Ibn ʿĀbidīn, *Ḥāshiyat Radd al-mukhtār ʿalā Durr al-mukhtār sharḥ Tanwīr al-abṣār fī fiqh madhhab al-Imām Abī Ḥanīfa al-Nuʿmān*, 8 vols. (Beirut: Dār al-Fikr, 1412/1992), 6:220.

9) ʿAynī, *al-Bināya*, 9:287; Ibn ʿĀbidīn, *Radd*, 6:221.

10) ʿAynī, *al-Bināya*, 9:285. Cf. Ibn ʿĀbidīn, *Radd*, 6:220.

pre-emption. Although the origin of pre-emption remains obscure,[11] all jurists agree that it was established to prevent certain damages caused by the entrance of an outsider into co-ownership. According to non-Ḥanafīs, these are pecuniary or physical damages that result from division, since co-owners are more likely to put an end to their relationship than to tolerate an unwelcome newcomer. This is because, in many cases, co-owners are relatives whose co-ownership arose from inheritance, as attested in Abbāsī's *fatwa*s.[12] Non-Ḥanafīs, therefore, limit pre-emption to co-owners.[13] The purpose of pre-emption is to protect co-owners against the sale of a share of the property held in common that would result in an undesirable division.[14] By the same token, non-Ḥanafīs generally restrict the object of pre-emption to a share in anything divisible, immovable as well as movable, e.g. a share in buildings, trees, or cattle sold apart from the land held in common.[15]

For Ḥanafīs, the damages to be avoided by pre-emption include any inconvenience or unpleasantness arising from a bad relationship between those who live next to each other, whether in a common space or in neighboring houses.[16] Co-owners are thus treated as equivalent to adjoining neighbors, in the sense that co-owners, who have equal rights in the use or enjoyment of the property held in common, live nearby.

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11) Some jurists hold that the origin of pre-emption is pre-Islamic. See al-Bājī, *Kitāb al-muntaqā sharḥ Muwaṭṭaʾ Imām Dār al-Hijra Sayyidnā Mālik b. Anas*, 5 vols. (Cairo: Dār al-Kitāb al-Islāmī, 1332/1913-14), 5:199; al-Ḥaṭṭāb, *Mawāhib al-jalīl li-sharḥ Mukhtaṣar Khalīl*, 8 vols. (Beirut: Dār al-Kutub al-ʿIlmiyya, 1416/1995), 7:366. See also Aharon Layish, "Islamization of Custom as Reflected in Awards of Tribal Arbitrators in the Judaean Desert," *Jerusalem Studies in Arabic and Islam* 35 (2008), 285-334. On the possible influence of Jewish or Roman law, see M. Le Baron Adrien Forgeur, "De la préemption en droit égyptien," *L'Egypte Contemporaine* 11 (1920):124; Jean Baz, *Essai sur la Fraude à la Loi en Droit Muslman (Etude de Droit Musulman Comparé et de Droit International Privé)* (Paris: Librairie du Recueil Sirey, 1938), 51.

12) Often referred to as a group of people (*jamāʿa*) who share inherited property in common. See e.g. ʿAbbāsī, *Mahdiyya*, 5:171-72 (27 Dhū al-Qaʿda 1265), 175 (14 Dhū al-Ḥijja 1266), 178 (2 Jumādā 1267) and so on.

13) Bājī, *Muntaqā*, 5:200; al-Māwardī, *al-Ḥāwī al-kabīr fī fiqh madhhab al-Imām al-Shāfiʿī wa-huwa sharḥ Mukhtaṣar al-Muzanī*, 18 vols. (Beirut: Dār al-Kutub al-ʿIlmiyya, 1414/1994), 7:230-31; Ibn Qudāma, *al-Mughnī fī fiqh al-Imām Aḥmad b. Ḥanbal al-Shaybānī*, 12 vols. (Beirut: Dār al-Fikr, 1405/1985), 5:179.

14) Ibn Qudāma, *Mughnī*, 5:177.

15) Ibid., 5:180; Māwardī, *Ḥāwī*, 7:233-34; Bājī, *Muntaqā*, 5:199.

16) ʿAynī, *Bināya*, 11:282; Ibn ʿĀbidīn, *Radd*, 6:217.

Because such a situation may be intolerable with an unwelcome "neighbor," co-owners have priority over other categories of pre-emptors whose properties are totally or partially separated from the adjoining ones. However, Ḥanafīs limit the object of pre-emption to an immovable property or a share thereof, since the turnover of owners in an immovable property is less frequent and it makes a disagreement between them all the more serious.[17]

Despite these differences, there is a general tendency to minimize the scope of pre-emption—a tendency common to modern Egyptian legislation. Ḥanafīs in particular assimilate pre-emption to usurpation (*ghaṣb*) in the sense that the pre-emptor acquires the purchaser's property without the latter's consent.[18] By discouraging potential purchasers, this system hinders the circulation of real property. Acting on the assumption that pre-emption is a "weak" right, Ḥanafīs make it subject to a number of legal prerequisites at various stages, from the accrual of the right to its final establishment.[19] In certain cases, Ḥanafīs allow the purchaser to circumvent this right, often in collaboration with the vendor, by means of legal devices (*ḥiyal*),[20] some of which are mentioned in ʿAbbāsī's *fatwa*s. The most popular method in modern Egypt is to make the price of the property in question unknown to the pre-emptor, by putting a part of it into a bag, because he cannot lay claim to the property until he specifies who bought it for how much. ʿAbbāsī demonstrates great tolerance for this practice, basing himself on the authority of standard legal works.[21] Even without such a device, a pre-emptor may easily lose his right, especially when he fails to declare his will to pre-empt the sale immediately after he has specified the purchaser and the sale-price. Many pre-emptors laid claim to the property too late,

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17) ʿAynī, *Bināya*, 11:349.

18) Ibid., 11:274; Ibn ʿĀbidīn, *Radd*, 6:216.

19) Ibn ʿĀbidīn, *Radd*, 6:219. See also Ziadeh, *Property Law*, 47.

20) Satoe Horii, "Reconsideration of legal devices (*ḥiyal*) in Islamic jurisprudence: The Ḥanafīs and their 'exits'," *Islamic Law and Society* 9/3 (2002), 338-40.

21) ʿAbbāsī, *Mahdiyya*, 5:178 (the second case in Jumādā II 1267. The date is illegible due to a misprint). See also 5:167 (9 Ṣafar 1265), 169 (12 Jumādā II and 4 Rajab 1265), 171 (26 Dhū al-Qaʿda 1265), 174 (28 Ramaḍān 1266), 175 (25 Dhū al-Qaʿda 1266), 176 (18 Ṣafar 1267), 177 (30 Rabīʿ I 1267), 177-78 (28 Rabīʿ II 1267), 179-80 (26 Dhū al-Ḥijja 1267) and so on.

sometimes years after the lapse of their right.[22] Conversely, the pre-emptor may take action against the purchaser whenever he gains the necessary information, e.g. more than twenty years after the sale.[23] Be that as it may, the purchaser remains in an unsecure position for a long period—another problem associated with the institution.

1.2. Landownership as the Cause and Object of Pre-emption

To appreciate the changes to be discussed in section 2, two major principles of Ḥanafī pre-emption should be noted.

First, the object of pre-emption is *ownership* of land: no other right may be acquired by way of pre-emption. Ownerless land, which is inalienable by definition, is not subject to pre-emption: the same holds for a property converted into *waqf*, i.e. property (immovable as a rule) sequestered in perpetuity whose income is allocated for charitable purposes, immediately or not. When the allocation is immediate, the *waqf* is called "charitable" (*khayrī*). When the income is transferred to one or more persons, as specified in the foundation deed (usually children of the founder and their descendants), on the condition that upon the extinction of all the beneficiaries the property becomes a charitable trust, the *waqf* is called family *waqf* (*waqf ahlī*).[24] Both types of *waqf* were legitimized in the early stages of Islamic law. The family *waqf* in particular was widely used to circumvent Islamic inheritance rules that result in the fractionalization of family wealth, and to protect the property against sequestration or confiscation by the state. Secondly, the cause of pre-emption is also *ownership* of land, since one exercises the right of pre-emption in his capacity as co-owner of the land in question or as an owner of adjoining land, even in a fictitious sense. As a rule, a holder of other rights in the land sold, such as a lessee or pawnee, cannot be a pre-emptor. It goes without saying that ownerless land, such as *waqf* properties, causes no one to acquire another land by way of pre-emption.

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22) See e.g. ibid., 5:167-68 (22 Ṣafar 1265), 172-73 (8 Muḥarram 1266), 181 (6 Rabīʿ I 1268).

23) Ibid., 5:170 (19 Rajab 1265).

24) Aḥmad Maḥmūd Fuʾād, *Sharḥ aḥkām al-waqf al-ahlī baʿda intihāʾihā* (Shobra: Maṭbaʿat al-Naṣr, 1952), 14-16.

An exception to the first principle is the right of *ḥikr* or long lease, which is practiced in order to encourage the reclamation of *waqf* property that has fallen into disuse: the lessee (*muḥtakir*) enjoys the land in perpetuity and his right passes to his heirs, so long as a fixed rent is paid.[25] This kind of lease had much-criticized effects, such as the misappropriation of these properties by the lessees, deterioration as a result of perpetual use, or pecuniary damages to *waqf* beneficiaries as a result of low rents.[26] With the spread of *waqf*, however, long lease was commonly practiced (in modern Egypt, land held by long lease was associated with *waqf*).[27] By the tenth century at the latest, Central Asian Ḥanafī jurists relaxed the early doctrine that limited the term of lease of *waqf* land to no more than two years.[28] Some Ḥanafīs, including Ottoman jurists like Ibn Kamāl (d. 1533) and Abū Suʿūd (d. 1574), argued that the lessor can pre-empt the sale of a building erected by the *muḥtakir* to a third party because of a superficies (*ḥaqq al-qarār*) attaching to it, i.e. in this case the building is regarded as immovable property.[29] In this sense, the right of *ḥikr* may be assimilated in modern legal terminology to what is called *real right* (*ḥaqq ʿaynī*). A real right allows its holder to exercise immediate power over a thing that is the object of this right, unlike a personal right (*ḥaqq shakhṣī*) arising from an obligation that entitles its holder, i.e. a creditor, to demand from the debtor a certain performance (giving, doing, or not-doing). The right of a normal lessee is of a personal nature, because he is entitled to require the lessor to deliver the object in a good condition.

In terms of terminology, however, Islamic law does not distinguish between real and personal rights. Both the right of *ḥikr* and the normal lease fall within the scope of *ḥaqq al-intifāʾ*. In contemporary usage, the term *ḥaqq al-intifāʾ* refers to usufruct, i.e. a real right to the use of

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25) Ibn ʿĀbidīn, *Radd*, 6:217-19; Ḥaṭṭāb, *Mawāhib*, 7:380-81; Muḥammad Kāmil Mursī, "Le hekr et le droit de preemption," *Majallat al-qānūn waʾl-iqtiṣād* 8 (1938): 13-14, 19.

26) Ibn Qayyim al-Jawziyya, *Iʿlām al-muwaqqiʿīn*, 4 vols. (Cairo: Maṭbaʿat al-Saʿāda, 1374/1955), 3:303-04.

27) ʿAbbāsī, *Mahdiyya*, 5:169 (5 Jumādā II 1265), 176 (3 Muḥarram 1267), 183-84 (23 Dhū al-Qaʿda 1268), 189 (8 Rajab 1269).

28) On long-term lease (*al-ijāra al-ṭawīla*), see Qāḍī Khān, *Fatāwā Qāḍī Khān*, on the margin of *al-Fatāwā al-ʿālamgīriyya* (Būlāq: al-Maṭbaʿa al-Amīriyya al-Kubrā, 1310/1893), 2:303-04.

29) Ibn ʿĀbidīn, *Radd*, 6:217-18.

and benefit from things (movable or immovable) over which another has ownership, in the same manner as the owner himself, subject to certain conditions. In Islamic law, the content of *ḥaqq al-intifāʿ* is broader and varies according to the context in which it is applied. This right refers to ownership of the enjoyment of a thing (*manfaʿa*) in any way, a counterpart to ownership of the thing itself (*ʿayn* or *raqaba*). Both kinds of ownership combine to form a *milk* (or *milkiyya*), which is equivalent to the modern concept of ownership right, i.e. a right to enjoy a thing in the most absolute manner.[30] In Ḥanafī law, *manfaʿa* is not an object of ownership (*māl*) by itself and cannot be alienated separately from *raqaba*, without a contract drawn up for this special purpose, such as hire or lease.[31] In this regard, servitudes are exceptional, because they do not always derive from a contract. Be that as it may, neither *ḥaqq al-intifāʿ* nor servitude is systematically studied in standard works of Islamic law. So long as ownership of *manfaʿa* is subject to a contract, its import is changing, either by nature of the contract or by virtue of special agreements of the parties.

In the case of a building erected by the lessee in a long lease, his *ḥaqq al-intifāʾ* is the object of the right of pre-emption exercised by the landowner. However, the question of whether the right of *ḥikr* allows the lessee to pre-empt a sale of the land is hardly discussed.[32] Also, none of the four Ḥanafī categories of pre-emptors exercises the right in his capacity as holder of *ḥaqq al-intifāʾ*, but rather as the owner of an immovable property.

1.3. The State Landownership Theory

The term *ḥaqq al-intifā* is often applied to the usufruct of individuals over land whose *raqaba* belongs to the state (this right is also called *taṣarruf*). This is because, except for Ḥanafīs, Sunnī jurists hold that in Egypt and other countries conquered by force, the *raqaba* of most agricultural land made subject to *kharāj* (land tax), without being dis-

30) al-Suyūṭī, *al-Ashbāh wa'l-naẓā'ir fī qawā'id wa-furūʿ al-shāfiʿiyya* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1403/1983), 326.

31) ʿAlī Ḥaydar, *Durar al-ḥukkām sharḥ Majallat al-aḥkām*, 2 vols. (Beirut, Baghdad: Manshūrāt Maktabat al-Nahḍa, n.d.), 1:100, on Art. 125. Cf. Art. 126.

32) The modern Egyptian courts were divided on this issue. Mursī, "Le hekr," 18.

tributed among the Arabs as privately owned land paying *ʿushr* (*zakāt* or religious tax on agricultural products), passes to the Muslim community.[33] The individual holder of *kharāj* land has merely *ḥaqq al-intifāʾ* and must pay *kharāj* in return for his enjoyment of the land.[34]

This theory, which allowed states to maximize land revenues, formed the basis of the land and tax regimes of most pre-modern dynasties, including the Ottomans. In the Ottoman Land Code of 1858, for example, most agricultural land is classified as *mīrī* (although *kharāj* land is excluded in accordance with the classical Ḥanafī view), whereas private property is represented by building sites in towns and villages, along with *ʿushr* land.[35] Logically, the state landownership theory must lead to the regulation of any transfer or devolution of property belonging to the state. However, the matter is disputed even by non-Ḥanafīs. According to the Ḥanbalī Ibn Qudāma (d. 1223), an unauthorized sale of such land is permissible when declared valid before a court, as is the rule with other controversial questions open to legal interpretation.[36] By invoking the authority of Khayr al-Dīn al-Ramlī (d. 1671), who supported the application of pre-emption to *kharāj* land, Ibn ʿĀbidīn (d. 1836) attempted to defend the traditional Ḥanafī view, according to which this category of land belongs to its individual holders.[37]

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33) Bājī, *Muntaqā*, 3:219; Māwardī, *Ḥāwī*, 14:260; Ibn Qudāma, *Mughnī*, 2:307.

34) According to this view, *kharāj* is more like a rent than a tax on property. By contrast, Ḥanafīs regarded *kharāj* as a tax on property: They held that *kharāj* land that was left in full ownership of the peasants at the time of conquest belongs to the taxpayer. However, the rise of tax farmers and other intermediaries as virtual landlords made this tenet incompatible with the state of affairs. As a result, Egyptian Ḥanafīs based themselves on the assumption that the gradual death of the peasant proprietors without heirs must have led to the devolution of their properties to the state. In this manner, they legitimate the fact that what was taken from contemporary Egyptian land was nothing other than a rent. The thesis of "the death of peasant proprietors" became mainstream Ḥanafī doctrine. See Baber Johansen, *The Islamic Law on Land Tax and Rent: The Peasants' Loss of Property Rights as Interpreted in the Hanafite Legal Literature of the Mamluk and Ottoman Periods* (London, New York, Sydney; Croom Helm, 1988), 80-101.

35) Arts. 2 and 3. I used the Arabic translation of the Code in Yūsuf Ibrāhīm Ṣādir, *Majmūʿat al-qawānīn*, 6 vols. (2nd ed., Beirut: al-Maṭbaʿa al-ʿIlmiyya, 1927).

36) Ibn Qudāma, *Mughnī*, 2:310-11.

37) Ibn ʿĀbidīn, *Radd*, 4:180. See also 6:224. Cf. note 34 above. His ostensible adherence to the traditional Ḥanafī tenet with regard to Syrian and Egyptian lands should be qualified by the different situations of both countries. On this issue, see Cuno, "Was the land of

The impact of the state landownership theory must have varied across time, subject to local conditions. In all likelihood, pre-modern states had little need to intervene in private legal matters so long as taxes were collected. Nor did they have a systematic means to intervene. A real property registration system was introduced by the aforementioned Ottoman Land Code of 1858, which attempted to establish direct control over land, albeit without much success.[38] In Egypt, where this Code was not applied, Muḥammad ʿAlī reduced individual rights in land to *ḥaqq al-intifāʿ* in its literal sense by reviving the state landownership theory, which officially remained in force until 1896. For their part, cultivators of *mīrī* land inherited their plots and disposed of them by way of sale, rent or mortgage. Legally, however, "inheritance' was applied only to privately owned property, whereas *intiqāl* or the transmission of usufruct was applied to *mīrī* land. Likewise, the alienation of *mīrī* land was called *isqāt* or the cession of the usufruct right, as distinct from the "sale" of private property. In Egypt, mortgage on *mīrī* land, which corresponds to *anticrèse*, was called *ghārūqa*.[39] By the same token, in official law, pre-emption was confined to private properties. In fact, ʿAbbāsī holds against claimants of pre-emption in cases of *isqāt*.[40] Paradoxically, such claims indicate that in their daily legal life, cultivators were accustomed to the institution of pre-emption.[41]

Before we follow the development of Egyptian land policies over time and their relevance to pre-emption, it will be useful to briefly survey major legal developments relating to pre-emption.

2. Pre-emption in Modern Egyptian law

2.1.1. The National Civil Code

Almost immediately after the Ottomans appointed Muḥammad ʿAlī as governor of Egypt in 1805, he embarked on the modernization of the

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Ottoman Syria *miri* or *milk*? An examination of judicial differences within the Hanafi school," *Studia Islamica*, 1995/1 (June) 81:137-42.

38) Ziadeh, *Property law*, 8-10.

39) Cuno, *Pasha's peasants*, 82-84.

40) ʿAbbāsī, *Mahdiyya*, 5:191 (4 Ṣafar 1270), 193-94 (27 Muḥarram 1271), 195-96 (14 Jumādā I), 203 (21 Ramaḍān 1273), 215 (12 Rajab 1283).

41) As suggested in Cuno, *Pasha's peasants*, 182.

country and laid the foundation of his virtually autonomous dynasty, which lasted until 1953.

Under his grandson, Ismāʿīl, radical changes in the legal system were introduced by a judicial reform that resulted in the establishment of two types of modern courts and the promulgation of the codes to be applied therein. The Mixed Courts (*al-maḥākim al-mukhtaliṭa*, 1874-75), staffed by Egyptian and foreign judges, heard cases of mixed interests and applied codes that were modeled primarily on French law.[42] The "Native" Courts (*al-maḥākim al-ahliyya*, 1884, renamed *al-maḥākim al-waṭaniyya* or National Courts in 1936) shared jurisdiction over Egyptians with the Sharīʿa Courts. In 1897, the jurisdiction of the Sharīʿa Courts was restricted to personal status cases and to the foundation and administration of *waqf*s. The National Codes were largely patterned after the Mixed Codes. Pre-emption found its way into the Mixed Civil Code (1876), and then into the National Civil Code (1883), which, in 1949, was replaced by the New Code. As with other national laws, the National Civil Code was originally formulated in French, but later translated into Arabic, albeit inaccurately. The frequent divergences between the French and the Arabic texts were the cause of many complaints by jurists.[43]

Eight provisions relating to pre-emption in the National Civil Code (Arts. 68-75, corresponding to Arts. 93-94, 96-101 of the Mixed Civil Code)[44] are generally in accordance with Islamic law, albeit with a slight

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42) It is easy to assume that the growing political and financial dependence of Egypt upon the Capitulatory Powers made it necessary for the Egyptian government to adopt French codes. See Nathan J. Brown, *The Rule of Law in the Arab World. Courts in Egypt and the Gulf* (Cambridge: Cambridge University Press, 1997), 27. According to another account, however, French codes were adopted because French law was tantamount to *jus commune* among the majority of foreign subjects in Egypt. See ʿAbd al-Razzāq al-Sanhūrī, "Wujūb tanqīḥ al-qānūn al-madanī al-Miṣrī waʿalā ayy asās yakūnu hādhā al-tanqīḥ," *Majallat al-Qānūn waʾl-Iqtiṣād* 6/1 (1936), 14; Mark Hoyle, *Mixed Courts of Egypt* (London/Dordrecht/Boston: Graham & Trotman, 1991), 17.

43) Sanhūrī, "*Wujūb*,"15, 34; al-Ḥukūma al-Miṣriyya: Wizārat al-ʿAdl, *al-Qānūn al-madanī: Majmūʿat al-aʿmāl al-takhḍīriyya*, 7 vols. (Cairo: Maṭbaʿat Dār al-Kutub al-ʿArabī, n.d.), 1:27.

44) The Arabic text is taken from Mursī, *al-Shufʿa fī al-qānūn al-ahlī waʾl-mukhtaliṭ wa-fī al-sharīʿa al-islāmiyya*, 3d ed. (Cairo: Sharikat Maktabat wa-Maṭbaʿat Muṣṭafā al-Bābī al-Ḥalabī wa-aulādihi, 1366/1947), 9-11. The French text is from *Codes Égyptiens. Tribunaux Indigènes* (Cairo: Imprimerie Barbier et Cie, n.d.), 35.

divergence from Ḥanafī doctrine. According to the Code, three categories of people may exercise pre-emption, in the following order: (1) a landowner who leased his land with permission to build or plant thereupon (Art. 68);[45] (2) co-owners (Art. 69); and (3) adjoining neighbors (Art. 73). The first category is not new to Islamic law. The commentators agree that this category allows the lessor to acquire, by way of pre-emption, buildings or plantations sold to a third party by the lessee who owned them. They also agree that this provision was probably borrowed from French writings on Algerian Mālikī legal doctrine.[46] Since buildings and plants are treated as movables, they cannot, according to Ḥanafīs, be the object of pre-emption, with the exception of a building on land held in a long lease (see 1.2 above). In Egypt, however, Muslim jurists were divided on this issue.[47] The same was true with some earlier rulings of the modern Egyptian courts.[48] Presumably, the National Civil Code intended to put an end to this controversy.

2.1.2. Pre-emption Law

Nearly two decades of operation exposed the insufficiency of both the Mixed and the National Civil Codes in governing cases of pre-emption. The relevant provisions were therefore replaced by the Decree of 23 March 1900 for the Mixed Courts and by the Decree of 26 March 1901 for the National Courts, each known as a Pre-emption Law (*qānūn al-shufʿa*).[49]

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45) "*Man aʿāra arḍahu li-insān wa adhina lahu biʾl-bināʾ aw al-ghars* (*Celui qui a prêté son terrain avec permission de bâtir ou de planter*)."

46) Mursī, *Shufʿa*, 64; idem, "Al-Shufaʿāʾ wa-marātibuhum fī al-sharīʿa al-islāmiyya wa-fī al-qawānīn al-ahliyya waʾl-mukhtaliṭa," *Majallat al-Qānūn waʾl-Iqtiṣād* 2 (1932): 593 (hereinafter Mursī, "Shufaʿāʾ,"1).

47) Ibid., 6:217-19; Ḥaṭṭāb, *Mawāhib*, 7:380-81. ʿAbbāsī, *Mahdiyya*, 5:179 (10 Dhū al-Qaʿda 1267), 185 (4 Ṣafar 1269), 189 (7 and 16 Shaʿbān 1269), 200 (28 Dhū al-Ḥijja 1272), 201 (15 Rabīʿ II 1273).

48) Mursī, "al-Shufaʿāʾ wa-marātibuhum fī al-sharīʿa al-islāmiyya waʾl-qawānīn al-ahliyya waʾl-mukhtaliṭa," *Majallat al-qānūn waʾl-iqtiṣād* 3 (1933):17-18 (hereinafter Mursī, "Shufaʿāʾ," 2).

49) Mursī, "Shufaʿāʾ," 1:568; Sanhūrī, *al-Wasīṭ fī sharḥ al-qānūn al-madanī*, 10 vols. (Alexandria: Munshaʿāt al-Maʿārif Jalāl Ḥazzī wa-Shurakāʾihi, 2004), 9:457; ʿAbd al-Sallām al-Dhihnī, *Fī al-amwāl* (Cairo: Maṭbaʿat al-Iʿtimād, 1344/1926), 650; Ziadeh, *Property Law*, 46.

The Mixed and National Pre-emption Laws are identical. The sources at my disposal do not give details relating to the preparation of these laws,[50] save for some dates. In his doctoral thesis on pre-emption, published in 1897, Nasralla remarked that the draft of the National Law had only recently been presented to the cabinet.[51] The Mixed Law slightly antedated its national counterpart, because its draft was confirmed by the Mixed Court of Appeal on 12 June 1897, as known from the decision on this issue made in 1899 by the legal advisor (*al-mustashār al-qaḍā'ī*),[52] which can be regarded as the prospectus of this law. The original text of this decision is unavailable to me. The following is a translation of a partial citation made by Muḥammad Kāmil Mursī (d. 1958; on him, see the next section), who, to the best of my knowledge, is the sole author to mention this source:

> The present law of pre-emption [i.e. the provisions of the Mixed and National Civil Codes] has long been causing damage to many subjects and attracting complaints, especially from the Administration of State Domain (*maṣlaḥat al-dūmīn*). The draft of the decree that was thus proposed, though not having been brought before the House, is in conformity with the rulings of the Mixed Courts and was confirmed by the aforementioned Court of Appeal in its decision of 12 June 1897. Pre-emption is an institution peculiar to Islamic law that entitles co-owners, usufructuaries (*muntafiʿīn*) and adjoining neighbors to substitute themselves in place of the purchaser by paying the same price and costs [as he paid]. However, the principles of pre-emption were not laid down as they must be in the mixed law. This is because the authors of these laws (*sic*) did not have a thorough knowledge of the precise rules of pre-emption. The gravity of the matter is self-evident, however, because pre-emption is deemed to be a serious obstacle to freedom of transaction over immovable properties that are the most important source of wealth for an agricultural country. Therefore, it is necessary to clarify the cases in which pre-emption is permissible, or rather, to lay down a proper procedure for the exercise of this right and, among others, as a precaution against an indefinite accrual of this right, to fix a term for the acknowledge-

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50) Mursī, *Shufʿa*, 39.

51) Y. Nasralla, *De la préemption dans le droit égyptien. Thèse pour doctorat* (Paris: Librairie Société Géneral des Lois et des Arrêts, 1897), 4.

52) The legal advisor at the time was Malcolm McILwraich, who held office from 12 October 1898 to 30 September 1916, as successor of Sir John Scott. *al-Kitāb al-dhahabī li'l-maḥākim al-ahliyya 1883-1933*, 2 vols. (Būlāq: al-Maṭbaʿa al-Amīriyya, 1937), 1:184.

ment of pre-emption, so that the purchaser will not be exposed to a permanent risk of being deprived of his property by way of pre-emption.[53]

Here—unlike in classical Islamic legal doctrine—*ḥaqq al-intifāʾ* is treated as a cause of pre-emption. In fact, the Pre-emption Law assigns the right of pre-emption to the usufructuary. In other respects too, this law diverges greatly from Islamic Law. In the following, I refer only to the National Pre-emption Law.

Despite many additions made to improve the previous provisions on pre-emption, the Law remained obscure and imperfect in many respects. In defining pre-emptors, Art. 1 refers only to co-owners and adjoining neighbors,[54] while Art. 7 prioritizes four categories of pre-emptors. Taken together, pre-emption belongs to: (1) A bare owner of land (*mālik al-raqaba*), (2) co-owners, (3) a usufructuary (*ṣāḥib ḥaqq al-intifāʿ*), and (4) adjoining neighbors. Categories (1) and (3) form a pair. The National Civil Code defines "usufruct" as "a right to use and enjoy a thing of which the bare ownership belongs to another" (Art. 13). The Pre-emption Law allows the bare owner to preempt a sale of the usufruct attached to his land and, conversely, the usufructuary may preempt a sale of bare ownership. Although the usufructuary is assimilated to a co-owner, he may exercise the right of pre-emption only when the bare owner does not do it (Art. 2)—we will return to the meaning of this article. This type of pre-emption is not derived from the classical Islamic principles of pre-emption.

Another remarkable change is the radical restriction of pre-emption. For example, someone who exercises his right of pre-emption is required not only to give notice to this effect to both the vendor and the purchaser, but also to tender the price and the expenses that shall be paid (Art. 14/1). Whether this tender must be made literally, i.e. by depositing the subject matter of the performance with an official depository, was a matter of controversy in the courts.[55] Moreover, the application

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53) Mursī, *Shufʿa*, 39, 503 n. 1.

54) The Arabic text is based upon Niẓārat al-ḥaqqāniyya, *al-Majmūʿ al-rasmiyya li'l-maḥākim al-ahliyya* (Būlāq: al-Maṭbaʿa al-Amīriyya), 1901:193-96; Mursī, *Shufʿa*, 11-16.

55) See e.g. Niqābat al-muḥāmīn al-ahliyya, *al-Muḥāmāh. Majalla qaḍāʾiyya shahriyya* 1/3 (1920): No. 21 (District Court of Tanta, 22 October 1918) *vs.* 1/8 (1922): No. 78 (District Court of Alexandria, 16 November 1920).

of pre-emption to adjoining neighbors was drastically limited. Art. 1 grants them this right under the following conditions: (a) when the object of pre-emption that adjoins their properties is a building or a building site in towns (*al-mudun*) or in villages (*al-qurā*), i.e. in a densely inhabited district (*agglomération urbane*):[56] (b) otherwise (i.e. in the case of agricultural land),[57] both of the following conditions must be fulfilled: (i) the land sold enjoys certain servitudes over the adjoining land or, *vice versa*, the adjoining land is the dominant tenement with regard to the land sold; and (ii) the adjoining land adjoins the land sold on two sides and its value is at least half that of the land sold. The distinction between urban estates and agricultural land may be seen as a vestige of the state landownership theory (see 1.3 above).

The Pre-emption Law contains two apparently conflicting elements. Despite its general tendency to restrict pre-emption, the Law creates a new type of pre-emption as a means to acquire either usufruct or bare ownership of land. Put differently, usufruct becomes a cause (for the usufructuary) and an object (for the bare owner) of pre-emption. The extension of pre-emption coverage in this way invited severe criticism from jurists.[58]

Jurists had another reason to criticize the innovation: this type of pre-emption is of no practical use. This point will be discussed in 2.3.

2.1.3. The New Civil Code

By 1936, Egypt had gained full independence from Britain. A new national legal system was created, and the New Civil Code came into force in 1949, on the day the Mixed Courts were abolished. Although the New Code was largely drafted by both members of the third and final drafting committee—the Egyptian jurist Sanhūrī and his former supervisor at the University of Lyon, Edward Lambert (d. 1947)—most articles dealing with pre-emption were prepared by the second committee, composed of five foreigners and six Egyptians, including the aforementioned Mursī, a law professor at Cairo University known for his study of pre-emption.[59]

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56) Mursī, "Shufa'ā'," 2:8; idem, *Shuf'a*, 78.
57) Mursī, "Shufa'ā'," 2:19, 8; idem, *Shuf'a*, 89, 78.
58) Mursī, *Shuf'a*, 505.
59) *al-Qānūn al-madanī*, 1:6-9; Sanhūrī, *Wasīṭ*, 9:458.

Following the Pre-emption Law, the New Code tightened the regulation of pre-emption in terms of procedure (Arts. 940-43); the pre-emptor was now required to deposit the actual price of the land sold in the competent court within a prescribed period (Art. 942/2), and, further, pre-emption was defined as a privilege rather than an established right (Art. 935),[60] in accordance with a general principle repeatedly confirmed by courts that pre-emption is "an exceptional right" incompatible with a broad interpretation.[61] On the other hand, a new kind of pre-emption was again created. Compared to the Pre-emption Law, there was no change with regard to the first three categories of pre-emptors, i.e. the bare owner, co-owner, and usufructuary. The fourth category, however, includes both parties to a long lease; the lessor (also called "bare owner") may pre-empt a sale of the right of *ḥikr* to a third party and, conversely, the lessee may acquire bare ownership by way of pre-emption. Finally, adjoining neighbors have a right to pre-emption under the same conditions as made by the Pre-emption Law (Art. 936 (a)-(e)). Like usufruct, the right of *ḥikr* now becomes a cause (for the lessee) and an object (for the bare owner) of pre-emption.

2.2. The Purpose of the New Pre-emption System: Establishment of Full Landownership

Let us now consider the intent of these innovations.

The regulation of pre-emption was certainly a critical issue, as implied by the above-mentioned prospectus of 1899, which highlights negative effects of the institution, and by both the Pre-emption Law and the New Civil Code, which drastically limited the coverage of the neighbor's right to pre-empt a sale of agricultural land, as a precaution against land speculation (on this point, see 4.1). Paradoxically, however, the measures taken by the legislators point to the necessity to maintain the institution itself. The explanatory memorandum of the proposed

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60) Sanhūrī, *Wasīṭ*, 460-62. The details are summarized in Bechor, *Sanhuri Code*, 240-41.

61) Mursī, *Shuf'a*, 28-29. See also, e.g., *al-Muḥāmāh* 1/8 (1921): No. 78 (District Court of Alexandria, 16 November 1920), 407, 3/1(1922): No. 20 (Summary Court of Beni Suef, 31 January 1921), 54. 6/10 (1926): No. 544 (District Court of Qina, 25 January 1926), 878. 7/3 (1926): No.154 (Court of Appeal Cairo, 10 June 1926), 216. 7/7(1927): No. 474 (Court of Appeal Asyut, 3 March 1927), 814.

New Code gives the following account at the beginning of the chapter on pre-emption (the interpolation in brackets follows the original text):

> In the end, we reached a decision to maintain pre-emption as one of the causes of the acquisition of ownership (for historical considerations, i.e. because the institution already forms part of the legal traditions of our country). Moreover, pre-emption has the merit of integrating the component elements of the right of ownership (*jamʿ mā tafarraqa min ḥaqq al-milkiyya*), just as the right of usufruct is conjoined with bare ownership through the exercise of pre-emption.[62]

Thus the institution of pre-emption system was intended as a means to establish full landownership by encouraging persons who have real interests in the same property to integrate their rights. Needless to say, also implied in this context is the right of pre-emption assigned to both parties of a long lease, as well as that assigned to a neighbor whose property benefits from or suffers servitudes in relation to the adjoining agricultural plot. The regulation of pre-emption was all the more necessary, seeing that these new types of pre-emption were introduced in order to encourage the establishment of full landownership.

However, it was not the makers of New Civil Code who attached this new meaning to pre-emption. For their part, they followed the Pre-emption Law which, in their view, enlarged the scope of pre-emption in order to meet "the socio-economic needs" of Egypt, i.e. the necessity to establish full landownership.[63] It is well established in Egyptian jurisprudence that the Pre-emption Law enabled the usufructuary and bare owner to integrate their rights into a full ownership right over the property.[64] This view can be traced back to Aḥmad Fatḥī Zaghlūl (d. 1914), an elder brother of Saʿd Zaghlūl and one of the prominent jurists of his time.[65] In what was arguably the first Arabic commentary on the National Civil Code, published in 1913, he states that the Pre-emption Law gives the right of pre-emption to the bare

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62) *al-Qānūn al-madanī*, 6:343.

63) Ibid., 6:361, on the margin (from the minutes of 14 May 1937).

64) Mursī, "Shufaʿā'," 1:597; Sanhūrī, *Wasīṭ*, 9: 526.

65) Mursī, "Shufaʿā'," 1:597, n. 1. On him, see Ziadeh, *Lawyers, the Rule of law and Liberalism in Modern Egypt* (Stanford California: Hoover Institution, 1968), 86-88, 90, 106n.

owner so that he may establish full ownership by releasing his land from usufruct belonging to another.[66] The same applies to owners of adjoining agricultural plots subject to servitudes. A National Court of Appeal ruling of 10 June 1926 corroborates this understanding. The case subject to this ruling pertains to an adjoining neighbor who sought to preempt an unregistered sale of his former co-owner's land. In rejecting the claim, the Court declares that the *raison d'être* of pre-emption is the protection of its holder from certain damages caused either by co-owners and neighbors or by "the existence of real rights that conjoin the property of the pre-emptor and that of the vendor to such a degree that the ownerships should rather be united."[67] In these contexts, the rationalization of landownership relations or something like that appears to be the legislative purpose.

However, there is nothing to suggest that the legislators of the Pre-emption Law actually intended the establishment of full landownership in this sense. The above-mentioned prospectus of 1899 does not advocate such an advantage of pre-emption, but rather calls for a reform of the current institution, which is regarded as "a serious obstacle to freedom of transaction over immovables." Furthermore, Nasralla, who may have been informed of the draft of this law (perhaps *via* his father, who was a National Court judge, as known from the dedication of his book) and even quotes it in his dissertation of 1897, does not mention this purpose.

2.3. The Mystery of Usufruct as a Cause and Object of Pre-emption

Also, the assignment of the right of pre-emption to the usufructuary or bare owner for this purpose was useless, as suggested by jurists who criticized this innovation (see 2.1.2).

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66) Aḥmad Fatḥī Zaghlūl, *Sharḥ al-qānūn al-madanī* (Cairo: al-Maṭbaʿa al-Amīriyya, 1913), 84.

67) *al-Muḥāmāh* 7/3 (1926): 215. With the promulgation of Law No. 18 of 1923, which provides that any contract transferring ownership of real property should be registered on pain of nullification, the question of whether an unregistered sale gives rise to the right of pre-emption to the property sold became a major point at issue. After the promulgation of the New Civil Code, the affirmative position became predominant. Sanhūrī, *Wasīṭ*, 9:493-500.

This was because jurists understood *usufruct* here (and in the National Civil Code as well) in its modern sense as defined in French law—a major source of modern Egyptian laws—that is to say, "a real right to enjoy things of which another has ownership in the same manner as the owner himself, but on condition that their substance be preserved, and this right definitely terminates upon the natural death of the usufructuary."[68] The definition is derived from the modern concept of ownership, which consists of three elements: use, benefit from, and disposal of the object. Usufruct consists of the first two elements and reduces ownership to a right of disposal. This nominal title to the object is called "bare ownership" (*ḥaqq al-raqaba* or simply *raqaba*).[69] In French law, usufruct can be created either by law or by contract. In Egypt, however, usufruct by law was not introduced into the National Civil Code, while one seldom assigned the usufruct to another by a contract specified for this purpose. Also, the usufructuary, in the Pre-emption Law, does not refer to a *muḥtakir* or others who enjoy *waqf* land, because the Law provides that no *waqf* property may be acquired by way of pre-emption (Art. 4).[70]

Seeking to determine the practical import of this type of pre-emption, the second drafting committee of the New Code examined another two cases in which a usufructuary may exercise his right, albeit in vain. The first is the case of people who occupy a district in a city and build their houses with the permission of landowners. The committee initially agreed to assign the right of pre-emption to these inhabitants. However, this provision was subsequently deleted from the draft code on the grounds that the potential exercise of the right by such usufructuaries would cause a decrease in land values and impede urban development.[71] The second case was an actual event that was brought before a court: a husband donated his property to his wife, who in turn bequeathed the usufruct of the property to him.[72] Sanhūrī refers to a

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68) Sanhūrī, *Wasīṭ*, 9:1189.

69) Ibid., 9:1190.

70) Mursī "Shufaʿā'," 2:155; Sanhūrī, *Wasīṭ*, 9:564, 578-79. According to Art. 71 of the National Code and Art. 939 (2) of the New Code, a *waqf* property cannot be a cause of pre-emption.

71) *al-Qānūn al-Madanī*, 6:363, 366, on the margin (minutes of 17 May 1937 and 18 June 1937).

72) Ibid., 6:364, on the margin (minutes of 18 June 1937).

variant of this case as a more common, indeed, practically the sole cause of, the accrual of usufruct in Egypt: a person sells his property to one of his heirs, while reserving for himself the usufruct of the property during his lifetime. However, as Sanhūrī points out, this practice (and the previous one) seeks to circumvent Islamic inheritance rules that set a limit of 1/3 on a bequest: the practice cannot be regarded as a usufruct contract in its proper sense. Moreover, this type of sale was declared null and void by some courts under the National Civil Code and finally rejected by the New Code; Art. 917 provides that in the absence of any evidence to the contrary, such a sale is regarded as a testamentary disposition and made subject to the legal limits applicable to such a disposition.[73] The second drafting committee itself did not seriously consider assigning the right of pre-emption to people who acquire usufruct as a result of a circumvention of law. Thus there were few, if any, possibilities that a person would exercise pre-emption in his capacity as a usufructuary or bare owner. The sale of usufruct or of bare ownership was accordingly rare, as was the exercise of the right of pre-emption by a usufructuary or bare owner.[74] In fact, none of the sources at my disposal refers to any court ruling regarding this kind of pre-emption.

Considering all this, I suggest that we fail to understand the Pre-emption Law when it refers to "the usufructuary" or "the bare owner." The Law does not use these terms in their modern sense, but follows pre-modern legal tradition. This is because, as shown below, the modern concept of usufruct was not widespread in the nineteenth century.

3. The Usufructuary's Right of Pre-emption as a Means to Create Private Landownership

3.1. Ḥaqq al-intifāʿ in the Mixed and the National Civil Codes

In Islamic Law, the term *ḥaqq al-intifāʿ*, rendered "usufruct" in modern legal contexts, refers to ownership of *manfaʿa*, i.e. enjoyment of a thing, as contrasted with *raqaba*, i.e. ownership of the thing itself (see 1.2).

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73) Sanhūrī, *Wasīṭ*, 9:1201-2.

74) Ibid., 9:1196-97; Mursī, *Shufʿa*, 75, n.1; idem, Shufaʿā,'" 1:604.

Whereas usufruct in its modern sense is a real right to use and benefit from the property belonging to another, *ḥaqq al-intifāʿ* in Islamic law can include any kind of enjoyment.

In the New Code, the term *ḥaqq al-intifāʿ* is clearly used in its modern sense. According to Sanhūrī, who relies upon a definition given in French jurisprudence, *ḥaqq al-intifāʿ* here is a real right that consists of two of the three characteristics of ownership, i.e. the right to use and the right to benefit from the object, while the owner retains the right of disposal. From this point of view, as Sanhūrī suggests, Art. 13 of the National Code, which, apparently following Art. 29 of the Mixed Code,[75] defines usufruct as "a right to use and enjoy a thing of which bare ownership belongs to another," is so vague that it can include any kind of enjoyment.[76] In this sense, the definition in both the National and the Mixed Codes resembles the Islamic concept of of *ḥaqq al-intifāʿ*.

The Islamic concept of *ḥaqq al-intifāʿ* (ownership of *manfaʿa*) is wider than usufruct in its modern sense, because the enjoyment of a thing can be controlled and disposed of in the same manner as the thing itself. By contrast, usufruct in its modern sense is never assimilated to ownership, but rather it is a right that is by nature different from and subordinate to ownership. In contemporary legal terminology, the term *manfaʿa* or its ownership is replaced by "usufruct," whereas "*raqaba*" is still used in the sense of bare ownership. However, at the time of the Mixed and the National legislations, the distinction between *raqaba* and *manfaʿa* was well preserved, as suggested in *Murshid al-ḥayrān* of Muḥammad Qadrī (d. 1886).[77] Like the Ottoman Civil Code (the *Majalla*), this work compiles selected opinions of Ḥanafī jurists on matters relating to property law in the form of a modern code. Qadrī himself was trained in modern law and participated in the drafting of

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75) "*L'usufruit est le droit d'user et de jouir d'un bien dont la nue proprieté appartient à un autre*." *Codes Égyptiens. Tribunaux Indigènes*, 28. For the text of the Mixed Code, I relied on J.-A. Wathelet et R.-G. Brunton, *Codes Égyptiens et Lois Usuelles en Vigueur en Égypte I. Codes Mixtes et Indigène et Code de Statut Personnel*, 2nd ed. (Brussels: Veuve Ferdinand Larcier, 1922), 10.

76) Sanhūrī, *Wasīṭ*, 9:1188.

77) Muḥammad Qadrī, *Kitāb al-murshid al-ḥayrān ilā maʿrifat aḥwāl al-insān fī al-muʿāmalāt al-sharʿiyya ʿalā madhhab al-Imām al-Aʿẓam Abī Ḥanīfa al-Nuʿmān mulāʾiman li-ʿurf al-diyār al-miṣriyya wa-sāʾir al-umam al-islāmiyya* (Cairo: al-Āfāq al-ʿArabiyya, 1424/2003), 3.

the National Civil Code in his capacity as Minister of Justice.[78] In his *Murshid*, he tries to explain the meaning of usufruct by using traditional terminology. According to Art. 4, rights relating to the disposal of things and their usufruct (*al-intifāʿ*) are divided into (1) ownership of both *raqaba* and *manfaʿa* (i.e. full ownership of the object. Cf. Art. 5); (2) ownership of *manfaʿa* alone; and (3) servitudes, superficies and the like. Category (2), or "permissible usufruct" (*al-intifāʿ al-jāʾiz*), includes use of the thing and enjoyment of its fruits, even though its holder does not own the *raqaba* itself, on the condition that the substance be preserved (Art. 13). The "usufruct" can be transferred with or without consideration (Art. 15), i.e. by means of lease (Art. 29 etc.), endowment (Art. 17 etc.), testament (Art. 18 etc.), or loan for use (Art. 22 etc.). Ownership of *manfaʿa* can be the right of residence in a house. In this case, ownership of *manfaʿa* may be limited to this purpose alone (i.e. as a personal right) or may include enjoyment of the fruits (Art. 17. Cf. Art. 14 of the National Code).

In his commentary on the National Code, published nearly three decades after its promulgation, Fatḥī Zaghlūl still defines usufruct as a right to "own" the *manfaʿa* of a thing belonging to another in the same way as the owner himself, on the condition that the substance be preserved. [79] As a result, he includes as usufruct the right to use, i.e. a personal right, and the right of residence, which can be real or personal;[80] the holder of *ḥaqq al-intifāʿ* is entitled to enjoy the thing either directly (i.e. his right is of a real nature) or indirectly, i.e. by way of lease, partnership (*sharika*), or share-cropping (*muzāraʿa*). Moreover, Zaghlūl erroneously states that usufruct over an immovable is a personal right in the sense that the holder cannot exercise his right until the owner puts the property at his disposal.[81]

The definition of *ḥaqq al-intifāʿ* as ownership of *manfaʿa* has another logical consequence: the holder of this right and the owner of *raqaba* are assimilated to co-owners of the property. Therefore, according to

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78) He held office from Sept. 14, 1881-Feb. 3, 1882. See *al-Kitāb al-dhahabī*, 1:97. On his person and works, see Ziadeh, *Lawyers*, 19-20. On his contribution to the making of the Code, see Sanhūrī, "*Wujūb*," 16; *al-Muḥāmāh*, 7/6 (1927):649.

79) Zaghlūl, *Sharḥ*, 54.

80) Ibid., 51.

81) Ibid., 55.

Zaghlūl, a usufructuary is not responsible for loss of the property to which his right is attached when the loss is caused by *force majeure*, but he cannot demand a substitute from the bare owner, because the property perishes at the risk of both parties.[82] This analysis does not apply to the modern legal relationship between a usufructuary and a bare owner, since their rights are different by nature.[83]

In sum, both Qadrī and Zaghlūl apparently confuse *ḥaqq al-intifāʾ* as ownership of *manfaʿa* with "usufruct" in its modern sense. Presumably, this is not due to their lack of proficiency in modern legal terminology, but rather because the Mixed and the National Civil Codes themselves presuppose the existence of two categories of "usufruct." According to the Mixed Code, when the right of usufruct is "established by the state" over *kharāj* land, it can be "permanent" (Art. 35);[84] according to the National Code, which makes no mention of the state as the creator of this right, the usufruct is either permanent or temporary, but can only be temporary among individuals (Art. 15),[85] i.e. when created by one individual in favor of another, as is the case with usufruct in modern law. According to Zaghlūl, the category of "permanent usufruct" originates from the distinction between *kharāj* land, the *raqaba* of which belongs to the state, and *ʿushrī*, or privately owned land.[86] In other words, "permanent usufruct" refers to an individual usufruct right under state landownership, a right distinct from "usufruct" in its modern sense. The existence of such a right may explain the practical reason why, as suggested by Qadrī and Zaghlūl, the concept of *ḥaqq al-intifāʿ* was not fully modernized during the nineteenth century and even thereafter. Within the legal framework of both the Mixed and the National Codes, the distinction between *raqaba* and *manfaʿa* still formed the basis of Egyptian land policies beginning with Muḥammad ʿAlī's reform.

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82) Ibid., 58.

83) Sanhūrī, *Wasīṭ*, 9:1190-91.

84) "L'usufruit peut être perpétuel quand il est établi par l'Etat sur des terres *haradjis* dans les termes des réglements."

85) "Il peut être temporaire ou perpétuel, mais entre particuliers il ne peut être que temporaire."

86) Zaghlūl, *Sharḥ*, 55.

3.2. Nineteenth century land policies

The theory of state landownership governed the land and tax regimes of pre-modern dynasties, including the Ottomans (see 1.3).

In Egypt, most land was *mīrī* and it was held by peasants, though they customarily enjoyed their plots for life and passed them on to their heirs. Their inherited rights of usufruct are called *athar* or *athariyya*, which also refers to peasant land itself (in the following, however, peasant land will be referred to as *kharāj* land, since the term became prevalent after 1854).[87] However, when a form of tax-farm called *iltizām* came to prevail, state landownership became a fiction. Under the *iltizām* system, state land was transferred through public auction, originally for a specific number of years, to tax-farmers or *multazim*s, who, in return for their service, received a tax-free section of land for use (*ūsya*) and a share of land revenue. By the early eighteenth century, the *multazim*s established themselves as virtual landowners: they possessed their holdings for life, passed them to their heirs, converted land into *waqf* and disposed of it in different ways, including mortgage, pawn, and sale.[88]

Muḥammad ʿAlī abolished the *iltizām* system in an effort to reestablish state landownership and direct taxation. Although revolutionary in its impact upon the structure of political power, his reform followed a recurring pattern of state struggle for control of land revenues.[89] Through cadastral surveys, each plot of *kharāj* land was registered in the holder's name, with the amount of tax due from the plot, while many *waqf* and *ūsya* lands were reclassified as *mīrī*.[90] In order to maximize revenues, rights of usufruct over these lands were redistributed among individuals. *Ibʿādiyya* or uncultivated land that was not included in the cadastre was also made available for farming under different conditions. Eespecially after 1820, however, many peasants fell into tax arrears, and their plots were reassigned by the government to those who were able to cultivate them and pay their tax. These methods, which

87) Cuno, *Pasha's peasants*, 35, 165.

88) Cuno, "The Origins of Private Ownership of Land in Egypt: a Reappraisal," in *The Modern Middle East: A Reader*, ed. Albert Hourani, Philip Khoury and Mary C. Wilson, 2nd ed. (London, New York: I.B. Tauris, 2004), 197, 201-3; Baer, *Landownership*, 1-2.

89) Cuno, "Origins," 211.

90) Cuno, *Pasha's peasants*, 103, 107-8.

tended to concentrate arable land in the hands of wealthier peasants and rural notables who could afford additional holdings, strengthened the stratification of the village community.[91]

Another result of the reform was the expansion of privileged estates. With the collapse of the state monopoly system in response to pressure from the Great Powers (1841-42), large estates developed, partly from the *ʿuhda* system, a revival of the *iltizām* system for bankrupt villages: High-ranking officers and officials were forced to assume "responsibility" for paying the tax arrears of villages they received. Since the *mutaʿahhid*s were required to make their villagers plant crops specified by the government and take the harvest at a fixed price, the government could maintain control over agricultural production. For almost the same purpose, Muḥammad ʿAlī and members of his family held private estates, called *jiflik*, which included the country's best cropland. The number of tax-free grants of *ibʿādiyya* to high-placed persons also increased. In 1846, grantees acquired almost complete ownership rights. In 1854, with the abolition of the tax exemption, the *ibʿādiyya*, the *jiflik* and the *ūsya* came to form a single class of *ʿushr* land, i.e. privately owned land, as distinct from *kharāj* land.[92]

As for *kharāj* land, the government not only tightened administrative control over it, but also promoted its efficient redistribution through the Law of 13 December 1847, the Law of 27 January 1855 and the Law of 5 August 1858, known as the Saʿīd's Land Law. During this decade, the peasants' right to recover possession of plots that they had abandoned or that were made over to another who took charge of paying tax arrears was gradually reduced, while the legal status of the actual landholders was stabilized. Although these laws refer to the sale, pawn and inheritance of *kharāj* land, they do not create these rights, but simply point to existing legal custom, while making any disposal of *kharāj* land subject to permission of the authorities and bureaucratic formalities.[93]

In the early 1870s, the government changed its course in an effort to transfer state landownership to individuals, as a means to reduce

91) Ibid., 147-56.
92) Ibid., 160-63; Cuno, "Origins," 219; Baer, *Landownership*, 16-19.
93) Cuno, *Pasha's peasants*, 191-94.

heavy indebtedness.[94] The *Muqābala* Law of 30 August 1871 assigned full landownership to holders of *kharāj* land, subject to the payment of six years' taxes in advance. When the payment of the *muqābala* was made obligatory in 1874, many *kharāj* lands were privatized, although the Mixed Civil Code of 1875 still defines *kharāj* land as "property that belongs to the state and the usufruct of which was ceded to individuals, in the conditions and cases established by the regulations" (Art. 21).[95] In 1880, the *Muqābala* Law was abolished, but holders who had made full payment of the *muqābala* received ownership rights. Accordingly, the National Civil Code of 1883 assimilates *kharāj* land to private property (*milk*), in accordance with the *Muqābala* Law and the Decree of 6 January 1880, which abolished that law.[96]

The 1880s witnessed another trend of offering to individuals state domain administered by special departments, such as *mubāḥ* land (*bien libre*), i.e. unclaimed and mostly uncultivated land that belongs to whoever cultivates it, with permission.[97] For example, a regulation of 14 October 1880 provided for the registration of all uncultivated state land held by individuals as their private property subject to payment of *kharāj*. The final step toward privatization of the remaining *mīrī* land was made by the British, who sought to gain support from landowners.[98] The Mixed Court of Appeal's ruling of 23 February 1886 recognized that pre-emption was applicable to this category of land.[99] The Mixed Court of Appeal's ruling of 26 April 1893 declared that *kharāj* land might be converted into *waqf* without permission. Finally, the Decree of 3 September 1896 equated *kharāj* and *'ushr* lands with regard

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94) Ibid., 203.

95) Baer, *Landownership*, 10-11; Art. 21 of the Mixed Civil Code ("Les biens *haradjis* ou *tributaires* sont ceux qui appartiennent à l'Etat et dont il a cédé, dans les conditions et dans les cas prévus par les réglements, l'usufruit aux particuliers."

96) Art. 6 : "On appelle biens *mulk*s ceux sur lesquels les particuliers un droit entier de propriété. Les terres *Karadjis* (*sic*) sur lesquels les propriétaires ont acquitté la Mookabalah sont assimilées aux biens *mulk*s conformément à la loi sur la Mookabalah et au décret du 6 janvier 1880." Cf. Cuno, *Pasha's peasants*, 204.

97) Baer, *Landownership*, 193.

98) Cuno, *Pasha's peasants*, 204.

99) Gouvernement Égyptien, *La législation en matière immobilière. Recueil des lois, rêglements es instructions administratives relatifs á la propriété immobilière* (Cairo : Imprimerie Nationale, 1893), 76.

to the right of ownership.[100] This was the official end of state landownership.

3.3. Pre-emption as a Means to Transfer the Raqaba of Land to Individuals

The privatization of state land beginning in the 1870s took the form of transforming an individual usufruct right, called *permanent usufruct* in the Mixed and National Civil Codes, into a full ownership right, by the state as the creator of this kind of usufruct. *Permanent usufruct* lost its practical import at the time of the promulgation of the National Code which, therefore, omitted the definition, but *permanent usufruct* continued to function as a legal concept.

The Pre-emption Law preserves a vestige of state landownership in its distinction between urban private estates and agricultural land (see 2.1.2). This may explain why the concept of *permanent usufruct* found its way into the Mixed Pre-emption Law, no doubt drafted prior to the official end of that theory in 1896, and also into its National counterpart, which may be a literal reproduction of the Mixed Law. In support of this hypothesis, Art. 2 of this law provides that a usufructuary is regarded as a co-owner in common.[101] This provision, which appears to contradict the priority given by Art. 7 to the co-owner over the usufructuary (see 1.2.2), puzzled the authors on pre-emption.[102] As mentioned in 3.1, in modern law, a usufructuary can never be assimilated to a co-owner. In this context, Art. 2 of the Pre-emption Law makes sense when "usufruct" is rendered as ownership of *manfaʿa*. In this case, the right of pre-emption assigned to a usufructuary by the Pre-emption Law can be seen as a means to transform his right into full landownership. In other words, the Law allowed theoretical "usufructuaries" to acquire the *raqaba* of land belonging to the state by way of pre-emption.

If so, exactly which "usufructuaries" did the Pre-emption Law envision? Though rightly a "usufructuary" of *mīrī* land, the assignee of a

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100) Baer, *Landownership*, 12.

101) "*Yuʿadd sharīkan fī al-ʿaqār al-mashfūʿ man yakūn lahu ḥaqq al-intifaʿ fīhi kullihi aw baʿḍihi*."

102) Mursī, "Shufaʿāʾ," 1:603; idem, *Shufʿa*, 74.

ghārūqa (mortgage on *mīrī* land; see 1.3), to which the National Code devotes just one article indicating that this kind of mortgage is applicable only to *kharāj* land (Art. 553), must be excluded from the scope of the Pre-emption Law. As suggested by the National Court of Appeal's ruling of 23 November 1905, which followed earlier rulings on this issue, the land to which a *ghārūqa* is attached can be sold by a compulsory sale executed by a court in favor of other categories of secured creditors; the assignee of a *ghārūqa*, who has only the right to retain the property until his claim is satisfied, cannot suspend such a sale.[103] Art. 3 of the Pre-emption Law, however, provides that no one can preempt this kind of sale.

In light of legal developments in the 1880s, the Pre-emption Law may have been, partly, a continuation of the policy of transferring state domain, such as *mubāḥ* land, to individuals as private property subject to the payment of *kharāj*, as suggested by the Mixed Court of Appeal's ruling of 6 March 1890 (*Egyptian government vs. Salīm Badr al-Dīn*). In this case, the claimant Salīm Badr al-Dīn challenged the validity of a public sale of uncultivated state land to a third party, asserting that, prior to this sale, he had demanded the land in question from the government in his capacity as "pre-emptor," as prescribed by Art. 7[104] of the Decree of 6 October 1886. According to this article, when, during the operation of a land survey, it is found that a person has revivified or cultivated a property belonging to the state without permission, he can acquire the property as *kharāj* land in full ownership by paying either half of the estimated value of the land, if it is established that he brought barren land into production, or, if not, the full value.[105] In

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103) *al-Majmūʿa al-rasmiyya* 1906:No. 51. Even after the complete privatization of land, however, the *ghārūqa* seems to have been widely practiced, and some National Courts considered it to be valid, on the assumption that the decree of 1896 did not abolish *kharāj* land as a legal category (*al-Majmūʿa al-rasmiyya* 1902: No. 46, 1905: No. 71, 1906: No. 51. No. 63). However, others declared the *ghārūqa* null and void, arguing that *kharāj* land had been abolished and that the *ghārūqa* often provided a front for usury (1909: No. 54. See also 1911: No. 40, No. 86 and 1912: No. 62).

104) Erroneously referred to as Art. 6 in *Bulletin de Législation et de Jurisprudence Égyptiennes* 2 (1890): 217, 218.

105) "Si, pendant les opérations d'arpentage, il a été constaté qu' une personne a amélioré ou a cultivé sans autorisation une terre appartenant à l'Etat, cette personne aura la faculté de garder la terre en question, mais dans des conditions à traiter avec le Gouvernement,

rejecting Salīm's claim, the Court stated that this provision grants the right of "pre-emption" to cultivators when the operation of a land survey imposed upon the Administration of Cadastre by the aforementioned decree reveals that the land they cultivated belongs to the state, and that this condition does not apply to the claimant, because the land in question was neither registered in the cadastre by the operation of such a survey, nor had it been put into cultivation when the aforementioned decree came into force.[106]

After 1900, state land was the main source of new private land. As a result of a series of laws enacted during the 1880s, a vast amount of state land was acquired by large landowners, land companies and individual investors, including foreigners, especially at the turn of the century.[107] It is not inconceivable, therefore, that the drafters of the Pre-emption Law intended to introduce a new kind of pre-emption in order to give "usufructuaries" preference over third parties in acquiring state land, just as the aforementioned Decree of 6 October 1886 made it possible for unauthorized cultivators of *mubāḥ* land to acquire full ownership of the land they cultivated by paying either its full estimated value or half of it, in preference over others. Presumably, such a method increased the number of claims to pre-emption pertaining to state land and led to the preparation of a special law on this issue, as suggested by the prospectus of 1899, according to which the legal deficiency in matters of pre-emption attracted criticism from the Administration of State Domain (see 2.1.2).

It should be noted, however, that the Decree of 6 October 1886 does not explicitly apply the term *pre-emption* to the preferential right given to cultivators, whereas the above-mentioned ruling of the Mixed Court of Appeal does. Strictly speaking, the right assigned by the Decree of 1886 to unauthorized cultivators of *mubāḥ* land cannot be called *pre-*

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qui tiennndra largement compte des frais encourus et toute circonstance fortuite, et en payant une somme égale à la moitié de la valueur estimative de la terre s'il est constaté que le terrain était stérile et est rendu productif, et à la valeur entière s'il est constaté que, lors de la prise en possession, le terrain était déjá productif… La terre sera cédé comme terre Kharadji, mais avec jouissance de propriété absolue..." *Législation en matière immobilière,*148.

106) *Bulletin*, 2:218-219.

107) Baer, *Landownership*, 95-98, 83-84.

emption, because the exercise of this right does not presuppose sale of the land to a third party: the land can be offered by the government directly to a cultivator who fulfills the conditions required for preferential acquisition, in exchange for the full value or half of it, and the exercise of this right causes no change in the actual state of affairs. Put differently, in the nineteenth century, the concept of pre-emption was broader than it would become later, when this right was associated with the legal relations of individual parties in which the state had no part.

In this sense, the Decree of 14 October 1880 relating to the sale of uncultivated state land is more properly a source of the right of pre-emption, although none of the sources at my disposal refers to it as such. Regarding state land smaller than ten *faddān*s (one *faddān* = approx. one acre) that is surrounded by private properties, Art. 13 provides that the owner of the property in which the enclave is situated has priority in acquiring it, if he offers as much as the highest price bid by a third party at a public auction, and that land upon which privately owned buildings have been erected, or an immovable that is shared in common with an individual, will be sold preferentially to the owner of the buildings or co-owner of the immovable.[108] Although the addressee of the first case is not a usufructuary of state land, his case reminds us of the adjoining neighbor of agricultural land in the Preemption Law, because an enclave can adjoin his property on two sides and perhaps cause certain servitudes as well. In any case, in this decree the owner's right to acquire the enclave can be called *pre-emption*, since he preempts a sale of the land to a third party. Meanwhile, in the second case, the owner of the buildings is properly a usufructuary of state land, while the co-owner can be associated with him. Their right of "pre-emption" apparently does not presuppose a sale of the land to a third party. Be that as it may, both the Decree of 14 October 1880 and the Decree of

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108) "Les parcelles de terrains d'une contenance inférieure à 10 feddans enclavées dans les propriétés particulières, seront vendues par préference au propriétaire du fonds dans lequel se trouve l'enclave, si avant la clôture du procés-verbal de la séance d'ouverture des commissions, il offre un prix égal au montant de l'offre la plus élevée. Les terrains sur lesquels s'elévent des constructions appartenant à un tiers, ou les quotes-parts d'immeubles possédés en common par l'Etat et un tiers, seront également vendus par préférence au propriétaire des constructions ou aux copropriétaires des immeubles." *Législation en matière immobilière*, 142-43.

1886 have as their primary aim the transfer of the *raqaba* of state land to its usufructuaries. The Pre-emption Law, which was prepared in the 1890s, likely had the same purpose. The "usufruct" in this Law is fictitious, created in theory by the state, and the right of pre-emption caused by this "usufruct" is primarily claimed vis-à-vis the state for a preferential transfer of *raqaba*.

If the state intended pre-emption as a means to offer the *raqaba* of land preferentially to the actual "usufructuaries" in this way, the holders of *kharāj* land who had not paid the *muqābala* and hence had not yet acquired full title to their plots may also come within the range of the "usufructuaries" as pre-emptors.

When the Mixed Pre-emption Law was promulgated in 1900, however, this type of pre-emption no longer had any practical import, and its purpose soon became obscure, although sporadic traces of the nineteenth-century legal framework must have been clear in the eyes of contemporary jurists. Surprisingly, even Zaghlūl, who was familiar with the concept of usufruct as ownership of *manfaʿa* or "permanent usufruct" established by the state, failed to link it with "usufruct" in the Pre-emption Law. Be that as it may, judging from the prospectus of 1899, the legislators saw no need to abandon the draft or replace it with another, to the extent that they could legitimate their work by assuming that Islamic Law itself assigns the right of pre-emption to usufructuaries, and by highlighting the necessity for an overall reform of the institution. Knowingly or not, Zaghlūl explained the purpose of law in general terms of the establishment of full landownership. This is plausible, and later jurists accepted this account.

4. Establishment of Landownership in the New Code

4.1. The Survival of the Institution: Landownership as Ideology

As demonstrated by Cuno, nineteenth-century legal developments were part of a national history sponsored (1) by the Egyptian government, which credited Muḥammad ʿAlī and his reformist successors with the creation of modern private landownership, and (2) by the rising landed classes, who sought to consolidate their rights (see note 2).

The Pre-emption Law became an embodiment of this new ideology. As a result, the new pre-emption system was involved in a paradoxical tug-of-war over landownership; from the pre-emptor's perspective, his right as a legal cause to acquire landownership had to be defended by all means, whereas advocates of the purchaser attacked pre-emption as, *inter alia*, a serious infringement upon his right to acquire ownership of the property by virtue of the principle of freedom of contract.[109] Interestingly, as Mursī observed, the purchaser's advocates appear to have been predominant among his contemporaries.[110] Mursī was a jurist who represented the interests of the landed classes in promoting security of property,[111] and he made a consistent attempt to minimize the scope of pre-emption (see below). Apart from the possible advantage of accumulating adjoining plots, pre-emption as a whole likely earned the displeasure of the landed classes in their capacity as purchasers or investors. However, a separate study is needed on this point. The following discussion focuses on how the makers of the New Code redefined pre-emption as a tool pertinent to their ostensible legislative purposes, notably, the establishment of full landownership.

When the draft of the New Code came under deliberation before the Lower House, freedom of contract formed the theoretical basis for opposition to pre-emption.[112] Because of its possible misuse, pre-emption exercised by an adjoining neighbor was the main target of the opposition. In fact, under the Pre-emption Law, which subjected an adjoining neighbor's right to pre-empt a sale of agricultural land to special conditions as a precaution against such behavior, especially at the turn of the century and during the 1920s, land speculation boomed and the number of pre-emption cases increased.[113] Speculators often purchased a tiny enclave abutting on several pieces of agricultural land in order to accumulate these plots by way of pre-emption.[114] For this reason and others, in the drafting of the New Civil Code, Mursī and other members of the second committee called for the abolition of a

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109) Dhihnī, *Amwāl*, 645-46; Mursī, *Shufʿa*, 31, 509-11; Muṣṭafā al-Nakhkhāṣ, "Baḥth fī al-shufʿa," *al-Muḥāmāh* 9: 459, 464.

110) Mursī, *Shufʿa*, 510.

111) Cuno, *Pasha's peasants*, 206.

112) *al-Qānūn al-Madanī*, 6:373-76.

113) Forgeur, "Pre-emption," 375.

114) Mursī, "Shufaʿā'," 2:21-22; Sanhūrī, *Wasīṭ*, 9:578.

neighbor's right of pre-emption.[115] After the draft code was completed by the third committee, the examination committee, headed by Sanhūrī, removed the neighbors' right of pre-emption from it, under the pretext that Ḥanafīs represent a minority opinion on this issue and, by implication, that a modern Egyptian legislator is not bound to their doctrine when interpreting Islamic law. However, the Legislative Affairs Committee of the Lower House reinstated this type of pre-emption into the proposed Code, albeit limiting its application to agricultural land (Art. 1005 (E)).[116] Subsequently, a debate arose among members of the House, focusing upon freedom of contract and, with greater intensity, upon certain harmful effects of pre-emption, including its abuse by "powerful neighbors" in an effort to absorb adjoining small, landed properties.[117] The majority of the legislators, however, finally approved the neighbor's right of pre-emption under the same conditions specified by the second drafting committee in accordance with the Pre-emption Law.[118] Bechor argues that "the removal of *shuf'a* from land law ... was thus perceived by the authors of the New Code as an essential reform."[119]

When the second drafting committee of the New Civil Code started working on the preparation of the articles regarding pre-emption, however, the restriction or removal of this right was not the sole issue. It must be noted that even pre-emption exercised by an adjoining neighbor was intended by them as a means to an end. Muṣṭafā al-Shurubajī, who later participated in the examination committee of the draft code, in his capacity as member of the Upper House,[120] advocated the maintenance, or rather the enlargement of, this type of pre-emption in order to provide "the (small) farmers who constitute the majority of the Egyptians" with a means to improve their farm management by enlarging their properties. He implied that the exercise of the right of pre-emption in this case should be limited to tiny plots, invoking Spanish law to this effect. His argument was decisive for the survival of the neighbor's right

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115) *al-Qānūn al-madanī*, 6:359-61, on the margin (minutes of 14 May 1937).
116) Ibid., 6:365-72.
117) Ibid., 6:379-80 (minutes of 15 May 1946).
118) Ibid., 6:383-84. A full translation of the debate is given in Bechor, *Sanhuri Code*, 244-47.
119) Bechor, *Sanhuri Code*, 238.
120) *al-Qānūn al-madanī*, 1:8, n3.

of pre-emption.[121] Thus the second committee associated this type of pre-emption with a policy of creating small peasant proprietors, although thoroughgoing land reform to this effect was not attempted before the 1940s and was not implemented until the Military Revolution of 1952, primarily because of the political influence of large landowners.[122] Be that as it may, in the end, the committee adopted the provisions of the Pre-emption Law with regard to the adjoining neighbor.[123]

Another problem was the right of pre-emption assigned to a usufructuary or bare owner, which appeared useless in Egyptian legal life, to the extent that usufruct was understood in its modern sense. For this reason, in the second drafting committee, Mursī upheld the abolition of this type of pre-emption.[124] However, his argument was opposed by a member who invoked the need to put an end to "an improper situation" whereby the elements of ownership right are disjoined. This position was supported by the president himself, who believed that the establishment of full landownership was the very spirit of the Pre-emption Law.[125] It was in this context that the institution was legitimated by "the socio-economic needs of Egypt" (see 2.2). Most members of the committee agreed with the maintenance of the usufructuary's or bare owner's right of pre-emption,[126] although, as shown in 2.3, they could not establish the practical import of this right. Apparently they found no firm grounds for deviating from the Pre-emption Law, which, they believed, had introduced this type of pre-emption in order to promote the establishment of landownership.

4.2. Regulation of ḥikr and Family waqf

It was the third drafting committee that gave concrete expression to the establishment of full landownership in the New Code by assigning the right of pre-emption to both parties of *ḥikr* or long lease.

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121) Ibid., 6:370, on the margin (minutes of 17 December 1937).
122) Baer, *Landownership*, 201-02.
123) *al-Qānūn al-Madanī*, 6:363, on the margin (minutes of 18 June 1937).
124) Ibid., 6:359, on the margin (minutes of 14 May 1937)
125) Ibid., 6:360, on the margin (minutes of 14 May 1937).
126) Ibid., 6:365, on the margin (minutes of 18 June 1937).

In modern Egyptian law, *ḥikr* is defined as a contract that creates a "real right" to enjoy land for any purpose in exchange for a fixed rent.[127] In the second committee, a proposal was made for the assignment of this right of pre-emption to the *muḥtakir* alone, in order to acquire the land upon which he erected a building (as noted, the same view had been held by some Muslim jurists). Otherwise, the *muḥtakir*'s right of pre-emption was open to question, because most land held in long lease was *waqf* property, which could be neither a cause nor an object of the right of pre-emption.[128] When the question arose as to whether the *muḥtakir* could preempt a sale of an adjoining plot, Mursī stated that he was producing a report on this issue,[129] likely referring to his essay published in 1939. In this essay, he also limits the right of pre-emption to the *muḥtakir* who owns a building standing on the property subject to long lease: In view of established custom, the *muḥtakir* in this case deserves legal protection, although the right of long lease in general can never be assimilated to ownership.[130]

The third drafting committee approached the issue from a totally different perspective. It assigned the right of pre-emption to both parties of a long lease, in order to promote an early dissolution of their legal relationship, as an indirect attack against family *waqf*.[131] As noted in 1.2, *waqf* is divided into two types: "charitable" (*khayrī*), and familial (*waqf ahlī*). Although both types were accepted in Islamic Law, in practice it was difficult to distinguish a charitable *waqf* from a family *waqf*. A strict distinction between two types of *waqf*s by name and nature is a modern trend, because all *waqf*s have a charitable purpose.[132] One can give relief to his own relatives by way of *waqf*, and, upon extinction of the beneficiaries, the income reverts to a charitable purpose. Also, the two types of *waqf* could be combined in such a way that the income was distributed in a fixed proportion between charitable beneficiaries and relatives. In modern times, however, it has been established that the family *waqf* was invented after the charitable *waqf* as an

127) Fu'ād, *Aḥkām*, 79.
128) *al-Qānūn al-Madanī*, 6:363, on the margin (minutes of 14 May 1937).
129) Ibid., 6:407, on the margin (minutes of 10 December 1937).
130) Mursī, "Le hekr," 19.
131) Bechor, *Sanhuri Code*, 229-30.
132) Fu'ād, *Aḥkām*, 15.

lslamic legal institution, as a means to circumvent certain laws, causing number of problems. Powers demonstrated that in Algeria under French rule, French orientalists promoted such a view, in support of colons who were having trouble acquiring land that had been converted into family *waqf*, and spearheaded a campaign to reform the institution.[133]

In modern Egypt, too, several negative consequences of the *waqf* institution were ascribed to its "family" type, e.g. stagnation in land circulation, the development of large estates, and the deterioration of land conditions.[134] In the forefront of the opponents, Azīz Khānkī, who, like Mursī, represented the interests of the landed classes (see note 111), highlighted an improper distribution of land by calculating how much land was excluded from circulation. In an essay published in 1927 in the *Journal of the National Bar Association*, which he edited, he reports that in that year, the total area of *waqf* land was approximately 611,203 *faddān*s,[135] as compared to 30,000 *faddān*s in 1900.[136] The opponents of family *waqf* also shifted the focus of the argument to religion, by asserting that the family *waqf* violates Islamic Law and by portraying themselves as victims of a vehement attack by narrow-minded religious figures. An essay to this effect was produced by, e.g. Muṣṭafā Ṣabrī, a follower of Azīz Khānkī, probably in liaison with the latter.[137] According to Ṣabrī, his proposal to abolish family *waqf*, for which he was accused of being an infidel or heretic, gained support from leading politicians, including Saʿd Zaghlūl and progressive intellectuals, and it influenced Syrian legislation under French mandatory rule.[138]

A start toward *waqf* reform was made in the 1940s. Among others, Law No. 48 of 1946 set a limit on the duration of a family *waqf*. Although Law No. 180 of 1952 abolished this type of *waqf*, its

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133) David S. Powers, "Orientalism, colonialism, and legal history: The attack on Muslim family endowments in Algeria and India," *Comparative Studies in Society and History* 31/3 (1989), 535-54, 564-65.

134) Baer, *Studies in the Social History of Modern Egypt* (Chicago and London: The University of Chicago Press, 1969), 80-83.

135) ʿAzīz Khānkī, "Niẓām al-waqf," *al-Muḥāmāh* 7/9-10 (1927): 942-43; cf. Baer, *History*, 79.

136) Baer, ibid.

137) Muṣṭafā Ṣabrī, "Ḍarūrat ilghāʾ al-awqāf al-ahliyya," *al-Muḥāmāh* 7/7 (1927): 751-53. Cf. Ziadeh, *Lawyers*, 129-30.

138) Ṣabrī, ibid., 753-54.

regulation proceeded side-by-side with the final elaboration of the New Civil Code. The Code supported a series of special laws by placing limitations on *ḥikr*. While the pre-modern criticism leveled at *ḥikr* was based upon the necessity to protect *waqf* properties against harmful effects arising from a long lease, the New Code indirectly targeted family *waqf* by removing this "undesirable right" of *ḥikr*, which was regarded as a serious infringement on the right of ownership.[139] This implies that full ownership should be reestablished when the land ceases to be a *waqf*. To this end, the New Code introduced a right of pre-emption that enables one of the parties to conbine the right of *ḥikr* with bare ownership. The Code also limited the future conclusion of *ḥikr* contract to *waqf* land (Art. 1012 (1)), stipulating that the contract cannot be concluded for a period exceeding sixty years (Art. 999) and that it terminates, even before the end of the period, when the land ceases to be a *waqf* (Art. 1008 (3)). When the family *waqf* was abolished by Law No. 180 of 1952, most *ḥikr* contracts over this type of *waqf* were terminated. Law No. 649 of 1953 authorized the Ministry of Waqf to put an end to a *ḥikr* over a charitable *waqf*. As a result, the new right of pre-emption almost never played its role: Most *ḥikr* contracts over private properties that had been concluded prior to the operation of the New Code were terminated. Thereafter a new *ḥikr* was rarely concluded even with regard to charitable *waqf*s. Moreover, a sale of the right of *ḥikr* attached to a *waqf* property cannot be pre-empted, because Art. 939/2 of the Code provides that a *waqf* cannot exercise the right of pre-emption.[140]

Conclusion with Additional Remarks

Despite problems posed by the Islamic institution of pre-emption, modern Egyptian lawgivers maintained it, or rather re-defined it, for several specific purposes that could be legitimated in the name of the establishment of full landownership.

The ultimate goal of the modern Egyptian pre-emption system may be regarded as a by-product of the late nineteenth-century land policy of transferring state landownership to individuals who by law were

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139) *al-Qānūn al-Madanī*, 6:364; Sanhūrī, *Wasīṭ*, 9:526; Fuʾād, *Aḥkām*, 80.
140) Sanhūrī, *Wasīṭ*, 9:542-43.

defined as "usufructuaries." The rights of these "usufructuaries" formed a category distinct from usufruct in its modern sense, in both the Mixed and the National Codes. In this context, the goal of pre-emption was to make it possible for the state to give preference to "usufructuaries" in acquiring full title to land in their possession. They may have been holders of *kharāj* land who did not pay the *muqābala* or unauthorized cultivators of *mubāḥ* land. Since the Pre-emption Law likely had the same purpose, this law, contrary to the standard wisdom, was not the starting point of the innovations regarding this institution. Prior to the promulgation of this law, the assignment of the right of pre-emption to "usufructuaries" had lost its practical import. Jurists reinterpreted the provision as promoting the establishment of landownership, in accordance with the spirit of the age. The Pre-emption Law was taken over by the makers of the New Code, with its purported goal of establishing full landownership. Despite all of the problems attributed to it, the adjoining neighbor's right of pre-emption was maintained, ostensibly as a means to create small peasant proprietors. Again, a new type of pre-emption was introduced in order to advance the termination of long lease and to strike an indirect blow against family *waqf*, in favor of landowners.

Although many questions remain to be answered, it is clear that pre-emption in modern Egyptian law is no revival of Islamic law. On this point, a National Court of Cassation's ruling of 31 January 1946 regarding a point in dispute under the Pre-emption Law, i.e. whether the pre-emptor must deposit the amount he has to pay with an official depository (see 2.1.2), reveals a mechanism of statute law that makes Islamic law into a legislative tool; a secular court is bound to Islamic law merely with regard to those civil relations that antedate its creation or are put in charge of this law by statute laws, such as inheritance or long lease, and with regard to personal status questions over which the competent *Sharīʿa* courts have primary jurisdiction without suspension of the claim. As for matters that a modern legislator incorporated into statute laws in consideration of specific elements, such as rules pertaining to pre-emption, they fall under the jurisdiction of secular courts, which are not bound to ancient legal doctrine.[141] In other words, those

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[141] Maḥmūd ʿUmar ʿAlī Fahmī (ed.), *Majumūʿat al-qawāʾid al-qānūniyya allatī rarrarathā Maḥkamt al-Naqd wa-al-Ibrām fī al-mawādd al-madaniyya*, 5/1 (1949): 82.

aspects of Islamic law that are incorporated into statute law by a legislator for specific purposes form part of statute law and are applicable within its framework. The legitimacy of statute law is tied to its legislative purposes, not to the components of its articulation that are no longer "Islamic," even if the legislator disguises his purposes as an Islamization of law, as Bechor has shown, with regard to Sanhūrī. Although Sanhūrī refers critically to the above-mentioned ruling of 1946,[142] his work can be regarded as a product of the same logic.

142) Sanhūrī, *Wasīt*, 9:455-46.