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The American University in Cairo  
School of Humanities and Social Sciences

**Imprisonment for Insolvent Debtors in Egypt  
With Specific Reference to Al-Gharemoun Cases**

A Thesis Submitted to  
The Department of Arab and Islamic Civilizations

In Partial Fulfillment of the Requirements  
For the Degree of Master of Arts

By  
**Nivert ElSherif**

Under the supervision of  
**Dr. Mohamed Serag**

**May /2018**

The American University in Cairo

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With Specific Reference to Al-Gharemon Cases**

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In partial fulfillment of the requirements for  
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Has been approved by

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Date

Dedication

To Fatma, Aisha, and Hassan,  
My Jewels

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In transliterating the Arabic names, nouns or sentences, it was kept simple. The diacritic ‘ is used for the ayn, and the diacritic ’ is used for the hamza.

All the Arabic sources’ quotes are translations by the writer of the paper unless otherwise specified.

All the Quran verses are derived from the Noble Quran Site.

This paper uses the Chicago style.

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## 1. Introduction

In the past decade, the Egyptian media has been presenting and fostering the term *gharemoun* by perpetual announcement and advertisement. In Egypt, *gharemoun* connotes the poor insolvent male debtors, while *gharemat* is the female version thereof; they are poor prisoners of defaulting debts. According to various sources, this category of debtors constitutes more than 35%<sup>1</sup> of the Egyptian prison population<sup>2</sup>. All cases are related to delinquent checks and/or security receipts which penalty is immediate incarceration. One NGO publication claims that they were singlehandedly successful in bailing out 50,000 insolvent debtors in their seven years of fieldwork<sup>3</sup>. The charge of these debtors was failing to satisfy checks and/or security receipts, which average 1500 LE<sup>4</sup> (\$85). A person could be sentenced for three years for an amount as little as 90 LE<sup>5</sup> (\$18<sup>6</sup>). Some debtors accumulate imprisonment sentences that reach decades. In fact, one recent report in the news was hailing the bailing out of one of the *gharemoun*, who amassed a 98-year-imprisonment sentence for checks equal to 2,800 LE<sup>7</sup> (\$157).

The time and effort involved in legal procedure<sup>8 9</sup> in addition to the cost of lengthy incarceration expenses<sup>10</sup>, not to mention the psychological impact of incarceration on debtors and/or their

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<sup>1</sup> Al-Khossousi, in an interview with a current MP, Dr. Elizabeth Shaker.

<sup>2</sup> According to a personal interview with Abdullah, Misr el Kheir Foundation legal consultant, it is very difficult to give a correct number of these debtors at any certain point in time as daily incarceration rules are in effect.

<sup>3</sup> Misr El Kheir Foundation NGO, announces on 16 October 2016 the bailing out of defaulting debtors that falls under their Social Solidarity Department.

<sup>4</sup> According to a TV interview with ON E television channel, the average amounts of debt vary between 1000 LE and 2000 LE. These amounts are equivalent to \$56 and \$113 respectively.

<sup>5</sup> AbulMagd, Footnote 3 quoting a Field study on a group of woman in Cairo – Mubadarat ‘alashan el Kheir ye‘om: a woman was actually sentenced for three years for the mentioned amount of money.

<sup>6</sup> These dollar conversions are dependent on the time the court verdict was announced. Before the floatation of the Egyptian Pound, \$1 equaled 7 LE. Since that time in November 2016, the dollar has been fluctuating reaching 17.76 LE during the writing of this paper. To avoid confusion, the dollar value mentioned in the different cases throughout this research paper is calculated during the time of the cases’ actual occurrence.

<sup>7</sup> Cairoscene Team.

<sup>8</sup> El-Dean, pp. 221-224. The author enumerates the drawbacks of the Egyptian judicial system: backlog and delay which means that a litigant may need 30 to 40 court appearance before the judge reaches a final verdict. The system suffers from a shortage of judges, efficient bailiffs, and professional expert referrals.



dependents as well as the social stigma that follows release and the financial delinquency that does not end with incarceration but practically starts for these debtors are some of many outcomes that do not commensurate to the amounts of debt money owed by the individual debtor.

There are numerous non-governmental and social organizations concerned with these debtors<sup>11</sup>. They investigate different prison cases and bail many insolvent debtors out. However, definitely government and society may be effective and helpful in solving debtors' problems once legislative measures are taken to reverse the imprisonment laws for the poor individual insolvent debtors in Egypt.

The research scope in the following pages traces the legal handling of debtors; how debtors who face unforeseen calamities have been treated throughout Islamic legal history from the time of the Quran revelation until modern times. Thus, the maxim of justice reflecting on debts in general and insolvency in particular will be elucidated. Various accounts of insolvent debtors are therefore examined. Moreover, I highlight how these debtors were dealt with in the Islamic Tradition; the reader will henceforth be acquainted with the first insolvency case in Islam. Furthermore, judges' manuals are further investigated to reflect the development of legal

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<sup>9</sup> According to Abdullah, the Misr el Kheir legal consultant, there are 71 steps that the foundation needs to follow in order to release one debtor; starting with identifying the deserving alms insolvent debtor from the prison registers, identifying the respective creditor/s, deciding legal measures, attempting reconciliation with creditor/s, to mention but a few.

<sup>10</sup> Already the prisons in the Egypt are suffering from several problems. According to the Human Rights Report Egypt 2016, "prison cells (are)... overcrowded, and prisoners lack(ed) adequate access to medical care, proper sanitation and ventilation, food and potable water".

<sup>11</sup> Numerous individuals plus social and legal entities collect money for the release of these people. (Periodical attention is given to alms' givers such as individual businessmen (AbuHashima 27.6.2016 *al Yom el Sabe'*) and executives (The Security Chief of Gharbeya Governorate and his fellow officers pay for *gharemoun* 23.6.2016 *al Yom el Sabe'*) and religious institutions (Al Azhar Institution affiliated Beit al Zakat pays for *al-gharemoun* 23.12.2014 Official Azhar Facebook site) in addition to individual Egyptian alms' givers).

procedure and application of Islamic legal thought. Additionally, the available legal handbooks emphasize the detailed handling of the insolvent debtors throughout the seventh into the 15<sup>th</sup> century. These books constitute the legal foundations for the judiciary and their jurisdictions. In order to reflect their practical implementation, published 16<sup>th</sup> century Egyptian court records of the Moroccan community as well as 17<sup>th</sup> century Ottoman Turkish court registers of Istanbul are reviewed. Analyzing the latter helps envisioning the problems facing the judges and how they succeeded in keeping the market economically and socially going and growing. Furthermore, records of the Egyptian Oases are added for comparison as excessive debts and the absence of the just arm of the law can only lead to the destruction of the community. Finally, the development of the Egyptian legal system - until it reaches its present state - is summarized expanding on how the legislators of the modern codes of law tried to achieve justice in modern times while the actual law applications move away from this goal, forcing the society into the intricate insolvency incarceration phenomenon it is contesting today. Therefore, the immediate and prolonged incarceration upon the default of a check and/or security invoice payment for an insolvent debtor who faces an unexpected hurdle - that makes him/her unable to repay on time – needs to be reversed, giving insolvents a chance to financially rebuild themselves outside the prison walls.

## **2. Debtors in the Quran and the Tradition**

### **2.1 Justice and Contracts in the Quran**

Contractual justice is a vital component for the attainment of justice amongst human beings. It is detailed in multiple verses in the Quran to insure the rights and obligations of the parties involved in a contract: “O you who have believed, when you contract a debt for a specified term, write it down. And let a scribe write (it) between you in justice. Let no scribe refuse to write as

Allah has taught him. So let him write and let the one who has the obligation dictate. And let him fear Allah, his Lord, and not leave anything out of it (2:282). "... And if one of you entrusts another, then let him who is entrusted discharge his trust (faithfully) and let him fear Allah, his Lord..." (2:283). "And fulfill the covenant of Allah when you have taken it, (O believers), and do not break oaths after their confirmation while you have made Allah, over you, a witness. (16:91). "Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice" (4:58). The writing of a contract, the provision of witnesses, and the insistence on just transactions are all basics for a contractual agreement. Accordingly, Islamic jurists took it upon themselves to safeguard a framework that comprises all debt transactions to ensure the protection of the sellers/creditors in all dealings.<sup>12</sup>

The word *adl* signifying justice is counted over 28 times in the Quran. According to Mahmoud Ayoub, "*Adl* in Islam means a balanced approach to all things, including life"<sup>13</sup>. "Indeed Allah orders justice and good conduct" (16:90). "And do not consume one another's wealth unjustly..." (2:188). "Allah destroys interest..." (2:276). These verses highlight an additional dimension to the contract: Fairness is observed between the two parties of a contract; Interest (V) or literally, the increase or excess, is according to the laws of the Islamic jurists is unacceptable. The "unjustified enrichment, or receiving a monetary advantage without giving a countervalue" is completely prohibited<sup>14 15</sup>. There has to exist a balance in the contract transactions.

In addition to the mutual legal obligation, that manifests itself in the trustful and just writing of any contract, there is an obligatory merciful dimension. "Alms are only for the poor and the needy, and ...and those in debts...." (9:60) "And if someone is in hardship, then (let there be) postponement until (a time of) ease. But if you give (from your right as) charity, then it is better for you, if you only knew" (2:280). If a party is unable to fulfill its part of the contract, a Muslim should be patient and wait till a time of ease. Furthermore, people who are in debt and have no

<sup>12</sup> Schacht, pp. 144-160.

<sup>13</sup> Barazangi, FazlurRahman, Ayoub pp. 19-26.

<sup>14</sup> Interest is a huge issue in Muslim legal thought. In the Jahiliya period, the debt was doubled if a year passed without payment; and if nothing is paid by the second year, then the amount is re doubled, i.e. the original debt was quadrupled in two years. Al-Qurtubi, vol. IV, p. 202.

<sup>15</sup> Schacht, p. 145.

money are eligible for alms from the community around them. This extra element of societal obligation and duty towards the less fortunate or the debtors in need accounts for a merciful approach to equity. It asserts a tolerance as well as a humane understanding of the other in mutual obligation's conditions.

Hence, the Quran provides basic elements for the foundation of procedural justice: the writing of the contract in order to ensure rights; the honest and just abiding by the parties involved; to observe the truthful dealing of the contract by not taking more than one deserves – exemplified in the idea of the prohibition of interest; at the same time to have mercy towards insolvent debtors exemplified in the aspect of patience on a delayed debtor and alms' giving exemplified in the financial help for the needy debtor. The effectiveness of these conditions lies in the fact that debtors, creditors as well as the community is involved to work out the economic credit situation as will be exemplified throughout the paper.

## **2.2 Insolvent Debtors in the Tradition**

The tradition of the prophet is the second place, where the applications of the rules of God are extracted. Al Qurtubi in his *Tafsir*, after defining the word *gharemoun* in 9:60, he counts the following tradition: A man had borrowed money in order to pursue the business of selling fruits. The fruits went bad and the man had no money to repay his original debt. As a first step, the prophet told the gathered creditors to pay alms and relinquish the debt. However, this act did not cover the complete liability. The prophet refused that anyone does any harm to the debtor. "Take what you find (with him) and you have nothing else to do!"<sup>16</sup> A clear sign that no one obtains any further rights on the insolvent debtor. Debtor shall continue working, creditors are to wait, no impediment to the debtor's re-inclusion in the financial cycle must be exercised.

In *Al-Tabaqat* of Ibn Sa'd, the following story of Mu'adh ibn Jabal, took place: Mu'adh was one of the prophet's companions. In year 9 AH, Mu'adh ibn Jabal faced some difficulties when he was indebted to more than one lender. His situation worsened to the extent that he hid at home

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<sup>16</sup> Al Qurtubi, vol. VIII, p. 184.

in order not to be followed by any of his creditors. Harassment of the debtor was a common custom as well as the selling of the debtor to his creditors in order to work for the creditor until he satisfies his debt.<sup>17</sup> Hence, the creditors went to the prophet in order for him to find them a way to regain their money. The prophet summoned Mu'adh and the creditors followed him. First, the prophet asked the creditors whether they are able to give up their loans to Mu'adh as alms in the name of God. Some of them agreed, as they knew that he had no money and left the crowd. The rest of the creditors refused to give up their capital debt. To satisfy the rest of the creditors, the prophet decided to sell all of Mu'adh's possessions. The amount collected was divided proportionately amongst the creditors. However, the money could only cover 5/7<sup>th</sup> of the total unpaid credit loan. According to Jahili custom (*'urf*)<sup>18</sup> the creditors wanted the prophet to sell Mu'adh to them as a slave, like this he will have ransomed the rest of his loan; or he could work for the rest of the debt amount for the lenders. But the prophet made it very clear that they had no control over his being or his body. The prophet ordered them to leave and advised Mu'adh to leave to Yemen to spread the word of God there, saying: "May God give you<sup>19</sup>" After selling all his belongings, Mu'adh was penniless<sup>20</sup>.

This reaction on the part of the prophet was a sign that prohibits any kind of incarceration of the unable debtor and constitutes the cornerstone of the Islamic law of insolvency. The prophet's request to allow the debt to be alleviated by alms giving on the part of the creditors first and the community second was the first step to the financial solution of the problem. The selling of all of Mu'adh's assets leads to the second step. The execution of this action proves to the community the real financial insolvency of Mu'adh. He would have been bankrupt, had his possessions covered his debts, however, he was insolvent, i.e. his possessions did not cover his

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<sup>17</sup> According to Farhat Ziadeh in his research "*Mulazama or Harassment of Recalcitrant Debtors in Islamic Law*", he assumes that this constant *mulazama*, or what he signifies as harassment of a debtor is a lighter developed form of the Roman law whereby the creditor had the right to detain the debtor, sell him to slavery or kill him. Quoted from J.B.Moyle, *Imperatoris Iustiniani Institutionum* (Oxford; at the Clarendon Press, 1903) p. 295. In some Eastern countries, this custom still prevailed in different degrees. Eventually, the idea of killing and selling of slavery was lessened to reach the mere following and harassment of the debtor as in the case of Mu'adh. (p. 299)

<sup>18</sup> Ziadeh, p. 299.

<sup>19</sup> "*la'al Allah yagburak*" which could be understood as: may God give you from his abundance.

<sup>20</sup> *mu'dam* is the word used and it connotes that he owned absolutely nothing.

debts. In the case of Mu'adh, he was unable to live with the constant harassment of his debtors, until he finally hid in his house. As this is a blatant contradiction to his resumption of his normal life, to his ability to find a solution for his financial problems, to his right to start anew, the prophet had to interfere to solve the dilemma as was described. With 2/7 of an unpaid debt, harassment to Mu'adh was still a threat, and that was the main reason the prophet decided to suggest to Mu'adh to leave the city. The prophet sent Mu'adh to Yemen in order to spread the religion of Islam and to start a new life. And the new life reaped its fruits.

Several years later, the prophet died and Mu'adh returned to Mecca to perform the pilgrimage. This pilgrimage group was the first one to travel to Mecca after the death of the prophet. Omar ibn al Khattab was head of the pilgrimage group. He met with Mu'adh and both men hugged each other. They exchanged condolences on the loss of the prophet. Omar ibn al Khattab noticed that Mu'adh had a couple of slaves following him. Knowing his old credit story, he told him to ask Abu Bakr, the caliph at the time if he was allowed to keep his slaves. Mu'adh defended his state of affluence and told Omar ibn al Khattab that both slaves were presents and that Abu Bakr had no right to interfere in him receiving any presents. But it seems that Omar's comment was a reminder of the old debt, the 2/7 that were left unpaid and the main reason for Mu'adh leaving his home and his clan in the first place. The next day, Mu'adh went to Abu Bakr and asked his opinion on keeping the slaves and Abu Bakr granted him the present. In spite of the companion of the prophet's approval of the slaves, in a matter of days, Mu'adh had freed the slaves. Thereafter, with his money earned in Yemen, he passed by all his old creditors and repaid his old remaining 2/7 of his debts.<sup>21</sup>

As mentioned earlier, the Quran provides basic the rules of a contract: to honor and respect the debt; the debtor is to return his debt and the creditor may not abuse the debtor. In the story of Mu'adh, there is a contract that has been admitted by both parties, except that the debtor was unable to repay - on time. Further Islamic legal guidelines were elucidated from this story. The first guideline is that people should be merciful towards each other. As Mu'adh had lost all his money and was unable to pay, people should have some compassion towards the unintentional

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<sup>21</sup> Ibn Saad, pp. 123-4.

calamities. The loss of one's capital falls under this category. Secondly, the fact that the prophet refused to sell Mu'adh is a unconcealed refusal of slavery for the reason of debt. Under no circumstances is a creditor in control over the debtor's body, whether in terms of physical detention or mere slavery work for the creditor until the debts are satisfied. Thirdly, Mu'adh was given the chance to start a job and make a new life in a new place where no one knows him. This means that people should be given the right to start anew, always. They should exercise their right to live, work and be productive in their societies. If need arises, they may move from one community to another in order to fulfill God's word in being productive and prolific. This step is the only guarantee to their return to the economic financial cycle, which is the main intention for the earlier steps. Fourthly, rights and contracts have to be observed! When Mu'adh became wealthy, Omar reminded him that he had had debts. Debts do not become obsolete with time, but they may be postponed: "Postponement until time of ease...". Debts mean rights, and rights are preserved. Time, tolerance or postponements are not meant to relinquish a contractual right. Time and postponement are meant to wait for the financial cycle to pick up its speed again. People were companionate towards Mu'adh by paying alms whether the creditors or the community. But their compassion does not equal the forfeit of rights, unless this step is performed willingly. The latter is performed in order to expedite the return of the insolvent to the financial cycle. It is important to note, that the insolvent is not a burden on society, he/she is not handicapped, old or unable to earn a living. The insolvents are merely faced with a calamity that makes them financially unable – for a limited time. Eventually, they are expected to return to the economic life. Obviously Omar was very aware of this point, and that was the reason he urged Mu'adh to give up his slaves in a gentle reminder of the old debt. The prophet was not available, but Omar had witnessed Mu'adh's debt issue. He knew that the prophet meant for him to start anew somewhere where he can make a living and be able to observe his earlier contracts. When he gained enough money for a living, he had to repay the remaining 2/7 of his debt. Finally, the exercise of the Islamic religion is by achieving God's justice towards God and towards each other. Justice towards God is the act of alms giving; justice towards human beings is by respecting the contracts, even after a lapse of time. This fact is the undergoing interpretation in an insolvency act. Insolvency is not meant to give up the debt. The debtor has to pay his debts once insolvency is alleviated. The insolvency is a temporary financial state. Society must realize that the problem of the insolvent debtor is temporary and society is urged to

show support. Only through the alms or the selling of the assets is the problem solved for the debtor in order to give him the chance to rebuild himself and move from this temporary financial stalemate state. Hence, the insolvent debtor must find means to stand on his own again. Imprisonment as a punishment is not an option; it's a further complication of the insolvency situation.

According to Majid Khadduri, there is substantive justice and procedural justice.<sup>22</sup> Substantive justice is the inherent justice; the intent of the law and the procedural justice is “the regularity”, “the meticulousness”, “the impartiality” in the application of the law, which lead to the achievement of justice. In Mu‘adh’s case, the procedure that took place in terms of asking for creditors’ alms, community’s alms, selling of the assets; all fall under procedural justice. And these were executed in order to reach substantive justice; the justice that will solve a problem; the justice that will give way to the non-reoccurrence of the problem. In the process, definitely there is a price to be paid. There is the debtor who had to give up all what he owns, and there is the creditor who did not receive his debt in partial or in whole. Nonetheless, this price at this point in time is economically better in comparison to incarceration and harassment that practically lead to Mu‘adh’s hiding. Mu‘adh’s self-inflicted incarceration would not have led to his financial re-building.

The previous cases stress that the prophet was very compassionate towards those who are honest, clean debtors and were unable to pay due to unforeseen or unexpected calamities. In addition, the prophet inserted a communal responsibility: the creditor is asked to forfeit the debt or part of it in shape of alms in the name of God; then the community is asked to pay alms hence helping the debtor to repay. This is not a coercive responsibility; it is a responsibility based on an awareness of a problem and being involved in the solution of the problem. Thereafter, the debtor should sell all his belongings if he has a debt in a clear show of his financial inability. This is one way to be just towards the creditors. Thirdly, there is no way, the debtor is incarcerated or limited in place or in being. This is understandable, as this limitation will prevent the debtor

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<sup>22</sup> Khadduri, p. 135.



from generally exercising his life and practically returning to the economic cycle. Hence, substantive justice as well as procedural justice is realized.

### **2.3 Insolvent Debtors in the Traditional Judges' Literature**

With the passage of time, the schools of law spread across the Islamic lands reflecting the respective customs of the newly established Muslim communities and the different law implementations started taking different shapes. The judges institutionalized their different schools. Many judges wrote practical workbooks to explain how they reach their legal decisions.<sup>23</sup> Besides, they also wanted to leave their followers detailed registers of their legal thought to help the next generation of future legal thinkers. This literature explains many legal procedures, amongst which the precise explanation of the place where the judge should hold his court, his helpers, how he chooses the references in the different cases, how he should handle the witnesses, the reason for the respective punishments, and how a judge reaches his final verdict.

The prisons and the prisoners were also part of the judges' responsibilities. A study by Al-Hosany on "Incarceration Architecture" in the early Islamic period shows that the prisons during the time of the prophet as well as the four caliphs after him was a means to an end, i.e. a person was put in prison in order to start his rehabilitation process<sup>24</sup>. This rehabilitation meant an imminent and quick release to society as soon as the need for confinement disappeared. The prisoners were held in mosques, living with the visiting believers. Others were kept within the realms of the prophet's living space. Prisoners were observed by well-chosen prisoners' keepers, as the environment and the daily communication were a big part of the rehabilitation process of the prisoners<sup>25</sup>. As to women, they were also kept in the mosques or simply restrained in their own dwellings.<sup>26 27</sup>

<sup>23</sup> Al-Baghwi. The editor compiled a list with 35 legal *Shafe'i* handbooks written by different Islamic jurists. Pp. 11-20.

<sup>24</sup> Al-Hosany, Renewable..., p. 465 quoting A. Al Alfi "Punishment in Islamic criminal Law" M.C. Bassiouni (Ed.), The Islamic Criminal Justice System, Oceana Publications, London (1982).

<sup>25</sup> Al-Hosany argues that the prisoners "enjoyed the high quality indoor environment, which characterized the houses of that period: high natural lighting, good ventilation, concerns for hygiene, and generous spaces." *Islamic Penal Theories...* p. 18. The first prison was built in the time of Ali, the fourth caliph.

The underlying maxims discerned in the case of Mu‘adh and additional traditions along with the Quran related debt verses were transformed into procedural laws in the handbooks of the judges. The judges’ literature referenced confirms that the indebted person may be imprisoned for a limited time until he pays his debts. This is some sort of a specific performance that should eventually make the debtor pay assuming he has the money. But in cases where the debtor is unable to pay, as with the insolvent debtor, all the sources of the judges’ manuals agree that this specific kind of debtor may not be imprisoned and must be released once his financial inability is proven.

In *The Judicature Literature (Adab el Qada’)* which was explained and edited by Al Gassass around the tenth century, the Hanafi jurist Al-Khassaf, asserts the following legal steps towards a creditor’s claim against a debtor: First, it is imperative to note that the judge has no right to urge the debtor into payment by any coercive means. No hitting is allowed. And because of that, the only way to apply pressure on the debtor is to imprison him.<sup>28</sup> The judge adheres to the following steps when dealing with a debt issue: Once the creditor appears in court, the judge should be easy with the debtor allowing him time to collect and pay the requested debt.<sup>29</sup> . If the debtor admits that he has the money and refrains from payment, then he should be imprisoned. If he admits that he has no money and the plaintiff is unable to provide proof to the contrary, the debtor is released. Putting a debtor behind bars can only take place when the plaintiff submits evidence to the debtor’s affluence. In this case the debtor is put behind bars until he repays the debt. Al-Khassaf insists that imprisonment should never exceed four months. Some judges favor six months, whence a debtor’s financial state is re-investigated.<sup>30</sup> Re-investigation of a case is to reach a decision and not to resume the imprisonment; meaning either the debtor pays or

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The first building did not succeed in keeping the prisoners so a second was built “Al-Mekhias”. A strong eye was kept by the caliph on the prisoners and their well-being. (referencing Al-Samad, 1995); Al-Suruji, p. 160.

<sup>26</sup> Al-Hosany, *Islamic Penal Theories...* p. 19 (quoted from Al-Laheib, 1984).

<sup>27</sup> With the Ummayyads came the evolution of the imprisonment system. But then imprisonment was mainly developed for political dissidents, and the conditions in the prisons deteriorated dramatically. (Al-Hosany, *Islamic Penal Theories...* p.19).

<sup>28</sup> Al-Khassaf, p. 254, article 280.

<sup>29</sup> *Ibid.*, pp. 254-5, article 281.

<sup>30</sup> *Ibid.*, p. 256, article 282.

finds means of payment if he is able, otherwise he has to be proven insolvent. If after four months the debtor still does not pay, then it is the responsibility of the judge to free him and announce his insolvency.<sup>31</sup> A creditor is always urged by the judge to be patient and wait for the debtor until the debtor collects him his money.<sup>32</sup> The fact that the debtor will not leave prison until he is announced insolvent is an affirmation to the creditor that he will get his money, even if the debtor needs to sell all his possessions. This limited imprisonment sentence moderately alleviates the pressure on the complaining creditor. He does not need to harass the debtor, and he may rest assured that the debtor will not flee with the money, if there are bad intentions on the debtor's side, and the debtor will eventually sell all his assets to satisfy his debt.

During the time of confinement, the judge should order investigations amongst the neighbors and people of expertise in order to provide evidence for the poverty or affluence of the debtor. If poverty is proven, then insolvency is announced.<sup>33</sup> During the process, the judge's duty is to expedite the process of investigation and reach a conclusive solution.

If insolvency is announced, the debtor should be set free. Harassment of the debtor is accepted.<sup>34</sup> Other jurists concur that the judge should order the debtor to sell his possessions or the judge may appropriate the possessions himself and sell them to manage the debt.<sup>35</sup>

It is important to note that the imprisonment sentence is upon the request of the creditor. In providing an incarceration sentence, the legal system tries to legally fulfill the contractual obligation between the debtor and the creditor. This system is helping the creditor to get his

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<sup>31</sup> Ibid., pp. 255-256.

<sup>32</sup> Ibid., p. 258, article 285 quoting the hadith of the prophet from Ibn Hanbal, volume 1, page 327: whoever waits for his debtor to repay his money or forfeits his right to this debt, God will put him in His shade on the Day of Judgment.

<sup>33</sup> Ibid., p. 257, article 284.

<sup>34</sup> Ibid., p. 258; Not all Sunni schools of law accept harassment. The Hanafis in particular tolerate them according to the research "Mulazama or Harassment of Recalcitrant Debtors in Islamic Law" by Farhat Ziadeh.

<sup>35</sup> Ibid., p. 262, article 287.

money. But at the same time, the judge does not leave the debtor under the mercy of the creditor; hence the balance of justice is accomplished.

There are agreed upon general rules and regulations for imprisonment of an insolvent debtor. And these include meticulous details to reflect the special nature of this kind of imprisonment. Imprisonment should never lead to a debtor's illness. And if the debtor gets sick then someone should be allowed to take care of him. If there is no one, then the debtor must be set free, as imprisonment should not be a reason to do him any bodily harm.<sup>36</sup> Moreover, the debtor may not be imprisoned with thieves, lest they could harm him.<sup>37</sup> The debtor should eat, drink and have sex.<sup>38</sup> Up to that point in the investigation process, the debtor is neither charged with theft nor betrayal of contract.

Obviously, Al Khassaf and later Al Gassass who received his knowledge from him and added his notes to the handbook, followed in the footsteps of the prophet. Once the debtor is declared insolvent, he sells his belongings - as was the case with Mu'adh - and the case is closed for the creditor.

In that respect, it is noteworthy to state that after insolvency, any far future repayment of the original debt, or the rest of it (if there is a rest after selling of the insolvent's assets), was never discussed with the judge. The idea that Omar insinuated to Mu'adh as to the repayment of the rest of his old debt, the fact that a repayment is necessary, was never mentioned in the literature books. Apparently the actual return of an insolvent debtor to the financial cycle is practically lengthy as the insolvent is starting from scratch and it could take him a considerable time to stand on his own feet. Furthermore, the judges wanted to focus on their own jobs in attaining justice at their point in time. The return of the insolvent debtor may take place in the far future when the respective judges are not available to oversee this act of justice. In that respect, the alms' giving is one way to return creditor's money during its time as well as the selling of the

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<sup>36</sup> Ibid., p. 264, article 291.

<sup>37</sup> Ibid., pp. 264-265, article 293.

<sup>38</sup> Ibid., p. 265, article 294.

insolvent's assets. The fact stays that the debt needs to be returned and this can never happen unless the debtor has the means to return the money, i.e. his is back in the financial cycle.

A second book is Al-Baghawi's (433AH - 516AH/1044 – 1122 AD), which was written in the 11<sup>th</sup> century. His recommendations regarding debtors are almost identical to those mentioned earlier in respect to the re-investigation of the prisoners and the non-incarceration of the insolvent debtor.<sup>39</sup>

Once the investigative imprisonment period reaches an end or once a new judge is appointed, whichever comes earlier, the case is re-opened. An announcer is sent around the city to summon any litigant in the area who has a claim against the prisoner. If the litigant is absent and does not show up after the announcer's calls, the prisoner is released.<sup>40</sup> If a litigant shows up, the case is re-investigated. If the prisoner is a debt prisoner, who admits that he is indebted and proves that he is unable to pay, then he is released.<sup>41</sup>

Later in the 12<sup>th</sup> century, the chief judge Shehab el Din Abi Ishaq Ibrahim ibn 'Abdallah (583AH – 642 AH), known as Ibn Abil Damm, follows similar stages upon dealing with an imprisoned debtor. He asserts that right witnesses should appear in court. If these right witnesses confirm that the debtor is unable to pay and there are no further witnesses to confirm otherwise, then the prisoner is released.<sup>42</sup> This judge accentuates the difference between the insolvency and bankruptcy. He describes that bankruptcy can be the result of fire or a sinking ship for example, whereby the debtor will sell his remaining assets and all his possessions to cover his debts. Insolvency on the other hand, means that the assets are not sufficient to cover the debt. The declaration of insolvency includes right witnesses who swear that the debtor does not own except "the clothes he is wearing and his daily food" and it may be added that "he deserves alms

<sup>39</sup> al Baghawi, p. 136.

<sup>40</sup> Ibid., "*al asl la habs 'alayh*", i.e. a debtor should not be imprisoned - unless asked for by the creditor, p. 137.

<sup>41</sup> Ibid., pp. 136-137.

<sup>42</sup> Ibn Abi Damm, pp.76-77, chapter 59 "*wa tariq 'amr al I'ssar la yakhfa, fa la yatoul bihi*".

giving”.<sup>43</sup> Apparently, the investigative process became more intricate with the expansion of society and the expansion of the economic market. The witnesses became a necessity and their just testimonies needed verifications. Hence, procedural law was developing to achieve justice.

*The Judge's Literature* by judge Abi Al Hassan Al-Mawardi (364 - 450 AH/ died 1058)<sup>44</sup>, the famous Abbassi judge, explains that there is a format that needs to be filled out to attest to the prisoner's financial insolvency: *da'wa I'ssar*. ! Al-Mawardi affirms, the debt is any money owed to an entity such as a personal debt, a rest of trade transaction, a promised dowry for a new wife or even alimony for a divorced wife<sup>45</sup>. If the debtor has a house, then the judge appropriates it and sells it to cover the debt.<sup>46</sup> His belongings should be sold as he announces his bankruptcy or insolvency.<sup>47</sup> Al-Mawardi was very adamant in stressing that any kind of debt must be repaid and at any cost for the debtor.

Later in the 13<sup>th</sup> century, the same procedure for the unable debtor is applied by the judge Al-Suruji (639AH -710AH/1241-1310. The defaulter does not go to prison unless he has been investigated first or there are witnesses to testify to his ability to pay.<sup>48</sup> As considered by Al Khassaf, the prisoner is granted several rights: he should not be hit, he should not be rented to his creditors, his family is granted visits<sup>49</sup>; the prisoner is allowed private time for sexual intercourse<sup>50</sup>; the imprisonment period is definite, the judge should ask and investigate and release him after a specific time frame<sup>51</sup>; if the prisoner is sick, he should have someone to attend to his health. Imprisonment is not to lead to the prisoner's bodily harm, sickness or death.<sup>52</sup> At any point in time, if the plaintiff asks to release the debtor, then the judge should set him free.<sup>53</sup>

<sup>43</sup> Ibid., pp. 408-409, ; chapters 496;497.

<sup>44</sup> Al-Mawardi, p. 18; Al-Baghwi, p. 16.

<sup>45</sup> Ibid., p. 229.

<sup>46</sup> Ibid., p. 229.

<sup>47</sup> Ibid., pp. 228-229.

<sup>48</sup> Al-Suruji, p. 161, chapter 130.

<sup>49</sup> Ibid., p. 162, chapter 132.

<sup>50</sup> Ibid., p. 163, chapter 135.

<sup>51</sup> Ibid., p. 162, chapter 134.

<sup>52</sup> Ibid., p. 163, chapters 135, 135a.

<sup>53</sup> Ibid., p. 163, chapter 137.

Ibn Farhoun (died in 1397/ 729AH – 799AH) in *Tabsirat al Hukkam* affirms that no offender should be imprisoned unless he is repetitive in his harm to society or he is in constant denial of his harm<sup>54</sup>; No theft offender should be imprisoned unless he is “*mawsuf bel sariqa*”<sup>55</sup>, meaning that he causes imminent harm to society. His release is against the general interest of the community at large. A debtor is imprisoned as a pressuring measurement in order to make him pay his debts. His imprisonment sentence should not be prolonged. In all cases, a free man, equal to a slave, would go behind bars only if his situation has been extensively investigated and imprisonment is only if the defendant is hiding his money as not to pay his dues.<sup>56</sup>

All of the above prove the fact that imprisonment of the insolvent debtor is not a *ta'zir* punishment, i.e. not a corrective punishment. It is a specific performance that should lead to debt repayment. Imprisonment may be seen as a *ta'zir* punishment only if the offender is dangerous to society or *mawsoof bel sariqa* as literally explained by Ibn Farhoun.

Up to that point in history, the reader may trace a balance of power exercised by all three factors of the debt issue: First the creditor has a right towards his credit by the power he has over the debtor, as upon his request the judge may imprison the debtor. On the other hand, the debtor, if he has the money, he is pressured to pay by the judge's investigations or by the threat of his poverty announcement. If he has no money as he claims, then his assets are sold. This is a solution to his credit problem, as he may be able to start anew and try to earn money without the initial debt threats. This is not an easy step for the debtor. If he is a trader, he will not want to jeopardize his reputation in the market. If he is a buyer, he also does not want to jeopardize his credit reputation amongst his own community. Besides, who will want to jeopardize the selling of all his assets except for the clothes he is wearing! Finally, there is the judge who balances the two sides of the debt: the judge helps the creditor to obtain his money from the debtor, hence maintaining the contractual rights, and helps the debtor by not allowing the creditor to exercise any vengeful acts towards him, thus ensuring no abuse and mercy if required.

<sup>54</sup> Ibn Farhoun, vol. II, p. 158.

<sup>55</sup> Ibid, vol. II, p. 159.

<sup>56</sup> Ibid, vol. II, p. 319.

The realization of justice in the above structure is well observed. This whole process was initiated in order to achieve as much just transactions as humanly possible. However, justice is an intangible term. The creditor has a right. It is in the interest of justice to apply pressure on the debtor to avoid any abuse of this right. It is in the interest of the debtor to announce his insolvency in order to end the problem at hand; otherwise it may be a vicious credit problem. In addition, the system preserves the dignity of the debtor. The debtor is not treated as a criminal under any circumstances. The debtor is kept within separate walls, apart from the criminals, with all of his rights reserved and he is granted family visits, help and medication. This stresses the special category where Islamic law places the debtors. Finally, the controlled timeframe by which the cases are solved, beside the non-delayed implementations of bankruptcy or insolvency procedures, are factors that compliment the success of the system. All these elements, counted together, ensure the positive sustainability of the commercial market system.

Apart from the theoretical procedures described in the previous judges' manuals, there is an important debt anecdote that took place around the turn of the 1<sup>st</sup> century A.H., which may shed more light on the problem at hand. In *The Governors and Judges of Egypt* by Al Kindi, there is a letter sent by Omar Ibn Abdel Aziz to the judge of Egypt at the time, 'Ayad Ibn 'Ubaid Allah. Judge 'Aiyad bin 'Ubaid Allah al Azdi had been appointed by Sulaiman Ibn Abdel Malek and was re-confirmed by Omar.<sup>57</sup> From the wording of the letter, it seems that the judge had sought the advice of the *Wali* on three debt cases in an earlier letter whereby Omar sends back the following answer: "You mention that a person died and had a lot of debts and he had a house and nine slaves. The creditors wanted their money back. They say that the slaves were bought before the debtor had died! Hence, you sell the slaves for the right prices. If the slave wants to pay this money for her freedom, then she is free. If the slave wants to remain a slave then she is sold to the creditors. Whatever is available should be divided equally amongst the creditors. The second question is about a man who bought slaves. His partner died and his debt accumulated. You mention that you have left him in the hands of his creditors until you receive my judgment. Order this man to try to repay his debt with all his possessions. Order his

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<sup>57</sup> Al Kindi, pp. 236-237.



creditors to be merciful. He should not be sold to them. Be just with all the creditors. Finally, you mention that there is a man who buys slaves and resells them for the third of their value in cash. He kept doing this until his debts multiplied to reach 300 dinars. You say that his creditors came with him asking for selling him to them. You order this man to try to work and repay his debts. As to his creditors, they should not buy him. The creditors have to have patience and mercy until Allah helps him in his issue.”<sup>58</sup>

History repeats itself in strange ways. These three cases took place around the year 100 AH. The first story tells about a sudden death that affected a debt repayment process. Omar advises the judge to sell the slaves and give the money back to the debtors. The second case is about a business where the partner died, leaving his second partner under the control of the creditors. Omar orders the creditors to be patient with the debtor. The third case is of particular interest in this research. The caliph realized that the slave seller has a cash need, otherwise why would he buy slaves and resell them with a loss. Realizing the debtor’s need, the caliph reacted with understanding and mercy. The verdict of the caliph was not to obtain the creditors’ rights, as much as to ease the cash need of the unable debtor. He orders the governor to remind the creditors of God’s commands, of human mercy, of societal support. His order for patience is a direct application of the Quran “wait until ease”. The creditors should have mercy until Allah helps him, whether this is through alms from society or work by the debtor.

When analyzing the latter anecdote, the researcher Farhat Ziadeh in his investigation of harassment of the recalcitrant debtor, assumes that the incarcerating or selling of the recalcitrant debtor must have been so entrenched in society that the judge was under huge pressure from the creditors, that he had to seek the caliph’s advice<sup>59</sup>. And obviously, this same idea is still entrenched in the Egyptian society, as these very same kinds of debtors are actually put behind bars after 1250 years of a clear refusal of this penalty as will be shown later in the research.

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<sup>58</sup> Ibid., pp. 242-245.

<sup>59</sup> Ziadeh, pp. 297-298.

### **3. Debtors in Published Court Cases in Pre-Modern Times**

The previous judges' literature exemplifies a fair and compassionate theoretical framework for the handling of debts. The specific consecutive legal steps with the minute practical details reflect the procedural justice that was developing in time. To evaluate the success or failure of this theoretical framework, practical court cases are introduced. First a collection of the Moroccan community court records in the 16<sup>th</sup> century in Egypt is presented. Due to the limited Egyptian court records in the Middle Ages, I added the Ottoman commercial court records published by Timor Kuran from the courts of Istanbul during the 17<sup>th</sup> century. As the name suggests, the latter involves commercial court cases with commercial partnerships. The nature of the latter is very different from the basic trading transaction or the personal debt. Nonetheless, as this research is particularly concerned with incarceration in case of insolvency and unforeseen calamities that delay debt repayments, it is interesting to see how the legal judges in Ottoman Istanbul dealt with unforeseen calamities that lead to complete capital loss; how they accepted proofs and made a final judgment. Finally, some additional documents of the Egyptian Oases are investigated. Although the latter are distantly situated and have an almost independent nature from the rest of Egypt, they give an example of how excessive debts and a bad legal system may completely destroy the economic cycle for the community.

#### **3.1 Debtors in the Egyptian Court Registers of the 16<sup>th</sup> Century**

Researcher Abdel Rahman Abdel Rehim Abdel Rahman collected and published two volumes on the Moroccan Community in Cairo after the establishment of the Ottoman Empire in Egypt. This community lived in Egypt before the Ottoman's rule in 1516, but since that date, they increased in numbers and left their prints on all aspects of the Egyptian life, whether military, culture, or economy. The trade business flourished during their time and on their hands. They bought items from the far west and east and marketed them in Egypt and sold Egyptian goods all over the surrounding lands. They created companies with limited liabilities and established small and large enterprises. Egypt became the trading center of the area.<sup>60</sup> The collection of the court cases gathered by the above researcher comprises seven *shar'i* courts that handled this community's

<sup>60</sup> Abdel-Rahman, vol. II, pp. 9-11.

affairs throughout 16<sup>th</sup> century Egypt. These businesses involved persons from all religions and the reader is introduced to an abundance of jobs and titles. In such environment all business disputes are expected to be present.

In the seven Cairo court registers that are published, the reader encounters a multiplicity of registrations along with adjudications, hence, underlining the legal security of rights for the parties concerned. There are several cases where the buyer takes the goods and is supposed to pay the rest of the money later, but he refuses to pay or delays payment. In this case, the judge goes through the same procedure that was described earlier in the Islamic legal books in the previous chapter. After taking the oath in front of the judge, both litigants swear to their truthful testimonies. Investigations and verdicts ensue. All different cases reflect the consistency in procedure.

The court registers reflect actual life situations; there is one case where both litigants go to court and swear to their testimonies. But as the seller is unable to get witnesses to his version of the story, the judge closes the case and both litigants leave the court unharmed.<sup>61</sup> In other cases, the defendant admits a debt or a partial payment and promises to complete payment. As this promise is the agreed upon solution, both litigants leave the court unharmed.<sup>62</sup> When or how payment is provided later is not mentioned in these registers. Obviously, once an understanding is established between buyer and seller in front of the judge, the conflict is solved. The debtor does not want to cause himself legal damage.

There is one case registering the release of a debtor.<sup>63</sup> Earlier, the concerned creditor had requested the debtor's incarceration. This procedural instrument was successful as the debtor's family or partners finalized his debt for him, thus, his release was announced.

In many of the cases, the buyer pays part of the price of a commodity and delays the rest. Whether this is because he does not have the money or decides that the goods are not worth the

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<sup>61</sup> Ibid., vol. II, doc 51, p. 219.

<sup>62</sup> Ibid., vol. I, doc. 11.

<sup>63</sup> Ibid., vol. I, doc. 82.

money, the reader can never know. However, the documents of the court cases show that once the plaintiff goes to court and proves his sale or his debt, and the defendant does not provide the payment, the judge puts the latter behind bars as per request of the plaintiff.<sup>64</sup> In these instances, the endnote on the court registry says: “The plaintiff requests the imprisonment of the defendant! May God end his imprisonment! ” This sentence is a reflection of the *shari‘a* content and the intent of the jurist. It is a reminder for the judge’s rules and regulations. On the one hand, it is not the judge who puts the debtor behind bars. The judge acts on behalf of the creditor. The latter has rights that should be fulfilled. At the same time, the judge is ensuring that the debtor does not escape his commitment to the creditor. There is an inherent will by the judge to apply God’s rules in releasing the debtor, once payment or insolvency is reached, whichever comes first. The judge is personally responsible for the wellbeing of the debtor.

It is important to note, that in these different cases, the difference between a breach of a trade contract and a personal debt is not very clear. In both cases, there is a liability that was put forward for a creditor/seller. Once the debtor admits this liability, compliance to the above rules apply. Up to that point in time, the debt was a general term for any outstanding liability owed to a party as was highlighted by Al-Mawardi earlier in the paper.

No cases of bankruptcy or insolvency are observed in these registers. We can safely assume that the Moroccan business community during this time period had successful businesses going on as appears in their growing community along the years. A considerable part of the business is reputation; hence no seller or buyer wants to engage in a disgraceful business deal, whereby he is unable to fulfill his part of the deal, thus jeopardizing his later business associations. The legal system kept all aspects of the business transactions under successful legal control.

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<sup>64</sup> Ibid., vol. I, documents: 24,29,47,78, vol. II: doc 66 pp. 73-74, doc 29, doc 37 p. 207; 73 p. 234, doc 11 p. 304, doc 17 p. 307; doc 18 p. 308; doc 19 p. 308 (In this case, the guarantors of a tradesman were imprisoned and not the buyer himself).

### **3.2 Debtors in the Turkish Court Registers of the 17<sup>th</sup> Century**

The published Istanbul court cases edited by Timur Kuran give the reader a good glimpse into the actual financial life and legal adjudications of the 17<sup>th</sup> century economic market in Istanbul.

Our concern for these records is focused on the unforeseen calamities that were faced by the partners in commercial partnerships. The *mudaraba* partnership means that one party provides the capital for a business transaction and the second party works with the capital<sup>65</sup>. Profit is decided in advance upon agreement. In *mudaraba*, the financial capital loss is completely borne by the capital provider. “According to Islamic legal texts, (in the case of *mudaraba*) partners need not pay each other compensation in the event of property loss”.<sup>66</sup> Still according to the registers, the capital investors would go to court for several reasons. Sometimes, they want to legally verify the honesty of their partners’ claims; some other times, they want to prove that the capital invested was not part of a partnership agreement, but actually a personal loan that the partner used to start his own business. The reader of these records notices that the judge is very meticulous in discerning whether the case is a personal debt case or a commercial partnership case or a mere trade transaction. Only once proven that it is a personal debt case, the debtor is told to repay his debt. In three cases<sup>67</sup> amongst the *mudaraba* commercial partnerships, the witnesses corroborated that the partner did not comply to the rules of the partnership; hence the money received was understood to be a loan and not part of a capital investment. Hence, the defendants were instructed to repay to their creditors.

In addition, capital investors want to assure that their partners were not negligent in pursuing their businesses. In one case, the plaintiff complained that there was negligence on the part of the business partner that lead to the sinking of his ship. The judge investigated this issue by summoning ship owners and asking them about the methods of handling the ships. In this particular case, the defendant was found not guilty.<sup>68</sup>

<sup>65</sup> Kuran, vol. II, p. 9 (quoting Udovitch, *Partnership and Profit in Medieval Islam*, 1970, chap. 6).

<sup>66</sup> Ibid., vol. II, according to the judge in case 232, p.337.

<sup>67</sup> Ibid., case 98, p.148, case 186, p.273, case 262, p.385.

<sup>68</sup> Ibid., case 65, p. 109.

As for the working partner, there are several calamities that they could face in their commercial trips. The calamities vary from ship attacks<sup>69</sup> and stolen goods<sup>70</sup> to sea storms<sup>71</sup> and ship sinking<sup>72</sup>. All calamities present in these commercial partnerships' registers extend to total capital loss. After the oaths of both parties were taken, the judge investigated if there was a sudden affluence of the defendant that may testify against his testimony; if there were witnesses to the pirates who raided the ship in mid sea, if there were any witnesses who provided proof to the contrary of the defendants' oaths. In all the cases investigated, the unforeseen calamities' factor was well taken into consideration and the defendants were not charged. The Islamic legal system was emphatic and receptive to the circumstances of the trading business: looters, storms were part of the daily hardships that a trader faced during that time period and the legal system was able to understand and adapt to /the nature of the surrounding environment.

### **3.3 The Oases Court Registers**

If the law is not attentive to the community, chaos is the only outcome. The Oases Court registers are a well-defined example of this idea. In Egypt there are several oases located in the Western desert. As they are far from the Nile Valley and transportation entailed long days of travel, in most of their history these remote areas were treated as an entity on their own. The researcher Milad published very old court case manuscripts pertaining to three of the oases: Al Kharga and Dakhla and Bahreya. The 109 court case documents span over a period of four centuries, from 860-1260AH. The oases are self-sufficient in their plantations and food consumption. Being far from the center of government and the big cities, they were granted their own independent administration and judiciary that reported to the Wali of Egypt. The government is responsible to send the judges and governors. Taxes were decided by agreement between the government and the inhabitants<sup>73</sup>.

<sup>69</sup> Ibid., case 28 pp. 57-58; case 35 p. 70; case 37 pp. 72-73.

<sup>70</sup> Ibid., case 41 p. 78.

<sup>71</sup> Ibid., case 31 pp. 63-64; case 116 p. 176; case 232 p. 337; case 239 p. 347.

<sup>72</sup> Ibid., case 48, pp. 86-87; case 65, p. 109.

<sup>73</sup> Milad, pp. 10-11.

The documents under scrutiny include correspondence, contracts, and new laws emanating from the central government (*al diwan al 'ali*).<sup>74</sup> From the nature of the Oasis, their few inhabitants and the type of their livelihood, the documents are basically registration and correspondence. Considering the four hundred year time span they cover, the documents are not many; only 110 documents are investigated and published by Milad. Still they give an insight on life conditions in these remote areas during different time periods. Milad investigates the language, the stamps, the subject, the final verdicts. In more than one case, the researcher gives full account of the registry that goes beyond the basic information.

There is only one undocumented debt case<sup>75</sup>. But there are five tax cases bought forward by the people of the oasis against tax collectors and taxes.<sup>76</sup> One particular document is worthy of attention: document 24<sup>77</sup>. This document registers the alleviation of taxes and the relief of abuse by the administration. At that point in time in the year 1095 AH, i.e. around the 17<sup>th</sup> century AD, the inhabitants of the oasis were faced with multiple taxes. Unable to pay, the men decided to move to the Nile Valley to the East and left their lands. When the tax collectors arrived to collect the taxes, they only found widows and loners and empty farms.<sup>78</sup> Obviously realizing the extent of the damage done by the harsh taxation system and the inability of payment, the loss of a secured income compelled the governor to take action. The judges registered the alleviation of all taxes except for the standard one land tax. Thereafter, the judges pleaded to the men to return to their lands in order to start farming and producing as they used to and continue their productive life. At the end of the document, there are several witnesses' signatures<sup>79</sup> to the new laws against abuse and coercion in tax amounts and tax collection. As was habitual in later court cases of the Moroccan documents mentioned above, the registry ends with a couple of Quran

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<sup>74</sup> Ibid., p. 189.

<sup>75</sup> Undocumented means that the case of a *shar'i* debt is mentioned, but the researcher Milad did not deem it of necessity to investigate it. Hence we can safely assume that it is a mere registration of a debt and accordingly outside our research scope.

<sup>76</sup> Ibid., doc 75 p. 89, doc. 77 p. 91, doc. 38 p. 52.

<sup>77</sup> Ibid., p. 38, pp. 136-139.

<sup>78</sup> Taxpayers were told that the men have left the Oases and moved towards the Nile, to the east.

<sup>79</sup> The names include 'princes' who are the governors or representatives of the governors and other plain names, which are probably heads of important of big clans in the oasis.

verses. In this particular case, there are over two pages of Quran verses that condemn those who oppress others and are not merciful towards them.

In addition, other decrees followed regarding the rights of the inhabitants and the legal mercy that should be granted to them in terms of the application of justice in general and the taxation in particular.<sup>80</sup> The importance of these documents is in the fact that if the law does not take its role in shaping people's lives and providing and achieving justice, a state of pandemonium is imminent to follow. Once the inhabitants of a place were suffocated by the taxation, they left their lands. As much as this may seem difficult to imagine nowadays, an outrageous consequence can materialize in different ways as will be shown.

#### **4. Dealing with Insolvent Debtors in Modern Egyptian Laws**

##### **4.1 History of the Modern Laws**

From the middle ages onwards, political events unfolded to bring the Islamic legal system in direct contact with the western world. In the early 16<sup>th</sup> century, Egypt fell under the Ottoman rule, thus becoming a “semi autonomous [Ottoman] province”<sup>81</sup>. As presented earlier in this research, up to that point in time, the *shari'a* courts were prevailing.<sup>82</sup> In addition, eventual legislations by the rulers to enhance the law, called the *qawanin* were declared.<sup>83</sup>

Earlier on the Ottomans had signed Capitulation treaties whereby the foreigners were subject to criminal and civil legislations that stem from their respective countries and jurisdictions took place in their respective consular.<sup>84</sup> Proper courts for foreigners and nationals on the one hand

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<sup>80</sup> There are other communications to the judge to be merciful when collecting taxes. And he should be merciful towards the poor as the inhabitants are complaining from him and his tax collection methods. Milad, doc. 38, p. 52. The judge is asked to be just in collecting the taxes and remove any injustice. Milad, doc 77, p. 91. An additional document is relating to the judge and his abusive adjudications. Milad, doc 90, p. 105.

<sup>81</sup> Zarinebaf p. 53.

<sup>82</sup> Brown, p. 2.

<sup>83</sup> Peters, p 211, p. 213.

<sup>84</sup> Brown, p. 2.



and nationals amongst themselves on the other hand were of absolute necessity to organize commercial life. Thus, in Egypt the establishment of the mixed courts in 1876, followed by the national courts in 1883<sup>85</sup> was an essential step to organize the legal affairs and achieve just, expeditious jurisdictions. At the same time, the widespread strong French legal and cultural impact influenced the Egyptian legislature, moving it to promulgate several market laws: hence, the Penal Code, the Commercial Code 1883 and the Maritime Code - almost all legal reproductions of the French codes - came into effect<sup>86</sup>.

Since the 19<sup>th</sup> century, the commercial laws in Egypt stayed in stagnant position apart from few law amendments in the middle of the 20<sup>th</sup> century.<sup>87</sup> Political developments around the turn of the 20<sup>th</sup> century led to growing national sentiments. These manifested themselves in suggestions towards the unification of the laws. In 1949, the Egyptian Civil Code was promulgated to substitute the previous laws applied in the mixed and the national courts and the latter were abolished.<sup>88</sup> The Egyptian Civil Law 1949 is a mixture of European codes in addition to the Islamic *shari'a* laws.

With the passage of time globalization, technological advancements and the economic world developments necessitated the promulgation of supplementary laws that would attend to issues, such as: international banking, investment, securities regulations, fair competition, amongst other issues.<sup>89</sup> The New Commercial Code of 1999 was created. It came into full effect in 2005.<sup>90</sup>

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<sup>85</sup> Hill, p. 300.

<sup>86</sup> Coulson, p. 151.

<sup>87</sup> The penal code added the defaulted check penalties in 1935. (Sorour, p. 670). In 1934, law 46 announced the commercial registry; and in 1945 law 29 was introduced for the different companies with limited liabilities amongst other commercial activities. Murad, p. 6

<sup>88</sup> Bechor, "To Hold the Hand of the Weak", p. 180.

<sup>89</sup> El Dean, pp. 4-5.

<sup>90</sup> There is no official translation for the 1999 Code. Sometimes it's called the Trade Law (ILO) or Law No. 17 on Commerce (WIPO) The 'New Commercial Code' has been used by El-Dean and it is used throughout the paper. According to Hill, the contemporary modern legal practices in Middle Eastern countries have not gained popularity amongst western scholars, hence the scarcity of legal academic material on current issues. (pp. 280-281, p. 281, footnote 10) Not to mention that most of the national legal writings do not have official translations in their respective countries. (p. 282).

This short historical development of the legal system in Egypt is necessary in order to review the problem of *gharemoun* in Egypt in modern times.

#### **4.2 Al-Gharemoun: An Intricate Problem**

The *gharemoun* and *gharemat* are basically poor insolvent debtors. They end up in prison as they have written checks or security invoices and defaulted on payment. According to Article 534 in the New Commercial Code 1999, any individual who drafts a check without sufficient funds to cover it is penalized by incarceration and/or a 50,000 LE fine.<sup>91</sup> As to the security receipt, it is a breach of trust crime that falls under the category of Theft & Usurpation in the Egyptian Penal Code 1937. Article 341 on the breach of trust, inflicts a “penalty of detention” that may not be less than 24 hours and up to 3 years and maybe “coupled” with a monetary fine of 100 LE.<sup>92</sup> These insolvent debtors may default on double-digit amounts and still end up three years or more in prison. It is very hard to keep count of their numbers, as daily incarceration rules are in effect.<sup>93</sup> Estimates of their numbers vary, but they could constitute one third of the present prison population in the Egyptian prisons. The problem of *gharemoun* is an intricate problem with social, economic and legal aspects intricately intertwined.

##### **4.2.1 Actual Court Cases**

Below are several actual court cases that will highlight the different facets of the problem:

Case A: A 63-year-old mom of six children buys appliances on installments to marry off her daughter. She defaults on checks for 5,500 LE (\$ 313<sup>94</sup>). The court sentences her to two years in jail.<sup>95</sup>

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<sup>91</sup> El-Marsafawy, p. 389.

It is interesting to note, that the check defaulter is penalized by incarceration in the following Arab countries: Lebanon, Libya, Syria, Jordan, Iraq, Algeria, Kuwait, Sudan, Yemen. Incarceration periods vary from two weeks to seven years. Al-Marsafawy, pp. 14-18.

<sup>92</sup> Sorour, p. 796; Penal Code 1937, article 341.

<sup>93</sup> Hamdy, quoting the Assistant to the Egyptian Interior Minister.

<sup>94</sup> Egypt devaluated its currency in November 2016. Hence, before this date any LE amount was calculated upon the value of 8.80LE per \$1. Today the dollar is around 18LE for the\$1. The dollar

Case B: A husband buys a small three-wheel motorbike (*Tuktuk*) on installments to start a small transportation business. He makes an accident and dies. With no income to cover the rest of his monthly installment checks (7,000 LE, ie. \$ 350), his wife, his warrantor is sentenced to four years in prison.<sup>96</sup>

Case C: A housewife's husband falls ill. She decides to buy household equipment and resells them for a lesser price in order to acquire immediate cash for her husband's operation. The husband does not get better and she fails to repay her household installment checks. After six months of the debt date, she is sentenced to seven years for checks equivalent to 7,000 LE (\$411). The original amount she has borrowed was 2,000 LE (\$117)<sup>97</sup>.

Case D: A man is sentenced to 98 years of imprisonment for checks equivalent to 2,800 LE. An NGO picked up his case and was finally able to get him out of prison after spending 15 years in jail.<sup>98</sup>

#### **4.2.2 Categories of Al-Gharemon**

The researchers of *gharemon* cases have identified three categories of defaulters: The first category consists mainly of the parent who wants to marry off his sibling. He or she buys furniture or electric equipment on installments in order to furnish the new house for the newlyweds as illustrated in case A. The parent writes installment checks or security invoices for the seller to be paid over an agreed upon period of time. If the debtor fails on any of the installments, the checks or security invoices are presented to court and the debtor goes to jail.

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exchange rate of every amount in this paper is calculated upon its value during the time the court case took place.

<sup>95</sup> Badran. "Gharemat Misr: Ahzan wara' al Qudban." BBC News/Arabic. 8 Mar. 2017.

<sup>96</sup> Al-Gharemeen. TV/Facebook Advertisement, 4 June 2017.

<sup>97</sup> Mother's Day/Al-Gharemat, Radio Program (21 Mar 2017).

<sup>98</sup> Cairoscene team. 5 Nov. 2017.

A second category is a category that comprises people who neither borrow the money nor lend the money. They are the warrantors, who are requested by the lender/seller to sign on the checks to secure the timely repayment of the first party, which is the borrower. As in case B, many times the warrantor is the wife, or an old grandparent who guarantees payment with his or her monthly pension. If for any reason the original debtor cannot pay, it is the warrantor who is put behind bars.<sup>99</sup>

All the defaulted debtors who have been bailed out by different NGOs have stories of financial need behind them. The journalist and “Women Prisoners of Poverty” NGO president, Nawal Mostafa, likes to call them poverty prisoners.<sup>100</sup> According to her fieldwork with the *gharemat*, the main reason for their defaulted checks and/or security receipts is the sudden non-availability of cash. She stresses that once the debtors have an installment process established, they have the will and the intention to fulfill their contracts. However, a calamity befalls the family; such as in case A above, the basic installment process of the debtor was interrupted by loss of a job, which in turn led to defaulting, hence imprisonment. Or else, as in case B, the head of the family died along with loss of the borrowed capital in an accident. Imprisonment of the mother, the warrantor, was the final straw that broke this family’s financial cycle.

There is a third category of defaulted debtors. It comprises individuals who are in need of immediate cash. This cash could cover an urgent operation for a family member, a sudden death, or any unexpected financial necessity. This needy person has no one to lend him/her money. So he/she resorts to the following idea: he/she undergoes the procedure of buying a product –or multiple products depending on the amount of cash needed – on installments and re-sells with a lesser price, maybe less 20%, 30%, or even 50%, hence, acquiring immediate cash on hand for his/her necessity. Whether the borrower is able to repay the initial installment on time, is highly

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<sup>99</sup> Abdullah, in the Interview with Misr el Kheir legal advisor, he states that one case of *gharemoun* shows that the father was unable to repay his debt, so his wife was the guarantor, and the older daughter was the guarantor for the mother and the younger daughter was the guarantor for the older daughter. The whole family, parents and two daughters ended up in jail for default on payment.

<sup>100</sup> Her NGO is called: Women Prisoners of Poverty: Children of Female prisoners’ Association.

questionable. Eventually the signed checks and/or security receipts end up in front of the judge. Imprisonment is the end result.

Case C is the original cash need situation. The intent behind the delinquency is not clear in the eyes of the law. Nonetheless, as mentioned earlier in Al-Kindi, Omar Ibn Abdel Aziz recognized the issue of the slave trader who sells slaves for less. He understood the intent of the process, the immediate cash necessity. Thus he stopped the financial cycle from getting worse by ordering the judge not to incarcerate the trader and also prohibiting the creditors from abusing him. The intent (*al niyya*) equals the “corollary maxims”, which is the principles of bona fide and animus in law<sup>101</sup>. Unfortunately, nowadays, the intent is not questioned once the criminal act has satisfied all its factors; the judge is presented with signed checks and security receipts, and the person is penalized according to the law. The result is an aggravation of a need situation.

### **4.2.3 The Legal Complexity**

In all of the above cases, the issue is related to signed checks or security receipts. The installment checks are one way for ensuring the payment of the debtors to their creditors. Here it is important to note, that the checks are used as a guaranteeing tool against their original intent.<sup>102</sup> The debtor signs multiple checks with minimal amounts of money spread on long periods of time. Theoretically, he will have collected the money once the due date on the check approaches. To that effect, the same with the security receipt. Since everyone does not have a bank account or access to the checking system, some traders revert to the security receipt to guarantee their trading transactions. The breach of trust crime incurred by signing a security receipt, assumes that the person signs on receiving a monetary trust to deliver it to a third party. Nonetheless, this person does not deliver. Hence, in the eyes of the law, it is considered a theft crime for the person takes something that does not belong to him.

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<sup>101</sup> Khadduri, p. 141.

<sup>102</sup> Al-Marsafawy, pp. 246-254, although the checks equal money and must be covered once they are written to their respective orders, still post dated checks are accepted in court as otherwise the credit system will be crippled, especially when dealing with installments.

The incarceration sentences are contingent upon the number of the defaulted checks and/or security receipts the debtors sign in addition to the number of creditors who lend them the money. Still, the problem is twofold: on the one hand, we have the cases of poor and needy debtors, whereas on the other hand we have the vengeful, criminal creditors. In many instances, the seller or tradesperson knows the need of the borrower. In a multiple of cases, the borrower is an illiterate simple person. The lender uses this deficiency of the borrower. He makes the borrower sign blank checks or security receipts<sup>103</sup> in which the trader writes any amount he wishes later when he presents these legal credit papers to court.<sup>104</sup> Imprisonment is the final end result.

Other ways of fraud are related to the previous idea. We have a lender who holds checks for a borrower with an x amount. Once the borrower cannot pay, the lender prolongs the period of the check payments and adds 50% on top of the original agreed upon amount. Thus, what started out to be an amount of 2,000 LE on four installments becomes 3,000 LE on six installments and the process continues. The borrower tries to keep up with payment. He fails to pay after three checks; the lender adds another thousand pounds to the original amount and extends another two months. As mentioned in case C, what the borrower started with as 2,000 LE ended up in 7,000 LE after six months. In these cases, the checks are submitted to court and the borrower ends up in jail. In other cases, the borrower could have paid a big sum of the original amount before the checks are actually put forward to the judge. The end result is an original debt that is multiplied and a never-ending payment process which final station is the prison.

To complicate matters even further, in some cases, the lender - after he had gotten his money or most of it - he does not give up his checks to court, but gives the checks to another lender. The latter restarts the same procedure with the borrower; he tries to pressure the borrower into

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<sup>103</sup> Al-Bindary. "Issal Al-Amana: Al-Tariq Al-Sari' Lil Intiqam Min Al Khossum." Al-Tahrir News. 20 Sept. 2017.

<sup>104</sup> A non-governmental media plan that encourages borrowers, and especially women to never sign blank checks took place in 2014. This media plan was intended to make people aware that the person they deal with could very well misuse their need. *Ma temdeesh... la lel tawqi' 'ala bayaad.*

payments and prolongs the checks' due times while increasing the liability. The intention is to squeeze as much money as possible from the poor borrower.<sup>105</sup>

These examples are blatant examples of embezzlement and exploitation on the part of the creditors. The creditors abuse the illiteracy or ignorance of the debtor to extract more than their rights. They actually succeed in using the law to their advantage and get away with it. Other creditors fully exploit the need of the debtor and are able to make him abide to any terms in order to receive his needed cash. Poverty in Egypt is on the rise<sup>106</sup>. To top it, illiteracy amounted to almost 25% in 2015.<sup>107</sup> Hence, "poor civic education"<sup>108</sup> and ignorance of the law lead easily to "abuse and be[ing] abused"<sup>109</sup> by others. A strong legal structure is very necessary to save and solve debtors' issues.

#### **4.3 Incarceration Development in the French Law**

When Egypt promulgated its first civil and penal codes, the French model was closest to mind. The French involvement in the Egyptian politics as well as the constant student missions to France made the French legal system more appealing to the Egyptian legislators and jurists. The check penalty of incarceration was introduced in the French penal code in 1935. Nevertheless, the French system was in a constant state of amendment, adapting to the changing political and economic market requirements.<sup>110</sup>

<sup>105</sup> Abdallah, Interview with legal advisor of Misr el Kheir NGO.

<sup>106</sup> UNdata. More than 25% of the Egyptian population is under the poverty line, according to the Central Agency for Public Mobilization And Support in United Nation's 2011 International Statistics. This is an increasing percentage from the 16.7% in the year 2000.

<sup>107</sup> Egypt Literacy rate according to UNESCO in 2015.

<sup>108</sup> El-Dean, p. 247.

<sup>109</sup> Ibid, p. 247.

<sup>110</sup> Sorour, pp. 670-671; The French Law was adapting to major political and economic changes throughout its development. First it adapted to the "commercial company institution under the second empire", the two world wars, economic crises of the 1970s and the 1980s. Hence, legislative changes took place in 1935, 1955, 1967, 1985 respectively. ElDean, p. 177, footnote 2 quoting Lafont, H. *The French Bankruptcy System* (1994).

First in 1972, the penal sentence related to defaulted checks was substituted with a system of fines.<sup>111</sup> Imprisonment was restricted to repetitious acts of default or fraudulence. By 1991, incarceration of the defaulted debtor was completely abolished after its futility has been proven.<sup>112</sup> Now, the established banking credit system has the upper hand in ensuring a positive and trustful regulation in addition to banking penalties to control the delinquency of any debtor.<sup>113</sup> Hence, at present, the French commercial laws pertaining to faulty debtors are a complete transformation from the original laws promulgated a century earlier.<sup>114</sup>

#### **4.4 Discussion: The Gharemoun Problem**

The provisional incarceration that was exercised by the Islamic legal judge earlier is not available for the debtor today. The incarceration now is a penalty inflicted by the law upon the debtor. This incarceration is not provisional or time limited. It is a final number of years per check or security receipt. Each of the *gharemoun* creditors seeks financial guarantees in the name of the law. The pressure exercised by the incarceration penalties of the checks and the security receipts provides this guarantee.

The bankruptcy/insolvency<sup>115</sup> rules that had successful outcomes in the *shari'a* courts are incorporated into the modern laws. "Bankruptcy legislation has a considerable impact on economic activities carried out within a jurisdiction: it helps in establishing a strong payment discipline that is fundamental for a well functioning market; it ensures the flow of credit by

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<sup>111</sup> Ibid., p. 670-671.

<sup>112</sup> El-Dean, p. 77, quoting De Vauplane, H. and Simart, O. (1997), op. cit., 236-239; Fisher, J. and Bewsey, J. (1997), op. cit., p. 301.

<sup>113</sup> Sorour, pp. 670-671.

<sup>114</sup> Al-Marsafawy, p. 8, footnote 1 French statistics prove that almost 50% of the debts are paid through checks. In England and the USA, this percentage reaches 90%. It is plausible to say that in the USA people use checks more than actual money. The banks have excellent controlling guarantees that render any abuse of the system very difficult. (quoting Antaki Al-Mausu'a (Maussu'at al Hoquq al Tugaria (1958) p. 331.

<sup>115</sup> El-Dean uses the term commercial bankruptcy to distinguish it from the civil bankruptcy, which is basically insolvency (e'ssaar). Hence the above quote relating to bankruptcy is applicable to both bankruptcy and insolvency. The basic difference between the two terms is that in bankruptcy, selling the assets covers the liabilities. In insolvency, selling the assets does not cover the liabilities in part or whole.



instilling confidence in debt repayment, in this regard it represents a final phase of debt collection. It represents the cost of failure, thus, encouraging managers to pay due attention to the long term profitability and short term liquidity of their ventures; it provides down and out debtors with an orderly means of exit; and assists those facing temporary financial difficulties to see their troubles through".<sup>116</sup> Earlier in the Islamic legal system, the bankruptcy or insolvency executions ordered by the judge ensured simply all of the above. The successful economic market that existed throughout the years reflects the sound *shari'a* debt laws. However, according to the New Commercial Code of 1999, the bankruptcy laws are applicable to traders and individuals with large bank accounts. Banking financial restructuring, bankruptcy and reconciliation are the options available for the defaulting trader-debtor and the rich bank clients<sup>117</sup>.

Furthermore, the insolvency certificate for the poor debtor that was granted by the judge earlier to solve a financial situation is also not available in modern time. The insolvency laws are included in the civil law. However, they cannot be applied as the penal codes of the default on checks and security invoices supersede, hence impede the civil solutions. Insolvency is simply not in effect<sup>118</sup>. Judges do not apply it.<sup>119</sup> As to reconciliation for the individual debtors, it is only in the hands of the creditor who got them in prison in the first place.

#### **4.5 The Futility of Incarceration**

Reflecting on the *gharemoun* cases in Egyptian prisons, their penal jail sentence is practically a perpetuation of their insolvency. Once they are out, they have had lost a job coupled with a criminal record, which make it very difficult to financially start anew in a smooth fashion. The

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<sup>116</sup> El-Dean, p. 173 quoting Mizsei, K. (1993), Bankruptcy and the Post-Communist Economies of East Central Europe, p. 3)

<sup>117</sup> Abu-Sha'baan in his article on debts in the United Arab Emirates, claims that the law does not pay attention to the poor debtor. However, as the poverty rate is extremely low in the UAE, the problem with insolvencies started only in 2008 when the world markets crashed.

<sup>118</sup> El-Dean, p. 194, According to El Dean, civil insolvency is not an option for any judge who handles an insolvent individual debtor.

<sup>119</sup> Emad Abdallah, legal advisor of Misr el Kheir NGO, asserts that insolvency is not being accepted by the judges who preside over the *gharemoun* cases.

return of the insolvent prisoner into social life with a criminal record is highly challenging. The social humiliation that follows the insolvent debtor as he is labeled a ‘criminal’ cannot be overseen. An NGO, “Women Prisoners of Poverty: Children of Female Prisoners Association”, that mainly deals with female insolvent prisoners finds that 65% of the women who get out of prison return to prison as they are unable to start a living as ex-criminals; the society does not open a door for mercy.<sup>120</sup> Hence newer cycles of social problems begin. In fact, insolvent debtors are imprisoned with embezzlers and fraudulent debtors. The imprisonment sentence equates the insolvent debtor with a criminal during and after the imprisonment period, a notion against Islamic thought, with the worst repercussions inflicted upon the debtor.

In addition, alms’ giving for *gharemoun* cases in Egypt is understood as an act to satisfy a godly command and it definitely is just that. The alms giving part however always starts after the debtor’s incarceration has taken place. Practically NGOs work on insolvents that are all already prisoners; hence, the damage is already done.

This does not undermine the noble job the NGOs are accomplishing in terms of identifying the poor insolvents in prison, to work out their records with the prison authorities and solve their credit issues with the creditor/s. Many try to find them jobs, as poverty was the main reason they defaulted in the first place. Still, these very same steps could be more effective if they take place with no imprisonment sentence to complicate an already complicated situation.

As mentioned by the legal workers on *gharemoun* cases, there are 71 necessary steps to bail out one insolvent debtor.<sup>121</sup> The effort needed to identify the poor insolvent prisoner, coupled with the needed approach to his creditors, the working out of acceptable solutions, in addition to finalizing the official legal process is exhausting for all parties involved. In addition the process

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<sup>120</sup> Badran, quoting NGO president Nawal Mustafa. According to her, some of these women prisoners are pregnant when they are sentenced to jail. They go to jail, because they are unable to repay money borrowed. These prisoners deliver the newly born babies in jail. As they are poor prisoners, they have no money to register their newly born babies and the state ends up with governmentally unregistered kids.

<sup>121</sup> Emad Abdullah, the legal consultant for Misr el Kheir NGO in discussion with the author, May 2018.

is extremely time consuming and every day that passes equals another day in prison for the debtor.

Nowadays, with the current imprisonment sentences for the *gharemoun*, the general interest of the community is not granted. The legal system is allowing the plaintiff as well as the state to inflict a repetitive incarceration punishment on the debtor. This is more of a punitive measure, than a procedural instrument as was exercised by *shari'a* law in the earlier days.

Finally, the long imprisonment sentences - that may be rounded to reach a century<sup>122</sup>- are sometimes illogical and hard to comprehend. They are simply incommensurate to the act of defaulting on a debt that does not involve neither fraud nor embezzlement on the part of the debtor.

#### **4.6 Suggestions for Solutions**

According to Al-Sanhuri, "Law is nothing other than the offspring of life. It is subject to life, influenced by life and protects life."<sup>123</sup> Therefore, if a need arises, law has to adjust and adapt according to the changing circumstances of a new situation. If it proves its futility, it needs to be reversed in order to realize its intent. The removal of the penal incarceration is the first thing that comes to mind, when discerning the various aspects of justice in the cases of the insolvent debtors. However, the legislature challenges this idea, as they are afraid of the exploitation of the creditor by the debtor that may take place.<sup>124</sup> This is a valid fear. Nonetheless, the application of

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<sup>122</sup> Ibid., another case the NGO is working on is related to a man who has check defaulting penalties for 77 years.

<sup>123</sup> Becher, *The Sanhuri Code*, p. 1 quoting *Wujub Tanqil al Qanun al Madani al Misri wa Aala Ay Assas Yakun hadha al tanqih*, in *Majallat al Qanun wal Iqitsad* 6(1936) pp. 93-94.

<sup>124</sup> The legislature was very aware when drafting this article. In the explanatory memorandum of article 533 and 534, the legislature wanted to assure the honoring of the check in order for the debtor not to abuse his debt or his creditor, hence shaking the base of the commercial system. In fact, the incarceration of the creditor in case of accepting a check while knowing that the debtor does not cover it was removed from the article in order to encourage the creditors to give installment options in order to enhance the commercial activities. Murad, pp. 276-281.

the law has proven that the creditor is able to exploit the debtor and especially the poor debtor. Hence, legal measurements must outline new ways by which the relationship between the debtor and the creditor is well balanced. Legal measurements are necessary to provide the security for the creditor to be able to enter into trustful financial deals and measurements that allow the debtor not to be controlled by the creditor in a suffocating manner - as is the case in Egypt now. The role of the judge that was exercised earlier is not available now. Therefore, rule of law must be flexible enough to adapt to achieve this equilibrium.

The incarceration penalty has proven its futility in France. After reviewing of the *ghremoun* cases in Egypt, the criminal penalty is currently causing economic, social and legal losses. Alleviation of detention for poor insolvent debtors may start gradually by deciding check and security invoice amounts that are up to 1750 LE (\$100) for example. However, any alleviation of the penalty is extremely connected with the economic and social endeavors to provide the necessary trust and solutions for the commercial system. In France, most of the citizens are connected in a credit banking system, not to mention the high literacy rate and the legal awareness. In Egypt, these are yet unsolved issues, and any attempt to address them is time related. Hence, additional solutions could include the following ideas:

Economic suggestions: The provision of governmental institutions that provide installment programs for electric appliances and furniture for newly weds and families.<sup>125</sup> Hence, the debtors are under the immediate supervision by the government. At the same time, calls to cultural changes regarding excessive marriage arrangements need to be addressed. In addition, the government may spread the ideas for financial inclusion and enhance the small and medium enterprise funds.<sup>126</sup>

Social suggestions: NGOs that are collecting alms for the poor prisoners could be more involved in the start of the commercial process. The alms could start a fund for small debtors whose

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<sup>125</sup> Hamdy. Many of the ideas are suggestions by legal and judicial experts who are interviewed in the local media.

<sup>126</sup> The Central Bank of Egypt has been promoting this idea through advertisement in the past two months. Hence, this step is in progress.

monthly checks do not exceed 200 LE (\$12). Hence, instead of collecting alms to bail these debtors out of jail, maybe these monies can be lent to debtors to limit default in the first place. Besides, this step will not leave the poor borrowers preys to greedy creditors. Moreover, NGOs and the government must spread civic education as well as campaigns that warn debtors from the abuses of the creditors, from writing blank checks or security invoices.<sup>127</sup>

Legal suggestions: It is commendable to eliminate the first felony that drove the debtor to jail from his criminal record in order to facilitate finding a job for him/her after the imprisonment sentence. It is important to pronounce to society the non-criminality of these debtors.<sup>128</sup> On the other hand, “One scholar suggests emulating the changes in the French system: by introducing a special system that applies exclusively to corporate bodies, commercial and civil, and maintain the current commercial bankruptcy provisions for individual merchants and civil insolvency for individual non merchants.”<sup>129</sup>

Procedural justice must lead to substantive justice.<sup>130</sup> For example: it is understandable that the judge is not supposed to investigate the intent of every case of check delinquency that comes in front of him. However, if there is proof that the check was used as a security instrument for installments and not as an instrument of fulfillment, then he could move the case to the civil court where the imprisonment sentence is not applicable and where civil bankruptcy or insolvency can be applied.<sup>131</sup> This could deter embezzling creditors from using poor debtors to their favor.

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<sup>127</sup> Already such a campaign has been launched. It advised debtors not to sign blank checks or security invoices. Campaign “*la lil tawq*’ *’ala bayad*”.

<sup>128</sup> Yom Gedid, interview with Nawal Mostafa confirms that the charged female poor debtors are imprisoned in the same area with the criminals who could be sentenced because of fraudulence or embezzlement.

<sup>129</sup> Al-Dean, p. 187, quoting Al-Masry, H., *Bankruptcy*, Cairo; NP 1988.

<sup>130</sup> Khadduri, p.145.

<sup>131</sup> Abu-Sha’baan. “Hal Al-Sheek Adat Wafaa Am Daman Am Kilayhima.” Al-Iqtissadi. 6 Nov. 2016.

In connection with the previous suggestion, the installment contract must be attached to the security receipt in order to directly move the case to the civil judiciary.<sup>132</sup> But then, this requires the attention of the debtor, as the creditor misuses the need of the debtor and would not give him the money unless he signs the separate security receipt.

Clifford Dorn, one of The Theory of Restorative Justice perpetrators, has elucidated that restorative justice is “a philosophy of justice emphasizing the importance and interrelations of offender, victim, community and government in cases of crime and delinquency.”<sup>133</sup> The idea is to get society more involved in the process of the rehabilitation of the criminals. The theory has been developed in order to repair damages done by crimes in society. For example, the movement takes the idea of *deya* from Islamic *Shari'a* as a way to ease tensions between the perpetrators of the crime and the victims. The main goal is not to “deter” crime as much as to “restore harmony of society”.<sup>134</sup> The idea of restorative justice could be a long-term goal for our legislative system. They can introduce the theory first on *gharemoun* prisoners, who have huge difficulties after the release from prison.

There are many ways that can be used in order to achieve justice, especially when its repercussions are so discernible in society. Legal amendments may be long term, but they are the most effective in bringing social harmony to the community.

#### **4.6.1 Al-Sanhuri and the Civil Law**

The Egyptian Civil Code promulgated by Abdel Razzek Al-Sanhuri adopted from the French, the German, the Italian and the English principles along with the *Shari'a* laws.<sup>135</sup> This distinctive approach by Al-Sanhuri reflects many notions of the restorative justice movement mentioned

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<sup>132</sup> Hamdy, “25% Min Al Masgunat Gharemaat.” *El-Bawaba News*.

<sup>133</sup> Hascall, p. 39 quoting Clifford Dorne from Clifford K. Dorne, *Restorative Justice in the United States; An Introduction* 3-4 (Pearson Prentice Hall 2008).

<sup>134</sup> *Ibid.*, p. 37.

<sup>135</sup> Coulson, p. 153.

above. Obviously this was in fact how he saw the law: as means to “social solidarity”<sup>136</sup>, a way to lessen the widening gap between the classes of Egypt after World War II. The Code aimed to “developing models of legal and social flexibility in order to prevent a coercive legal and social structure from leading to a social explosion and an exacerbation of the exiting situation rather than its amelioration”<sup>137</sup>. He included: the doctrines of unforeseen circumstances (*al hawadith al tari’a*), the doctrine of exploitation (*istighla*), the principle of good faith (*husn al niyya*). According to the latter, “contracts are to be observed fairly, without intent to deceive, defraud or mislead”<sup>138</sup>. In addition, Al-Sanhuri was able to add that the debtor in good faith might be granted an extension. Moreover, doubt is interpreted in the debtor’s favor in order to protect the weaker parties in a contract. In short, his codes combine the Islamic legal idea of the *al ‘aqd shari’at al muta’aqedeen* (contracts are to be observed) together with *nazra ila mayssara* (wait until ease...) <sup>139</sup>. Al-Sanhouri was indeed ahead of the curve in his legislations and his law was ahead of its time.

Nonetheless, Egypt has dual jurisdictions governing its economy: the Civil Law of 1949 and the New Commercial Law of 1999.<sup>140</sup> The Egyptian Civil Law 1949 gives the judge the tools to apply substantive justice as understood by the early Islamic jurists and modern legislators of today. The commercial penalties related to the check obstruct the use of this Civil Law for the cases of the insolvent debtors as mentioned earlier. Finally, the law has the tools that will lead to social justice as reiterated by Al-Sanhuri. It is therefore time to attend to the check law in particular and the Criminal Penal Code in general and adapt both to reflect the substantive justice laws aim to reach.

<sup>136</sup> Bechor, *The Sanhuri Code*, p. 67.

<sup>137</sup> *Ibid.*, p. 68.

<sup>138</sup> Bechor, *The Sanhuri Code*, p. 189.

<sup>139</sup> Guy Bechor in his book *The Sanhuri Code, and the Emergence of modern Arab civil law* follows the Egyptian parliament records of the sessions between Al-Sanhouri and the Egyptian parliamentarians who wanted to stick to the French system as was applied in the West at the time and also in Egypt. After intensive deliberations, the parliament approved the exception of general events that would guarantee the breach of contract in case of absolute necessity in order not to “abrupt commercial life”. Bechor, p. 190

<sup>140</sup> El-Dean, p. 178.

## 5. Conclusion

The Muslim jurists were adamant in ensuring the observance of rights and obligations while aiming for justice as highlighted in the revelation and the tradition. The Islamic legal system draws a map of precise steps whereby theoretically and practically, the judges keep the debtors and creditors in control. They are firmly regulated as no party may exploit or abuse the other party. Upon the request of the creditor, the judge detains the defaulted debtor until investigations take place. Once investigations prove an insolvent debtor, the debtor is released to start his financial cycle. If he has possessions, they are sold to satisfy the creditor. If possessions are not enough, the creditor is ordered to wait for the debtor until he repays in the future. The creditor has no control over the body of the debtor, meaning that he may not use him or his work to his benefit as in early Roman times. The financial mobility of the debtor was in constant change reflecting the financial change needed to rise from failure to success. If a criminal factor is behind the debt - whether on the part of the debtor or the creditor - then the legal procedures reflect the penalty which falls under *ta'zir* punishment. In all cases, the debtor is not a criminal and is never treated as such, whether in prison or outside of prison. Any imprisonment is extremely limited and substantive justice was realized on the hands of the judges.

The debts - in all their forms - are treated as legal obligation, whether they consist of personal loans or business loans. Regardless of their scope, whether relating to individual needs or market needs, all debts must be honored in order not to abrupt commercial life. The court registries of 16<sup>th</sup> century Cairo and 17<sup>th</sup> century Istanbul argue for the success of this system. If the legal system is unable to regulate the transactions of the society to the benefit and interest of its community, failure is imminent and devastation is inevitable as was the case with the taxes overwhelmed society of the Oases.

Furthermore, the western legal systems have promulgated laws in order to realize justice. The western systems are in constant adaptation to the national and global developing circumstances in order to provide the tools to successfully move the market towards success. After a long application of incarceration penalties on defaulted debtors, the French legal system realized the futility of incarceration for debtors for the commercial system. Hence, they developed different



measures of control in addition to social and financial restrictions that evolved to completely replace the incarceration rules of earlier times. They developed the bankruptcy rules that also became a security to the economic system. In modern times, the economic system helps the defaulted debtor to arrange his financial position so as to succeed and to overcome his default and the reasons for the default. All procedures are away from prison walls.

In the 19th century, Egypt adopted the western legal system and was successful in promulgating its own civil laws and commercial laws. The need to modernize the laws by codification and the establishment of new legal bodies such as the penal codes 1937 and the civil code of 1949 and the new commercial law 1999 were important stations in the development of the Egyptian legal system. However, the latest law of 1999 still includes the incarceration of the debtor upon default. Even though laws have been promulgated in order to secure the commercial system and adapt to the global market, still these latest laws of 1999 seem to favor the trader and not the individual person. This resulted in the problem of *gharemoun* and *gharemat* in the Egyptian society. The numbers of these defaulted debtors is on hourly rise. These debtors use the check and the security receipt in their dealings. If they fail for reasons beyond their control such as a sudden death or loss of a job, they default on their debt and end up in jail. The Egyptian communities' high poverty and illiteracy rates add to the complication of the problem as these debtors are prey to the abuse of greedy creditors. The result is crowded prisons along with social and economic disasters.

In conclusion, an imminent check imprisonment law change is requested. It should relieve pressures off the individual debtor in particular and the prison institution in general. The *gharemoun* and *gharemat* issue is a complex issue. It needs social awareness on part of the society spreading legal awareness in order to prevent abusive acts. At the same time, the problem is partially an economic problem that requires banking solutions and more banking regulations that reach to the small debtors and allow their re-entry into the financial cycle. Unlike the French society that enjoys a high literacy rate and a strong and controlling banking system, the Egyptian system must be receptive to the demands of its citizens adapting to their needs. The legal system must provide the remedies to reach a just society.

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