

The Egyptian Second Republic: The Future of Litigating Islam Before the Supreme Constitutional Court

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“In the name of God, the Compassionate, the Merciful.
 This is a covenant from Muhammad the prophet
 [governing the relations] between the believers and Muslims . . .
 and those who followed them and joined them and fought with them.
 They constitute one Ummah [community]. . .”¹

INTRODUCTION

Egypt post-Mubarak is still in transition. Mubarak’s pursuit in grooming his son for the Presidency threatened the very essence of the republic. Key political forces as well as the silent majority were unified under one slogan: “the people want to bring down the regime.” Once the regime went down, this rainbow coalition disagreed on what the second republic would look like. One issue was essentially the dividing line between this coalition: the relation between Islam and the state.

Religion is a timeless fixture in Egypt. The Preamble of the 2012 Constitution introduces Egypt as “the oldest state that has. . . opened the way to monotheism and the knowledge of the Creator, [and] embraced God’s prophets and messages[.]” In this sense, the relation between the individual and his God is a major component of the Egyptian culture. However, the relation between Islam and the state is far from being settled in the Egyptian mind. This problematic relation relationship was apparent during the transition process that followed the recent uprising in Egypt.

In pursuit of a constitutional document that governs an “orderly transition,” the Supreme Council of the Armed Forces (SCAF) offered the Egyptians two options in a referendum: either to vote “yes” to eight amendments and keep the 1971 Constitution alive, or to vote “no” and

1. Arguably, the first written constitution in the world: *MITHAQ-I-MEDINA* (CONSTITUTION OF MEDINA), 622 A.D. See ALFRED GUILLAUME, *THE LIFE OF MUHAMMAD: A TRANSLATION OF IBN ISHAQ’S SIRAT RASUL ALLAH* 231-32 (1955).

bury the Constitution altogether.² To be clear, the 1971 Constitution was mostly criticized due to the extensive powers assigned to the President and due to the new constitutional amendments arguably introduced to pave the way for Mubarak's son to run for the presidency. It would not be accurate to claim that this Constitution was being criticized due to its position on the relation between Islam and the state. This phenomenon was evidenced by the topics that were addressed by the eight proposed amendments. None of them addressed the relation between Islam and the state. None of them addressed Article Two, which contained the Shari'a Clause.

One of two scenarios was supposed to take place as a result of the referendum. First, the majority of the voters vote "yes." Under this scenario, the 1971 Constitution would continue to govern the transition process after limiting the President's powers, removing rigid restrictions on candidacy for presidential elections, and keeping Article Two as it is. Second, if the referendum was rejected, the SCAF would have to approach the major political forces to decide how to proceed from this point.

In brief, the 1971 Constitution to governing power was at stake as the transition process after amending it and the referendum was supposed to be an exercise in weighing its popularity. What happened in reality was completely different. The political Islam groups campaigned for a different cause: weighing the popularity of the Shari'a clause and Article Two.

The Shari'a Clause in Article Two of the 1971 Constitution of Egypt is more than a component of the Egyptian legal culture. Shari'a literally, in Arabic, means a "way." In Islamic legal thought, Shari'a is the way in pursuit of justice, which starts by the divine texts and ends with human understandings. In the minds of Muslim laypeople, Shari'a means justice.

It is fair to say that imposing the Shari'a Clause in this context of the referendum created an irrational and misinformed fear that burying the 1971 Constitution means eliminating the Shari'a, and ultimately nostalgia in pursuit of justice, from the Egyptian culture. "The imposition of Article 2 on the debate [over the amendments] was for the most part the handiwork of the Salafist movement"³ and "Salafists were among the

2. Kristen Stilt, *Assessing Tahrir's First Ballot Box*, FOREIGN POLICY (Mar. 21, 2011), *available at* http://mideast.foreignpolicy.com/posts/2011/03/21/assessing_tahrir_s_first_ballot_box.

3. Salma Shukrallah & Yassin Gaber, *What Was Religion Doing In the Debate on Egypt's Constitutional Amendments?*, AHARAM ONLINE (Mar. 22, 2011), *available at*

fiercest advocates of the ‘Yes’ vote, declaring it a religious duty for all Muslims, portraying the ‘No’ campaigners as Christian and secularist ‘enemies of Islam.’”⁴ While it is hard to recognize how far imposing Article Two on the debate over the amendments affected the outcome of the referendum, it might help us understand how the SCAF acted upon the result of the referendum. Although 77.2 percent of the voters said “yes,” the SCAF issued a constitutional document containing sixty-three articles that buried the 1971 Constitution.⁵ Realizing that the referendum was portrayed as addressing the Shari’a instead of heeding the 1971 Constitution, the SCAF took a middle ground: a new constitutional document that buries the 1971 Constitution and preserves the Shari’a clause among other articles.

However, the March 2011 Constitutional Declaration did not solve the ambiguity of the relationship between Islam and the state. Article 2 of the 1971 Constitution appears unchanged as Article 2 of the 2011 Declaration. The military council simply deferred the issue to be solved after the country’s transition process ended, when a new president, parliament, and Constituent Assembly would presumably be charged with drafting a new constitution.

While Egyptians agreed on the need to accomplish these three tasks—electing a president, electing a parliament, and writing a new constitution—they strongly disagreed about the sequencing of the these tasks. It is “the chicken-and-egg problem faced in all transitions—that you cannot elect new institutions until there is a constitution, but that you cannot have a constitution without electing a body to discuss and approve it.”⁶ Tunisia, for example, elected a constituent assembly with a one-year mandate after which a parliament was elected under the new

<http://english.ahram.org.eg/NewsContent/1/64/8267/Egypt/Politics-/What-was-religion-doing-in-the-debate-on-the-Const.aspx>.

4. *Id.*

5. For more details about the constitutional declaration, see Nathan J. Brown & Kristen Stilt, *A Haphazard Constitutional Compromise*, Commentary, CARNEGIE ENDOWMENT FOR INT’L PEACE (Apr. 11, 2011), available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=43533>; see also Nathan Brown & Mara Revkin, *Egypt’s Supreme Court Ruling on the Presidential Election Law: Road Block or Minor Speed Bump for the Military?*, ATLANTIC COUNCIL (Jan. 30, 2012), available at <http://www.acus.org/egyptsource/egypt%E2%80%99s-supreme-court-ruling-presidential-election-law-road-block-or-minor-speed-bump-mi>.

6. Marina Ottaway, *Egypt’s Transition: Finding a Way Out of the Vicious Circle*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Feb. 6, 2012), available at <http://carnegieendowment.org/2012/02/06/egypt-s-transition-finding-way-out-of-vicious-circle>.

constitution.⁷ Egypt, however, chose to elect institutions for the long term while the new constitution not only might change their own powers but even the rules of the political game. This choice led to “a deeply flawed transition process”⁸ and became another element of confusion with regard to the process of defining the relation between Islam and the state in a democratic way.

In fact, the sequence of fulfilling these three tasks proved to be vital and that meaningful elections alone do not make a meaningful democracy. “Egypt’s Brilliant Mistakes,” as Professor Marc Lynch described it, led to “a meaningful Egyptian election, in which nobody knows who will win and the outcome really matters.”⁹ It might be true that the elections were meaningful if one determines that Egypt went through the process of fulfilling the three tasks. However, others might argue that the elections do not seem meaningful in light of the outcome of the transitional process not reflecting many political realities. Overall, it is hard to assume that the outcome of the transitional process represents a cornerstone of an emerging democracy built upon the rule of law in both its procedural and substantive senses.

Egypt chose to have a Parliament that will elect a Constituent Assembly assigned with drafting a new Constitution upon which a President will be elected. The parliamentary elections took place in January 2012 and ended with political Islam groups (the Muslim Brotherhood and Salafis) winning 70% of seats of the two chambers of the Parliament.¹⁰ This Parliament chose the 100 members of the Constituent Assembly tasked with drafting a new constitution. This first Constituent Assembly was dissolved by a court order for including members of the Parliament.¹¹ A few days after the Parliament formed a second Constituent Assembly, the Supreme Constitutional Court (SCC) dissolved the Parliament’s lower chamber due to the unconstitutionality of the Parliamentary Elections Law for violating the principle of equal

7. *Id.*

8. *Id.*

9. Marc Lynch, *Egypt’s Brilliant Mistakes*, FOREIGN POLICY (May 22, 2012), available at http://lynch.foreignpolicy.com/posts/2012/05/22/egypts_brilliant_mistakes.

10. David D. Kirkpatrick, *Islamists Win 70% of Seats in the Egyptian Parliament*, N.Y. TIMES (Jan. 21, 2012), available at <http://www.nytimes.com/2012/01/22/world/middleeast/muslim-brotherhood-wins-47-of-egypt-assembly-seats.html>.

11. Marina Ottaway, *Egypt: Death of the Constituent Assembly?*, CARNEGIE ENDOWMENT FOR INT’L PEACE (June 13, 2012), available at <http://carnegieendowment.org/2012/06/13/egypt-death-of-constituent-assembly/brzn>.

opportunity.¹² These legal developments affected the transitional process on different grounds. Dissolving the lower chamber of the Parliament threatened the legitimacy of both the upper chamber of the Parliament as well as the Second Constituent Assembly elected by this Parliament. The road map for the transitional process has changed as the Presidential elections were moving forward while the process of drafting the Constitution was stumbling. That meant that Egypt will have a President before having a Constitution that defines the Presidential powers and, even more importantly, the legitimacy of the institution drafting this Constitution is questionable.

The presidential elections that took place in June 2012 introduced Egypt to its first Islamist president: Mohamed Mursi.¹³ Mursi is a Professor of Engineering with his PhD from the United States, a leading member of the Muslim Brotherhood and the former chairman of its newly-established political arm: the Freedom and Justice Party (FJP). Faced with numerous political, economic and social challenges, Mursi took many decisions that sounded politically necessary but were legally questionable. His decision to recall the dissolved chamber of the parliament was overturned by the SCC. His constitutional decree overturning the last constitutional decree issued by the SCAF a few days before announcing the results of the Presidential elections raised questions regarding his constitutional power to issue such decrees. He also took other decisions that were both legally and politically controversial. For example, he issued a temporary constitutional decree ending once the new Constitution is approved; among other things, this decree immunizes his decisions from judicial review, immunizes the upper chamber of the parliament as well as the Constituent Assembly from judicial dissolution and dismisses the Public Prosecutor from his office by appointing a new one. This decree brought Mursi in direct confrontation with the Judiciary that felt a major breach of its independence. As the SCC was supposed to decide on dissolving the upper chamber of the Parliament, Mursi's supporters surrounded its building and prevented its justices from getting in, forcing the court to suspend its activity. Eventually, Mursi signed into law Egypt's 2012 Constitution after it was approved by the Constituent Assembly and

12. Nathan J. Brown, *Cairo's Judicial Coup*, FOREIGN POLICY (June 14, 2012), available at http://mideast.foreignpolicy.com/posts/2012/06/14/cairo_s_judicial_coup.

13. David D. Kirkpatrick, *Named Egypt's Winner, Islamist Makes History*, N.Y. TIMES (June 24, 2012), available at <http://www.nytimes.com/2012/06/25/world/middleeast/mohamed-morsi-of-muslim-brotherhood-declared-as-egypts-president.html?hp>.

passed in a referendum. It is not clear how far the harm that occurred by this clash with the Judiciary could be repairable after having the new Constitution enforced.

The type of relationship between Islam and the state was left to the Constituent Assembly. Despite the serious legal and political challenges that faced that institution,¹⁴ it could host domestic political debates over the role of Islam in the public sphere. The debate over the referendum revealed that there are many critical questions that need answers. Among these questions: what are the origins of the Shari'a Clause in the 1971 Constitution and why was it amended in 1982? What is the scope of this clause in terms of its effects to Muslims and non-Muslims? And, what effects did this Clause have that left different groups unsatisfied as evidenced in the debate over the referendum? The Constituent Assembly was supposed to be a proper forum where all concerns could be raised and a national consensus be reached to articulate answers to all these questions.

To be clear, building a national consensus with regard to the relationship between Islam and the state requires more than merely evaluating the origins, scope, and effect of the Shari'a Clause. But, this Clause seems to be the starting point of many political debates over the issue. Two months after Mubarak stepped down, Alexandria University School of Law hosted a first of its kind debate in Egypt between Sobhi Salih, a senior leader in the Muslim Brotherhood (MB), and Amr Hamzawy, a professor of Political Science at Cairo University and a liberal activist. They disagreed about many issues but agreed about one thing: Islam does not fit with the doctrine of separation between religion and state.¹⁵ The next struggle will be between liberal Islam and

14. Nathan Brown, *Egypt Tries to Reconstitute Itself*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Sep. 6, 2012), available at <http://www.carnegieendowment.org/2012/09/06/egypt-tries-to-reconstitute-itself/drsl>

(noting that "[t]he drafting body seems to be making some progress and even appears to be operating in a vaguely consensual fashion, with just enough intemperate comments and controversial proposals to spice up deliberations and enliven headlines but not so many as to derail the effort.").

15. Wissam Ahmed, *Subhi and Hamzawy: No Separation Between Religion and State*, MASRAWY NEWS (in Arabic) (Apr. 27, 2011), available at http://www.masrawy.com/news/egypt/politics/2011/april/27/hamzawy_religion.aspx?ref=rss (last visited May 21, 2011); see also Nathan Brown, *Post-Revolutionary Al-Azhar*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Oct. 3, 2011), available at <http://carnegieendowment.org/2011/10/03/post-revolutionary-al-azhar/8kit> (noting that "[n]obody in Egypt is arguing for separation of religion and state; disputes center around the terms and ways in which they will interact.").

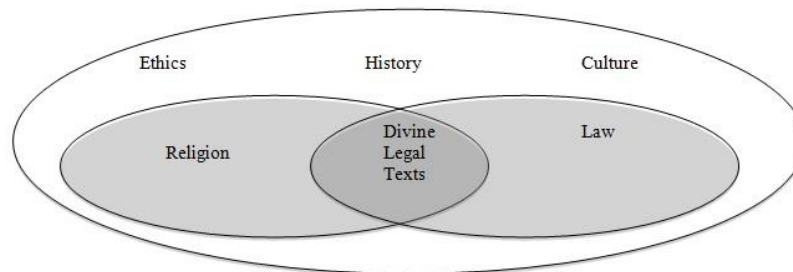
conservative Islam, as opposed to the commonly viewed division between liberal constitutionalism and Islamist constitutionalism. To a great extent, this struggle will reflect itself in many forums, such as in academia, the Parliament, and the Judiciary. But, it is fair to say that the Supreme Constitutional Court will play a major role in interpreting the Shari'a Clause and how it works side by side with other articles of the constitution.

This article explores the future of litigating Islam in the Egyptian Second Republic.¹⁶ In particular it discusses the role that the Supreme Constitutional Court of Egypt can play in paving the way for an a pluralistic understanding of Islam. While reviewing the constitutionality of the legislation, the Court's interpretation of the Shari'a Clause and how it will affect the legal system will be vital in defining the relationship between Islam and the state and what role Islam will play in the public sphere. This article explores how litigating Islam before the SCC will reveal a form of governance that is neither secular (as in Turkey) nor theocratic (as in Iran). Rather, it will reveal a civic state with an Islamic identity that is based in Intell-political Islam rather than theo-political Islam as I will discuss later. Part II examines the revival of constitutionalism in the Second Republic of Egypt. Part III explains the role the Shari'a Clause plays in stabilizing the Egyptian legal system by bridging the gap between contemporary Egyptian legal institutions and its Islamic origins. Part IV discusses the need to revive a formula of checks and balances while understanding the Shari'a clause in order to drive its litigation through more legal arguments rather than political compromises. Finally, part V explores how far the SCC can guard the emerging civic state while pioneering the transition and judicializing a pluralistic understanding of the Shari'a Clause. One final remark is necessary before proceeding to concerns regarding the usage of the phrase "relationship between Islam and the state" in this article. I believe this phrase is more accurate than the phrase "relationship between religion and the state." In Islamic thought, faith covers one's acts in both

16. A country's "second republic" refers to the emergence of government that adopts new policies and characteristics that reflect political realities or values different than the ones that prevailed before. Originally, it was coined in French (*Deuxième République*) to refer to the republican government of France from the deposition of Louis Philippe after the 1848 Revolution until the initiation of the Second Empire after the 1851 Coup. While France recognized its fifth republic in 1958, the term "second republic" continues to be used in various contexts. *See generally* THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (2009). Here, I use the term "second republic" to refer to the current, post-revolution Egyptian regime as it develops.

the religious practices and the secular interactions. In other words, Islam is *din wa dunya* (a religious faith and a secular way of life). See Figure (1) below.

Figure (1) Islam: a religious faith and a secular way of life



I. REVIVAL OF CONSTITUTIONALISM IN THE EGYPTIAN SECOND REPUBLIC

A. *Three Constitutional Dilemmas Led to the Uprising*

The Egyptian uprising that ended Mubarak's 30-year rule in 18 days began to foment decades ago. Though many events contributed to the uprising, three main events have directly led to it. First, the April 6 Youth Movement emerged in 2008 as an Egyptian political Facebook group, following tactics of similar movements in Serbia, Georgia, and the Ukraine. Comparable Facebook groups soon followed. Second, Mohamed ElBaradei, a Nobel Peace laureate and one of the country's leading democracy advocates, returned to Egypt in February 2010 as a potential candidate for the 2011 elections. Last, but not least, the Egyptian parliamentary elections that took place in November 2010 were reportedly the most fraudulent ever. Mubarak's party won more than 90 percent of the seats.

It is fair to say that the uprising embodies a continuing struggle for constitutionalism in Egypt.¹⁷ The three main events that led to the

17. By constitutionalism, I mean the norms that create legislative, executive, and judicial powers as well as the norms that limit these powers in the form of civil rights like free expression and association, equality, and due process of law. This struggle for constitutionalism is gaining momentum not only in Egypt but also in other parts of the Arab world. For example, in Jordan, political activists are calling for the establishment of a constitutional court as a vital tool to maintain the separation of powers. See Hani

revolution are directly linked to constitutional dilemmas that hindered any serious political reform in Egypt over the past 30 years. The first constitutional dilemma was related to the official recognition of new political parties. Mubarak's regime heavily controlled the recognition of any new political party and the activities of existing parties through the Political Parties Committee (PPC).¹⁸ As the Committee had excessive discretionary powers, it turned down many requests for official recognition of different political parties.¹⁹ One of the parties that sought recognition was "el-Wasat el-Gadid," a moderate Islamic party,²⁰ which was given legitimacy by a court decision immediately following the revolution. Alternatively, many Facebook groups and civic organizations emerged to bring attention to social grievances that were politically ignored for a many years.²¹ Immediately following revolution, SCAF

Hazaimah, *Constitutional Court Vital Ingredient of Reform – Activists*, THE JORDAN TIMES (Apr. 17, 2011), available at <http://www.jordantimes.com/index.php?news=35469> (last visited May 21, 2011); Algerian President Abdelaziz Bouteflika vowed to make legislative and constitutional reforms before May 2012 Elections to enhance the role of political parties. See *President Vows Changes to Constitution, Electoral Law*, FRANCE24 (Apr. 16, 2011), available at <http://www.france24.com/en/20110415-algerian-president-bouteflika-announce-reforms-democracy-economic-development> (last visited May 21, 2011).

18. For more details about the Political Parties Committee, see TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPEMENT IN EGYPT 94-95 (2007).

19. These excessive discretionary powers were not subject to judicial review. *Id.* at 94 n.16. The ability of administrative courts to overturn decisions of the Political Parties Committee (PPC) was weakened in 1981. Law 30/1981 mandated that appeals of PPC decisions would be reviewed by an exceptional body of 'public figures' appointed by the minister of Justice and on approval from the state-dominated Supreme Council of Judicial Bodies.

20. The founder of *el-Wasat el-Gadid* (the New Center Party) is Abu el-Ala Mady, a former member of the Muslim Brotherhood. The Brotherhood criticized him for trying to split the movement. For more details about the ideological split inside the Brotherhood, see BRUCE K. RUTHERFORD, THE STRUGGLE FOR CONSTITUTIONALISM IN EGYPT: UNDERSTANDING THE OBSTACLES TO DEMOCRATIC TRANSITION IN THE ARAB WORLD (Ph.D. Dissertation, Yale University, 1999) (mentioning that "beyond these generalities, the leadership is deeply divided over the type of state the MB seeks and how it will be attained" and concluding that "[t]he ideological split within the [Muslim Brotherhood] reflect a broader fragmentation that has rendered the organization far less coherent and effective that it was in the 1970s.") *Id.* at 407, 412.

21. The last few years of Mubarak's regime witnessed civic organizations' increased interest in good governance issues like transparency, accountability, and fighting corruption. Of course, such increasing interest raised a lot of tensions with the regime. For more details, see Adham A. Hashish, *Fighting Corruption: Civil Government under Development Law*, 28 ARAB J. POL. SCI. 63 (2010) (in Arabic).

approved a new law “easing the curbs that choked political life under deposed President Hosni Mubarak.”²²

Second, Article 76 of the Egyptian 1971 Constitution, as amended in 2007, imposed draconian restrictions on both partisan and independent presidential candidates—a move allegedly tailored to guarantee that either Mubarak or his son would be the next president.²³ Once Mohamed ElBaradei returned to Egypt, his followers formed the “National Coalition for Change” which called for free and fair elections, constitutional reforms, and the abolishment of the emergency law. The Muslim Brotherhood, the biggest opposition bloc in the People’s Assembly and the largest Islamic political group in Egypt and the world, announced its support for Mr. ElBaradei’s demands “for amending the constitution to allow independents to run for president and abolishing [the] emergency law [that] curtails political activity and has been in place since 1981.”²⁴

The third dilemma is related to the constitutional safeguards of free and fair parliamentary elections. This issue has two dimensions. On the one hand, after the 2000 decision²⁵ of the SCC, stating that elections must be placed under full judicial supervision to comply with Article 88 of the Constitution, elections to the People’s Assembly and Shura Council in 2000 and 2005 were held under full judicial supervision. This resulted in an increase in the number of opposition seats in the parliament. The 2005 Parliamentary elections ended with the Muslim Brotherhood winning 20 percent of the seats of the People’s Assembly. However, as Mubarak in 2007 decided to amend Article 88 limiting the judicial supervision, the 2010 election ended with the ruling National Democratic Party (NDP) winning more than 90 percent of the seats. On the other hand, Article 93 of the Constitution empowered the Court of Cassation to only investigate cases of electoral fraud. The final saying on appeals is left to the Parliament itself. As the Parliament often ignored the recommendations of the Court of Cassation, activists called for an

22. See *Factbox: New Law Opens Door to Political Parties in Egypt*, REUTERS (Mar. 28, 2011), available at <http://www.reuters.com/article/2011/03/28/us-egypt-parties-idUSTRE72R3IZ20110328>.

23. Ahmed Shalaby & Yousry el Badry, *Gamal Mubarak: I was going to run for president*, AL MASRY AL YOUM (Apr. 27, 2011), available at <http://www.almasryalyoum.com/en/node/415512> (last visited May 21, 2011).

24. *Islamists Backs ElBaradei’s Reform*, THE EGYPTIAN GAZETTE (Apr. 17, 2010), available at <http://213.158.162.45/~egyptian/index.php?action=news&id=6575> (last visited May 21, 2011).

25. Case 11, Judicial Year 13, issued July 8, 2000.

amendment of Article 93 to give the Court of Cassation the final say on appeals.²⁶

B. The 1971 Constitution: Three Competing Forms of Constitutionalism

Yet the struggle for constitutionalism in modern Egypt²⁷ started long before Mubarak's assumption of the presidency. In his interesting study "Struggle for Constitutionalism in Egypt,"²⁸ Bruce K. Rutherford explains the development of the Egyptian constitutionalism in the modern history. In his words, there are "three critical junctures that shaped the development of Egyptian constitutionalism: 1882, when Egypt's Parliament passed the 'Fundamental Law' that first asserted the authority of Parliament to constrain the executive; 1923, after Egypt received its formal independence from Britain and drafted a constitution that created its first independent government; and, 1964, when the regime promulgated a constitution that reflected the goals of the Nasser revolution."²⁹ In Rutherford's analysis, he explains that "three conceptions of constitutional order compete in Egypt and are embedded in distinct institutions: Liberal Constitutionalism, which is embedded in the judiciary; Nationalist Constitutionalism, which is grounded in the Presidency; and, Islamic Constitutionalism, which is rooted in the Muslim Brotherhood." He concludes that "[t]he period 1882 to 1969 resulted in each form of constitutionalism becoming embedded in an institution. The subsequent competition of these forms of constitutionalism in the 1970s and 80s reflected not only the clash of ideas, but also the clash of these institutions."³⁰

26. Gamal Essam El-Din, *Reforming the Constitution*, AL AHAM WEEKLY (Feb. 10-16, 2011), available at <http://weekly.ahram.org.eg/2011/1034/sc43.htm>.

27. Modern Egyptian history tends to begin in 1882 when the Ottoman Khedivate of Egypt became part of the British sphere of influence. However, the first Egyptian Revolution of 1919 created the first independent Egyptian state in modern history: the Kingdom of Egypt (1922-1953). The Kingdom of Egypt had two constitutions: the 1923 Constitution and the 1930 Constitution. The second Egyptian Revolution of 1952 led by a group of army officers resulted in abolishing the monarchy and establishing the Republic of Egypt in 1953. This regime, the first Republic of Egypt, had six constitutional documents: 1952, 1953, 1956, 1958, 1962, and 1971. In 1954, a constitution was drafted but never adopted. The third Egyptian Revolution of 2011 resulted in suspending the 1971 Constitution, adopting the 2011 constitutional declaration and, subsequently, the 2012 Constitution.

28. RUTHERFORD, *supra* note 20.

29. *Id.* at 114.

30. *Id.* at 202.

Indeed, the 1971 Constitution reflected a formula that allowed the three institutions, and ultimately three forms of constitutionalism, to co-exist. Part V of this Constitution, titled “System of Governance,” allocates the decision-making powers among seven different bodies each is addressed in a separate chapter. These bodies are: the Head of State, the Legislature, the Executive, the Judiciary, the Supreme Constitutional Court, the Armed Forces, and the National Defence Council, and the Police.³¹ The initial reading of this constitutional allocation of powers reveals an intention by the drafters to strike a balance between three political bodies, the Presidency, the Legislature, and the Executive, on the one hand, and three non-political bodies, the Judiciary, the Armed Forces, and the Police on the other. While the first category can bring change to the Egyptian society, the second category can bring stability to the Egyptian bureaucracy. Finally, the Supreme Constitutional Court serves as a moderator of issues that arise between the forces of stability and the forces of change. However, during Mubarak’s era, the practice went far away from theory. The Presidency controlled both the Executive and the Legislature, promoted stability instead of change, and relied heavily on the Police as a force of stability. This not only changed the constitutional nature of the Police from a non-political to a political body, but has also led some prominent judges to play a political role calling for change and reform.³²

31. An eighth chapter was assigned to the Socialist Public Prosecutor, which was aimed to be a “a state organ that was originally presented to Egyptians as an ombudsman but in fact was used for an odd mix of political and corruption cases.” As this body “had lost much of its political role” and was “no longer mentioned” and “presumably abolished,” its existence was getting more theoretical than practical. Ultimately, its chapter “was replaced with an entirely new text allowing for the stipulation of an anti-terrorism law” according to the 2007 Constitutional Amendments. Nathan J. Brown, et al., *Egypt’s Controversial Constitutional Amendments*, CARNEGIE ENDOWMENT FOR INT’L PEACE (2007) available at http://www.carnegieendowment.org/files/egypt_constitution_webcommentary01.pdf.

32. This explains the judicial activism that the Supreme Constitutional Court preached and practiced during the 80s and 90s. In the same sense, this explains also the political activism that the Judges’ Association practiced during the last years of Mubarak’s era. For more details, see MAHMOUD HAMAD, *WHEN THE GAVEL SPEAKS: JUDICIAL POLITICS IN MODERN EGYPT 4* (PhD Dissertation, University of Utah, 2008) (noting that “[t]he political role of the Egyptian Judiciary is central to understanding the dynamics of Egyptian politics. Political analysts, academics, and human rights activists highly esteem the Egyptian Supreme Constitutional Court (SCC) as a major democratizing force in the country.”).

C. The 2011 Constitutionalism: Muslim Liberals v. Islamists

Now, the question is: will this constitutional formula survive in the Egyptian Second republic? At the moment, it is hard to predict the main characteristics of the Egyptian Second Republic. Many basic questions have yet to be answered. For example, it is not clear how the new constitution will define the national identity of the state. Even before its independence in 1922, Egypt suffered and continues to suffer an identity crisis. Egyptian history is a testament to the inability of one to render a simple nationalistic characterization.³³ Another example is the type of the political system. Egypt has experienced both the parliamentary system (1922-1953) and the presidential system (1953-2011). The last example regards the relationship between the state and Islam. Despite the fact that approximately 90 percent of the Egyptian population has been Muslim for a long time, this relationship has been a dramatically controversial issue only during the late 1970s. Even with the emergence of the Muslim Brotherhood as a social movement in 1928, and its transformation into a political force opposing the British rule in Egypt in 1936, only in 1970s did Egypt witness a rapid expansion of Islamic political groups.

In brief, as constitutionalism revives in Egypt and political ideologies interact with the legal institutions, the SCC will witness a form of cases litigating Islam, i.e. in relation to the Shari'a Clause, between Muslim and non-Muslim liberals and Islamists. The next section explores how the relationship between Islam and the state has evolved in contemporary Egypt, and how such evolution revealed itself in Article Two of the 1971 Constitution and the SCC's jurisprudence.

II. STABILIZING THE EGYPTIAN LEGAL SYSTEM THROUGH THE SHARI'A CLAUSE

Article two of the 1971 Constitution states: "Islam is the religion of the state and Arabic its official language, principles of Islamic Shari'a are the chief source of legislation." Conventional literature deals with Article Two as if all its components have the same historical origin and same weight. However, accurate interpretation of Article Two requires

33. The main characters of the Egyptian identity have Islamic, Arabic, and African roots. Nasser's regime (1956-1970) relatively succeeded in drafting a balanced identity that combined all the three elements as he explained it in his book on the philosophy of the revolution. See GAMAL ABD AL-NASIR, EGYPT'S LIBERATION: THE PHILOSOPHY OF THE REVOLUTION (1955).

dividing it into three different clauses: the State Religion Clause, the Official Language Clause, and the Shari'a Clause. In this sense, one can understand the different circumstances surrounding the incorporation of two different clauses, which have been mistakenly equivocated: the State Religion Clause and the Shari'a Clause.

A. The State Religion Clause of Article Two

The State Religion Clause appeared for the first time in Egyptian legal literature when it was incorporated in the 1923 Constitution. This was the first constitutional document that Egypt had as an independent nation after ending its status as a British protectorate in 1922. The Committee that drafted the 1923 Constitution consisted of 30 members; some of them were independent, and others were affiliated with political parties.³⁴ There was not a single Islamic political group at that time in Egypt, and the Committee members included, among others, a Christian religious leader,³⁵ four Christians, and a Jewish businessman. The state religion clause was suggested by Mohammed Bakhit, the former Mufti of Egypt at that time, and upon voting unanimously, the clause passed without reservation.³⁶ In brief, Islam was introduced as a state religion among the articles addressing the national identity. This view was prevailing among the members of the committee, Muslims and non-Muslims. However, at the time, the importance of incorporating this clause and what its justification was unclear.

State religion clauses in constitutional documents of different European countries that succeeded the Roman Empire could be justified as a model. The Roman Empire persecuted Christianity during the 2nd and 3rd centuries, until it changed its position through the Edict of Milan (313 A.D), which "held the state to be neutral with regard to religion."³⁷ As the Empire shifted to a somewhat hostile stance towards Pagans, Emperor Theodosius established a single Christian doctrine as the state's

34. See Tariq El Bashri, *About Article II of the Constitution*, AL AHRAM (Feb. 28 2007), available at <http://www.ahram.org.eg/Archive/2007/2/28/OPIN1.HTM> (in Arabic) (last visited May 21, 2011); see also the second part of the article, AL AHRAM (Mar. 1, 2007), available at <http://www.ahram.org.eg/Archive/2007/3/1/OPIN2.HTM> (last visited May 21, 2011). Tariq el Bashri is a prominent Egyptian intellectual, former judge, and the head of the Constitutional Amendments' Committee that was formed after Mubarak stepped down.

35. John XIX, Deputy Patriarch who became later the Patriarch from 1928 to 1942.

36. El Bashri, *supra* note 34.

37. ERWIN FAHLBUSCH, *THE ENCYCLOPEDIA OF CHRISTIANITY: VOLUME 5* 189 (2008).

official religion. In that sense, one may understand how state religion clauses, or in fact “state church” clauses, have Roman origins. While the Empire existed before the emergence of Christianity, and while it had once aggressive policies towards Christians, adopting a state religion clause in the basic laws would reflect the changing policies of the Empire. In this case, the state religion clause is sort of a *de jure* norm intended to end existing *de facto* norms.

This is not the case with Islam. Before the emergence of Islam, no state or any other form of body politic existed in the Arabian Peninsula. It was Islam itself that established a body politic that started with a city, Madinah, then became a state, and then turned later into an Empire. Even the nations, like Egypt, that already had a sort of political system at that time when they joined the emerging Empire, did not portray Islam as a single state religion. Islam emerged as a *de facto* norm, i.e. it co-existed with other *de facto* norms.³⁸ This explains how Egypt, which became part of the Muslim Empire in 641, continued to have a Christian and Jewish population at the time it had its first constitution in 1923. This formula indirectly reflected itself in the first constitutional document in Islamic history; i.e. Charter of Madinah *Dustur al Madinah* in 622.³⁹ Moreover, this formula reflected itself directly in the first state religion clause in Islamic history, the 1876 Ottoman Constitution.

Apparently, it is the first Ottoman Constitution that turned Islam from a *de facto* norm, i.e. the majority’s religion, into a *de jure* norm, i.e. state religion. Article 11 states that “Islam is the state religion. But, while

38. Among the topics that deserve further studies is the contribution of the Muslim philosopher, jurist and scientist Ibn Rushd (Averroes) to the notion of secularism and its echo in other Islamic political thought such as the controversial *Al-Islam Wa Usul Al-Hukm* (Islam and the Foundations of Governance) by Ali Abdel Raziq (1888-1966).

39. See BARAKAT AHMED, *MUHAMMED AND THE JEWS: A RE-EXAMINATION* (1979). Interestingly, the prologue of chapter II quoting the words of Francis Edwards Peters states:

... the concept of the *ummah* as a political confederation of tribes and clans, including non-Muslims, Jewish ones, had inevitably to yield to Muhammad’s original understanding of a body whose foundation may be ethnic but whose reason for being is shaped by the divine purpose of salvation. The Jews were such an *ummah*, and in Medina they were more than just a historical and literary illustration of a theological point; they were a political reality.

See also FRANCIS E. PETERS, *ALLAH’S COMMONWEALTH: A HISTORY OF ISLAM IN THE NEAR EAST, 600-1100 AD* (1973). A similar notion was recently mentioned by Ahmad Kamal Abu Al- Majd, a prominent Egyptian law professor in Egypt in an interview at Orbit Network’s program *al-Qahera al-Youm* (Cairo Today) (May 17, 2011), available at http://www.youtube.com/watch?v=w1vzwD4zR58&feature=player_embedded.

maintaining this principle, the state will protect the free exercise of faiths professed in the Empire, and uphold the religious privileges granted to various bodies, on condition of public order and morality not being interfered with.”⁴⁰ Interestingly, compared to the 1971 Egyptian constitution, this article was not among the articles that state the basic constituents that identify the Empire (Articles 1-2). It was among the articles that state the public rights of Ottomans (Articles 8-26). The fact that this constitution was “based on models of the Belgian Constitution of 1831 and the Prussian constitution of 1850”⁴¹ explains the whole situation. Article 12 of the Prussian Constitution of 1850, titled “State Religion,” states “[t]he Christian religion shall be taken as the basis of those state institutions which are connected with the exercise of religion without prejudice to the religious liberty guaranteed by Article 12.”⁴² This explains how the state religion clause was transplanted into the 1876 Constitution of the Ottoman Empire, and eventually to many constitutions in Arab nations that succeeded the Ottoman Empire with little, if any, significance in practice.

A good example of how Islam became a *de jure* norm that has a role in the public sphere comes from the Egyptian Civil Code that was mainly drafted by Jurist El-Sanhuri in 1941 and went through several revisions until its enforcement in 1949. Article 1 of the Code provides that “in the absence of any applicable legislation, the judge shall decide according to the custom and failing the custom, according to the principles of Islamic Shari’a. In the absence of these principles, the judge shall have recourse to natural law and the rules of equity.” Article 1 explains how El-Sanhuri tried to stabilize the process of legal reform in Egypt, at that time, by backing it with Islamic origins and comparative perspectives. In this sense, Principles of Islamic Shari’a, as a technical concept, was introduced for the first time in the Egyptian legal literature to work as a secondary source of law that may guide the judge in civil matters absent of any applicable legislation.

B. The Shari’a Clause of Article Two

The Shari’a Clause of Article 2 states that “principles of Islamic Shari’a are the chief source of legislation.” Apparently, one cannot find a

40. CONSTITUTION OF THE OTTOMAN EMPIRE, Dec. 23, 1876.

41. SELSUK AKSIN SOMEL, HISTORICAL DICTIONARY OF THE OTTOMAN EMPIRE 60-WORD CONSTITUTION (2003).

42. CONSTITUTION OF THE KINGDOM OF PRUSSIA, Feb. 1850.

clear political philosophy behind incorporating this Clause either in its 1971 original form or even in its 1980 amended form.⁴³ It is possible that the rise of political Islam groups during Sadat's era led him to back his legitimacy with a sort of Islamic constitutionalism. It is also possible that this clause was incorporated to fight against claims that the legal system reflected "European," rather than "Islamic," origins and culture.

This ambiguous usage of the concept, i.e. principles of Islamic Shari'a, in the 1971 Constitution rendered it more than a mere technical concept as El-Sanhuri intended in the 1949 Civil Code. Here, in Article Two, the concept was politically overloaded and, eventually, it was the SCC that tried to develop a jurisprudence that brings the concept back to its technical nature.⁴⁴

Now, the question is: what does the concept principles of Islamic Shari'a mean? To make the picture clearer, imagine Shari'a as a snowball. Shari'a consists of both the divine texts and human jurisprudence as Figure (2) below explains. This jurisprudence is in two forms: principles and applications as Figure (3) below explains. The principles continue to exist in the abstract, regardless of the time or the place, to represent the philosophy and goals of Shari'a (*maqasid*). In this sense, the *maqasid* around which Islamic legal theory develops is the preservation of five foundational goals: Religion, Life, Lineage, Intellect, and Property. The applications develop in practice to adjust the legal institutions to changing circumstances in time and place.

Through centuries, rich jurisprudence emerged and reflected how the philosophy and goals of Shari'a work in different geo-political contexts. As time passed, this jurisprudence that has been developing through centuries created principles and applications that cover a very broad scope of different topics, times, and places. Whenever scholars succeed in their intellectual endeavors, *Ijtihad*,⁴⁵ legal institutions develop to

43. The clause was amended in 1980 from "a principal source of legislation" into "the principal source of legislation."

44. See Nathan J. Brown, *Egypt and Islamic Sharia: A Guide for the Perplexed, Q&A*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (May 15, 2012), available at <http://carnegieendowment.org/2012/05/15/egypt-and-islamic-sharia-guide-for-perplexed/argb>. By 1980, the inflationary spiral had reached the point that Article 2 of the Egyptian constitution was amended to read that "the principles of the Islamic sharia are the main source of legislation." That text, as expansive as its prose, was attached to no clear implementing structures, so it was not clear at all what it meant when it was first adopted. It referred not specifically to the Islamic Shari'a but to its "principles," a particularly ambiguous term.

45. *Ijtihad* means "the exertion of mental energy for the sake of arriving, through

bring the abstract principles to practice applications. Whenever the scholars cannot undertake the *Ijtihad* process, either due to technical inability or political oppression, the legal institutions freeze and become obsolete.

Despite the rise or fall of *Ijtihad*, Shari'a continues to exist even though its principles might be attached to a lot of outdated historical applications. Now, scholars shall undertake sincere efforts in order to reach the center of this snowball and "carefully transplant" it into an already existing legal system and an already working legal institutions. Of course, the task is not easy due to differences in understanding among various political actors in Muslim societies. This is not only about liberals versus Islamists but also about differences amongst Islamists themselves such as the Muslim Brotherhood (al Ikhwan al Muslimon) versus Salafis in Egypt. This illustrates the endless debate within the Constituent Assembly that Egypt witnesses while drafting the workings of Shari'a Clause for the new constitution. The drafters of the 1971 Constitution used a broad term: principles of Shari'a with no mention to any specific mechanism to interpret what principles are. It was the SCC that tried to develop a jurisprudence that brings the concept back to its technical nature.⁴⁶

reasoning, at a considered opinion." WAEL B. HALLAQ, *SHARIA: THEORY, PRACTICE, TRANSFORMATIONS* 49-50 (2009).

46. Similar to this, see Nathan J. Brown, *Egypt and Islamic Sharia: A Guide for the Perplexed, Q&A*, May 15, 2012, CARNEGIE ENDOWMENT FOR INT'L PEACE, available at <http://carnegieendowment.org/2012/05/15/egypt-and-islamic-sharia-guide-for-perplexed/argb>. By 1980, the inflationary spiral had reached the point that Article 2 of the Egyptian constitution was amended to read that 'the principles of the Islamic sharia are the main source of legislation.' That text, as expansive as its prose, was attached to no clear implementing structures, so it was not clear at all what it meant when it was first adopted. It referred not specifically to the Islamic sharia but to its "principles," a particularly ambiguous term.

Figure (2) Islamic Law Shari'a: divine legal texts and a human jurisprudence Fiqh

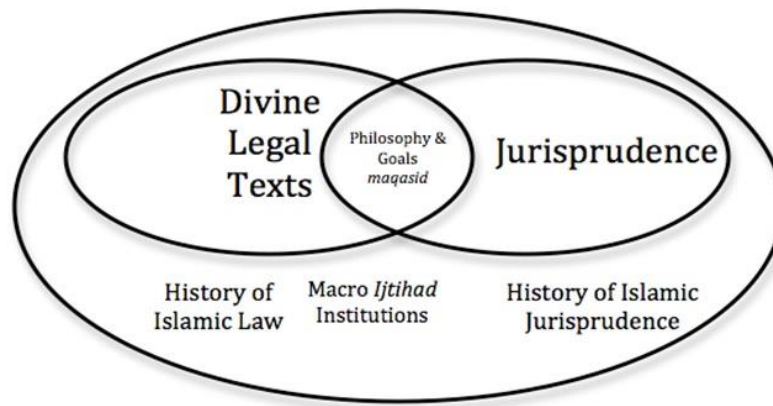
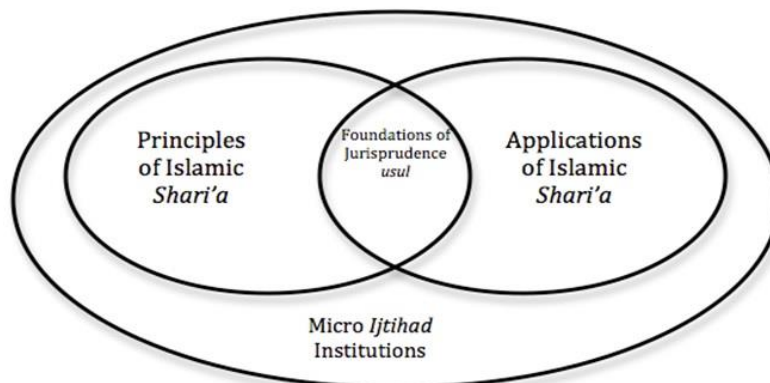


Figure (3): Islamic Jurisprudence: timeless Shari'a principles and renewable Shari'a applications



In brief, what we may call the “careful transplant” doctrine is an inevitable step for any meaningful attempt to Islamize a legal system, i.e. to revive an Islamic identity within a contemporary legal system, like the case in Egypt.

C. The “Careful Transplant” Doctrine in Action

Egypt is a good case to examine the “careful transplant” doctrine in action. In general, this doctrine has two aspects: the “careful” part

represents the procedural aspect, and the “transplant” part represents the substantive aspect of the doctrine. The SCC has contributed heavily to the process of adjusting the procedural aspect of this doctrine within the contemporary legal system in Egypt. However, the approach it used for this purpose limited its ability to adjust the substantive aspect of the doctrine.

In order to articulate its theory on the Shari’a Clause, the SCC relied on the Report of the General Committee that prepared the amendment of the Shari’a Clause in 1980. In one of its milestone decisions,⁴⁷ the Court quoted the following part of the Report:

The departure from the present legal institutions of Egypt, which go back more than one hundred years, and their replacement in their entirety by Islamic law, requires patient efforts and careful practical considerations. Hence, legislation for changing economic and social conditions that were not familiar and were not even known before, together with the innovations in our contemporary world and the requirements of our membership in the international community, as well as the evolution of our relationships and dealings with other nations - all these call for careful consideration and deserve special endeavors. Consequently, the change of the whole legal organization should not be contemplated without giving the lawmakers a chance and a reasonable period of time to collect all legal materials and amalgamate them into a complete system within the framework of the Qur’an, the Sunna and the opinions of learned Muslim jurists and the ‘Ulama . . .⁴⁸

The SCC used a double-edged sword in order to maintain the stability of the legal system against unpredictable judicial decisions that try to abide by the Shari’a Clause. The Court held that the Shari’a Clause addresses the legislator and not the judge. This approach froze any unpredictable judicial activism that may try to revive Shari’a applications and override existing legislation. Indeed, the SCC, through this approach, succeeded in assuring the predictability of judicial decisions and, ultimately, the stability of the legal system.

However, this approach not only restricted the lower courts but also the SCC itself in its power of judicial review of the pre-1980 legislation. According to the SCC’s theory, the Shari’a Clause as amended in 1980 to make the principles of Islamic Shari’a the chief source of legislation, would not have retroactive effect.⁴⁹ This means that the SCC’s judicial review would be limited to reviewing the legislature’s compliance with

47. MOUSTAFA, *supra* note 18 at 108 (citing Case 20, Judicial Year 1 (May 4, 1985)).

48. *Id.* at 109.

49. *Id.*

the Shari'a Clause only for post-1980 legislation. In other words, the SCC would not oblige the legislature to review the compliance of pre-1980 legislation with the Shari'a Clause. In this sense, the constitutional obligation, according to the SCC theory, covers post-1980 legislation but not pre-1980 legislation. New legislation passed after 1980 violating the principles of Islamic Shari'a can be constitutionally challenged and may be struck down by the SCC. In practice, this approach turned out to be a procedural shield against a considerable number of cases litigating Islam.

The procedural shield that the SCC created allowed it the opportunity to stabilize contemporary legal institutions. It seems that the SCC assigned itself the procedural aspect of the doctrine, i.e. the "careful" part, and preferred to leave the substantive aspect, i.e. the "transplant" part, to the legislature. The SCC chose to allow, within its jurisdiction of substantive judicial review, the legislature to prioritize what fit the society's needs, review its compliance with the principles, and generate a national consensus over sensitive public policies, such as the unearned accretion (*riba*) and criminal punishments (*hudud*), instead of haphazardly leaving this process to litigants. In practice, the parliament during Mubarak's regime did little in bridging the contemporary legal institutions with their Islamic origins.⁵⁰ In the few cases where the parliament did, it was a matter of necessity, such as reforming the family and personal status laws, which traditionally adhere to religious norms to the greatest extent. In these cases as well as others, it was the SCC that undertook this task, addressed the Islamic origins of some legal institutions, and "established practice and theory of interpreting the Shari'a in favour of developing positive law and progressive jurisdiction."⁵¹

It is fair to say that the parliaments in the Second Republic will be more inclined to review existing legal institutions through an Islamic filter. With Islamist groups competing with liberals, and even competing among themselves, the SCC will have to be more active with regard to

50. CLARK B. LOMBARDI, *STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF SHARIA INTO EGYPTIAN CONSTITUTIONAL LAW* 138 (2006).

51. Dr. Andrea Büchler, Amira Latif & Firdavs Kutliev, *Supreme Constitutional Court Egypt: A Commented Translation of Egypt's Supreme Constitutional Decision in Case No. 125 of Judicial Year 27 on Child Custody*, in HATEM ELLIESIE, ET AL., *GAIR-MITTEILUNGEN* 79-93 (2010), available at <http://www.rwi.uzh.ch/oe/cimels/publications/GAIR-2010-Mitteilungen-02.pdf>

(commenting on a decision by the Supreme Constitutional Court of Egypt in 2008 on a child custody case that challenged the constitutionality of one of the 2005 legal reform in family and personal status laws).

the substantive part of the doctrine. Ultimately, the SCC will have to decide on how well the legislature respects the Shari'a Clause while creating new legislative applications. However, to be clear, with the rise of competing understandings of the essence of Shari'a, i.e. the principles and the applications, it seems that the SCC's jurisprudence will evolve and become more advanced than its jurisprudence during Mubarak's era. In other words, since Islamist groups will be heavily represented in the Parliament and will undertake considerable efforts to review pre-1980 legislation, the SCC will have to be more assertive in addressing controversial issues and be less reliant on the procedural shield it used during Mubarak's era. The next section explores that the need for any legislative efforts that relate to the Shari'a Clause to reflect a revival of the early form of the "checks and balances" formula that existed in Islamic history.

III. BRINGING CHECKS AND BALANCES TO THE SHARI'A CLAUSE

A. *Intell-political Islam vs. Theo-political Islam*

Contemporary Muslims still believe in the basic democratic values that emerged during the earliest Islamic governance model, the Rashidun Era (632-661).⁵² The Rashidun's individual commitment to these democratic values that have origins in the divine texts allowed these values to evolve through a semi-institutional framework through time in later Islamic governance models.⁵³ Such evolution reflected itself in two remarkable institutions in Islamic history: the first is a political institution, the Caliphate, and the second is a civic institution, the Maddhab.⁵⁴ When these values prevailed, the interaction between the representatives of these two institutions, rulers and scholars, represented an early form of the "checks and balances" doctrine found in modern constitutionalism.⁵⁵ The eventual decline of these values illustrates why the Madhhabs, as platforms for law-making processes, left us advanced institutions of private law that had their equivalents in the English

52. Also called the era *The Rightly Guided Caliphs*.

53. This basically applies to Umayyad Kingdom (661-750), the Abbasid Kingdom (750-1258), and other Muslim bodies politic that were essentially a hereditary dynasty even if the head of the state claimed to be elected.

54. Adham A. Hashish, *Ijtihad Institutions: The Key to Islamic Democracy Bridging and Balancing Political and Intellectual Islam*, 9 RICH. J. GLOBAL L. & BUS. 61 (2010).

55. See NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* (2008).

Common law but did not leave a similar heritage with respect to constitutional law.⁵⁶

Attempts to revive Islamic democratic values should consider this early formula of checks and balances. According to these values, the ruler, either an individual or a group, is a mere agent for the public. Therefore, the ruler's legitimacy is conditioned on his respect for the body of law that has been developing within civil society represented by the Madhhabs.⁵⁷ In other words, the body of law, as a property that belongs to Allah, has its origins in the divine texts, and its development through human jurisprudence emerging from civil society could be seen as an early form of a social contract. In this sense, it is essential not only that the ruler's exercise of powers be checked, but also that the body assigned to check such powers grows within civil society and enjoys a considerable independence that balances the powers of the ruler. The absence of such independence and the ruler's control over this "checks and balances" body go against the very essence of these democratic values. Whenever a ruler, either an individual or a group, controls both the body politic and the independent "checks and balances" body, it is fair to say that this model of governance is "Theo-political Islam" with too much concentration of powers, as compared to an "Intell-political Islam" model of governance.

In this sense, it is the *ijtihad* institutions that can "empower the intellectual Islam (Intell-Islam) stream to check the political Islam (Polit-Islam) stream and balance it within a framework of Islamic governance."⁵⁸ *Ijtihad* is different than *jihad*,⁵⁹ the latter representing the tool through which the body politic can effectively achieve social and political mobilization towards certain causes such as reform, development, or even war. By *ijtihad*, I mean the independent intellectual efforts that take place in order to rationalize the body politics' investment of Muslims' resources.

56. Hashish, *supra* note 54, at 63.

57. BERNARD LEWIS, *THE POLITICAL LANGUAGE OF ISLAM* 30-31 (1991) (concluding that "Muslim law has never conceded absolute power to the sovereign, nor, with few exceptions, have Muslim sovereigns ever been able to exercise such power for any length of time").

58. Hashish, *supra* note 54.

59. In Arabic, the term *Jihad* means struggle. It applies to both individuals and societies. In Islamic literature, there are two kinds of *Jihad*: lesser *Jihad*, which means struggle for the warfare, and greater *Jihad*, which means struggle for the welfare. See Mohamed R. Hassanien, *International Law Fights Terrorism in the Muslim World: A Middle Eastern Perspective*, 36 *DENV. J. INT'L L. & POL'Y* 221 (2007).

In brief, it is important for contemporary Muslims who are trying to strike a balanced relationship between Islam and the state, not to let this relationship be defined in light of Islamist forces alone and in the absence of independent intellectual Islamic forces. Indeed, “[b]oth Polit-Islam, through its main tool *jihad*, and Intell-Islam, through its main tool *ijtihad*, represent the heart and mind of Islamic democracy.”⁶⁰ Otherwise, leaving the playing field to Islamists alone risks handing any Muslim society to a “Theo-political Islam” style of governance that will control both the Muslims’ resources and the intellectuals’ efforts to make the best rational use of these resources. Alternatively, contemporary Muslims should pursue an “Intell-political Islam” style of governance that allows intellectual Islam to check and balance the powers of Islamism.

In contemporary Egypt, the independent *ijtihad* institutions that can contribute to the “Intel-political Islam” and save the country from turning into a “Theo-political Islam” are Al-Azhar, the law schools, and the judiciary. While Al-Azhar and the law schools represent academic forums for *ijtihad*, it is the judiciary that can put this *ijtihad* into action by injecting its outcome into the body politic and the legal system. In other words, it is the judiciary that can rationalize the role that Islamic norms can play in the public sphere in the future. The tasks of interpreting what is Shari’a and deciding whether or not a law conforms with it are not monopolized by one single institution.

Salafi members of the Constituent Assembly have tried recently to change this while drafting the new constitution. They attempted to change both the wording of the Shari’a Clause as well as the body that will interpret it. Professor Nathan Brown describes their attempt to change the wording: Some Salafis have deployed their newfound interest in constitutional texts by proposing that the word “rulings” (*ahkam*) be inserted so that it is not merely unspecified “principles” but the “rulings” of the Islamic sharia—a far more specific guideline—serve as the primary source of legislation.

The Muslim Brotherhood has rejected this position. And the Brotherhood has begun to muse about dropping the word “principles” so that the provision would read only that “the Islamic sharia is the main source,” an even more general phrasing than what exists currently. It has also offered the idea of incorporating language specifying that other religious communities should be governed by their own shari’as in

60. Hashish, *supra* note 54 at 63-64.

matters of personal status, a formula whose main effect might simply be to burden legal translators with the puzzling task of conveying the possibility of non-Islamic shari'as. Such a clause would likely have minimal impact on the Egyptian legal order, since the personal status law for recognized religious communities is so deeply entrenched in Egyptian law and practice.⁶¹

Salafis presented a proposal "to give Egypt's main Islamic institution [Al-Azhar] the final say on whether the law of the land adheres to Islamic laws"⁶² which will limit the options the SCC has in choosing among different interpretations accepted within Al-Azhar academia. Critics of the proposal accuse the Salafi members "of trying to foist onto Al-Azhar a role that contradicts a tenet of Sunni Islam - that no one holds a monopoly in interpreting the word of God."⁶³ Therefore, "[s]ome liberals accept the idea of giving laws a religious seal of approval but say Al-Azhar's advice must not be binding" in order not "to turn Egypt into an Iran-style theocracy."⁶⁴

B. *Al-Azhar and the Egyptian Law Schools*

The rise of Islamist groups in Egypt after Mubarak led many to look for other religious institutions as a counterweight.⁶⁵ While there are many religious institutions, such as the Ministry of Religious Affairs, which manages state-owned mosques, and Dar al-Ifta, which issues *fatwas* (interpretations of Islamic law) upon official and non-official requests, most of the focus was directed towards another institution: Al-Azhar.

It seems that many want Al-Azhar to be a deeply influential institution in society's culture and politics, as it used to be throughout its history. As Nathan Brown explains:

[P]erhaps the central—and certainly the most prestigious—element in the state-religion complex is al-Azhar. The institution began more than a

61. Brown, *supra* note 44.

62. Tamim Elyan, *Egypt constitution talks stumble on role of Islam*, REUTERS (Sep. 12, 2012), available at <http://www.reuters.com/article/2012/09/12/us-egypt-constitution-idUSBRE88B0VB20120912>.

63. *Id.*

64. *Id.*

65. "Al-Azhar Document" embodies the role that Al-Azhar played as a counterweight to political Islam movements in post-revolutionary Egypt. It was a result of negotiation among leading religious scholars and prominent intellectuals, and it was announced in June 2011. See Nathan Brown, *supra* note 15, at 13.

millennium ago as an important mosque and center of Islamic learning. Today it is far more than a mosque; al-Azhar is now a state entity that has evolved into a behemoth running large and dispersed parts of the religious and educational apparatus of the country. In the aftermath of Egypt's revolution, a quiet but intense argument is taking place over the governance and role of al-Azhar in the country, its structure, and the role it plays in public life.⁶⁶

It is telling that once Tariq al-Bashri, chairman of the Constitutional Amendments Committee, finished his primary task of drafting the proposed Constitutional Amendments, his next task was to draft legislation aimed at regulating Al-Azhar.⁶⁷ Bashri announced that the new law would adopt the idea of electing the Grand Imam of Al-Azhar in addition to restructuring major entities affiliated with the institution.⁶⁸

Such reforms seek to enable Al-Azhar to have more institutional independence from the government and regain its identity and multi-dimensional mission. Nathan Brown explains this mission:

In addition to the educational apparatuses attached to al-Azhar, some scholars and research bodies within the institution focus on religious scholarship. The most prominent and significant of these is the Islamic Research Complex, whose bookish title masks a significant political role. The organization is best known for issuing fatwas (findings of religious law), and, when it does so, it effectively speaks in the name of the institution. While the Egyptian state has had a designated bureaucracy for

66. *Id.* at 4. Additionally, "opponents of Islamists may not like al-Azhar's teachings in all respects, but they prefer it (and find it more predictable and more pliable to other political demands) to that of the Brotherhood and especially to Salafism." *Id.* at 13.

67. Nathan Brown notes other aspects of reform that the law might approach.

"The legislation being drafted by a committee charged by al-Azhar would likely bring the financial resources of the institution under its direct control, break the link between al-Azhar and the cabinet, curtail efforts by other ministries to monitor and control al-Azhar's activities in various realms (especially in education), and grant the institution full autonomy in its own affairs. Most critical in this last regard would be re-creating the Senior Ulama Body and allowing it to elect the shaykh of al-Azhar." *Id.* at 12.

Eventually, [t]he ruling military council did rush through a new law governing al-Azhar, issuing it by decree a few days before the parliament assumed legislative authority. That law allows the current *shaykh* heading the institution to appoint forty senior scholars to a "Senior Ulama Body" (which then becomes self-perpetuating by selecting its own members); the body will elect future *shaykhs*. Nathan J. Brown, *Egypt's Judges in a Revolutionary Age*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Feb. 22, 2012), available at <http://carnegieendowment.org/2012/02/22/egypt-s-judges-in-revolutionary-age>.

68. The contemporary usage of the term "Al-Azhar" has a broader meaning than its original usage when the term was coined more in 970. Al-Azhar, which started as a mosque and became later a university, refers now to a "complex of associated institutions." Brown, *supra* note 15, at 4.

issuing fatwas for more than a hundred years, al-Azhar's Islamic Research Complex has a reputation for providing a more learned and less pliable set of answers than the designated bureaucracy, Dar al-Ifta, which is headed by the state mufti. In fact, some Islamic Research Complex members do not hide their disdain for Dar al-Ifta, viewing it as, in essence, the regime's Islamic lawyer, willingly turning out the interpretations the rulers need at any particular moment.⁶⁹

Electing and restructuring leadership positions may secure Al-Azhar's institutional independence against the state, but it will not revive its intellectual capacity to represent mainstream Islam. Indeed, without assuring full respect to academic freedoms, Al-Azhar will turn into a political, rather than academic, entity that has an institutional independence from the government. Al-Azhar will turn into an ideological platform that is vulnerable to whatever group can get the votes to lead it, instead of being an academic forum for intellectual debate about Islam and Shari'a.

Fortunately, with regard to deciphering the nature of Shari'a, the development of Islamic legal studies is not being undertaken only through Al-Azhar. Beside Al-Azhar's three schools of Shari'a and law,⁷⁰ Egypt has 13 law schools⁷¹ that offer Islamic law courses as part of their academic curricula.⁷² At least one law school, Alexandria School of Law, has expanded its program to cover advanced Islamic legal studies in cooperation with Al-Maqasid Research Centre in the Philosophy of Islamic Law (Markaz Dirasat Maqasid Al-Sharia Al-Islamiyah), which is affiliated with Al-Furqan Islamic Heritage Foundation in London. In particular, the cooperation focuses on studying the philosophy of Islamic law, especially the goals of Shari'a (*maqasid al-sharia*) in order to "develop the process of *ijtihad* and the renewal of Islamic *fiqh*, its fundamental theory (*usul*), and Islamic thought in general."⁷³

69. *Id.* at 5.

70. In Cairo, Tanta, and Asyut.

71. In the following universities: Cairo, Alexandria, Ain Shams, Asyut, Mansoura, Beni-Suef, Tanta, South Valley, Monufia, Helwan, Banha, Zagazig, Fayoum.

72. M. Serag, *Legal Education in Egypt*, 43 S. TEX. L. REV. 615, 617 (2001).

73. Sheikh Ahmed Zaki Yamani, *Al-Maqasid - Chairman's Introduction*, available at <http://www.al-furqan.com/en/al-furqan-foundation/al-maqasid/chairmans-introduction> (last visited May 21, 2011). The Chairman's message states

Al-Furqan Islamic Heritage Foundation established Al-Maqasid Research Centre in the Philosophy of Islamic Law (Markaz Dirasat Maqasid Al-Sharia Al-Islamiyah). The mission of the Centre is summarized in the revitalization of the knowledge of al-maqasid, in order to develop the process of *ijtihad* and the renewal of Islamic *fiqh*, its fundamental theory (*usul*), and Islamic

Unlike Al-Azhar's admission policy, all these law schools admit both Muslims and non-Muslims to their programs. It is not clear at this moment whether or not the new legislation for Al-Azhar will change the admission policy. To be clear, there are several Christian judges already holding senior positions in the Egyptian judicial hierarchy. Debates occasionally arose on the occasion of appointing a Christian judge to a senior judicial post in the Mubarak era. While, Mubarak respected seniority as a judicial norm in such appointments,⁷⁴ it is expected in the near future that this issue will generate a considerable amount of public debate⁷⁵ and probably will be constitutionally challenged. Interestingly, the SCC itself has two Christian judges among its 19 justices.⁷⁶ Overall, the Egyptian law schools will continue to offer Islamic Shari'a courses in the same manner as they offer courses in Christian Family Shari'a. The following paragraphs explore one phenomenon that is expected to grow in the Second Republic: Christians litigating Islam.

C. Copts Litigating Islam

The future of litigating Islam in the Egyptian Second Republic will not be exclusive to Islamists and Muslim liberals but also Copts as well as other minorities. In fact, just a few months before the Revolution, the Shari'a Clause gained public attention following a decision rendered by the Supreme Administrative Court (SAC) with regard to the competence of the Coptic Church over the second marriage of divorced Copts. Interestingly, the argument that the Church adopted was based on the Shari'a Clause.

The dispute started as the Pope⁷⁷ "lost an appeal to overturn a court verdict in favor of a Copt, who sued the church for denying him authorization to wed again after divorcing his first wife."⁷⁸ The SAC

thought in general. The Centre also aims to broaden the horizons of knowledge for students of Islamic studies everywhere.

74. This happened in two situations: appointing Judge Adel Andraous as the President of Cairo Court of Appeals, and appointing Judge Nabil Mirham as the President of the Council of State.

75. After the 2011 uprising in Egypt, the executive appointment of Emad Shehata, a Christian police officer, as a governor to Qina in south Egypt has created substantial tension.

76. Justice Maher Sami Yusef and Justice Polis Fahmi Iskandar.

77. Pope Shenouda III, whose papacy in the Coptic Orthodox Church of Alexandria spanned nearly four decades (1971- 2012).

78. *Egypt Coptic Church rejects second marriages despite court ruling*, EGYPT.COM NEWS (June 2, 2011), available at <http://news.egypt.com/en/2010060210998/news/>

upheld the decision of the lower court stating that “[b]y law, a Christian can remarry and the constitution guarantees his rights to have a family. The appeal by Pope Shenouda III to prevent Copts from remarrying is rejected.”⁷⁹

Later on, in a press conference, Pope Shenouda stated that “[w]e respect the Egyptian judiciary, but no force on earth can make the Church violate teachings of the holy Bible in order to execute a judicial verdict.”⁸⁰ Interestingly, he backed his position by saying, “Islam allows Copts to resort to [Copts’ Shari’a] and in turn, no one should interfere in the Church’s own practices and decisions.”⁸¹ He was referring to a verse in Surah (Qur’anic chapter) Al-Maidah that reads “Let the people of the Injeel (Gospel) judge by what Allah has revealed therein . . .”⁸² In his words, he explained that “Islamic Law (Shari’a) says ‘judge between people of the Scripture according to what they believe in,’ and this principle came in all personal status laws . . . [and] many of the [decisions] of the Court of Cassation and the Supreme Constitutional Court stressed the principle of the application of Christian law on its followers.”⁸³ Moreover, Shenouda threatened to “defrock any priest who allows a divorced Christian to remarry, except in cases where the divorce was on the grounds of adultery.”⁸⁴ It is worth mentioning that “many Copts turn to the civil law and some of its articles, which are based on Islamic law, to get divorced through courts rather than their church.”⁸⁵

Taking it to the constitutional level, Pop Shenouda “assigned the Church’s legal committee to file a lawsuit at the Supreme Constitutional Court to settle the legal controversy regarding the Administrative Court’s ruling that compels the church to allow divorced Orthodox Copts to remarry.”⁸⁶ Later on, the SCC suspended the ruling of the SAC pending

egypt-news/egypt-coptic-church-rejects-second-marriages-despite-court-ruling.html.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Qur’an*, 5:47.

83. *Coptic Pope Rejects Egyptian Court Ruling on Remarriage of Divorcees*, ASSYRIAN INTERNATIONAL NEWS AGENCY (June 9, 2010), available at <http://www.aina.org/news/20100608192647.htm>

84. *Id.*

85. *Id.*

86. Essam Fadl, *Pope Shenouda resorts to Supreme Constitutional Court on remarriage controversy*, THE DAILY NEWS EGYPT (June 16, 2010), available at <http://www.thedailynewsegypt.com/pope-shenouda-resorts-to-supreme-constitutional-court-on-remarriage-controversy.html>.

a final decision on the claim.⁸⁷

Overall, a fair portion of the expansion in cases litigating Islam will be driven by minorities in general, and Copts in particular in the Egyptian Second Republic. In the near future two main issues will engender the most public debate: family matters and regulating places of worship. In the long run, one important topic is likely to gain more attention in academia: the jurisprudence of minorities in Islam. Interestingly, one aspect of this jurisprudence, the status of Muslims living in non-Muslim countries, has been developing faster than the other, i.e. the status of non-Muslims living in Muslim Countries.⁸⁸ However, developing this aspect must be accompanied by an inevitable step: developing studies on the history of Islamic law itself instead of relying on the widely spread history of Islamic jurisprudence. In other words, developing the Islamic jurisprudence on minorities must rely on the principles of Islamic Shari'a driven from the divine texts more than relying on historical applications of these principles. Such studies are inevitable, not only for academia, but also for the judiciary that will witness competing theories of interpretation. The next section explores how far the SCC's role shall change in the Second Republic in order to protect the emerging civic state.

IV. JUDICIALIZING A PLURALISTIC UNDERSTANDING OF THE SHARI'A CLAUSE

A. The Judiciary: a Guardian of Transition

The role of the Egyptian judiciary has been discussed recently by Professor Chibli Mallat, a prominent Arab scholar and a visiting professor of law at Harvard Law School, in his article "Revising Egypt's Constitution: A Contribution to the Constitutional Amendment Debate."⁸⁹ Professor Mallat seems willing to entrust the judiciary to lead

87. Lawrence D. Jones, *Egypt Coptic Church rejects second marriages despite court ruling*, CHRISTIAN POST (July 23, 2010), available at <http://www.christianpost.com/news/egypt-high-court-overturms-coptic-remarriage-ruling-46026/> (last visited May 21, 2011).

88. See Andrew March, *Islamic Norms in Secular Public Spheres Conference: Political Problems, Legal Issues, and Social Practices: Panel 2 - What is Sharia in Muslim and Non Muslim contexts?*, University of California, Berkeley (May 9, 2009), available at <http://webcast.berkeley.edu/events.php?group=Islamic+Norms+in+Secular+Public+Spheres+Conference%3A+political+problems%2C+legal+issues%2C+and+social+practices>.

89. Chibli Mallat, *Revising Egypt's Constitution: A Contribution to the*

the transitional process that Egypt is facing, considering that it is the “only group that meets the required democratic expertise and the detachment from executive and legislative positions.”⁹⁰ As Professor Mallat justifies his choice, he notes that:

The best way is to entrust a respected group of people, with a natural constitutional mandate, to oversee the transitional period, and to ensure that the democratic level playing field is balanced, so that the autocratic practices of some Islamic groups, including the Muslim Brotherhood, and vindictive remainders of the regime, are seriously checked. When a transition from sixty years of dictatorship is envisaged, the number of details that need to be addressed is staggering, and the need for a coherent body of constitutional and electoral experts to oversee the complex measures needed is obvious . . .⁹¹

It seems that Professor Mallat’s main concern is exploring the “best way to promote ‘orderly transition’—that is, constitutional, nonviolent revolutionary change.”⁹²

In fact, what Professor Mallat calls for is similar to what the 1971 Constitution states as rules of transition in case of absence of the head of state in Article 84.⁹³ According to Article 84, as Mubarak stepped down and the people rejected the legitimacy of the People’s Assembly, it was the President of the SCC that had to execute the Presidential Office during the transition, not the SCAF as it happened. Yet, the judiciary in general played a major role in the transition by deciding critical issues, such as dissolving the National Democratic Party (Mubarak’s party),⁹⁴

Constitutional Amendment Debate, 52 HARV. INT’L L.J. ONLINE 182 (2011).

90. *Id.* at 187.

91. *Id.*

92. *Id.* The transition is therefore critical for ensuring the process leading to the elections is free, fair and peaceful. It means that an independent body should be present to monitor, encourage democratic behavior, deter intimidation, and punish violence. Only the judiciary and the people of the law generally have the expertise and detachment needed to staff this necessary agency for democracy at the most crucial time of the early post-Mubarak stages.

93. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Sep. 11, 1971, article 84 states:

In case vacancy of the Presidential office or the permanent disability of the President of the Republic, the Speaker of the People’s Assembly shall temporarily assume the Presidency; and, if at that time, the People’s Assembly is already dissolved, the President of the Supreme Constitutional Court shall take over the Presidency, provided, however, that neither shall nominate himself for the Presidency . . .

94. *Egypt dissolves former ruling party*, AL JAZEERA NEWS (Apr. 16, 2011), available at <http://www.aljazeera.com/news/middleeast/2011/04/2011416125051889315.html>.

dissolving the local municipal councils,⁹⁵ allowing Egyptians living abroad the right to vote,⁹⁶ blocking the creation of the first Constitution Assembly,⁹⁷ and curbing the military's power to arrest civilians.⁹⁸

To be clear, the judiciary played an important role side by side with SCAF during the transition process. The SCC, in particular, issued two landmark decisions that had far reaching consequences on reshaping Egypt's transitional process, to the extent that professor Nathan Brown viewed the situation as a sudden constitutional vacuum⁹⁹ and professor Chibli Mallat called, in a recent article, for saving the SCC from itself.¹⁰⁰ The first decision concerned the parliamentary elections as it led to dissolving the Parliament. The reason for that is the unconstitutionality of the Parliamentary Election Law as the independent candidates "had been disadvantaged by a clause restraining them to a quota that does not apply to members of political parties."¹⁰¹ The second decision is related to the presidential election as it allowed Mubarak's last prime minister to continue in the presidential race. The reason for this is the unconstitutionality of the lustration law, commonly referred to in the media as 'the law of political exclusion,' as it "deprived people of political rights without criminal charges or judicial process."¹⁰²

Overall, beyond the role that the judiciary played during the transitional process, this article is more concerned with the relationship

95. Mohamed Fadel Fahmy, *Egyptian court dissolves local councils*, CNN NEWS (June 28, 2011), available at http://articles.cnn.com/2011-06-28/world/egypt.councils.dissolved_1_local-councils-parliamentary-elections-ruling-party?_s=PM:WORLD.

96. Jon Jensen, *Cairo court: Egyptian expats allowed to vote overseas*, GLOBAL POST (Oct. 25, 2011), available at <http://www.globalpost.com/dispatches/globalpost-blogs/the-casbah/cairo-court-egyptian-expats-allowed-vote-upcoming-election>.

97. *Egypt court suspends constitutional assembly*, BBC NEWS (Apr. 10, 2012), available at <http://www.bbc.co.uk/news/world-middle-east-17665048>.

98. Ernesto Londoño, *Egyptian court curbs military's power to arrest civilians*, THE WASHINGTON POST (June 26, 2012), available at http://www.washingtonpost.com/world/middle_east/egyptian-court-curbs-militarys-power-to-arrest-civilians/2012/06/26/gJQAKzZ64V_story.html.

99. Nathan J. Brown, *Cairo's Judicial Coup*, FOREIGN POLICY (June 14, 2012), available at http://mideast.foreignpolicy.com/posts/2012/06/14/cairo_s_judicial_coup.

100. Chibli Mallat, *Saving Egypt's Supreme Constitutional Court from itself*, AHARAM ONLINE (June 15, 2012), available at <http://english.ahram.org.eg/NewsContent/4/0/45009/Opinion/0/Saving-Egypt%E2%80%99s-Supreme-Constitutional-Court-from-i.aspx>.

101. *Id.*

102. Brown, *supra* note 99.

between Islam and the state and how the judiciary will balance it after the transition. The importance of the judiciary in general, and the SCC in particular, seems far more important than ever before in terms of generating a national consensus over the role Islam shall play in the public sphere.

B. The SCC in the First Republic: A Political Reform Advocate

The first Supreme Court in Egyptian history was introduced during Nasser's regime in 1969. It continued to exist until the current Supreme Constitutional Court (SCC) replaced it in 1979. However, the circumstances surrounding the formation of both courts explain how each of them differed in their commitment to the notion of constitutionalism.

Nasser's clash with the judiciary reached its peak during the so-called "judges' massacre" of 1969 when he dismissed many judges opposing his policies.¹⁰³ In this sense, he founded a Supreme Court whose task was to review legislation and contradictory judicial decisions in order to ease the introduction of revolutionary socialist policies to legal institutions.

By contrast, Sadat promoted his nationalistic vision, which combined both the rule of law and free market economy. Founding the SCC served both goals by allowing the Court a considerable degree of independence to transplant free market policies into the legal system while assuring its commitment to constitutionalism.

The independence that the SCC enjoyed over the years allowed the Court to present a unique case of judicial activism in an authoritarian regime.¹⁰⁴ In his notable study, "The Struggle for Constitutional Powers: Law, Politics and Economic Development in Egypt,"¹⁰⁵ Professor Tamir Moustafa explains "The Emergence of Constitutional Power (1979-1990)" as follows:

103. Rutherford explains this massacre as a clash between Nassir's regime and the judges' liberalism;

The insular nature of the judicial profession facilitated the preservation of judges' liberalism. There were only 700 active judges during the Nasser period. Most of them graduated from either Cairo University Law School or Alexandria University Law School. They came from similar social and economic backgrounds and participated in the same social circles. RUTHERFORD, *supra* note 20, at 303.

104. RUTHERFORD, *supra* note 20, at 298.

105. MOUSTAFA, *supra* note 18.

The SCC provided restitution for Nasser-era property rights violations, and it shaped a new legal framework demarcating limits on state powers in the economy. SCC rulings went much further than the regime had originally intended when it struck down Sadat-era laws insulating the state from the burden of providing full compensation to citizens' claims. . . . [And] in the political sphere . . . the Court chipped away at the regime's corporatist system of political control by restoring political rights to opposition activists and striking down the regime's constraining electoral laws.¹⁰⁶

As Professor Moustafa further explains in "The Rapid Expansion of Constitutional Power (1991-1997),":

The Supreme Constitutional Court played a crucial role in overturning Nasser-era economic policies while enabling the government to claim that it was simply respecting an autonomous rule-of-law system [Also] the SCC used this leverage to initiate an aggressive political reform agenda with bold rulings in the areas of freedom of the press, freedom of association, and electoral reform. Throughout this period, a tacit partnership emerged between the SCC and a support network of opposition activists, human rights organizations, and professional syndicates. Domestic legal struggles were also internationalized when activists and the SCC used Egypt's international treaty obligations to challenge and strike down repressive domestic laws.¹⁰⁷

Ultimately, Mubarak's regime attempted and succeeded in limiting the SCC independence after the retirement of Chief Justice Wali al-Din Galal in 2001.¹⁰⁸ By breaking "a strong norm that had developed over the previous two decades," Mubarak selected a Chief Justice from outside the SCC. Professor Moustafa describes the situation:

Although the president always retained the formal ability to appoint whomever he wished for the position of chief justice, constitutional law scholars, political activists, and justices themselves had come to believe that the president would never assert this kind of control over the Court and that he would continue to abide by the informal norm of simply appointing the most senior justice on the SCC. Mubarak proved them wrong.¹⁰⁹

In brief, authoritarian regimes try to "benefit from autonomous judicial institutions by channeling divisive political questions into the courts"¹¹⁰ and Mubarak's regime was no exception. In particular, the

106. *Id.* at 16-17.

107. *Id.* at 17.

108. See RUTHERFORD, *supra* note 20, at 398-402 (discussing the attacks of Fathi Sorour, Speaker of the Parliament, and Mustapha Abu Zeid, a former Minister of Justice and socialist Public Prosecutor on the SCC).

109. MOUSTAFA, *supra* note 18, at 199.

110. *Id.* at 34 (explaining that "This phenomenon is more familiar in democratic

SCC had its share in confronting many controversial issues that were brought before it either through litigating a case or interpreting legislation. It is true that “[d]ozens of Egyptian Supreme Constitutional Court rulings enabled the regime to overturn socialist-oriented policies without having to face direct opposition from social groups that were threatened by economic liberalization.”¹¹¹ However, it is also true that the court, at the same time, “pursued a progressive political agenda for over two decades by selectively accommodating the regime’s core political and economic interests.”¹¹²

C. The SCC in the Second Republic: An Islamic Consensus Builder?

Of course, among the most controversial issues that Mubarak’s regime preferred to circumvent is the relationship between Islam and the state.¹¹³ During its golden age, the SCC contributed to solving some controversies related to this sensitive issue. Litigating Islam before the SCC created the so-called “Article 2 jurisprudence.” While this jurisprudence produced juridical milestones in understanding the Shari’a Clause, it is not clear at this moment how the rising Islamist groups in Egypt will receive this jurisprudence.¹¹⁴ Overall, this jurisprudence was

settings, where elected leaders sometimes delegate decision-making authority to judicial institutions to avoid divisive and politically costly issues.”)

111. *Id.* at 36. (“Court rulings dismantled parts of the social welfare system built by Nasser without the regime having to assume direct political responsibility for those actions.”).

112. *Id.* at 8.

113. *Id.* at 37. Moustafa explains this tension in detail:

[I]n the Egyptian context, the religious versus secular nature of the state is a perennial tension. Although the regime periodically uses religious institutions and symbolism to shore up its legitimacy, the piety card is a double-edged sword because of the state’s inability to monopolize religious rhetoric. The question of religion and the state is one that the regime therefore prefers to circumvent, both to avoid public discontent and to smooth over possible rifts within the ruling elite itself. Once again, the regime benefits from having judicial institutions to which such problematic and intractable disputes can be delegated in precisely the same way that politicians defer [to] courts in democratic systems.

114. *Cf.* Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Sharia Threaten Human Rights?: How Egypt’s Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT’L L. REV. 379, 430-34 (2006) (discussing the question of how Islamist groups are receiving the SCC’s jurisprudence and whether litigating before the court and relying on the basic scheme that the court has developed might suggest acceptance of a great deal of the SCC’s jurisprudence).

the product of an era during which the regime judged Islamist groups to be illegal and dealt with the SCC itself as a threat to the regime's interests.¹¹⁵ Eventually, Mubarak's regime succeeded in limiting the SCC's independence after the retirement of Chief Justice Wali al-Din Galal in 2001.¹¹⁶ As a result, the Court continued to use the existing jurisprudence without any remarkable contribution to it.

The most recent controversy that was brought before the SCC during the last years of Mubarak's regime was the appointment of women to the administrative courts.¹¹⁷ Mubarak's regime did not have a well settled and declared public policy regarding appointing women in the judiciary as the issue has been controversial for a long time. The heated debate about this issue always recalls different arguments from Islamic jurisprudence. In fact, appointing female judges is one aspect of a broader controversy about females acting in a public capacity (*wilayah ammah*) that includes the lower ranks of public service to the highest rank, i.e. the Presidency. The SCC had its first female justice in 2003¹¹⁸ and the ordinary courts started recruiting women in 2007. While appointing women at the SCC and the Ordinary courts has not been met, at least publicly, by criticism inside these two institutions, the situation was different with the Administrative courts. The meeting of the General

115. Professor Moustafa explains this tension:

As the regime grew increasingly nervous about opposition advances through the SCC and the Court's growing base of political support, the regime moved to undermine their efforts. Over a five-year period, the regime employed a variety of legal and extralegal measures to weaken the judicial support network and ultimately to undermine the independence that the Supreme Constitutional Court had enjoyed for two decades. Political retrenchment was challenged inside and outside the courts, but political activists were unable to prevent regime retrenchment given the overwhelming power asymmetries between the state and social forces. MOUSTAFA, *supra* note 18, at 8-9.

116. Cf. Nathan Brown, *supra* note 67, at 11-12 (noting that "[t]he country's Supreme Constitutional Court, a potentially critical body that is separate from the rest of the judiciary, lost much of the feistiness it showed in the 1980s and 1990s when President Mubarak appointed a series of chief justices less likely to cause the regime any trouble.").

117. Specifically, to the *Majlis al Dawlah* (State Council).

118. The appointment of Tahani al-Gibali to Egypt's Supreme Constitutional Court in 2003 is thought to be influenced by Hosni Mubarak's wife Suzanne. The New York Times claimed that al- Gibali "advised the [army] generals not to cede authority to civilians until a Constitution was written." David D. Kirkpatrick, *Judge Helped Egypt's Military to Cement Power*, N.Y. TIMES (July 3, 2012), available at <http://www.nytimes.com/2012/07/04/world/middleeast/judge-helped-egypts-military-to-cement-power.html>.

Assembly of the State Council that ended with more than 80% voting against appointing women at the State Council launched a heated debate. The meeting was a reaction to an executive decision taken by the Special Board of the State Council initiating the procedures to recruit new members including females for the first time in the Council's history. The government referred the matter to the SCC asking the Court to interpret two provisions. First, the word "Egyptian" was mentioned as a condition of judicial appointments at the Administrative courts; it was not clear whether this word referred only to males or to both genders. Second, it was not known whether appointing new members to the Administrative courts is entrusted to the General Assembly or to the Special Board. The Court took a middle-of-the-road position. In regard to the first provision, the Court stated that the word "Egyptian" is meant to address the nationality of the nominee without regard to gender; therefore, the Court refused to interpret the word because it is not subject to dispute.¹¹⁹ With respect to the second provision, the Court stated that the Special Board is entrusted with new appointment matters.

In brief, Mubarak's controversial appointments weakened the SCC ability to generate a national consensus over this controversial issue.¹²⁰ Even after Mubarak stepped down, the SCC has not yet recovered from the damage Mubarak has done to its independence. One example is the clash that took place between the SCC and the Court of Cassation right before the first referendum that took place after ousting Mubarak. As the Constitutional Amendments Committee drafted the proposed amendments, it stated that the SCC would be entrusted to decide on the

119. Compare Ali Afifi, Constitutional Court resolved dispute over appointment of female judges, *The Daily News* (Mar. 13, 2010) (in Arabic), available at <http://www.dar.akhbarelyom.org.eg/issue/detailze.asp?field=news&id=532> with RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* 94-95 (2010) (stating that "[t]he court took an inclusive approach and stressed that the law grants both men and women equal rights to assume judicial positions in administrative courts. The pertinent legislation stipulates that members of the Council of State must be 'Egyptian,' a word that in Arabic is specific to the male gender. However, the Supreme Constitutional Court ruled that in this context the word means 'citizen,' which includes both genders.").

120. As Mubarak appointed Faruq Sultan as Chief Justice of the SCC in 2009, many commentators expressed their concern about this controversial appointment. See e.g. Nathan Brown, *Why did the Egyptian regime appoint a new chief justice?*, *FOREIGN POLICY* (July 21, 2009), available at http://lynch.foreignpolicy.com/posts/2009/07/21/why_did_the_egyptian_regime_appoint_a_new_chief_justice (discussing Mubarak's appointment of Chief Justice Faruq Sultan in 2009); see also Clark B. Lombardi, *Egypt's New Chief Justice*, *COMPARATIVE CONSTITUTIONS PROJECT* (Sept. 30, 2009), available at <http://www.comparativeconstitutions.org/2009/09/egypts-new-chief-justice.html>.

appeals from parliamentary elections. Indeed, the Committee should have limited its work to amending only the necessary provisions that will govern an “orderly transition.” It should not have drawn a new policy that shifts one jurisdiction from a higher court to the highest court. Interestingly, the statements of the members of the Court of Cassation not only defended their prior experience in investigating electoral fraud cases, but also raised concerns about the SCC’s independence and institutional ability to handle the task. The SCC issued a statement defending its ability, while ignoring the attack on its independence. A few days before the referendum, reports stated that the final draft of the proposed amendments would leave this jurisdiction to the Court of Cassation. On referendum day, the only provision that had been changed from the Committee’s first draft was one that dealt with reviewing parliamentary appeals; the Court of Cassation had jurisdiction.

This tension between the Court of Cassation and the SCC revealed how some groups were not satisfied with one aspect or another related to the SCC. One of these aspects is appointing the justices at the Court. Faruq Sultan, the Chief Justice of the SCC when the uprising took place, was viewed as a part of the old regime.¹²¹ Mubarak “appointed a series of more reliable chief justices from outside the Court”¹²² and Sultan was the last of them. Though Sultan, as a Chief Justice of the SCC, did not assume the powers of the President after Mubarak as the 1971 Constitution states, he played a critical role in the transition process as the head of the commission overseeing the presidential elections.¹²³ At an early stage after the uprising, a decree law¹²⁴ passed by the SCAF with the approval of the Egyptian Cabinet on June 18th 2011 amended SCC law 48/1979 pertaining to appointment of the Chief Justice. The new amendment restricts the President’s ability to choose a new Chief

121. Matt Bradley, *On Eve of Egypt Vote, New Court Scrutiny*, WALL ST. J. (June 11, 2012), [available at](http://online.wsj.com/article/SB10001424052702303444204577460610368607718.html) <http://online.wsj.com/article/SB10001424052702303444204577460610368607718.html> (noting that “[t]he 18 judges on Egypt’s Supreme Constitutional Court were appointed, with few exceptions, during Mr. Mubarak’s era. About half came to the court during a period of staunch judicial independence during the 1980s. Others arrived under the Mubarak regime’s later efforts to stack the bench with cooperative justices.”).

122. Nathan Brown, *Why did the Egyptian regime appoint a new chief justice?*, FOREIGN POLICY (July 21, 2009), [available at](http://lynch.foreignpolicy.com/posts/2009/07/21/why_did_the_egyptian_regime_appoint_a_new_chief_justice) http://lynch.foreignpolicy.com/posts/2009/07/21/why_did_the_egyptian_regime_appoint_a_new_chief_justice.

123. David Kenner, *Egypt’s invisible strongman*, FOREIGN POLICY (April 16, 2012), [available at](http://blog.foreignpolicy.com/posts/2012/04/16/egypts_invisible_strongman) http://blog.foreignpolicy.com/posts/2012/04/16/egypts_invisible_strongman.

124. Egypt Decree No. 48/2011.

Justice by limiting the President's choice to the three senior justices on the Court after the General Assembly's approval of the Court's justices.¹²⁵ An early proposal to amend the structure of the SCC is mentioned in an article written by Judge Tariq al Bashri, the head of the Constitutional Amendments Committee, discussing the draft of the 1954 constitution, as a good model of a liberal constitution. The article draws attention to a "Supreme Court" that is composed of nine justices, three chosen by the Judiciary, three by the Parliament, and three by the President (Articles 187-193).¹²⁶

However, the new 2012 Constitution takes a different approach to appointing the justices at the SCC. Article 176 states: "[t]he Supreme Constitutional Court is made up of a president and ten members. The law determines judicial or other bodies that shall nominate them and regulates the manner of their appointment and requirements to be satisfied by them. Appointments take place by a decree from the President of the Republic." The 2012 Constitution took a more specific approach towards the structure of the SCC than the 1971 Constitution. Article 176 of the 1971 Constitution states: "[t]he law shall organize the way of formation of the Supreme Constitutional Court, and prescribe the conditions to be fulfilled by its members, their rights and immunities." This allowed Mubarak's regime to expand the formation of the Court into two chambers and to channel the sensitive cases to one of them. The 2012 Constitution stabilized the formation of the Court into only 11 members.

Another matter that raised tension between the SCC and different Islamist groups was the Court's decision on the unconstitutionality of the Parliamentary Election Law that led to the dissolution of the lower chamber of the Parliament (People's Assembly). To be clear, this was

125. See Nathan Brown, *supra* note 67, at 12, stating:

"the Court . . . secured a decree law in June 2011 from the ruling military council that got little attention in the wave of post-revolutionary exuberance. It restricts the president's choices for the position of chief justice to the Court's three most senior members and requires the agreement of the General Assembly of the Court's justices for the appointment to proceed. The brief decree also requires precedence be given to the Court's 'Commissioner's Body,' a group attached to the court that helps prepare cases and opinions, for appointment to the Court's main bench. The result will be a remarkably self-perpetuating Court and one that may be very difficult to check."

126. Tariq el Bashri, *The Draft of the 1954 Constitution deliberately excluded July rebels from power*, ALMASRY ALYOUM (Feb. 19, 2011) (in Arabic), available at <http://www.almasry-alyoum.com/article2.aspx?ArticleID=288330&IssueID=2051>.

not the first time the SCC overturned parliamentary election laws forcing the Parliament to be dissolved using the same constitutional principle of equality as a legal rationale. The SCC did it twice before in 1987¹²⁷ and 1990¹²⁸, citing a foreign legal ruling¹²⁹ *Baker v. Carr*,¹³⁰ a landmark case in which the US Supreme Court refused to apply the political question doctrine on the issue of reapportionment of legislative districts and, hence, considered the issue a justifiable question. In 2011, the challenged law was proposed to the military council (SCAF) reserving one-third of the Parliament's seats for independent candidates and the other two-thirds for candidates from political parties. However, the military council, under pressure from non-Islamist groups, "altered the law at the last minute to let party members compete for independent seats, but didn't extend the same opportunity to independent candidates."¹³¹ Interestingly, the SCC issued its controversial decision in a case brought by Anwar Sobh Darweesh, a Salafi who lost the race for a parliamentary seat as an independent candidate and brought a case before the Supreme Administrative Court¹³² which later referred it to the SCC.

The tension reached a new level when President Mursi took office and decided to cancel the military council's decree dissolving the Parliament, alleging that "he is not overturning the court's ruling. That ruling didn't dissolve the parliament; it only struck down the law by which the parliament was elected."¹³³ The SCC, with its jurisdiction over enforcing its decisions, rejected Mursi's decision stating that "[a]ll the rulings and decisions of the Supreme Constitutional Court are final and not subject to appeal . . . and are binding for all state institutions."¹³⁴ The

127. Case 131/ Judicial Year 6 SCC, *available at* <http://www.hccourt.gov.eg/Rules/getRule.asp?ruleId=437>.

128. Case 37/ Judicial Year 9 SCC, *available at* www.hccourt.gov.eg/Rules/getRule.asp?ruleId=421.

129. Bradley, *supra* note 121.

130. *Baker v. Carr*, 369 U.S. 186 (1962).

131. Bradley, *supra* note 121.

132. *Supreme Administrative Court Defers Decision on Dissolving the People's Assembly to October 15th*, Ahram (Sep. 22, 2012), *available at* <http://www.ahram.org.eg/Al-Mashhad-Al-Syiasy/News/172633.aspx>.

133. Nathan Brown, *Train Wreck Along the Nile: The battle over Egypt's parliament is more than just a legislative disaster. It's a legal nightmare*, FOREIGN POLICY (July 10, 2012), *available at* http://www.foreignpolicy.com/articles/2012/07/10/train_wreck_along_the_nile.

134. *Egypt Supreme Court rejects Mohammed Morsi power grab*, THE TELEGRAPH (July 9, 2012), *available at* <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/9387027/Egypt>

next day, “lawmakers met briefly, adjourning almost immediately until Parliament’s status has been ruled on by the Court of Cassation,”¹³⁵ an attempt to circumvent the SCC’s decision. The Court of Cassation made it clear that it has no “jurisdiction to consider Parliament’s request to determine how to apply the Supreme Constitutional Court ruling to dissolve the People’s Assembly.”¹³⁶

The drafters of the 2012 Constitution aimed to avoid any dilemma regarding the constitutionality of parliamentary election laws in the future. Article 177 of the 2012 Constitution states:

The President of the Republic or Parliament shall present draft laws governing presidential, legislative or local elections before the Supreme Constitutional Court, to determine their compliance with the Constitution prior to issuance. The Court shall reach a decision in this regard within 45 days from the date the matter is presented before it; otherwise, the proposed law shall be considered approved.

If the Court deems one or more parts of the text non-compliant with the provisions of the Constitution, its decision shall be implemented.

The laws referred to in the first paragraph are not subject to the subsequent control stipulated in Article 175 of the Constitution.

Article 175 states:

The Supreme Constitutional Court is an independent judicial body, seated in Cairo, which exclusively decides on the constitutionality of the laws and regulations.

The law defines other competencies and regulates the procedures to be followed before the court.

In this sense, Article 177 comes as an exception to the general rule of jurisdiction stated in Article 175. While Article 175 sets posteriori constitutional review as a general rule of jurisdiction for the Court, Article 177 introduces an exception to this general rule by defining certain laws subject to a priori constitutional review. These are the laws governing presidential, legislative or local elections whose drafts will be reviewed by the Court before their issuance.

The drafters of the 2012 Constitution also addressed another matter related to the Court’s theory on Shari’a. Islamist groups, heavily

-Supreme-Court-rejects-Mohammed-Morsi-power-grab.html.

135. Heba Saleh, *Egypt court rejects recall of parliament*, FINANCIAL TIMES (July 10, 2012), available at <http://www.ft.com/cms/s/0/1792a75a-ca7e-11e1-89f8-00144feabdc0.html#axzz2HRZiGNAP>.

136. *Cassation Court: Verdict to dissolve Parliament not within our jurisdiction*, EGYPT INDEPENDENT (July 14, 2012), available at <http://www.egyptindependent.com/news/cassation-court-verdict-dissolve-parliament-not-within-our-jurisdiction>.

represented in the Constituent assembly drafting the Constitution, did not share the same opinion of the Court's understanding of the principles of Shari'a. One example of this is the debate within the Muslim Brotherhood that occurred when the group was drafting its first Party Platform in 2007. In brief, some proposed the creation of a body of elected senior religious scholars (the 'Ulama Council) to review legislation. Such a proposal "seemed to catch some Brotherhood leaders by surprise"¹³⁷ and "sparked an unusual dispute within the Brotherhood . . . An ideological division pitted a conservative or reactionary wing against a reformist wing, and a generational struggle pitted an old guard against a new guard."¹³⁸ In contrast, another group "viewed the Supreme Constitutional Court as the most appropriate body to determine the extent to which legislation is consistent¹³⁹ with the requirements of the Islamic Shari'a under article 2 . . ."¹⁴⁰ Interestingly, among the group defending the proposal was President Mohamed Mursi who was then a member of the Guidance Bureau; among those opposing the proposal was 'Abd al-Mun'im Abu al-Futuh, who was expelled from the Brotherhood for his decision to run an independent presidential campaign. Eventually, this debate led to a sort of consensus that the proposed council would have only an advisory capacity. In an interview with an independent Egyptian daily, General Guide Mahdi 'Akif made this clear:

We want to construct a body of elected religious scholars that will choose the Shaykh of al-Azhar [one of the two most important religious officials in the country] but it will only be an advisory body. Whoever in public life wishes to consult it may do so. But the final decision is for the parliament—which must, as required by the constitution, accord with the Islamic Shari'a. If there is a difference, it is for the Constitutional Court to judge among disputants."¹⁴¹

Article 4 of the new Constitution introduced the Body of Senior 'Ulama (scholars) while addressing the role of Al-Azhar in general:

Al-Azhar is an encompassing independent Islamic institution, with exclusive autonomy over its own affairs, responsible for preaching Islam,

137. CARNEGIE ENDOWMENT FOR INT'L PEACE, THE DRAFT PARTY PLATFORM OF THE EGYPTIAN MUSLIM BROTHERHOOD: FORAY INTO POLITICAL INTEGRATION OR RETREAT INTO OLD POSITIONS? 4 (Jan. 2008), *available at* <http://www.carnegieendowment.org/2008/01/14/draft-party-platform-of-egyptian-muslim-brotherhood-foray-into-political-integration-or-retreat-into-old-positions/4va>.

138. *Id.* at 6.

139. *Id.* at 7.

140. *Id.* at 8.

141. *Id.* at 16.

theology and the Arabic language in Egypt and the world. Al-Azhar Body of Senior 'Ulama is to be consulted in matters pertaining to Islamic Shari'a.

The State shall ensure sufficient funds for Al-Azhar to achieve its objectives.

The Grand Sheikh of Al-Azhar is independent and cannot be dismissed.

The method of choosing the Grand Sheikh from among members of the

Body of Senior 'Ulama is to be determined by law.

All of the above is subject to legal regulations.

It is not clear what exact role that Al-Azhar Body of Senior 'Ulama will play in the public sphere in relation to other official institutions such as the SCC or the Parliament or how the next Parliament will treat the decree law on Al-Azhar that was passed by the military council in January 2012. Professor Nathan Brown notes "one passage in the law seems to give a vaguely defined but potentially quite powerful voice in 'determining' legal and doctrinal matters. That is much more than many al-Azhar advocates bargained for."¹⁴²

In fact, to understand the role of Al-Azhar in the future, Article 4 must be viewed within the context of Articles 2, 3, and 219. The four articles were the subjects of negotiations between the different political actors represented in the Constituent Assembly on one side, and Al-Azhar on the other. Salafis tried to impose a more direct role on Al-Azhar in defining Shari'a and placing it in the legal system, but Al-Azhar was not inclined to play such a role. Salafis tried to amend Article 2 to make it more relevant to their understanding of Shari'a as rules, not merely principles, but the Muslim Brotherhood, as well as other non-Islamist groups, did not share the Salafi view. As Al-Azhar sponsored efforts to bring all parties together, the outcome was leaving Article 2 (Principles of Islamic Shari'a) as is with no amendments and adding Article 3 (Principles of Christian and Jewish Shari'as), Article 4 (Al-Azhar and its Body of Senior 'Ulama) and Article 219 (detailing the meaning of the Principles of Islamic Shari'a).

In this regard, Article 3 states: "The principles of Egyptian Christians and Jews Shari'as are the main sources of legislation for their personal status laws, religious affairs, and the selection of their spiritual leaders."

And Article 219 states: "The principles of the Islamic Sharia include its *adilla kulliyya*, *qawa'id usuliah* and *qawa'id fiqhiyya* and the sources

142. Nathan Brown, *Why are so many upset about al-Azhar?*, ATLANTIC COUNCIL (Jan. 30, 2012), available at <http://www.acus.org/egyptsource/why-are-so-many-upset-about-al-azhar>.

considered by the Sunni madhhabs.”

As Professors Clark Lombardi and Nathan Brown observe, “[t]he italicized words are technical terms rarely used outside of scholarly circles.” In brief, the Article seems an attempt to shed light on how

‘Islamic shari’a has engendered a diverse set of intellectual inquiries stretching over more than a millennium,’ and allow the SCC to rethink its techniques “that acknowledged scholars and their traditions but treated them a bit roughly and even as unimportant.”¹⁴³

Overall, SCC seems set to continue playing a major role in building democracy in the Second Republic. As Professors Lombardi and Brown note:

Finally, the SCC itself is likely to continue to be called upon to play a major role. The constitution allows the more senior justices on the SCC to retain their positions, and these are precisely the figures who helped apply the SCC’s old approach. They may not feel compelled to bend despite the provision’s fairly precise language. But as they are replaced—and as a new law is written to govern appointment to the SCC—the court’s stance might change to one friendlier to neo-traditional understandings.¹⁴⁴

V. CONCLUSION

The Egyptian Second Republic will witness an expansion in litigating Islam. What prevailed during Mubarak’s era was a sort of “Islamist opposition v. secular legislation.” At that time, the SCC relied considerably on the procedural shield it had artificially created to avoid destabilizing the legal system on the one hand, and to avoid raising Shari’a-related political tensions on the other. What will emerge in the future is a more advanced form of litigating Islam in terms of both quantity and quality. In terms of quantity, as Islamist groups are expected to gain a considerable amount of votes in any forthcoming election, many public policies aiming to “Islamize” society will emerge. In case these policies lack adequate national consensus, different groups, such as liberals and Copts, will rise to challenge them. In terms of quality, the SCC will be encouraged to take a bolder attitude in examining challenged legislation. Ultimately, the Court will have to spend more time discussing jurisprudential doctrines and less time restraining itself by procedural technicalities. Moreso, a Parliament with considerable

143. Clark Lombardi, *Islam in Egypt’s new constitution*, FOREIGN POLICY (Dec. 13, 2012), [available at](http://mideast.foreignpolicy.com/posts/2012/12/13/islam_in_egypts_new_constitution) http://mideast.foreignpolicy.com/posts/2012/12/13/islam_in_egypts_new_constitution.

144. *Id.*

Islamist participation will be inclined to review existing legislation, and therefore will limit the effectiveness of any procedural shields that restrained the SCC in the past. Finally, as argumentation will have to advance beyond “liberal v. conservative” Islamic jurisprudence, developing Islamic legal studies that address the contextual versus textual analysis of the divine scripture will be an inevitable step. In particular, interpreting the Shari’a Clause will rely more on legal arguments than political considerations. Such arguments will require sincere effort to distinguish the timeless Principles of Islamic Shari’a from the historical applications of Shari’a. As the demand on litigating Islam will increase, the question will be: is the Egyptian legal system ready to meet this demand by generating an advanced Islamic jurisprudence? In this sense, several forums must be ready: the forums that have to advance Islamic jurisprudence, Al-Azhar and the law schools, and the forums that have to put it into action in the legal system and the body politic, i.e. the judiciary in general and the SCC in particular. Finally, it is important for these forums to institutionalize themselves as builders of national consensus among different political and social actors and guardians of how these principles work in reality. In the absence of the early Islamic formula of “checks and balances,” one may be concerned that the relationship between Islam and the state will turn into a “Theo-political Islam” rather than an “Intell-political Islam” model of governance.