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# Religious Constitutionalism in Egypt: A Case Study

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Article 2 of the Constitutional Declaration of 2011 reads, “Islam is the religion of the state, Arabic is its official language. Principles of Islamic Sharia are the principal source of legislation.” Islamists see this as their gateway to entering and determining the path of Egypt’s political and legal life. Ironically, while Article 2 was included in the former Egyptian Constitution of 1971, Islamists today argue it was not fully enforced. The Article was retained in 2012.

The Supreme Constitutional Court (SCC)’s current interpretation of Article 2 is a liberal one that is partly accepted by the Islamists. The SCC’s interpretation states that in order for legislation to be consistent with Article 2, it should not violate the authentic rules of Sharia and should maintain human welfare as well as human rights. Islamists claim this interpretation does not satisfy their strict religious ideology; however, they explicitly accepted it in their platform in 2007 in order to protect the Article from being altered or removed from the constitution.

In this essay, I will analyze the political significance of Article 2. First, I will first trace the historical background of the Article in an attempt to show how it entered the Egyptian Constitution. Second, I will examine how the SCC developed a methodology of liberal interpretation of Article 2 that has been followed by several other Muslim countries. Third, I will answer the question of whether Article 2 is really applicable in Egypt. In doing so, I will discuss the view of politically active Islamists, particularly the Muslim Brotherhood, and to what extent it presents a contrast to the SCC’s interpretation. Fourth, I will examine the challenges that surround

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the application of Article 2, including opposition from the Christian minority and liberal scholars. Finally, I will propose some suggestions that might secure a pragmatic application of the Article.

## HISTORY OF ARTICLE 2

Islamic constitutionalism can be traced back to Egypt's first constitution in 1923. Article 149 inserted Islam into the Constitution by declaring that "the religion of the state is Islam and Arabic is its official language." Interestingly, all of the drafting committee members—including the Christian members—unanimously approved this Article. One may speculate that the consensus was merely an attempt to solidify Egypt's identity, which the British occupation had tried desperately to efface, or an acknowledgment of Egypt's *de facto* composition. Following the Constitution of 1923, the Constitutions of 1930, 1956, 1964, and 1971 all incorporated Article 149. Only the Constitution of 1958, drafted after the unification of Egypt and Syria, omitted the Article.

After President Mohammad Anwar el-Sadat assumed power in Egypt in 1970, a new constitution was drafted and promulgated, which became known as the Permanent Egyptian Constitution of 1971. By this time, the Islamists in Egypt were more organized and their political faction, the Muslim Brotherhood, was stronger in asserting their ambitions for governance and a religious state. Sadat sought to placate the Islamists, both to avoid the threat they posed and to use them against the leftist allies of deceased President Gamal Abdel Nasser who opposed Sadat's policies.<sup>1</sup> In order to win the Islamists' support, Sadat proposed to add the phrase "and the principles of Islamic Sharia are a primary source of legislation" to Article 149 of the 1923 Constitution. The new Article read: "Islam is the religion of the state, Arabic is its official language, and the principles of Islamic Sharia are a primary source of legislation."

Interestingly, this was not Sadat's last brushstroke on Article 2. In 1980, Sadat found himself constrained by Article 77 of the 1971 Constitution, which limited the President to two six-year terms. Sadat wanted to amend Article 77 to allow him to continue beyond the designated two terms and saw no possibility of doing so without the support of ordinary Egyptians, as well as the Islamists. The solution was to propose an amendment to Article 2 alongside the desired amendment to Article 77. The amendment to Article 2 read, "the principles of the Islamic Sharia are *the* primary source of legislation [emphasis added];" the amendment to Article 77 added the phrase "the President may be reelected for other successive terms."

This was a cunning move by Sadat. Using Article 2, he played to the religious tendency of ordinary Egyptians, as well as the Islamists, in order to pass Article 77, as any opposition to Article 77 would have struck down Article 2 at the same time.<sup>2</sup> However, Sadat did not expect that the change in Article 2 from “a” primary source of legislation to “the” primary source would result in the major controversy and debate over interpretation that continues to this day.

Moreover, Sadat did not expect that his relationship with the Islamists would deteriorate after he signed the Egypt-Israel Peace Treaty in 1979. He was assassinated in October 1981.<sup>3</sup>

## UNDERSTANDING ARTICLE 2

Since its inception, Article 2 has been widely interpreted to mean that all laws must be consistent with Islamic Sharia.<sup>4</sup> Given the controversial nature of such an interpretation, the following analysis seeks to clarify the parameters of the Article in order to help illuminate its role in present-day Egypt.

### *Islam and the State*

As noted previously, the beginning of Article 2 reads, “Islam is the religion of the state and Arabic is its official language,” obviously addressing the identity of the state. As the majority of the population in Egypt is Muslim and Arabic is its dominant language, this phrase seems to merely reflect the status quo. Furthermore, the phrase, “Islam is the religion of the state” suggests that Islam is the religion of the majority of the population and not the religion of the state as an institutional entity; it does not signal that non-Muslims should be deprived of the right of freedom of religion or the freedom to practice their religious rites.<sup>5</sup> In Egypt, the rights of non-Muslims are guaranteed in part because they are related to the right of citizenship.<sup>6</sup> Furthermore, if we accept that Article 2 prohibits laws contrary to Islamic Sharia, any law that restricts the religious

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freedoms of non-Muslims in Egypt would be rendered unconstitutional simply because Islam guarantees these rights in many places. For example, the Qur'an reads, "there shall be no compulsion in [acceptance of] the religion. The right course has become clear from the wrong."<sup>7</sup> Likewise, it also reads, "and had your Lord willed, those on earth would have believed—all of them entirely. Then, [O Muhammad], would you compel the people in order that they become believers?"<sup>8</sup>

Furthermore, it is worthwhile to consider whether the phrase "Islam is the religion of the state" classifies Egypt as a clerical state to the extent that the whole state, either in its governmental or societal aspects, would be subject to the control of Islamic clerics. Yet, this interpretation is unlikely to prevail. In fact, the idea of a clerical state is against Islamic Sharia because this idea assumes the existence of a mediator between people and God. The existence of this mediator is against the concept of monotheism, the premise upon which the code of law is based.<sup>9</sup>

Many worry that dictating in the Constitution that Islam is the religion of the state is a step backward that may lead to religious discrimination. This worry is potentially mitigated by the constitutions of some countries that may seem to be more democratic than Egypt. For example, the Constitution of Greece stipulates that, "the prevailing religion in Greece is that of the Eastern Orthodox Church of Christ."<sup>10</sup> Moreover the Constitution of Denmark reads that, "the Evangelical-Lutheran Church of Denmark is the established Church of Denmark and, as such, is supported by the State"<sup>11</sup> and that "the King must belong to the Evangelical-Lutheran Church."<sup>12</sup> Based on these examples, these kinds of constitutional phrases

merely declare a reference to the state; they do not hurt democratic movements per se, unless they are specifically misused.

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*This begs the question: does the phrase "the principles of Islamic Sharia" signify that the law must be identical with Islamic Sharia, or does the word "principles" take the Article somewhere else?*  
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***The Principles of Islamic Sharia as the Primary Source of Legislation***

The last portion of Article 2 states "principles of Islamic Sharia are the principal source of legislation."

This is the most controversial part of the Article because it declares that no law may be inconsistent with the principles of Islamic Sharia.

Islamic Sharia is a broad term, which includes rules that the Prophet

Muhammad legislated by means of revelation as well as the entire jurisprudential system developed by Islamic scholars.<sup>13</sup> However, Article 2 specifically refers to the “principles” of Sharia and does not refer to it in absolute terms. This begs the question: does the phrase “the principles of Islamic Sharia” signify that the law must be identical with Islamic Sharia, or does the word “principles” take the Article somewhere else? It therefore is necessary to consider these possibilities and their interpretation in conjunction with the role of the SCC, as discussed below.

### *The Supreme Constitutional Court on Article 2*

The Egyptian SCC has the sole authority to exercise the power of judicial review in order to ensure that all laws and regulations conform to the Egyptian Constitution, and to interpret laws so as to remove any confusion or ambiguity regarding their meaning.<sup>14</sup> Accordingly, the SCC seemed to be the proper forum for many parties, including the Islamists, to shed more light on the meaning and consequences of Article 2. Consequently, it is safe to stand on its interpretation of the Article.

Despite hearing many cases arguing that certain laws were inconsistent with the principles of Islamic Sharia mentioned in Article 2, the SCC did not find it necessary to interpret what “the principles of Islamic Sharia” meant until 1993.<sup>15</sup> In that year, a petitioner challenged the constitutionality of Articles 18(b) and 20 of Law No. 100 of 1985,<sup>16</sup> which amended some provisions of the Personal Status Law, claiming that they violate Article 2. Article 18(b) reads, “[i]f a husband divorced his wife without her consent and without any specific cause, the wife deserves an extra compensation, which is equal to two years of any maintenance payment she might receive.” Article 20 provides that, “the wife’s right to custody terminates when the male child reached the age of 10 and the female child reached the age of 12. However, if it is in the children’s interests, a judge may allow the male child to remain in his mother’s custody until the age of 15 and the female child until her marriage.”

The SCC denied the petitioner’s claim and ruled that there was no violation of Article 2 of the Constitution.<sup>17</sup> In justifying its decision, the Court argued that only the ‘authentic rules’ of Islamic Sharia are inviolable. They are non-changeable and cannot be construed or altered; *Ijtihād*, or individual reasoning, is not allowed for these rules. In contrast to this, rules that do not enjoy such authenticity can be changed, construed, or altered to fit the needs of time and to maintain the general purposes of Sharia and its underpinnings: the religion, life, reason, honor, and property.<sup>18</sup>

According to this decision, the SCC established two levels of review under which a law's constitutionality should be tested. First, the legislation must not violate the authentic rules of Sharia as described by the Court.<sup>19</sup> Second, the legislation must be consistent with the general purposes of Sharia so that it does not impede their application.<sup>20</sup> Regarding the first level of review, the Court declared that the "principles of Islamic Sharia" means those rules that are authentic in their existence and meaning. In the context of Islamic law, the Qur'an<sup>21</sup> and the Sunnah, or the sayings and normative practices of Prophet Muhammad,<sup>22</sup> are the chief primary sources. The Qur'an enjoys absolute authenticity of existence, being beyond dispute.<sup>23</sup> However, the authenticity of the Sunnah, especially al-Hadith ("the Prophet's sayings and speeches"), is questionable<sup>24</sup> because many of the sayings and speeches were not narrated by the Prophet.<sup>25</sup> On the other hand, the authenticity of meaning is a challenge for both the Qur'an and the Sunnah.<sup>26</sup> A Qur'anic text as well as a Prophet's speech or saying could embrace multiple meanings that entail multiple interpretations. The SCC developed an interesting legal solution to deal with the meanings of the legal texts: if they are unambiguous after careful examination, the plain meaning will be implemented,<sup>27</sup> but if they remain ambiguous or vague, the court itself will try to interpret this ambiguity without contradicting the tenets of Sharia.

The second level of review is to examine whether the challenged legislation is consistent with the purposes of Sharia: to promote and protect religion, life, reason, honor, and property. Indeed, the development of these purposes was the product of Islamic jurists' interpretation and *Ijtihād*, or individual reasoning,<sup>28</sup> to promote human justice and welfare,<sup>29</sup> and to render Islamic Sharia a complete corpus and system for life, not merely a set of rules.<sup>30</sup> Consequently, the Court held that a law that undermines human justice and welfare would be rendered unconstitutional.<sup>31</sup>

The SCC approach to interpreting and applying Article 2 reveals that it adopts the theory of *siyassa shariyya*, which means that the system of governance should be consistent with Sharia, but with a slight reform. The Court's position could be summarized in the development of two criteria that a law must meet in order to be consistent with Article 2: consistency with authentic Islamic rules and promotion and maintenance of the purposes of Islamic Sharia.<sup>32</sup> On the other hand, the Court did not consider the argument that the theory of *siyassa shariyya* confers exclusive jurisdiction on the religious jurists and guilds to interpret Sharia. Instead, it reserved the jurisdiction to use *ijtihād* skills whenever the need arose.

The stress that the Court places on the need for legislative consistency

with the welfare-oriented purposes of Sharia characterizes the Court as an entity with a liberal constitutional jurisprudence.<sup>33</sup> However, any argument that the Court's methodology is an attempt to secularize Egyptian legislation to the extent of declaring them unrelated to Islamic law would be greatly misleading.<sup>34</sup> The methodology can instead be seen from the perspective of reinterpreting Islamic rules in a way that fits the needs of the modern era and society. Many scholars have acknowledged the validity of the argument that the Court carried out a genuine attempt to introduce Islamic Sharia as a unified corpus, as well as a life system that can accommodate the modern era and its challenges.<sup>35</sup>

### IS ARTICLE 2 REALLY APPLICABLE?

The question of whether Article 2 is truly applicable is a question without a complete answer. In fact, the answer depends on many political currents, including the voices of minorities and those who wish to take charge of applying Article 2 in Egypt—the religious guilds.

After the 2011 Revolution, the Muslim Brotherhood successfully established the Freedom and Justice Party, through which it became fully involved in Egyptian political life and won the parliamentary majority in 2011. Despite the fact that the SCC dissolved the Parliament in June of 2012,<sup>36</sup> the Brotherhood's Parliamentary majority reveals the extent to which the Islamists gained strength by successfully winning the people's confidence. With this in mind, it would be helpful to examine the Brotherhood's stance towards the application of Article 2.

Article 2 plays a crucial role in justifying the existence of the Muslim Brotherhood and ensuring its legitimacy; thus, the Brotherhood is eager to preserve the Article in the Egyptian Constitution.<sup>37</sup> While articulating its political and economic views as well as its goals for the future of Egyptian society in 2007, the Brotherhood unexpectedly embraced the SCC's interpretation of Article 2 in its party platform.<sup>38</sup> Its recognition of the SCC's constitutionally liberal approach to Article 2 was motivated by the Brotherhood's political agenda and aspirations. Specifically, Brotherhood leaders were compelled to accept the SCC's liberal methodology so that Article 2 would remain untouchable, even if the Court's interpretation was inconsistent with their religious ideology.<sup>39</sup> It is noteworthy that when the Brotherhood declared that the party policies and reforms were in accordance with the SCC determination of the principles of Sharia, it implicitly acknowledged that the SCC has jurisdiction to interpret Article 2.<sup>40</sup> However, this acknowledgment was not absolute; in fact, the Brotherhood

views the SCC's methodology as a mere beginning and has accepted it as a small step towards embracing Islamist political and religious ideology.<sup>41</sup>

According to the Brotherhood, the acceptance of the SCC interpretation of Article 2 was a political decision that fit into a certain era. However, its real view of Article 2 started to emerge in 2011 once it became more involved in Egyptian politics, established a political party, and won a parliamentary majority.<sup>42</sup> This stance emphasizes the role of the Islamic jurists and guilds in interpreting Article 2, and seeks to ensure that they play a role in examining legislation and its consistency with regard to the principles of Sharia.<sup>43</sup>

### TENSIONS BETWEEN ARTICLE 2 AND EGYPTIAN LAW

A cursory examination of Egyptian law is sufficient to realize that the meaning of Article 2 is not fully embraced. Although Article 2 lists the principles of Islamic Sharia as the primary source of legislation, Article 1 of the Egyptian Civil Code lists the principles of Islamic Sharia as the third source to which judges should defer, after the legislation itself and

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custom.<sup>44</sup> This creates a direct conflict between Article 2 and the civil code, which might lead to severe inconsistencies as one case could have two different outcomes according to a judge's approach. Furthermore, many articles in the Egyptian penal code are inconsistent with the meaning of Article 2. In the context of Islamic Sharia, crimes like fornication and theft are classified among the *hudud* offenses—offenses that are mentioned in the Qur'an with

their penalties. Thus, a judge should follow them as prescribed in the Qur'an without relying on his *Ijtihād*. However, in the penal code, the punishment for fornication is imprisonment,<sup>45</sup> while Islamic Sharia stipulates that the appropriate punishment is lashings.<sup>46</sup> Similarly, the penal code punishment for theft is imprisonment,<sup>47</sup> while Islamic law stipulates hand amputation.<sup>48</sup> Moreover, selling and buying wine, contrary to the authentic rules of Islamic Sharia,<sup>49</sup> is legal in Egypt. Additionally, neither the Constitutional of 2011 nor any of the prior constitutions required that the president be male and Muslim, a condition that has been set by *Ijma*,<sup>50</sup> or the unanimous consensus of the Islamic jurists and the third primary



source of Islamic law.<sup>51</sup> In the context of Sharia, rules legislated by the means of *Ijma* are considered to be authentic and obligatory.<sup>52</sup>

These examples leave little doubt that Egyptian legislators have not fully adhered to Article 2. The argument that the *hudud* penalties and the presidency requirements are Sharia “rules,” not “principles” in the language of Article 2, and consequently represent no violation of Article 2, is unlikely to prevail. When the SCC interpreted Article 2, it interpreted “the principles of Islamic Sharia” to mean the authentic rules of Islamic Sharia,<sup>53</sup> and the Court has been recognized by all legal and political parties as the competent entity to determine the constitutionality of laws and regulations.

Indeed, it seems Egypt continues to follow Muhammad Ali’s policy in drafting legislation in the European style and limiting the role of religious jurists and guilds,<sup>54</sup> which was the main reason for limiting the scope of Article 2. Today, Egypt has to a large extent successfully secularized its laws, drawing them mainly from the French legal system in which Islamic Sharia plays little—if any—role.<sup>55</sup> Nevertheless, when it comes to issues of personal status, Islamic Sharia plays an exclusive role, with non-Muslim Egyptians being allowed to ask the judge to rule according to their religious law.<sup>56</sup> Interestingly, Egypt’s unique experience inspired many Muslim countries to follow suit and draft secular legislation in which Islamic Sharia has only a small role to play.<sup>57</sup>

## CHRISTIANITY AND ARTICLE 2

Christianity prevailed in Egypt during the fourth, fifth, and sixth centuries, until the Islamic conquest in AD 640.<sup>58</sup> Today, Egypt has the largest Christian minority in the Middle East. Egyptian Christians, referred to as Copts, represent ten percent of Egypt’s population – between ten and twenty million people.<sup>59</sup>

As a minority in Egypt, Copts are fearful of a full application of Article 2. Their fears pertain largely to the belief that as a minority group under Islamic Sharia, they will be linked to the state by the *dhimmi* contract that promotes discrimination against non-Muslims.<sup>60</sup> Further, some Coptic scholars argue that a full application of Article 2 would also entail a full application of Islamic Sharia, which could endanger adherence to universally accepted standards of human rights.<sup>61</sup>

However, an argument that applying Sharia would render the Christians subject to the *dhimmi* contract is not accurate. This is because, even if we interpret the *dhimmi* contract as promoting discrimination against non-Muslims, this contract was terminated in 1856 when the Khedive of

Egypt, the Ottoman provincial ruler, declared that non-Muslims were eligible to be admitted to state positions.<sup>62</sup> Moreover, one cannot argue that applying Islamic Sharia would render Copts' rights, as well as human rights, vulnerable. This is because Islam honors those who were given the

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Scripture, including Christians, and orders Muslims to be kind to them.<sup>63</sup>

Further, applying Sharia would provide great protection to and promotion of the concept of human rights. This much is evident from the SCC's methodology. It explicitly ruled that a law would be unconstitutional if it violates the concept of human rights, as this would make it inconsistent with the spirit and tenets of Islamic Sharia.<sup>64</sup>

Copts as well as some Muslims fear that if Sharia is to be fully applied, *hudud* penalties like hand amputation for thieves and beheading for murderers would be applied as well. In fact, applying the *hudud* penalties requires prerequisite conditions that Egyptian society lacks.<sup>65</sup> *Hudud* penalties were legislated to preserve an existing virtuous society, not to create one. Thus, before the *hudud* penalties may be activated, legal justice should be attained with all people subject to the law on an equal basis and a system of societal justice should be reached so that all people may find that their daily earnings guarantee a minimal, decent standard of life.<sup>66</sup> Furthermore, Islam requires very strict evidence to prove a *hudud* crime, to such an extent that it may be refuted by a mere suspicion to the contrary.<sup>67</sup>

## LOOKING AHEAD

Reconciliation should be reached between Article 2 and other articles that contradict it, especially Article 1 of the civil code. Specifically, Article 1 of the civil code should not list the principles of Islamic Sharia as the third source to which judges should defer while Article 2 concurrently considers those principles to be the main source of legislation.

The presidential election of 2012 installed Mohammad Morsi, the Muslim Brotherhood candidate, as the first Egyptian president since the Revolution of 2011. This raises the question: how might Morsi deal with Article 2 given Egypt's special circumstances? More precisely, how will a President with a strong Islamic ideology subordinate Egypt legally and ideologically to Article 2, taking into account the Christian minority as well as the moderate nature of the country?

Following the intense debate concerning Article 2, the SCC should reexamine its definition of “the principles of the Islamic Sharia” and reinterpret this constitutional phrase in order to clear any vagueness regarding whether the word “principles” means “rules” or whether it includes a more lenient standard than what the latter embraces. Finally, vesting the sole power to appoint the president of the Court in the president of the Republic is highly questionable,<sup>68</sup> as it could affect the SCC’s neutrality regarding the interpretation of Article 2. It is likely that a president supported by Islamists will select the president of the Court from among those who share his ideology. Consequently, one could expect the Court to adopt a strict interpretation of Article 2 in the future<sup>69</sup>—a possibility that would not be viewed with favor by a large proportion of stakeholders in Egypt and beyond. ■

#### ENDNOTES

- 1 See: Mona El-Ghobashy, “The Metamorphosis of the Egyptian Muslim Brothers,” *International Journal of Middle East Studies* 373-377 (2005): 37. El-Ghobashy shows how Sadat’s policy with regard to the Muslim Brotherhood was mainly intended to develop anti-Nasserist politics in Egypt. Furthermore, Tamir Moustafa argues, “Sadat was using the Islamist trend to counterbalance Nasserist power centers within the state and society.” Tamir Moustafa, “The Islamist Trend in Egyptian Law,” *Politics & Religion* 610 (2010): 617-618.
- 2 Article 2 was in fact a great victory for the Islamists. This is especially true for the Muslim Brotherhood, as it allowed them to participate in the Egyptian legal system. Article 2 itself justified this involvement because the Brotherhood’s position renders them the most qualified polity to bring the Article’s language to effect.
- 3 Egypt’s signing of the Camp David treaty with Israel outraged most of the Arab countries, as well as Islamists in Egypt. In reaction to the signing, the Islamists began to politically oppose Sadat. This movement was subsequently targeted, leading to arrests and imprisonment of the leaders of the Islamists and the Muslim Brotherhood. As the tension between Sadat and the Islamists escalated, the Islamists successfully planned and executed Sadat’s assassination while he was watching the annual victory parade of Egypt’s 1973 attack on Israel. See: Saad Eddin Ibrahim, “Domestic Developments in Egypt,” in *The Middle East: Ten Years After Camp David*, ed. William B. Quandt (The Brookings Institution, 1988): 19, 54-55.
- 4 Tamir Moustafa, “The Islamist Trend in Egyptian Law,” *Politics and Religion*, Vol. 3, 617-618.
- 5 Tahanni Al-Gebali, “Aletar Al-dostory ly-tatbiq Al-mada Al-Thania mn Al-dostor [The Constitutional Framework to implement Article 2 of the Constitution],” *Working Paper Presented at a Lecture in Alexandria Bibliothheque* (June 9, 2007): 7, <http://nwrcegypt.org/?p=3659>.
- 6 Al-Gebali, *The Constitutional Framework*, 8.
- 7 Qur’an 2:256.
- 8 Qur’an 10:99.
- 9 Al-Gebali, *The Constitutional Framework*, 9.
- 10 1975 Syntagma [Syn.] [Constitution], sec. 3 (Greece).

- 11 June 5, 1953 Constitution, sec. 4 (Denmark).
- 12 Ibid.
- 13 Isma'il Al-Faruqi and Louis Al-Faruqi, *The Cultural Atlas of Islam* (Chicago: Kazi Publications, 1996): 279.
- 14 The Egyptian Constitutional Declaration of 2011, art. 49.
- 15 Clark B. Lombardi, *State Law as Modern Islamic Law in Modern Egypt: The Incorporation of the Sharia into Egyptian Constitutional Law* (Leiden: Brill Academic Publishers, 2006): 178.
- 16 See the English translation of the law in: Dawoud S.El Alami, "Law No. 100 of 1985 amending Certain Provisions of Egypt's Personal Status Laws," *Islamic Law and Society* 1 (116) (1994): 120.
- 17 Supreme Constitutional Court, Case no. 7, Judicial Year 8.
- 18 Ibid.
- 19 Lombardi, *State Law*, 185.
- 20 Ibid.
- 21 The Qur'an is considered to be the fundamental, first source of Islamic law by all scholars. See: Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence, 2nd Edition*, (Cambridge, UK: Islamic Texts Society, 1991): 14.
- 22 The Sunnah is the second primary source; Islamic law considers the sayings, doings, tacit approvals, and normative practices of the Prophet Muhammed among its primary sources. The Sunnah is not higher than the Qur'an; rather, it aids in interpreting it. This means that only the Qur'an is infallible. The Sunnah, however, is prone to mistakes as scholars consider some hadiths to be very weak and doubtful. See: Michael Mumisa, *Islamic Law: Theory & Interpretation* (Beltsville, MD: Amana Publications, 2002): 57.
- 23 Kristen Stilt, "Islam is the Solution: Constitutional Visions of The Egyptian Muslim Brotherhood," *Texas International Law Journal* 46 (73) (2010): 81.
- 24 Ibid.
- 25 Frank E. Vogel, "Conformity with Islamic Sharia and Constitutionality Under Article 2: Some Issues of Theory, Practice, and Comparison," in *Democracy, The Rule of Law, and Islam*, eds., Eugene Coltran and Adel Omar Sherif (London, Kluwer: Cimel Book Series No. 6, 1999): 525, 531.
- 26 Stilt, "Islam is the Solution."
- 27 Lombardi, *State Law*, 186.
- 28 In the context of Islamic law, *Ijtihād* is the process of exerting intellectual effort either to establish a new rule if the Qur'an and the Sunnah lack a clear rule to face a newly emerging issue, or to reform an existing rule in order to adapt to new developments. On the contrary, Islamic law knows what is called *Taqlid*, which is the process of adhering to an existing opinion or decision of a certain jurist's school of thought rather than triggering *Ijtihād* to establish a new rule. See: Mohamed Abdelaal, "Taqlid v. Ijtihād: The Rise of Taqlid as the Secondary Judicial Approach in Islamic Jurisprudence," *J. JURIS.* 14 (151) (2012): 152, 160.
- 29 Lombardi, *State Law*, 188.
- 30 R.M. Gleave, "Makasid al-Sharia," in *Encyclopedia of Islam, 2<sup>nd</sup> Edition*, ed. P. Bearman et al., (Leiden: Brill Publishers, 2006): 569.
- 31 In 2006, a woman who refused to enforce her husband's order of obedience after he had divorced her and denied the occurrence of that divorce challenged the constitutionality of Article 21 of Law No. 1 of 2000, claiming that it violated Article 2 of the Constitution. Article 21 reads, "[a] divorce, in case of its denial, cannot be proven except by witnesses and authentication ...". The woman argued that limiting the ways

to prove a divorce's occurrence only to witnesses and authentication contradicts the principles of Islamic Sharia that are the primary source of legislation according to Article 2, which she believed rendered Article 21 unconstitutional. The Court triggered the first level of review and ruled that limiting the ways to prove a divorce, if one of the spouses denied its occurrence, only to witnesses and authentication violates the authentic rule of Islamic Sharia that a divorce could be proven by all methods of proof such as evidence, oaths, and recognition. The Court tested the legislation under the second level of review arguing that divorce is a kind of mercy from God for both spouses who found it difficult to continue their life together. Thus, Article 21, which limits the ways to prove the divorce to witnesses and authentication, means that the legislator triggered its *ijtihadic* skill out of its place. The Court then moved to argue that these limitations in Article 21 were an undue mandate that hindered the proving of a divorce that occurred by clear words or acts to the extent that it impedes the purposes of Sharia and human justice and welfare. Accordingly, the Court ruled that Article 21 violates Article 2 of the Constitution and declared it unconstitutional. Egyptian Supreme Constitutional Court. Case no. 133, Judicial Year 26.

- 32 Supreme Constitutional Court, Case no. 7, Judicial Year 8. See also: Supreme Constitutional Court. Case no. 8, Judicial Year 17.
- 33 Lombardi, *State Law*, 197.
- 34 Clark B. Lombardi and 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," *American University International Law Review* 21 (379) (2006): 432.
- 35 See: Frank E. Vogel, "Conformity with Islamic Sharia and Constitutionality under Article 2: Some Issues of Theory, Practice, and Comparison," in *Democracy, the Rule of Law and Islam*, eds. Eugene Cotran and Adel Omar Sherif (1999): 535-538. Some scholars argued against this idea claiming that the SCC's methodology in interpreting Article 2 was a "strategy used by the secular order" to preserve the secular anatomy of the order and the society as well. Others argued that the Court's methodology was a mere attempt to secularize the judicial decisions against the Islamists political tide. See: Kilian Balz, "The Secular Reconstruction of Islamic Law: The Egyptian Supreme Constitutional Court and the "Battle Over the Veil" in State-Run Schools," in *Legal Pluralism in the Arab World*, eds. Baudouin Dupret et al (1999): 243; Ran Hirschl, "Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales," *Texas Law Review* 82 (1819) (2004): 1819-28.
- 36 Supreme Constitutional Court, Case no. 20, Judicial Year 34.
- 37 Nathan Brown and Amr Hamzawy argued that Egypt went through several constitutional amendments "that aimed in part to undercutting the Brotherhood." However, they argued, "Article 2 and its Islamic reference provides continuing constitutional refuge for the Brotherhood's program." See: Nathan J. Brown and Amr Hamzawy, "The Draft Party Platform of the Egyptian Muslim Brotherhood: Foray Into Political Integration or Retreat Into Old Positions?," in *Carnegie Papers: Middle East Series* 89 (2008): 3.
- 38 The Muslim Brotherhood, *Draft Platform of the Political Party* (2007): 6 (quoted in Stilt, "Islam is the Solution," 89).
- 39 When the Brotherhood became heavily involved in Egyptian politics they followed the same line that President Sadat had followed, arguing that Article 77 regarding presidential term limits should be amended. They stressed the religious tendencies of the majority of Egyptians in justifying their position. But the Brotherhood's policy positions retain vagueness on the position of Sharia. To some extent, this stress on

religious aspects led the Brotherhood to slightly ignore some legal and political details, one of which is the Brotherhood's clear position on Article 2. In fact, the SCC's methodology in interpreting Article 2 represented a cover from the Brotherhood's criticisms of this vagueness. Brown and Hamzawy argued that the Brotherhood's behavior in referring to the SCC's approach in interpreting Article 2 is "politically savvy." To some extent, this explains their religious reference and at the same time refers to the "constitutional order;" in doing so, it reiterates that the legislature is the competent entity to legislate and the SCC is the entity to exercise the process of judicial review. See: Brown and Hamzawy, "The Draft Party Platform," 3.

40 The Supreme Constitutional Court's Law, No. 48 of 1979, Art. 25.

41 The Brotherhood's view seeks a strict application of the theory of *siyassa shariyya* that Egypt should be fully governed by Islamic law. This will guarantee the application of both sides of the theory of *siyassa shariyya*; the consistency of laws with Sharia and the involvement of the religious jurists and guilds in the process of drafting and amending legislations. Dr. Muhammad Selim Al-'Awwa, a prominent Islamic scholar, stated this clearly, both that "religion is law in practice" and that "the government of Islam is the government of law." See: Muhammad Selim Al-'Awwa, "Religion and Political Structures: An Islamic Viewpoint," *Occasional Papers*, No.3 (Birmingham, UK: Centre for the Study of Islam and Christian-Muslim Relations, 1999): 2-6, quoted in Bruce K. Rutherford, "What Do Egypt's Islamists Want? Moderate Islam and the Rise of Islamic Constitutionalism," *Middle East Journal* 60 (4) (2006): 710.

42 Supreme Constitutional Court, Case no. 20, Judicial Year 34.

43 With this position, the Brotherhood wanted to revive the dormant aspect of theory of *siyassa shariyya* by reserving a role for the religious jurists and guilds that follow the Brotherhood's positions when reviewing the consistency of legislations with Islamic Sharia. Some scholars agreed with the view presented by the Brotherhood that the religious jurists and guilds should play a role in drafting legislations and that the head of state and the Parliament should not enjoy an exclusive role in this matter. However, those scholars did not agree on the extent of the role that the religious jurists and guilds should have in the process of drafting legislations. Ahmad Kamal Abu al-Majd, *Nazarat hawla al-Fiqh al-Dusturifi-l-Islam [Views on Constitutional Jurisprudence in Islam]* (Cairo: 1962): 4; Yusufa l-Qaradawi, *Min Fiqh al-Dawla fi Al-Islam [On the Jurisprudence of the State in Islam]* (Cairo:1997): 98.

44 From Article 1 of the Egyptian Civil Code: "In the absence of a provision of a law that is applicable, the Judge will decide according to custom. In the absence of custom, they will decide in accordance with the principles of Islamic Sharia. In the absence of such principles, the Judge will apply the principles of natural justice and the rules of equity." Egypt Civil Code, Article 1.

45 From Articles 274, 275, 277 of the Egyptian Penal Code: "A married woman who committed Fornication should be punished by imprisonment for a term not more than two years." And "the man who [is] involved with Fornication with her should be punished with the same penalty;" "Each husband who [was] proved to [commit] Fornication in the Marital house, according to the wife's claim, should be punished by imprisonment for not more than six months." Egypt Penal Code, Articles 274, 275, 277.

46 "The woman or man found guilty of sexual intercourse - lash each one of them with a hundred lashes, and do not be taken by pity for them in the religion of Allah, if you should believe in Allah and the Last Day. And let a group of the believers witness their punishment." Qur'an 24:2.

- 47 See: Egypt Penal Code, Articles 311, 312, 313, 314, 315, 316, 317, 318.
- 48 “[As for] the thief, the male and the female, amputate their hands in recompense for what they committed as a deterrent [punishment] from Allah. And Allah is exalted in Might and Wise.” Qur’an 5:38.
- 49 “O you who have believed, indeed, intoxicants, gambling, [sacrificing on] stone altars [to other than Allah], and divining arrows are but defilement from the work of Satan, so avoid it that you may be successful.” Qur’an 5:90. After God had addressed the *hudud* crimes and penalties, God described them to be the limits that should not be transgressed; “These are the limits of Allah, so do not transgress them. And whoever transgresses the limits of Allah - it is those who are the wrongdoers.” Qur’an 2:229.
- 50 “A candidate is eligible to run for the office of presidency after meeting the following qualifications: The nominee must be an Egyptian citizen of at least 40 years of age, have never held another citizenship, and must not be married to a foreigner. Both of the nominee’s parents must be Egyptian citizens, and have never held foreign citizenship. The nominee must not be under a suspension of political and civic rights.” Egypt Constitutional Declaration of 2011, Article 26.
- 51 Abdelaal, 153. To form *ijma*, five conditions have to be met: (1) a sufficient number of jurists should participate in the deliberation and discussion, with this number governed by a reasonableness test; (2) a unanimous agreement should be reached regarding the issue in question; (3) a clear view or opinion must have been deduced from each jurist; (3) the unanimous consensus should be proved correct either by its popularity among all jurists and scholars or its wide transmission by trustworthy people; (4) and the unanimous consensus shouldn’t be preceded by another consensus that contradicts it.
- 52 “You are the best nation produced [as an example] for mankind. You enjoin what is right and forbid what is wrong and believe in Allah. If only the People of the Scripture had believed, it would have been better for them. Among them are believers, but most of them are defiantly disobedient.” Qur’an 3:110. Prophet Muhammad also stated in a hadith that “my Community shall never unite upon error.”
- 53 Supreme Constitutional Court, Case no. 7, Judicial Year 8.
- 54 In Ottoman Egypt, pre-Muhammad Ali, the theory of *siyassa shariyya* prevailed to the extent that it restricted both judges and rulers. The former were restricted because courts found themselves bound to base their decisions on the *fiqh*, or jurisprudence, of either a certain school of thought or a certain Islamic jurist. Rulers were restricted by this theory because they found themselves under the gavel of Islamic jurists and guilds, and so they could not legislate or even propose a law away from the influence of Islamic jurists. Right after Muhammad Ali assumed the reins of governance in Egypt he moved away from the role played by jurists and guilds and their influence in the government. Inspired by the European style, Ali decided to sponsor major reforms in Ottoman Egypt to modernize Egypt and to reduce the jurists’ power. In doing so, Ali sent scholars and students to study law in Europe. Those scholars and students were Ali’s main tool to redefine the theory of *siyassa shariyya* and constrain the role of the religious guilds. Ali took an unprecedented step towards a legal positivist interpretation of Sharia through the process of codification. By codification, Sharia knew new interpreters other than jurists and guilds, who no longer monopolized the judiciary because the graduates of the new national law schools could be judges; judges no longer needed to have specific religious education or training. Clark B. Lombardi, *State Law as Modern Islamic Law in Modern Egypt*, 50, 62-63; Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton-New Jersey, Princeton University Press, 2008): 83.

- 55 Nathan J. Brown, "Sharia and State in the Modern Muslim Middle East," *International Journal of Middle East Studies* 29 (359) (1997): 360.
- 56 Brown, "Sharia and State," 360. Brown argued that most of the Muslim countries secularized their laws either when they "abandoned the Sharia or rendered it irrelevant to all questions except those related to personal status."
- 57 *Ibid.*, 361.
- 58 Youssef M. Ibrahim, "U.S. Bill has Egypt's Copts Squirming," *New York Times*, April 18, 1998.
- 59 Steve Stanek, "Coptic Believers Say Extremists are Driving them out of Egypt," *The Globe and Mail*, July 7, 2007; Ethan Cole, "Egypt's Christian-Muslim Gap Governing Bigger," *The Christian Post*, July 8, 2008.
- 60 Yustina Saleh, "Law, the Rule of Law and Religious Minorities in Egypt," *Meria Journal*. 8 (4) (2004), <http://www.gloria-center.org/2004/12/saleh-2004-12-07/>. The word *dhimmi* refers to non-Muslims who live on Islamic land. According to the "*dhimmi* contract," non-Muslims are allowed to live in the Islamic state in return for a kind of tax called *jizya*. Being governed by the "*dhimmi* contract," non-Muslims enjoy the same rights that Muslims enjoy and have the same obligation that Muslims have; however, they are excluded from some specific duties. See: H. Patrick Glenn, *Legal Traditions of the World* (New York: Oxford University Press, 2007): 218-219.
- 61 Saleh, "Law."
- 62 Nabil Luqa Bibawi, "Dr. Nabil Luqa Bibawi's response to AWR's questions on Yustina Saleh's article on the 2<sup>nd</sup> article of the Egyptian constitution," *Arab West Report* 51 (2005).
- 63 "And do not argue with the People of the Scripture except in a way that is best, except for those who commit injustice among them, and say, 'We believe in that which has been revealed to us and revealed to you. And our God and your God is one; and we are Muslims [in submission] to Him.'" Qur'an 29:46; "[Y]ou will find the nearest of them in affection to the believers those who say, 'We are Christians.' That is because among them are priests and monks and because they are not arrogant." Qur'an 5:82. It is noteworthy that when the Prophet Muhammad immigrated from Mecca to Al-Medina, he drafted the "Constitution of Al-Medina." In this Constitution the Prophet Muhammad states the rights of *dhimmi* non-Muslims. For example, Article 25 declared the freedom of religion when it provided, "[Non-Muslims] are one community with the believers (the Jews have their religion and the Muslims have theirs), their freedmen and their persons except those who behave unjustly and sinfully, for they hurt but themselves and their families." Whilst Article 37 states, "[Non-Muslims], the Jews must bear their expenses and the Muslims their expenses. Each must help the other against anyone who attacks the people of this document." The articles are cited as quoted in A. Guillaume, *The Life of Muhammad: A Translation of Ishaq's Sirat Rasul Allah* (Oxford: Oxford University Press, 1955): 231-233.
- 64 Supreme Constitutional Court Case no. 7, Judicial Year 8.
- 65 In an interview with *Al-Wasat*, an Egyptian daily newspaper, Dr. Mohamed Selim Al-'Awa, a prominent Islamic thinker, supported the argument that the application of *hudud* is not possible now in Egypt. *Al-Wasat Newspaper*, Apr. 18, 2012.
- 66 In the context of Islamic law, the legislated rule is related to its purpose to the extent that whenever this purpose disappears the rule should be halted. 'Umar ibn Al-Khattab, the second Islamic Caliph and a prominent figure, halted the *Hud* of Theft in the year of drought and famine.
- 67 It has been narrated that Prophet Muhammad said, "Drop the prescribed penalties (*hudud*) in cases of doubt as possible as you can."



- 68 The SCC's law provides, "the President of the Court should be appointed by the President of the Republic. A member of the Court is to be appointed by the President of the Republic from two candidates, after seeking the opinion of the Judicial Supreme Council, one is nominated by the Court's General Assembly and the other by the Court's President." Law No. 48 Year 1979, Article 5.
- 69 Interestingly, Benin, a small country in West Africa, developed a constitutional method of appointing the members of its Constitutional Court that guarantees the Court's independence. Article 115 of the Benin Constitution of 1991 reads, "the Constitutional Court composed of seven members whom the Parliament and the President participate to appoint them. The Parliament appoints four members, while the President appoints three."