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Egypt's New Constitution: The Islamist Difference

Lama Abu Odeh

Introduction

While most political forces outside the Islamist camp looked to the rupture caused by the Egyptian revolution of 2011 as an opportunity to restructure the state politically and economically through law, Islamists, who have participated in the events of Tahrir square only obscurely and in the most hesitating manner¹, had their eyes set on a different rupture of a different time. It was the rupture that had occurred a century and a half before that had brought the European legal transplant to Egypt in the guise of the Code and had consequently marginalized Islamic law as the law of the state cornering it in the limited field of family law. For Islamists, that rupture was nothing short of a calamity, one that had progressively undermined the institutions of Islamic law production and the privileged cultural status of its jurists, the “Ulama”². In the words of Rafiq Habib, the assistant to the head of the Muslim Brotherhood’s Freedom and Justice Party: questionable

What happened was a displacement of Islam as an authoritative framework for the benefit of a secular one... The historically displaced Islamic framework however remained the natural alternative to what is currently

¹ With the exception of the youth section of the Muslim Brotherhood Organization

² Arabic for “Muslim jurists”

the case, which was never the option of the masses but was rather coerced upon them from above³ .⁴

The Egyptian revolution, but also and perhaps more importantly, the impressive electoral victory the Islamists garnered for themselves in its aftermath, was an opportunity to remedy that earlier foundational calamity; to reverse its fortunes so that, as the Islamist camp saw it, the proper history of Egypt based on the unfolding of the authentic identity of its masses could be set in place. Or as the Salafi preacher Mazen Al Sarsawi put it and rather gloatingly:

Why should I compromise when I have won? We have an opportunity now- do we rule by French law or Sharia? Do we choose unfaith? He who chooses to rule by man-made law even though he has the option to rule according to God's law has committed heresy!⁵

Lawyer-Politicians

The post-revolutionary project of the Islamists therefore is a legal one par excellence. It is premised on the task of reversing the displacement of Islamic law that took place a century and half earlier and returning it to its “proper” place as the official law of the land. This

³ آخر كلام: مواد مثيرة للجدل في دستور مصر³ (THE LAST WORD: CONTROVERSIAL MATTERS IN EGYPT'S CONSTITUTION)- YOUTUBE, <http://www.youtube.com/watch?v=Y5bBVB3pYKU> (last visited May 28, 2013)

⁴ Quote by Habib who had participated with several others in discussing the draft of the new Egyptian constitution on a famous TV program called, “The Last Word”, *Id.*

⁵ Sarsawi lecturing on the difference between the principles of Sharia and the rules of Sharia - YOUTUBE, <http://www.youtube.com/watch?v=-cc0YNIYEzM> (last visited May 28, 2013).

was by no means the first time that the Islamist camp had launched a counter-structuring strategy of the legal system in Egypt's history. There indeed were historical precedents but this was the first time they could do it with their "hands gripping at the steering wheel", so to speak.⁶

Nothing could match the confidence of Subhi Saleh of the Muslim Brotherhood, arriving to his debate with the famous liberal parliamentarian Amr Hamzawi with plentiful of Islamic law up his sleeve. Enough that is to remedy the problem of import law and replace it with what is Islamic. This is how Saleh started his opening remarks in the debate:

Islam is both religion *and* state. There are 6200 verses in the Quran, 600 of those touch on law. Those who want to separate religion from state will have to "abolish" those 600 verses!

continuing,

Islamic Sharia covered all aspects of the law equal to Western law. What is the meaning of the Bayaa ⁷with Abu Bakr after the death of the prophet; isn't that the "social contract" of Montesquieu and Rousseau?⁸

⁶ Amr Shalakany, *BETWEEN IDENTITY AND REDISTRIBUTION: SANHURI, GENEALOGY AND THE WILL TO ISLAMISE*, 8 ISLAMIC LAW AND SOCIETY 201–244 (2001)

⁷ "Bayaa" (Arabic) means "collective contract"; the reference is to the Muslim community's collective offer to Abu Bakr, one of prophet Mohammad first disciples, to become the first Muslim ruler/successor following the prophet's death.

⁸ Debate between political liberal Amr Hamzawi and Subhi Saleh from the Muslim Brotherhood that took place in the Faculty of Law of the University of Alexandria - YOUTUBE, <http://www.youtube.com/watch?v=1rLgKJjiBa8> (last visited May 28, 2013).

And while there was no shortage of law talk on everybody's part in the aftermath of the Egyptian revolution, for we have all seen how legalized it had proven to be,⁹ for the non-Islamist camp law was primarily a means to an end: a way to radically redraw the political and economic framework of the fallen state of Mubarak to make it more free and/or egalitarian. For the Islamists, however, law's identity was foundational. Law was both an expression of where the "umma"¹⁰ struck its cultural identification, and a tool to restructure the state and society in the direction of that identification. The identity of the law therefore was the primary issue to which all other issues had to be subordinated, for, after all, it was only with reference to *this* (Islamic) law, and in seeking the guidance of *its* doctrinal framework, that Islamists could even begin to develop a position or a policy proposal on things political and economic.

For the Islamist camp, law/jurisprudence stood as the privileged field of knowledge towering over all others and from which those others drew their guidelines. Islamist discourse was so law-laden, that law traversed the ideological in their speech whereby the strict rigid command of the legal stood in for the more malleable organization of ideas in the ideological, stunting the growth of the latter. And so the new Islamists came armed with the "law" in more than one sense since law

⁹ LAMA ABU-ODEH, OF LAW AND THE REVOLUTION (Social Science Research Network) (2012), <http://papers.ssrn.com/abstract=2142545> (last visited May 28, 2013), forthcoming in Penn. Int. L. J.

¹⁰ Arabic for Muslim nation

had to perform triply for them – it was the place where identity was deposited, where law proper was to be found, and the place where the skeletal concepts for politics, economics, and the ethical, could be discovered and spun out into spheres autonomous from law. Talking legally and talking about law, therefore permeated so much of those Islamists’ speech, especially in the Salafis’s case, making them something akin to lawyer - politicians.

“There Are No Secularists in Egypt”

While the authoritative and towering bite of the law in the religious tradition left the Islamist camp with infant ideologies and little direction on how to run a modern state, the unrelenting discipline of the authoritarian illiberal state had an equivalent impact on the opposing camp! For all the Islamists’ railing against their opponents, the non-Islamists, whom they frequently accused of defending the (alien) import “French” law, contemptuously hailing them as “the secularists” and the “liberals”, “secularism” and “political liberalism” as distinct political ideologies, didn’t appear to have solid local articulation in Egypt. Decades of dictatorial rule (since Nasser of 1952) made articulation of political ideologies suffer its own symptoms of stunted growth, so much so that “secularism” and “political liberalism” resided only in preliminary and nascent fashion awaiting a democratic system for their “discursive launching”, so to speak.

“Secularism” especially, as an expression of the “proper” relationship between church and state, appeared to have fared particularly badly in the aftermath of Egypt’s revolution. Those of us who followed the debate on Article 2 of the Egyptian constitution (Principles of Sharia is the primary source of legislation) taking place on television talk shows or in public exchanges between Islamists and their opponents, couldn’t help but feel the rhetorical trap in which the Islamists’ opponents found themselves. Grappling to respond to the Islamists’ camp’s insistence on amending the phrasing of the article to extend its reach, opening up the possibility of Islamicizing law on constitutional grounds, the non –Islamists’ retort to the Islamic reconstructive project often appeared inarticulate and somewhat opaque. Many followed the practice of prefacing their positions with the perfunctory “Nobody is opposed to Art 2” in their exchanges with the Islamists! An example of such retort was Dr. Jaber Nassar’s, the Constitutional law professor from the Faculty of Law of Cairo University, who insisted in one of those exchanges,

There are no secularists in Egypt and there is no one opposed to Sharia.
Those who are non-Islamists should not be described as “secularists” ¹¹

Islamists had successfully turned the word “secularist” into such a dirty word that everyone was bending over backwards to deny the allegation that they might be one! For being a secularist could only mean being anti-Sharia and any hint of such exposed the person to the

¹¹ See *supra* note 2.

charge of being a heretic. A problem that the American University in Cairo (AUC) political science professor, socialist activist and famous leader of the Egyptian revolution, Rabab Mahdi, referred to with the following words

There is a problem of accusing people of heresy and treason¹²

That is not to say that there were no attempts in the non Islamist camp, after the obligatory “we are all for Sharia”, to offer an interpretation of “Sharia” that would remove it from the domain of religious epistemology and place it in one that is more secular and universalist. The fate of such attempts however often seemed uncertain. In his debate with the Salafi Abdel Monem Al Shahhat, Amr Hamzawi did exactly that arguing that “Sharia” for him was a doctrine that was based on “principles of justice, freedom and equality, the ruling principles of the international human rights charter, which should equally govern the Egyptian constitution”¹³. Furthermore, Hamzawi asserted that Sharia based practices constituted a background cultural fact about the country and its inhabitants woven into the very cultural fabric of Egypt that no one could possibly deny or attack. Elaborating:

¹² *Id.*

¹³ Debate that took place between liberal parliamentarian Amr Hamzawi and the Salafi leader Abdel Monem Al Shahhat- Youtube, <http://www.youtube.com/watch?v=ZA-RH7HTWOs> (last visited May 28, 2013).

When have we ever heard of practices violating Sharia in Egypt? Why are we afraid of Egypt? We are a disciplined society that has closely followed the principles of Sharia!¹⁴

But such accommodating if more secular articulations of Sharia and its place left Al Shahhat cold. Insisting that Hamzawi got his prioritization order straight, he retorted:

Justice is *restricted* by Sharia. Equality is *restricted* by Sharia. Freedom is *restricted* by Sharia¹⁵

Refusing the accommodating gesture, he insisted:¹⁶

We the Salafis, our governing framework is clear: it is the Quran, the Sunna and we consider Al Azhar¹⁷ as our guide. What is your guide? What is your term of reference?

We the Salafis adopt a method in interpreting the text of the Quran and the Sunna- it is a specific method. We ask the question: is this permitted or is this

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ It was perhaps because of this sense of rhetorical entrapment that the non-Islamist camp made the membership of the constituent assembly drafting the constitution such a big issue. The Islamists had packed the assembly with two thirds of their followers leaving their opponents crying for more representation of other “sectors” of the society.

¹⁷ Al – Azhar is a reference to the religious institution located in Cairo that had been a center of Islamic production of law and jurisprudence (and other forms of knowledge) since the 10th century. This institution had lost its central role with the adoption of European legal transplant in the nineteenth century and its clerical membership and income had been under the control of the state since the time of Nasser in 1952. The Islamists new project is to re-center this institution and to transform its current clerical membership to one that is independent from state interests.

prohibited? We seek the answer in interpretations offered by the prophet and the first three successor generations of his disciples.¹⁸

Islamists then fared much better than their much demonized opponents for while both camps came short on the level of the ideological, Islamists moved with the upper hand of the law on their side – the law to mobilize their supporters, to discipline their interlocuters, and to experience their normative superiority over their stuttering opponents with all their disarticulated positions. It was the law to lay down the law!

But Who Speaks for State Law?

And while there was this *other* “law”, the official law of the state with its origin in the legal transplant, and the object of the Islamist camp’s venom, it wasn’t exactly one that the non-Islamist camp felt they “owned” as if it were *their* law the way the Islamist camp treated Sharia. Rather it was simply *state* law. The distance between this state law and the new post-revolutionary *political* “liberals” and “secularists” was the distance between them and the authoritarian state with all its punishing history.

It is true that Egyptian law per legal system embodied a certain version of legal liberalism, given its origin as a European transplant, but it had on the one hand picked up a great deal of illiberal residue over the

¹⁸ *Supra* note 8.

years as a result of authoritarian governance and on the other, it had not had the benefit of political liberalism as a background ideological formation to feed its interpretation precisely for the same reason. And while by virtue of being a European transplant that had historically displaced Islamic law by cornering it, making it an instance of “secular law”, it had had to make do without the benefit of ideologized secularism to feed it interpretively.

Indeed, it is by virtue of this “lack” that law had to function as a metonym for political liberalism and secularism *both*– perhaps a poor one at that- for if one had to look for liberalism in Egypt one would find its traces in law –to property rights, consent of contract, punishment only with proven guilt, protection of minors. And if one looked for secularism, one looked at transplanted civil, commercial and criminal codes, evoking in their organization, structure and rationale, far more the achievements of European enlightenment than anything related to pre-modern Islamic jurisprudence.

In other words, this was a legal system that was “liberal” without “liberals” and non-Islamic without secularists. So it wasn’t so much that the non- Islamist camp in the aftermath of the revolution positively identified with “French Law”, rather, it was that the prospect of Islamicizing such a legal system that had most alarmed this camp, quite satisfied as it was with the way the Egyptian Constitutional Court (SCC) had historically narrowed down the meaning of “Sharia principles” referred to in Art 2 of Mubarak’s constitution making only the most

determinate provision qualify as “Islamic”¹⁹. By doing so, the SCC had severely limited the possibility of using Sharia to overturn laws on constitutional grounds. For a camp that was busy articulating a coherent Egyptian-style political liberalism, Islamicizing the legal system, with the culturally disciplinarian tendencies of the Islamist camp becoming increasingly manifest, would seem to only increase exactly what was most troubling about the Mubarak’s system: its illiberal aspects.

That is not to say that state “French” law didn’t have its defenders. It did. But these were primarily its professional functionaries – lawyers, judges, law professors, who might or might not be religious, for whom the Egyptianizing efforts of the drafter of the Egyptian Civil Code of 1949, the famous jurist Sanhuri, were more than sufficient, and the SCC’s interpretation of Art 2 had hit the exact balance between “tradition and modernity”.²⁰ Anything further than that threatened to disrupt the professional universe they had mastered: its division of roles, its discourse, its codes and laws, its structure and rationale, and quite possibly their own status and prestige as the “field experts”.

These professional anti-Islamicizing lawyers were not in a position to counter the *politicization* of the legal system’s identity in the

¹⁹ Clark Benner Lombardi, Note, *Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State*, 37 Colum. J. Transnat’l L. 81-123 (1998).

²⁰ *Supra* note 5.

way the religious lawyer politicians were able to do. State law didn't have its liberal and secular politicians, but it sure did have its lawyers! That is because if the modern state was able to do something it was to produce "law" as a differentiated field of knowledge and practice, administered by its own professionally trained functionaries. An important aspect of this professional training was the carefully policed separation between law and politics, which limited the capacity of these state-oriented lawyers to engage the Islamists and their reconstructive project "up close and personal".

For these reasons the Islamic reconstructive project proceeded without much opposition. With a majority membership in the constituent assembly drafting the new constitution, the task before the Islamist camp was clear and without much ado they proceeded to do. What they wanted was nothing short of a reversal of the current legal order: from one of liberal legalism with Islamist accommodation to one of Islamist legalism with liberal accommodation. A reversal that will only be complete if constitutional review was put into effect comprehensively through use of the textual tools offered by the new constitution.

The Textual Basis for the Islamic Reconstructive Project

The final product was quite impressive in the effectiveness of the "identity encirclement" its provisions managed to achieve. These elements included:

First, the new Egyptian constitution (December 26, 2012) redefines the scope of the “principles of Sharia” to include “ its total proofs, jurisprudential rules and sources as agreed upon by the people of Sunna and consensus” (Art 219). According to the Salafi legislator Borhami,²¹ the word “sources” refers to “Quran, prophetic tradition, analogy and consensus”, the officially recognized sources of the law in the Sunni tradition. What this formulation does is potentially drastically open up the domain of Sharia-based doctrine that could function as the basis to overturn positive law. This formulation was a direct response to SCC’s notorious (in Islamist eyes) narrowing down of that “trumping law domain”. Now, with the new constitution, all kinds of rules qualify as “Sharia”, whether determinate or not, an expression of a majority or a minority of scholars, an object of consensus or not, and all such *Sharia* rules can be used to trump modern legislation as unconstitutional.

Second, the new constitution introduces Al-Azhar as the source of guidance on what constitutes Sharia giving it a supra interpretive power over and above that of the SCC²². The Council of Al Azhar Senior

²¹ WOMEN’S RIGHTS IN THE EGYPTIAN CONSTITUTION: (NEO)LIBERALISM’S FAMILY VALUES, [http://www.jadaliyya.com/pages/index/11852/womens-rights-in-the-egyptian-constitution_\(neo\)li](http://www.jadaliyya.com/pages/index/11852/womens-rights-in-the-egyptian-constitution_(neo)li) (last visited May 29, 2013)

²² Art 4 of the new Constitution, “Al-Azhar is an independent Islamic institution, its headquarters in Cairo and its domain is the Islamic nation, and the whole world. It shall be responsible for spreading the Islamic call and the religious scholarship. The Council of Al-Azhar’s Senior Scholars shall be consulted on issued related to Islamic Sharia.

The State shall ensure all the sufficient financial allocations for the achievement of its objectives and the law shall determine the section of the Rector of Al-Azhar, who

Scholars is charged with providing legal consultation on what constitutes Sharia. This too is a response to the “notorious” SCC, and a blatant attempt to “defang” it by giving it a subordinate position in constitutional interpretation. “This SCC, we really have to get rid of it” Borhami declared!²³

Third, the new constitution restricts the exercise of “rights and liberties’ to what may not violate the foundations “of state and society” which in the mind of the Islamist legislator include Sharia as such “foundation”.²⁴ Thus, Sharia is made to stand as the supreme law over and above any universal notion of human rights- validating the quote above by Shahhat that “Equality is restricted by Sharia, freedom is restricted by Sharia, and justice is restricted by Sharia.”

According to Art 81 of the new Constitution,

Exercise of rights and liberties should not violate the section on “state and society”.²⁵

Fourth: the new constitution allows for declaring acts criminal legally not only on the basis of parliamentary legislation as the old

shall be independent and impeachable and will be elected from among the members of the Council of Al Azhar’s scholars

²³ See *supra* note 15.

²⁵ This is the section that includes reference to “Sharia as the primary source of legislation”, namely, Section One of the new Constitution

constitution required but in addition, on the basis of a constitutional text (Art 76).²⁶ What this means is that the Islamic style of crime and punishment can now stand to gradually replace the current non-Islamist criminal code by declaring the latter unconstitutional and replacing it with crime and punishment a la Islamic law.

Fifth: the new constitution includes constitutional provisions that allow the “state” to enforce social morality and that sanctions the same on the part of “society”. Similar provisions existed in the previous Egyptian Constitution of 1971²⁷ but the danger in repeating such provisions, with a slightly different formulation, is the surfacing in the post-revolutionary period of self-appointed morality enforcing religious groups²⁸, opening up the possibility for an Islamic style of Hisba – a delegation of powers by the state to a civilian force to enforce the moral behavior in public on behalf of the state. ¹ Article 11 of the new Constitution provides,

²⁶ Art 76 of the new Constitution, “...no penalty or crime unless by constitutional text or legislative provision....”

²⁷ Article 9 of 1971 Constitution reads “The family is the basis of the society founded on religion, morality and patriotism. The State strives to preserve the genuine character of the Egyptian family—with the values and traditions it embodies—while affirming and developing its character in relations within the Egyptian society.”

Article 12 reads “The society shall be committed to safeguarding and protecting morals, promoting the genuine Egyptian traditions and abiding by the high standards of religious education, moral and national values, historical heritage of the people, scientific facts, socialist conduct and public morality within the limits of the law. The State is committed to abiding by these principles and promoting them.”

²⁸ Incidents of religious groups in provincial towns enforcing morality were widely criticized by the media, see for example,

<http://www.alarabiya.net/articles/2012/10/31/246901.html>; <http://al-shorfa.com/ar/articles/meii/features/2013/04/03/feature-01>;

<http://sudanyiat.net/news.php?action=show&id=20479>, (last visited May, 29 2013).

“The State undertakes to protect public morals and public order, the high standards of social upbringing, ethical and patriotic values, scientific facts, Arab culture, the cultural and historical tradition of the people, according to the determination of the law. “

Article 10 of the new Constitution reads:

The family is the foundation of society based on religion, morality and patriotism. Both the state and *society* undertake to preserve the authentic nature of the Egyptian family, its stability and internal cohesion, protect and preserve its moral values, according to the determination of the law.

With such constitutional provisions in place, and with recorded electoral victories, Islamists in Egypt stand today to transform much about the current legal system to make it more “Islamic”. The domains that will be the privileged sites of the reconstructive project will surely be women, personal liberties and literary and cultural creativity. And this is all going to be a decided march to the “right”!

Rightward Egypt Marches But How Far?

Why to the “right” and how much to the “right” will these constitutional amendments push the legal relations between the state and its citizens and among its citizens, especially its men and women, would all depend. Egyptian civil society had been turning to religion since the seventies with the rise of a variety of religious movements competing with the old Muslim Brotherhood who had been around for

decades for the hearts and minds of the populace. The authoritarian regime of Mubarak persecuted these movements politically but gave them free reign culturally and socially (with intermittent crackdown), allowing them to establish social bases through pulpits, social welfare networks, and apolitical social organizations, a reign that had been intensified with the proliferation of religious TV channels and the commoditization of female religious dress and fashion. If the social pact of the authoritarianism of the nationalist Nasser was based on “give me politics I will give you economic welfare”, the social pact of Mubarak’s authoritarianism was based on “give me politics and the economy and I will give you economic contentment and some welfare *through* religion”. Religiosity proved an effective “private” to the “public” of the state and its politics.

To express the above legally, one would have to resort to the legal realist insight that non-acts are acts. The non-intervention by the state in a set of social relations amounts to an intervention in itself in that the state’s passivity serves to sanction those relations as they are in their particularity. If one were to look at the Mubarak era, one could accordingly argue that the withdrawal of the state from enforcing religious identity, for the most part²⁹, while allowing for the increase in social religiosity had sanctioned the intervention of religion in social relations with all the traffic of powers, privileges and entitlements that that entailed. Arguably, a shift in gender relations, relations between

²⁹ There is an important exception to that which is the discrimination against the Ahmadis and the Bahais through the decisions of the Administrative Courts by depriving them of passports.

dominant religions and subordinate ones, and between more religious people and those who were less so or between them and non-believers, had been allowed to occur by the “non-intervening” state. This state of “non-intervention” is of course supplemented and qualified by the multiple acts of intervention by the state in the name of “religious identity”, explicitly sanctioned by law, such as when the state acted to uphold “public morality” by banning discrete acts of “speech” (allowed by the old constitution), when it moved to enforce the rules of family law that find their basis in religion, and when it used its discretion in (de) criminalizing acts, involving assault on religious minorities, their property, and their places of worship. The totality of these acts/non-acts constituted what we might call the de facto relationship between “state and mosque” during the Mubarak era.

Some have pointed out that there was little that was new in the new constitution from the old one in so far as the “Islamic” element was concerned.³⁰ Sharia was always a source of legislation, and the values of the family and public morality were always state and society sanctioned,³¹etc. The new elements of introducing “Al-Azhar” as an advisory on the “Islamic” and making the exercise of “rights and liberties” contingent on not violating the fundamentals of “society” introduced in the constitution of 2012 would not make much difference from the set of powers/privileges/entitlements settled upon during the Mubarak era. Moreover, if the non-intervention of the Mubarak state had produced

³⁰ See *supra* note 20.

³¹ Compare Art 10 of the new Constitution with Art 9 of the Constitution of 1971, and Art 11 of the new Constitution with Art 12 of the old one.

religious effects, then the kind of difference in religious effect the Islamists would produce by using state power (through their own discrete selection of acts/non-acts) made no difference or not much of it anyway³². Egypt would still be the same old religious Egypt.

The Difference the Islamist Difference Would Make

Even though the new constitution is quite similar to the old one, I contend that the Islamist difference will indeed make a difference. This is so for two reasons:

First, Some of what is similar in constitutional provisions between the old and the new, namely those related to women, were settled upon after the Islamists proposed in earlier drafts an account of the relations between men and women that were based on complementarity of roles inside the family that were vehemently opposed. Confronted with the opposition, those provisions were withdrawn. They were withdrawn with the idea that what was included in the previous constitution was sufficient to suggest the idea of complementarity and there was no need to spell it out specifically.

Second, The determination with which the Salafis pursued the different provisions, namely those related to the new definition of “principles of Sharia” and the inclusion of Al-Azhar as having and

³² Though I would suspect that no one would deny the novelty of introducing “crimes and punishments” through constitutional interpretations as the new constitution would allow “Article 76”.

advisory role to the SCC, is not something that can be dismissed as of little effect.

Both the above indicate that there is an intention to pursue a reconstructive project of law premised on cultural identity regulation at the center of which stand women and public morality as politics of “first instance”, through the mediation of a doctrinal “return” to Sharia and the institutional assistance of a self-avowedly religious institution, Al-Azhar.

So the question is what tools and instruments does the new Egyptian constitution offer the Islamists in power to advance such a project? What kind of state interventions would such legal instruments allow and to what distributive effect? If every legal relation, whether between the state and individuals or between individuals themselves can be seen as a particular distribution of legal powers, privileges and entitlements, what kind of re-organization of those powers/privileges/entitlements would the Islamists proceed to enact?

To identify those “tools and instruments”, I identify two rule structures, one substantive and the other procedural, the determination of which in the future will gradually give shape to those legal tools available. I say in the future because while the rules in the new constitution give us some indication of their orientation, or shall we say “distributive effect”, a great deal yet needs interpretation and determination. Constitutional rules are by nature quite indeterminate

and moreover, substantive rules interact with each other and with other procedural ones that are not necessarily immediately obvious, making prediction of distributional effects exceedingly difficult. With every new interpretation of a rule, the face of the legal reconstructive project, which I contend is apace by the Islamists, will shift accordingly.

The Cluster of Substantive Rules

Above, I have identified the substantive rules related to the identity regulative project as Art 219 (defining “Principles of Sharia”), Art 4 (role of Al-Azhar), Art 81 (rights and liberties subject to state and society foundations), Art 76 (crime through constitutional provision), Art 10, 11 (state and society preserve family, state sanctions public morality).

It is noteworthy that in this cluster of rules, “principles of Sharia” is made operative in three different fashions:

First, It functions formally as a supra constitutional principle. Art 2 of the new constitution (exact copy of the previous one of the old constitution) provides that “Principles of Sharia are the primary source of legislation”. While typically the provisions of the constitution itself function as the basis for constitutional review, here we have a constitutional provision (Art 2) that refers to extra constitutional principles that will operate constitutionally in the same manner as the formal provisions of the constitution. What are those supra

constitutional “principles”? Art 219 defines them as Sharia’s “total proofs, jurisprudential rules and sources as agreed upon by the people of Sunna and consensus”.

On a formal level, the text of the constitution, by virtue of Art 2, expands in its scope to incorporate a “doctrinal regime” (principles of Sharia) that has yet to be identified which will have the same power of constitutional review as the constitutional provisions that have already been textually identified in the body of the constitution of 2012. On a substantive level, how this “doctrinal regime” breaks down between formal rules that can function as extra-constitutional provisions with power to overturn legislation on constitutional grounds the way other provisions do and other kinds of legal materials that cannot do the same legal work and would have to be dismissed with, depends greatly on how the court interprets Art 219.

The way Art 219 is defined is very puzzling in that it incorporates under “principles of Sharia” the whole body of what we call in modern times “Islamic law”. It refers to the substantive rules of the law (jurisprudential rules), the sources from which these rules were derived (sources agreed upon by the people of Sunna and Consensus) and the rules of interpretations to be followed in deriving the substantive rules of law “total proofs”.

In modern constitutional speak, only rules can perform the function of judicial review, rules of interpretation which are only

second-level rules offered as guidance to those trying to implement the law, as well as the sources from which the rules are derived, which do not have the status of “rules” at all but are nothing but pre-law, the raw and rough materials from which the rules are derived, cannot do so. It is as if the Salafi constitutional legislature who has insisted on this formulation is inviting us not so much to perform constitutional review of existing legislation or one to be passed in the future but to legislate, Islamicly, *ab initio* from the ground up.

In pre-modern speak, the difference is between insisting that *siyassa sharyya* (*legislation passed by ruler*) not be repugnant to what is identified as some determinate set of rules identified as “Sharia” and insisting that *siyassa* be actively derived from Sharia’s sources, in complementarity with its already existent rules, using its mode of rationale and argumentation. The first, would limit the role of *ulama* in overseeing the ruler’s legislation, the second, would increase it significantly. The closest example of the latter is the doctrinal edifice that has emerged in the contemporary era in the area of Islamic finance as instance of *neo-Ijtihad*.³³

The historic practice of the SCC is closer to the first example, Art 219 suggests the second as normative legal practice. If so, then the delineation “issues related to Sharia” per Art 4 “...The Council of Al-Azhar’s Senior Scholars shall be consulted on issued related to Islamic Sharia” would increase exponentially. According to this latter

³³ Cite Frank E Vogel on “Conformity with Sharia”

interpretation, every new piece of legislation would have to be either an instance of legislation related to Sharia on its face or derivatively related to it! Al-Azhar, the modern version of the old *ulama*, will hover over the head of the modern legislature (secular ruler) as a regulative supra council, its preview of all legislation inescapable!

Second, “Principles of Sharia” appears not only formally in the new constitution but also through a “nesting” operation. Art 81 makes “exercise of rights and liberties” contingent upon conformity with “principles provided for in the *section* on state and society”, which section incorporates Art 2 stipulating that “principles of Shari the primary source of...” which in turn refers to Art 219 for definition of what constitutes “principles of Sharia”, etc.

As opposed to the operation described above where the constitution explodes outward to incorporate a different doctrinal regime with its own set of legal instruments, styles of argumentation and raw materials, threatening to transform through this act of incorporation the positive legal system in its totality and to cause its restructuring *ab initio*, in nesting, we see the constitution imploding inward through self referentiality, an internal continual self-negation whereby the whole section on “rights and liberties”, the most important one in any modern liberal constitution, is made contingent upon the be ending point of “principles of Sharia”. The “ending point” is as we have seen above a false one for it is also the beginning one for a re-launching outward.

The Cluster of Procedural Rules

Procedural rules are important and stand to influence greatly the way substantive rules work. Their impact on the resultant jurisprudence overall is not negligible for they define the instances, terms and conditions under which substantive rules are triggered.

In fact a distinction between a procedural rule and a substantive one is not always apparent. For instance, a rule will need to be in place that defines “issues related to Sharia” (Art 4). It will have to answer the question of what kind of legislation qualifies as a “matter of Sharia” which would trigger the advisory role of Al Azhar and compel SCC to transfer the case to it. This rule could either be of a substantive nature (the SCC decides depending on the nature of the legislation in question) or of a formal or procedural nature (if one of the litigants evokes Art 2 of the Constitution). The first rule would greatly increase the power of the SCC (vis a vis Al Azhar) as a gatekeeper of what would make the first cut for consideration under Art 2. It is *up to the SCC* which cases end up in Al-Azhar’s “docket”. The second would go the opposite way.

Another “procedural” rule would need to be in place to define the “advisory” aspect of Al-Azhar’s role. There is a difference in effect between a rule that would require Al-Azhar to write more than one opinion on the case referred to it and then obliged the SCC to follow one of them, and another that would require only one opinion by Al-Azhar and then left the option to the SCC to either adopt the opinion of Al-

Azhar or to reject it. If the latter case, a further procedural rule would have to determine whether the SCC should include in its judicial opinion the reasons for overriding Al-Azhar's "advisory" opinion or whether it is exempt from doing so. The difference would be in defining the ways in which the SCC will act as the final "decider" of the case.

Another procedural rule would be needed to determine whether a piece of legislation that had been referred to Al-Azhar for an advisory opinion before its promulgation could still be challenged per its constitutionality before the SCC after it had been legislated.

Finally much would depend on the interpretation of Art 222 of the Constitution (arguably of a procedural nature) that stipulates, " All laws and executive decrees passed before this constitution shall remain legally valid and effective. They cannot be modified or annulled except according to procedures provided for by this constitution". What does this article mean? Does it preclude from constitutional review all laws passed before the constitution of 2012? What is the meaning of the exception "except according to procedures provided by this constitution"?

How the SCC interprets this rule in the future will be of great significance. There is an apparent self-referential aspect to it, in that the SCC would have to decide whether its previous constitutional review would be revisited. It would need to determine which past laws would be open for constitutional review: none? All, except those whose

constitutionality had already been determined by the SCC? Some other distinction?

The Cluster of Corporatist Rules

“Corporatist rules” here refer to the rules pertaining to the internal organization of the judicial and legislative bodies that can either evoke or review the question of constitutionality of new legislation. An example of such rules in the case of the legislature is one that determines that before a piece of legislation is referred to Al-Azhar for advice on its “Islamicity”, a certain number of parliamentary votes would have to be secured for such referral or one that would alternatively treat the request by one member (or five or ten) to be more than sufficient.³⁴

Both the Egyptian judiciary and Al-Azhar as corporatist entities are undergoing re-organization. Such reorganization is bound to have an effect on the jurisprudence they will leave in their trail.

The Judicial Authority bill, debated now by the Shura Council, raises judicial salaries while lowering judges’ retirement age. Art 176 of the new constitution limits the number of judicial appointments to the SCC to ten (excepting the president of the court) putting to an end the practice of court “packing” pursued by Mubarak. If we add to the above that the rule of the Brotherhood would certainly put an end to the

³⁴ This can also qualify as a procedural rule

practice of excluding from judicial appointment judges sympathetic to religious parties and organizations “ for security reasons” as was the case under Mubarak, then the Egyptian judiciary is about to depart from its previous self. The judiciary is a powerful corporatist entity or “estate” as some cynically call it, that has within it a great deal of antagonists to the rule of the Islamists. There is a great deal of ongoing pushback from some of its sections to the ongoing restructuring attempt by the legislature and time will tell how deep the change will prove to be.

Given this restructuring the question is to what extent is the Egyptian judiciary open to an identity regulative project pushed its way by an Islamist legislature? How near on the way will it meet the latter and where will it split the difference between them? It is not that the judiciary was not engaged in an identity regulative project of its own before. It was, as my discussion of the turn to religion under Mubarak argued. They obviously intervened intermittently through their interpretations to “lay down the law” on identity. The Islamist project however appears to create a shift in the way this is organized, relying more on the direct coercive power of the state rather than on social transformation occasioned and facilitated by the non-intervention of the state.

As for Al-Azhar, the new constitution awarded it autonomy as an institution, one that it had lacked for close to half a century, including an autonomous financial budget guaranteed by the state and self-

appointing powers (Art 4). The *shaykh* of Al-Azhar was awarded a post for life.

No family law reforms were passed under the previous dictatorships without the official endorsement of Al-Azhar. Its leaders had provided the interpretive framework supporting those reforms and lent them the legitimating weight of the institution they presided over. So one can confidently state that in so far as the SCC in the past had upheld family law reforms that were constitutionally challenged, the SCC's position on those reforms matched those of the Al-Azhar of the past, the one beholden to the dictator.

Whether this will change in the context of a newly autonomous Al-Azhar remains to be seen. Al-Azhar has historically asserted its "*Wasatiyya*" (moderation, or literally, "in the middle") ideology, and its *Shaykh*, awarded an appointment for life by the new constitution (Art 4), had occasionally berated the Salafis for their extremism and amateurish approach to Sharia interpretation³⁵. Many of those religious competitors have criticized Al-Azhar for accommodating in its student and administrative bodies those belonging to questionable "sects" (Shia, Sufis, etc), as well as for promoting doctrinal positions that do not belong squarely to those of the "the people of Sunna and consensus" as now stipulated for by the new Art 219.³⁶ Whether Al-Azhar will insist on

³⁵ Rachel Scott, *What might the Muslim Brotherhood do with al-Azhar? Religious Authority in Egypt*, *Die Welt des Islams: International Journal for the Study of Modern Islam*, 52, No. 2 (2012), pp. 1-35.

³⁶ *Id.*

this position it had delineated for itself in the past in the context of the rise of electoral power of religious parties that had historically been critical of its role under the dictatorship or whether it will shift in their direction to increase its legitimacy in the eyes of their electoral base is an interesting question.

Al-Azhar confronts not just the historic antagonism of the Salafis, but also the ambivalence of the Muslim Brotherhood towards its newly awarded constitutional authority. On the face of it, the Brotherhood would welcome this role, which would validate and support its political program presented to the electorate as introducing the novel element of “Islam”. “Islam” according to the Brotherhood platform should be the defining identity of the state, including its laws, morals, and policies.³⁷ And what better stamp of the Islamicity of state acts than that offered by Al-Azhar the most prestigious and oldest religious institution in the Islamic world, bar none?

In fact however, the Brotherhood seems averse to the rise of Al-Azhar authority as long as it controlled the legislature with its coalition majority. Its electoral dominance gives it the power to decide the question of “Islamicity” as it sees fit, including departing from its considerations if it needed to.³⁸As the ruling party, desperate to achieve

³⁷ KRISTEN STILT, “ISLAM IS THE SOLUTION”: CONSTITUTIONAL VISIONS OF THE EGYPTIAN MUSLIM BROTHERHOOD (Social Science Research Network) (2010), <http://papers.ssrn.com/abstract=1612482> (last visited May 29, 2013)

³⁸ See for example the controversies over borrowing an international loan from the EU, Sharia compliant state bonds, and Islamic prohibition of interest as discussed in the Appendix of Parolin’s article, *supra* note 36, at 9.

political victories against the background of state implosion in a post-revolutionary transitional period the Brotherhood does not want to have its hands tied to “identity” considerations which it may have promoted per party in opposition, but which could limit its maneuvering room as a ruling one³⁹. The instruments and tools of governance available to the Brotherhood are limited enough, as it has chosen not to radically disrupt the previous power of “estates” that ruled during the reign of Mubarak (primarily the military and security establishments with the economic domains they control). The last thing the Brotherhood needs, arguably, is yet another empowered “estate”, Al-Azhar, which can undermine in the name of “Islam” the last remaining tools the new ruling party had at its disposal.

It is noteworthy that even though both Al-Azhar and SCC had supported family law reforms, both had done it through different understandings of what constituted Sharia, almost opposite ones. Al-Azhar, while sympathetic to attempts at Ijtihad to modernize Islamic law, remained conservative in its attitude towards the tradition of *Taqlid*, i.e., the doctrinal legacy of the schools of law that emerged in the pre-modern era. Many of the modern reforms of family law had been rationalized by Al-Azhar through reference to minority views of jurists coming from these schools, including, those of the Shia sect.⁴⁰ The reforms, according to Al-Azhar were justified because they corresponded to a view expressed by some jurist in the past. This is to

³⁹ *Supra* note 37.

⁴⁰ SIR JAMES NORMAN DALRYMPLE ANDERSON, *LAW REFORM IN THE MUSLIM WORLD* (Athlone Press) (1976)

be contrasted by the more rationalist approach of the SCC in which what constituted “Sharia” was limited sharply to those “clear and determinate rules in Quran and Hadith”, which would then free in the SCC’s view the modern legislature to innovate.⁴¹ The ideological correspondence between the SCC and Al-Azhar on the question of family law reforms despite the difference in methodological approach, two approaches, one seemingly literalist and the other rationalist, shows the indeterminacy of “constitutional tests” in relation to their ideological effect.

Conclusion

How the triangular relationship between a legislature with a religious majority, the SCC and Al-Azhar, against the background of constitutional provisions that are ambiguous and await interpretation and procedural delineation will unfold, and what kind of legislative and jurisprudential legacy this triangular relationship will leave in its trail, remain to be seen. The fierce intentionality with which the Salafis pursued the cluster of constitutional provisions related to Sharia, and the “foundations of state and society”, warn of a future legislative push from the right of the political spectrum. The treatment by religious parties of gendered relations as a politics of “first instance” with an electoral base that is mostly rural foretells of attempts to either reverse family law reforms or to at least halt any attempts for future ones. Many such reforms find opposition from those who see themselves as “moderate” and coming from the official establishment of the judiciary

⁴¹ *Supra* note 18.

who might lend support to an attempt to reverse them on the part of a mobilized legislature.⁴² A bill was already introduced to the Egyptian parliament before its dissolution proposing to change the custody age of children in an attempt to limit mother's caretaking time period in the aftermath of divorce.⁴³ I expect more such bills will be introduced in the near future. Furthermore, instances of self-appointed enforcers of vice and virtue have been reported in the aftermath of the Egyptian revolution. Will such practices find constitutional cover or become functionalized institutionally, time will only tell.

Even though "gender" appears to be a politics of "first instance" for religious parties, the pressing economic needs of Egypt as well as the failure of the Brotherhood to create a coalition among various political forces to work in the name of "public interest" has pushed matters of economics and security to the forefront of its agenda as a reigning party. Continuous and increasing protests against the Brotherhood suggests a deferral of "gender" questions as any attempt to move with an elaborate agenda on such matters might fuel further street protests and makes an already deteriorating situation worse. This is so especially with the Brotherhood's attempt to secure its rule domestically by appealing to international, especially US, approval.

⁴² See Moustafa Imam's article (Arabic) on The Coming Revolution of Modifying the Personal Status Code, ثورة التغيير علي قوانين الأحوال الشخصية قادمة, <http://www.ahram.org.eg/archive/Investigations/News/98686.aspx> (last visited May 29, 2013)

⁴³ For more analysis on modifying the Personal Status Code see <http://forums.fatakat.com/thread2837374> (last visited May 29, 2013)

However, the Salafis, the Brotherhood's political partners remain unreliable. Public morality and the relations between men and women matter deeply to them. What kind of legislative agendas they will push, what kind of support they will get from Brotherhood representatives, what kind of stance will Al-Azhar take, are questions for the future to answer.