

MODERN LEGAL REFORM IN EGYPT: SHIFTING CLAIMS TO LEGAL AUTHORITY

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In 1980, Article 2 of the Egyptian Constitution was amended to read: “The principles of the Islamic *shari‘a* are the principal source of legislation [*mabadi’ al-shari‘a al-islamiyya al-masdar al-ra’isi li-al-tashri*].”¹ After two centuries of civil codes modeled on French law and the incremental erosion of the Islamic *fiqh* (the substantive law of Islamic jurists), Islamic law appears to have resurfaced.² Scholars of Egyptian history have documented the consistent “replacement” of Islamic law with European law since the beginning of the nineteenth century.³ But despite their predictions, Islamic law did not fade quietly into oblivion; with the amendment of the Constitution in 1980 and recent decisions by the Egyptian constitutional court, Islamic law is formally the underlying basis for *all* state law. Like the emerging constitutional orders in Iraq and Afghanistan, contemporary Egyptian law has responded to increasing demands for a modern legal order grounded in Islamic norms. How should we understand this intersection of Islamic law and the

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In transliterating Arabic terms, I use two diacritical marks: I represent the *‘ayn* with a reverse apostrophe and *hamza* with an apostrophe. Following law review convention, I do not use other diacritical marks. In addition, for the sake of clarity, I often form the plural of Arabic words by adding the English “s” rather than transliterating the Arabic plural.

¹ For an English translation of the Egyptian Constitution, see THE CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, *translated in* HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT app. A, at 283-320 (Kevin Boyle & Adel Omar Sherif eds., 1996).

² The 1971 Constitution also contained a reference to Islamic law; it declared that the *shari‘a* was to be a source of legislation. The small change in wording, however, made Islamic law *the* source of all legislation, making legal challenges based on Islamic law difficult to dismiss and prompting the interpretation of Article 2 by the Supreme Constitutional Court. *See infra* Parts II.D and II.E. For a constitutional history of Egypt, see generally Kevin Boyle & Adel Omar Sherif, *The Road to the 1971 Constitution: A Brief Constitutional History of Modern Egypt*, in HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT, *supra* note 1, at 3-12.

³ *See infra* Part II.A.

modern state? And what are the consequences of this legal development?

The following historical account of Egyptian legal reform in the nineteenth and twentieth centuries offers a view different from those that assume contemporary Egyptian law reflects a historical process of Europeanization, or secularization.⁴ By looking through the lens of Islamic legal history and theory, a new perspective on legal change in Egypt emerges. A historical account that focuses on the changes in legal institutions from the perspective of Islamic legal history situates the constitutional amendment within a longer process of ideological change more complex than the “replacement” of Islamic law with European law. Accounts that do not pay attention to the larger historical and cultural context of Egyptian reform leave out a substantial portion of the story. If we investigate legal reforms from within the paradigms of Islamic legal theory and analyze the changes in terms of Islamic jurisprudence, the story of legal reform is also an account of a much older tension within Islamic law and governance: the dynamic between the *fiqh* (the private law of Islamic scholars) and the *siyasa* (the public law of the governing authority). I argue that Egyptian leaders did not simply enact western laws in a vacuum; they negotiated these reforms in a particular historical and political context, integrating Western laws into established legal traditions. The resulting reforms are a product of this negotiation, of integrating new tools and ideas into established legal (i.e., Islamic) frameworks.

This approach does not suggest that Egyptian laws are more or less Islamic; rather, it counters the assumption that legal reformers and political leaders sought to subvert or abandon Islamic tradition by adopting foreign laws. It seeks to construct an *Egyptian* story of legal reform that explores legal change in the language of the supposedly supplanted Islamic tradition. From this perspective, we can better trace the historical origins and development of the current interaction of state law and Islamic jurisprudence and better understand the consequences of this development in Egyptian law. Furthermore, an understanding of how Islamic legal theory developed in the Egyptian context can inform our understanding of parallel developments elsewhere.

⁴ See, e.g., Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT'L L. REV. 379, 386 (2005).

To this end, the following discussion uses historical Islamic concepts of government, politics, and law to tell the story of the power of the modern state. In section one, I outline the relevant Islamic legal history and theory, briefly summarizing the development of the *fiqh-siyasa* dynamic. In section two, I detail the major legal reforms of the nineteenth and twentieth centuries, analyzing how they reflect and respond to historical norms and institutions organized around the *fiqh-siyasa* dichotomy. I conclude with an analysis of the Supreme Constitutional Court's interpretation of Article 2 and a discussion of the political and social implications of the significantly changed relationship between *fiqh* and *siyasa* today.

I. HISTORICAL BACKGROUND: ISLAMIC LEGAL THEORIES OF SIYASA (POLITICS)

A. *Classical Theories of an Ideal Ruler*

The large body of substantive Islamic legal doctrine, called *fiqh*, originated outside the public sphere of government and politics in the private realm of individual scholars or jurists, i.e., the '*ulama*' (jurist-scholars).⁵ When jurists began to derive legal rules and methodologies from the *shari'a*, the divine law of God, the ruling entity, the caliphate, was already established and governing according to its own public laws and regulations. During these early years, under the rule of the Umayyad and Abbasid caliphates, individual scholars began establishing the possible sources, tools, and substantive rules of Islamic law. But this scholarly tradition of *fiqh* was not standardized or even easily accessible; one scholar's diligent effort to understand the divine law (*ijtihad*) was as valid as another's, lending equal validity to opposing views.⁶ Although the early '*ulama*' sought to advise rulers and even served as state judges, or *qadis*, the lawmaking and adjudicatory power of the ruler was considerable, particularly in the areas of administration,

⁵ BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* (1998). I use the terms '*ulama*', scholars, and jurists interchangeably.

⁶ In Islamic jurisprudence, every qualified jurist conducting a diligent independent legal analysis using the *shari'a* sources—namely the Qur'an, the *ahadith* (prophetic traditions), *ijma'* (juristic consensus), and *qiyas* (analogical reasoning)—will be rewarded in the hereafter. A well-known *hadith* reports that the Prophet said that God promises two bounties for a correct *ijtihad* and one for an incorrect *ijtihad*. KHALED ABOU EL FADL, *SPEAKING IN GOD'S NAME: ISLAMIC LAW, AUTHORITY AND WOMEN* 9 (2001).

taxes, and criminal law.⁷ That said, the sphere of the ‘*ulama*’ was expanding as well, as they established their role as authoritative interpreters of the divine law.⁸

By the classical period of Islamic jurisprudence, a period during which the caliphate was in decline and political power unstable, jurists, such as al-Mawardi (450/1058), al-Juwayni (478/1085), and al-Baghdadi (429/1037), developed a more complete *fiqh* theory of the ruler’s authority—a theory that became, according to Frank Vogel, the “authoritative Sunni doctrine of government.”⁹ Interestingly, these scholars envisioned an idealized ruler exercising unlimited power in the realm of *siyasa* (literally politics or policy), immune from removal even when he fails to uphold God’s law. But provided the ruler meets the stringent conditions for election by the ‘*ulama*’ to leadership, this expansive power would, theoretically, be in trustworthy hands. Unfortunately, precisely because of these demanding conditions, the ruler was destined to fall short. In particular, according to the jurists, the ruler should be a *mujtahid*, a jurist capable of *ijtihad* (independent legal reasoning), a standard precious few could meet.¹⁰

Why did the ‘*ulama*’ imbue the ruler with such power? In part, they wanted to keep the peace by preventing public rebellion against the state, a position likely influenced by the bloody history of the Khawarij who believed in the right to depose (forcibly and

⁷ FRANK E. VOGEL, *ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA* 189 (Brill 2000).

⁸ Bernard Weiss describes the ruler’s lawmaking jurisdiction as that of public law, and the ‘*ulama*’s as that of private law, explaining that public law ideally serves the limited purpose of enforcing the rights of God and individuals when individuals choose to call upon the ruler’s executive enforcement powers. That is, Islamic law contemplates the private settlement of disputes, but gives individuals the choice of calling upon public authority if necessary. WEISS, *supra* note 5, at 183. This public-private distinction helps generalize an otherwise complicated relationship between the ruler and the scholars of Islamic law, but should not be confused with the use of these terms in common and civil law traditions: in Islamic law, private law is law developed outside political institutions, such as courts, executives, and parliaments. Furthermore, the Islamic conception of legal rights does not give rights to the state; individual rights, such as contract rights or rights to compensation, remain with the individual (in the private sphere). EL FADL, *supra* note 6, at 13.

⁹ VOGEL, *supra* note 7, at 190.

¹⁰ *Id.* at 192. Vogel lists other requirements for the ruler in classical jurisprudence: “Other qualifications are that he be a male Muslim of a character as least as upright as that of an acceptable witness, that he be physically sound, that he be of good judgment and skilled in matters of the state, and that he be of the Prophet’s tribe Quraysh.” *Id.*

violently) any ruler who has committed a sin.¹¹ In addition, Frank Vogel argues that the scholars' desire to prevent rebellion and their construction of an idealized *mujtahid* ruler also helped secure the 'ulama's authority over Islamic law by ensuring that substandard rulers would remain in power out of necessity: "Paradoxically, an idealized rulership, even one with broad delegations of power, offers less a threat to the legitimacy of the texts and their interpreters than a more modest but realizable one."¹² In other words, the 'ulama' constructed a theory that preserved their elite position as sole interpreters of the divine law, a position from which they could critique the government.

B. *Toward a Larger Role for the 'Ulama' in Islamic Governance*

Eventually the 'ulama' began developing more comprehensive and realistic theories of the ruler's power in a body of scholarship called the *siyasa shar'iyya*. That is, they began developing a *fiqh* of public law that delegated some authority to the ruler to make laws (*siyasa*) that serve the needs of society.¹³ Not surprisingly, this body of thought seeks to define the limits of state power by asserting a larger role for the 'ulama' in governance,¹⁴ particularly in ensuring that the ruler fulfills his duty to uphold the *shari'a*. The work of two jurists, Ibn Taymiyya (728/1328) and Shihab al-Din al-Qarafi (626/1228), illustrate the 'ulama's interest in circumscribing the ruler's power and preserving their elite status as interpreters of God's law. They are also relevant to historical inquiries into Egyptian legal reform. Ibn Taymiyya is likely the most well-known and influential scholar of *siyasa* theory. And al-Qarafi's work is largely a scholarly response to abuses of political power in Ayyubid-Mamluk Egypt during the thirteenth century.

Ibn Taymiyya called for a cooperative government of rulers and jurists, rejecting the view that jurists should leave the worldly

¹¹ *Id.* at 188, 195. I realize the term "state" is anachronistic in this context. I use the terms "state" and "ruler" interchangeably to denote the power or authority of a sovereign government or leadership at a given historical moment.

¹² *Id.* at 195.

¹³ Frank E. Vogel, *Conformity with Islamic Shari'a and Constitutionality Under Article 2: Some Issues of Theory, Practice and Comparison*, in DEMOCRACY, THE RULE OF LAW AND ISLAM 530 (Eugene Cotran & Adel Omar Sherif eds., 1999).

¹⁴ For example, Ibn Taymiyya's student, Ibn Qayyim al-Jawziyyah (751/1350-1), argued that the duty to obey the ruler comes from the duty to obey the jurists because the duty to obey the ruler rests on the condition that the ruler uphold the *shari'a*, and the jurists are the authoritative interpreters of the *shari'a*. EL FADL, *supra* note 6, at 15.

realm of politics to the unlimited discretion of state power.¹⁵ Instead of strengthening the *shari'a* by denouncing the sinful ruler, jurists should participate in governance and lend the ruling power greater legitimacy. To this end, Ibn Taymiyya advanced a more realistic image of a ruler unencumbered by the formal requirements of classical theory; for Ibn Taymiyya, a ruler need only uphold the *shari'a*. Furthermore, the ruler's lawmaking authority, the *siyasa*, is part of the *shari'a*, just as jurist-made law, the *fiqh*, is part of the *shari'a*. Hence, within the bounds of the *shari'a*, *siyasa* and *fiqh* should never conflict, and political leadership should draw upon both the *siyasa* and the *fiqh*. Ibn Taymiyya's interpretation of the Qur'anic command to obey God, the Prophet, and "those in authority" (*uli al-amr*) reflects this harmonization: in his view, the phrase "*uli al-amr*" includes both the '*ulama*' and the ruler.

Although Ibn Taymiyya argued that the *siyasa* is part of the *shari'a*, he did not require that the ruler be a *mujtahid* capable of deriving *siyasa* laws according to the rigorous methods of the scholars. Instead, a ruler's laws and practices are valid provided they meet two conditions: they do not contravene a revealed text or *ijma'* (scholarly consensus) and they generally advance the public welfare or interest (*maslaha*; pl. *masalih*). Ibn Taymiyya's student, Ibn al-Qayyim, argued that the ruler's latitude to create laws in the public interest, following the principle of *maslaha*, is extensive. In response to those who objected to *siyasa* laws that go beyond revealed text (such as the Qur'an), Ibn al-Qayyim argued that the *siyasa* laws must address the needs of people:

"[T]his is a . . . deficiency in [the critics'] knowledge of the reality of the shari'a, and of the harmonization between it and the world of fact. When those in authority see this, and that the people's affairs will not be put right without something added to what this group [i.e., the critics] understands of the shari'a, then they create for themselves *siyasa* laws by which the interests of men are ordered."¹⁶

As we will see, the principle of the general public welfare, or *maslaha*, is a popular legal device in modern Egyptian legal reform.¹⁷

¹⁵ My brief overview of Ibn Taymiyya's work is taken from VOGEL, *supra* note 7, at 202-05.

¹⁶ AL-QAYYIM, *quoted in* VOGEL, *supra* note 7, at 205.

¹⁷ Although I focus on *maslaha* generally as it is used in the public, or *siyasa*, sphere of law, Muslim jurists developed theories regarding its use in deriving *fiqh* rules as well. Because *fiqh* scholarship is tied closely to the divine texts, the Qur'an and the *ahadith* (traditions of the Prophet), *maslaha* was often described as an extension of *qiyas* (analogical

Ibn Taymiyya's cooperative government of jurists and rulers is, of course, an ideal conception of governance much like the earlier jurists' *siyasa* theories: in practice, rulers did not always listen to or respect the authority of the jurists. And because rulers held the executive power to enforce the *shari'a*, they could frustrate the efforts of jurists seeking to maintain an intellectual culture of pluralism (consistent with the belief that every *mujtahid* is correct) and scholarly authority over the law. In particular, although the state *qadi* courts (*mahkama*; pl. *mahakim*) applied the *fiqh*, the courts fell under the jurisdiction of the ruler, who appointed the judges (*qadis*) and oversaw their administration. As the four main schools (*madhhab*; pl. *madhahib*) of Sunni jurisprudence crystallized, the ruler could exercise substantive control over the *fiqh* law applied in the courts by choosing jurists from certain schools. The scholarship of the Egyptian jurist al-Qarafi is largely a response to this kind of *siyasa* manipulation of the *fiqh*.¹⁸ As a member of the Maliki school (*madhhab*), al-Qarafi was understandably troubled by the policies of the state-appointed chief *qadi* who refused to enforce *qadi* rulings that contradicted the views of the Shafi'i school, the school to which the chief *qadi* belonged.¹⁹ But because the courts fell within the ruler's *siyasa* jurisdiction, the ruler could arguably choose among different *fiqh* views.²⁰ Responding to this encroachment on the jurists' independence, al-Qarafi proposed further limitations on the substantive lawmaking jurisdiction of the ruler.

To establish limits on the *siyasa* power, al-Qarafi's theory places restrictions on legally binding decisions (*hukm*),²¹ and there-

reasoning) rather than an independent source of law. See WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES 112 (1997). The esteemed jurist, al-Ghazali, however, recognized a somewhat broader role; if the public interest serves one of the core principles of the *shari'a* (life, private property, mind, religion, and progeny), it may form the basis of legal reasoning. *Id.* Although al-Ghazali's principles derive from textual sources, the use of *maslaha* in this context is less ostensibly tied to the text than its use in identifying the 'illah, or cause, in analogical reasoning. But the kind of *maslaha* (*maslaha mursala*) rulers may use according to their *siyasa* power is even broader, often entirely lacking a textual basis. SHERMAN A. JACKSON, ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHAB AL-DIN AL-QARAFI 59 & n.110 (1996).

¹⁸ JACKSON, *supra* note 17.

¹⁹ *Id.*

²⁰ *Id.*

²¹ The *fatwas*, or legal opinions of private jurists, are not "binding" in the sense that failure to follow them will result in worldly sanctions. Should an individual believe that the *fatwa* represents the law of God, it is in fact God's law for that individual, but the consequences arising from a failure to follow the law are reserved for the hereafter. Conversely, the legal decisions of *qadis*, state-appointed judges, are binding, but this is not because they

fore, on government.²² The ruling power may enact laws that pertain to civil and criminal matters (*mu'amalat*), but may not interfere in religious observances (*ibadat*). Furthermore, al-Qarafi restricted the *siyasa* authority to certain *fiqh* categories of rules: only obligatory (*wajib*), neutral or permissible (*mubah*), and forbidden (*haram*) categories may be imposed by political power. In other words, *siyasa* laws may not regulate behavior falling in the recommended (*mandub*) and discouraged (*makruh*) categories of the *fiqh*.²³ In fact, according to Jackson's study of al-Qarafi's work, the state's intervention as law enforcer should be the "exception rather than the rule" because the individual does not need the state's mediation in accessing her legal rights and obligations.²⁴ Although this may seem to impose more stringent restrictions than Ibn Taymiyya's *siyasa* theory, consistent with his Maliki affiliation, al-Qarafi recognized the considerable role of *maslaha* (public welfare).²⁵ The state exists solely to "promote the welfare of the individual" by assisting the individual in her efforts to follow the *shari'a*.²⁶ Hence, although al-Qarafi limited the reach of public authority, he granted the governing power substantial flexibility in crafting laws that promote the public welfare.

C. Qadi Courts and Siyasa Tribunals²⁷

In order to better understand the division between the *siyasa* and the *fiqh*, we should briefly explore the development of judicial institutions in Islamic legal history. We have already encountered the *qadi* courts, where state-appointed judges applied the scholarly *fiqh*. Although *qadis* were appointed by the ruler, they generally

are more correct; they are binding according to the ruler's authority to maintain order and administrative justice. EL FADL, *supra* note 6, at 159-60.

²² JACKSON, *supra* note 17, at 195.

²³ *Id.* at 197. As Jackson observes, al-Qarafi's restriction of the *siyasa* power to certain legal categories of rules assumes the *qadis* are applying established rules consistent with a regime of *taqlid* (as opposed to *ijtihad*): "In short, the idea that judges are restricted to rules from certain legal categories, in order to have any real meaning, must assume that these rules are already recognized as such prior to the time the judge comes to adjudicate the case. In other words, the function of the judge must be understood to be simply one of *applying* rules that have already been established as such in his *madhhab* [school of jurisprudence]." *Id.* at 209.

²⁴ *Id.* at 218.

²⁵ *Id.* at 57.

²⁶ *Id.* at 224.

²⁷ The following discussion comes from Asifa Quraishi, unpublished manuscript (on file with author).

came from the scholarly ranks of the jurists and were able to apply the private *fiqh* either as a result of their own *ijtihad* or, later, in conformity with the established rules of the schools (*madhahib*). Although they did find ways to dictate the substantive law applied in the *qadi* courts, generally the ruler did not interfere in the *qadis*' decision-making process or influence the outcome of a given case.²⁸

But the *qadi* courts were not the only state institutions in which individuals could litigate a grievance or dispute. Pursuant to the state's *siyasa* power, rulers established various administrative tribunals in which the *fiqh* and scholarly opinion played little to no role. For example, beginning in the first centuries of Islam, rulers appointed an official called the *muhtasib* to oversee the administration of the market place, delegating to this individual broad authority to regulate public norms of behavior, civil matters, and minor criminal infractions. The *muhtasib* adjudicated violations in a tribunal under the state's *siyasa* power. In addition, the ruler himself would often preside over the *diwan al-mazalim* (forum of public grievances), a tribunal open to any individual with a public grievance. (Complaints tended to focus on the abuses of state officials and others in power.) Free from the constraints of the *fiqh*, the *mazalim* judge could use evidence and tactics, including coercion, which *qadis* following the *fiqh* could not use. Similarly, judges sitting in *shurta* (criminal) tribunals enjoyed broad discretion in resolving criminal matters, including the authority to initiate a case without an individual complaint and the discretion to choose, and even invent, the appropriate punishment.²⁹

Because the decisions of *siyasa* tribunals were not the product of scholarly *ijtihad*, they were, in theory and often in practice, reviewable by higher authorities. *Siyasa* decisions sought to achieve certain policy goals—namely the advancement of the public interest (*maslaha*) by “removing a preponderant harm or by obtaining a

²⁸ For example, with the formation of the schools, rulers could use their *siyasa* power to dictate the substantive law applied in *qadi* courts. Ottoman rulers used their *siyasa* jurisdiction to declare Hanafi law the law of the empire and to establish a hierarchal system of lawmaking and review. See *infra* Part I.D.

²⁹ Criminal jurisdiction in Islamic law involves both *siyasa* and *fiqh* law. The Qur'an only specifies certain crimes and punishments (the *hadd* crimes), but jurists have recognized the state's authority to regulate unspecified crimes and punishments (*ta'zir* crimes) pursuant to the *siyasa* power to advance the public welfare (*maslaha*). See Ghaouti Benmelha, *Ta'azir Crimes*, in *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 212 (M. Cherif Bassiouni ed., 1982).

preponderant benefit.”³⁰ Because the state issued *siyasa* decisions to further this policy of public welfare, the decisions were a means to an end and, therefore, subject to review to ensure that they actually served this end, i.e., the public welfare. Conversely, the substantive content of a *qadi*'s decision was not reviewable, although the *mazalim* judges did hear individual complaints regarding factual errors or corruption in the *qadi* courts in order to ensure *qadis* did not abuse their power. But the legal reasoning of a *qadi*'s decision was not subject to state review.³¹

D. *The Ottoman Empire: Extensive Use of the State's Siyasa Power*

No discussion of the development of the *fiqh-siyasa* dichotomy within Islamic law would be complete without mention of the legal institutions of the Ottoman Empire. Using its *siyasa* power to uphold the *shari'a* and protect the public welfare, the Ottomans declared the Hanafi school (*madhhab*) of *fiqh* the official law of the empire and formalized *siyasa* laws in an unprecedented number of codes, culminating in the well-known *Majallah* (or civil code) of the nineteenth century.³² The ruling power also incorporated the '*ulama*', or jurists, into the state legal system by creating an educational and bureaucratic hierarchy designed to staff the *qadi* courts.³³ In addition, the famous *shaykh al-islam* exercised considerable power, reviewing the sultan's *siyasa* decrees for consistency with the *shari'a* and overseeing the administration of the *qadi* courts. As Frank Vogel describes it, “[t]he result was a highly positivized, nationalized, regular body of law that included both *fiqh* and *siyasa* and was largely enforced by the *qadi*.”³⁴ Although rulers had previously used their *siyasa* power to determine which school's jurisprudence would apply in *qadi* courts, none had

³⁰ Quraishi, *supra* note 27, at 121.

³¹ Although *qadi* decisions were theoretically independent of the ruling power's influence and coercion, the ruler often had the military might to do as he pleased, using brute force to coerce and retaliate against recalcitrant *qadis* that flouted his will. For example, following the Ottoman conquest of Egypt in 1517, Sultan Selim I “personally beat a judge, made him wear the uncleaned stomach of an ox as a hat, and caused him to be paraded in the streets of Cairo riding backward on a donkey to bring him into ridicule and contempt.” FARHAT J. ZIADEH, *LAWYERS, THE RULE OF LAW, AND LIBERALISM IN MODERN EGYPT* 4 (1968).

³² See BERNARD LEWIS, *THE EMERGENCE OF MODERN TURKEY* 120 (1961).

³³ See *id.* at 107.

³⁴ VOGEL, *supra* note 7, at 206.

achieved this kind of control over the application of *fiqh*.³⁵ And although this expansion of the *siyasa* jurisdiction drew upon the *fiqh* for legitimacy and practical administration, the substantial incorporation of jurists into state legal institutions likely shaped the *fiqh* and the juristic culture by institutionalizing *fiqh* scholars and practices for *siyasa* purposes—a development that increased the jurists’ political power but “may also have weakened the *fiqh* edifice from within.”³⁶

II. THE *FIQH-SIYASA* DYNAMIC IN EGYPTIAN LEGAL REFORM

In investigating the influence of Western laws on Egyptian legal reform, Nathan Brown acknowledges three possible explanations for what appears to be the substantial influence of foreign legal systems on the legal reforms of the nineteenth and twentieth centuries: “that they are best seen as tools (or at least residues) of imperialism, that they are built to establish the rule of law and circumscribe the authority of rulers, and that they underwrite the positions of elites.”³⁷ Through a close analysis of the historical development of these reforms, he shows how the positions of elites, particularly their desire for a stronger, more centralized state, led political leaders to develop and maintain a European-style legal system. I agree that political leaders seeking to establish a state free from foreign influence sought to advance the state’s institutional and military strength. But we should not assume that they understood their legal and political reforms to be a project of secularization (or Westernization)³⁸ inconsistent with Islamic law. If we analyze critical moments of legal reform as a continuation of the historical *siyasa-fiqh* dynamic, a more nuanced history emerges, one in which political leaders strengthen the Islamic *siyasa* jurisdiction for various ends.

This history highlights the complicated relationship between state authorities and the ‘*ulama*’, exposing the artificial line be-

³⁵ Quraishi, *supra* note 27, at 81.

³⁶ VOGEL, *supra* note 7, at 207.

³⁷ NATHAN BROWN, *THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF* 15 (1997); see also Daniel Crecelius, *The Course of Secularization in Modern Egypt*, in *RELIGION AND POLITICAL MODERNIZATION* (Donald Eugene Smith ed., 1974) (teleological account of Egypt’s legal development as moving toward modernity and secularism).

³⁸ See, e.g., LEWIS, *supra* note 32, at 113 (referring to Muhammad Ali as a “successful Westernizer”); see also Lombardi & Brown, *supra* note 4, at 386 (referring to the modern secularization of Egyptian law).

tween the two and illustrating how state authority could both suppress and advance the *'ulama's* authority. Similarly, it demonstrates how the *'ulama'* at times rejected and at other times supported expansions of state, or *siyasa*, power. In short, it highlights continuity, rather than a break, in Islamic legal history, as modern legal reformers struggle with the same historical tensions medieval jurists sought to reconcile. Should jurists remain outside the corrupting worldly sphere of the ruler as al-Mawardi and his contemporaries argued? Or, should they participate in government in order to ensure that the *shari'a* is upheld as the law of the land? As we shall see, some *'ulama'* did participate in the strengthening of the Egyptian state, expanding the *siyasa* jurisdiction over time. A financially and institutionally stronger state could serve the interests of an increasingly under-resourced *'ulama'*. But legal and institutional reform led to unintended consequences: as the *siyasa* jurisdiction expanded to serve the interests of the modern state, the *'ulama's* authority weakened and the *fiqh* dwindled in importance.

A. *Early Nineteenth-Century Reforms under Muhammad Ali (1805-1848)*

Histories of modern legal reform in Egypt generally begin with the rule of Muhammad Ali as the Ottoman viceroy in Egypt.³⁹ After years of political unrest, as French and Ottoman powers battled for control of Egypt, the *'ulama'*⁴⁰ organized a revolt that led to Ali's instatement as ruler and his subsequent efforts to strengthen Egypt through various legal and institutional reforms.⁴¹ In his efforts to increase the state's revenues, Ali confiscated cer-

³⁹ Though Egypt was part of the Ottoman Empire, Egyptian rulers exercised considerable autonomy over decisions of state administration and law. For example, the Ottoman *qanun*, or *siyasa* codes, were applied piecemeal and sometimes not at all. See J.N.D. Anderson, *Law Reform in Egypt: 1850-1950*, in *POLITICAL AND SOCIAL CHANGE IN MODERN EGYPT: HISTORICAL STUDIES FROM THE OTTOMAN CONQUEST TO THE UNITED ARAB REPUBLIC* 214 (P.M. Holt ed., 1968). By 1876, Egypt was basically independent of the Ottoman Empire administratively, financially and judicially, although the country remained nominally part of the Ottoman Empire through World War I. See *id.* at 212.

⁴⁰ According to Afaf Loutfi El Sayed, the Egyptian *'ulama'* consisted of the rector of the Islamic university al-Azhar, the *muftis* of the four schools of law, and leaders of the Sufi orders. Afaf Loutfi El Sayed, *The Role of the 'ulama' in Egypt During the Early Nineteenth Century*, in *POLITICAL AND SOCIAL CHANGE IN MODERN EGYPT: HISTORICAL STUDIES FROM THE OTTOMAN CONQUEST TO THE UNITED ARAB REPUBLIC*, *supra* note 39, at 266.

⁴¹ *Id.* at 271.

tain *awqaf* (charitable endowments, s. *waqf*) used to support religious institutions, and he increased taxes, breaking his promise to the ‘*ulama*’ that, should they help him come to power, he would not tax unjustly.⁴² Scholars generally identify this as the beginning of the end of the ‘*ulama*’s social influence, arguing that Ali’s reforms weakened them financially, and his disregard for their counsel weakened their authority.⁴³ Indeed, historian Afaf Loutfi El Sayed seems to view the years of Ali’s leadership as the beginning of a secular nationalism that signaled the end of Islamic, or religious, law:

Once nationalism replaced the overall concept of the Muslim community as the focus of loyalties, the political influence of religion waned. When the modern Muslim relegated religion to the realm of the spiritual, and admitted that society could be ruled by a civil code of law, his dependence on the “*ulama*” as other than religious teachers disappeared, and their influence on him in matters other than religion disappeared likewise.⁴⁴

But in light of the historical resilience of al-Azhar and the ‘*ulama*’ generally, we should not overstate the impact of this particular period in history. Established in 973 A.D., the Islamic university al-Azhar had endured scores of rulers and their varying political agendas, as well as suffering periods of financial trouble, long before Ali ruled Egypt.⁴⁵

In addition, attributing the decline of religious authority largely to the adoption of civil codes of law is problematic. As discussed above, rulers could enact laws pursuant to their *siyasa* power based on *maslaha* (public interest). Hence, the notion that Ali enacted criminal laws that, according to one scholar, “went further than any other in departing from Sharia” reflects confusion regarding Islamic legal theory and history.⁴⁶ Historically, rulers applied a range of criminal laws and punishments that expanded upon and even departed from divine texts and the *fiqh*, a practice the jurists accepted as part of the state’s *siyasa* jurisdiction. Similarly, Ali’s creation of various administrative tribunals in addition

⁴² See *id.* at 277; ZIADEH, *supra* note 31, at 128.

⁴³ See El Sayed, *supra* note 40; BROWN, *supra* note 37.

⁴⁴ El Sayed, *supra* note 40, at 280.

⁴⁵ A. CHRIS ECCCEL, EGYPT, ISLAM AND SOCIAL CHANGE: AL-AZHAR IN CONFLICT AND ACCOMMODATION 115-16 (1984).

⁴⁶ Anderson, *supra* note 39, at 210.

to the *qadi* courts⁴⁷ is consistent with historical uses of the *siyasa* power. Ali established a centralized and comprehensive system of councils (*diwans and majalis*) that extended to the local levels and applied state regulations and Ottoman *qanun*. But these councils were an extension of administrative (i.e., state) authority, separate from the jurists' authority over the *fiqh*. Indeed, they were not called *mahakim* (the term used for *qadi* courts), and they did not disturb the jurisdiction of the *qadi* courts where the *fiqh* was applied.⁴⁸ Historical accounts tend to treat Ali's *siyasa* tribunals as the beginning of European legal influence and a departure from the *shari'a*.⁴⁹ But again, in light of Islamic legal history, and particularly the *fiqh* theories of *siyasa*, Ali's reforms do not look European—they seem to fall squarely within the ruler's *shari'a*-based *siyasa* power.

B. Late Nineteenth and Early Twentieth-Century Reforms

Although Europeans had economic ties with Egypt prior to Ali, he significantly increased this influence by encouraging European travel and investment.⁵⁰ Under historical treaties of capitulations, Europeans already enjoyed a special status, exempting them from jurisdiction in Egyptian courts.⁵¹ But as European financial interests increasingly dominated Egyptian commerce,⁵² the inability to resolve cases between foreigners and Egyptians, including the Egyptian government, proved unworkable. After various interim solutions, the mixed courts were established in 1876, allowing for the adjudication of civil disputes between foreigners and Egyp-

⁴⁷ Throughout Egypt's history, these courts were referred to as *shari'a* courts. Because I am specifically concerned with the *fiqh-siyasa* dichotomy, I refer to them as *qadi* courts in order to prevent confusion. Although *fiqh* was applied in these "*shari'a*" courts, *siyasa* laws may be considered part of the *shari'a* as well.

⁴⁸ See BROWN, *supra* note 37, at 25. Ali created a special council charged with reviewing "all siyasiyyah [political] rules" and recommending changes. ZIADEH, *supra* note 31, at 13. To accomplish this, Ali asked the council to investigate "practices current in Europe in this field." *Id.* This request suggests his equation of European civil codes with the *siyasa* laws of Islamic tradition. *Id.* Eccel specifically recognizes the promulgation of administrative law as within Ali's *siyasa* jurisdiction: "When Muhammed Ali began establishing a legal system under his control it was in the name of *siyasa* that he issued laws (*kanun*, *la'iha*, not *sari'a*) and established courts (*majalis* rather than *mahakim*)." ECCEL, *supra* note 45, at 103.

⁴⁹ See, e.g., BROWN, *supra* note 37.

⁵⁰ ECCEL, *supra* note 45, at 94.

⁵¹ *Id.*

⁵² By the time the mixed courts were created, foreign powers had assumed oversight of Egypt's finances in the wake of the country's bankruptcy. BROWN, *supra* note 37, at 28.

tians under a new civil code largely based on French models with a few provisions based on Islamic law.⁵³ Consular courts continued to try cases in which their nationals were criminal defendants and to oversee matters of personal status for foreigners.⁵⁴

The mixed courts heard a tremendous number of cases, producing approximately forty-thousand written opinions annually.⁵⁵ Their expansive jurisdiction, coupled with their long life span (ending in 1949), reflects their significant place in Egypt's legal history. As legal reformers sought solutions to subsequent administrative problems, the machinery, including the civil code, of the mixed courts was an influential example. But using the mixed courts as an example of the secularization, or Europeanization, of Egyptian law can be misleading. Two-thirds of the judges appointed to these courts were foreigners. And all laws applied in the courts had to be approved by foreign powers.⁵⁶ In his comprehensive study of the mixed courts, Jasper Yeates Brinton aptly observes: "On the one hand, they are part of the judicial system of the Egyptian state; on the other, they are under the protection of a dozen foreign nations."⁵⁷ Even their long tenure can be explained as the product of foreign interests and competition, rather than a result of their integration into the underlying domestic legal system.⁵⁸ In any event, the mixed courts looked more like international tribunals than domestic courts.

Unlike the mixed courts, the reforms of the administrative councils in the early 1880s did change the underlying domestic system of *siyasa* tribunals into an organized, hierarchal system of national courts, applying a uniform civil code adapted from the code of the mixed courts.⁵⁹ Chris Eccel notes what appears to be an important shift in terminology: the national courts were named "al-

⁵³ See ZIADEH, *supra* note 31, at 24-28; Anderson, *supra* note 39, at 217. The use of French codes is not surprising, as the French language and intellectual culture already enjoyed a prominent place in Egyptian society, and the commercial community was familiar with French civil laws. ZIADEH, *supra* note 31, at 28. Moreover, Ottoman codes were greatly influenced by French models. See LEWIS, *supra* note 32, at 116.

⁵⁴ Anderson, *supra* note 39, at 217.

⁵⁵ JASPER YEATES BRINTON, *THE MIXED COURTS OF EGYPT* xxiii-xxiv (1931); see also B.A. ROBerson, *The Emergence of the Modern Judiciary in the Middle East: Negotiating the Mixed Courts of Egypt*, in *ISLAM AND PUBLIC LAW: CLASSICAL AND CONTEMPORARY STUDIES* 107 (Chibli Mallat ed., 1993).

⁵⁶ ZIADEH, *supra* note 31, at 25.

⁵⁷ BRINTON, *supra* note 55, at xxiii-xxiv.

⁵⁸ BROWN, *supra* note 37, at 29.

⁵⁹ *Id.* at 29-30.

Mahakim al-Ahliya,” a designation he describes as “a move on the part of secular development to appropriate for itself the sar‘i [*shari‘a*] designation mahkama,” which was previously reserved for the *qadi* courts.⁶⁰ Although this change in terminology is significant, the conditions under which the national courts originated do not support the conclusion that Egyptian leaders sought to secularize the law or abandon Islamic legal institutions. As political leaders debated the substance of the new civil code to be applied in the national courts, Egypt suffered a severe financial crisis and endured a period of political instability, resulting, in 1882, in the British occupation of Egypt.⁶¹ Reformers had been considering a more extensive reform of civil laws based on the *shari‘a*, but with the British occupation, they decided time was of the essence. By adopting much of the structure and code of the mixed courts, they could quickly implement the reform and avoid European interference in legal development.⁶² The new system was, therefore, a result of expediency rather than secularization.

Indeed, as Brown notes, the lack of opposition to the national courts and civil code, particularly from the ‘*ulama*’, is telling: “[G]iven the current-day strength of *shari‘a*-minded critics of the Egyptian legal system, the subdued tone of the debate in the 1880s is striking.”⁶³ The reformers likely contributed to the acceptance of the national courts by giving the *qadi* courts concurrent jurisdiction with national courts in matters they were accustomed to hearing.⁶⁴ But the lack of opposition may also have resulted from the national courts’ affiliation with *siyasa* concerns of state and foreign influence. The Egyptian government actually appointed foreign judges to these courts, anticipating the eventual incorporation of

⁶⁰ ECCEL, *supra* note 45, at 105.

⁶¹ P.J. VATIKIOTIS, *THE HISTORY OF EGYPT FROM MUHAMMAD ALI TO MUBARAK* 126-54 (3d ed. 1985). Under Khedive Ismail’s leadership, Egypt accrued a large foreign debt. By 1879, the European powers were convinced that Egypt was bankrupt, leading them to ask the Ottoman Sultan to depose Ismail. Internal unrest followed as military leaders sought political power. As Vatikiotis explains, this situation of financial and political turmoil led rather unexpectedly to the British occupation of Egypt in 1882. *Id.* at 158.

⁶² BROWN, *supra* note 37, at 30; ECCEL, *supra* note 45, at 105 (“Though European influence is readily observed in the secular court development, there is no evidence of European imposition.”). Although the system was established without foreign interference, the British eventually exercised substantial control over the national courts and the legal system generally, appointing European judges to the courts and supervising the judiciary in general. BROWN, *supra* note 37, at 36-38.

⁶³ *Id.* at 33.

⁶⁴ *Id.*

the mixed courts into the national court system.⁶⁵ Although the national courts may look like “a decisive break from preexisting judicial structures,”⁶⁶ even these reforms seem to fall squarely within the state’s historical *siyasa* powers.⁶⁷

The most profound changes in terms of their impact on the *fiqh* law and the ‘*ulama*’ were undoubtedly those made to the *qadi* court system beginning in the 1870s and continuing into the twentieth century. The first major limitation on the *qadi* courts’ jurisdiction occurred in 1873 when the *majalis hisbiyya* were established to supervise the financial interests of Muslims unable to manage their own affairs (e.g., due to mental health problems), matters previously within the *qadis*’ jurisdiction.⁶⁸ In addition, in 1880, the *qadi* courts were subjected to organizational reforms, and their choice of law was restricted to the dominant opinions of the Hanafi school (*madhhab*).⁶⁹ Subsequent laws mandated further organizational changes and imposed other limits on the *qadis*’ jurisdiction through procedural laws, which indirectly limited the cases *qadis* could hear. For example, the marriage registration law established a minimum age for marriage and discouraged child marriages by prohibiting *qadis* from hearing claims related to unions that could not be registered.⁷⁰ Arguably, this kind of piecemeal legislation falls within the *siyasa* power because it does not interfere with a *qadi*’s legal reasoning except to impose a particular school of *fiqh*—a practice the Ottomans had already developed as part of the state’s *siyasa* jurisdiction.⁷¹

⁶⁵ *Id.* at 31; see also ZIADEH, *supra* note 31, at 36.

⁶⁶ BROWN, *supra* note 37, at 33.

⁶⁷ Eccel concludes: “The secular [national] court system developed out of the drive to increase central state coordination, to meet the need for a juridical system fully under Egyptian authority, based on criteria not limited to theology.” ECCCEL, *supra* note 45, at 105. Although I agree that leaders created the national courts to strengthen the Egyptian state, I question whether they understood their reforms as “outside” a certain theology. Islamic legal history and theory suggest a basis for these reforms *within* Islamic law.

⁶⁸ Anderson, *supra* note 39, at 218.

⁶⁹ *Id.*

⁷⁰ *Id.* at 223.

⁷¹ The personal status laws based on the *fiqh* have not been codified to this day, although beginning in the 1920s single laws were passed to codify specific rules. See generally Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND. J. TRANSNAT’L L. 1043 (2004). In the 1920s, a committee, which included several Azhar ‘*ulama*’ was formed to review and potentially reform personal status laws. But they did not agree to a modern reinterpretation of the *fiqh* or to codification of existing *fiqh* rules. Instead, their approach appears to be guided by their desire to legislate according to a broad understanding of the state’s *siyasa* power: “The whole reform movement was based

The 1897 legal reforms providing for appellate review of *qadis*' decisions are, however, a significant departure from previous legal practices and institutions. As we have seen, in Islamic legal history and theory, the content of a *qadi*'s independent legal reasoning (*ijtihad*) based on *fiqh* legal methodology is not reviewable.⁷² Chris Eccel quotes a historical source in explaining how the creation of a three-tiered system of *qadi* courts allowing for appellate review significantly circumscribed the influence of the private jurists within the state legal system: "Subsequently the functions of the muftin [private jurists] were 'restricted to fatawa for the National Courts, the government, and private individuals, in private matters that cannot come before the sar'i [*shari'a*] courts, and should a party bring a fatwa before one of these courts, the court is not bound by it.'" ⁷³ In the past, *qadis* followed the historical practice of consulting with respected private jurists. Once appellate review was established and the substantive law restricted to one *madhhab*, the practice of consultation gave way to a hierarchal administration of a small portion of the *fiqh*.⁷⁴

The crucial question is, therefore, why did political leaders implement institutional changes that imposed upon the *fiqh* in an unprecedented fashion? The involvement of the well-known Egyptian jurist and reformer, Muhammed Abduh, in this period of governmental reform sheds light on how at least one eminent jurist

upon the assertion that the ruler (or, in a modern state, the legislature) could, according to Islamic law, restrict the jurisdiction of the [*qadi*] courts not only with regard to locale and time, but also with regard to what cases might be heard and which of the variant views of jurists could be applied." ZIADEH, *supra* note 31, at 124.

⁷² In Islamic law, "*ijtihad* is not reversible [*al-ijtihad la yunqad*]." Vogel, *supra* note 13, at 530. But we have also encountered the regulation of *qadis* in later years by chief judges. In theory, these *qadis* were not qualified to conduct their own *ijtihad*, so their application of the established rules of the four Sunni schools of jurisprudence was reviewable by a jurist with more experience and education. An appellate system could theoretically be established on this basis, using jurists of higher ranks as appellate judges. For a more comprehensive treatment of appellate review in Islamic law, see Mohammad Hashim Kamali, *Appellate Review and Judicial Independence in Islamic Law*, in ISLAM AND PUBLIC LAW: CLASSICAL AND CONTEMPORARY STUDIES, *supra* note 55, at 49.

⁷³ ECCEL, *supra* note 45, at 85-86. These courts were never bound by legal opinions of private jurists, but as a practical matter, the opinions played an important role. Because the jurists were the only ones qualified to interpret the law, state-appointed judges needed their authoritative opinions. But as the administrative (*siyasa*) law of the state grew and the state limited the application of the *fiqh* to a particular school, state judges could derive legal rules without appealing to the complex methodology of the jurists.

⁷⁴ In addition to requiring that *qadis* apply only Hanafi law, legal reforms (in 1897) restricted *qadi* court jurisdiction to personal status matters only. ZIADEH, *supra* note 31, at 56.

perceived the role of the state at the turn of the century. Abduh graduated from and taught at al-Azhar, served as a *qadi*, and eventually as Grand Mufti of Egypt in 1899.⁷⁵ His position as jurist and government official lend particular relevance to his views of the *qadi* court reforms.

In 1899, the state appointed Abduh to conduct a study of the *qadi* courts in Egypt.⁷⁶ The study paints a bleak picture of *qadi* courts in a state of disorganization and corruption. Abduh attributed their decline to changes in Egyptian society and the failure of the state. In particular, he noted that the courts were overburdened because of the disappearance of traditional kinship communities in which disputes were previously settled. In addition, the state had failed to provide the necessary financial resources. Abduh expressed his alarm and concern regarding the courts' conditions: "Some of the judges have told me that they have entered a district court and found a single chair upon which the judge sat, while the scribes sat upon seats of gas cans. How can one's soul not anguish, how can one's regret not persist . . ." ⁷⁷ In the end, Abduh concluded that the courts' regrettable decline, including widespread practices of bribery and corruption, was a result of the government "abandon[ing] the courts to themselves," leaving them "completely free of government supervision."⁷⁸ The courts' lack of resources and administrative supervision also affected the quality of *qadis'* decisions; *qadis* often lacked the education and experience necessary to apply the law contained in the many volumes of *fiqh*.

Given this state of affairs, Abduh's support of legal reform is not surprising. Throughout Islamic legal history, the ruler exercised some supervision of the *qadi* courts, allowing, for example, individuals to appeal *qadi* decisions to *mazalim* (*siyasa*) tribunals if they asserted claims of corruption or bribery.⁷⁹ Abduh therefore called upon the state to fulfill its duty in overseeing the administration of the *qadi* courts. He argued for a codification of *fiqh* laws based on the practice of *talfiq* (selectively choosing positive rules

⁷⁵ Abdelaziz Ahmad Ayyad, *The Politics of Reformist Islam: Muhammad Abduh and Hasan al-Banna* (1987) (unpublished Ph.D. dissertation, Georgetown University) (on file with Lauinger Library, Georgetown University).

⁷⁶ ECCEL, *supra* note 45, at 87.

⁷⁷ *Id.* at 89.

⁷⁸ *Id.* at 93.

⁷⁹ *See supra* Part I.C.

from the different schools), specifically arguing that this practice fell within the state's *siyasa* authority.⁸⁰ To remedy the lack of *qadi* training and education, he also recommended substantial state reform of al-Azhar, including a special program that encouraged successful students to become *qadis*.⁸¹ With Abduh's support, the state implemented a number of reforms, bringing much of the administration of al-Azhar under governmental control and imposing a government-monitored internal hierarchy within the university and affiliated mosques.⁸²

Although the reforms of al-Azhar and the *qadi* courts certainly signal an expanded use of the state's *siyasa* jurisdiction, even these reforms are not without historical precedent. As discussed above, the Ottomans established a hierarchal system of *qadi* courts and implemented educational reforms designed to improve the administration of justice. Moreover, we cannot cite these reforms as an example of the secular state encroaching on Islamic law and the '*ulama*'. In addition to Abduh, members of the '*ulama*' had been serving in *siyasa* tribunals and directing legal reform throughout the nineteenth century.⁸³ In other words, some jurists were part of the expansion of the state.⁸⁴ Furthermore, the expanded role of

⁸⁰ Anderson, *supra* note 39, at 223. The practice of *talfiq* has been considered, at least since the early years of the Ottoman Empire, as part of the *siyasa* power of rulers. Rulers could privilege one *fiqh* rule over another in the name of public welfare (*maslaha*). This view of *siyasa shar'iyya* justified codifications based on the *fiqh*, such as the Ottoman *Majallah*. See Vogel, *supra* note 13, at 534.

⁸¹ ECCEL, *supra* note 45, at 93.

⁸² Ayyad, *supra* note 75, at 124. Interestingly, Abduh's reformist writings and teachings reflect a belief in social, rather than political, change, emphasizing that education and social reform must precede political reforms in the name of Islam. *Id.* at 95-100; MALCOLM H. KERR, ISLAMIC REFORM: THE POLITICAL AND LEGAL THEORIES OF MUHAMMAD 'ABDUH AND RASHID RIDA 135 (1966). He reportedly encouraged his mentor, al-Afghani, to focus on educational rather than political reform. According to his student, Rashid Rida, Abduh disagreed with al-Afghani's political agenda of Islamicization of the state as a means of reform. Ayyad, *supra* note 75, at 27. Abduh's support of state reforms, therefore, seems motivated by a desire to strengthen religious institutions so that they may better serve society, rather than a belief that the state should control religion or use religious institutions to control society.

⁸³ See generally ECCEL, *supra* note 45.

⁸⁴ Not all jurists were in favor of these reforms. In fact, many al-Azhar '*ulama*' resented Abduh and the legal reforms he supported. See *id.* at 158-59, 176-83. As Eccel explains, governmental reforms, including the establishment of separate educational institutions for the training of *qadis*, created significant competition for jobs. Al-Azhar graduates and faculty understandably objected to reforms that made their courses of study more difficult while undermining their chances of employment. See *id.* at 191. My point is not that the state-led reforms encountered little opposition from Islamic jurists. The crucial point is that the "state" and the "*ulama*" are not separate entities: some '*ulama*' served as

the state in the administration of religious institutions and *fiqh* law does not appear to result from a desire to secularize the law; rather, it appears to be grounded in a desire to strengthen Islamic law and improve state administration, objectives consistent with the historical and theoretical obligations of Muslim rulers.

C. *Sanhuri's Civil Code: Toward a Fiqh that Serves Siyasa Ends*

With the recognition of at least nominal independence from Britain in 1922,⁸⁵ Egyptian legal history entered yet another era. In the 1930s, political leaders agreed to a date (1949) after which the mixed courts would cease to operate and the national courts would assume their jurisdiction.⁸⁶ Foreign powers would no longer have special legal status. In preparation for domestic legal autonomy, political leaders agreed that the civil code should be replaced with a more indigenous Egyptian code. In 1936, a committee, led by 'Abd al-Razzaq al-Sanhuri, was formed to revise the civil code.⁸⁷ Although the *fiqh* content of Sanhuri's code is considered minimal, the fact that he drew upon the *fiqh* at all is notable. As we have seen, the Egyptian state had pragmatically adopted European codes as *siyasa* laws for decades.

Scholarly interpretations of Egypt's history trace the secularization of its law to reforms beginning with Ali and culminating in the national courts. If these accounts are accurate, we should be surprised that Sanhuri even considered the *fiqh*. But a history conscious of the historical *fiqh-siyasa* dynamic sheds new light on the historical reforms of the nineteenth century, demonstrating the presence of Islamic law at the very moment it appears absent to those focusing on European "influence." Islamic law had not been replaced by "secular law"; instead the number of *siyasa* laws and institutions had increased, while the influence of the *fiqh* declined. With the expansion of the national courts and the state bureaucracy in the nineteenth century, the realm of *siyasa* had grown considerably, decreasing the importance of *qadi* courts and the

state authorities and some state authorities were members of the '*ulama*'. This suggests that legal reforms arose in part from debates occurring within Islamic legal circles and were not merely the result of an uncritical adoption of secular European laws.

⁸⁵ British intervention in Egyptian affairs continued until the revolution of 1952. Selma Botman, *The Liberal Age, 1923-1952*, in 2 THE CAMBRIDGE HISTORY OF EGYPT: MODERN EGYPT, FROM 1517 TO THE END OF THE TWENTIETH CENTURY 291 (M.W. Daly ed., 1998).

⁸⁶ Anderson, *supra* note 39, at 226-27.

⁸⁷ ZIADEH, *supra* note 31, at 138-42.

relevance of the *fiqh* in state law. Sanhuri proposed a new legal methodology that would revive the *fiqh* by placing it firmly within the service of the *siyasa*, contributing to an even stronger state.

Trained in French and European law, Sanhuri wrote his dissertation in the field of comparative law.⁸⁸ His proposals for the revival of Islamic *fiqh* reflect this background, particularly his training in the “science” of comparative law. According to Sanhuri, Islamic *fiqh* is to modern Islamic law what Roman law is to European law—the foundation upon which law *evolves*. The reason Islamic *fiqh* is not suitable for the modern era is not an inherent quality of the law itself, but instead a consequence of its failure to evolve. In other words, the jurists ceased adapting it to new circumstances.⁸⁹ In Sanhuri’s view, the work of the modern reformer jurist is to identify where the *fiqh* stopped developing and then usher it into the new era:

“[The reformer must] see where the Islamic jurist stopped in developing the law, whether in the basic rules or in the detailed provisions. Then these details should be developed on the basis that the Islamic jurists set, using their wording, style and logic. When Islamic jurisprudence needs development, develop it, but when it conforms to the civilization of the present age, leave it as it is.”⁹⁰

Many classical and modern jurists would object to this enterprise as abandoning divine text in favor of social pragmatism. In fact, although Sanhuri claimed to be using the jurists’ methodology, his means-end approach—updating the law to suit social exigencies—looks more like the realm of *siyasa* than *fiqh*.

Other aspects of his theory resemble the jurists’ *fiqh* of *siyasa shar’iyya*, the body of *fiqh* that elaborates the ruler’s lawmaking jurisdiction and governing authority, as discussed above. Enid Hill explains what Sanhuri described as the scientific stage of adapting the *fiqh* for purposes of state codification: “The point of departure is to separate the religious part from the temporal part, and again in the temporal part, to distinguish between the permanent legal rules and the variable ones. A permanent rule is valid for all times

⁸⁸ Enid Hill, *Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of ‘Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971*, 10 CAIRO PAPERS IN SOC. SCI. 24 (1987).

⁸⁹ *Id.* at 111.

⁹⁰ *Id.* at 117.

and places; the variable rule is temporary and particular.’”⁹¹ The “religious” rules are applicable only to Muslims and should not form part of state law, an approach that mirrors that of classical jurists, such as al-Qarafi, who argued that the ruler could not interfere in religious observances (*‘ibadat*). Moreover, his distinction between permanent, unchangeable rules, and temporal, historically specific rules, recalls Ibn Taymiyya’s condition that *siyasa* laws not contravene a divine text. Although we do not know whether Sanhuri was personally influenced by these jurists, his new scientific theory of Islamic *fiqh* certainly looks more like old classical theories of the ruler’s lawmaking power than jurists’ theories of *fiqh* interpretation. As we have seen, this resemblance is part of a historical process in which the *fiqh* and the jurists’ legal methodology are increasingly relegated to the narrow category of *siyasa shar’iyya*, the *state* law of the *shari‘a*.⁹²

At the time Sanhuri drafted the civil code, which was enacted in 1949, he published an article detailing his new legal methodology for deriving modern codes from Islamic *fiqh*, but he had not applied this methodology to construct an actual code. Consequently, the civil code was based instead on an admirable comparative effort, consisting of provisions from twenty civil codes (from Europe, Asia, Africa, and the Americas), the decisions of Egyptian courts, and some rules from the *shari‘a* (i.e., the *fiqh*).⁹³ In defending the code’s Egyptian origins,⁹⁴ Sanhuri estimated that three-fourths or four-fifths of the rules came from the old Egyptian civil code and

⁹¹ *Id.* at 35-36.

⁹² Classical jurists also applied the concept of *maslaha* (public welfare) in developing the *fiqh*, but the concept is limited in *fiqh* interpretations, whereas it is widely applicable to the development of *siyasa* laws. See *supra* note 17.

⁹³ ZIADEH, *supra* note 31, at 142.

⁹⁴ Ziadeh describes the criticism of the Senate committee that reviewed the draft code as inconsistent:

On one hand, it was maintained that the old code, which, with some exceptions, had been based on French law, was in need only of some modification here and there, and that it was only right and proper to preserve the ‘legal culture’ already accruing to Egypt. On the other hand, it was maintained that should a complete recodification be allowed, such recodification should be based on the *shari‘ah*.

Id. at 143.

Although Ziadeh suggests that this inconsistency may reflect the committee’s composition of secular lawyers and al-Azhar professors, the underlying reasons are difficult to assess. The al-Azhar scholars could theoretically object on both grounds, recognizing the old codes as *siyasa* laws appropriate for state governance or arguing for a larger role for the ‘*ulama*’ in constructing *siyasa* laws grounded in the *shari‘a*.

Egyptian court decisions.⁹⁵ Moreover, the influence of the *shari'a* was not negligible. General principles of Islamic law guided Sanhuri's choice among comparative codes in certain matters. For example, following the *fiqh*, he adopted civil provisions from states that used objective rules to determine legal obligations, rather than subjective rules requiring knowledge of the parties' intent.⁹⁶ Moreover, specific provisions governing various issues, such as *awqaf* (charitable endowments), legal capacity, and fraud, were derived from Islamic law, and the code specifically directs courts to look to the *shari'a* as a residual category of law.⁹⁷

Given the lack of a *fiqh* foundation for *siyasa* laws, particularly since the inception of the mixed courts, Sanhuri's methodology is a turning point in that it claims a *fiqh* basis for *siyasa* laws. Although Abduh and other earlier reformers did not intend for the state to incorporate the *fiqh* in this way, their institutional reforms contributed to this result: public laws and institutions had slowly eroded the relevance of private jurists in legal affairs. Modern reforms of the *fiqh* would now serve *siyasa* ends. Where many opinions had flourished, the state would now codify only one interpretation based on methodologies traditionally applied to *siyasa* rather than the scholarly *fiqh*. And whereas the *siyasa* power of old regulated little, the new state would regulate all, leaving little room for the private *fiqh*.

D. *The 1952 Revolution and Beyond: Rule by Might*

The historical *fiqh-siyasa* dynamic within Muslim societies is sometimes referred to as a delicate balance between two different claims to authority—the *fiqh* yielding the power of the pen and the *siyasa* yielding the power of the sword.⁹⁸ With the 1952 Free Officers Coup and subsequent years of authoritarian rule under Jamal Abd al-Nasser, Egypt was clearly ruled by the sword. In addition to the regime's military base, its socialist policies, such as the nationalization of foreign capital, ensured that the state became the

⁹⁵ *Id.* at 144.

⁹⁶ *Id.* at 142.

⁹⁷ *Id.* at 143. The *shari'a* is, however, mentioned as the *second* source of law courts should use to fill gaps in the code; the first is custom (*'urf*). But as Hill notes, custom is strongly associated with Islamic law: "Custom (*'urf*) in its technical meeting [sic] is known usually 'only insofar as it is a rule that comes from the *Shari'a* . . . either from the works of Islamic jurists or rooted in their sources (*masadir*).'" Hill, *supra* note 88, at 80.

⁹⁸ See, e.g., VOGEL, *supra* note 7, at 201-02.

largest economic power.⁹⁹ Not surprisingly, the regime also sought further control over religious institutions, law, and the 'ulama' themselves. In 1955, the *qadi* courts were abolished and their jurisdiction transferred to the national courts.¹⁰⁰ In addition, in 1961, the government passed a law reorganizing al-Azhar, placing it under the jurisdiction of the Ministry of Endowments and subjecting its finances to state administration. The law also gave governmental officials control over important institutional appointments, including the appointment of the Shaykh al-Azhar. Under the reorganization, the university expanded from three colleges of theology, Arabic, and *shari'a* to include nonreligious colleges, such as medicine, law and engineering. Although this expansion greatly increased state funding of al-Azhar, it came at a considerable cost. The institution was expected to lend legitimacy to the regime's policies; those that resisted were removed from the faculty.¹⁰¹

Shortly after Anwar al-Sadat succeeded Nasser in 1970, he promulgated the Constitution of the Arab Republic of Egypt and instituted numerous economic reforms, including the open-door (*infitah*) policy designed to encourage the return of foreign capital.¹⁰² He even released members of the *Ikhwan* (the Muslim

⁹⁹ P.J. Vatikiotis, *Some Political Consequences of the 1952 Revolution in Egypt*, in *POLITICAL AND SOCIAL CHANGE IN MODERN EGYPT: HISTORICAL STUDIES FROM THE OTTOMAN CONQUEST TO THE UNITED ARAB REPUBLIC*, *supra* note 39, at 369. The personal status division of the national courts was also subject to the old law requiring application of the Hanafi *fiqh* to personal status matters, unless a codified state rule (*qanun*) governed the issue in the case. *Id.*

¹⁰⁰ Botman, *supra* note 85, at 228. Hanafi *fiqh*, in addition to the piecemeal codifications of the 1920s, continued to govern personal status matters after they were transferred to the national courts. Members of the *shari'a* bar (which was separate from the bar for lawyers practicing before the national courts) did not strongly object to the end of the *qadi* courts probably because they were subsequently allowed to bring all claims (not just personal status matters) before the national courts, a right they did not previously have. ZIADEH, *supra* note 31, at 61; *see also* Kristen Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 *GEO. WASH. INT'L L. REV.* 695, 731-33 (2004).

¹⁰¹ From 1959 to 1968, the number of Islamic scholars at al-Azhar dropped from 298 to 170. Tamir Moustafa, *Conflict and Cooperation Between the State and Religious Institutions in Contemporary Egypt*, 32 *INT'L J. MIDDLE EAST STUDIES* 3, 5-6 (2000). In addition to the law reforming al-Azhar, Nasser passed a law that placed all *waqf* (endowment) land under state control, which also increased the 'ulama's financial dependence on the regime. *Id.* at 5. Control of religious endowments (*awqaf*) also furthered Nasser's subsidization of mosques, resulting in state administration of large numbers of mosques, a practice that continued under Sadat and Mubarak. *Id.* at 7.

¹⁰² Alain Roussillon, *Republican Egypt Interpreted: Revolution and Beyond*, in 2 *THE CAMBRIDGE HISTORY OF EGYPT: MODERN EGYPT, FROM 1517 TO THE END OF THE TWENTIETH CENTURY*, *supra* note 85, at 359.

Brotherhood) and other Islamist activists imprisoned by Nasser, although he likely did this to gain approval in the face of socialist opposition.¹⁰³ In addition, the regime may have hoped some tolerance of moderate Islamists would quell the more radical strains of Islamist opposition. Building on the 1971 Constitution's declaration that the *shari'a* was a source of legislation, Sadat actually instituted a program designed to ground Egyptian legislation in the *shari'a*. But, as one historian explains, this program was likely little more than political posturing: "For Sadat, the Islamization of legislation was mere gesturing, the means of quelling the left and the Islamists, and, or so he hoped, of confirming his own legitimacy."¹⁰⁴ Sadat was likely gesturing again in 1980 when the Constitution was amended to change the *shari'a* from one source to *the* main source of legislation, but calls for reform did not subside and the Supreme Constitutional Court eventually recognized the constitutional status of the *shari'a* and its role in shaping state law.

E. *Constitutional Reform: The Future of the Fiqh is Siyasa*

In 1985, five years after the amendment, the Supreme Constitutional Court finally interpreted the meaning of Article 2 of the Constitution, which reads: "The principles of the Islamic *shari'a* are the principal source of legislation [*mabadi' al-shari'a al-islamiyya al-masdar al-ra'isi li-al-tashri*]." ¹⁰⁵ They rendered this interpretation in a case involving al-Azhar. The medical faculty at al-Azhar alleged the unconstitutionality of a civil code provision requiring the institution to pay interest on a debt from the time the legal action commenced.¹⁰⁶ Al-Azhar argued that the civil code provision is unconstitutional under Article 2 of the Constitution because this kind of interest violates Islamic law, which prohibits usury (*riba*). In deciding whether and how Article 2 applies to the challenged civil code provision, the Court quoted legislative history, specifically the report of the special legislative commission that drafted the 1980 amendment:

¹⁰³ *Id.* at 366.

¹⁰⁴ *Id.* at 385.

¹⁰⁵ THE CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT art. 2, translated in Vogel, *supra* note 13, at 527. Vogel notes the adoption of the term *tashri*, "the modern and faintly impious term for legislation," rather than *taqnin* (codification) or *ahkam* (legal rules). Vogel, *supra* note 13, at 527.

¹⁰⁶ Hatem Aly Labib Gabr, *The Role of the Supreme Constitutional Court of Egypt in Upholding Democracy and the Rule of Law*, in DEMOCRACY, THE RULE OF LAW AND ISLAM *supra* note 13, at 218.

According to the terms of the report of the said commission, the aim of the new formulation of Article 2 of the Constitution is “to constrain the legislator to have recourse to the binding commands of the *shari‘a*, to the exclusion of any other source in order to discover what (law) he is searching for; then, if he does not find there an explicit ruling, then he is to employ the *shari‘a* resources of innovative reasoning (*al-ijtihadiyya*) in order to arrive at the proper rules to follow and which do not transgress the foundations and global principles of *shari‘a*.”¹⁰⁷

The Court also referred to the intent, documented in the legislative history, that the process of bringing Egyptian legislation into conformity with the *shari‘a* be a gradual process so as to preserve the order and stability of the legal system.¹⁰⁸ Recognizing the disorder that could follow, should the Court review laws promulgated prior to the amendment (1980), the Court held that Article 2 applies only to laws passed after the amendment.

Regarding post-amendment laws, the Court held that they must conform to Article 2: “any such legislative text which is contrary to the principles of *shari‘a* would be in violation of the Constitution.”¹⁰⁹ In other words, the principles of *shari‘a* are a check on the state’s lawmaking power, a view that comports with classical *fiqh* theories of *siyasa shar‘iyya*. But as we shall see, the Court subsequently followed the general methodology of the special commission’s report; in decisions elaborating upon Article 2’s meaning, the Court has imbued it with both *siyasa* and *fiqh* lawmaking powers. In the following section, I sketch the key elements of the Court’s theory of Article 2, highlighting its apparent relationship to

¹⁰⁷ Case No. 20 (19 May 1985), quoted in Oussama Arabi, *Neo-Shafi‘ism or the Islamic Constructive Metaphor in Egypt’s High Constitutional Court Policy*, 17 ARAB L. Q. 323, 330 (2002).

¹⁰⁸ Gabr, *supra* note 106, at 219. Interestingly, the committee report, which was approved by the People’s Assembly, contemplates the complete replacement of Egypt’s current law with Islamic law, a task that must be gradual: “the departure from the present legal institutions of Egypt, which go back more than one hundred years, and their replacement in their entirety by Islamic Law requires patient efforts and careful practical consideration.” *Id.*

¹⁰⁹ Arabi, *supra* note 107, at 331. The Court explained that applying Article 2 to pre-amendment laws “would result not just in the abrogation of all civil, penal, social, economic and other laws that are contrary to the principles of *shari‘a*, but would also oblige the courts to apply to litigation submitted to them non-codified rules to replace the abrogated rules, with all the risks of contradiction among these (non-codified) rules, and the destabilization of order that would ensue.” *Id.* (quoting High Constitutional Court Decision of 4 May 1985, *Al-Jarida al-Rasmiyya, The Official Gazette, Cairo*, No. 20, 19/5/85).

the *fiqh-siyasa* dynamic.¹¹⁰ I then discuss the facts, rationale, and outcome of a particular case in order to illustrate the theory's concrete application. In conclusion, I will offer observations that tie the Court's jurisprudence into the historical development of the *fiqh-siyasa* dichotomy and suggest possible political implications of the current state of affairs.

1. Step One: Definitive Rules and Principles

The Court appears to build on the legislative history's reference to "binding commands" and "explicit rulings" of *shari'a* in interpreting the legislator's first step in deriving Islamic law consistent with Article 2. But what qualifies as a binding command includes both definitive texts and general principles derived from these texts. Legislation may not contravene texts (of the Qur'an and Sunna) that are definitive in both meaning and authenticity (*al-nusus al-qat'yya al-dalala wa-al-thubut*), a phrase that, in the *fiqh*, refers to texts that jurists can show "have only one meaning and [are] beyond doubt, historically accurate and authentic"—a standard few texts meet in the classical *fiqh*.¹¹¹ In deciding whether a text is certain, or definitive (*nass qat'i*), the Court has relied on its own reading of revealed text,¹¹² mainly the Qur'an, and has also cited disagreement among the jurists to show that a

¹¹⁰ The Court does not use or acknowledge the *fiqh-siyasa* dichotomy, nor does it clearly state what kind of legal methodology it is adopting. In fact, although it cites the Qur'an, an occasional *hadith*, and established *fiqh* rules, it does not specify which sources of law are most important or cite any *fiqh* scholarship that would provide clues to its approach. Consequently, scholarly interpretations of the Court's decisions, particularly the intent or meaning behind them, vary substantially. See, e.g., Lombardi & Brown, *supra* note 4; Arabi, *supra* note 107; Vogel, *supra* note 13; Bernard Botiveau, *Contemporary Reinterpretations of Islamic Law: The Case of Egypt*, in *ISLAM AND PUBLIC LAW: CLASSICAL AND CONTEMPORARY STUDIES*, *supra* note 55; Nathan Brown, *Islamic Constitutionalism in Theory and Practice*, in *DEMOCRACY, THE RULE OF LAW AND ISLAM*, *supra* note 13, at 218; John Murray & Mohammed el-Molla, *Islamic Shari'a and Constitutional Interpretation in Egypt*, in *DEMOCRACY, THE RULE OF LAW AND ISLAM*, *supra* note 13, at 218.

¹¹¹ Vogel, *supra* note 13, at 529-31. Kilian Bälz compares the Court's treatment of definitive rules to Sanhuri's permanent rules. *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* (Bandouin Dupret, Maurits Berger, & Laila al-Zwaini eds., 1999). While both the Court and Sanhuri characterize these rules as unchangeable over time, we should be careful in equating the two theories. Vogel notes that those writing on the Court's jurisprudence frequently mistranslate *thubut* (definitive or certain) as "permanence" or "fixity." Vogel, *supra* note 13, at 529 n.6.

¹¹² E.g., Case No. 29, 11th Judicial, 26 March 1994, *discussed and quoted in* CLARK BERNER LOMBARDI, *STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARI'A INTO EGYPTIAN CONSTITUTIONAL LAW* 218-224 (2006). In this case, the

text's meaning is uncertain. For example, the Court noted the differing *fiqh* views that interpret Qur'anic texts on *mut'a* (compensation for a divorced wife), concluding that "[t]his difference is due only to the fact that these texts are uncertain as to their interpretation and not definitive as to God's meaning."¹¹³

Given the paucity of "definitive" texts in the *fiqh*, this element of Article 2 review will likely do little to limit the government's legislative power.¹¹⁴ But in defining what constitutes a definitive ruling, the Court has also referred to the general goals and universal principles of *shari'a*, which include "religion, life, reason, honor and property."¹¹⁵ These definitive universal principles are immutable and therefore do not change with time:

"It is therefore inconceivable that understanding of them should change with change in time or place or that their application or approach should diverge . . . Rather, they remain in their content and goals universal principles aiming toward objectives that cannot be neglected. The SCC has the responsibility of overseeing adherence to these principles and their application. [It is also charged with seeing to] their preeminence over any legal principle that contradicts them. This is because Article 2 of the Constitution places the universal principles of the Islamic *shari'a* above all else, considering that its original principles represent

Court found no certain text in the Qur'an that settled whether a father is obligated to pay back child support. *Id.* at 221.

¹¹³ Case No. 7, 8th Judicial Year, 15 May 1993, *quoted in* Vogel, *supra* note 13, at 534. Should the Court find the jurists in agreement (*ijma'*), it might conclude that a text's meaning is certain. But the Court does not restrict itself to dominant views of the four schools, making *ijma'* an incredibly difficult standard to meet; a minority opinion would likely exist in every case.

¹¹⁴ Vogel notes that the Court has not held any specific rules, or texts, to be definitive, but has implied the certainty of rules in dicta. These include rules, such as "polygamy is the right of the husband" and "women must cover their bodies, if not everything but their face and hands" and several others. Vogel, *supra* note 13, at 542. Although I agree that these conclusions may be drawn from the Court's rationale, I am reluctant to say whether the Court would categorize them as definitive. The Court does not specifically state that they are definitive, even though its rationale may strongly imply this.

¹¹⁵ *Id.* Vogel notes that these are the "five commonly enumerated 'basic objectives' of the *shari'a*." *Id.* They depart only slightly from the five main goals (*darurat*) of the law enumerated by the famous jurist al-Ghazali: the protection of religion, life, private property, mind, and offspring. See HALLAQ, *supra* note 17, at 89. In addition, according to al-Ghazali, the main goal (*maqsud*) of the law is the promotion of benefit and the exclusion of harm, *id.*, a maxim frequently cited by jurists, particularly in conjunction with the principle of *maslaha* (public interest), which underlies the *siyasa* power. The Court frequently cites this principle as well. See *infra* note 122.

its mainstays, the demands of which must always be preferred to any legal principle that contradicts them.”¹¹⁶

Although the Court’s tone is firm, the general and universal nature of these certain principles actually gives the legislative branch substantial latitude. As we will see below (in discussing the requirement that legislation serve the public welfare), these universal principles generally correspond to the classical limitation that *siyasa* laws promote the public welfare.

2. *Step Two: Resolving Uncertainty through Ijtihad*

According to the Court, if legislators do not find a definitive text on the subject matter, they may proceed to exercise their own *ijtihad* (independent legal reasoning) in order to reduce the matter to a “single basis eliminating difference of opinion and not contradicting the established sources and universal principles of the *shari’a*.”¹¹⁷ In other words, state officials (the ruler in classical terms) are to engage in the independent legal reasoning traditionally reserved to *mujtahids*, those jurists with extensive training in the *usul al-fiqh* (sources or roots of law). The Court seems to recognize the opposition that this step could inspire, but persists with its new interpretation of who is best suited to interpret the law:

“While it may be said that the exercise of *ijtihad* by means of revealed and rational *shari’a* proofs concerning those rulings that are uncertain and their link to the interests [masalih] of the people is a right of those capable of *ijtihad*, it is more appropriate that this right be held by the person in authority, assisted as to every issue, according to its specificity and as is relevant, by persons who are authoritative [*ahl al-nazr*] in public affairs.”¹¹⁸

The Court’s use of “person in authority” (*wali al-amr*) conjures classical references to the ruler and the *siyasa* power, but its delegation of *ijtihad* confers broader lawmaking jurisdiction on the public authority than *fiqh* scholars of *siyasa shar’iyya* would grant. In fact, it recalls the early idealistic *fiqh* theories of the *siyasa* power, in which the Muslim ruler was also a *mujtahid*, the most accomplished of jurists. The important difference here is that those in authority (i.e., legislators) are not jurists. Moreover, the Court

¹¹⁶ Case No. 18, 14th Judicial Year, 2 May 1997, *quoted in Vogel, supra* note 13, at 541 (alterations and omissions in original).

¹¹⁷ *Id.*

¹¹⁸ Case No. 29, 11th Judicial Year, 26 March 1994, *quoted in Vogel, supra* note 13, at 537-38.

does not even require that they consult with jurists.¹¹⁹ Ultimate legal authority rests not with the jurists, but with authorities in “public affairs.”

3. Step Three: Maslaha as the Main Source of Ijtihad

The *ijtihad* of the legislator is not, however, based on the rigorous methods of the jurists; it is instead guided by *siyasa* principles: “‘When there is no text about [an issue], *ijtihad* is only limited by the universal rulings so as not to impede their general goals.’”¹²⁰ These universal precepts, or principles, are those that advance the public welfare or interest (*maslaha*). When the legislator does not find a definitive text governing an issue, she should exercise *ijtihad* to derive “‘practical rules that are, in their ramifications, gentler for the people and more concerned with their affairs and [that] better protect their true interests.’”¹²¹ These practical rules must preserve the “‘general goals of the *shari’a* . . . so that religion, life, reason, honor, and worldly goods are protected.’”¹²² Hence, the “definitive” general principles described above also constitute the sources of the legislator’s *ijtihad*, the foundations from which the law is derived and to which it must conform. By following this methodology, the person in authority will not contravene revealed text. In support of this assertion, the Court has adopted a view similar to Ibn Taymiyya’s in asserting the unity of *maslaha* and revealed text: “[a]nd the interest/aspect of human welfare (*maslaha*) that is incompatible with the Qur’anic texts is not considered to be

¹¹⁹ Indeed, the Court has emphasized this point by noting that the person in authority is “‘not bound . . . by the *ijtihads* of past persons. He may differ with them in his legislation, seeking to order the affairs of human beings in a specific environment that is unique in its facts and circumstances.’” Case No. 18, 14th Judicial Year, 2 May 1997, *quoted in* Vogel, *supra* note 13, at 537.

¹²⁰ Case No. 29, 11th Judicial Year, 26 March 1994, *quoted in* LOMBARDI, *supra* note 112, at 222 n.54 (alteration in original) (arabic words omitted).

¹²¹ Case No. 8, 17th Judicial Year, 18 May 1996, *quoted in* LOMBARDI, *supra* note 112, at 246 (alteration in original).

¹²² *Id.* In this same case, the Court similarly stated: “‘The *wali al-amr* has – in disputed questions – the right [to perform his own] *ijtihad* to facilitate the affairs of the people and reflect what is correct from among their customs and traditions, so long as they do not contradict the universal goals of their *shari’a*’” *Id.* at 251 (alteration in original). The Court has also cited the “universal” rule *la darar wa la dirar* (no harm, no counterharm), noting that the person in authority should act to prevent harm and advance benefit, views consistent with the ruler’s *siyasa* obligations based on *maslaha*. See LOMBARDI, *supra* note 112, at 195-200.

a true interest (*maslaha*).¹²³ That is, a state law based on the public welfare will—by definition—be compatible with the *shari'a*.

4. Applying Article 2: Fathers, Daughters, and Dress Codes¹²⁴

In 1994, in response to the increasing number of school girls wearing either the *niqab* (veil covering all but the eyes) or the *hijab* (veil that covers the hair), the Minister of Education issued an administrative order prohibiting the wearing of the *niqab* and requiring parental permission to wear the *hijab*. The order did, however, require that girls wear the school uniform, which consists of a long skirt and long-sleeved blouse. The government claimed its order promoted classroom order and ensured girls were not pressured to wear the *hijab* without their parents' knowledge. Not surprisingly, the government's action inspired opposition. In particular, a father who had required that his daughter wear the *niqab* filed a lawsuit alleging that the order violated Article 2 because it contravened the principles of the *shari'a*. Two years later, the Court decided the narrow issue of the ban on the *niqab*, noting the issue of parental permission for the *hijab* was not at issue in this particular case.¹²⁵

First, the Court considered whether the ban on the *niqab* violates a definitive text, citing four Qur'anic verses that arguably deal with women's dress.¹²⁶ Noting the jurists' disagreement regarding how women should dress, the Court concluded that these verses are not definitive. Consequently, the Court reasoned that this issue is open to *ijtihad* by the person in authority (i.e., the legislative branch); those in authority may restrict women's dress "in light of that which is prevalent in her society among the people and which

¹²³ Case No. 35, 9th Judicial Year, 15 August 1994, *quoted in* LOMBARDI, *supra* note 112, at 230.

¹²⁴ I rely on Lombardi, *supra* note 112, at 240-53, for my summary of the following case: Case No. 8, 17th Judicial Year, 18 May 1996; *see also* Nathan J. Brown & Clark B. Lombardi, *The Supreme Constitutional Court of Egypt on Islamic Law, Veiling and Civil Rights: An Annotated Translation of Supreme Constitutional Court of Egypt Case No. 8 of Judicial Year 17 (May 18, 1996)*, 21 AM. U. INT'L L. REV. 437 (2005).

¹²⁵ Egyptian 'ulama' in the 1970s and 1980s generally agreed that women should at least wear the *hijab*, disagreeing regarding the *niqab*. According to al-Azhar's *fatwa* council, the Minister's order was clearly contrary to Islamic principles. LOMBARDI, *supra* note 112, at 243-45, 243 n.102, 245 n.107.

¹²⁶ According to Lombardi, the Court quoted the following four verses: "'Qur'an 24:31, [Tell Muslim women to] cast their veils (*khumur*) over their bosoms'; Qur'an 24:31, '[Let them] not reveal their adornment'; Qur'an 33:59, '[Tell Muslim women to] draw close their cloaks when they go about'; and finally, Qur'an 24:31, 'let them [not] stamp their feet, so that their hidden ornaments may be known.'" *Id.* at 247-48 (alterations in original).

is considered correct from their habits and customs [and] whose meaning does not collide with any certain texts.” That is, state legislators may establish “practical rules” that are “answerable to real interests/welfare (*masalih*)” and do not contravene the “universal goals (*maqasid kulliya*) of the *Shari’a*.” In the end, the Court held that the government’s order satisfies these requirements by preserving women’s modesty through a conservative dress code while ensuring their mobility in prohibiting the *niqab*.¹²⁷

III. CONCLUSION: THE CONSEQUENCES OF THE HISTORICAL EROSION OF THE *FIQH*

By interpreting Article 2 to require that state laws not contravene revealed (definitive) text and advance the public interest (*maslaha*), the Supreme Constitutional Court has continued the historical *fiqh* tradition of subjecting the ruler’s *siyasa* power to certain limitations; indeed, these two elements of the Court’s approach recall the approaches of medieval jurists, particularly Ibn Taymiyya. But the resemblance stops here because, in sanctioning the *ijtihad* of state lawmakers, the Court has reserved little to no role for the *fiqh* or the jurists that traditionally produce it. Where Sanhuri’s methodology places *fiqh* in the service of *siyasa*, the Court’s methodology subsumes the *fiqh* within the *siyasa*. Although jurists will no doubt continue to produce private scholarship, its relevance in both the public and the private spheres is greatly diminished. “Those in authority” need not consult them or their opinions because they too are capable of deriving law from the divine texts. Without the power of the pen, the *fiqh* and its proponents are no match for a strong, pervasive state.

We can see this dynamic only if we look at contemporary Egyptian law through the lens of history and from the standpoint of Islamic legal theory. If we instead begin by asking whether laws are more or less Islamic, we will fail to identify the deeper implications of recent legal changes. Scholars engaged in the debate over

¹²⁷ Lombardi and Brown argue that this case reflects the Court’s innovative approach to Islamic legal reasoning in the modern era. In their view, the Court upheld the authority of Islamic law, but did so in a way that does not “prevent women from enjoying their internationally recognized human rights.” Lombardi & Brown, *supra* note 4, at 429. Although the Court has indeed demonstrated its “commitment[] to liberal economic philosophy and to the protection of certain civil and political rights” in numerous cases, *see id.* at 424, I question Lombardi and Brown’s characterization of this particular decision as progressive. Many women and feminist activists would likely disagree with the decision, arguing that it violates a woman’s right to choose how she may dress.

whether the Egyptian Court's interpretation of Article 2 is secular or Islamic end up concluding either that the Court's approach is secular¹²⁸ or that it is Islamic because Islamic law may be interpreted in light of modern circumstances and liberal ideas.¹²⁹ Given what we know about the historical expansion of the state's *siyasa* jurisdiction, both conclusions are plausible. Historically, *siyasa* laws did at times depart from divine text and often from the scholarly *fiqh*, giving them a "secular" quality. But they also acquired legitimacy by claiming to advance the public welfare in light of contemporaneous social and political conditions. In short, labeling Egyptian case law Islamic or secular does not help us identify important continuities and breaks within the Islamic legal tradition. Consequently, we may also fail to consider the implications of the state's marginalization of the private *fiqh*.

Fortunately, a historical understanding of Islamic legal theory and Egyptian legal reform can illuminate this dynamic and help us consider potential consequences. Scholars of Egyptian history and politics have argued that the state's increasing dominance over religious institutions, such as al-Azhar, has contributed to radicalism, particularly the political violence of the 1990s.¹³⁰ In other words, the state's control of religious institutions contributes to the religious extremism of groups, such as *al-Jama'a al-Islamiyya*, that seek to overthrow the Egyptian government and establish an "Islamic" state. But as we have seen, the government's financial support and administrative involvement in religious institutions does not necessarily lead to the perception of state "control," although substantial interference certainly can.¹³¹ The Muslim ruler has a duty to support and uphold religion and its institutions; to do so may be a proper use of the *siyasa* power. The perception of state "control" therefore arises not only from the state's administrative and financial interference, but also from the state's interference with ideas and ideology. In Egypt, when the state attempted to appropriate religious thought and discourse by infringing on the *'ulama's* intel-

¹²⁸ See Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819, 1822-28 (2004).

¹²⁹ See Lombardi & Brown, *supra* note 4, at 431-35.

¹³⁰ See Moustafa, *supra* note 101; OLIVIER ROY, *GLOBALIZED ISLAM: THE SEARCH FOR A NEW UMMAH* (2004); GREGORY STARRETT, *PUTTING ISLAM TO WORK: EDUCATION, POLITICS, AND RELIGIOUS TRANSFORMATION IN EGYPT* (1998).

¹³¹ See Moustafa, *supra* note 101. For example, the dismantling of independent *awqaf* (private endowments for the benefit of religious institutions) is certainly not a legitimate use of the *siyasa* power. *Id.*

lectual autonomy, it threatened the autonomy of the *fiqh*, a grievance at the heart of radical opposition movements. By requiring *fatwas* in support of state policies and removing ‘*ulama*’ that do not uphold the government’s agenda, the state erodes the legitimacy of both the state and the ‘*ulama*’.

In classical Islamic legal theory, without the separate realm of the *fiqh*, the realm of *siyasa* has no limitations. Historically, the jurists guarded their authority over the law, an authority they used to both legitimate and de-legitimate governing powers. Even when rulers failed to uphold the *shari‘a* and follow the guidance of the jurists, the jurists’ scholarship and counsel represented the true law, the law of God, an authoritative voice in opposition to a sinful state. Because this voice has been marginalized and tarnished over time, new voices of opposition have emerged to try to fill the void.¹³² Radical calls to overthrow the state represent just one possibility.

Other voices have claimed the authority to lead in opposition to the state and the established ‘*ulama*’. For example, moderate calls for social reform less focused on immediate political change have emerged. Raymond Baker refers to this movement as the “New Islamist Trend,” a movement led by prominent intellectuals, including Shaikh Muhammad al-Ghazzaly.¹³³ In contemporary Egypt, this movement advocates peaceful social change aimed at creating a broad Islamist base in society, the very approach Muhammad Abduh advocated a century ago. New Islamists actually advocate a return to the views of modern reformers, including Abduh, particularly their emphasis on education and modern inter-

¹³² For example, the popular religious leader, Sheikh Kishk, has ridiculed the idea of Islamic law passed by state legislators. A portion of one of his sermons reflects the erosion of respect for state leadership and the ‘*ulama*’, as well as the emergence of various new voices of opposition:

“Are you going to accept it [the *shari‘a*] or reject it, O People’s Assembly? God’s *shari‘a* is submitted to a handful of His worshippers that they might approve or reject God! What sort of comedy is this? And al-Azhar continues to slumber, while preachers are imprisoned. . . . We are now seeing the advent of all kinds of sects that arrogate the divine religion to themselves. . . . ‘These mosques belong to the waqfs’, ‘these are Sunni’, ‘those are part of the *ansar al-sunna*’”

Sermon, *quoted in* GILLES KEPEL, *THE PROPHET AND PHARAOH: MUSLIM EXTREMISM IN EGYPT* 184 (Jon Rothschild trans., 1985) (omissions in original).

¹³³ RAYMOND BAKER, *ISLAM WITHOUT FEAR* 10 (2003); *see also* CARRIE ROSEFSKY WICKHAM, *MOBILIZING ISLAM: RELIGION, ACTIVISM, AND POLITICAL CHANGE IN EGYPT* (2002); DENNIS J. SULLIVAN & SANA ABED-KOTOB, *ISLAM IN CONTEMPORARY EGYPT: CIVIL SOCIETY VERSUS THE STATE* (1999).

pretations of the *fiqh*.¹³⁴ Recognizing that power will remain concentrated in the state for the foreseeable future, they have looked for new spaces and openings for change. Like the radical Islamists, the New Islamists argue that the traditional '*ulama*' have no special entitlement to political authority.¹³⁵ In short, the state's erosion of the private *fiqh* contributes to both radical and moderate movements. With the marginalization of traditional spheres of opposition, different voices of opposition have emerged to claim the authority of *fiqh* and Islamic tradition.

Unlike accounts that focus on the displacement of Islamic law with European law, an account based on traditional Islamic concepts demonstrates how historical reforms contributed to an increasingly stronger state by marginalizing and weakening traditional voices of opposition and by eventually claiming total authority over the law. Although European legal traditions give the state complete authority over the law, the Islamic tradition does not. In claiming the authority to interpret the *shari'a* and unify differences in legal opinion, the contemporary Egyptian state is claiming the legitimacy that, historically, only private jurists could claim. Moreover, legal and institutional changes have changed the '*ulama*'s position as the authoritative interpreters of divine law. Although early reformers, such as Muhammad Abduh, did not intend to marginalize the *fiqh* or weaken the juristic tradition (indeed, they seem to have opposite ends in mind),¹³⁶ their reforms contributed to a more centralized *siyasa* power that now seeks to incorporate the *fiqh* to serve its own ends. Whether new voices of opposition can reclaim a separate space for the *fiqh* and its claim to legal authority is an open question.

¹³⁴ BAKER, *supra* note 133, at 207-10.

¹³⁵ *Id.* at 177.

¹³⁶ This is consistent with theories of historical institutionalism in political science. These theories focus on how historical and structural conditions, including cultural norms, shape institutions in unintended and often unbeneficial ways. In other words, institutional change is path dependent; it depends on the underlying social context. See generally Peter A. Hall & Rosemary Taylor, *Political Science and Three New Institutionalisms*, in INSTITUTIONS AND SOCIAL ORDER (Koral Soltan, Eric Uslander, & Virginia Haufler eds., 1998); Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251 (2000).