ARTICLE

DO CONSTITUTIONS REQUIRING ADHERENCE TO *SHARI'A* THREATEN HUMAN RIGHTS? HOW EGYPT'S CONSTITUTIONAL COURT RECONCILES ISLAMIC LAW WITH THE LIBERAL RULE OF LAW*

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Over the last thirty years, a number of Muslim countries, including most recently Afghanistan and Iraq, have adopted constitutions that require the law of the state to respect fundamental Islamic legal norms. What happens when countries with a secular legal system adopt these "constitutional Islamization" provisions? How do courts interpret them? What are the effects on the regulation of the economy or on human rights? This article will present a case study of constitutional Islamization in one important and

* Editor's Note: *ILR* editors typically check citation Bluebook form and verify the substantive aspects of both the text and footnotes. This article draws upon a number of foreign language sources, including case law in Arabic. *ILR* has edited citation form to the greatest extent possible, but our substantive editing of these foreign sources is not exhaustive. In this text, Arabic words have not been fully transliterated. An apostrophe (') has been used to render the letter "hamza" and a reverse apostrophe (') has been used to render the letter "'ayn." Macrons have not been used nor have dots been put under consonants unique to Arabic.

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influential country, Egypt. In interpreting Egypt's constitutional Islamization provision, the Supreme Constitutional Court of Egypt has over the last twenty years developed a creative new theory of Islamic law. Employing this method, the Court has interpreted shari'a *norms to be consistent with international human rights norms and with liberal economic policies. The experience of Egypt does not tell us how constitutional Islamization will necessarily unfold in every country. It does demonstrate that, in a world where Islamic norms are contested, a progressive court with judicial prestige and independence can develop and apply a theory that interprets Islamic legal norms to be consistent with democracy, international human rights and economic liberalism.*

INTRODUCTION

Over the last thirty years, a number of Muslim countries have adopted constitutions containing provisions requiring the law of the state to be consistent with the norms of *shari'a*, meaning Islamic law.[1] The Muslim world's enthusiasm for enacting these "constitutional Islamization" clauses shows no signs of abating.

1. Countries with a majority Muslim population that have, through enactment or amendment, given Islamic legal norms a preferred position in the constitutional scheme include, inter alia, Afghanistan, *see* AFG. CONST. art. 3; Egypt, *see* EGYPT CONST. art. 2; Iran, *see* IRAN CONST. 1358 [1980] arts. 2-4; Pakistan, *see* PAK. CONST. art. 227; Qatar, *see* QATAR CONST. art. 1; Sudan, *see* SUDAN TRANSITIONAL CONST. art. 4; Saudi Arabia, whose Basic Law declares both that *shari'a* is binding law and that all legislation repugnant to *shari'a* is unenforceable, *see* Royal Decree No. A/90 art. 1, *reprinted in* BUSINESS LAWS OF SAUDI ARABIA 4.1-3, 4.1-4 (Nicola H. Karam trans., 2002); and Yemen, *see* YEMEN CONST. art. 3.

Afghanistan's new constitution contains such a provision.[2] Iraq's recently adopted constitution also includes one.[3] It is notable that the Afghan and Iraqi constitutions were each drafted with some degree of assistance from the international community, and officials in the U.S. hailed their ratification as enormously positive developments.[4] Apparently, the international community has concluded that the trend towards constitutional Islamization is harmless or else unstoppable.

How are constitutional Islamization provisions interpreted, and what impact do they have on legal systems? Some scholars and policy-makers in the United States have suggested that constitutional Islamization provisions must inevitably lead to important and unfortunate changes to the legal system. In particular, some fear that constitutional Islamization clauses will hinder a country's ability to develop democratic governance structures, to conform to human rights norms, or to engage fully in the global economy.[5] Other

2. Article 3 of the new Afghan Constitution thus reads: "No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan." AFG. CONST. art. 3.

3. Article 2 of the Constitution, ratified in October 2005, reads in relevant part,

> . . . Islam is the state's official religion and it is a foundational source of legislation: (a) It is not permissible to enact a law that contradicts the fixed rulings of Islamic law. (b) It is not permissible to enact a law that contradicts the principles of democracy. (c) It is not permissible to enact a law that contradicts the basic rights and liberties mentioned in this constitution. . . .

(Please note that Arabic uses technical terms in unusual ways and is difficult to translate. The translation here is by the authors and departs from that of the translations most widely linked to on the internet.)

4. For the drafting of Afghanistan's Constitution, see INT'L CRISIS GROUP, ASIA REPORT NO. 56, AFGHANISTAN'S FLAWED CONSTITUTIONAL PROCESS 13-21 (2003). The permanent Iraqi Constitution was drafted with less direct input from outsiders than the Afghan Constitution. Nevertheless, it was drafted and ratified during a period of occupation, and leading figures in the U.S. government hailed it as a crucial step in the re-establishment of liberal democracy in the region.

5. *See, e.g.*, SONALI KOLHATKAR, FOREIGN POLICY IN FOCUS, AFGHAN WOMEN CONTINUE TO FEND FOR THEMSELVES 3 (2004), *available at* http://www.fpif.org/pdf/papers/SR2004afghanwom.pdf (noting the "ominous inclusion of the supremacy of Islamic law in the [Afghan] constitution"). An opinion piece by J. Alexander Their, an advisor to Afghanistan's Constitutional Commission, has expressed similar sentiments. J. Alexander Their, *Attacking Democracy from the Bench*, N.Y. TIMES, Jan. 26, 2004, at A23 (arguing that Afghanistan's Constitution does not firmly protect human rights because "it has a

scholars disagree, arguing instead that the trend towards constitutional Islamization is not, in itself, harmful.[6] The reasoning cited in support of these conflicting conclusions tends to be intuitive or anecdotal. At this point, there is a need for more systematic case studies of constitutional Islamization—studies examining the methods that judges on constitutional courts use to interpret Islamic law, and studies looking for patterns in the Islamic jurisprudence that are emerging in constitutional courts around the Muslim world. Such studies are needed to understand whether the current trend towards constitutional Islamization in the Muslim world presents a challenge to the spread of international human rights norms and, if so, what is the exact nature of that challenge.

This article and the translation that follows it[7] will describe the constitutional Islamization provision in force in one important and influential country, Egypt. It will also describe the way in which that provision has been interpreted and applied by the Supreme Constitutional Court of Egypt ("SCC"), and it will consider briefly the implications of the Egyptian experience. Part I describes the decision by the Egyptian government to enact a constitutional provision (Article 2) that apparently required all Egyptian law to be consistent with *shari'a* principles. This new provision raised two complex issues. The first issue was whether the courts had jurisdiction to hear constitutional challenges to legislation on the ground that it was inconsistent with Islamic law. Eventually, the

very dangerous loophole: it states that no law can be contrary to the 'beliefs and provisions' of Islam"); *see also State Dep't Report on Int'l Religious Freedom: Hearing Before the Subcomm. on Int'l Terrorism, Nonproliferation & Hum. Rts.*, 108th Cong. (2004) (statement of Joseph K. Grieboski, Founder and President, Institute on Religion and Public Policy) (citing a Jan. 26, 2004 letter from U.S. Senator Rick Santorum to Ambassador Paul Bremer asserting that "[t]he most immediate threat to religious freedom lies in proposals to overturn the religious neutrality of Iraq's interim constitution").

6. *See, e.g.*, NOAH FELDMAN, AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY 55 (2003) (proposing that constitutional Islamization clauses existing in Egypt can be expected to be a part of the Islamic landscape in the future, and are not, in themselves, problematic).

7. 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 (2006).

SCC, which is the authoritative interpreter of the Egyptian Constitution, determined that it did have jurisdiction over some—though not all—of these cases. Having made this ruling, the Court had to address a second issue: in modern Egypt, there has been no consensus, even among Islamist political factions, about who can interpret Islamic law or about the proper methodology for Islamic legal interpretation. How was a court supposed to identify the *shari'a* principles against which state law would be measured?

To understand the Court's approach to interpreting Article 2, it is important to have at least passing familiarity with some important theories of Islamic law upon which the Court drew. Part II of this article will describe these theories.

Part III of the article will describe the method that the SCC has developed to date for identifying and interpreting the *shari'a* principles which Article 2 requires the state to respect. It will begin by discussing the SCC itself and stressing the Court's commitment to a liberal constitutionalist vision. It will then describe the way in which the justices of the SCC have tried to articulate a method of interpretation that will be recognized as appropriate by a wide range of Egyptians, but which can also be used to interpret Islamic law in a progressive manner that is consistent with the SCC's liberal constitutionalist philosophy.

In the last section of Part III, the article will summarize an important Article 2 case in which the Court upheld restrictions on veiling in public schools. This will illustrate how the Court's approach is carried out in practice. (Following this article, there is a companion article, which provides a complete translation of this case.)[8] We have chosen to focus on this case both because it provides a good example of Article 2 jurisprudence and involves issues of broad interest—touching upon important issues of women's rights, freedom of expression, free exercise of religion and the authority of governments to regulate schools.[9] The translation should be a useful

8. *See id.*

9. Governmental restrictions on public veiling have been hotly challenged in high profile cases in constitutional courts in Europe and in Turkey. The BBC has put online an interactive map of nations witnessing litigation over government bans on headscarves. This map includes links to various news pieces discussing

resource for those teaching Islamic law to non-Arabic speakers, and for those performing research on law and human rights in the Middle East.[10]

We will conclude this article with a few brief thoughts on the ramifications of our findings. As this article and the following translation each show, the adoption of constitutional Islamization clauses has brought a new group of thinkers into the debate about the nature of Islamic law and its role in modern states, namely judges. These judges have added an intriguing new voice to Islamic legal debates. Judges have a very different training than traditional Islamic religious scholars and most modernist Islamist political activists. Looking at the Islamic legal tradition, the justices of the SCC have proposed a theory of Islamic legal interpretation that marries the national commitment to Islamic law with the Court's commitment to liberal constitutionalism. Given the uniqueness of the Court's theory and the progressive results to which that theory has led, it is striking that the theory has to date been embraced, with some caveats, by lower courts, and it also seems to have been accepted by the Egyptian public.

The development of Article 2 jurisprudence reveals that judges on constitutional courts are not simply passive participants in the debates over the constitutional role of Islamic law in the modern world. They are legal thinkers with the power to shape the way Islamization is experienced and, ultimately, how it is conceptualized by people. A study of the SCC's interpretation of Article 2 does not tell us how constitutional Islamization will necessarily evolve in every country.[11] The history of Article 2 to date does demonstrate,

this litigation. *See Headscarves in the Headlines*, BBC NEWS, Feb. 10, 2004, http://news.bbc.co.uk/1/hi/world/europe/3476163.stm (last visited Oct. 21, 2005).

10. At a recent Association of American Law Schools national conference panel on the teaching of Islamic law in law schools, there was consensus that one of the great impediments to teaching Islamic law in the United States and to discussing Islamic law with non-experts is the lack of English translations of court cases from the Arab world interpreting Islamic law. *See* Ass'n of Am. L. Sch. et al., Workshop on Islamic Law, http://www.aals.org/am2004/islamiclaw/ (last visited Oct. 21, 2005).

11. The Egyptian political and legal systems are in flux. Even in Egypt, then, it is possible that the SCC's Article 2 jurisprudence will be modified by future courts or that it will be applied in a more conservative manner.

however, that Islamic legal theory has become contested terrain in the modern era. If a court has sufficient prestige and independence, it will have considerable flexibility to interpret and apply Islamic law in a way that is consistent with its overarching constitutional philosophy. A progressive court can thus "Islamize" state law in a way that is consistent with democracy, international human rights and economic liberalism.

I. BACKGROUND

To understand why Egyptians constitutionalized Islamic law and the difficulties that constitutional Islamization posed, it helps to have some background. Just before the modern era, most Egyptian Muslims assumed that state law should be consistent with the rulings and goals of *shari'a*. During this period, there was considerable consensus about how Muslims should interpret *shari'a* and thus a consensus on the meaning of *shari'a* itself. In the modern era, secularists challenged that assumption and secularized Egyptian law.[12] Dismayed by the secularization of Egyptian law, Islamist organizations eventually succeeded in pressuring the Egyptian government to adopt a constitutional provision requiring Egyptian law to conform to *shari'a* principles.[13] By this time, however, consensus had broken down on how to interpret *shari'a*. Courts were

12. After the Islamic invasion in the seventh century, the Egyptian legal order was deeply informed by the *shari'a*. During the second half of the nineteenth century, European influences—particularly ideas from the French Revolution, and scholars like Rifa'a Tahtawi and Taha Husayn—began to influence Egyptian law. A more secular orientation emerged, seen in an 1837 Organic Law that regulated government based on contemporary European works. *See* 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 3, 4 (Kevin Boyle & Adel Omar Sherif eds., 1996); JOHN L. ESPOSITO, THE ISLAMIC THREAT: MYTH OR REALITY 56-62 (3d ed. 1999).

13. Political pressure was reinforced by acts of violence. For example, militant Islamic organizations, such as Muhammad's Youth, the Army of God and the Islamic Society, attacked bars, nightclubs, government buildings, and other areas influenced by Western behavior. In the heated environment, Anwar al-Sadat amended the Constitution in 1980, declaring "Islam is the religion of the state" and *shari'a* was "the main source of legislation." ESPOSITO, *supra* note 12, at 94-95.

thus faced with the challenge of interpreting and applying a provision that meant different things to different people.

A. THE CLASSICAL IDEAL OF A STATE WHOSE LAW WAS CONSISTENT WITH *SHARI'A*

Prior to the nineteenth century, classical Islamic legal theory shaped political thought in the Muslim Mediterranean and helped dictate state behavior. Classical Islamic legal theory assumed that God's law, the *shari'a*, should be interpreted in the first instance by classical Islamic legal scholars. It was also accepted, however, that scholarly interpretation of *shari'a* ("*fiqh*") might differ from one group of scholars to another. A legitimate ruler had an obligation to enact laws that were consistent, in some broad sense, with one of the competing "orthodox" interpretations of *shari'a*. To ensure compliance, the ruler could appoint Islamic legal scholars to resolve disputes according to their *fiqh*; alternatively, most scholars believed the ruler could develop statutes in consultation with Islamic legal scholars. In a later part of this article, we will discuss in detail the classical methods of interpreting *shari'a* and of developing legitimate state law.[14]

B. SECULARISM AND ISLAMISM IN THE MODERN ERA

Courts in the Ottoman Empire, which controlled Egypt through much of the nineteenth century, had applied *fiqh* or statutes informed by *fiqh*.[15] Over the course of the nineteenth century, the governments in many Arab Muslim areas, including the increasingly autonomous region of Egypt, moved to reform their legal systems and often to Europeanize them based on the civil law model.[16] In countries like

14. *See infra* Part II.A.

15. The extent to which *shari'a* law was actually in force is a matter of some dispute among scholars, but two detailed examinations of legal practice in Egypt and the Ottoman Empire demonstrate the influence of *shari'a*-based laws and court systems. *See* GALAL H. EL-NAHAL, THE JUDICIAL ADMINISTRATION OF OTTOMAN EGYPT IN THE SEVENTEENTH CENTURY (1979); HAIM GERBER, STATE, SOCIETY, AND LAW IN ISLAM: OTTOMAN LAW IN COMPARATIVE PERSPECTIVE (1994).

16. *See* NATHAN J. BROWN, THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF 2-3 (1997) (explaining that between 1869 and 1877, the Ottoman *majalla*, or codification effort, was influenced by the model of the *Code*

Egypt, the Europeanization of law involved two separate, though overlapping, developments. First, governments restructured their legislative, administrative and judicial sectors. Second, they applied codes of statutory law, which were published in a national gazette and administered by a centralized court system.[17] Such developments were not, by themselves, incompatible with Islamic theories of legitimate government. So long as the new statutes were drafted with the input of classical Islamic legal scholars and consistent with their *fiqh*, the codes could easily be characterized as legitimate expressions of Islamic legislation. The codified laws, however, came increasingly to reflect European norms at the expense of traditional Islamic norms. In 1882, the Egyptian government finally moved to adopt comprehensive codes. Although some initial codification efforts had included religious scholars, the government did not submit their codes to the leading Sunni jurists for approval. In fact, the codes generally reflected European rather than Islamic legal norms.[18] After 1882, Islamic legal norms remained operative in Egypt primarily in matters of personal status, including marriage, divorce and inheritance.[19]

In the early twentieth century, "Islamist" organizations, such as the Muslim Brotherhood,[20] were formed in Egypt, and agitated for a

Napoléon). Egypt, an Ottoman province, in the 1870s and 80s established a court system modeled on the French system, which applied a code based upon the *Code Napoléon*. *Id.* at 29-31.

17. *See id.* at 24 (discussing the hierarchical, centralized system, which was a fundamental feature of the non-*shari'a* judicial structure that existed in Egypt during the first three-quarters of the nineteenth century). During this time, the officials in Cairo exhibited a great deal of control, and limited the role of local and village councils to minor issues and cases. *Id.*

18. *See id.* at 32.

19. *See generally* J. N. D. ANDERSON, ISLAMIC LAW IN THE MODERN WORLD 81-82 (1959).

20. For the history of some of these movements and a bibliography, see, for example, ESPOSITO, *supra* note 12, at 53-118. One group important in Egypt that Esposito does not discuss was the quasi-fascist group Young Egypt, discussed in CLARK B. LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE *SHARI'A* INTO EGYPTIAN CONSTITUTIONAL LAW 104 (forthcoming 2006).

return to Islamic law.[21] The adoption of Western governmental structures by Arab states like Egypt and corresponding acceptance of this development by Egyptian Islamists affected subsequent Islamist political demands, which increasingly came to be couched in "constitutionalist" terms. As majority Muslim states in the Arab world moved to a European-style legal system, they often adopted formal, written constitutional documents.[22] As constitutionalism began to pervade legal thinking in the Muslim world, Islamist groups began to express their demands in Islamic terms. They sought to guarantee a role for Islamic law in the state by demanding that constitutional language be adopted which required state law to be consistent with Islamic law.[23] The demand for constitutionalization of Islamic law was particularly powerful in Egypt.

C. THE ADOPTION OF ARTICLE 2

In 1970, as Egypt prepared to adopt a new constitution, Egyptian Islamists were able to convince the government to create an explicit constitutional role for the Islamic *shari'a*. Egypt's 1971 Constitution thus became the first Egyptian constitution to mention Islamic law

21. By this, most Islamists meant that all codified law in the modern state must be drafted so as to be consistent with the *shari'a*. On the Brothers, see RICHARD P. MITCHELL, THE SOCIETY OF THE MUSLIM BROTHERS (1993); BRYNJAR LIA, THE SOCIETY OF THE MUSLIM BROTHERS IN EGYPT: THE RISE OF AN ISLAMIC MASS MOVEMENT 1928-1942 (1998).

22. *See generally* NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT 3-91 (2002). Some of the last holdouts in the Arab world were Saudi Arabia and Oman, who eventually promulgated "basic laws" in the 1990s. *Id.* at 3, 54-61.

23. Arab constitutional documents in the first half of the twentieth century largely confined themselves to symbolic language establishing Islam as the state religion. *See* Nathan J. Brown & Adel Omar Sherif, *Inscribing the Islamic* Shari'a *in Arab Constitutional Law*, *in* ISLAMIC LAW AND THE CHALLENGES OF MODERNITY 55, 60-62 (2004). In the second half of the twentieth century, however, Islamist political movements successfully demanded the explicit incorporation of Islamic *shari'a* into the constitutional order. *See id.* at 63-66. Pressures to Islamize constitutions were also felt in non-Arab countries, such as Iran, *see generally* Ann Elizabeth Mayer, *Islam and the State*, 12 CARDOZO L. REV. 1015, 1035-42 (1991), Afghanistan, *see, e.g.*, INT'L CRISIS GROUP, ASIA BRIEFING NO. 29, AFGHANISTAN: THE CONSTITUTIONAL LOYA JIRGA (2003), and Pakistan, Mayer, *supra*, at 1042-47.

(and not merely Islam as a religion), and to give Islamic law an explicit role. Article 2 of the Constitution proclaimed that "the principles of the Islamic *shari'a* are a chief source (*masdar*^{un} *ra'isi*^{un}) of legislation."[24] Over the course of the 1970s, Islamism grew stronger, and the government began to prepare Islamic revisions to Egyptian law.[25] Furthermore, the wording of Article 2 was subtly but significantly strengthened in 1980. In the phrase cited above, the word "a" was changed to "the." With that change, the principles of the Islamic *shari'a* ceased to be one among many chief sources of Islamic law and, instead, became "the chief source" (*al-masdar al-ra'isi*) of Egyptian legislation. The legislative history suggested that Article 2 as amended required all Egyptian law to conform to "the principles of the Islamic *shari'a*."[26] As we will see below, this interpretation was subsequently ratified by the Supreme Constitutional Court of Egypt.

D. DEBATES ABOUT WHETHER THE COURTS COULD ENFORCE ARTICLE 2

The amendment of Article 2 was itself a significant symbolic victory for Islamists. However, because a number of crucial issues remained unresolved, it was impossible to predict the practical impact of the amendment. Among other issues, the text of Article 2 did not make clear who had constitutional authority to identify and interpret the principles of the Islamic *shari'a* and to determine

24. EGYPT CONST. art. 2 (1971).

25. *See generally* GILLES KEPEL, JIHAD: THE TRAIL OF POLITICAL ISLAM 80-88 (2002) (providing a brief overview of the Egyptian Islamist movement taking place in the 1970s, which attracted students and played a pioneering role in the wider movement later occurring throughout the Muslim world).

26. *See* LOMBARDI, *supra* note 20, at 132-35 (discussing the report of the committee in charge of drafting the amendment and some of the debates in parliament). For a discussion of the same report and debates, compare Hatem Aly Labib Gabr, *The Interpretation of Article 2 of the Constitution*, *in* HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT, *supra* note 12, at 217, 219; and Rudolph Peters, *Divine Law or Man-Made Law?*, 3 ARAB L.Q. 231, 236 & n.20 (1988).

whether Egyptian legislation was in conformity with them.[27] Were the political branches free to interpret the principles of the Islamic *shari'a* as they thought best? Or did the courts have the final say on whether legislation was consistent with these principles?

When it amended Article 2, the ruling party seems to have assumed that the political branches alone would determine whether Egyptian laws conformed to "the principles of the Islamic *shari'a*." According to the ruling party, Article 2 required the political branches only to make their best efforts to Islamize the law and their judgment could not be questioned.[28] By this interpretation, once new codes had been drafted, the courts could not challenge the political branches' assertion that the laws were Islamic. Islamists naturally had a different view. They asserted that Article 2 empowered and, indeed, obliged the courts to determine whether Egyptian legislation was consistent with the principles of the Islamic *shari'a* and, if it was not, to strike it down.[29]

If the government had seemed in good faith to be pursuing a policy of Islamization, its position might have had a certain appeal for courts. However, by the early 1980s, the government had obviously abandoned any good faith effort to Islamize the law. After the assassination of President Sadat in late 1981 by disgruntled Islamists, the new government of Husni Mubarak scuttled all plans for Islamic legal reform.[30] Thereafter, although the ruling party

27. *See* Bernard Botiveau, *Contemporary Reinterpretations of Islamic Law: The Case of Egypt*, *in* ISLAM AND PUBLIC LAW 261, 277 (1993) (describing the debate over the role for the Islamic *shari'a* during this period).

28. *See* BROWN, *supra* note 16, at 126 ("Few judges would question the viability or legitimacy of the *shari'a*, but most would view it as a body of law that informs (and places general restrictions on) positive law, as expressed in clear legislative texts.").

29. *See* Clark B. Lombardi, State Law as Islamic Law in Modern Egypt: The Amendment of Article 2 of the Egyptian Constitution and the Article 2 Jurisprudence of the Supreme Constitutional Court of Egypt 176 & n.27 (2001) (unpublished Ph.D. dissertation, Columbia University) (referencing sources identifying various cases in which Islamist lawyers asked the courts to void or enjoin enforcement of various articles of the civil and penal codes).

30. In the late 1970s up through the middle of 1981, the Sadat regime claimed to be actively moving towards some form of Islamization. The proof of that policy was a program under the control of Sufi Abu Talib that was supposed to review and revise Egyptian law to conform to *shari'a*. After the assassination of Sadat, the

asserted that only the political branches had the right to determine whether the obligation to harmonize Egyptian law with Islamic *shari'a* had been met, it had become clear that the political branches could not necessarily be trusted to make a good faith effort to Islamize Egyptian law. Any court that declared Article 2 to be non-justiciable would be seen as tacitly condoning the government's violation of a constitutional command. What was the Court to do?

The SCC in 1985 issued a politically savvy opinion that resolved the threshold question of justiciability.[31] The Court's 1985 opinion was peculiarly reasoned, but politically ingenious. The SCC held that although it did not have jurisdiction to hear challenges to legislation that was in force on the date that Article 2 was adopted, it *did* have jurisdiction to hear challenges to legislation enacted thereafter—a doctrine often described, somewhat misleadingly, as the doctrine of the "non-retroactivity" of Article 2.[32]

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government claimed that it would maintain its commitment to Islamization. However, Sufi Abu Talib's program ceased to make any progress, and in 1985, it was formally closed down. For a discussion of the government's apparent commitment to Islamization and the sudden death of that commitment, see LOMBARDI, *supra* note 20, at 129-39. Rudolph Peters has suggested three reasons for what he calls the government's "*volte-face*": a "hardening" of attitudes toward Islamists in the wake of the assassination of Sadat, a fear of sectarian clashes, and concern about relationships with foreign donors (particularly the United States) on whom the Egyptian economy increasingly relied. Peters, *supra* note 26, at 239. It should be noted, however, that Enid Hill has argued the government never really believed that Abu Talib would succeed in preparing Islamic codes and was thus forced to squelch them when they appeared. Enid Hill, *Law and Courts in Egypt: Recent Issues and Events Concerning Islamic Law*, *in* THE POLITICAL ECONOMY OF CONTEMPORARY EGYPT 240, 250-51 (Ibrahim M. Oweiss ed., 1990).

31. Rector of the Azhar Univ. v. President of the Republic, Case No. 20 of Judicial Year 1 (Sup. Const. Ct. 1985), *translated in* 1 ARAB L.Q. 100 (Saba Habachy trans., 1986).

32. The Court reasoned that Article 2 did not give the courts the power to compel the legislature to enact a new law or amend a law that was already in force on the date that Article 2 was amended in 1980. The SCC was barred, even indirectly, from compelling such an action—for example, by voiding as un-Islamic a law that was in force on the date that Article 2 was entered into force. Paradoxically, however, Article 2 authorized the courts to review any laws that the political branches voluntarily chose to enact or amend after Article 2 came into force. As a practical matter, then, the SCC could not accept jurisdiction over any Article 2 case (including, as it turned out, the case at bar) if it challenged as un-Islamic a piece of legislation that antedated the amendment of Article 2. The Court would, however, be empowered (and indeed was required) to review legislative

At a time in which secularists and Islamists were engaging in increasingly violent confrontations, this doctrine gave each side a partial victory. It allowed the SCC to paint itself as a neutral arbiter. At the same time, the decision had the beneficial effect of buying the Court time to develop a method of interpreting the principles of the Islamic *shari'a*. Most of the cases on the Court's docket involved challenges to laws already in force at the time Article 2 was enacted in 1980. Thus, the decision cleared the Court's docket of the case at bar and the vast majority of Article 2 challenges then before the Court.[33]

In short, without renouncing its authority to eventually exercise Article 2 review, the SCC was able to postpone for several years the day when the Court would have to identify, interpret and apply the principles of the Islamic *shari'a*. This delay was fortunate because of the difficulty inherent in articulating these principles.

E. WHAT WERE "THE PRINCIPLES OF THE ISLAMIC *SHARI'A*"?

Article 2 did not explain what it meant by the term "the principles of the Islamic *shari'a*," and the legislative history did not provide much guidance either.[34] This lack of instruction created serious problems for a court trying to interpret and enforce Article 2. These

enactments that were issued *after* the amendment of Article 2 in 1980. As a practical matter, it was *as if* Article 2 were non-retroactive. Nevertheless, that is not technically what the Court said. The Court accepted that Article 2 was retroactive, but merely stated that cases involving laws enacted prior to the amendment were non-justiciable. *Id.*

33. Nathalie Bernard-Maugiron has listed eighteen cases that the Court dismissed on non-retroactivity grounds between 1985 and 1992. Of these, eight (including the two 1985 cases) were already on the Court's docket at the time that the doctrine of non-retroactivity was announced. *See* Nathalie Bernard-Maugiron, *La Haute Court constitutionelle Égyptienne et la shari'a islamique*, 19 AWRÂQ 110-11 (1998).

34. Indeed, the meaning of the amendment was debated both inside the drafting committee and by outside commentators and political figures, but prior to adoption, no consensus was reached on the precise implications of the various formula considered. *See, e.g.*, Minutes of the Preparatory Comm. for Drafting the Const. for the Arab Republic of Egypt (1971) (on file with the library of the Majlis al-Sha'b, Cairo); *see also* JAMAL AL-'UTAYFI, ARA' FI AL-SHARI'A WA-FI AL-HURRIYYA [OPINIONS ON THE *SHARI'A* AND FREEDOM] (1980); Joseph P. O'Kane, *Islam in the New Egyptian Constitution: Some Discussions in al-Ahram*, 26 MIDDLE EAST J. 137, 143-48 (1972).

problems emerged because, over the course of the nineteenth and twentieth centuries, the classical consensus on questions of Islamic legal theory had broken down throughout the Muslim world. By the late twentieth century, Muslims had come to champion a number of very different theories of *shari'a*. Before it could try to identify and apply the principles of the Islamic *shari'a*, the SCC would have to consider a number of competing approaches to Islamic legal interpretation. It would have to decide whether to adopt one of these approaches or, instead, come up with a new approach of its own.

II. COMPETING METHODS OF ISLAMIC LEGAL INTERPRETATION

Over the course of the twentieth century, consensus collapsed in the Islamic world on the proper method of interpreting Islamic law. In Egypt and some other countries, a number of very different modernist approaches to Islamic legal interpretation had been suggested. A number of these different approaches acquired powerful supporters. Because Article 2, as amended, did not state which of these very different methods should be used to identify and interpret these principles,[35] the Court would have to determine for itself whether it would revert to classical methods of interpreting *shari'a*, adopt one of the popular modernist approaches, or develop its own new approach. The following discussion describes classical Islamic legal theory and three modernist theories of Islamic interpretation.

A. CLASSICAL METHODS OF INTERPRETING *SHARI'A* AND DEVELOPING ISLAMIC STATE LAW

The first theory to which the Court could have looked was classical Sunni Islamic legal theory.[36] Before discussing classical

35. Classical jurists often talked about "rulings" (*ahkam*), rules (*qawa'id*), roots (*usul*) or goals (*maqasid*) of *shari'a*, but almost never about principles (*mabadi'*). The term "principles" was instead used in classical science, philosophy, and theology. The use of this term in Article 2 suggested that the Constitution was not importing specific classical rules, but rather larger principles that could be induced from the entire tradition of Islamic law and legal theory.

36. For years, the history of *usul al-fiqh* was traced to the seminal work of Muhammad Ibn Idris al-Shafi'i (d.204 A.H./820 C.E.). There is currently

methods of legal interpretation, it is helpful to recognize that classical Sunni legal theorists distinguished between three types of ethico-legal norms: *shari'a* proper, *fiqh*, and Islamic state law. *Shari'a* was God's law—the body of commands that God wants people to obey. God had revealed some of these norms to prophets such as Muhammad. After the death of the Prophet, no one had perfect knowledge of these norms. Highly trained jurists could try to understand them by studying scripture and logic, but they understood that most of their conclusions were inherently fallible.

The science of interpreting *shari'a* was called *'ilm usul al-fiqh*, which might loosely be translated as "the science of the roots of understanding God's law."[37] A scholar's interpretation of God's law

considerable dispute over the traditional account. Some have challenged the attribution and dating of the work usually attributed to Shafi'i. The seminal work arguing for a re-dating of the work was NORMAN CALDER, STUDIES IN EARLY MUSLIM JURISPRUDENCE (1993). For a modified version of this argument, see Christopher Melchert, *Qur'anic Abrogation Across the Ninth Century: Shafi'i, Abu 'Ubayd, Muhasibi, and Ibn Qutaybah*, *in* STUDIES IN ISLAMIC LEGAL THEORY 75, 75-98 (Bernard G. Weiss ed., 2002) (noticing changes over time in the attribution of Risala to a follower of Shafi'i from almost a century later). Other modern scholars have accepted the traditional attribution and dating, but question whether the work was influential. *See, e.g.*, Wael B. Hallaq, *Was al-Shafi'i the Master Architect of Islamic Jurisprudence?*, 25 INT'L J. OF MIDDLE EAST STUDIES 587, 587-605 (1993). Still others suggest that our focus on Shafi'i's work as the starting point of the tradition is misplaced and that a full understanding of the development of the tradition will require further research into other earlier works. *E.g.*, Joseph E. Lowry, *Does Shafi'i Have a Theory of "Four Sources" of Law?*, *in* STUDIES IN ISLAMIC LEGAL THEORY, *supra*, at 23, 23-50; Devin Stewart, *Muhammad B. Da'ud al-Zahiri's Manual of Jurisprudence: Al-Wusul ila Ma'rifat al-Usul*, *in* STUDIES IN ISLAMIC LEGAL THEORY, *supra*, at 99, 99-158.

37. This is because it sought to describe the roots (or "sources") (*usul*) in which humans could find indications of God's law and describe the method by which these roots could be interpreted. Continuing the arboreal metaphor, the substantive rules that a jurist developed by interpreting these roots/sources were called *furu'*, the "branches" of God's law. As we will see, the SCC co-opts the idea of "roots" and "branches," but it uses them in an idiosyncratic way. In its Article 2 jurisprudence, it distinguishes between precepts that constitute "roots" (*usul*) of *shari'a* and those that constitute branches (*furu'*), but it defines these terms differently than the classicists. According to the SCC, the roots (*usul*) of *shari'a* are substantive legal rulings (which would be considered *furu'* by the classicists). These substantive rules are special, however, in that they are axiomatically known to be valid in all places and at all times. All other substantive legal rules that jurists derive are of only contingent validity and thus may, under appropriate

was referred to as his *fiqh* (literally, his "understanding"). It was understood that equally competent Muslim scholars could disagree in their interpretation of a text or their expansion upon established scriptural rules, and, if this occurred, it would be impossible to know which scholar was correct. Thus, there might be at any one time several competing bodies of *fiqh*, and those who followed one body of *fiqh* did not consider the champions of another interpretation to be heretics.

If there were competing, equally valid interpretations of *fiqh*, how could the state determine what rules to impose on its subjects? According to classical scholars, the state could choose to apply as its law one of the competing bodies of *fiqh*. Theoretically, the state could also choose to apply statutes that were drafted by a ruler on policy grounds, but were checked to ensure that they did not contradict the evolving *fiqh* of Muslim scholars. Such statutes might be considered "Islamic" statutes. Islamic statutes played only a minor role in the pre-modern Islamic state. However, with the rise of modern states in the Islamic world—states with centralized legal systems that applied codified bodies of law—Islamic statutes became an increasingly important part of the legal system in Islamic states.

In short, humans could not know with certainty what God had commanded them to do in his *shari'a*. Trained scholars could, however, come up with "rulings" (*ahkam*) which, taken together, represented their *fiqh*—their interpretation of *shari'a*. State law would have to be consistent with one of the orthodox juristic interpretations of *fiqh*. The state did not have to hire a scholar to derive a ruling for every situation that it wished to control. However, it would ideally consult with scholars to ensure that the laws it enacted and enforced were "consistent with" the *fiqh* of the scholars.

So how did jurists develop their *fiqh*? Classical jurists recognized two approaches to interpreting *shari'a* and developing *fiqh*: *ijtihad* and *taqlid*.[38] The preferred method was *ijtihad*. Nevertheless, for reasons described, classical jurists came over time to rely more heavily on *taqlid*.

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circumstances, be dispensed with. It is these contingent rulings that the Court refers to as *furu'*.

38. *See* discussion *infra* Part II.A.1-2 (describing these different methods for interpreting *shari'a*).

1. Classical Ijtihad

Performing *ijtihad* meant looking for knowledge about God's law in four "sources": the Qur'an, the *hadith* literature, juristic logic (*qiyas*) and juristic consensus (*ijma'*).[39] The Qur'an represented a transcription of the words God had revealed to the prophet Muhammad. A *hadith* was an account of some event in the Prophet's life. Because the Prophet was considered to have been protected from sin, the stories of his words and deeds provided Muslims with some further commands and a model of correct behavior. Thus, many of these reports were collected in books—and a handful came to be considered particularly trustworthy. The Qur'an and *hadith* literature contained some clear commands and described prophetic actions and statements that, if contextualized, seemed to imply a divine command. The third source of knowledge was juristic logic, which could help jurists better understand these commands and, more importantly, expand upon them to address problems that were not specifically addressed in scripture.[40] The fourth source, scholarly consensus, was a tool by which the community could establish some interpretations of God's law as definitive and thus incontrovertible.[41]

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39. This brings us to a point of nomenclature. Many classical jurists used the term *ijtihad* to refer to the entire process of deriving rules from scriptures *and* extrapolating logically from them. A minority of jurists, however, used the term *ijtihad* more narrowly to refer exclusively to the second stage—the process of deriving new rules through logical extrapolation. The Supreme Constitutional Court of Egypt uses the latter, more restricted meaning of the term *ijtihad*. Without approving or disapproving of this usage, we will adopt it here. Following the Court, then, we will use the term "*ijtihadi* rules" exclusively to refer to rules that have been derived by jurists who have extrapolated logically from rules that have been confidently identified in texts. *Ijtihadi* rules, by this account, are the product of human reason and are inherently fallible.

40. *See, e.g.*, BERNARD WEISS, THE SPIRIT OF ISLAMIC LAW 22-23 (1998) (explaining that Muslim juristic thought is based on the assumption that the law of God is not "sent down from heaven as a finished product"); WAEL HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES 36-124 (1997) (recognizing the limits of the scriptures and the development of other sources of Islamic law, including juristic logic as a source of law).

41. *See* WEISS, *supra* note 40, at 22-23 (explaining that consensus provides authority because the textual sources of law contain "few precisely worded rules of law," and therefore it is up to jurists to provide clear statements of law).

Ijtihad began with scriptural analysis. A scholar would look first to the Qur'an. The Qur'an was considered axiomatically to be a correct account of God's words as they had been recited by God's angel to the Prophet Muhammad.[42] Because the number of explicit Qur'anic commands is limited, scholars often had to move to the *hadith* literature. The *hadith* literature was a somewhat problematic source of information about God's command. Classical jurists were realistic about the possibility that eyewitnesses had misremembered what they saw, or that some later Muslims might even have fabricated stories about the Prophet's life.[43] Scholars thus developed critical methods of evaluating the trustworthiness of individual *hadiths*.[44] These methods relied primarily on analysis of the figures who had related the account that was recorded in the *hadith*. Based on their analysis, classical jurists expressed certainty about the authenticity of a few *hadiths*.[45] Many other *hadiths* were thought to

42. The Qur'an's authenticity was established through the fact that it was validated by transmission through multiple eyewitnesses and down through separate chains of authority. On *tawatur*, see Jeannette Wakin, *Interpretation of the Divine Command in the Jurisprudence of Muwaffaq al-Din Ibn Qudamah*, *in* ISLAMIC LAW AND JURISPRUDENCE 33, 33-52 (Nicholas Heer ed., 1990) (explaining *tawatur* (literally meaning "recurrence") as the process used to demonstrate the authenticity of texts, where recurring transmissions through a large number of individuals guarantee authenticity and eliminate doubts about the conveyed information's validity); Bernard Weiss, *Knowledge of the Past: The Theory of* Tawatur *According to Ghazali*, *in* STUDIA ISLAMICA 81, 81-105 (1985); Aaron Zysow, The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory 335-64 (1984) (unpublished Ph.D. dissertation, Harvard University) (on file with author) (explaining the "epistemology of the cause," more specifically the methods used to validate the nature and origin of laws); and HALLAQ, *supra* note 40, at 60-68 (reviewing the necessary conditions for obtaining certainty in the accuracy of a Prophetic report, and noting how jurists have divergent views on the minimum number of message transmitters deemed sufficient, although there is a general consensus that the minimum is five).

43. For a summary of some early jurists' concerns about the authenticity of *hadiths*, see James Robson, Hadith, *in* 3 ENCYCLOPEDIA OF ISLAM 23 (new/2d ed.) [hereinafter EI2].

44. The method was made up primarily by studying chains of transmission—lists of people starting with the eyewitness(es) and recording the persons over the generations to whom the eyewitness had passed down the knowledge.

45. Only a few *hadiths* had a sufficient number of mutually corroborating chains of transmission to be considered "*mutawatir*" and thus, like the Qur'an, indubitably authentic. *See generally* Robson, *supra* note 43.

have a high probability of being authentic. They were thus considered presumptively correct and thus legally probative.[46] Classical Islamic scholars did not only confront questions of authenticity, but questions of interpretation as well. Acutely conscious of the problems posed by linguistic ambiguity, classical jurists considered only a few scriptural commands to be entirely unambiguous and thus certain (*qat'i*) with respect to their meaning. In many other cases, jurists could only identify a meaning that was presumptively correct (*zanni*) with respect to its meaning.[47]

As the foregoing makes clear, a jurist who looked for evidence of God's law in the scriptures had to evaluate both the authenticity of the text and the clarity of the command.[48] A small number of scriptural commands were considered to be certain with respect to both their authenticity and meaning (*qat'i fi thubut wa-dalalatiha*).[49] Others were certain (*qat'i*) with respect to one, but only "presumptive" (*zanni*) with respect to the other.[50] It is crucial to note that classical jurists believed that rules in this second tier were still highly likely to reflect God's will and, in the absence of evidence to the contrary, people accepted such rules as presumptively binding.[51]

The importance of this point will become clear shortly, when we discuss modernist theories of Islamic legal interpretation. As will be described below, modernist theories often depart from the classical tradition and hold that humans are bound to respect classical interpretations of Islamic law, only to the extent that these classical interpretations follow inexorably from commands that are certain with respect to both their authenticity and their meaning.[52] Furthermore, in areas of law where there is no scriptural text that is certain with respect to both its authenticity and meaning, many of

46. *Id.*

47. *See* HALLAQ, *supra* note 40, at 36-40, 42-58.

48. *See* Zysow, *supra* note 42, at 90-91 (explaining how legal texts are divided into four categories based upon their authenticity and the provided reference, and those texts that are certain in both areas provide the most guidance).

49. *Id.*

50. *Id.*

51. *Id.*

52. *See infra* text accompanying notes 82-83.

these modernists feel that they can (and should) use methods of legal interpretation that rely heavily on non-scriptural sources of law such as utility or custom. In short, the modernist rejection of the classical jurists' respect for the previously established "presumptive" interpretations of *shari'a* freed modernist jurists to develop interpretations of *shari'a* that were heavily shaped by utilitarian concerns or by respect for the evolving custom of a Muslim nation. Modernist jurists with a utilitarian bent often justified their method of legal reasoning by arguing that it was consistent with the classical doctrine of the "goals of the *shari'a*."

Classical jurists recognized that trustworthy scriptures did not provide rules to resolve every conceivable question. When faced with a question that was not governed by a trustworthy scriptural command, a classical jurist would have to derive a rule by expanding logically from previously established scriptural commands.[53] Permissible methods of extrapolation constituted a fourth source of law. Juristic logic was primarily analogical. Many jurists believed, however, that consequentialist considerations should play a role in the process of drawing proper analogies.[54] According to the classical doctrine of the "goals of the *shari'a*" (*maqasid al-shari'a*), a properly trained jurist could induce from scriptural commands a number of divinely favored "interests" or "benefits" (*maslaha*, sing.; *masalih*, pl.) that God's laws tended to promote.[55] The achievement of each interest was a "goal" (*maqsad*, sing.; *maqasid*, pl.) of the law.[56] Most classical jurists agreed that *shari'a* recognized five

53. On *qiyas*, see HALLAQ, *supra* note 40, at 82-107 (reviewing legal reasoning methodology collectively referred to as *qiyas*, the most important being analogical reasoning); and WEISS, *supra* note 40, at 66-87.

54. *See* HALLAQ, *supra* note 40, at 83; *see also* SUBHI MAHMASSANI, FALSAFAT AL-TASHRI FI AL ISLAM [The Philosophy of Jurisprudence in Islam] 79-83 (Farhat J. Ziadeh trans., 1961).

55. A jurist could also identify results that the laws tried to prevent, each of which were characterized as a "harm" (*darr*). Promoting a benefit or, conversely, preventing a harm was said to serve the "goals of the *shari'a*." *See* HALLAQ, *supra* note 40, at 112 (defining the goals as "protecting life, private property, mind, religion, and offspring").

56. For examples of classical theorists, see, ABU HAMID AL-GHAZALI, AL-MUSTASFA MIN 'ILM AL-USUL 284-315 (1970); MUHAMMAD KHALID MASUD, SHATIBI'S PHILOSOPHY OF ISLAMIC LAW 127-68 (1995) (providing a detailed analysis of recent studies of *maslaha*, *maslaha* in *usul al-fiqh*, and classical theorist

particularly important interests/benefits: religion, reason, life, progeny, and property. Some jurists added a sixth: honor *('ird*).[57] These were said to have been recognized by consensus as the "necessary" goals of the law; below these necessary goals stood less important "interests/benefits."[58] Each scriptural rule of *shari'a* was assumed to promote one or more interests. If a jurist wanted confidently to develop a law by analogy to a scriptural ruling, he would need to understand the interest that the underlying scriptural ruling promoted. Having derived a rule that, he thought, was analogous to the scriptural rule, he would check his conclusion by asking whether the new rule would advance the same interest(s) as the underlying scriptural rule.[59] This meant that a rule derived by analogy was of contingent validity. It ceased to be applicable whenever circumstances changed so dramatically that it no longer promoted effectively the goals that it was supposed to serve.[60]

Abu Ishaq al-Shatibi's analysis of the *maslaha*); Zysow, *supra* note 42, at 394-96; HALLAQ, *supra* note 40, at 89-90, 92; and MALCOLM H. KERR, ISLAMIC REFORM: THE POLITICAL AND LEGAL THEORIES OF MUHAMMAD 'ABDUH AND RASHID RIDA (1966). For a general discussion of the doctrine in the works of later jurists, see MUWAFFAQ AL-DIN IBN QUDAMA, RAWDAT AL NAZIR WA JUNNAT AL MUNAZIR 86-87 (1385 A.H.); BERNARD G. WEISS, THE SEARCH FOR GOD'S LAW: ISLAMIC JURISPRUDENCE IN THE WRITINGS OF SAYF AL-DIN AL-AMIDI 609-13 (1992) (citing al Amidi); MASUD, *supra*, at 139-42 (detailing Amidi's exploration of the objectives or goals behind the rules of law); and KERR, *supra*, at 69-70 (discussing Qarafi).

57. On the addition of *'ird* by some jurists, see Zysow, *supra* note 42, at 343-44, 435, n.259. It should be noted that in contemporary usage, *'ird* often is used to refer to a woman's sexual virtue.

58. *See supra* note 56 and accompanying text.

59. *See generally* Zysow, *supra* note 42, at 335-64 (detailing the methods used to validate the nature and origin of the laws); HALLAQ, *supra* note 40, at 110-11 (addressing the requirement that the reasoning and purpose are clearly grounded in the textual evidence).

60. Thus, as one late classical jurist wrote, the difference between textually derived rules and logically derived rules was the difference between "universal legal rules (*al-shara'i' al-kulliyya*), which do not change with the change of time" and "particular [acts of] *siyasa* (*al-siyasa al-juz'iyya*) that are dependent upon [considerations of] welfare, thus being limited by time and place." Mohammad Fadel, Adjudication in the Maliki Madhhab: A Study of Legal Process in Medieval Islamic Law (unpublished Ph.D. dissertation, University of Chicago, 1995) (citing and translating Ibn al-Qayyim).

Like scriptural rules that were of "presumptive" authenticity or meaning, rules derived by analogy were not "certain" to be rules of *shari'a*. It was accepted that qualified jurists would disagree about the implications of a scriptural ruling, and thus that competing, but equally orthodox opinions, might arise. Classical jurists believed, however, that the Islamic community was divinely protected from error, and thus would never agree on an incorrect legal conclusion.[61] Because of the doctrine of collective infallibility, classical theory held that juristic consensus was the fourth source of knowledge about God's law. It meant that a particular interpretation of Islamic law that had once been considered merely "probable" was definitively correct and no longer subject to question. The vast majority of legal thinkers accepted that the consensus of all scholars in a single generation was sufficient to establish the truth of a legal proposition. Some scholars, however, accepted that only the consensus of the first generation of Muslims could be trusted without question.

2. Classical Taqlid

Although reasoning from the four "sources" of law was the ideal method of deriving *fiqh*, few jurists after the eleventh century actually employed this method—choosing instead to reason from precedent. By the twelfth century C.E., all jurists had come to be associated with one of four mutually orthodox "guilds" of jurists—the Hanafi, Maliki, Shafi'i and Hanbali guilds.[62] Almost all members of these guilds (and thus almost all Islamic jurists) were thought to be in a posture of *taqlid*, meaning that they were required to follow the precedents laid down by the early masters of their guilds.[63]

61. *See* WEISS, *supra* note 40, at 114-18 (explaining that a jurist's authority derives from the foundational texts and is an acceptable expression of the law of God and thus infallible). For more on infallibalism, see Zysow, *supra* note 42, at 463-83.

62. On the development of the four schools, see CHRISTOPHER MELCHERT, THE FORMATION OF THE SUNNI SCHOOLS OF LAW, 9TH-10TH CENTURIES C.E. (1997). For the consolidation of competing schools and the ultimate triumph of the four Sunni schools of law, see DEVIN J. STEWART, ISLAMIC LEGAL ORTHODOXY: TWELVE SHIITE RESPONSES TO THE SUNNI LEGAL SYSTEM 25 (1998).

63. The trend away from reasoning from primary scriptural sources (*ijtihad*) and towards precedential reasoning (*taqlid*) is reflected in the biographical and legal literature by the decreasing references to *mujtahids* (scholars who practice

Through sophisticated (and often creative) methods of precedential reasoning—methods which are generally subsumed under the rubric *taqlid*—jurists in a guild worked from the precedent of their guild to develop the *fiqh* of their guild.[64] Jurists in each of the four guilds accepted the *fiqh* of other guilds as "orthodox"—meaning they did not judge a Muslim to be a sinner simply because he followed the doctrine of a rival guild.[65] Indeed, so long as a Muslim followed the doctrine of one of the guilds, he would probably go to heaven. In short, it was generally understood (and accepted) that there would be at any one time several competing and ever-evolving interpretations of Islamic law, each of which was equally "orthodox."[66] Muslims came to follow different interpretations of Islamic law—each interpretation continuing to evolve under the supervision of a different guild of jurists.

Could a state force its citizens to obey one of the competing, equally orthodox versions? If so, which one should it select? Initially, most jurists worked from the premise that state law would be legitimate only if the state were headed by an extraordinary figure who was descended from the Prophet, trained as a jurist, and

ijtihad) and the increase in references to *muqallids* (scholars who reason out law through *taqlid*). For a survey of the literature, see Wael B. Hallaq, *On the Origins of the Debate About the Existence of* Mujtahids *and Gate of* Ijtihad, 63 STUDIA ISLAMICA 129, 129-41 (1986); Wael B. Hallaq, *Was the Gate of* Ijtihad *Closed?*, 16 INT'L J. OF MIDDLE EASTERN STUDIES 3, 3-41 (1984); and WAEL B. HALLAQ, AUTHORITY, CONTINUITY, AND CHANGE IN ISLAMIC LAW 86-120 (2001). In reading these, please note that the *mujtahid* within a guild is bound by *taqlid*. On this point, see SHERMAN A. JACKSON, ISLAMIC LAW AND THE STATE: CONSTITUTIONAL JURISPRUDENCE OF SHIHAB AL-DIN AL-QARAFI 73-79 (1996). Nevertheless, the idea that later scholars were less talented than their forbearers was certainly a legal fiction. In fact, the most qualified *muqallids* were said to be jurists who understood completely the method that their exemplars had used to derive law through *ijtihad*—meaning that theoretically, they should have been able to perform *ijtihad* themselves. For a discussion of this point, see, for example, *id.* at 94-96.

64. STEWART, *supra* note 62, at 25.

65. *See, e.g.*, BABER JOHANSEN, CONTINGENCY IN A SACRED LAW: LEGAL AND ETHICAL NORMS IN THE MUSLIM *FIQH* 37-42 (1999). For a longer explanation of the development of this doctrine and some of its ramifications, see LOMBARDI, *supra* note 20, at 15-18, 45-46.

66. On this doctrine, and its ramifications for the development of classical Islamic law, see JOHANSEN, *supra* note 65, at 39.

possessed other exceptional qualifications. Such a ruler could impose as law rules drawn from his preferred interpretation of *shari'a*. Eventually, however, attitudes towards state law in the Islamic Mediterranean came to be heavily influenced by the theory of *siyasa shar'iyya*, which proposed a slightly different approach to determining the legitimacy of a state's law.[67]

According to the doctrine of *siyasa shar'iyya*, Islamic society could legitimately be governed by any "possessor of coercive power" *(wali al-amr)*. To ensure that his laws were legitimate, however, this ruler would have to consult with classical Islamic jurists and would have to ensure two things: (i) His edicts must not require Muslims to perform acts that these jurists deemed forbidden (or abstain from acts that the jurists deemed mandatory); (ii) His edicts must not cause general harm to society by impeding the goals that Islamic jurists accepted as goals of the law.[68]

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67. *See, e.g.*, IBN TAYMIYYA, AL-SIYASA AL-SHAR'IYYA (1988). For a French translation, see HENRI LAOUST, TRAITÉ DE DROIT PUBLIC D'IBN TAIMIYA (1948), and for an English translation, see OMAR FARUKH, IBN TAYMIYYA ON PUBLIC AND PRIVATE LAW IN ISLAM (1966). For a detailed analysis of Ibn Taymiyya's thought, see HENRI LAOUST, ESSAI SUR LES DOCTRINES SOCIALES ET POLITIQUES DE TAKI-D-DIN AHMAD B. TAIMIYA 278-318 (1939) [hereinafter LAOUST, ESSAI]; and ANN LAMBTON, STATE AND GOVERNMENT IN MEDIEVAL ISLAM 144 (1981) (explaining that Ibn Taymiyya "describes *al-siyasa al-shar'iyya* as a treatise on the general principles of divine government and appointment to the lieutenancy of the prophet and states that it was indispensable for the ruler and his subjects and for those in charge of affairs" (Arabic terms omitted)).

68. Thinkers like Ibn Taymiyya thus proposed that the proper role of *shari'a* (as interpreted by the jurists) might be best conceptualized as creating an outer boundary on the legislative power of the state. The jurists identified rules that people could not be commanded to violate—and that must thus be reflected in state law. The jurists could also identify social interests that state law must promote. So long as he did not compel people to sin, the *wali al-amr* had significant discretion to enact whatever legislation he thought would best advance society's enjoyment of these benefits. As Frank Vogel puts it:

> [B]y this doctrine, Ibn Taymiyya advances both a more expansive vision for fiqh (among other things, embracing disputed doctrines by which fiqh draws on utility) . . . and also a constitutional theory by which the excesses of rulers may be curtailed and *Shari'a* legitimacy extended to actual states. In effect, his doctrine offers rulers *Shari'a* legitimation in return for a greater share of power for *'ulama'*; it offers *'ulama'* greater *Shari'a* efficacy at the cost of their being implicated further in affairs of state.

Classical legal theory, including the theory of *siyasa shar'iyya*, had an enormous impact on the political philosophy of the Ottoman state.[69] Justifying its behavior in terms of this theory, the Ottomans imposed as law both unwritten *fiqh* and, increasingly, statutes, and in part as a result, the empire enjoyed considerable popular legitimacy. The ideal of *siyasa shar'iyya* came to influence Muslim thought throughout the areas under Ottoman control, including Egypt.[70]

In sum, then, classical Islamic legal theory set out two highly complex methods by which Muslims were supposed to interpret and apply God's command. When state law was measured for conformity with *shari'a*, it was measured against the interpretation that classical jurists had developed using one of these two methods. As we will describe shortly, however, some Islamic legal thinkers in the modern era came to question the efficacy of the classical methods of Islamic legal interpretation. They have thus proposed a number of new methods for interpreting the *shari'a*. Some of these modernist approaches to Islamic legal reasoning have had a strong influence on the SCC's Article 2 jurisprudence.

Frank Vogel, *Siyasa*, *in* EI2, *supra* note 43, pt. III ("In the Sense of *Siyasa Shari'a*").

69. For later Mamluk thinkers influenced by the theory, see Vogel, *Siyasa*, *in* EI2, *supra* note 43 (discussing Ibn Farhun's text, TABSIRAT AL-HUKKAM 12-13, 104-15 (Cairo, 1884). For Ottoman thinkers influenced by it, *see id.* (discussing al-Tarabulusi's text, MU'IN AL-HUKKAM); and see also URIEL HEYD, STUDIES IN OLD OTTOMAN CRIMINAL LAW 198 & n.4 (V. L. Menage ed., 1973) (discussing Dede Efendi's legal theory).

70. For a discussion of the ways in which Ottoman thought came to influence Egyptian legal thought, see Lombardi, *supra* note 29, at 54-55, 70-73; and see also GALAL H. EL-NAHAL, THE JUDICIAL ADMINISTRATION OF OTTOMAN EGYPT IN THE SEVENTEENTH CENTURY 7-9, 71-73 (1979) (recounting the reorganization of the Egyptian administration after the Ottomans conquered Egypt, as well as the implementation of the *shari'a* as law); BROWN, *supra* note 16, at 25 (explaining that during the first three-quarters of the nineteenth century, the judicial structure was not based entirely on *shari'a*, but the courts generally operated under a blend of Ottoman *qanun* and Egyptian regulations and decrees, which was either based on *shari'a* or did not contradict it); and Rudolph Peters, Sharia *and the State: Criminal Law in Nineteenth Century Egypt*, *in* STATE AND ISLAM 152, 152-57, 174 (C. van Dijk & A. H. de Groot eds., 1995) (tracing the connection between specific criminal legislation in Egypt and the *shari'a*).

B. MODERNIST THEORIES OF ISLAMIC LAW AND ISLAMIC LEGISLATION IN EGYPT

Over the course of the nineteenth and twentieth century, the Ottoman province of Egypt gained independence.[71] As the new state began to take shape, Egyptian intellectuals and government officials, impressed by the legal systems of continental Europe, were coming to favor statutory law over judge-made law—eventually deciding to codify law. At the same time, social and intellectual changes prompted a new class of intellectuals to re-examine traditional assumptions about *shari'a* and its role in the state. Some thinkers came to embrace secularism—the idea that statutory law would be legitimate even if lawmakers did not attempt to ensure that the statutes were consistent with *shari'a* norms. Modern Islamists, on the other hand, continued to insist that a statute was legitimate only if it was consistent with God's law.[72]

Modern theorists have tended to uphold the essential premise of *siyasa shar'iyya*. That is to say, they have asserted that *shari'a* is known to contain both a number of universally applicable rules and a number of general principles requiring that people promote divinely favored social goals. State law will be legitimate if it respects both the specific commands and the larger goals. As modern Islamic thinkers have explored new ideas about textual criticism, epistemology, and hermeneutics, they have developed new methods of legal reasoning to identify the Islamic rules and goals against which the law of the state should be measured. They have also proposed specific methods of drafting legislation that were consistent

71. *See* Anna Jenefsky, *Permissibility of Egypt's Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 15 MD. J. INT'L L. & TRADE 199, 216 (1991) (explaining that Egypt achieved independence from the Ottomans in 1874).

72. *See, e.g.*, ALBERT HOURANI, ARABIC THOUGHT IN THE LIBERAL AGE: 1798-1939, at 132-33 (1962) (tracing the influence of Muhammad 'Abduh, a proponent of maintaining consistency between Islamic and state law); *see* discussion *infra* Part II.B.2 (discussing the neo-*ijtihad* theory rooted in the work of Muhammad 'Abduh). For a more involved discussion, see Lombardi, *supra* note 29, at 69-77 (reviewing the political events of this time and the views that precipitated them).

with these rules and goals.[73] Three competing modern approaches became particularly influential over the course of the twentieth century. Two of these seem to have significantly influenced the SCC's understanding of Islamic law.

1. Neo-Traditional Approaches to Islamic Legal Interpretation

Among the modern approaches to Islamic legal reasoning is one that we might refer to as "neo-traditional." Neo-traditional movements—as we define them—are movements asserting that the authority to interpret *shari'a* is confined to classically trained scholars. The guilds had collapsed as effective teaching and licensing institutions in the nineteenth century.[74] Nevertheless, the Egyptian government took over and maintained the institutions of classical learning that used to be controlled by the guilds, particularly the prestigious university at the mosque of al-Azhar, whose graduates held themselves out to be the intellectual heirs to the jurists associated with the four classical Sunni guilds of law. After the takeover, the graduates of this institution, though they studied the traditional Islamic sciences, were not associated with a particular guild, but rather with the aggregate tradition of exegesis. This permitted scholars to propose variations on traditional methods of Islamic legal reasoning and drafting Islamic statutes.[75]

What defines a theory as neo-traditional for the purposes of this article is that it assumes that the most authoritative interpretation will be carried out by a scholar who has received classical training and is recognized as a member of the special class of scholar known as the *'ulama'*. Thus, a state law will only be legitimate if it is approved by

73. *See* discussion *infra* Part II.B.1-3 (providing examples of various theories, specifically those proposed by Rashid Rida and al-Sanhuri).

74. *See* LOMBARDI, *supra* note 20, at 67-69 and accompanying sources.

75. For example, many argued the state should not strive to ensure that its law was consistent with the interpretation of a particular guild. Rather, the state should simply ensure that each of its laws reflected a position taken by some scholar in the past, thereby turning state law into a hodgepodge of rulings from different Sunni guilds and even from non-Sunni scholars. *See generally* Wael B. Hallaq, *Juristic Authority vs. State Power: The Legal Crises of Modern Islam*, 19 J.L. & RELIGION 243 (2003-2004).

a member of the *'ulama'* or by a committee of members.[76] It is possible that some of those who drafted Article 2 were inclined towards neo-traditionalism and thus assumed that Article 2 required the state to conform to al-Azhar's interpretation of Islamic law. However, such an interpretation of the Article seems to have been intolerable to the Supreme Constitutional Court of Egypt, which wanted to maintain plenary control over the interpretation of Article 2 and therefore possess the sole authority to determine whether a law violated Article 2. The Court thus drew inspiration from two important modernist approaches to Islamic legal reasoning. Each proposed a method of reasoning that did not absolutely require classical Islamic training. The SCC drew upon classical legal theory and upon these two modernist theories to develop a pastiche method of Islamic legal interpretation. Employing this method without regard to the *'ulama'*'s interpretation of Islamic law, the SCC has to date developed a progressive body of modernist Islamic jurisprudence.[77]

2. Interpreting Shari'a *Through Utilitarian Neo-*Ijtihad

One influential Egyptian modernist theory of Islamic legislation proposed that the Islamic state should develop legislation through a method that might best be characterized as "utilitarian neo-*ijtihad*." The roots of this approach go back to the work of the nineteenth century Egyptian jurist and reformer Muhammad 'Abduh.[78] However, it was 'Abduh's disciple Rashid Rida who first tried to articulate the method systematically.[79] Rida proposed a new method

76. On neo-traditional approaches to drafting statutes, see generally LOMBARDI, *supra* note 20, at 80-83, 103-04, and accompanying sources.

77. *See* discussion *infra* Part III (explaining the SCC's theoretical basis in developing its own progressive form of Islamic jurisprudence).

78. *See* HOURANI, *supra* note 72, at 145-57 (providing an outline of the views espoused by 'Abduh); KERR, *supra* note 56, at 123-52 (asserting that 'Abduh possessed the view that "[i]t is not right reason or the lessons of history that lays down the rules; it is Islam," but religion does not delegate the authority to make political decisions, rather Islamic law and natural law coincide).

79. On the relationship between Rida and 'Abduh, see KERR, *supra* note 56, at 153-55 (tracing the philosophical influence of 'Abduh on Rida, specifically the notion that natural law and human reason can provide guidance on the types of behavior that "lead to worldly prosperity or failure").

of (1) identifying the rules and goals of *shari'a*, and (2) developing codifiable state legislation that served the public interest without violating the established rules and goals of *shari'a*.[80] He called his method "*ijtihad*," but its tie to classical *ijtihad* was attenuated.[81]

Rida asserted that the process of developing legislative rules would ideally begin with a search for universally applicable rules found in scriptural sources, which a state would have to incorporate into its national law. Rida was *not* demanding, however, that states ask their legislators to derive rules through classical *ijtihad* and enact them as law. As we stressed above, classical jurists had looked for rules that were certain *or* probable with respect to their authenticity or meaning. Rida, on the other hand, held that the state only had to respect rules that were absolutely certain with respect to their authenticity and meaning.[82] Theoretically, states also had to respect rules on which there had been binding consensus. However, Rida limited the number of cases in which a determination that there was binding juristic consensus (*ijma'*) could establish the certainty (and universality) of an otherwise uncertain rule.[83] Between Rida's strict textual standards and the limits he placed on the role of consensus, a jurist adopting Rida's modernist approach would find few scriptural rules that had to be incorporated into state law—far fewer rules than the classical jurists.[84]

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80. *See* HAMID ENAYAT, MODERN ISLAMIC POLITICAL THOUGHT 78-81 (1982) (explaining Rida's contention that an Islamic political system was capable of reconciling utilitarian goals with Islamic ideals by using a modern form of *ijtihad* as a basis for the development of modern legislation).

81. See discussion *supra* Part II.A.1 (defining classical *ijtihad* as extracting Islamic law through four distinct sources: the Qur'an, the *hadith* literature, juristic logic, and juristic consensus).

82. *See, e.g.*, RASHID RIDA, YUSR AL-ISLAM (1923), *translated in* HALLAQ, *supra* note 40, at 218 (providing Rida's view that texts bearing "conclusive evidence in both content and transmission" are binding because they lack ambiguity, and no other evidence may override them unless it is a text of greater weight or a widely accepted principle of *shari'a*).

83. Following a minority of classical jurists, Rida held that only the consensus of the Prophet's companions could establish binding scholarly consensus. *See* HALLAQ, *supra* note 40, at 216.

84. Indeed, because Rida advocated an idiosyncratic method of evaluating the authenticity of *hadiths*, he actually found even fewer—most of which turned out to be very general principles found to be derived from the Qur'an. Rida was skeptical

Rida proposed a utilitarian method of developing "Islamic" rules to apply in the many areas that were not governed by a scriptural command. Following the idiosyncratic classical jurist Najm al-Din al-Tufi,[85] Rida argued that the *hadith* "no harm and no retribution" (*la darar wa-la dirar*) revealed a supreme utilitarian principle commanding people to act in the service of public good.[86] Furthermore, following Muhammad 'Abduh, Rida asserted that humans could, with confidence, determine what was in their best interest based on reason and the systematic observation of nature.[87]

Working from these two premises, Rida concluded that, when there were no "universal" rulings on point, an Islamic state must order people to act in a way that reason suggests will advance human welfare (*maslaha*).[88] Finally, whenever texts commanded people to follow a course of behavior that reason reveals to be "harmful," people were obligated to ignore the supreme utilitarian command requiring exceptions to be made in such circumstances. Rida's utilitarian method of identifying Islamic norms and developing Islamic legislation left tremendous discretion in the hands of rulers or

about the efficacy of traditional *hadith* criticism, which he considered too formalistic. He was thus willing to challenge the authenticity of certain *hadiths* that had traditionally been accepted as authentic, with the result that he accepted fewer *hadiths* as authentic than had traditional jurists. In this, Rida was following his teacher Muhammad 'Abduh who, in a work edited by Rida, expressed some doubts about whether one was really obliged to blindly accept the authenticity of a non-*mutawatir hadith* that seemed inconsistent with the Qur'an or inconsistent with what reason told us was plausible. For a discussion of Rida's theories, see DANIEL BROWN, RETHINKING TRADITION IN MODERN ISLAMIC THOUGHT 32-38, 97-98, 116-22, 129-141 (1996); and G. H. A. JUYNBOLL, THE AUTHENTICITY OF THE TRADITION LITERATURE: DISCUSSIONS IN MODERN EGYPT 15-18, 21-63, 114-21, 139-52 (1969).

85. For a biography of al-Tufi, see *al-Tufi*, *in* 10 EI2, *supra* note 43, at 588.

86. Rida published al-Tufi's treatise on *maslaha* in *al-Manar*, the magazine that he edited, and recommended it to readers. *See* 9 AL-MANAR, at 745-70. For the utilitarian nature of the conclusions that Rida took from al-Tufi, see generally HALLAQ, *supra* note 40, at 217-19.

87. *See, e.g.*, 9 AL-MANAR, at 216, *translated in* KERR, *supra* note 56, at 157 ("Islam is the religion of natural disposition and cannot possibly contradict the laws of creation, nor can its customs contradict those of nature, for everything is from God.").

88. *See* KERR, *supra* note 56, at 190 and accompanying sources; *see also* HALLAQ, *supra* note 40, at 218-19; KERR, *supra* note 56, at 194-95.

their legal advisors, who would have to determine whether a proposed statute was "Islamic" largely on the basis of subjective conclusions about utility.[89]

3. Interpreting Shari'a *Through Comparative Neo-*Taqlid

While Rashid Rida was articulating his new approach to Islamic legal interpretation and legislation, a younger contemporary, 'Abd al-Razzaq al-Sanhuri, was developing a very different approach. Like Rida, Sanhuri insisted that the governments in majority Muslim states should apply Islamic legislation—legislation drafted and checked against certain universally applicable precepts of Islamic law that promoted useful social goals.[90] Like Rida, Sanhuri rejected the traditional classical approaches of deriving law. However, Sanhuri's method of identifying the universally applicable precepts and goals of Islamic law was quite different from Rida's. Rida insisted that those who sought to understand Islamic legal principles should use a radically reconceptualized version of *ijtihad*. Like traditional scholars in the age of *taqlid*, however, Sanhuri implicitly rejected Muslims' ability to understand ancient and obscure scriptural texts. Thus, he rejected the idea that modern scholars should go back to the early Islamic practice of reasoning directly from these texts. Modern Muslims would instead follow in the footsteps of the jurists in the guilds who practiced *taqlid* and seek

89. For criticisms on this score, see, for example, Fazlur Rahman, *Towards Reformulating the Methodology of Islamic Law*, 12 N.Y.U. J. INT'L L. & POL. 219, 223 (1979); and HALLAQ, *supra* note 40, at 224 ("[N]o amount of interpretation or textual manipulation can affect or diminish [the universal and general norms'] presence in the *Shari'a*."). If Islamic judges had used it to develop Islamic rulings on a case-by-case basis, legal outcomes would have been extremely unpredictable. However, Rida did not believe that it would be used in this way. Rather, it would be used to draft rules that would be codified and applied consistently in courts. Subjectivism had practical consequences. As some critics pointed out, it seemed to leave citizens vulnerable to a state that was largely free to legislate as it saw fit. For criticisms on this score, see, for example, Rahman, *supra*; and HALLAQ, *supra* note 40, at 224. Interestingly, Rida implicitly recognized this and suggested that it would make sense to have constitutional protections beyond those required by Islamic law. *See* KERR, *supra* note 56, at 183. On Rida's political theory more generally, see LAOUST, ESSAI, *supra* note 67, at 573-74; and ENAYAT, *supra* note 80, at 69-83, particularly 77-81.

90. *See, e.g.*, 'ABD AL-RAZZAQ SANHURI, LE CALIFAT 580 n.7 (1938).

essential "Islamic" legal principles through examination of the later exegetical tradition.[91] Sanhuri's method of extracting laws from precedent was very different from the traditional methods used by classical jurists. If Rida's approach to deriving state law was a radically modern form of neo-*ijtihad*, Sanhuri's was a radically modern form of neo-*taqlid*.

Sanhuri's neo-*taqlid* was shaped by comparative legal approaches that were being explored by European nationalist legal thinkers who were involved in the process of developing codes of law for European nation states.[92] Sanhuri tried to induce from the diverse writings of the classical jurists a number of principles that had explicitly or implicitly recurred in texts from different times and places.[93] These principles represented the universally applicable law that Muslims must accept and Islamic states were not to enact legislation that was inconsistent with them.[94] Sanhuri was not simply

91. *See id.* at 580-81; *see also* 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, at 5, 38-39 (1987).

92. *See* 'Abd al-Razzaq Sanhuri, *Le droit musulman comme element de refonte du code civil égyptien*, 3 RECUIL D'ETUDES EN L'HONNEUR D'EDOUARD LAMBERT 621, 623 (1938); *see also, e.g.*, HILL, *supra* note 91, at 39 (summarizing Sanhuri's approach).

93. The drive to create a code of Islamic law through comparative legal methods may have been influenced by nationalist legal theory. Comparative legal methodology initially came to prominence during the rise of European nation-states. Nationalist political ideology assumed that certain populations that had been divided politically in the past actually shared a common heritage. By comparing and contrasting the bodies of law that had traditionally governed the various peoples of the nation before their unification, comparative jurists distilled a number of overarching principles of law, which were, it was said, the essential legal principles of that nation. *Cf.* KONRAD ZWEIGERT & HEIN KOTZ, INTRODUCTION TO COMPARATIVE LAW 50-62 (Tony Weir trans., 2d rev. ed., 1987). See Amr Shalakany, *Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamise*, 8 ISLAMIC L. & SOC'Y 201, 207-14, 224-26 (2001), on the anti-formalist influences on Sanhuri.

94. As the former Ottoman provinces of the Middle East began to fragment into nation states, Sanhuri modified his theory to make room for national variations in Islamic law. For a general consideration of Sanhuri's thought and its evolution, see HILL, *supra* note 91; Oussama Arabi, *Al-Sanhuri's Reconstruction of the Islamic Law of Contract Defects*, 6 J. OF ISLAMIC STUDIES 153, 153-72 (1995); Oussama Arabi, *Intention and Method in Sanhuri's* Fiqh: *Cause as Ulterior*

saying that Muslims had to follow rules that had been ratified by scholarly consensus (*ijma'*)—or at least not in any sense that the classical jurists would have recognized. Classical theory held that once the qualified jurists of a generation had reached consensus upon a particular rule of *shari'a*, then later generations were required to accept this rule as binding. Sanhuri was not concerned with identifying specific rules ("x is required" or "y is prohibited") that had been explicitly accepted by a particular generation. Rather, he was scouring the exegetical literature trying to identify legal principles that had been implicitly respected by Muslims at all times during their history. These universally accepted principles might take the form of specific rules of behavior; for instance, "under certain circumstances, a husband is required to do 'x' for his wife." They might also take the form of more abstract principles; for instance, "under certain circumstances, a husband should do whatever is most likely to promote result 'y.'" Though he did not use the terms "rulings" or "goals," one might argue that Sanhuri was trying to identify in the Muslim legal tradition analogues both of the classical jurists' universally applicable "rulings" of *shari'a* and of the classical jurists' "goals" of the *shari'a*.

To the extent that Islamic or national principles did not dictate a particular rule, the state was free—at least from an Islamic perspective—to legislate as it saw fit.[95] Like Rida's version of neo-*ijtihad*, Sanhuri's version of neo-*taqlid* left legislators and/or judges

Motive, 4 ISLAMIC L. & SOC'Y 200, 200-23 (1997); Guy Bechor, *'To Hold the Hands of the Weak': The Emergence of Contractual Justice in the Egyptian Civil Law*, 8 ISLAMIC L. & SOC'Y 179, 179-200 (2001); and David Johnston, *A Turn in the Epistemology and Hermeneutics of Twentieth Century* Usul al-Fiqh, 11 ISLAMIC L. & SOC'Y 233, 235, 266-68 (2004). Increasingly coming to believe that Muslims were defined by their region as well as their religion, Sanhuri posited that the law of a Muslim nation state should also reflect any norms that were essential to that region. Accordingly, when hired to develop national codes, he also studied legal writings unique to the territory in which the nation state was forming and sought to include those too. Thus, when drafting the Egyptian Civil Code of 1949, he induced not only Islamic principles from the classical tradition as a whole, but also Egyptian principles induced from the statutes and court rulings that had historically been applied in Egypt. *See generally* Shalakany, *supra* note 93.

95. For an analysis of this aspect of Sanhuri's thought, see HILL, *supra* note 91; and Shalakany, *supra* note 93, at 230-35.

significant discretion to establish laws that advanced what they considered just or socially beneficial.

C. COMPETING ISLAMIST POLITICAL FACTIONS AND THE EMBRACE OF DIFFERENT APPROACHES TO ISLAMIC LEGAL INTERPRETATION

Over the course of the twentieth century, Egyptian Islamists who wanted Egyptian legislation to be "Islamic" aligned themselves with different approaches to Islamic legal interpretation, and thus they demanded very different types of Islamic legal reform. Some Egyptians were enamored with neo-traditional theories, insisting that the *'ulama'* should identify the rules and goals that state legislation had to respect. Increasingly, the most powerful Islamist factions explicitly embraced modernist ideas. For example, the ideologues of the Muslim Brotherhood, such as Hassan al-Banna and Sayyid Qutb, were inspired by Rashid Rida's idea of state legislation developed through utilitarian neo-*ijtihad*.[96] Many members of the legal academy and legal profession, on the other hand, were drawn to Sanhuri's call for state legislation to respect principles induced from a study of the evolving Islamic legal tradition. Sanhuri became a prominent professor and judge, and was ultimately appointed lead draftsman for the hugely influential Egyptian Civil Code.[97] As Baber Johansen has pointed out, his ideas have continued to this day to influence the thought of legally trained Islamists.[98]

By the time Article 2 was amended in 1980 to make "the principles of the Islamic *shari'a*" the chief source of legislation, Egyptians disagreed deeply about how a court should identify these principles—and thus about what they required. Once it decided that Article 2 cases were justiciable, the SCC had to carefully consider the method that it should use to identify and interpret the *shari'a* norms to which state legislation was to conform.

96. *See* Lombardi, *supra* note 29, at 104-08; *see also* discussion *supra* Part II.B.2 (explaining Rashid Rida's version of utilitarian neo-*ijtihad*).

97. For Sanhuri's biography, see generally HILL, *supra* note 91; and Shalakany, *supra* note 93, at 201-44.

98. JOHANSEN, *supra* note 65, at 59.

III. THE SCC'S METHOD OF INTERPRETING *SHARI'A* AND IDENTIFYING THE PRINCIPLES THAT STATE LAW MUST RESPECT

In its Article 2 jurisprudence, the SCC has had to work with competing approaches to Islamic legal interpretation to establish its own official method. To understand the choices that the SCC made when it articulated and applied its theory, it helps to understand a little bit about the SCC and its commitment to the liberal rule of law.

A. THE SUPREME CONSTITUTIONAL COURT OF EGYPT

In the 1980s, the judiciary in Egypt was recovering from years of executive pressure and reestablishing its independence. The justices of the SCC were an unexpected but important force in this process. Under the regime of Jamal 'Abd al-Nasir, the Egyptian courts had lost much of their independence.[99] In the 1970s, the ruling party worked to establish a new constitutional court—the Supreme Constitutional Court—which henceforth would be the only court with the power to void Egyptian legislation as unconstitutional.[100] The ruling party planned to establish a court with limited safeguards that would be subservient to the executive.[101] Reasserting itself, the

99. *See* BROWN, *supra* note 16, at 84-92 (discussing the Nasirist attempt to subdue the judiciary through "presidential decree laws" limiting judicial independence and the creation of new legal bodies, which provided Nasir with significant control over the judiciary).

100. Since the 1930s, Egyptian courts had occasionally asserted (but had not vigorously pursued) a right of constitutional review. *See generally* Enid Hill, *Establishing the Doctrine of Judicial Review in Egypt and the United States*, *in* THE ROLE OF THE JUDICIARY IN THE PROTECTION OF HUMAN RIGHTS (Eugene Cotran & Adel Omar Sherif eds., 1997). Even the idea that judges might overturn legislation, was distasteful to Nasir and his successors. In 1969, the government formed by presidential decree a Supreme Court with exclusive jurisdiction over the constitutionality of legislation. The 1971 Constitution then created a constitutional requirement that such a court become part of the Egyptian governmental structure.

101. Nasir's new court was not given strong guarantees of independence. *See, e.g.*, BROWN, *supra* note 16, at 61-92. *See generally* Nathalie Bernard-Maugiron & Baudouin Dupret, *Introduction* to EGYPT AND ITS LAWS xxviii-xxix (Nathalie Bernard-Maugiron & Baudouin Dupret eds., Arab & Islamic L. Series No. 22, 2002). The 1971 Constitution was enacted after Nasir's death, but it institutionalized some of the residue of Nasir's distaste for judicial power. It gave a constitutional basis for a constitutional court that had already been created. This

judiciary succeeded in ensuring that the new court had guarantees of independence.[102] Thereafter, to the delight of the judiciary, the new SCC proved to be remarkably aggressive in exercising constitutional review and imposing supra-legislative norms on the political branches.[103] The SCC was committed to a philosophy of legal

recently created constitutional court had been established partly to ensure that critical matters (including judicial review of the constitutionality of legislation) would be kept out of the hands of the regular judiciary. The Constitution provided that this Court would be established and regulated pursuant to implementing legislation enacted by a parliament. This parliament was, of course, under the firm control of the ruling party, and thus, the government of Anwar Sadat assumed that it would be able to keep the parliament from granting the new constitutional court any real independence. *See id.*; *see also* Tamir M. Moustafa, Law Versus the State: The Expansion of Constitutional Power in Egypt, 1980-2001 (2002) (unpublished Ph.D. dissertation, University of Washington); Bruce Rutherford, The Struggle for Constitutionalism in Egypt: Understanding the Obstacles to Democratic Transition in the Arab World (1999) (unpublished Ph.D. dissertation, Yale University).

102. During the 1970s, the judiciary fought successfully to ensure that the new constitutional court would have some independence from the executive and legislature. When the implementing legislation for the new constitutional court was finally passed in 1979, it established a surprisingly independent Supreme Constitutional Court. *See* Statute of the Supreme Constitutional Court, Law No. 48 of 1979, *translated in* HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT, *supra* note 12, at 323-39. As established, the Court has a specialized, primarily constitutional jurisdiction. For a summary of the court's duties, see Awad Mohammad El-Morr et al., *The Supreme Constitutional Court and Its Role in the Egyptian Judicial System*, *in* HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT, *supra* note 12, at 37, 37-60; and Adel Omar Sherif, *Constitutional Adjudication*, *in* EGYPT AND ITS LAWS, *supra* note 101, at 325, 325-44 [hereinafter *Const. Adjuducation*]. When a court determines that a legitimate constitutional issue arises in the course of a normal legal case, the court with jurisdiction is required to refer the case to the SCC for disposition. *Const. Adjudication*, *supra*, at 329-38; Adel Omar Sherif, *An Overview of the Egyptian Judicial System, and Its History*, 5 Y.B. OF ISLAMIC & MIDDLE E. L. 17, 19-20 (1998-1999) [hereinafter *An Overview*]. See BROWN, *supra* note 16, at 102-03, for a discussion of the politics surrounding the laws establishing working procedures for the Court, and an analysis of the safeguards designed to protect the Court's independence. For a complete discussion of the structure of the Court and the way in which its judges are appointed and monitored, see *An Overview*, *supra*, at 17.

103. There is a large literature on the SCC and many works point out this intriguing quality. *See, e.g.*, the articles printed in HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT, *supra* note 12; and THE ROLE OF THE JUDICIARY IN THE PROTECTION OF HUMAN RIGHTS, *supra* note 100; *see also* BROWN, *supra* note 16, at 102-26; Tamir Moustafa, *Law Versus the State: The Judicialization of Politics in Egypt*, 28 L. &

liberalism, which strongly protected negative liberties in the areas of economic regulation and human rights.[104] Indeed, with respect to the latter, the SCC interpreted the Constitution's rule of law provisions to incorporate into the Egyptian Constitution a requirement that the government respect international human rights norms.[105] As a new court seeking to establish its independence from (and power over) an authoritarian executive, the SCC was concerned about its public reputation. Interested in ensuring that its interpretation of Article 2 would be accepted by the public, the SCC needed to develop an approach to Islamic legal interpretation that would be respected by a wide range of people—including a wide range of Islamists. At the same time, the SCC seemed eager to see whether it could interpret *shari'a* principles in a manner that was consistent with the liberal rule of law, including the protection of international human rights. It was a challenging assignment, and the SCC developed its theory slowly and incrementally.

The SCC issued its first Article 2 opinion in 1989, striking down a law in part on the grounds that it was inconsistent with the principles of the Islamic *shari'a*.[106] Even then, the Court mentioned the Article 2 issue in passing, without explaining how it had developed its interpretation. It was not until 1993 that the SCC issued a detailed opinion describing a theory of Islamic law and the basic outlines of

SOC. INQUIRY 883, 883-927 (2003); *Const. Adjuducation*, *supra* note 102, at 325-44.

104. On the SCC's cases involving economic rights, see, for example, Awad Mohammad El-Morr, *The Status and Protection of Property in the Constitution*, *in* HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT, *supra* note 12, at 115, 115-27; Enid Hill, *The Supreme Constitutional Court of Egypt on Property*, EGYPTE MONDE ARABE, No. 2 of 1999, at 55; and *Const. Adjudication*, *supra* note 102, at 325-44.

105. *See* Case No. 22 of Judicial Year No. 8 (Sup. Const. Ct. 1992). For discussions of the case and its ramifications, see Adel Omar Sherif, *Unshakeable Tendency in the Protection of Human Rights: Adherence to International Instruments on Human Rights by the Supreme Constitutional Court of Egypt*, *in* THE ROLE OF THE JUDICIARY IN THE PROTECTION OF HUMAN RIGHTS, *supra* note 100, at 35, 37-38; JOHANSEN, *supra* note 65, at 367-68; and Kevin Boyle, *Human Rights in Egypt: International Commitments*, *in* HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT, *supra* note 12, at 87.

106. *See* Case No. 68 of Judicial Year 3, 4 S.C.C. 335 (1989).

its approach to Islamic legal interpretation.[107] In its opinions since 1993, the SCC has combined different approaches to Islamic legal interpretation in order to develop a method of interpretation that will be rhetorically attractive to a range of Islamists. At the same time, the SCC has articulated the theory in such a way that it leaves itself considerable discretion to interpret Islamic law in light of its basic assumptions about justice and social utility. Not surprisingly, it has exercised its discretion to develop a liberal interpretation of *shari'a*.

B. THE SCC'S THEORY OF ISLAMIC LAW

1. Overview

Drawing upon both the classical doctrine of *siyasa shar'iyya*[108] and Rashid Rida's modernist theory,[109] the SCC interprets Article 2 to require the state to develop laws that meet two criteria: (1) they must be consistent with universally applicable scriptural rules of Islamic *shari'a*, and (2) they must advance the goals of the *shari'a*.[110] In developing a method of identifying these rules and goals, the Court has effectively created a pastiche of modernist approaches to identifying the universal rules and goals of *shari'a* that state law must respect.

2. Identifying the Rules of Shari'a *Which a State Must Respect*

When the SCC tries to identify the rules of *shari'a* that the state must not contravene, it begins by looking for scriptural rules. In its quest for these rules, it departs from the classical tradition (and follows Rida) by searching only for principles that are "absolutely

107. *See* Case No. 7 of Judicial Year 8, 5-2 S.C.C. 265 (1993); *see also* Bernard-Maugiron, *supra* note 33, at 101-41 (describing the early cases).

108. *See supra* notes 67-70 and accompanying text (introducing the theory of *siyasa shar'iyya*, meaning "state action within the bounds of the *shari'a*").

109. *See supra* notes 79-89 and accompanying text (explaining Rashid Rida's modernist theory of utilitarian neo-*ijtihad*).

110. *See, e.g.*, *Case No. 7 of Judicial Year 8*, 5 S.C.C. at 283-84; Case No. 29 of Judicial Year 11, 6 S.C.C. 231, 249-51 (1994); Case No. 8 of Judicial Year 17, al-Jarida al-Rasmiyya [Official Gazette] 1026, 1031-32 (Sup. Const. Ct. 1996), *translated in* Brown & Lombardi, *supra* note 7, at 446-47.

certain with respect to both their authenticity and meaning."[111] Intriguingly, the SCC does not seem to follow faithfully Rida's method of establishing textual authenticity or the meaning of a text.

With respect to establishing textual authenticity, one cannot say much about the SCC's method. The justices accept the Qur'an as authentic. Beyond this, however, they have not described, even obliquely, their method of separating the absolutely trustworthy *hadiths* from the merely probable.

When determining whether a scriptural text has an unambiguous meaning, the SCC fuses Rida's method with Sanhuri's.[112] Like Rida, the SCC begins with a direct textual analysis of the scriptural passages that seem to be on point.[113] Unlike Rida, however, the Court regularly seeks confirmation of outward meaning through an inductive survey of classical juristic writing over the years. That is to say, the Court surveys juristic literature to see whether the jurists consistently applied whatever law seems to have been established in the passage. If not, the Court finds strong evidence that they did not agree on the rule in question.[114] The SCC's method of identifying legally binding scriptural rules thus fuses classical scripturalism and/or Rida's scripturalism with Sanhuri's insistence that states are

111. *See, e.g.*, *Case No. 7 of Judicial Year 8*, 5 S.C.C. at 283; *Case No. 29 of Judicial Year 11*, 6 S.C.C. at 249; *Case No. 8 of Judicial Year 17*, at 1031, *translated in* Brown & Lombardi, *supra* note 7, at 446.

112. *See* discussion *supra* Part II.B.2-3 (articulating both Rida's theory of utilitarian neo-*ijtihad* and Sanhuri's theory of comparative neo-*taqlid*).

113. *See, e.g.*, *Case No. 7 of Judicial Year 8*, 5 S.C.C. at 283-84; *Case No. 29 of Judicial Year 11*, 6 S.C.C. at 250-51; *Case No. 8 of Judicial Year 17*, at 1035, *translated in* Brown & Lombardi, *supra* note 7, at 452-53.

114. *See, e.g.*, *Case No. 7 of Judicial Year 8*, 5 S.C.C. at 284; *Case No. 8 of Judicial Year 17*, at 1035, *translated in* Brown & Lombardi, *supra* note 7, at 453. One should stress that the Court is *not* here adopting the classical doctrine of *ijma'*—the doctrine discussed above, which allowed jurists to establish the meaning of a law through scholarly consensus. Rather, it is adopting a method of reasoning from modern comparative legal methodology. First, the Court is *not* accepting as binding the rules on which the scholars of a single generation (or the first generation of Muslims) had agreed upon. Second, in looking for "agreement," the Court does not require unanimous acceptance. Rather, like Sanhuri, it looks for trends that reveal themselves over the course of many generations. *Cf.* Johnston, *supra* note 94, at 268 (stating that there were three stages in the development of consensus, which developed throughout the course of various generations).

only obliged to respect those principles that have been consistently accepted by a critical mass of traditional jurists over the centuries.

Because a scriptural command is not binding unless it is absolutely certain with respect to both authenticity and meaning, one would expect the Court to find few such binding scriptural precepts. This turns out to be true. The Court has found only a few precepts that it deems absolutely clear with respect to both authenticity and meaning.[115] Furthermore, the precepts that it has so far uncovered have tended to take the form of fairly general principles. To apply these principles in specific cases, an interpreter must still make some judgment calls. For example, in the case that is translated following this article, the Court states that an indubitably authentic Qur'anic text clearly commands women to "cover" themselves.[116] What "cover" means in practice, however, is ambiguous. Accordingly, the political authorities have enormous discretion to set rules for "covering" as they think best, so long as the justices accept that the rules would not impede people's ability to realize the goals of the law.[117] In fact, the Court has apparently never struck down a law on the grounds that it facially violates a rule that is absolutely certain with respect to both its authenticity and meaning. Though the Court's reasoning in some cases is opaque, it seems that whenever the Court has declared a law to be inconsistent with the principles of the Islamic *shari'a*, it has done so because it considered the law in question to be inconsistent with the larger "goals of the *shari'a*."[118]

115. *See, e.g.*, Case No. 35 of Judicial Year 9, 6 S.C.C. 331, 350 (1994) (holding that the Qur'an grants men an absolute right to marry up to four wives provided that the taking of a wife does not harm any existing wife).

116. *See Case No. 8 of Judicial Year 17*, at 1035, *translated in* Brown & Lombardi, *supra* note 7, at 452-53 ("The Exalted One has said: 'Let them draw their veils (*khumur*) over their bosoms;' 'Let them not reveal their adornments except what is outward[ly apparent];' 'Let them draw close their cloaks;' and 'Nor let them stamp their feet so that their hidden adornments may be known.'").

117. *See, e.g.*, *Case No. 8 of Judicial Year 17*, at 1035, *translated in* Brown & Lombardi, *supra* note 7, at 456-57.

118. *See, e.g.*, Case No. 6 of Judicial Year 9, 6 S.C.C. 542, 560-61 (1995) (holding that a law forcing landlords to continue renting to the extended family of deceased or departed tenants created more harm than good and thus violated the general utilitarian command to the government requiring "acceptance of the specific harm in order to repel a general harm").

3. Identifying the Goals of Shari'a *that a State Must Respect*

As a practical matter, then, the most important part of the SCC's method of interpretation is its method of determining whether a law under Article 2 review serves the "goals of the *shari'a*." In most Article 2 cases, the discussion concerning the goals of the law tends to be very confusing. For one, the SCC seems to consider two very different types of goals. The first are goals that the Court believes specific types of law should promote: custody laws are supposed to promote the well-being of the child; divorce laws protect the well-being of the wife; veiling laws are supposed to promote modesty, and so forth. The second are goals that all laws must promote—or at least must not impede. To be consistent with the goals of the law, a law must both advance the specific goals that laws of its type are supposed to promote *and* must not impede in a serious way society's ability to realize the results that God wants society to enjoy more generally. Although the SCC does not have any consistent nomenclature that distinguishes between the two types of goal, we will distinguish between "specific goals" and "general goals."

To identify the specific goals that a certain type of law is supposed to promote and to determine whether a law does, in fact, promote them, the SCC draws in part upon the classical doctrine of the "goals" of the law.[119] To begin, the Court seems to adopt the classical assumption that *shari'a* has a paramount concern with five human interests, which overlap with, but do not mirror exactly, the classical "necessaries."[120] The SCC then tries to determine which of these necessaries, if any, is most likely the goal that this type of legislation is supposed to promote. If it cannot find a "necessary" that the law promotes, it looks to see whether it can identify any other result that this type of law may be designed to promote. To determine this, the Court not only looks for clues in the scriptural passages that address regulations, but it also performs an inductive survey of the classical

119. *See, e.g.*, *Case No. 7 of Judicial Year 8*, 5 S.C.C. at 283; *Case No. 29 of Judicial Year 11*, 6 S.C.C. at 250; *Case No. 35 of Judicial Year 9*, 6 S.C.C. at 350; *Case No. 8 of Judicial Year 17*, at 1032, *translated in* Brown & Lombardi, *supra* note 7, at 448 & n.17.

120. *See, e.g.*, *Case No. 7 of Judicial Year 8*, 5 S.C.C. at 283; *Case No. 29 of Judicial Year 11*, 6 S.C.C. at 250; *Case No. 8 of Judicial Year 17*, at 1032, *translated in* Brown & Lombardi, *supra* note 7, at 448.

jurists' interpretation of these verses.[121] In other words, the SCC tries to identify the overarching human interest that all classical jurists seem to have agreed *shari'a* was trying to promote.[122] Thus, to identify the specific goals of the law, the Court is performing some sort of hybrid of classical goals analysis and Sanhuri's comparative interpretation.

However, the "specific goals" are not the only goals that must be taken into account. The Court seems to be convinced that, as a general rule, God wants people to enjoy whatever reason reveals to be beneficial. Thus, alongside the requirement that laws advance the specific goals that they are supposed to serve is a requirement that the law not harm society. We will refer to this as the requirement that the law serve the "general goals" of the *shari'a*. Not surprisingly, the SCC justifies its embrace of rationalist utilitarianism in much the same way that Rashid Rida did. It states that it must give effect to the unambiguous, utilitarian principle announced in the *hadith*, namely "no harm and no retribution" (*la darar wa la dirar*).[123]

There is a subtle relationship between the specific goals (which are determined through textual analysis and an analysis of history) and the general goals (which are derived by reason). To begin, the SCC looks to the general goals when the specific goals of the law are open-ended. That is to say, the specific goal of a law may be advancing the welfare of children. If so, what constitutes welfare? Welfare will be defined as the promotion of the general goals of the

121. *See, e.g.*, *Case No. 29 of Judicial Year 11*, 6 S.C.C. at 255; *Case No. 8 of Judicial Year 17*, at 1035-36, *translated in* Brown & Lombardi, *supra* note 7, at 453-54.

122. On close inspection, the SCC does not hew strictly to the classical understanding of the necessaries. The SCC does not include, as most classical jurists did, "progeny" in its list of necessaries. It does, however, include "honor/modesty" (*'ird*) which only a few jurists accept as a necessary. *Compare supra* text following note 56 (listing the goals articulated in the classical sources), *with Case No. 7 of Judicial Year 8*, 5 S.C.C. at 283, *and Case No. 8 of Judicial Year 17*, at 1032, *translated in* Brown & Lombardi, *supra* note 7, at 448 (listing the general goals of the *shari'a* articulated by the SCC: to protect religion, life, reason, honor, and worldly goods).

123. *See, e.g.*, *Case No. 35 of Judicial Year 9*, 6 S.C.C. at 354; *Case No. 29 of Judicial Year 11*, 6 S.C.C. at 254. Even when it does not explicitly cite this *hadith*, it uses language to make clear that it is determining the Islamic-ness of a law by balancing harms. *Cf. Case No. 6 of Judicial Year 9*, 6 S.C.C. at 561.

law—namely, whatever our reason tells us is beneficial. Second, there may be a case in which the Court finds no specific goal that *shari'a* requires certain types of law to serve. Those types of law must still, however, promote the public welfare. Finally, the Court suggests that axiomatically, it will find a law inconsistent with "the principles of the Islamic *shari'a*" if it leads to results that the Court believes to be gravely harmful.[124]

In short, the SCC in its goals analysis seems impressionistically to balance: (i) the classical idea that *shari'a* seeks to promote five necessary human interests above all others with (ii) the apparent policy priorities of the texts (as derived through a plain meaning analysis) and of the early jurists (as determined through a Sanhuri-esque analysis) and (iii) a Rida-esque commitment to promoting legal outcomes that reason suggests are just and socially beneficial.

The SCC's goals analysis is not a *purely* utilitarian analysis. Nonetheless, it permits (and arguably requires) judges sometimes to check legislation against norms that reflect their understanding of patterns in traditional Islamic reasoning, and it tempers their conclusions at all times by checking them against rationally derived conceptions of "justice" and/or social utility. In dicta, the SCC has argued that Islamic law is, for constitutional purposes, a source of general moral principles that must be interpreted anew in every day and age and must take evolving notions of human welfare into account.[125] The embrace of this open-ended type of reasoning permits decisions to turn on subjective conclusions about utility and permits judicial intrusion into policy-making.

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124. For example, in *Case No. 8 of Judicial Year 17*, the Court asserts that in seeking to promote the "necessary" human interest in honor/modesty, the Egyptian government (the "*wali al-amr*" of Egypt) was correct to be promoting modest dress only to the point where it imposed upon the psychological well-being of women and their ability to earn a living. The conclusion seems to be rooted, at least to some degree, in the justices' assumptions about women's roles in society and about women's feelings. *Case No. 8 of Judicial Year 17*, at 1036, *translated in* Brown & Lombardi, *supra* note 7, at 454.

125. *See, e.g.*, *id.* at 1032-33, *translated in* Brown & Lombardi, *supra* note 7, at 447-48 (stating that the rulings of the Islamic *shari'a* develop and change according to time and place to confront different events, guaranteeing flexibility and vitality).

The SCC could have taken concrete steps to limit the potential for judicial legislation by asserting that the courts must defer to the political branches' reasonable judgments about the utility of a law. Intriguingly, the justices have not taken such steps. They have been ambiguous about how much deference they will give to legislative and executive policy judgments. Admittedly, in the vast majority of cases, the Court seems to have agreed with the political branches' judgment about the utility of a law, and one suspects that the SCC might be giving some degree of deference.[126] However, the Court has never explicitly said that it must defer to the political branches. Furthermore, in some cases it has struck down laws on "goals" grounds—after balancing the benefits and harms of the law and concluding the laws were fundamentally unjust to some segment of society.[127]

Looking at the SCC's cases as a whole, it seems that the SCC has taken advantage of the flexibility in its theory and has tried to ensure that for the purposes of Egyptian constitutional law, the *shari'a* will be interpreted to be consistent with (and indeed to reinforce) the Court's established commitments to liberal economic philosophy and to the protection of certain civil and political rights—particularly women's rights.

The SCC's Article 2 opinions consistently suggest that "justice" requires people to respect each other's human rights (as understood

126. In a few cases, the Court's language even suggests, indirectly, that in cases where reasonable people could disagree, the government is free to legislate as it sees fit. *See, e.g.*, *Case No. 8 of Judicial Year 17*, at 1038, *translated in* Brown & Lombardi, *supra* note 7, at 456-57 ("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* (*al-maqasid al-kulliyya li shari'atihim*). [These universal goals] are not violated by the *wali al-amr*—acting in the sphere of his capacities—in regulating girls' dress. For there should be no revealing of her *'awra* or legs, nor any informing about her body. There should be no revealing her features in a way that repudiates modesty. And the Decision aims at this [result] when it obliges each female pupil associated with one of the stipulated educational stages to wear an appropriate uniform, which screens her without revealing her and which covers her nakedness and display of charms.").

127. *See, e.g.*, *Case No. 6 of Judicial Year 9*, 6 S.C.C. at 560-61 (concluding that the government wrongly calculated the benefits and harms of a landlord-tenant law).

by the international human rights community), and that the enjoyment of these rights is an essential aspect of human welfare. Thus, laws which impose upon international human rights are inconsistent with human welfare and justice and thus with the general goals of the *shari'a*. Working from this assumption, the SCC has argued for an interpretation of Islamic law that is much more generous to women than the interpretations proposed by the classical jurists. Based on this progressive interpretation, the SCC has upheld statutes that abandon classical Islamic laws in favor of laws that are consistent with international conventions protecting the rights of women and children.

For example, classical Islamic jurists did not speak clearly about the right of property owners to dispose of their property. Using the utilitarian prong of its goals analysis, however, the SCC has struck down laws that impose heavily on landowners' right to maintain or dispose of their property.[128] Classical jurists severely restricted women's right to divorce. They also did not require divorced men to pay alimony to their ex-wives, and limited women's rights to recover funds from the father for money expended on behalf of his children. The SCC has rejected, however, the idea that state law should follow the classical Islamic jurists' example in these areas. Arguing first that the Islamic scriptures do not establish a clear rule in this area and second that the balance of harms favors a departure from the classical rulings, the SCC has upheld as "Islamic" legislation that requires husbands to pay alimony,[129] legislation that provides women with a right to retroactive child support[130] and legislation that provides Egyptian women with the right to dissolve their marriage for "harm" if their husband takes a second wife.[131]

128. *See id.* (striking down a law requiring landlords, under certain circumstances, to rent their property to the extended family of a deceased or departed tenant).

129. *See* Case No. 7 of Judicial Year 8, 5-2 S.C.C. 265 (1993).

130. *See* Case No. 29 of Judicial Year 11, 6 S.C.C. 231 (1994).

131. *See* Case No. 35 of Judicial Year 9, 6 S.C.C. 331 (1994).

C. AN EXAMPLE OF THE COURT'S REASONING: A 1996 CASE ON VEILING

To understand how the Court draws upon modernist approaches to legal reasoning in order to establish its distinctive (and to date liberal) interpretation of *shari'a*, it helps to see how the Court applies its theory in a concrete case. One of the most intriguing of the SCC's Article 2 cases is a 1996 case involving a ministerial regulation that forbade schoolgirls from wearing the veil in public schools.[132]

In Egypt, the practice of veiling has become highly charged. In the 1980s and 1990s, veils, particularly the full-face veil known in Egypt as the *niqab*, were taken by many to be a sign of sympathy with radical Islamism.[133] Over the course of these decades, the government became increasingly concerned about the rising number of women and girls wearing the veil (especially the *niqab*) in universities and schools.[134] Thus, in 1994, Egypt's Minister of

132. Case No. 8 of Judicial Year 17, *translated in* Brown & Lombardi, *supra* note 7. For a different interpretation of this case, see Kilian Bälz, *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 229 (Baudouin Dupret et al. eds., 1999).

133. Many "veiled" women in Egypt wear a limited type of veil, known as the *hijab*, which covers the hair and neck, but leaves the entire face uncovered. Some, however, wear the *niqab*, which is a more complete veil. The *niqab* covers most of the face, leaving only the eyes uncovered. Wearing the *niqab* is, for some, a sign of allegiance to puritanical forms of Islam and is in some cases taken to be a sign of allegiance to Islamism. At the time of this case, some Islamist groups espousing such interpretations of Islam had been engaged in a violent struggle seeking to overturn the secularist Egyptian government. Wearing the *niqab* (or having one's girls wear the *niqab*) was thus an act that was fraught with ambiguity, but also had tremendous potential for political significance. On types of women's dress in Egypt, see ANDREA RUGH, REVEAL AND CONCEAL: DRESS IN CONTEMPORARY EGYPT (Am. Univ. in Cairo Press 1987) (1986). For a discussion of the politics associated with different types of veiling at the time this case was decided, see GENEIVE ABDO, NO GOD BUT GOD: EGYPT AND THE TRIUMPH OF ISLAM 143-61 (2000) (arguing that the veil and its symbolism provide the "most prominent vehicle for debating women's rights").

134. *See* ABDO, *supra* note 133, at 143-61 (stating that wearing a head veil gained support in the early 1970s due to the rejuvenation of Islamic identity and in response to growing Western influence, and noting that Islamic groups fought hard against university authorities who were opposed to students wearing a head veil); *see also* Yasmine Abou El Kheir, *Schoolgirls Unveiled Without Consent*, MIDDLE EAST TIMES, Aug. 1-7, 1994, at 1 (quoting the Minister of Education as favoring a

Education issued an official "Decision"—essentially a formal administrative ruling—that regulated women's dress in all schools under the ministry's control. Controversially, the new Decision prohibited schoolgirls from wearing veils.[135] In the face of massive opposition, the government modified the order (officially, the government said it had "clarified" the order) to state that schoolgirls who received written permission from their parents would be permitted to wear a *hijab* veil, which covered the hair, but left the face uncovered. Girls who did not have such permission or who wore the *niqab* would still be expelled from their schools.[136] The rule was considered an affront by Islamists. One Islamist, the father of two schoolgirls, challenged the ministerial Decision in an administrative court, arguing that the ban violated the principles of the Islamic *shari'a* in contravention of Article 2. He also argued that it violated the religious freedom and the "freedom of individuality" of him and his daughters. The case was publicized by Islamists and was widely covered in the press.[137] The administrative court referred the case to the SCC, which rejected the father's claims.

To resolve this case, the SCC began by giving an overview of its general theory. Egyptian law must not violate any indubitably authentic and unambiguous scriptural command. It must also not work counter to the goals of the law, which include a general goal of maximizing social benefit. Going through the first prong of its analysis, the Court began by identifying a number of Qur'anic commands dealing with veiling and noting the disagreements among jurists in the past about whether they required a woman's face and hands to be covered.[138] Based on its own reading of the Qur'anic verses and on the different interpretations of these verses that scholars had produced, the Court concluded that God had

ban on veils in school because "[w]e will not let Egypt's schools become a well of extremism and terrorism").

135. *Case No. 8 of Judicial Year 17*, at 1032, *translated in* Brown & Lombardi, *supra* note 7, at 442 (noting how two girls were expelled from school for violating the Minister of Education's decision).

136. *Id.* at 1031, *translated in* Brown & Lombardi, *supra* note 7, at 442.

137. *See, e.g.*, Nicolas Pelham, *Veiled Teachers Face Ban*, MIDDLE EAST TIMES, Apr. 4-10, 1994, at 1; El Kheir, *supra* note 134, at 1.

138. *Case No. 8 of Judicial Year 17*, at 1035, *translated in* Brown & Lombardi, *supra* note 7, at 452-54.

unambiguously commanded women to "cover" some parts of their bodies, but had not clearly stated which parts of a woman must be covered. The Qur'anic command, while absolutely certain with respect to its authenticity, was not absolutely certain with respect to its meaning—at least insofar as it was not certain that it required women to veil their face. Accordingly, a ministerial Decision banning face veils was not *ipso facto* contrary to *shari'a*.[139] The Decision could only be deemed contrary to *shari'a* if it was found to violate the specific or general goals of the *shari'a*.

In the second prong of its analysis, the SCC began by focusing on the specific goals of veiling. The Court reminded the reader that the five ultimate goals of the *shari'a* are: religion, life, reason, property, and honor/modesty.[140] Assuming that the specific goal of the Qur'anic command to veil was the promotion of modesty, the Court proceeded to ask whether the Minister's ban on veiling in schools impeded the specific goal of modesty.[141] To determine this, the Court engaged in a somewhat unsystematic analysis of whether uncovered faces are immodest or promote immodesty.[142] It suggested that unveiled faces do not promote lewd behavior (and might actually *prevent* it), but the Court did not provide any support for this conclusion.[143]

Although the SCC had found that the Decision was not inconsistent with the specific goal of the Qur'anic veiling command (the promotion of "modesty"), it went on to consider whether the law might nevertheless violate the general goals of the *shari'a* (the expansion of human welfare). It concluded that a ban on women covering their faces does not harm society. In fact, in a notable section, the Court suggests that even if veiling *did* promote the specific goal of modesty, it created a host of indirect social costs. It implied that these other costs were so serious that, in the aggregate, a

139. *Id.*, *translated in* Brown & Lombardi, *supra* note 7, at 452.

140. *Id.* at 1032, *translated in* Brown & Lombardi, *supra* note 7, at 448.

141. *Id.* at 1036-37, *translated in* Brown & Lombardi, *supra* note 7, at 455 (stating that a woman's appearance "must manifest her modesty, [must] facilitate her legitimate contribution to what the affairs of her life require and [must] protect her from debasement").

142. *Id.* at 1037-38, *translated in* Brown & Lombardi, *supra* note 7, at 455-57.

143. *Id.* at 1037, *translated in* Brown & Lombardi, *supra* note 7, at 456.

command to veil the face would violate the fundamental axiom that God's law cannot harm Muslims. In describing the social costs of veiling, the Court seemed particularly concerned with the consequences if conservatives, by forcing their daughters to veil their faces, impeded their ability to work and engage in public activities.[144] Although the Court does not mention the point, it is perhaps significant that the right of women to participate in society is one recognized in international human rights documents already incorporated into Egyptian constitutional law.[145]

As the veiling case makes clear, Article 2 requires the government to ensure that its law is consistent with *shari'a* precepts as they are identified and interpreted by the Supreme Constitutional Court and not by the Islamic scholars of the past or by the contemporary *'ulama'*. As a practical matter, the Court has said that the government must respect rules that the SCC identifies in explicit scriptural passages of indubitable authenticity and determines to have been widely recognized throughout Islamic history. But Article 2 also requires the government to ensure that its laws in particular areas promote any larger social goals that the scriptures and Islamic tradition reveal are goals for this type of law—but only to the extent that it promotes all aspects of human welfare, including the enjoyment of human rights.

As a result, Article 2 does not require the Egyptian government to respect rules recognized by classical Islamic scholars if those classical rules would, in the long run, prevent women from enjoying their internationally recognized human rights. Indeed, Article 2 might require the Egyptian government to abandon such rules.

144. *Id.* at 1036, *translated in* Brown & Lombardi, *supra* note 7, at 454 ("She must perform tasks that will involve her mixing with others. It is therefore unimaginable that life in all its aspects would surge around her while she would be specifically required to be an apparition clad only in black or the like.").

145. *See supra* note 105 (citing *Case No. 22 of Judicial Year 8* and sources providing scholarly commentary on that case).

IV.THE RECEPTION OF THE SCC'S ARTICLE 2 JURISPRUDENCE

Contemporary specialists in Middle Eastern law and politics have disagreed about how best to characterize the SCC's theory and to explain the theory's significance. Oussama Arabi has claimed that the Court's theory is to be understood "basically in terms of classical Islamic legal methodology."[146] While the Court's method does borrow at some general level from ideas espoused by some classical thinkers, such a characterization seems misleading insofar as it diverts attention from the many ways in which the SCC's theory departs from classical theory.[147] Other Islamicists examining the SCC's theory, such as Baber Johansen[148] and Frank Vogel,[149] have correctly stressed that the SCC's theory departs from classical theory and that it does not fit neatly into any of the modernist traditions of neo-*ijtihad* either.[150]

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146. OUSSAMA ARABI, STUDIES IN MODERN ISLAMIC LAW AND JURISPRUDENCE 174 (Arab & Islamic L. Series No. 21, 2001). Arabi also refers to the Court's jurisprudential approach as "a version of state Shafi'ism." *Id.* at 195.

147. Arabi seems to minimize the Court's departures from classical assumptions about texts and the proper way to interpret them. Most important, the classical jurists accepted far more texts (including *hadith*s) as authentic and clear (and thus legally probative) than the SCC does. Furthermore, in the areas of *ijtihad*, Shafi'i sharply criticized the type of intuitive consequentialist reasoning that the SCC seems to embrace.

148. Baber Johansen, *Supra-Legislative Norms and Constitutional Courts: The Case of France and Egypt*, *in* THE ROLE OF THE JUDICIARY IN THE PROTECTION OF HUMAN RIGHTS, *supra* note 100, at 347, 347-76.

149. 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 525, 525-44 (Eugene Cotran & Adel Omar Sherif eds., 1999).

150. Johansen explicitly notes that it is hard to characterize the SCC's methodology. Johansen, *supra* note 148, at 369 ("Given the wording of this article [2], the legislator and the constitutional court . . . could have boldly re-interpreted the term 'principles' in light of the Islamic modernism of Muhammad 'Abduh or 'Abd al-Razzaq al-Sanhuri. But apparently neither the legislator nor the constitutional court had the ambition to do so."). Vogel is even stronger on this point. Conceding that the SCC seems to be trying in good faith to establish a theory of Islamic law, Vogel suggests:

> [T]heir references to *ijtihad* may be no more than a careless use of words or conceptions, especially since they are usually bolstered by purely utilitarian

As thinkers have struggled to characterize the SCC's approach to Islamic legal interpretation, an interesting debate has emerged, focusing on whether the SCC's theory can plausibly be called "Islamic." Although they are unable neatly to place the SCC's theory in any established line of theories, most historians of Islamic law, including Johansen and Vogel, have assumed that the Court's Article 2 jurisprudence represents a plausible, good faith attempt to understand how Islamic law should be interpreted in the modern era—particularly by courts applying constitutional Islamization provisions.[151]

On the other hand, some scholars—many of them social scientists—have implicitly challenged this conclusion. They have implied that the SCC declares constitutional principles as Islamic without plausible Islamic justification; and that the Court has papered over this cynical exercise through the (mis)use of technical terms. For example, Kilian Bälz asserts that Article 2 jurisprudence "is nothing but a strategy used by the secular order of secular law to maintain its autonomy."[152] More recently, Ran Hirshl has described Article 2 jurisprudence as an example of a "secularizing" judicial response to political Islamism.[153] As this article should make clear, we incline to Johansen and Vogel's view that the SCC's theory

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> arguments for assigning power to decide to the state. . . . [T]he Court may have begun to develop its own theory of Islamic constitutionalism and legislation. A key element so far is devotion to fixed but highly general principles either established by a clear text or by their pervasive influence on *fiqh* . . . coupled with an openness to a freewheeling *ijtihad* even when that *ijtihad* diverges entirely from the views, even the consensus, of past scholars.

Vogel, *supra* note 149, at 538, 543-44.

151. Johansen and Vogel never question that the SCC's theory of Islamic law should be considered an "Islamic" legal theory or that its Article 2 jurisprudence represents a good faith attempt to measure Egyptian legislation against Islamic norms. *See, e.g.*, Vogel, *supra* note 149, at 535-38; Johansen, *supra* note 148, at 370.

152. Bälz, *supra* note 132, at 243. A less doctrinaire but nevertheless skeptical position is implied in some of Baudouin Dupret's analyses of Article 2. *See, e.g.*, Baudouin Dupret, *La Chari'a est la source de la législation': Interpretations jurisprudentielles et théories juridiques*, *in* ANNUAIRE DE L'AFRIQUE DU NORD 34, 261-68 (1995).

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

should be considered a bona fide contribution to contemporary Islamic thought.

When considering whether the approach is a legitimate expression of "Islamic" legal thought, two points should be noted. First, by fusing elements of classical and modernist legal theory, the Court has not abandoned the tradition to create something un-Islamic. It has simply used the tradition in a creative way to create a new approach to Islamic legal thinking in the context of constitutional thought. Second, the fact that the SCC's theory leaves judges considerable discretion to incorporate their normative biases into law cannot, by itself, be used to justify a claim that the SCC's theory is non-religious.

It is hard to argue plausibly that the SCC's theory is more subjective than important modernist Islamic theories that are almost invariably considered "Islamic." Such theories include Rashid Rida's theory of utilitarian neo-*ijtihad* and the variants of this theory that were championed by later Islamist activists such as Hassan al-Banna or Sayyid Qutb (at least in his early writings).[154] When faced with two interpretations of *shari'a*, each heavily influenced by the interpreter's subjective assumptions about utility, it seems arbitrary to single out the more progressive interpretation as one that "secularizes" Islamic law. To do so suggests that liberal economics or respect for human rights is essentially "secular" and that a truly "Islamic" thinker (even one with a utilitarian approach to legal reasoning) cannot consider such principles in interpreting *shari'a*.

To put it differently, a statement that the SCC is "secularizing" Islamic law implies that that the Court, when it articulated its Article 2 policy, was not interested in engaging with God's command. It was merely trying expediently to preserve its own previously established "secular" laws against Islamist attack. This creates a false dichotomy. Over the centuries, a number of Islamic legal thinkers have argued that God commanded people to understand his texts in light of the evolving understanding of great sages or in light of the reason bestowed by God upon humans. To such thinkers it is

154. *See* Rahman, *supra* note 89. For a discussion of the debt that the Islamic legal theories of certain Muslim Brotherhood members, such as al-Banna and Qutb, owe to Rida's theories, see LOMBARDI, *supra* note 20, ch. 3, particularly pp. 104-10 and sources cited therein.

perfectly plausible that the *shari'a*, properly understood, requires the same type of behavior as laws derived by liberal jurists trained in secular law.

It is worth stressing that many Egyptians consider the SCC's method of interpretation to be appropriate and its interpretation of *shari'a* worthy of serious consideration. Indeed, the theory has been imposed without provoking serious public outrage—even among Islamists. It is notable that at a time in which Islamist militants have been attacking the "secularist" government of Husni Mubarak and the institutions that support this government, the SCC has so far escaped their wrath. Indeed, in what may be a sign of acquiescence to the Court's authority and the legitimacy of its interpretation, Islamists keep appearing before the judges trying to convince them to apply their theory, but to adopt a less liberal interpretation of utility and thus to reach more conservative results—particularly in the area of women's rights.[155] Egyptian appeals courts seem largely to have embraced the SCC's theory—albeit with some caveats. (They tend to be more systematic in the use of the *hadith* literature, a development which may have the long-term effect of tempering the extreme progressivism of the SCC's interpretation of *shari'a*.)[156]

The willingness of conservative Islamists to accept the Court's theory raises interesting questions. Most important, if the justices of the SCC become more conservative in the future, will they subvert the Court's flexible (and arguably) subjective approach to interpretation and use it for illiberal ends? At this stage, one can only speculate about this possibility. Certainly, such a result is conceivable. Nevertheless, such a shift will have to occur in the context of an Egyptian legal system, staffed by judges and justices who have been trained to respect precedent.

Although Egyptian constitutional jurisprudence does not employ precedential reasoning in the same way as courts in the United States, precedents are still important.[157] It is possible that the

155. For a discussion of the lower courts' reaction to the SCC's theory, see LOMBARDI, *supra* note 20, at 259-64.

156. *Id.*

157. *See* John Murray & Mohamed El-Molla, *Islamic* Shari'a *and Constitutional Interpretation in Egypt*, *in* DEMOCRACY, THE RULE OF LAW AND ISLAM, *supra* note

executive under pressure from Islamists will enact laws reflecting a more conservative Islamic ideology (particularly in the area of women's rights). It is also possible that some judges will personally approve of this move. Although one can only speculate about what would happen under those circumstances, one should bear in mind that the impulse to approve such laws may be checked by a respect for precedent. In such a case, a turn to the right would occur incrementally as judges worked around the existing liberal case law.

CONCLUSION

Having described the SCC's Article 2 jurisprudence to date, we can turn to the question with which we began this article: Does the rise of constitutions requiring states to respect *shari'a* norms threaten human rights? The SCC's Article 2 jurisprudence to date suggests that constitutional Islamization does not, by itself, retard the establishment of a liberal economy or lead to a serious diminution of women's rights or other human rights.

Today there is a widespread desire in the Muslim world for a return to "Islamic" legal values, but at the same time, there is no consensus on how Islamic values are to be interpreted. Until consensus forms in a particular country both on questions of interpretive authority and on the proper approaches to Islamic legal interpretation, we cannot say with confidence what practical effects constitutional Islamization will have on the legal system of a country. The Supreme Constitutional Court of Egypt's Article 2 jurisprudence shows that the effects do not have to be as dire as some pessimists suggest.

Faced with an ambiguous constitutional provision requiring Egyptian law to conform to undefined "principles of the Islamic

149, at 507, 508-09 (stating that while the Court cites a case for precedential value when the law itself was deemed constitutional in a prior case, the Court does not cite as precedent prior cases discussing and deciding legal issues); John Murray, *Techniques of Constitutional Analysis in Egypt and the United States*, *in* THE ROLE OF THE JUDICIARY IN THE PROTECTION OF HUMAN RIGHTS, *supra* note 100, at 377, 377-91 (discussing a "reasoning by example" technique of constitutional analysis where the Court finds a prior case with specific similarities and differences with the current case, notes the distinguishing elements that prevent the Court from using the prior case as precedent and then uses the reasoning in the prior case as "logical tools" to resolve the current case).

shari'a," the SCC has boldly proposed a new approach to Islamic legal interpretation. It has drawn from competing approaches to Islamic legal interpretation—each with powerful supporters in Egypt—and has developed a new approach that has broad rhetorical appeal and which permits the SCC to pursue a liberal interpretation of *shari'a*. The Court's progressive decisions to date have so far rejected the calls of conservatives to rein in the government's attempt to expand women's rights in Egypt. Even if Islamists were to become politically powerful in Egypt, these precedents might make it awkward for later governments quickly to enact "Islamic" legislation that imposes on previously established economic rights or women's rights.

The SCC's Article 2 jurisprudence does not represent the only possible approach to constitutional Islamization. Courts in other countries may use different interpretive techniques to understand the *shari'a*'s command. Alternatively, courts might use the same type of flexible and arguably subjective forms of reasoning and come up with a far less progressive interpretation of the *shari'a*.[158] Indeed, in Egypt itself, future justices, though they are presumably constrained by past precedents, may try to co-opt the SCC's theory and incrementally establish a less liberal interpretation of *shari'a*.

Nevertheless, the history of Article 2 jurisprudence to date makes clear that under the right circumstances a court *can* develop a coherent and, apparently, politically viable liberal approach to constitutional Islamization. It will be interesting to see whether the SCC's liberal interpretation of Islamic law to date continues to set the tone for Egyptian Islamic constitutional jurisprudence in the future, and, more broadly, whether it comes to influence the thinking of courts in other countries that have constitutionalized the *shari'a*.

158. Iran, Saudi Arabia, Sudan, Afghanistan and Pakistan may each provide interesting points of comparison and contrast.