Religions and Constitutional Transitions in the Muslim Mediterranean

"In times of stereotyping Islam and its political ambitions, this is a more than timely volume. The thorough studies presented by renowned scholars shed light on the complex interplay between religion, its role in society and politics, and the vast range of varieties in regulating the relationship between state law and religion. An outstanding scientific work!".

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"At a moment when discussions of Islam and politics are often driven by fear and misunderstanding, Ferrari and Toronto offer a compelling alternative in this study of the entangled histories of religion, law, and state on the northern and southern shores of the Mediterranean. This book charts a new and ambitious path for the comparative study of religion and constitutional law in Europe and the Middle East".

Professor Elizabeth Shakman Hurd, *Northwestern University, USA*

This book investigates the role of Islam and religious freedom in the constitutional transitions of six North African and Middle Eastern countries, namely Morocco, Algeria, Tunisia, Egypt, Turkey, and Palestine. In particular, the book, with an interdisciplinary approach, investigates the role of Islam as a political, institutional, and societal force. Issues covered include: the role played by Islam as a constitutional reference – a "static force" able to strengthen and legitimize the entire constitutional order; Islam as a political reference used by some political parties in their struggle to acquire political power; and Islam as a specific religion that, like other religions in the area, embodies diverse perspectives on the nature and role of religious freedom in society. The volume provides insight about the political dimension of Islam, as used by political forces, as well as the religious dimension of Islam. This provides a new and wider perspective able to take into account the increasing social pluralism of the South-Mediterranean region. By analyzing three different topics – Islam and constitutionalism, religious political parties, and religious freedom – the book offers a dynamic picture of the role played by Islam and religious freedom in the process of state building in a globalized age in which human rights and pluralism are crucial dimensions.

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Religions and Constitutional Transitions in the Muslim Mediterranean

The pluralistic moment

Edited by Alessandro Ferrari and James Toronto

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Preface

This book investigates the role of religion in contemporary constitutional transitions in some parts of the Islamic Mediterranean area. In particular, it analyzes how Islam influences and is influenced by constitutional changes that are taking place in many majority-Muslim Mediterranean countries. Particular emphasis is placed on the interaction of Islam and state legal systems in these countries and the role that the latter give to religious political parties, religious laws, and religious freedom.

The book pays special attention to the experience of rule by Islamic-oriented political parties in recent transitional contexts. It investigates how, in these countries, religious political forces have dealt with the challenges of pluralism, both at the constitutional level and in ordinary legislation. The purpose is to present an overview of the pressing concerns flowing from increasing pluralism for states, religions, and societies and the consequences for their legal systems. In fact, the present wars and tensions cannot totally divert attention away from the crucial and long process of constitutional democratization and "confessionalization" of religious traditions in this area. Indeed, civil society, beginning with young people and with associations that are involved in protecting human rights, seeks to construct an effective form of citizenship capable of ensuring full political participation for all citizens, regardless of their religious affiliation, in an effort to overcome sectarian strife. This grassroots pressure will inevitably require allocation of autonomous space in civil society for religious communities, which need to accentuate their separation from the state apparatus. This brings about a "confessionalization"/"specialization" of religions – their distinction from state institutions – that results in new relationships not only between "church and state", but also within religious communities themselves. In fact, the demise of the millet system, in which religious communities could play a public institutional role and majority religion was entirely part of state bureaucracy, elicits discussion about the role of religious hierarchies in civil society, thus requiring a different relationship between religious institutions and their faithful adherents, and between clergymen and lay people.

The book focuses on three principal topics: (1) the place of religion and religious freedom in recent constitutional changes; (2) the role of Islamic political parties, and more generally, the extent to which religion is allowed to play a role in political processes; and (3) the treatment of religious minorities, both as an object and a subject of political and legal debate.

After three introductory and comparative chapters, which emphasize the complexity of the Mediterranean scenario and the role played by the Northern European shore, the book focuses in greater depth on selected countries (Algeria, Morocco, Egypt, Palestine, Tunisia, and Turkey), trying to place the analysis in the framework of investigation of a broader range of MENA

countries. The aim is to investigate specific developments in considerable depth, while providing a context sufficiently broad to identify ideal types that can help provide a conceptual framework for analysis of national cases. It is a first step for a field that asks for new and deeper comparative inquiry able to take into account the complexity of the relationships among countries of the Mediterranean shore.

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16 Freedom of religion and the constitution in Egypt

The distinction between belief and practice, and protecting religion and government from each other

David E. Risley

Introduction

In Egypt, by both culture and constitutional law, religion and state are inextricably intertwined. Religion shapes government, and government shapes religion, posing fundamental challenges to both.

Religion governs human behavior through conscience, from the inside out. Governments control human behavior through coercion, from the outside in.

When the two opposite (but not necessarily opposing) forms of governance are structurally mixed, with the inevitable result that each influences the other, the obvious potential exists for them to be mutually corrupting. In Egypt, the question arises of whether the coercive power of government in regulating the practice and affairs of religion, including religious expression, will effectively secularize religion. On the other hand, will religion, or at least religious law, require the government to do things its leaders would otherwise prefer to avoid?

The greater question is who decides? Who has both sufficient enforcement power over government and sufficient respect within the religious community to effectively referee the contest between religious conscience and government coercion?

In Egypt, the answer is the justices of the Supreme Constitutional Court (SCC).

This chapter explores the constitutional provisions framing religious freedom issues in Egypt; some examples of government and judicial regulation of the practice of religion; and the jurisprudence of the SCC, which to date has been an exercise in creative balance. Finally, to most starkly frame the interplay between law and religion in Egypt, two case studies are examined involving the issue of apostasy from Islam.

Constitutional framework

The inextricable intertwining of religion and law in Egypt is enshrined in Article 2 of its 2014 Constitution, which states (as translated from the Arabic original into English), "Islam is the religion of the state. . . . The principles of Islamic *sharī'a* are the principal source of legislation".

Since 1980, that same language was contained in the second articles of the 1971 and 2011 Constitutions, as well as all interim constitutional declarations.

During the 1970s, the neo-traditionalist scholars of Al-Azhar – the leading center of Sunni scholarship regarding Islamic law, based in Cairo – undertook a project to develop a draft code of rulings on various aspects of Islamic law, and began to call for the government to

redraft laws to conform to what the Al-Azhar scholars deemed to be Islamic law's controlling principles.[1]

At the same time, some lay Islamist organizations such as the Muslim Brotherhood and more radical *al-Gama'a al-Islamiyya* (the Islamist Groups), whose members viewed the Al-Azhar scholars as being unduly subject to government influence, began pushing their own legislative agendas, which sometimes did and sometimes did not coincide with the views of the Al-Azhar scholars.

Public debates broke out over competing views of Islamic law, pitting Islamists (or at least neo-Islamists) against Islamists, and Islamists against Nasserists.

In the midst of that controversy, Sadat's public support was eroding, particularly as he moved toward the peace treaty with Israel. For whatever reason, probably both to bolster support among the Islamists while at the same time shaping the direction and degree of Islamist reforms, Sadat undertook his own program toward Islamization of the law. Parliamentary committees were established to draft more Islamically "correct" legislation. And, what had previously been the wording of Article 2 that Islamic law was to be "a" principal source of legislation was changed to "the" principal source.[2]

In 1981, Al-Azhar approved parliamentary drafts of six new legislative codes: civil, judicial procedure, evidence, penal, commerce, and maritime. However, the government's Islamization program failed to gain the support of the Muslim Brotherhood and some other Islamist groups whose leadership remained deeply distrustful of Al-Azhar and its intentions.[3] In 1981, the government banned the Muslim Brotherhood's publications and imprisoned many of its leaders, along with known leaders of the (then) violence-prone *al-Gama'a al-Islamiyya*.

Then, on October 6, 1981, Sadat was assassinated, and Hosni Mubarak subsequently became President. Under Mubarak, a national state of emergency was declared, and Sadat's Islamization initiatives were reversed, while at the same time Mubarak reached out to moderate Islamist leaders and released some Muslim Brotherhood figures. Although he shelved the proposed Islamic codes, Mubarak actively promoted Islamic culture and empowered Al-Azhar to censure the arts and publications deemed offensive to Islam.

As their political route toward Islamization of the country's laws closed, some Islamists decided the best route forward was through the judiciary by means of litigation calling for the application of Article 2. The path of most of that litigation inevitably led to the SCC, which has exclusive jurisdiction to rule on the constitutionality of laws. In deciding those cases, the SCC developed a jurisprudence earning sufficiently widespread respect among sometimes competing interest groups that the Preamble of the 2014 Constitution states, "We are drafting a Constitution that affirms that the principles of Islamic *sharī'a* are the principal source of legislation, and that the reference for interpretation thereof is the relevant texts in the collected rulings of the Supreme Constitutional Court".

That jurisprudence, summarized in part below, is an exercise in creative balance.

Other provisions of the 2014 Constitution intertwining law and religion include Article 3, which states, "The principles of the laws of Egyptian Christians and Jews are the main source of laws regulating their personal status, religious affairs, and selection of spiritual leaders". (It is estimated that while Egypt's population is about 90 per cent Muslim, the remaining 10 per cent consists mostly of Christians. Egypt's once-thriving Jewish community has all but disappeared.[4])

Of central importance to this discussion, Article 64 of the 2014 Constitution states, "Freedom of *belief* is absolute. The freedom of *practicing* religious rituals and establishing places of worship for the followers of revealed religions is a right organized [*i.e.*, regulated] by law". (Emphasis added.)

Note the distinction expressly made between belief and practice. People are absolutely free to believe whatever they choose, but any actions relating to religious belief are subject to government regulation.

If construed as the drafters almost certainly intended and as commonly understood, adherents to religions other than what Muslims consider to be the "revealed religions" – Muslims, Christians, and Jews – fall outside the scope of law in terms of their legal status – not necessarily unlawful per se, but lacking the legal legitimacy and therefore standing afforded to the three recognized religions.

Article 93, one of the most potentially consequential but seldom recognized provisions of the Constitution, states, "The state is committed to the agreements, covenants, and international conventions of human rights that were ratified by Egypt. They have the force of law after publication in accordance with the specified circumstances".

Article 93 gives the International Covenant on Civil and Political Rights (ICCPR), to which Egypt is a party, the force of domestic law. It remains to be seen what weight the SCC will give to the ICCPR in considering the constitutionality of laws claimed by litigants to violate their religious freedom, but at the very least Article 93 provides a constitutional basis for the SCC to look to the ICCPR as a legal point of reference. However, even as a constitutional point of reference, depending upon the interpretation given to its language, the ICCPR's seemingly absolute statements about freedom of both religious belief and practice is qualified by a limitations clause that could easily constitute an escape clause in a country such as Egypt.

Article 18 of the ICCPR states the general rules in its first two paragraphs:

1 Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2 No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

But, with regard to the practice of religion or expression of religious belief, the third paragraph of Article 18 states the exception:

3 Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, . . . or morals.

In the absence of any language limiting that exception to religion-neutral laws, in the case of Egypt and similar countries, it is plainly subject to being construed in a manner that could largely swallow up the rule, because Egypt's laws regulating religious practice and affairs are considered necessary by their proponents for exactly the reasons stated in the exception.[5]

Therefore, what may ultimately prove to be the pivotal provision of the 2014 Constitution limiting the government's authority to regulate religious practice and affairs is Article 92, which states, "Rights and freedoms of individual citizens may not be suspended or reduced. No law that regulates the exercise of rights and freedoms may restrict them in such a way as to infringe upon their essence and foundation".

Regulation of religious practice and affairs

Religious identity and religious community are so woven into the cultural and legal fabric of Egypt that the religion of citizens is noted on their national identification card – provided they are Muslim, Christian, or Jewish.

While subject to change, one's religion is considered to be determined by birth, inherited from one's parents, especially for those born of a Muslim father and therefore legally regarded as being Muslim regardless of actual personal belief or disbelief, or even the subsequent conversion of the father to a different religion.

For the most part, Egyptians are remarkably united by a common national identity, as Egyptians, regardless of their religious affiliation. In particular, most Egyptians view Egypt as being an historic home for both the Coptic Orthodox Church and Muslims, with both communities sharing equal claim to being Egyptian. At the same time, that unity and the fabric of Egypt's social order is widely viewed – with considerable factual basis – to be dependent on stability and harmony in interfaith relations, particularly between Muslims and Christians. Therefore, threats to interfaith harmony are considered threats to public safety and order.

It has long been the experience in Egypt that conversions (or attempted conversions) from one religion to another often fuel interfaith tensions and sometimes ignite violent conflict between religious communities on at least a local level, and on occasion more broadly. When deaths result, as they all too frequently do, the consequence can be long-term feuding and deeply bitter hostilities that threaten public safety and cause social instability. Under even the best of circumstances, therefore, conversion from one religion to another is widely considered to at least implicate legitimate public interests.

Consequently, while no law in Egypt expressly prohibits proselytizing (encouraging people to convert to another religion), it is de facto prohibited for all except Muslims, and under some circumstances even then. Because conversion from one religion to another so frequently leads to conflict and even violence between religious communities, it can and frequently does result in prosecution under the Penal Code of the proselytizers, converts, and their supporters for causing public disorder or damaging national unity.

The Penal Code provision commonly used for such prosecutions prohibits insulting, disdaining, or expressing contempt for any of the "heavenly religions" (Islam, Christianity, and Judaism) or any of their sects, and is also frequently invoked to punish blasphemy under Islamic law.[6] It was used, for example, in November 2013 to convict and sentence a prominent Islamist televangelist to five years of imprisonment for insulting Christianity by publicly burning a copy of the Bible.[7]

While no law expressly penalizes apostasy from Islam (*ridda*), Muslims deemed to have committed apostasy are subject to virtually all of the traditional legal consequences of apostasy except physical death, which in Egypt takes the form of civil death – an apostate's marriage is annulled; is not allowed to remarry, even to a non-Muslim; is excluded from inheritance; and blood ties with children are considered severed.[8]

With regard to speech delivered in a religious context, the rise of so-called political Islam has been matched by concern by many Egyptian citizens and government leaders with the political content of some such speech, including what is viewed by many as the inflammatory content of sermons preached by some imams during Friday prayers, especially some affiliated with or sharing the political views of the Muslim Brotherhood and more radical Islamist elements. Those public and government concerns have increased along with the frequency of terrorist attacks because the legitimizing ideologies of the organizations and individuals perpetrating most such attacks in Egypt are couched in Islamic (or pseudo-Islamic) terms. Based on such concerns, the government views it as both a social and public safety imperative to regulate both the persons delivering and content of sermons taught during Friday prayers.

Consequently, the Ministry of Islamic Endowments (*Awqaf*) requires that all mosques be licensed. The Ministry, headed by an Al-Azhar scholar, licenses and pays the imams who deliver sermons in those mosques, and since September 2013 requires graduation and

certification from Al-Azhar for appointment, stripping thousands of imams lacking such credentials of their preaching licenses. Moreover, it is now required that all licensed imams deliver their Friday sermons based on Ministry-issued talking points that include the subjects of tolerance and non-violence.

In matters of family and personal status law, Islamic law is applied to Muslims, while, to the extent such religious laws exist, the canon law of Christians is applied to Christians, and Jewish law is applied to Jews. Adherents of other religions, such as the Baha'i, are in a legal void, essentially legal non-entities. (The national identity cards of Baha'is have a dash in the space indicating religion.)

There is no such thing as civil marriage in Egypt, and only marriages of Muslims, Christians, and Jews are recognized. (Baha'i marriages are unrecognized, which creates a myriad of legal issues and difficulties in areas such as banking, real estate, inheritance, and sometimes even school registration.) Muslim men may marry non-Muslim women, but not the other way around. Divorce is relatively easy for Muslims, but is generally prohibited by the Coptic Orthodox Church unless a spouse commits adultery or converts to a different faith. If a non-Muslim woman converts to Islam but her non-Muslim husband does not, then their marriage is declared void and the woman is granted custody of her children (often resulting in serious intercommunity strife). Inheritance law is complicated and dependent upon the religious status of the parties.[9]

The obvious question arises of how such major differences in legal status and treatment of citizens can be justified in light of the first sentence of Article 53 of the 2014 Constitution:

> Citizens are equal before the law, possess equal rights and public duties, and may not be discriminated against on the basis of religion, belief, sex, origin, race, color, language, disability, social class, political or geographical affiliation, or for any other reason.

The answer is that the equality provisions of Article 53 seem absolute only when read in isolation, without also giving due consideration to the provisions in Articles 2 and 3 requiring the intertwining of the laws of religion and government. Untangling such issues when raised by litigants is the role of the SCC.

SCC jurisprudence

With Article 2 expressly grounding Egypt's national law in Islamic law, except for issues of personal status and religious affairs of Christians and Jews as carved out for them by Article 3, two questions naturally arise: (1) which view of Islamic law governs; and (2) of even greater practical importance, who decides?

The answer to the latter question, said Justice Adel Omar Sherif in his conference remarks, is the SCC, of which he is a Deputy Chief Justice (and teacher of Islamic law). He pointed out that when Islamic law becomes government law, it must be interpreted and decided by an institution with government enforcement authority. Article 192 of Egypt's Constitution entrusts that role of ruling on the constitutionality of laws, including their legitimacy under Islamic law, exclusively to the SCC.

Over the years, it has become apparent that the SCC strives to interpret the constitution as an organic whole rather than piecemeal – important because Egypt's Constitutions generally include something for everyone, sometimes inconsistently – and the court generally adheres as much as possible to its past jurisprudence. Among the principles upon which the SCC has taken a firm stand in developing that jurisprudence (sometimes to the consternation of the

political branches) are separation of powers, a commitment to equitable social and economic policies, and a now-constitutionally mandated commitment to international norms of human rights.

The first issue concerning Article 2 faced by the SCC was whether Article 2 was even justiciable, whether its application involved essentially political or religious questions in which the judiciary should avoid entanglement. It was probably for that reason that the court waited several years after the cases were filed before issuing its first rulings in Article 2 cases.

When it did announce the first two rulings on May 4, 1985, the first case illustrated the dilemma faced by the court if it chose to apply Article 2 retroactively. The issue was whether a seller of supplies to Al-Azhar University could charge interest on late payments. Al-Azhar took the position that charging such interest violated Islamic law and, in light of the 1980 amendment of Article 2, was therefore unconstitutional. Rather than decide that controversial issue, with all its potential for huge economic consequences, and simultaneously avoiding a potential battle for Islamic legitimacy with Al-Azhar, the court held that the amendment of Article 2 was non-retroactive, and that it was up to the legislature to decide whether to retain or alter pre-existing laws.[10]

The second case decided on the same day involved a challenge to the so-called "Jihan's Law" (named after President Sadat's wife, who reputedly pushed for its enactment), which increased a woman's rights relative to those of her husband when the husband sought a divorce. In its ruling, the SCC applied its non-retroactivity doctrine regarding Article 2, but nevertheless struck down the law on the ground that President Sadat exceeded his emergency powers during a legislative recess because the law did not involve a matter requiring urgent action.[11]

In that opening pair of cases the SCC made three points clear: (1) it would not use Article 2 to disrupt the existing legislative scheme; (2) it would nevertheless engage in Article 2 review of future legislation; and (3) it would not hesitate to strike down laws the court deemed unconstitutional.

In subsequent Article 2 cases, the SCC has established itself more as a referee than an Islamic rule-maker, enforcing broad outer limits within which the government can enact laws with Islamic legitimacy. A jurisprudence has emerged that is in some respects fairly clear and in others still developing, evidencing a preference for deciding issues on a case-by-case basis. What is clear is well summarized by Clark Lombardi:

> [T]he SCC in its Article 2 jurisprudence has explicitly adopted several theses common to theories of Sunni Islamic law: a government in power is permitted to enact whatever statutes it chooses, so long as it satisfies two tests. First, its legislation must not force Muslims to violate universally applicable rulings of Islamic law, which [the court] defines as rulings that are certain "with respect to authenticity and meaning". Second, its legislation must advance the "goals of the sharī'a".[12]

Because the SCC has found few absolutely certain rulings in Islamic law, by far the most important test is whether the challenged legislation advances or conflicts with the goals of the sharī'a.

In a 1995 case, a landlord raised a constitutional challenge to a law requiring landlords to transfer an apartment lease to remaining members of a tenant's household after the tenant died or vacated the property. The landlord raised property rights arguments based in part on Article 2. In discussing the Article 2 issue, the court found no certain answer to the issue in Islamic jurisprudence, but nevertheless found that a general policy of Islamic law protects the right to use and dispose of private property as its owners deem fit, so long as those actions do not violate some other principle or goal of Islamic law. In vindicating the

plaintiff's property rights, the result was presumably satisfying both to liberal business interests and conservative Islamists.[13]

In 1996, the SCC was asked to strike down an edict by the Minister of Education prohibiting the wearing of the *niqab* (full face veil) in public schools. Although the SCC upheld the constitutionality of the ministerial decree, which probably upset many Islamists, the court did so based on an analytical framework and methodology that most Islamists in Egypt appear willing to accept as legitimate. The court articulated its standard that legislation will be struck down if it contradicts absolutely certain rulings in Islamic law based on authentic and clear sources of authority. After finding no such clearly binding ruling on the subject that is applicable universally at all times and in all circumstances, the court turned to the question of whether the law violated or impeded the general goals of Islamic law, and concluded that the principles governing modesty in dress of women have differing application in differing times and contexts. The goal of the sharī'a was the promotion of dress that was as modest as possible. Given the fact that reasonable Muslim minds differ as to what is modest, the court could not find that the ministerial decree violated that goal.[14]

Eventually, as the court is called upon to decide close cases that will surely arise, the court may find it difficult to remain a referee, rather than becoming a rule-maker, due to the need to decide which competing view of the sharī'a shall be controlling. Will the court eventually be forced to choose as its going doctrine from among the various strongly held and sometimes conflicting understandings of the principles and goals of the sharī'a? If so, then perhaps Lombardi will be proven correct when he observes, "Patterns in the court's reasoning suggest that the justices of the SCC would prefer that their theory evolve in a progressive fashion and that it be applied to develop a liberal interpretation of Islamic law".[15]

On the other hand, perhaps the SCC will avoid choosing which interpretation of Islamic law to apply, including its own. Perhaps, as seems most likely, the court will instead treat *all* of the mainstream schools of thought regarding Islamic law, including modern thought, as being equally legitimate by expressing a standard of review in which the issue is whether the law in question can be justified under *any* of those legitimate schools of thought, and, if so, then the law in question will be upheld as within the bounds of legitimate Islamic law.

Either way, Lombardi's analysis of the SCC's view of the overarching policy imperative of the sharī'a will probably dominate its jurisprudence:

> To determine whether a state law advances [the] general goals [of the sharī'a], the Court seems to ask primarily whether that law impedes what the justices consider to be the general welfare. . . . They treat the enjoyment of human rights . . . as axiomatically good, and the justices have been reluctant to consider just or beneficial any principles that would require (or even permit) the violation of international human rights norms.[16]

The issue of apostasy from Islam

As previously noted, Egypt has no law specifically directed at punishing apostasy from Islam (*ridda*). But, that does not mean acts deemed to constitute apostasy go unpunished, whether by the government, courts, or by others who take the law into their own hands in the supposed name of Islam.

An example of the latter is the case of the 1992 murder of Farag Fawda (sometimes transliterated from Arabic as Faraj Foda). Fawda was a Muslim professor and author fiercely and often caustically critical of the Islamist movement in Egypt and many of its most prominent leaders, mocking their views of political Islam as "religious delirium" and maintaining

that they saw democracy only as a means to their undemocratic end of gaining control of the reins of government and consolidating their power sufficiently to establish their vision of an Islamist state. He was also critical of what he regarded as pandering by the government to a popular religiosity that he considered to be only a superficial and largely hollow vision of Islam. His mocking and caustic rhetoric in making his arguments offended many, including a group of senior scholars at Al-Azhar University who publicly accused him of being a secularist and of blaspheming against Islam. Within days, two men associated with the (at least then) violent Islamist extremist group *al-Gama'a al-Islamiyya* shot and killed Fawda.[17]

In a public statement issued after the assassination, *al-Gama'a al-Islamiyya* claimed responsibility, and said Fawda was killed as an apostate because of his beliefs and his public statements advocating for separation of religion and state and favoring the existing legal system of Egypt rather than one that implemented sharī'a (as his killers and their supporters viewed it).[18]

During the trial of those accused of committing or being actively complicit in Fawda's murder, the defense called as a witness a prominent Al-Azhar scholar, Shaykh Muhammad al-Ghazali, a member of what was then called Al-Azhar's Islamic Research Council (now Council of Senior Scholars). Al-Ghazali testified that the penalty under Islamic law for apostasy is death, that it is the duty of the government to put apostates to death, and when the government fails in that duty then others have the right to kill the offender and should face no punishment for doing so.[19] (At about that same time, Al-Ghazali published an article titled, "No Punishment in Islam for Anyone who Kills an Apostate".[20]) Al-Ghazali's testimony in the high profile trial did not prevent the conviction and execution of one of the attackers,[21] but it did stir up what one scholar characterizes as "[h]eated discussions . . . between Muslim scholars, lawyers, human rights activists, journalists and other liberals". And, "the issue produced an unprecedented split in Egypt's educated elite", with no clear resolution.[22]

Soon thereafter came the even more widely publicized case of Dr. Nasr Hamid Abu Zayd, about which much has been written, which resulted in the judicial annulment of his marriage over the objections of both spouses, and in Dr. Abu Zayd's flight from Egypt in the face of death threats.

Dr. Abu Zayd was an Associate Professor of Arabic Language and Literature at Cairo University, and had published several works on the subject of Qur'anic hermeneutics. He was Muslim and continued to identify himself as being a faithful Muslim throughout his life. In 1993, however, his application for promotion to full professor was at first denied in the face of an objection voiced by a particularly strident opponent on the advancement committee who viewed his scholarly writings as an affront to Islam.[23] Later, the advancement committee reversed its decision and promoted Abu Zayd to full professor, but if anything that only fueled the anger of his antagonists, who did not quit.

Along with a few others, the professor leading the opposition to Abu Zayd's academic advancement filed a legal action in Egypt's civil court system seeking a judicial declaration that Abu Zayd's marriage was void on the ground that he had committed blasphemy and was therefore an apostate, ineligible under Egyptian law to be married to a Muslim woman.

The fact that Abu Zayd's wife did not want a divorce was legally irrelevant under then-prevailing Egyptian law. The plaintiffs were considered to have legal standing to bring the action on the basis of the controversial procedure in Islamic law known as *hisba*, under which any Muslim is allowed to file a legal action against a fellow Muslim alleging a violation of the rights of God or the essential elements of Islam. Some have criticized the *hisba* doctrine as amounting to legal vigilantism, while others defend it as a means by which the Muslim community as a whole is empowered to protect itself.

The court of first instance ruled in Abu Zayd's favor, but the Court of Appeals reversed that decision and ordered his marriage annulled, and in 1996 the Court of Cassation (the supreme court of Egypt's common court system), upheld the legality of the Court of Appeals ruling.[24] Faced with death threats that in the wake of the killing of Farag Fawda he had to take seriously, and to escape the legal dissolution of their marriage against their will, Abu Zayd and his wife moved to the Netherlands, where he pursued an illustrious academic career until his death in 2010 during a visit to Cairo, where he was buried.[25] (During the conference preceding publication of this book, Justice Adel Omar Sherif of the SCC expressed his opinion that the outcome of the case would likely be different were it to have arisen today.)

For purposes of this discussion, the most instructive portion of the Court of Appeals' judgment order concerns the distinction it drew (or attempted to draw) between freedom of belief and the crime of apostasy, and its statement of the justification for punishing apostasy:

> The Court notes that there is a difference between apostasy, which is a material action with its basic elements and conditions . . . and belief (i'tiqad). Apostasy is necessarily comprised of material acts having an external existence. Such acts must make manifest, in a manner undeniable and without dissent, that one has called God Most High a liar, and the Prophet, peace be upon him, a liar by denying what he has brought to Islam. . . . Belief, however, differs clearly from apostasy. For apostasy is a crime whose basic material elements are presented before a judge to decide whether it exists or not . . . but belief concerns what is in the interior of a human being's self, belonging to his domain of secrecy. It is neither a matter of judicial probing, nor of investigation by people, but is to do with the relationship between the human being and his Creator.

Apostasy is a breach of the Islamic order, at its highest degree and most valued foundations, through manifest, material actions. In positive law, it comes close to a breach of the order of the state or high treason. Apostasy is investigated by the judge or the *mufti*. However, the punishment for assaulting religion through [an act of] apostasy does not contradict personal freedom. This is because freedom of belief (*'aqida*) requires that one be sincere (*mu'minan*) in his words and acts, and [so] one has a sound logic in abandoning belief. But a breach of Islam can only be due to the corruption in thought or the lure of material, sexual, or other worldly purposes. To combat this category [of desire] is not considered combat against freedom of belief, but rather the protection of belief [of others] from such vain, corrupt passions.[26]

In upholding the judgment of the Court of Appeals, the Court of Cassation made a similar distinction between belief and the crime of apostasy:

> Merely believing the afore-mentioned [referring to the courts' interpretation of Abu Zayd's writings] is not considered apostasy, unless it is embodied in words or actions. According to the majority of the Muslim legal scholars, among them the Hanafis, it suffices to consider a person an apostate once he deliberately speaks or acts in unbelief, as long as he meant to be degrading, contemptuous, obstinate, or mocking.[27]

Those views largely echoed those previously expressed in 1980 in separate litigation by Egypt's Supreme Administrative Court (distinct from the SCC):

> Since Islam protects the freedom of belief – for Islam may not be forced on anyone – freedom of belief as granted by the Constitution means that each individual may freely embrace whichever religion he believes without constraint. However, this freedom

> does not restrict the application of the Islamic shari'a to those who embrace Islam. The State's religion is Islam. . . . Since the plaintiff has embraced Islam, he must then submit to its law which does not condone apostasy.[28]

In essence, the reasoning expressed is a form of implied consent: in choosing to embrace Islam, a citizen implicitly consents to the application of Islamic law. The obvious flaws to that reasoning are two-fold: (1) in Egypt, citizens' religion is considered determined by birth, not by choice, based on the religion of their parents, or in Islam by virtue of their father being Muslim; and (2) given the wide range of views among Muslims regarding Islam and among scholars on most issues regarding the dictates of Islamic law, it cannot be reasonably inferred with sufficient certainty to support a court judgment imposing substantial civil or criminal penalties that a Muslim litigant, simply by virtue of the status of being Muslim, has voluntarily consented to and thereby waived any right to object to the full spectrum of potential views any particular court may take regarding the application of Islamic law.

An even more readily apparent aspect of both the Court of Appeals and Court of Cassation judgments in the Abu Zayd cases is the conflation of blasphemy with apostasy, especially in light of the fact that throughout the proceedings and his life Abu Zayd steadfastly insisted that he was a Muslim believer. By declaring him to be an apostate on the basis of the liberal nature of his views regarding understanding the Qur'an and the tenets of Islam, the courts in effect engaged in *takfîr*, the practice of declaring self-professed Muslims to in fact be unbelievers (*kafir*), or infidels, essentially a form of excommunication from Islam.

The great irony (to put it politely) is that the practice of *takfîr* is widely regarded within Islam as being an extraordinary measure justified only in the most extreme and most clearly unavoidable circumstances. Consider the statement of what can be legitimately characterized as a super-consensus (*ijma*) among major Islamic scholars embodied in the Amman Message:

> [I]t is neither possible nor permissible to declare as apostates any group of Muslims who believes in God, Glorified and Exalted be He, and His Messenger (may peace and blessings be upon him) and the pillars of faith, and acknowledges the five pillars of Islam, and does not deny any necessarily self-evident tenet of religion.[29]

The practice of *takfîr* is widely rejected in Egypt by even most fundamentalist Islamists, at least with regard to Sunni Muslims.[30] Moreover, it is widely recognized within Islam that to err in leveling a judgment that a self-professed Muslim is *kafir* is a major sin – accuser beware.

To frame the irony even more starkly, neither the Egyptian state nor its courts declare even radical Islamist terrorists who expressly couch their legitimizing ideology in Islamic (or pseudo-Islamic) terms to be apostates. Yet, Farag Fawda and Nasr Abu Zayd, both self-professed Muslims who staunchly maintained their faith in Islam, were declared to be apostates.

Probably in large measure as a result of the international notoriety generated by the Abu Zayd case, the Egyptian legislature subsequently amended the *hisba* laws to restrict the right to bring legal actions on the basis of *hisba* to the Public Prosecution Office of the Prosecutor General. That has not stopped the filing of *hisba* complaints with the Public Prosecution Office, usually as a means of generating adverse publicity against the supposedly offending party, but now the Prosecutor General has the right to decline to take any legal action. The flip side of that coin, however, is that the Prosecutor General does have the right to take legal

action in civil courts against Muslims and their marriages based on citizen complaints alleging apostasy of one or both spouses.

Moreover, even though at present there is no Penal Code provision expressly relating to apostasy, there appears to be a realistic potential that at some point in the future such a law may receive enough support in a popularly elected legislature to be enacted. A 2013 Pew Research Center report found that 74 per cent of Egyptian Muslims queried favored making sharī'a the law of the land, and of that group 86 per cent (64 per cent of the total) favored imposing the death penalty for apostasy.[31]

To date, the SCC has not been called upon to decide the issue of the constitutionality of a law that penalizes apostasy either on its face or in its application. But, if it does, then based on the SCC's past approach to deciding other cases involving issues involving the application of Islamic law, it seems likely that the justices of the SCC will distinguish between (1) a bare change in personal belief and respectful expression of that belief versus outward acts based on religious belief that violate religion-neutral penal code provisions, such as those relating to terrorism or prohibiting speech intentionally aimed at creating civil strife; and, more generally, (2) abandonment of belief in Islam in the context of modernity versus the very different context that existed in Islam's classical age during which the traditional view regarding the basis for punishing apostasy was developed.

In doing so, the SCC will almost surely note, either on its own or as a result of evidence and arguments presented by litigants, that the oft-repeated claim of the existence of consensus (*ijma*) among classical scholars that death is required as a penalty for apostasy is an overstatement – a strong majority view, yes, but not without a legally significant number of prominent dissenters. The court will also inescapably note or be made aware that the proposition that killing apostates is a duty of the modern-day state is rejected by a sizeable and growing number of highly qualified, well-respected scholars, including, as discussed below, a recent Grand Mufti of Egypt. One point on which there is widespread agreement, even among its proponents, is that the view that the death penalty is required for apostates was promulgated by scholars who lived and analyzed legal issues in the context of a long-gone world predating the advent of the modern nation-state, a world in a constant state of war or preparing for war, such that to abandon Islam necessarily included switching sides to a mortal enemy, tantamount to treason. The difference in views today revolves mostly around the question of whether the rationale for the traditional rule is timeless, or context-specific.

In support of the view that Islamic law does not require the death penalty for apostasy in the context of modernity (if ever), litigants will likely cite or the court will itself note an official *fatwa* (authoritative ruling on the application of Islamic law to a given circumstance or question) issued by a recent Grand Mufti of Egypt, Sheikh Ali Gomaa, who served as Grand Mufti for ten years until retirement from office in February 2013. That *fatwa* was in response to the question, "Some people claim that Islam infringes on freedom of belief by permitting the execution of apostates. Is that true?" After reviewing some of the pertinent authorities, Sheikh Gomaa concludes that the historical practice of executing apostates was "unrelated to freedom of belief, freedom of thought, or persecution". Rather, he said, the texts calling for the death penalty

> do not refer to leaving Islam as much as coming out against Islam. Coming out against Islam is considered a crime against the public order of the state. . . . In this case apostasy is tantamount to high treason.

After citing the supporting view of a prominent former Sheikh of Al-Azhar, Mahmoud Shaltut, Sheikh Gomaa continues, "The [historical] execution of apostates was not just for

apostasy. Rather, it was due to an additional factor that divides the Muslim community: using apostasy to cause Muslims to leave their religion". He concludes,

> It is clear that the issue of executing apostates is not actually applied in the reality of everyday life. This ruling is found in the sources of law not as a punishment preventing freedom of thought and belief, but rather something that is subject to administrative law.[32]

The legal significance of Sheikh Gomaa's *fatwa* is two-fold: (1) regardless of how apostasy may be viewed in other countries, his *fatwa* carries particularly great legal weight in Egypt because it was issued in his official capacity as Egypt's Grand Mufti; and (2) he clearly defines the historical rationale and thus the outer limits of legitimacy of applying the death penalty (or any other punishment) for apostasy, namely that earthly punishment is justified for apostasy only when the offender not only leaves Islam as a matter of personal religious belief but also seeks to cause other Muslims to leave their religion, at which point – but only at which point – it crosses the boundary between freedom of religion to a potential violation of the state's civil or criminal laws prohibiting causing public disorder or damaging national unity.

That view is in accord with the analyses of such other prominent modern authorities in matters of Islamic law as S.A. Rahman, retired Chief Justice of the Supreme Court of Pakistan, as laid out at length in his book on the subject, *Punishment of Apostasy in Islam*;[33] of Taha Jabir Alalwani, who received his Ph.D. in *usul al fiqh* (principles of Islamic jurisprudence) from Al-Azhar University and is a founder and past president of the *Fiqh* Council of North America, as presented in his book, *Apostasy in Islam: A Historical and Scriptural Analysis*;[34] and of the large number of prominent modern scholars of Islamic law who signed an online statement rejecting the traditional position that apostasy from Islam, without more, is punishable by death.[35] The statement of the latter group of scholars includes the following pointed observation:

> Undeniably, the traditional position of Muslim scholars and jurists has been that apostasy (*riddah*) is punishable by death. The longstanding problem of the traditional position, as held by Classical jurists or scholars, can be explained and excused as not being able to see apostasy, an issue of pure freedom of faith and conscience, separate from treason against the community or the state. However, the accumulated experience over the history in terms of abuse of this position about apostasy even against Muslims as well as the changed context of a globally-connected, pluralistic society should help us appreciate the contemporary challenges in light of the Qur'anic norms and the Prophetic legacy. In this context, while the classical misunderstanding about this issue of apostasy is excusable, the position of some of the well-known contemporary scholars is not.[36]

However, such evidence and arguments, even if accepted by the court as meritorious, may be insufficient in themselves to carry the day for litigants seeking an SCC ruling striking down a law requiring the death penalty or any other civil or criminal penalty for apostasy (without more). The fact would still remain that unless the court were to choose one legitimate view of Islamic law over another, which the court is generally loath to do if it can be avoided – although this could be an issue on which it would be considered unavoidable – in the face of a multiplicity of views among scholars the court would be unable to hold that such a law violates all legitimate Islamic schools of thought.

What the court could do – and in the view of this author should do – is invoke the norm of freedom of choice in religion found throughout the Qur'an, including the statement, "There is no compulsion in religion;"[37] the freedom of belief and practice provisions of Article 64 of

the Constitution (even with its authorization of government regulation of the practice of religion); and – most decisively – the provision of the Constitution prohibiting the government from regulating the exercise of rights to the point of unduly limiting much less extinguishing them, as stated in Article 92: "No law that regulates the exercise of rights and freedoms may restrict them in such a way as infringes upon their essence and foundation".

It would be difficult for the court, even if it were inclined to do so (which this author deems doubtful), to escape the legal conclusion that government execution of Muslims who leave Islam as a matter of personal religious belief would be the ultimate restriction and infringement on the essence and foundation of their freedom to choose in matters of religion, as guaranteed by both the Constitution and Qur'an. Even the functional equivalent of civil death for apostasy, without more, would presumably be held to be to violate the essence of the Constitution's guarantee of freedom of religion.

Where the line can permissibly be drawn between regulation and undue restriction of rights guaranteed by the Constitution is the kind of question that lies at the heart of the SCC's mission.

However those lines are drawn, Article 92 is likely to be the pivotal provision in the 2014 Constitution protecting both religion and government from each other, or at least limiting the damage to both.

Notes

1 Clark B. Lombardi, *State Law as Islamic Law: The Incorporation of Sharī'a into Egyptian Constitutional Law*, chapter 7 (Leiden: Brill, 2006).
2 Ibid.
3 Ibid.
4 "Egypt 2013 International Religious Freedom Report", accessed October 7, 2015, http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?year=2013&dlid=222287: 2–3.
5 For a discussion of interpretations and application of ICCPR Article 18(3) and the virtually identical language in European Convention of Human Rights Article 9(2) by the United Nations Human Rights Committee and European Court of Human Rights, see W. Cole Durham, Jr., "Religion and the World's Constitutions" in *Law, Religion, Constitution: Freedom of Religion, Equal Treatment, and the Law*, ed. W. Cole Durham, Jr., *et al.* (Farnham: Ashgate, 2013) Kindle edition, under "Autonomy and Standards of Review", pp. 3–36.
6 Penal Code Section 98-F authorizes a minimum of six months and up to a maximum of five years of detention for anyone who exploits and uses religion in any form of speech to instigate sedition and division or disdain or contempt for any of the heavenly religions or the sects thereto, or to otherwise prejudice national unity. (accessed 6 October 2015). Other examples of prosecutions under that and similar laws are summarized in "Egypt 2013 International Religious Freedom Report": 9–10.
7 The Islamist televangelist convicted and sentenced under that provision was Ahmed Abdallah, also known as "Abu Islam", accused of burning a Bible in a demonstration outside the U.S. Embassy on September 11, 2012. Daily News Egypt, "Abu Islam's Prison Verdict Reduced", accessed October 9, 2015, http://www.dailynewsegypt.com/2013/12/17/abu-islams-prison-verdict-
8 See Maurits S. Berger, "Apostasy and Public Policy in Contemporary Egypt", *Human Rights Quarterly* 25 (2003): 723–724.
9 "Egypt 2013 International Religious Freedom Report": 5–8.
10 SCC case no. 20 of judicial year 1 (May 4, 1985). See discussion in Lombardi, *State Law as Islamic Law in Modern Egypt*: 163–168.
11 SCC case no. 28 of judicial year 2 (May 4, 1985). See discussion at Lombardi, *State Law as Islamic Law in Modern Egypt*: 169–171.
12 Ibid.: 256.
13 SCC case no. 6 of judicial year 9 (March 18, 1995). See discussion at Lombardi, *State Law as Islamic Law in Modern Egypt*: 236–240.
14 SCC case no. 8 of judicial year 17 (May 18, 1996). Nathan J. Brown and 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)", *American University Law Review* 21, no. 3 (2006): 437–460.

15 Lombardi, *State Law as Islamic Law in Modern Egypt*: 257.

16 Ibid.

17 Amnesty International, "Egypt: Human Rights Abuses by Armed Groups", accessed October 7, 2015, https://www.amnesty.org/en/documents/mde12/022/1998/en/ (1998); Ana B. Soage, "Faraj Fawda, or the Cost of Freedom of Expression", *Middle East Review of International Affairs* 11, no. 2 (June 2007): 26–33.

18 Amnesty International, "Egypt: Human Rights Abuses by Armed Groups".

19 Tamir Moustafa, "Conflict and Cooperation Between the State and Religious Institutions in Contemporary Egypt", *International Journal of Middle East Studies* 32 (2000): 14; Taha Jabir Alalwani, *Apostasy in Islam: A Historical and Scriptural Analysis*, trans. Nancy Roberts (London: The International Institute of Islamic Thought, 2011): 12; Soage, "Faraj Fawda, or the Cost of Freedom of Expression". See also Nathan J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge: Cambridge University Press, 1997): 114.

20 "Al-Ghazali: No Punishment in Islam for Anyone who Kills an Apostate", *al-Hayah*, June 23, 1993 (as cited in Brown, *The Rule of Law in the Arab World*: 14 n.64).

21 Amnesty International, "Egypt: Human Rights Abuses by Armed Groups".

22 Alalwani, *Apostasy in Islam: A Historical and Scriptural Analysis*: 12–13. See also Soage, "Faraj Fawda, or the Cost of Freedom of Expression".

23 For extended discussions of Nasr Abu Zayd's writings found by his antagonists to be offensive to Islam, see Mona Abaza, "Civil Society and Islam in Egypt: The Case of Nasr Hamid Abu Zayd", *Journal of Arabic, Islamic and Middle Eastern Studies* 2, no. 2 (1995): 30–36; Muhammad Khalid Masud, "'Classical' Islamic Legal Theory as Ideology: Nasr Abu Zayd's Study of al-Shafi'i's *Risala*", accessed October 8, 2015, https://www.academia.edu/2179435/Classical_Islamic_Legal_Theory_as_Ideology: 4–7.

24 For an in-depth discussion of the course of litigation and substance of court rulings, see Hussein Ali Agrama, *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt* (Chicago: University of Chicago, 2012). Kindle edition: 45–52, 64–67.

25 Egypt Independent, "Nasr Hamed Abu Zaid: The end of a controversial scholarly legacy", July 5, 2010, accessed October 8, 2015, http://www.egyptindependent.com/news/nasr-hamed-abu-zaid-end-controversial-scholarly-legacy.

26 Cairo Court of Appeals, case no. 287 (1995) (as translated, with slight editing, in Agrama, *Questioning Secularism*: 50).

27 Court of Cassation, case nos. 475, 478, 481 of judicial year 65 (August 5, 1996) (as translated, with slight editing, in Berger, "Apostasy and Public Policy in Contemporary Egypt": 731).

28 Supreme Administrative Court, case no. 8 of judicial year 29 (April 1980) (as translated in Berger, "Apostasy and Public Policy in Contemporary Egypt": 736).

29 "Amman Message", Point 2, accessed October 9, 2015, http://ammanmessage.com/index.php?option=com_content&task=view&id=91&Itemid=74.

30 While the exceptionally broad consensus reflected in the "Amman Message" expressly declares adherents of Shi'a Islam to be Muslim, the relatively few Shi'a in Egypt are subject to substantial and sometimes deadly religious and political persecution. See Alam Saleh and Hendrik Kraetzschmar, "Politicized Identities, Securitized Politics: Sunni-Shi'a Politics in Egypt", *The Middle East Journal* 69 (Autumn 2015): 545–562.

31 Pew Research Center, "The World's Muslims: Religion, Politics, and Society", accessed October 9, 2015, http://www.pewforum.org/files/2013/04/worlds-muslims-religion-politics-society-full-report.pdf: 55.

32 Ali Gomaa, *Responding from the Tradition: One Hundred Contemporary Fatwas by the Grand Mufti of Egypt*, Tarek Elgawhary and Nuri Friedlander, trans. (Louisville: Fons Vitae, 2011): 83–86.

33 S.A. Rahman, *Punishment of Apostasy in Islam* (New Delhi: Kitab Bhavan, 2006 reprint of 1996 first edition).

34 Taha Jabir Alalwani, *Apostasy in Islam: A Historical and Scriptural Analysis*.

35 "Apostasy and Islam: 100+ Notable Islamic Voices Affirming the Freedom of Faith", accessed October 9, 2015, http://apostasyandislam.blogspot.com/.

36 Ibid.

37 Qur'an 2:256.