
Judicial institutions, the legitimacy of Islamic state law and democratic transition in Egypt: Can a shift toward a common law model of adjudication improve the prospects of a successful democratic transition?

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Egyptian law has undergone radical institutional change over the last 150 years, evolving from a decentralized system of largely uncodified Islamic law, into a highly centralized, positivist system modeled along the civil law system of France. The last quarter of the nineteenth century witnessed the wholesale adoption of European law, including the Napoleonic Code. After regaining independence, however, the Egyptian legal system has been steadily attempting to re-Islamize itself, beginning with the Sanhuri Code that replaced the Napoleonic Code in 1949 and the adoption of Article 2 in the Constitution in 1980 recognizing the Shari'a as the source of legislation for the Egyptian state. This article contrasts the jurisprudence of Egypt's Supreme Constitutional Court (SCC) construing the meaning of "shari'a" with the practice of ordinary Egyptian courts construing Egypt's civil code. It argues that the SCC has been able to garner a relatively high degree of legitimacy than the Sanhuri Code because its practice in construing the "shari'a" in constitutional challenges requires it to adopt common law style reasoning, while the ordinary courts are dominated by a positivist outlook on law which undermines its ability to claim Islamic legitimacy. This article argues that a broader shift to a common law culture would increase the Islamic legitimacy of Egypt's overall legal system; facilitate Egyptian courts' reconciliation with the constitutional commitments to Islamic authenticity, modernization, and human rights; and assist in Egypt's democratic transition.

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1. Legal hybridity and the legitimacy of post-authoritarian Arab legal orders

After a long and divisive battle, Egypt approved its first post-authoritarian constitution (the “2012 Constitution”) in a highly controversial referendum held in late December 2012.¹ Far from uniting Egypt’s disparate political factions, the constitutional drafting process exposed the deep fissures underlying the modern Egyptian republic.² One of the most divisive of these issues is the extent to which the modern Egyptian legal system ought to be dependent upon the “Shari’a,” or Islamic law. While Article 2 of the 2012 Constitution—which provides, among other things, that the principles (*mabādi’*) of Islamic law are the main source of legislation for the state—survives unchanged from the pre-revolutionary 1971 Constitution as amended in 1980, the 2012 Constitution added additional provisions concerning religion generally, and not just Islamic law.

The new Article 3 provides that the principles of the religious laws of Egyptian Jews and Egyptian Christians are the main source for legislation governing their religious communities and their family relations. The new Article 4 provides enhanced stature for the Azhar, the mosque-college that represents the official religious establishment in Egypt. This Article, in addition to recognizing the Azhar as an independent institution, also provides that “the views of the Committee of the Senior Scholars are to be taken into account with respect to all matters having a connection to Islamic law.” Most controversially, perhaps, was the new Article 219, which provides that “[t]he ‘principles of Islamic law’ include its universal textual proofs, its rules of theoretical and practical jurisprudence, and its material sources as understood by the legal schools constituting Sunni Islam.”³ The interaction of Articles 4 and 219 has led to fears among some commentators that the 2012 Constitution has essentially incorporated the entire body of Sunni law and legal doctrine—from the earliest periods of Islam to now—into Egypt’s system of positive laws and that it has ceded interpretive authority over this vast legal tradition to the clerics of the Azhar.⁴ Religion is relevant indirectly in other ways as well: the 2012 Constitution

¹ For the official Arabic version, see CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 26, 2012, http://egelections-2011.apppspot.com/Referendum2012/dostor_masr_final.pdf. For an unofficial English translation of the text, see <http://muftah.org/english-translation-of-egypts-new-draft-constitution>.

² Shadi Hamid, *Is There an Egyptian Nation?*, FOREIGN POLICY, Dec. 4, 2012, available at http://www.foreignpolicy.com/articles/2012/12/04/is_there_an_egyptian_nation.

³ For an overview of the new Art. 219, and its relationship to other provisions in the 2012 Constitution, including Arts. 2 and 4, see Nathan Brown & Clark Lombardi, *Islam in Egypt’s New Constitution*, FOREIGN POLICY, Dec. 13, 2012, available at http://mideast.foreignpolicy.com/posts/2012/12/13/islam_in_egypts_new_constitution.

⁴ See, e.g., Ziad Bahaa-ElDin, ‘Ashara Asbāb li-Rafḍ Mashrū’ al-Dustūr [Ten Reasons to Reject the Proposed Constitution], AL-SHURŪQ, Dec. 5, 2012, available at <http://www.shorouknews.com/columns/view.aspx?cdate=05122012&id=efaec23f-913a-4639-bad3-e61ee2474b62> (arguing that the interaction of these provisions creates ambiguity over which state institution has the final say over the validity of law, the parliament, the courts, or the Committee of the Senior Scholars at the Azhar).

contemplates, depending upon the specific content of legislation adopted in its wake, restriction of various rights in the name of moral values of the Egyptian people.⁵

At the same time, the 2012 Constitution reflects many conventional constitutional principles that are non-sectarian and consistent with secular liberal constitutional traditions.⁶ Thus, Article 5 affirms the notion of popular sovereignty. Article 6 affirms, *inter alia*, the democratic nature of the state; equal citizenship, pluralist politics, and the peaceful transfer of power among civil forces; the separation of powers; the supremacy of the law; and respect for human rights. Article 8 affirms the state's commitment to social justice and Article 14 affirms its commitment to economic development while striving for a fair distribution of national income.

Whatever else one might say about the 2012 Constitution, it accurately reflects the hybrid nature of Egypt's political and legal regime over the last 150 years: continuity with Islamic legal and religious traditions, while at the same time embracing as national goals modernization in the fields of the organization of the state, economic development, and a qualified acceptance of the post-World War II regime of international human rights law. Egyptian substantive law today, as is the case in much of the Arab world, is therefore a combination of uncodified rules of Islamic law, particularly in the area of family law, but also interstitially in other areas of the legal system;⁷ transplanted and partially-modified European codes; and positive legislation adopted by the state throughout the twentieth century claiming to be in conformity with Islamic law.

The Egyptian legal system thus reflects three sources of legitimacy. The first is the uncodified tradition of Islamic law, which was a combination of scholarly interpretations of revelation and decrees of ruling dynasts, and reflects the continuity of the modern Egyptian state with its Islamic past. This article will refer to this legal tradition as "Pre-Modern Islamic Law." The second is the legal transplant imported largely from Europe and represents the Egyptian state's commitment to build the institutions of a modern state that reflects ideals such as the rule of law and recognizes the responsibility of the state to promote the economic, social and even moral development of the state and its citizens. This article will refer to the transplanted European codes of the nineteenth century as "State Law" insofar as its legitimacy is expressly connected

⁵ Article 81, for example, prohibits legislation that eviscerates the rights set out in the constitutional text, but at the same time provides that the rights set out in the Constitution must be exercised consistently with Part I of the Constitution. Part I, for example, includes Art. 10 which declares the Egyptian family, whose foundation is "religion, morality and patriotism," to be a central part of the political and social order. For a criticism of the rights-restricting provisions of the 2012 Constitution, see Human Rights Watch, *Egypt: New Constitution Mixed on Support of Rights*, Nov. 30, 2012, available at <http://www.hrw.org/news/2012/11/29/egypt-new-constitution-mixed-support-rights>.

⁶ Ellis Goldberg, for example, observed that, in many respects, the most important source of influence for the 2012 Constitution was the constitution of the French Fifth Republic. Ellis Goldberg, *Drafting a Constitution: Part II*, NISRALNASR BLOG (Nov. 2, 2012, 10:38 AM), <http://nisralnasr.blogspot.ca/2012/11/drafting-constitution-part-ii.html>.

⁷ For an interesting and highly informative account of the interaction between Islamic law and civil law in the context of the last 150 years of Egyptian real property law, see RICHARD A. DEBS, *ISLAMIC LAW AND CIVIL CODE: THE LAW OF PROPERTY IN EGYPT* (2010).

to the legitimacy of the modern state-building project that began in the nineteenth century under Mehmet 'Alī and his descendants and continued by the Free Officers after the 1952 Revolution. The third source of legitimacy of the Egyptian legal system is the positive legislation of the modern Egyptian state that has been explicitly articulated as an attempt to articulate an Islamic legal sensibility that is consistent with the modernist project. The most important artifacts of this tradition have been the various legislatively enacted statutory reforms of Egyptian family law; the Egyptian Civil Code of 1949; and the adoption of Article 2 in Egypt's Constitution. This article will refer to this third tradition as "Islamic State Law."⁸ Islamic State Law represents the aspiration to reconcile the first two sources of legitimacy of the modern Egyptian state, and the extent to which it succeeds or fails is an important measure of whether the modern Egyptian political project itself succeeds or fails.

These three traditions, however, at least from an institutional perspective, have coexisted side-by-side in an uneasy, if not tense or even competitive, relationship, rather than in an integrated, mutually reinforcing political and constitutional order.⁹ In short, the hybridity of the Egyptian legal system is indicative, from a Rawlsian perspective, of a *modus vivendi* rather than an overlapping consensus.¹⁰ The gradual "inflation" of the Islamic grounds of legitimacy in Egypt and other post-Ottoman Arab states throughout the latter half of the twentieth century, and the first part of the twenty-first,¹¹ moreover, only brought these unresolved ideological conflicts into sharper relief. The deposed leaders of Arab authoritarian states such as Zayn al-Abidin Ben Ali of Tunisia and Hosni Mubarak of Egypt, and their respective supporters, exploited this ideological conflict to justify authoritarian political orders on the grounds that popular democracy would inevitably enable anti-liberal and anti-modernist forces to dominate state and society in the name of Islam.

The "Arab Spring," which has substantially empowered Islamic political parties such as the Nahḍa Party in Tunisia and the Freedom and Justice Party in Egypt, both with roots in the Muslim Brotherhood, has now brought a denouement to this theoretical debate. The long-standing unresolved ideological differences within the Arab world regarding modernization, the nature of state authority, and their relationship to Islam, are now on the table for democratic resolution. Successful resolution of these ideological conflicts could result in new, popularly recognized constitutions that could provide the Arab world with a constitutional template sufficiently stable to permit the consolidation of democratic institutions. On the other hand, failure to reach some kind of consensus on the "Islamic" question could presage a return to authoritarian systems of rule, thus vindicating, at least partially, the *ancien régime*.

⁸ Much has been written on the legal changes that took place in Egypt and other provinces in the Ottoman Empire in the nineteenth century and on legal modernization in the Arab world. See, e.g., NATHAN BROWN, *THE RULE OF LAW IN THE ARAB WORLD* (1997); WAEL HALLAQ, *SHARĪ'A: THEORY, PRACTICE, TRANSFORMATIONS* (2009); and NOAH FELDMAN, *THE RISE AND FALL OF THE ISLAMIC STATE* (2008).

⁹ TARIQ AL-BISHRI, *AL-WAD' AL-QĀNŪNĪ AL-MU'ĀSHIR BAYN AL-SHARĪ'A AL-ISLĀMIYYA WA AL-QĀNŪN AL-WAD'Ī* [*The Position of Modern Law: Between the Islamic Shari'a and Positive Law*] 5–6 (1996) (criticizing nineteenth- and twentieth-century reforms for creating parallel institutions rather than integrated ones).

¹⁰ JOHN RAWLS, *POLITICAL LIBERALISM* 147 (1996).

¹¹ Tamir Moustafta, *The Islamist Trend in Egyptian Law*, 3 *POLITICS & RELIGION* 610, 617 (2010).

One crucial question from the perspective of constitutional design that has been seldom discussed is the appropriate role for the judiciary in a system with conflicting ideological sources of legitimacy. This article takes the view that a common law system of adjudication is better poised to mediate these internal ideological problems than a civil law system which reduces law to the command of a sovereign. This calls for a radical reassessment of the role of courts and judges in post-Revolutionary Egypt, and by extension, other post-authoritarian Arab states which also suffer from ideological conflict rooted in religion and modernity.

2. State institutions, legal positivism and the controversial legitimacy of Islamic State Law

While much focus has been given to substantive questions of the compatibility of the norms of Pre-Modern Islamic Law and the extent to which they are or are not capable of substantively satisfying international human rights norms,¹² comparatively little attention has been given to the particular institutional context in which Islamic State Law has been articulated. If Islamic State Law, as a legitimating ideal, seeks to reconcile the historical tradition of Pre-Modern Islamic Law with the modernizing tradition of State Law, the question from the perspective of institutional design is what set of institutional arrangements would be most conducive to achieving legitimacy for Islamic State Law, and thereby enable the Egyptian state to pursue its goals of modernization, expansion of human rights while remaining faithful to Islamic conceptions of normativity? Legitimacy, for these purposes, means a legal system that is, simultaneously, (1) cognizably Islamic, (2) able to formulate and enforce rational public policy promoting economic and social development, and (3) responsive, even if it differs in certain details, in a meaningful way, from modern human rights norms, including gender equality, freedom of expression and freedom of religion.

The modern Egyptian state, however, instead of integrating the modernist and Islamic sources of its own legitimacy, has maintained separate and parallel institutions which derive their legitimacy almost exclusively from the extent to which they are responsive to their own internal constituencies. Even as Egypt was engaged in furious modernization projects in the wake of the Free Officers' Revolution of 1952, including modernizing judicial reforms which abolished courts applying Pre-Modern Islamic Law and incorporated them into the modernizing national courts system, it simultaneously undertook the reform and expansion of the educational reach of the center of Egyptian traditionalism, the Azhar, in an attempt to bolster the state's Islamic legitimacy.¹³ The principal *raison d'être* of the national courts meanwhile was

¹² See, e.g., Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT'L. L. REV. 379 (2006); and, ANN ELIZABETH MAYER, *ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS* (4th ed., 2007).

¹³ Malika Zeghal, *Religious Education in Tunisia and Egypt: Contrasting the Post-Colonial Reforms of Al-Azhar and the Zaytuna*, in *TRAJECTORIES OF EDUCATION IN THE ARAB WORLD: LEGACIES AND CHALLENGES* 115–116 (Osama Abi-Mershed ed., 2010).

to apply the now hegemonic system of State Law and insure that even the application of what remained operational of Islamic law was placed in the hands of graduates of modern law schools.¹⁴

The legal reforms that adopted State Law and displaced Pre-Modern Islamic Law which began in the nineteenth century and culminated in the mid-twentieth century responded effectively to the demands of those Egyptians who saw Pre-Modern Islamic Law as an obstacle to Egypt's modernization. Indeed, the principal justification given in the nineteenth century for the replacement of Pre-Modern Islamic Law with State Law was the general agreement among both leading Muslim statesmen and leading Muslim jurists that Pre-Modern Islamic Law was not particularly suitable to meet the challenges posed by the increasing threat of European imperialism.¹⁵ The codified model of State Law adopted by modern European states was viewed both as a tool that would make the state more effective through centralization and as a strategy for preserving national independence in the face of the threat posed by hostile European powers.¹⁶ As a result, modernizing states in the Arab world were particularly attracted to the civil law model because their ruling elites believed it would give them more control over the judicial system than the relatively decentralized system of Pre-Modern Islamic Law or even the English common law.¹⁷ It was the potential utility that the civil law model of legality offered to the nineteenth-century state-building project that commended it to Muslim ruling elites of that time, not a desire to adopt liberal norms of legality or to reject traditional Islamic conceptions of legitimacy.

At the same time, however, displacing the role of traditional religious elites from an effective role in the formulation and application of State Law even as they remained partially incorporated into the state structure by virtue of their role in education and the continued relevance of Pre-Modern Islamic Law to family law had the paradoxical effect of increasing their power over those segments of state policy which had been tacitly reserved to them. The long-term effect of these institutional policies was to set the stage for endemic conflict and competition between those groups in Egyptian society claiming to represent the state's Islamic legitimacy and those claiming to represent its modernist legitimacy.¹⁸

¹⁴ DEBS, *supra* note 7, at 56–71.

¹⁵ BROWN, *supra* note 8, at 58–59.

¹⁶ *Id.* at 48 (describing Egyptian decision to adopt French law as a “preemptive response to . . . imperialism.”). Brown also argues that Egypt's decision to adopt the Napoleonic Code in the nineteenth century, rather than an Islamically inspired code, was resolved in favor of the former largely because it was readily available to them at the time, while the Islamic code was still under preparation and thus not an immediately practical alternative. *Id.* at 30.

¹⁷ *Id.* at 58.

¹⁸ The sharp divisions between these two sources of legitimacy can perhaps best be seen in Egypt's approach to international human rights treaties, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), in respect of which Egypt entered a reservation with regard to the application of CEDAW to family law on the grounds that it was inconsistent with the norms of Islamic law which is based on the norm of equivalence and complementarity of spouses' rights rather than strict equality. See Declarations, Reservations and Objections to CEDAW, <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>.

The sharp conflict between the Egyptian state's modernist claims to legitimacy and its Islamic claims to legitimacy explains to a large extent the desire to create a modernized form of Islamic law that could be viewed as legitimate from the perspective of both sources of the state's legitimacy. The project to create an Islamic State Law, surprisingly perhaps, was led by Egypt's own class of professional, French-trained lawyers. The leader of this movement was 'Abd al-Razzāq al-Sanhūrī, an Egyptian legal scholar of comparative law who wrote extensively not only on Pre-Modern Islamic Law, but also the civil law and the common law.¹⁹ While there must have been many reasons that caused al-Sanhūrī to deem Egypt's Pre-Modern Islamic Law tradition relevant to its legal future, perhaps the key to understanding his turn to that tradition was his nationalism. Al-Sanhūrī understood that Egyptian independence meant that Egypt's legal culture also needed to be independent. For al-Sanhūrī, a *modernized* Pre-Modern Islamic Law represented a means by which Egyptian legal culture could gain independence: he found that Pre-Modern Islamic Law provided him with a ready-made legal language in Arabic that could be more easily adapted to the needs of the Egyptian state than the French civil code. Critically, al-Sanhūrī at no time advocated a return to the institutional structures that existed prior to the modern reform project, of which he was a part. Instead, he thought that Pre-Modern Islamic Law could be used to make that project more effective. To do so, however, Pre-Modern Islamic Law would have to be transformed into a body of rules consistent with the standards of contemporary legal science. He set out to do this, both theoretically and practically: theoretically, through modernist readings of Pre-Modern Islamic Law which recast traditional doctrines in modern terms; and practically, in connection with his works as primary draftsman for Egypt's new civil code (the "Sanhūrī Code") which would grant a modernized Pre-Modern Islamic Law a central place in Egypt's legal system.²⁰

Al-Sanhūrī's influence can hardly be underestimated: by recognizing formally a role for the Pre-Modern Islamic Legal tradition within State Law, al-Sanhūrī assured the continued relevance of that tradition precisely at a time when its continued legal relevance was increasingly in doubt. His impact, moreover, was not limited to Egypt: he also served as the primary draftsman for the codes of other Arab countries, including Iraq and Kuwait, thus allowing him to export his vision of a uniquely Arab legal system that would be a synthesis of Pre-Modern Islamic Law and the civil law system.²¹

¹⁹ For more on al-Sanhūrī and his contributions to modern Islamic law, see Enid Hil, *The Place and Significance of Islamic Law in the Life and Work of 'Abd al-Razzāq al-Sanhūrī, Egyptian Jurist and Scholar, Part I*, 3(1) ARAB L. Q. 33 (1988) and *Part II*, 3(2) ARAB L. Q. 182 (1988); 'Amr Shalakany, *Between Identity and Distribution: Sanhūrī, Genealogy and the Will to Islamise*, 8(2) ISLAMIC L. & Soc'y 201 (2001); and GUY BECHOR, *THE SANHURI CODE, AND THE EMERGENCE OF MODERN ARAB CIVIL LAW (1932–1949)* (2007).

²⁰ Different commentators have taken different approaches to answering the question of how "Islamic" is the Sanhūrī Code, sometimes taking a simplistic "inventory" approach which does nothing more than count the number of articles in the Sanhūrī Code that can be said to replicate substantive rules of pre-modern Islamic law. Other commentators have instead suggested that the influence of pre-modern Islamic law was much more subtle, but no less systematic on account of his sophisticated use of pre-modern Islamic law in drafting the Code. See, e.g., BECHOR, *supra* note 19, at 7 (arguing that pre-modern Islamic law in the Sanhūrī Code serves a "mediating, moderating and connecting role" between Islamic and modern traditions).

²¹ Brown, for example, described the legal systems of the Arab Gulf states as exemplary replicas of the Egyptian legal system. BROWN, *supra* note 8, at 128.

Indeed, one might say that al-Sanhūrī's determination to Islamize Egypt's civil code was a precursor for Article 2 of the Egyptian Constitution.

One question al-Sanhūrī failed to answer, however, was the legitimacy of an Islamized code promulgated by the institutions of a centralized and bureaucratized state. Pre-Modern Islamic Law received its legitimacy by virtue of a combination of the religious legitimacy of its representatives and their mastery of the complex discursive practices that constituted Pre-Modern Islamic Law. Al-Sanhūrī's proposal to create Islamic State Law, even if it was substantively Islamic, appeared to reinforce the notion that the law was an artifact of sovereign will rather than the product of the religious and discursive practices that constituted Pre-Modern Islamic Law, and to that extent it could still be impeached as not being truly "Islamic."²²

Indeed, one might say in criticism of al-Sanhūrī's vision of an Islamic State Law that there is an inherent tension between the positivist legal culture of the emergent civil law system in Egypt (and by extension, to other Arab states), and the decentralized and pluralistic discursive tradition that was constitutive of Pre-Modern Islamic Law.²³ There is little doubt that the legal class that emerged in Egypt as it simultaneously modernized and claimed to Islamize its legal system throughout the twentieth century also became increasingly positivist, in the sense that it became an article of faith that all law came from the state, and the role of the judiciary was simply to implement the legitimate laws passed by the state. Nathan Brown, for example, argues that the Egyptian judiciary has completely internalized a positivist conception of law which entails that the exclusive source of law is the state "as expressed in clear legislative texts."²⁴ Baber Johansen, too, in several articles on the role of Islamic legal norms in Egypt's modern legal system has repeatedly emphasized the point that to the extent that particular substantive rules within Egypt's contemporary legal system have an Islamic origin, they function within that system solely by virtue of their incorporation into the national system of positive law.²⁵ Similarly, Baudouin Dupret has emphasized the utter indifference with which Egyptian courts treat claims that involve "Islamic law," meaning, that the way Egyptian judges discharge their duties in cases involving rules which are historically derived from Islamic law is essentially

²² Indeed, this appears to be precisely the criticism that Hallaq has directed against "modern" versions of Islamic law: because they are embodied in a positivist system of law, they serve as mere Islamic window dressing to mask what is otherwise a thoroughly modernist project of domination for which law is an indispensable tool. HALLAQ, *supra* note 8, at 446–447.

²³ For a systematic overview of the legal culture of Pre-Modern Islamic Law, see WAEL HALLAQ, *AUTHORITY, CONTINUITY AND CHANGE IN ISLAMIC LAW* (2001).

²⁴ BROWN, *supra* note 8, at 126.

²⁵ See, e.g., Baber Johansen, *The Relationship Between the Constitution, the Sharī'a and the Fiqh: The Jurisprudence of Egypt's Supreme Constitutional Court*, 64(4) ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 881, 882 (2004). ("In the twentieth century, the *fiqh* norms that are introduced into the modern codes of the Arab states owe their validity to the fact that the national legislators has enacted them. In other words, these norms no longer qualify as a jurists' law."); and Baber Johansen, *Apostasy as Objective and Depersonalized Fact: Two Recent Egyptian Court Judgments*, 70(3) SOC. RES. 687, 687 (2003) (suggesting that because Egyptian courts which are adjudicating apostasy claims are national law courts, the decisions are cast in terms of "modern legal positivism that creates a new outlook on the legal and ethical outlook of Islam.").

no different than the way they would approach any case involving a rule that *lacks* an “Islamic” genealogy.²⁶

Dupret notes that “so long as a legal concept is used in a stable, unproblematic and unquestioned manner, [the question of its Islamic origin] has no special relevance to its current uses.”²⁷ Many rules within the Egyptian legal system, however, do not operate in an “unproblematic and unquestioned manner”: conservative Islamists may express skepticism that the rules exhibit sufficient fidelity to Islamic legal norms and more secular-minded Egyptians may criticize the very same or other rules as being sufficiently respectful of modern values of equality and human rights. In short, the legitimacy of al-Sanhūrī’s project of an Islamic State Law continues to be controversial, and according to some prominent commentators, the failure of the Sanhūrī Code to gain popular acceptance as “Islamic” must be taken as one its great failures.²⁸

If the Sanhūrī Code represented the first great effort by Egyptian jurists to establish an Islamic State Law, the constitutionalization of Islamic law in the form of Article 2 was the next step in this process. The next section will consider the relative success of Article 2 as construed by the Egyptian Supreme Constitutional Court (SCC) in garnering legitimacy for its interpretations of Islamic law.

3. The legitimacy of Islamic State Law: the Sanhūrī Code versus Article 2

Clark Lombardi has identified three strains of Islamic legal modernism in Egypt: neo-traditionalism, which identifies Islamic legitimacy with the clerical class, albeit one that has been, to some extent, modernized; neo-*taqlīd*, which identifies Islamic legitimacy as conformity with the clearly established and universal principles of Islamic substantive law as laid out in historically authoritative treatises of Pre-Modern Islamic Law; and neo-*ijtihād*, which identifies Islamic legitimacy in a reinterpretation of the revealed sources of Islamic law in a largely utilitarian manner.²⁹ Lombardi’s analysis of the SCC’s Article 2 decisions concluded that the SCC has not articulated an explicit method of determining what constitutes Islamic law for purposes of the Egyptian constitution, and instead it has adopted an approach that navigates between that of the

²⁶ Baudouin Dupret, *What is Islamic Law?: A Praxiological Answer and an Egyptian Case Study*, 24(2) THEORY, CULTURE & Soc’y 79, 88 (2007) (describing the practice of an Egyptian judge, even when applying “Islamic” rules, as one that seeks: “[T]o publicly manifest the correct accomplishment of his job. At this procedural level, it is obvious that the judge orients himself exclusively to the technicalities of Egyptian procedural law. These technicalities may include some reference to provisions explicitly relating to Hanafite or Maliki law, but this is always through the provisions of Egyptian law, as interpreted by the Court of Cassation.”)

²⁷ *Id.* at 86.

²⁸ Hill, *supra* note 18, Part II, at 85 (“If the *Shari‘a* rules become embedded in the modern, abstract language of codes so that they lose their identity except to the legally erudite, islamisation has not, for all practical purposes, taken place. The verdict on the popular and fundamentalist level, as to whether al-Sanhuri’s civil code is Islamic—or sufficiently so—must clearly be in the negative.”)

²⁹ CLARK LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT 78–99 (2006).

neo-*taqlīd* approach and that of the neo-*ijtihād* approach in a manner that maximizes its own interpretive freedom.³⁰

Although he describes the SCC's method toward Article 2 as a "pastiche,"³¹ he believes that it has nevertheless managed to secure for itself and its decisions a substantial amount of legitimacy, even in the eyes of more conservative Islamist elements in Egypt.³² Lombardi attributes the SCC's legitimacy to several factors. First, it has gone out of its way not to alienate any of the significant Islamist trends in Egypt,³³ even if it has vociferously asserted its independence *vis-à-vis* neo-traditionalist attempts to make Islamic State Law a product of contemporary clerical views.³⁴ Second, it has provided a public forum which hears and addresses complaints about the Islamic legitimacy of State Law in a fashion that takes the legal claims of those challenging the Islamic bona fides of state legislation seriously.³⁵ Third, although its flexible approach could be criticized on the grounds that it is result-oriented, its refusal to adopt categorical approaches to construing the meaning of Article 2 means, from a practical perspective at least, that Islamist elements who disagree with particular outcomes have no reason to conclude that the SCC is systematically biased against their interpretations of Islamic law.³⁶

If Lombardi is correct that the SCC has managed to secure its role as a responsible and therefore legitimate tribunal for arbitrating the Islamic legitimacy of Egypt's laws, why has the Sanhūrī Code failed to secure a similar degree of Islamic legitimacy among a wide sector of the Egyptian population? The answer to this paradox—the relative legitimacy of the SCC in contrast to the relative illegitimacy of the Sanhūrī Code—lies, in my opinion, in the differences in the legal culture of Egypt's civil law courts and the SCC. Egypt's ordinary courts, which are charged with applying the Sanhūrī Code, operate as paradigmatic civil law courts within a highly positivistic legal culture and, as a result, produce few written opinions that justify their decisions beyond citation to what the court believes is the relevant statutory provision.³⁷ The SCC, by contrast, operates in the fashion of a common law court, giving reasoned and sometimes lengthy opinions justifying its decisions and explaining its understanding of the Shari'a, and how the impugned rule relates to that conception of the Shari'a, even if the actual reasoning it uses, and the conclusions it reaches, may be controversial.³⁸

If the SCC's legitimacy has been earned, at least in part, precisely through its willingness to engage in a dialogue with competing conceptions of Islamic legality, it is somewhat ironic that the SCC may have inadvertently contributed to undermining

³⁰ *Id.* at 267.

³¹ *Id.* at 256.

³² *Id.* at 261.

³³ *Id.* at 179.

³⁴ *Id.* at 183.

³⁵ *Id.* at 261.

³⁶ *Id.*

³⁷ Boudroin-Dupret, *supra* note 26, at 87–90 (providing examples of Egyptian court cases in the context of family law disputes).

³⁸ LOMBARDI, *supra* note 29, at 201–256 (discussing Article 2 case law of SCC).

the Islamic legitimacy of the Sanhūrī Code when, in its very first Article 2 decision in 1985, the court insulated legislation adopted prior to the date of the amendment's enactment from challenge under Article 2.³⁹ Although its decision insulated the Sanhūrī Code from challenge under Article 2, it also deprived it of a potentially friendly public forum in which the Sanhūrī Code's Islamic *bona fides* could be publicly defended and upheld; and, the SCC's refusal to hear claims about the Sanhūrī Code's compliance with Article 2 may in itself strengthen the impression, at least among some Egyptians, that the Sanhūrī Code, in fact, is non-compliant with Article 2, or at a minimum, that the SCC lacks confidence that it could defend the Sanhūrī Code against an Article 2 challenge.

Ordinary Egyptian courts, when they are applying the Sanhūrī Code, by contrast, are not in the habit of giving a reasoned justification for their rulings in the fashion of common law courts. As a result, decisions of civil law courts have the appearance of simply being a tool for the enforcement of pre-determined sovereign commands without regard to the understandings of the parties before the court. And although Sanhūrī, as well as other academic lawyers, have engaged in substantial theoretical defenses of the Islamic character of the Sanhūrī Code,⁴⁰ the culture of civil law courts leaves little room for this reasoning to be communicated to litigants.

Moreover, al-Sanhūrī himself anticipated the continued need for a kind of backward reasoning, or what one might call “legal reverse engineering,” to defend the legitimacy of Islamic State Law. Thus, after arguing that adherence by modern Muslims to the Shari'a cannot mean that they are bound to the historical rules that previous generations of Muslim jurists had elaborated, al-Sanhūrī wrote:

This does not mean that the detailed rulings which prior generations and regions deduced through monumental efforts which deserve respect are to be abandoned; rather, the present must be tied to the past in a manner that does not bind the present in chains, thus bringing progress to a halt, but neither should [the present's] relationship to the past be cut so that the organic unity of the Islamic Shari'a, in its totality, ceases to exist.⁴¹

Civil law courts, however, and the positivist legal culture it sustains, are poorly equipped to perform the kind of historical reconciliation that al-Sanhūrī envisioned as necessary for his project of Islamic State Law to succeed. Indeed, from this perspective, even the Article 2 jurisprudence of the SCC must be viewed as deficient, whatever its merits or its relative degree of legitimacy. The deficiency of the SCC's approach to Article 2 stems from the wholly negative character of the SCC's Article 2 jurisprudence. It understands Article 2 solely as prohibiting the Egyptian state from adopting laws that violate what the SCC deems to be incontrovertible and immutable rules of Islamic law. As for those rules that are amenable to legal interpretation and evolution in the light of changed circumstances, the SCC has held that Article 2 is simply not

³⁹ *Id.* at 167.

⁴⁰ See, e.g., 'ABD AL-RAZZĀQ AL-SANHŪRĪ, MAṢĀDIR AL-ḤAQQ FĪ AL-FIQH AL-ISLĀMĪ [*The Sources of Obligation in Islamic Law*] (1953–1954).

⁴¹ 'ABD AL-RAZZĀQ AL-SANHŪRĪ, AL-SANHŪRĪ MIN KHILĀL AWRĀQIHĪ AL-SHAKHṢIYYA [*'Abd al-Razzāq al-Sanhūrī As Viewed From His Personal Papers*] 151 (Tawfiq al-Shāwī and Nādiya al-Sanhūrī eds., 2005).

relevant because the lawgiver, in these cases, is free to fashion its own rules without regard to the historical norms of Pre-Modern Islamic Law. As a result, the SCC has sanctioned an approach to Islamic State Law that is flexible, but also one that is indifferent to maintaining the integrity of Islamic law as a discursive tradition insofar as it does not generally undertake a reasoned demonstration “tying” the new rules to the old except at the most general and abstract level. Yet, this is precisely what seems to be required if Egyptian law is to effect a reconciliation between its commitment to modernism and Islamic authenticity.

4. Toward an Islamic state *common law* culture

Egypt, as a matter of its 1971 Constitution and its 2012 Constitution, and by virtue of the structure of the Sanhūrī Code, claims to be an Islamic law jurisdiction, albeit one committed to a modernized version of Pre-Modern Islamic Law developed through the modern institutions of the state. The reintroduction of the relevance of Pre-Modern Islamic Law to Egypt’s civil law system, however, has not seriously challenged Egypt’s positivist legal culture. One consequence of the incorporation of Islamic law within the Egypt’s prevailing positivist legal culture is that it potentially suffers from the same legitimacy gap that plagues Egyptian law generally and has led Egyptians to adopt extremely cynical and instrumentalist views of the law.⁴²

A turn toward common law methods of adjudication and statutory interpretation has a strong possibility of enhancing the legitimacy of Islamic State Law and therefore the legitimacy of Egypt’s political and legal order in the wake of the January 25 Revolution. The common law and Pre-Modern Islamic Law share many structural features which give good reason for thinking that a common law system of adjudication is better situated to reconcile the competing and at times contradictory claims of legitimacy that are characteristic of the modern Egyptian state. Common law judges, for example, give reasoned opinions in support of their rulings, something that is analogous to the practice of giving legal opinions (*iftāʾ*) in Pre-Modern Islamic Law.⁴³ Common law judges, through the institution of precedent, generally defer to previously decided cases, departing only when they can provide a reasoned

⁴² One of the ways that this legitimacy deficit manifests itself is in popular views of the law as being almost entirely instrumental, something that no doubt contributes to popular cynicism about the law and a willingness to defy it in circumstances when one can reasonably do so without fear of legal sanction. BROWN, *supra* note 8, at 128 (“there is little evidence that the Egyptian legal system has ever played any legitimating role in the eyes of most Egyptians (whose view of legal institutions has been extremely instrumentalist).”).

⁴³ The literature on *iftāʾ* and its role in Pre-Modern Islamic Law, has exploded in the last two decades. See, e.g., ISLAMIC LEGAL INTERPRETATION: MUFTIS AND THEIR FATWAS (Muhammad Khalid Masud, Brinkley Messick, & David eds., 1996); JAKOB SKOVGAARD-PETERSEN, DEFINING ISLAM FOR THE EGYPTIAN STATE: MUFTIS AND FATWAS OF THE DĀR AL-IFTĀʾ (1997); Muhammad Khalid Masud, *The Significance of Istiftāʾ in the Fatwā Discourse*, 48(3) ISLAMIC STUD. 341 (2009); Wael Hallaq, *From Fatwās to Furūʾ: Growth and Change in Substantive Islamic Law*, 1(1) ISLAMIC L. & SOC’Y 29 (1994); David Powers, *Fatwās as a Source for Legal and Social History*, 11(2) AL-QANTARA 295 (1990); and Kathryn Miller, *Muslim Minorities and the Obligation to Emigrate to Islamic Territories: Two Fatwās from Fifteenth Century Granada*, 7(2) ISLAMIC L. & SOC’Y 256 (2000).

basis to justify a change to the established rule, or distinguishing the case on its facts from the otherwise controlling precedent, thereby promoting a culture of adaptive but gradual legal change. So too, Pre-Modern Islamic Law, through the institution of *taqlīd*, established doctrinal baselines which bound judges, except to the extent that senior jurists could provide a reasoned justification for a departure from the pre-existing rule, or distinguished the new case on its facts from the otherwise controlling rule.⁴⁴ Finally, both the common law and Pre-Modern Islamic Law recognize the legitimacy of statutory law, but generally interpret statutory provisions against the background of preexisting principles taken from the common law or Pre-Modern Islamic Law.⁴⁵ Indeed, al-Sanhūrī himself, at least early in his career, understood Pre-Modern Islamic Law to be the functional equivalent of Egypt's common law (*al-qānūn al-‘āmm fī al-tashrī‘ al-miṣrī*), and drawing from that fact, he concluded that it continues to apply as Egypt's basic law until such time as positive legislation was enacted displacing it.⁴⁶

Common law courts, because of their commitment to following precedent, are more institutionally equipped to engage in the kind of historical dialogical reasoning that Sanhūrī rightly believed was required to ensure that Islamic State Law enjoys Islamic legitimacy. It seems, then, that before Islamic State Law can obtain greater legitimacy, ordinary Egyptian courts applying it need to adopt more of a common law culture, one that would compel them to offer reasons that go beyond citations to code provisions and compels them to demonstrate the intellectual continuity between, for example, the particular provisions of the Sanhūrī Code or other statutory provision the court is applying with the historical provisions of Islamic law. A common law culture of reasoned opinion giving would also force Egyptian courts to take into account modern challenges to other statutory provisions of the legal system taken from Pre-Modern Islamic Law that are facially inconsistent with various modernist commitments of the Egyptian state, including gender equality. To the extent that Egyptian courts would be required to hear claims challenging the legitimacy of various substantive rules, and provide written reasons defending their decisions whether to uphold or strike down the challenged statute, Egyptian courts could provide an institutional forum for dialogue between the heretofore competing sources of legitimacy within the Egyptian political and legal order.⁴⁷ The shift toward a common law system then could serve an integrative function over time as a systematic body of case law is developed in response to the demands of modernization, human rights and Islamic authenticity.

⁴⁴ See Mohammad Fadel, *The Social Logic of Taqlīd and the Rise of the Mukhtaṣar*, 3(2) ISLAMIC L. & Soc'y 193 (1996).

⁴⁵ Mohammad Fadel, *Ribā, Efficiency and Prudential Regulation: Preliminary Thoughts*, 25 WIS. J. INT'L L. 655, 683 n. 147 (citing Ḥanafī jurist Ibn ‘Abidin's discussion of application of Ottoman-era statute in the setting of a traditional Islamic court) (2008); *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991) (Congress "is understood to legislate against a background of common-law . . . principles").

⁴⁶ AL-SANHŪRĪ, *supra* note 40, at 128 (Oct. 19, 1923, entry no. 120).

⁴⁷ For examples, drawn from international human rights law and Pre-Modern Islamic Law, of how such reconciliation might take place, see Mohammad Fadel, *Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights*, 8(1) CHI. J. INT'L L. 1 (2007).

5. Illustrations of a new approach to Islamic State Law

The argument in Section 4 of this article suggests that Egyptian courts should, in reliance on Article 2, the new Article 219, and al-Sanhūrī's jurisprudential theory that Pre-Modern Islamic Law represents the common law of Egypt, construe positive legislation against the background of the legal principles embedded in Pre-Modern Islamic Law, much as do courts in the US when interpreting federal legislation. Egyptian courts should also be recognized as having broad power to "fill the gaps" in statutory legislation akin to the notion of federal common law in the United States using Sanhūrī's argument that the Shari'a represents Egypt's common law which remains in force until such time as duly enacted legislation displaces it. Such a stance would increase the Islamic legitimacy of Islamic State Law without necessarily undermining the substantive content of that law or creating a body of law that floats above the Egyptian state's democratic character; indeed, in many cases, taking such an approach to interpreting Egyptian statutory law could very well improve the substance of the law and even make it more egalitarian. A few examples are in order to illustrate the point.

5.1. Proof of harm in a divorce suit

In one of the earliest attempts by the Egyptian state to reform family law, the Egyptian Parliament in 1929 adopted a rule from the Mālikī school of jurisprudence that permitted a woman to obtain a judicial divorce based on a relatively flexible standard of harm or abuse.⁴⁸ This represented a sharp retreat from the official position of the Ḥanafī school—which represents the default legal regime for the family law of Muslims in Egypt—which only recognized judicial divorce in a very narrow set of cases which did not include abuse. While the Parliament changed the substantive rule of decision, it did not consider the procedural aspects of a spousal claim for divorce on the grounds of abuse, and as a result, Egyptian courts continued to apply Ḥanafī evidentiary rules to an aggrieved wife's claim of divorce based on harm: two male witnesses, or one male and two female witnesses.⁴⁹ Unsurprisingly, Egyptian women were often in a position where they could not assert their legal right to a judicial divorce because they were unable to satisfy the evidentiary requirements of Ḥanafī law. This mismatch between the remedy set out in Article 6 of Law no. 25 of 1929 and generally applicable Ḥanafī evidentiary law is unsurprising given that the Ḥanafīs did not, in the first instance, recognize a substantive right of women to obtain a divorce based upon abuse; however, if Egyptian courts had the powers of a common law court, and had they used those powers to consult Mālikī jurisprudence on the theory that it, too, was part of Egyptian common law (since it was part of the Shari'a), they could have filled the gap between the statutory remedy and otherwise applicable rules of evidence by adopting the less-demanding Mālikī evidentiary rule that governs a wife's claim of

⁴⁸ Law no. 25 of 1929, Art. 6 in DAWOUD SUDQI EL ALAMI & DOREEN HINCHCLIFFE, *ISLAMIC MARRIAGE AND DIVORCE LAWS OF THE ARAB WORLD* 56 (1998).

⁴⁹ Boudoin-Dupret, *supra* note 26, at 88.

abuse which permits proof of abuse to be established by hearsay and other circumstantial evidence.⁵⁰

5.2. The right of a wife to divorce at will and the “twisted arm”

Law No. 1 of 2000, the so-called “*Khul’* Law,” represents another Egyptian example of Islamic State Law.⁵¹ *Khul’* in Pre-Modern Islamic Law was a form of consensual divorce that permitted a wife to obtain a divorce from her husband in exchange for a payment of a mutually agreed consideration and waiver of other financial claims. The doctrinal innovation of the *Khul’* Law was to transform *khul’* into a unilateral right of the wife, effectively granting her an absolute right to divorce upon return of her dower.

While this statute was hailed as progressive insofar as it greatly facilitated the ability of at least some Egyptian women to exit undesirable marriages relatively efficiently, the statute is not without its problems. Suppose an Egyptian woman has legal grounds for a divorce based on harm under Article 6 of Law no. 5 of 1929, but she is unable to provide direct evidence of the injuries she has suffered, or that various inefficiencies in the court system are unreasonably drawing out the legal proceedings, some of them systemic, for example, a large backlog of cases, and some of them because her husband is acting in bad faith and intentionally delaying proceedings. Suppose further that her husband refuses to exercise his unilateral right (*ṭalāq*) to end the marriage. In this case, the *Khul’* Law offers the aggrieved wife a speedy resolution of her problem. One may assume in fact that this is the paradigmatic set of facts that motivated Egypt to adopt the *Khul’* Law in the first place. But note that in this paradigmatic case, the result is unjust as a matter of *distributive* justice: the woman had a legal right to a divorce in which case she would have been able to exit the marriage *and* keep her dower. By exercising her right under the *Khul’* Law, she is forced to pay for a divorce to which she was legally entitled.

Pre-Modern Islamic Law referred to this case as the woman whose arm is twisted into accepting a *khul’* (*al-mu’ḍala*) because she cannot provide legal grounds for divorce and her husband refuses to divorce her.⁵² Mālikī jurisprudence again provides a potential solution that Egyptian courts could adopt to solve this problem: under Mālikī law (but not Ḥanafī), when a woman pays a sum to her husband in consideration for a divorce to which she was morally entitled but failed to prove in court on account of an absence of legally admissible evidence, she is subsequently permitted to sue the husband for the return of the amount paid in consideration for the divorce,

⁵⁰ In cases involving claims of spousal abuse, the Mālikīs permit the aggrieved wife to prove her case using hearsay evidence. See 4 AḤMAD B. MUḤAMMAD B. AḤMAD AL-DARDĪR, AL-SHARḤ AL-ṢAGHĪR [*The Short Commentary*] 277 and 283 (Muṣṭafā Kamāl Waṣfī ed., Dār al-Ma’ārif, n.d.) (*wa jāzat al-shahāda . . . bi-samā’ fashā . . . bi . . . ḍarari zawj*).

⁵¹ For an interesting jurisprudential analysis of the *Khul’* Law, see OUSSAMA ‘ARABI, *STUDIES IN MODERN ISLAMIC LAW AND JURISPRUDENCE* 169–188 (2001).

⁵² Mohammad Fadel, *Political Liberalism, Islamic Family Law and Family Law Pluralism*, in *MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION* 164, at 177 (Joel A. Nichols ed., 2012).

on a theory of unjust enrichment, once she obtains her proof.⁵³ This rule responds effectively to the woman's desire for a speedy exit from an undesirable marriage while preserving her ability to reclaim her financial rights in the future once she is better able to make her case. Egyptian courts, if they were to take on the powers of a common law court, could easily adopt the Mālikī rule to further the legislatively adopted policies set forth in the statute, reaching a result that would simultaneously reinforce women's rights and increase the Islamic legitimacy of the overall legal system.

The best opportunity for the integration and reconciliation of Pre-Modern Islamic Law with State Law, however, remains in cases challenging the constitutionality of particular statutes or regulations. Lombardi has provided an exhaustive analysis of many of these cases and the manner by which the SCC has dealt with these challenges. I will use the example of one such case, *Minister of Health v. Shaykh Yusuf al-Badri*⁵⁴ (which was actually resolved by the Supreme Administrative Court, not the SCC), to illustrate how the court should have made use of Pre-Modern Islamic Law to strengthen its decision and reinforce the modernist character of the Egyptian legal system.

5.3. Female circumcision under Article 2

In *Minister of Health v. Badri*, the complainant brought a suit challenging the constitutionality of certain regulations promulgated by the Minister of Health that prohibited, except in limited circumstances, female circumcision in government and privately owned medical facilities, and criminalizing the procedure if it was performed by non-physicians. The complainant alleged that these regulations violated Article 2 on the ground that the Shari'a either commanded it for women or deemed it a meritorious religious act. Relying on the SCC's approach to the legal definition of the Shari'a in its Article 2 jurisprudence, the Supreme Administrative Court, after analyzing the argument of the complainant, concluded that the issue of female circumcision is unsettled from the perspective of Islamic law, with some legal schools recognizing it as a meritorious act while other authorities treat the practice with indifference. The Supreme Administrative Court reasoned that, because the challenged regulation in this case contradicted particular, rather than universal, interpretations of the Shari'a, it could not be held to violate Article 2, which mandates adherence only to those rules of Islamic value that are universally acknowledged. Other principles of Egyptian law and Egyptian commitments under international law were sufficient to uphold the constitutionality of the challenged regulation.⁵⁵ The *Badri* case shows clearly how the SCC's jurisprudence successfully cabins the potentially disruptive effect the rules of Pre-Modern Islamic Law could have on the modernist project of the Egyptian state,

⁵³ *Id.*

⁵⁴ Supreme Administrative Court of Egypt, Case no. 5257 of Judicial Year 43 (Dec. 28, 1997). For a detailed discussion of this case, see Killian Bälz, *Human Rights, the Rule of Law and the Construction of Tradition: The Egyptian Supreme Administrative Court and Female Circumcision* (Appeal no. 5257/43, 28 December 1997), in *THE RULE OF LAW IN THE MIDDLE EAST AND THE ISLAMIC WORLD: HUMAN RIGHTS AND THE JUDICIAL PROCESS* 35 (Eugene Cotran & Mai Yamani eds., 2000).

⁵⁵ *Id.* at 40–41.

but it also demonstrates its limitations insofar as it does not articulate a positive conception of the Shari'a that explains to the complainant why the state's *conception* of the Shari'a is sufficiently worthy of respect to override the sincere religious beliefs of Muslims holding a different conception.

More importantly, however, the Supreme Administrative Court could have avoided the awkward task of trying to adjudicate the status of a religious ritual, had it affirmatively incorporated from Pre-Modern Islamic Law its rules of pleading which would have required the dismissal of the case from the outset. A threshold question in this litigation was whether the plaintiff had standing to bring the case. The named plaintiff, Shaikh Yusuf al-Badri, was a prototype of the ideological plaintiff who lacked any concrete stake in the outcome of the case: he was neither a doctor with a stake in clarifying his obligations under applicable laws governing his right to practice medicine, nor was he a defendant in a government proceeding brought to enforce the decree in question, nor was he a parent seeking to have a physician perform this procedure on a minor daughter. On what grounds, then, did the Supreme Administrative Court find that he had standing? Surprisingly, the Supreme Administrative Court found that the plaintiff satisfied standing requirements by virtue of the fact that, as a *believing Muslim*, he had the right to know whether the circumcision of females was permissible or not under Egyptian law.⁵⁶ This decision apparently was consistent with otherwise applicable Egyptian standing law in matters of administrative law, which relaxes the general requirement that the plaintiff have a personal interest in the outcome of the case on the principle that allowing the suit to go forward is consistent with the goal of providing a means to control legality.⁵⁷

Had the Supreme Administrative Court applied standing principles from Pre-Modern Islamic Law to this case, it would have dismissed the plaintiff from the proceedings without having to consider its merits. Under the pleading rules of Pre-Modern Islamic Law, a valid claim must entail a dispute over a secular interest (*maṣlaḥa duniyāwiyya*); otherwise, the party is only seeking a legal opinion (*fatwā*) which, because of its non-binding nature, is not part of a judge's jurisdiction.⁵⁸ Adoption of this principle from Pre-Modern Islamic Law would not only have saved the court the trouble of adjudicating this case before it was sufficiently ripe, it would have affirmed the notion that it is not the function of courts to settle what is essentially a religious dispute. The Supreme Administrative Court's understanding of standing, however, is so broad that it opens the door to all sorts of purely doctrinal challenges to the substantive provisions of Egyptian law even when there is no

⁵⁶ "Whoever believes in Islam and who holds the opinion that the correct judgment according to Islamic law regarding female circumcision follows from his belief, in a sense that this is something commanded by the *shari'a*, whether considered part of the Islamic traditions or as a kind of good deed for women, has a personal interest in raising an action." *Id.* at 38.

⁵⁷ *Id.* Cf. Challenge No. 1121/10, sess'n of Mar. 23, 1968, seems to require some concrete connection with the case, e.g., that the plaintiff be "in a legal position where he may be directly affected by the decision." EGYPT AND ITS LAWS 270 (Nathalie Bernard-Maugiron & Baudoin Dupret, eds., 2002).

⁵⁸ SHIHĀB AL-DĪN AL-QARĀFĪ, AL-IHKĀM FĪ TAMYĪZ AL-FATĀWĀ 'AN AL-AHKĀM WA TAŞARRUFĀT AL-QĀDĪ WA-L-IMĀM [*The Criterion for Distinguishing Legal Opinions from Judicial Rulings and the Discretionary Actions of Judges and the Ruler*] 23 ('Abd al-Fattāh Abū Ghudda ed., 1967).

concrete controversy at issue. This relaxed principle of standing itself could encourage a flood of ideologically motivated suits whose only purpose is to challenge the doctrinal basis of law, and instead of helping to reconcile State Law with Pre-Modern Islamic Law, it risks simply exacerbating that tension under the weight of continuous, politically motivated challenges to legal rules.

Another consequence of the relaxed standing requirements applied by the court in the *Badri* case was that the decision did not address many issues that would have arisen had the case involved a concrete dispute. A more natural challenger to the rule would have been a physician who performed a circumcision at the request of a parent who *believed* that this was a valid act of religious devotion. Had such a physician subsequently been the subject of discipline for violating the administrative decree, he could have raised Article 2 as a defense in such proceeding; and in such a proceeding, the Supreme Administrative Court could have considered a host of important questions, such as the constitutional limits of religious freedom or the limits of parental authority over their children, in a factually rich setting and a properly adverse context. The court could have also attempted to reconcile the potential right to religious freedom of such a claimant with the prohibition by limiting its application to minor girls. In addition, had this question been formulated in such fashion, it is more likely that the party raising the Article 2 challenge would have raised substantive defenses rooted in particular doctrines of Pre-Modern Islamic Law, for example, what are the *Islamic* limitations on parental authority, thereby giving the Supreme Administrative Court an excellent opportunity to “tie” modern legal values to Pre-Modern Islamic Law system and thus preserve the “organic” relationship between the present and past of Islamic law in the manner al-Sahnūrī envisioned as necessary to preserve the legitimacy of Islamic State Law.

6. Conclusion

Egypt’s modern legal system is distinguished most sharply from its pre-modern ancestor not so much by the substance of its rules (although substantial differences do exist), but rather by the structure of its decision making. As a modernizing, post-colonial state, Egyptian elites have traditionally favored a centralized, top-down model of law, and to that end, they have cultivated a legal culture strongly shaped by the positivism of civil law traditions. Unfortunately, this commitment to a positivist legal culture is strongly at odds with other legal commitments of the modern Egyptian legal system, namely, its desire to be an Islamic legal system, and is partially responsible for the polarization between the two most important sources of the modern Egyptian state’s legitimacy: its modernism and its Islamic authenticity. This article argues that a shift to a legal system that is more like the common law could help bridge the divide in the Egyptian state that threatens its long-term stability and reduces its effectiveness in the short-term. Egyptian courts operating with common law powers would become better situated to effect the kind of reconciliation envisioned by Egyptian jurists like al-Sanhūrī between modern legal values and historical legal doctrines as necessary to secure the legitimacy of Islamic State Law.

The fact that the Supreme Constitutional Court of Egypt already acts like a common law court in the manner it formulates its Article 2 decisions helps explain the relatively greater degree of legitimacy its interpretations of Islamic law have enjoyed compared to that of the Sanhūrī Code. The Supreme Constitutional Court’s method of treating Article 2 as just one of numerous constitutional principles, all of which must be read together as a coherent whole,⁵⁹ strives for the kind of reconciliation between Pre-Modern Islamic Law and modern values of progress, democracy and human rights that have been at the heart of Islamic reform movements for the last one hundred years and also forms basis of the modern Egyptian state project. Its approach also provides the outlines of a workable template that ordinary Egyptian courts could apply in circumstances where litigants wish to challenge individual provisions of the Sanhūrī Code or other elements pre-1980 State Law under Article 2.

It may be the case that some conservative Muslims in Egypt hope that the new Article 219 overturns previous SCC precedent interpreting Article 2 and leads to a reactionary imposition of Islamic law in the name of ‘authenticity,’⁶⁰ but because its plain terms are inclusive rather than exclusive, i.e., “‘principles of Islamic law’ include . . . ,” not that the “‘principles of Islamic law’ are limited to . . . ,” this hope seems textually unjustified if not outright fantastic. More significantly, however, it does suggest a need for the SCC, and perhaps Egyptian courts and other rule-making bodies, whether engaged in promulgating administrative regulations or parliamentary drafting of new laws, to engage in a deeper kind of reconciliation with Pre-Modern Islamic Law along the lines first developed by al-Sanhūrī and illustrated by the examples in this article. A more principled reconciliation, one which strives for what Rawls would call a “reflective equilibrium”⁶¹ between Pre-Modern Islamic Law and State Law, could very well be the outcome of good faith adherence to Article 219 along with other provisions in the 2012 Constitution. As Brown and Lombardi have noted, however, much will depend on the future of practical politics in Egypt, and which parties will be successful in parliamentary elections, who will reach positions of influence in the Azhar and who will be appointed to the SCC.

Democracy, particularly in transitional regimes, does not come without its risks. It will only be through such a process of reconciliation, however, that Islamic State Law

⁵⁹ 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* 357 (Eugene Cotran & Adel Omar Sherif, eds., 1997).

⁶⁰ ‘Iqtirāḥāt al-Sha’b’ Tu’īd Mashrū’ “Hadd al-Ḥirāba” li-l-Nā’ib al-Salaḥī li-Ta’ḍīlihi [Parliament’s “Committee for Proposed Legislation” Returns the Proposed Bill “Penalty for Highway Robbery” to its Salaḥī Representative Author for Revision], AL-MIṢRĪ AL-YAWM, Mar. 14, 2012, available at <http://www.almasryalyoum.com/node/712551> (discussing shelving of bill by Parliament of a member of the religiously conservative Nūr Party proposing application of pre-modern Islamic law’s penalty for highway robbery, including, amputation of limbs and capital punishment in certain circumstances). See also Khaled Fahmi, *Khafar al-Islāmiyyīn ‘alā al-Shar’: Qānūn al-Ḥirāba Numudhajan [The Islamist Threat to Islamic Law and Secular Law: The Proposed Law of Highway Robbery as an Example]*, ALTAGHYR, Apr. 6, 2012, available at <http://altaghyer.com/node/67185> (warning of conservative Islamist threat to modern legal system and traditional Islamic law using example of proposed bill for punishment of highway robber which was put together using the harshest interpretations of the law from the pre-modern era).

⁶¹ RAWLS, *supra* note 10, at 8.

can come to enjoy both greater *Islamic* legitimacy as well as legitimacy from those who are suspicious of the general program of Islamization. Because the future stability of nascent Arab democracies will depend in large part on the ability of Islamic political parties and liberal parties to cooperate, adopting a system of adjudication that can more effectively engage in this process of reconciliation is institutionally necessary. Accordingly, granting Egyptian courts common law powers of rule-making could play a crucial role in stabilizing these nascent democracies by empowering judges to reconcile effectively the competing values of Islamic authenticity, the needs of modernity, and respect for human rights.