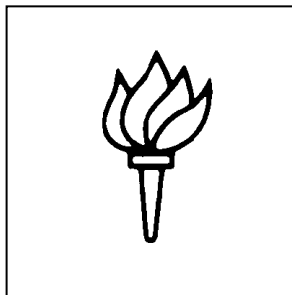


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### (Re)Arrangement of State/Islam Relations in Egypt's Constitutional Transition

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[The present draft focuses on Egypt's transition. A broader, comparative perspective on constitutional provisions regulating relations between *šarī'ah* and state law can be found in a chapter that I finalized while at NYU. It will appear shortly in the edited volume *Law, Religion, Constitution* (Ashgate: mid-2013).]

## (Re)Arrangement of State/Islam Relations in Egypt's Constitutional Transition

The Background, the Negotiations, the Compromise, and its Ramifications.

With an Appendix on the recent controversies over non interest-free loans and “*šarī'ah*-compliant” state bonds.

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Egypt's new Constitution features provisions that could significantly alter the previous arrangement of state/Islam relations. Until 2012, state institutions firmly asserted their jurisdiction on all matters legal, and extended their control over Islam's main religious institution in Egypt, al-Azhar. Since 1971, the Constitution established that the principles of Islamic law be a main source of legislation, but Parliament remained free to pass virtually any legislation, while the Constitutional Court was the final arbiter in deciding whether the former had considered such principles while legislating. At times, Parliament referred draft legislation to al-Azhar when legislating on matters with sensitive profiles of Islamic law—a safe referral, though, by virtue of the chain of political appointments from the Head of al-Azhar down. The scope of ideological and political divergence was predictably limited, due to the continuum between the executive, the legislative, the court and the religious institution.

During the transition that followed the ousting of Ḥusnī Mubārak in February 2011, however, Azharī positions ceased to be political appointments and referral to al-Azhar became mandatory, albeit for an advisory opinion. Appointments are now regulated by a law adopted in January 2012 by the Supreme Council of the Armed Forces (SCAF) and the referral has been introduced in the constitution approved in November 2012 by the “Islamist”-dominated Constituent Assembly (art. 4). How this new arrangement will play out is yet to be seen, but recent controversies over non interest-free foreign loans and “*šarī'ah*-compliant” state bonds (the *šukūk* law) suggest a potential paradigm shift. The final arbiter remains the Constitutional Court, but the capital on which the court can count to allow all state institutions to disregard the opinion of the revered religious institution may be limited.

Ramifications of the new constitutional arrangement cannot be fully explained through the politics behind the latter, which can nonetheless cast light on the usefulness of the “Islamist”/“Secularist” binary, on the ample divergence of worldviews within the “Islamist” bloc, and the modest familiarity of “Islamist” members of the Constituent Assembly on basic concepts of Islamic law.

### 1. The Background.

After a fast-tracked agreement on the *šarī'ah*-provisions in the new constitution, “Islamists” have started arguing over the scope of such provisions and contending for control of the institutions called to interpret them. Both parties in the “Islamist” camp, the Brotherhood and the Salafis, believe to have bargained a deal in their own favor, but the final compromise is just as ambiguous as the one in the previous constitution, and provides for a paradoxically less stringent test than the one offered by

“Secularists” on the basis of the current jurisprudence of the Supreme Constitutional Court. An apparently harmless referral to al-Azhar for an advisory opinion, however, is casting a longer shadow on the modern state/Islam relations with significant ramifications on the state’s sovereignty.

With “*šarī‘ah*-provisions” I refer to the constitutional provisions regulating the relations between state law and Islamic law, and that made their first appearance in Egypt in 1971 in the form: “the principles of Islamic law are a chief source of legislation” (art. 2). By that time, Egypt had developed a particularly complex and sophisticated legal system that included elements of Islamic law (not only in the area of personal status), but had also decided to absorb into a single state jurisdiction the previous confessional jurisdictions, both for Muslims and non-Muslims. The jurisdiction of *šarī‘* courts had been progressively sidelined in the 19th century until eventually incorporated into the state court system in 1955, but the law applied remained largely untouched in various areas, notably in family law.

Since 1971, all the areas of perceived non-compliance with Islamic law were challenged in higher courts: the Supreme Court until 1979, and the Supreme Constitutional Court since then. The jurisprudence of both courts was deemed largely unsatisfactory by litigants, who nonetheless kept bringing their challenges against the Egyptian legal system in virtually all areas of law. The Constitution was later amended with a more stringent provision, making “the principles of Islamic law” the chief source of legislation” (art. 2 as amended in 1980), but no major shift in the jurisprudence of the Supreme Constitutional Court was recorded.

Most of the frustrated challenges in court had come from the “Islamist” opposition to the regime, and it was expected that the drafting of the new *šarī‘ah*-provisions in the 2012 Constitution would cater mainly to that constituency, since the constitution-drafting was entirely dominated by forces that apparently shared a common view on the role of Islam in public life. Islam was oddly the prominent absent in the debate on the institutional design, but not so in the debate on the fundamental constituents of state and society and individual freedoms,<sup>1</sup> and—within the former—the new *šarī‘ah*-provisions featured among the most discussed and divisive issues in front of the assembly.

The political parties associated to the Muslim Brotherhood (the Freedom and Justice Party (FJP)) and to Salafism (al-Nūr) triumphed in the general elections held in 2011/12, and used the parliamentary advantage to be overrepresented in the constituent assembly. The former group built its historical platform on slogans such as “Islam is the solution” (*al-islām huwa al-ḥall*) or on an overarching policy of sheer “application of Islamic law” (*taṭbīq al-šarī‘ah*, popularized as *al-catalog*), whereas the latter had a tradition of disdaining politics and focusing on religious observance.

Secularists were in arms to contain the Islamist “take-over”, but a closer look at that debate in the constituent assembly shows that the polarization was not between Secularists and Islamists, rather between radically different worldviews within the Islamist spectrum. A profound difference in the appreciation of the role of the state and its institutions in the making of contemporary Islamic law is what emerged from the debate, and heated negotiations on the *šarī‘ah*-provisions show a remarkable distance between the ideological stances of the Brotherhood and Salafis. The final arrangement (extending beyond art. 2 to a provision on al-Azhar (art. 4) and an explanatory note to art. 2 (art. 219)) unveils the mutual mistrust behind the compromise and points to future areas of contention.

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<sup>1</sup> Most notably, in the drafting of the provision on religious freedom, where arguments drawn from the Islamic tradition were invoked to pursue a conservative agenda. Religious freedom is narrowly constructed as freedom of belief (*ḥurriyyat al-i’tiqād*, art. 43), and—unlike in past constitutions—is restricted to the heavenly religions (*al-adyān al-samāwiyyah*) recognized by Islam: only religious practices and places of worship for the heavenly religions are protected and regulated by statute (art. 43(2)).

As the creeping struggle for control of al-Azhar and the Supreme Constitutional Court quietly unfolds, confrontation on the scope of the new *šarīʿah*-provisions has already started surfacing in parliamentary and extra-parliamentary rows between the FJP, al-Nūr, the Presidency, and al-Azhar.

## **2. The Negotiations.**

For decades *šarīʿah*-provisions have been at the center of the constitutional debate in Egypt, showing an ever-changing landscape of political alliances across the political spectrum. After the ousting of Mubārak, the phenomenon became even more apparent, signaling both the ability of the issue to mobilize voters and how many of the battles fought in the name of *šarīʿah* had actually nothing to do with it.

The campaign over the constitutional amendments of March 2011, for instance, was largely played on art. 2, even if that provision did not feature among the articles whose amendment was proposed. At stake was the course of the transition (parliamentary elections first or constitution first, according to the commonly abridged formula), and forces that could count on rehearsed voter mobilization strategies opted for elections first. At that time, the forces in favor of elections first were the National Democratic Party (NDP, yet to be dissolved by the Supreme Administrative Court), and the Muslim Brotherhood (yet to be established as the Freedom and Justice Party). The old regime and its traditional opposition closed ranks and campaigned in favor of the constitutional amendments. The Brotherhood resorted to its traditional *catalog* rhetoric, and the NDP provided its support with the muftī ʿAlī Ğumʿah conjuring up the specter of a new constitution without an art. 2 provision. The amendments passed with an overwhelming 77 percent vote in favor.

In the campaign for the presidential elections in mid-2012, the rhetoric of *šarīʿah*-provisions was widely employed once again, especially in the runoffs between the Brotherhood (now FJP) candidate Muḥammad Mursī, and the NDP (now independent) candidate Aḥmad Šafīq. Brotherhood and NDP this time overemphasised their differences. The candidates presented themselves as sitting at the opposite sides of the ideological spectrum of *šarīʿah* enforcement, with Mursī reaching out to the Salafi vote and Šafīq to the Coptic vote.

The layout of the Constituent Assembly, however, was more the product of the results of the parliamentary elections, in which—to everyone’s surprise—the Salafi al-Nūr party carried one fourth of the votes. On the basis, again, of *šarīʿah* rhetoric, the FJP and al-Nūr (this time around) closed ranks and selected a Constituent Assembly where political Islam was overrepresented. With a majority exceeding two-thirds in both houses, the FJP/al-Nūr alliance managed to push through their ticket of members to the Constituent Assembly.

A significant distance in the positions of the FJP and al-Nūr emerged early on in the constitution-drafting process, in particular on the arrangement of *šarīʿah*-provisions. Al-Nūr found itself more and more isolated, while the FJP was crafting anti-Nūr alliances on the *šarīʿah*-provisions with other political forces (leftists, liberals, ..) and institutional representatives (al-Azhar, the Church, ..). It was very clear that the FJP was uninterested in altering the existing *šarīʿah*-provision (art. 2 as amended in 1980), and for very similar reasons that were guiding the sister al-Nahḍah party in Tunisia not to push for the introduction of a *šarīʿah*-provision, but rather be content with the existing establishment clause. Comfortable of a large (and possibly durable) parliamentary majority, both the Tunisian al-Nahḍah and the Egyptian FJP did not want to introduce further limitations to parliamentary sovereignty on the basis of *šarīʿah*.

Al-Nūr, on the other hand, seemed quite wary of the FJP, and did not want to concede to an FJP-dominated parliament the power to define what *šarīʿah* is. With slim chances of significantly affecting the configuration of future state institutions like parliament or the constitutional court, al-Nūr opted for al-Azhar. Unquestionably al-Azhar is currently under the tight control of its *šayḥ*, the Mubārak-appointed and former NDP-member Aḥmad al-Ṭayyib, but the institution still commands prestige, and the odds of figures affiliated or sympathetic to al-Nūr permeating it are surely higher than any other state institution. Al-Nūr was therefore in favor of a more stringent *šarīʿah* limitation and a strong oversight role to al-Azhar.

Almost all political forces and institutions took a stance in the debate over the *šarīʿah*-provisions, but the crucial negotiations were the ones between the FJP and al-Nūr. Liberals and leftists, in principle opposed to a *šarīʿah*-provision, soon conceded to realpolitik and articulated a strategy of standing by the existing formulation, guaranteeing the position of non-Muslim citizens, and maintaining the judicial review to the Supreme Constitutional Court, possibly limiting deviations from the latter's current construction of the *šarīʿah*-provision by introducing in the constitution an explanatory note. Al-Azhar had to cautiously ponder its position on account of the desire of its current administration to serve as a moderating factor in domestic politics, while factoring in the possibility of limiting the role of the institution in case of a change in its top administration. The Church, nominally opposed to any *šarīʿah*-provision, called for a mirror *šarīʿah*-provision for non-Muslims that could somehow limit the progressive interference by state courts in matters of personal status of Copts, and any possible introduction of non-confessional personal status law.

Negotiations started with a show of force on art. 2, where Salafis appeared determined to substitute the word “principles” (*mabādiʿ*) with regulations (*aḥkām*). Instead of a non-technical definition of inductively (un)defined principles leaving the door open to virtually any interpretation (*mabādiʿ*), Salafis wanted in the constitution the technical term used to refer to the deductively derived qualifications of any legal act as developed by scholars (*aḥkām*). It is unclear whether Salafis wanted to limit the scope to the qualifications developed in the past by classical legal scholars in a bid to assert a claim of *šarīʿah* authenticity, and a full explanation of what had to be considered *aḥkām* (according to what tradition (*madḥab*), what authoritative source, etc..) was never provided.

The Brotherhood, strong of the support of all other political forces, al-Azhar and the Church, maintained that the existing formulation of art. 2 had to be kept as it was, but in turn consented to an explanatory note on the meaning of principles (*mabādiʿ*), and a provision on the role of al-Azhar. Salafis wanted a stringent definition of principles, and a strong role for al-Azhar on all matters pertaining to *šarīʿah*. The Brotherhood then suggested a text for the explanatory note that was replete with jargon of classical Islamic jurisprudence: “the principles of Islamic law comprise its foundational texts (*al-adillah al-kulliyah*), its jurisprudential canons and legal maxims (*al-qawāʿid al-uṣūliyyah wa-l-fiqhiyyah*)” (art. 219). The proposed text is far from the Salafis original demand of *aḥkām*; it carries only a generic reference to all the textual sources from which a *ḥukm* can be derived, and only identifies fairly broad procedural rules on how to arrive at such a *ḥukm* (regulation/qualification). As for the provision on al-Azhar, the Brotherhood suggested to include a referral to the Body of Senior Scholars (*hayʾat kibār al-ʿulamāʾ*) on matters pertaining to *šarīʿah* (art. 4). The referral is only for an advisory opinion, but the Brotherhood was able to force the hand of the Salafis by obtaining the agreement of the *šayḥ* al-Azhar whose post was guaranteed against removal in the same provision. The *šayḥ* endorsed the overall arrangement of art. 2, its explicatory note and the provision on al-Azhar by declaring it a “red line.”

Salafis then conceded on the advisory opinion but insisted on adding a further element in the list of what the principles of Islamic law would comprise: “the sources recognized by Sunni law schools



(*al-maṣādir al-muṭabarah fī maḍāhib ahl al-sunnah wa-l-ḡamāʿah*)” (art. 219). Besides the sectarian concern of prohibiting references to non-Sunni sources, the definition of Sunni sources squarely overlaps with the definition of foundational texts mentioned earlier in the provision.

According to Salafis, the Brotherhood conceded on two other issues where strategic litigation will bring in the effect desired by Salafis with the reformulation of art. 2. In the general section on the guarantees of rights and freedoms, the maxim of *nullum crimen et nulla poena sine lege* has been adapted to “no crime and no punishment without a (previous) constitutional or statutory text (*illā bi-naṣṣ dustūrī aw qānūnī*)” (art. 76), and the exercise of rights and freedoms “need not to be conflicting with the basic constituents of the section on state and society of the constitution [artt. 1-30]” (art. 81(3)). With these two modifications, Salafis believe that they will be able to surreptitiously introduce Islamic crimes and punishments, and limit rights and freedoms according to a conservative interpretation of *ṣarīʿah*.

### **3. The Compromise.**

The new *ṣarīʿah* compromise extends beyond the original art. 2, but its axis remains on art. 2 and its explanatory note (art. 219). Judicial review rests with the Supreme Constitutional Court (art. 175), which will be called to interpret the new provisions. Al-Azhar’s advisory opinion of art. 4, on the other hand, will not be constrained by the principles and their explicatory note.

The key provision—art. 2—reads: “the principles of Islamic law are the chief source of legislation” (*mabādi’ al-ṣarīʿah al-islāmiyyah al-maṣdar al-ra’isī li-l-taṣrīf*). The text of the 1971 constitution as amended in 1980 is reproduced verbatim in the new constitution. Conventional canons of constructions proved insufficient to guide courts in its textual interpretation. It should come to no surprise, as it is case with any compromise provision with such a highly divisive history; courts interpreting the “social function of property” of many post-WW2 constitutions encountered similar problems when resorting to conventional canons of construction. Just as the “social function of property”, construction of art. 2 cannot be divorced from the way the provision has been implemented by state institutions, and in particular the jurisprudence of the courts that, since the 1971 constitution, have been charged with constitutional review of legislation (ordinary and secondary). This jurisprudential line was started by the Supreme Court, and has been maintained and developed by its successor, the Supreme Constitutional Court (SCC, established in 1979).

The SCC—domestically criticized for its hesitant and timid stance while internationally lauded for its liberal interpretation—devised a jurisprudence of art. 2 that is more conservative than what might appear.

Surely, it has limited the potentially expansive nature of art. 2 by confining its operation within the conventional domain of *ṣarīʿah*; interpreting the provision as a repugnancy clause it has prevented the emergence of a *siyāsah ṣar’iyyah*-style review where all areas of the law are required to comply with Islamic normativity. In constructing the term “principles” (*mabādi’*), however, the court has resorted to

traditional hermeneutics and prevented state institutions to re-engage with the sources in a number of areas. The SCC employed the Ḥanafī distinction—without acknowledging it—between different levels of obligation to redraw the boundaries of legitimate re-engagement with the sources. Ḥanafī jurisprudence differentiates between obligations grounded in texts that are certain in their origin and meaning (*qaṭ’ī al-tubūt wa-l-dalālah*), and those grounded in texts that are just speculative in their origin or meaning (*ẓannī al-tubūt aw al-dalālah*). The SCC asserts that legislation needs not be in conflict with the former qualification (in Ḥanafī jurisprudence: *farḍ*), but can re-engage with the sources in the case of the latter (in Ḥanafī jurisprudence: *wāḡib*) or any lesser qualification. The re-engagement with the sources is also framed in traditional terms as a form of neo-*iḡtihād* and is further

constrained by the requirement to pursue the broadly defined “objectives of the law” (*maqāsid al-šarī‘ah*). In sum, the SCC interprets the “principles of Islamic law” as a set of firm and solid traditional obligations (what Ḥanafis would call *furūq*) that allow no re-engagement with the sources, and five generic objectives that need to be pursued when re-engaging with the sources in all other cases. The Court has never struck down legislation for not pursuing the “objectives of the law”, but has found legislation in conflict with firm and solid traditional *šarī‘ah* provisions (notably in the cases of the inherited share tax (*darībat al-aylūlah*, SCC 5 July 1997, 82/xvii) and the evidentiary rules for a denied unilateral divorce (*talāq ‘ind al-inkār*, SCC 15 January 2006, 113/xxvi).

The explanatory note added in 2012—art. 219—reads, in its final formulation: “the principles of Islamic law comprise its foundational texts, its jurisprudential canons and legal maxims, and the sources recognized by Sunni law schools” (*mabādi’ al-šarī‘ah al-islāmiyyah tašmul adillatahā al-kulliyyah, wa-qawā’idahā al-ušūliyyah wa-l-fiqhiyyah, wa-mašādirahā al-mu‘tabarah fī maqāhib ahl al-sunnah wa-l-ġamā‘ah*). The idea of an explanatory note was not born in the Constituent Assembly and implicitly acknowledges both the ambiguities of art. 2, and that the jurisprudence developed by the SCC is just one of many that could be overimposed on the text. Ever since the elections-first approach to the transition prevailed in the March 2011 referendum on the constitutional amendments, a number of constitutional blueprints were circulated with the poorly concealed goal of streamlining the constitution-drafting in favor of forces who expected not to perform well in the general elections; the scheme was naturally rejected by the forces who did expect to perform better, and indeed did. All transitional governments and a number of independent groups attempted to propose to the public debate such blueprints that escalated from drafts to general principles, to supra-constitutional principles (in an attempt to impose a South African transition model). None of these texts was ever seriously considered, but this is where the idea of an explanatory note to art. 2 was first rehearsed, in a bid to prevent a future Islamist-dominated court from departing from the existing SCC jurisprudence—which was obviously deemed desirable by the non-Islamist forces involved in the blueprint drafting. A good example of this trend is the declaration of the constitutional principles signed by the self-styled Egyptian National Council in May 2011; the declaration attempts to frame in the form of an article the SCC jurisprudence, and quotes in a footnote the approval of the text by the muftī emeritus Naṣr Farīd Wāṣil “on the basis of 27 years of SCC constant jurisprudence”.<sup>2</sup> When the idea of an explanatory note was introduced in the Constituent Assembly, it was therefore inevitable that the note would engage in some form of dialogue with the existing SCC jurisprudence.

The explanatory note approved by the Constituent Assembly does not attempt to abridge the existing SCC jurisprudence, even if it draws from a largely common vocabulary. The desire to depart from the existing jurisprudence is therefore signaled by the choice of the drafters, but the extent and the direction of such a departure need to be assessed on the text.

The first element that art. 219 lists among the principles of Islamic law is *šarī‘ah*’s “foundational texts” (*al-adillah al-kulliyyah*). The translation as “foundational texts” is based on the explanation provided by members of the Constituent Assembly (both from the FJP and al-Nūr), but there is a significant discrepancy with its conventional use in Islamic law. *Dalīl* (sg. of *adillah*) is a philosophical term

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<sup>2</sup> (*ma‘a ta’kīd hādā al-mabda’ bi-l-ḍamānāt al-dustūriyyah al-lāti takful haqq ġayr al-muslimīn fī ‘l-istinād li-mabādi’ šarā’ihim al-ḥaṣṣah ka-mašdar li-tašrī‘āt al-aḥwāl al-šaḥṣiyyah lahum; ta’kīd anna mabādi’ al-šarī‘ah al-islāmiyyah hiya al-mabādi’ al-kulliyyah, al-ġayr muḥtalaf ‘alayhā, qaṭ‘iyyat al-ṭubūt qaṭ‘iyyat al-dalālah – annahā ḥiṭāb li-l-mušarri‘ wa-laysa li-ġayrih, wa-tubiḥ lahu al-intiqā’ min al-fiqh dūn isbāġ al-quḍsiyyah ‘alā aqwāl al-fuqahā’, wa-ḥaqq al-mušarri‘ fī ‘l-iġtihād li-taḥqīq al-mašāliḥ al-mursalāh al-lati yatawaḥḥāhā fī itār ahdāf al-tašrī‘ wa-‘alā hady min riqābat al-maḥkamah al-dustūriyyah al-‘ulyā dūn ġayrihā ‘alā maqāsid al-mušarri‘ wa-muraqabat al-inḥirāf al-tašrī‘ – anna al-wilāyah fī ‘l-muġtama’ hiya li-sulutāt al-dawlah dūn al-afrād aw al-ġamā‘āt*). Al-Maġlis al-waṭanī al-miṣrī, *Waṭīqat i’lān mabādi’ al-dustūr al-miṣrī al-qādim ba’d tawrat 25 Yanāyir 2011*, 7 May 2011.

employed in Arabic to translate the Greek for “sign” (*sēmeion*), but became widely used in Islamic legal theory to refer either to [1] the general rules of deduction (*adillah kulliyah* or *iġmāliyyah*) or to [2] the individual sources of a legal qualification (*adillah tafṣīliyyah* or *ġuz’iyyah*), and also, by metonymy, to [3] the foundational texts (*adillah šar’iyyah*). General rules of deduction (*adillah kulliyah* or *iġmāliyyah*)—the ones mentioned in art. 219—constitute the backbone of the general theory of law (*uṣūl al-fiqh*), to the point that they are often used—as a synecdoche—to refer to the general theory of law altogether. “The imperative mood entails obligation” (*al-amr li-l-wuġūb*), for instance, is an example of a general rule of deduction (*dalīl kullī* or *iġmālī*) [1], whereas “Perform prayer!” (*uqīmū l-ṣalāt*; Q. 2:43..) is an example of an individual source in the imperative mood that directs the legal scholar to the qualification of the object (prayer) as obligatory (*dalīl tafṣīlī* or *ġuz’ī*) [2]. The definition provided by drafters is more in line with *adillah šar’iyyah* [3], which is also the term generally employed by the SCC, and would include—according to the drafters—the general sources of legal qualifications accepted by all classical Sunni legal traditions: the Qur’ān, the tradition of the Prophet (*Sunnat al-nabī*), consensus of the scholars (*iġmā’*), and analogical extension (*qiyās*). *Adillah šar’iyyah*, however, include also sources not accepted by all classical Sunni legal traditions, like the Ḥanafī juristic preference (*istiḥsān*) or the Mālikī consideration of public interest (*istiṣlāḥ* or *ri’āyat al-maṣāliḥ*). As a result, the SCC considers qualifications drawn from a wider pool than the new text, consequently increasing the number of limitations placed on state legislation.

The second element that art. 219 lists among the principles of Islamic law are *šarī’ah’s* “jurisprudential canons and legal maxims” (*al-qawā’id al-uṣūliyyah wa-l-fiqhiyyah*). *Qawā’id*—translated either as rules or maxims—are a fairly independent legal genre both (1) within the general theory of law (*uṣūl al-fiqh*) and (2) within substantive law (*furū’ al-fiqh*). Usually a product of legal scholars’ inductive efforts, *qawā’id* conventionally express in a concise form the general rules framing (1) the methodology employed to arrive at legal qualifications of certain acts (*qawā’id uṣūliyyah*), or (2) broader areas of law (both substantive and procedural) beyond the confined scope of individual legal qualifications (*qawā’id fiqhiyyah*).<sup>3</sup> “The imperative mood entails obligation” (*al-amr li-l-wuġūb*)—mentioned earlier as an example of a general rule of deduction (*dalīl kullī* or *iġmālī*) [1]—can also be listed among the *qawā’id uṣūliyyah* (1); the two categories are largely interchangeable. Within the *qawā’id fiqhiyyah* (2), “certainty is not superseded by doubt” (*al-yaqīn lā yazūl bi-l-šakk*) is an example of a general rule with a strong procedural component. As a genre, *qawā’id* developed within each legal tradition (*maḍhab*) with the goal of offering the *maḍhab’s* complex articulation of legal theory and substantive law in a more accessible and practical form.<sup>4</sup> As a *maḍhab*-internal genre, the inclusion of *qawā’id* in the explanatory note without identifying a *maḍhab* does not provide the court with a clear enough limitation to review state legislation on. The SCC in its art. 2 jurisprudence often referred to both sets of rules (using the expressions: *al-uṣūl al-kulliyah* and *al-qawā’id al-fiqhiyyah*), but never struck down legislation on their basis. The only indication that this second element seems to offer is that the definition of the principles of Islamic law needs to be anchored to classical modes of legal production.

The third element that art. 219 lists among the principles of Islamic law are *šarī’ah’s* “sources recognized by Sunni law schools” (*al-maṣādir al-mu’tabarāh fī maḍāhib ahl al-sunnah wa-l-ġamā’ah*). Sources (*maṣādir*, sg. *maṣdar*) is not a technical term used in classical Islamic law. The expression was introduced in the explanatory note at the request of Salafī drafters, when they accepted that the obligatory referral to al-Azhar be only to obtain an advisory opinion. A prominent Islamist columnist in *al-Šurūq*, Fahmī Huwaydī, even denounced the “smell of Salafīs” (*rā’iḥat al-salafīyyīn*) on the

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<sup>3</sup> See Intisar Rabb, entry: “Legal Maxims,” in *Oxford Encyclopedia of Islam and Law* (Jonathan Brown et al. eds., Oxford: Oxford University Press, forthcoming 2013).

<sup>4</sup> See Wolfhart Heinrichs, entry: “Qawā’id fiqhiyya”, *Encyclopedia of Islam*, 2nd ed.,



addition, and in particular on its sectarian hue.<sup>5</sup> If we follow the explanation of the drafters on the first element of the provision (*al-adillah al-kulliyah* as proper *adillah šar‘iyyah*), this third element (*al-mašādir al-mu‘tabarah fi maḏāhib ahl al-sunnah wa-l-ğamā‘ah*) is just a replica. Sources (*adillah šar‘iyyah/mašādir*) are traditionally classified as (a) accepted by all Sunni legal traditions (*maḏāhib*) or (b) not recognized by all four *maḏāhib*. Textual arguments for or against including the latter sources hold equal weight; both focus on the plural form *maḏāhib*, which is not resolute. Even if it were to be interpreted in the extensive sense, it would just restrict the number of limitations on state legislation when compared to the existing jurisprudence of the SCC.

In the name of *šarī‘ah*, drafters wanted to distance the new arrangement of *šarī‘ah* provisions in the constitution from the existing jurisprudence of the SCC, but the latter still displays a more accurate and consistent reference to Islamic legal theory than the former. The explanatory note does not include the SCC theory of re-engagement with the sources (also known as neo-*iğtihād*), but by the same token the new constitution avoids the firm and solid traditional *šarī‘ah* provisions on the basis of which the SCC had struck down legislation twice. The new test set by artt. 2 and 219 is less stringent than the existing SCC jurisprudence, and if the former were to be applied to past cases, there are no reasons to believe that the SCC would have decided otherwise, and the argument could be advanced that also the two pieces of legislation struck down could have been deemed constitutional with a benign interpretation of the new test. In any case, and by operation of the conventional *ex nunc* principle (art. 222), the old test will still be applied to the legislation (ordinary and secondary) passed between 1980 and 2012, and the new test to the legislation passed after the entry into force of the new constitution.

#### **4. Ramifications.**

After the hasty approval of the draft constitution by the Constituent Assembly in late November 2012, the unreconciled worldviews behind the compromise arrangement of the *šarī‘ah*-provisions between the Brotherhood and the Salafis started to materialize in the parliamentary debates and in the race to secure the loyalty of the institutions involved in any *šarī‘ah* debate: the SCC and al-Azhar.

According to the new constitution, the SCC keeps reviewing legislation (ordinary and secondary) on the basis of the constitution, including the *šarī‘ah*-provisions (art. 175(1)). The constitution now prevents court-packing schemes by setting the number of judges to eleven (art. 176), and dismissed all the more junior judges (art. 233). Selection and tenure of SCC judges, however, are left to the law (art. 176).

Amendments to the law regulating al-Azhar were signed in by the Supreme Council of the Armed Forces just days before the sitting of the new chambers (Decree-Law 13 of 19 January 2012). The operation was highly criticized,<sup>6</sup> but it allowed the Mubārak-appointed Head of al-Azhar to appoint the first Body of Senior Scholars, which is a self-perpetuating body. Control over al-Azhar had been rightly perceived as one of the highest stakes in the transition,<sup>7</sup> and the story is currently unfolding, with the domestic press partially covering the still underground moves to shape the future of the institution.<sup>8</sup>

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<sup>5</sup> Fahmī Huwaydī, “ḥawf ‘alā al-šarī‘ah min anšārihā qabla ḥuṣūmihā”, *al-Šurūq* 13 November 2012.

<sup>6</sup> See the Egyptian Initiative for Personal Rights, *Mawqif min al-qānūn al-ğadīd li-tanzīm al-Azhar*.

<sup>7</sup> See Nathan Brown, *Post-Revolutionary al-Azhar*, Carnegie Paper, 2011.

<sup>8</sup> The establishment of a National Front for the Protection of al-Azhar and [the Ministry of] Religious Endowments is just one example. The Front was founded by the *imām* of the ‘Umar Makram mosque near Taḥrīr square with the goal of protecting these two institutions from the “brotherhoodization” (*aḥwanah*). *Al-Ahrām*, 30 March 2013. Maḏhar Šāhīn, ‘Umar Makram’s *imām*, was later removed from his post by a decision of the Ministry of Religious Endowments, but reinstated by an order of the Disciplinary Court. *Egypt Independent*, 10 April 2013, and *Ahrām Online*, 30 April 2013.

The advisory opinion of the Body of Senior Scholars at al-Azhar has to be requested on (all) matters pertaining to *šarī'ah* (art. 4); the provision is drafted in the passive voice (*wa-yuḥad ra'y.*), which can be construed as requesting all state institutions to solicit al-Azhar's opinion every time a matter pertaining to *šarī'ah* is discussed—including the SCC. In such a scenario, the SCC would still retain the final decision on the conflict between *šarī'ah* and state legislation, but the legitimacy of its determinations would broadly depend on its ability to outshine the opinion of the most prestigious religious institution in the Sunni world. The advisory opinion on which the Brotherhood had so lightheartedly conceded will most likely have a greater impact on the complex articulation of the relation between *šarī'ah* and the state than art. 2 and its explanatory note. The level of deferentiality to al-Azhar on matters of Islamic law is remarkable, and its opinion will significantly weigh in the debate. If art. 2 and 219 can impact the rhetoric of debate on matters pertaining to *šarī'ah*,<sup>9</sup> the true gamechanger will be art. 4 in the absence of a public discourse able to articulate reasons alternative to those that informed the classical regulations of Islamic law. Moreover, the Constitution does not frame nor specify on what basis the Body of Senior Scholars will articulate its opinion.

### Appendix.

The recent controversies over non interest-free loans and “*šarī'ah*-compliant” state bonds.

Since the coming into force of the new Constitution in late December 2012, there have already been two telling episodes in daily parliamentary life that point to the conflict of worldviews between the FJP and al-Nūr, and the centrality of art. 4 in its solution. Moreover, both episodes touched high-profile policies of the President and his Government, in the context of the dire economic and financial situation of Egypt in early 2013: the first jeopardizing a critical loan from the EU, and the second blocking an attempt to raise money through the introduction of “*šarī'ah*-compliant” state bonds (the *šukūk* bill).

(1) In the parliamentary debate over an international loan by the EU, al-Nūr moved to request al-Azhar's opinion on the compliance with Islamic legal regulations of the interests that Egypt would have to pay back if accepting the loan. 'Iṣām al-'Uryān, FJP's vice-president, vigorously reacted, and in a heated speech to the Council he argued that the Constitution establishes that sovereignty belongs to the people, who are represented in the chambers, and it is ultimately with them that the decision rests, not with al-Azhar's scholars.<sup>10</sup>

(2) The President and his Government repeatedly announced in 2012 their hope to overcome the financial crisis affecting Egypt by issuing “*šarī'ah*-compliant” state bonds that would attract investors interested in Islamic financial products. All along the extra-parliamentary debate, al-Nūr requested that al-Azhar's opinion be taken, and the Body of Senior Scholars issued a declaration that the draft bill was at odds with *šarī'ah* without, however, articulating its reasons.<sup>11</sup> When the Government eventually released the *šukūk* bill and introduced it into the Consultative Council, al-Nūr moved to formally refer the bill to al-Azhar, but the motion was defeated, and the bill voted into law by the FJP alone. After the approval of the law, a delegation of al-Nūr representatives met with the *šayḥ* al-Azhar

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<sup>9</sup> See Clark Lombardi and Nathan Brown, “Islam in Egypt's New Constitution,” *Foreign Policy, Middle East Daily Brief*, 13 December 2012.

<sup>10</sup> Minutes of the Consultative Council, 10 February 2013.

<sup>11</sup> *Al-Miṣrī al-yawm*, 2 January 2013.

to privately ask his opinion on it.<sup>12</sup> At its next meeting, the Body of Senior Scholars issued a strongly worded statement asserting its constitutional role, claiming that it should have been consulted in accordance with art. 4 of the new Constitution.<sup>13</sup> Al-Nūr's parliamentary spokesperson urged the President to refer the law to al-Azhar before signing it into law, threatening a constitutional challenge in front of the SCC on grounds of violation of art. 4.<sup>14</sup> President Mursī decided to give in and referred the law to al-Azhar, claiming that "the Body of Senior Scholar's role is only advisory and is meant to clarify the applicability of *šarī'ah*".<sup>15</sup> Even if the *šayḥ* al-Azhar had previously declared his intention not to engage with the law after its approval by Parliament, the Body of Senior Scholars (*Hay'at kibār al-ūlamā'*) and the Islamic Research Academy (*Mağma' al-buḥūt al-islāmiyyah*) scheduled a hearing to discuss the law on 8 April 2013.<sup>16</sup> After a second hearing, the Body of Senior Scholars issued a statement enumerating the amendments required in order for the *šukūk* law to be compliant with the principles and regulations (*mabādi' wa-aḥkām*) of *šarī'ah*. The statement was addressed to the President and the Speaker of the Consultative Council, with words of appreciation for the President's consideration of the Body's constitutional role. The content of the statement has yet to be fully released, but Azharī sources mention the necessity of the state-*šukūk* supervisory board to depend not from the Ministry of Finance but from al-Azhar, and of securing the identity of the investors, and the preservation of state ownership.<sup>17</sup> The President decided to refer the law back to Parliament, and the Finance Committee of the Consultative Council drafted amendments in line with the recommendations of the Body of Senior Scholars. When the amendments were discussed in the plenary, the Speaker Aḥmad Fahmī proposed to refer again the bill to the Body of Senior Scholars. Fahmī's motion was defeated, but he insisted to take a second vote, which caused an uproar that forced him to suspend the session. The Council later unanimously approved the bill.<sup>18</sup>

The debate over the *šukūk* law is setting a precedent on state/Islam relations under the new Constitution, and one cannot overemphasize the impact of the FJP's (mis)handling and al-Azhar's decision to engage. At stake are both state/al-Azhar institutional relations, and the definition of the framework according to which al-Azhar issues its opinions; a matter that has been neglected by the Constituent Assembly.

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<sup>12</sup> *Al-Šurūq*, 25 March 2013.

<sup>13</sup> *Egypt Independent*, 29 March 2013.

<sup>14</sup> *Al-Ahrām*, 31 March 2013.

<sup>15</sup> *MENA News Agency*, 1 April 2013.

<sup>16</sup> *Al-Šurūq*, 1 April 2013.

<sup>17</sup> *Al-Ahrām*, 12 April 2013.

<sup>18</sup> *Al-Ḥurriyyah wa-l-'adālah* (online edition), 30 April 2013.