INTRODUCTION

Over the last thirty years many Muslim nations have drafted or amended their constitutions to require that state law be consistent with shari‘a norms. The adoption and interpretation of constitutional provisions for the shari‘a can be characterized as a form of “constitutional Islamization.” This trend raises a number of important questions. What are the historical precedents, if any, for these provisions, and why have Muslim nations recently begun to adopt them? What happens when a country with a “secular” legal system, particularly one influenced by European models, suddenly adopts a shari‘a provision? How do judges in these countries, who often do not have any classical Islamic legal training, go about the difficult task of interpreting and applying the shari‘a? Does the adoption of constitutional Islamization provisions tend to require significant changes to legal systems already in place? Does it tend to drive that country away from or toward evolving international legal norms in the areas of human rights or finance?

Those interested in the phenomenon of constitutional Islamization and its ramifications will find much to ponder in Egypt’s recent history. When a new Egyptian constitution was promulgated in 1971, Article 2 provided, among other things, that “the principles of the Islamic shari‘a are a chief source of Egyptian legislation” (emphasis added). In 1980, the 1971 constitution was amended and its Islamization provision strengthened. Henceforth, Article 2 provided that “the principles of the Islamic shari‘a are the chief source of Egyptian legislation” (emphasis added). In 1985, the Supreme Constitutional

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1 Majority Muslim countries that have, through enactment or amendment, given Islamic legal norms a preferred position in the constitutional scheme include the following: Afghanistan (Afghan Constitution Article 3); Egypt (Egyptian Constitution, Article 2); Iran (Iranian Constitution, Articles 2–4); Pakistan (Pakistani Constitution, Article 227); Qatar (Qatari Constitution, Article 1); Saudi Arabia; and Yemen (Yemeni Constitution, Article 3). The Saudi Basic Law declares both that the shari‘a is binding law and that all legislation repugnant to shari‘a is unenforceable; see Royal Decree No. A/90 Article 1.
Court of Egypt (the “SCC”) held that Article 2 as amended required that all Egyptian legislation enacted after the amendment be reviewed for consistency with “the principles of the Islamic *shari‘a*.” Since this seminal 1985 ruling, the SCC has developed a substantive body of jurisprudence applying Article 2—upholding some laws as consistent with the principles of the *shari‘a* and striking some others down as inconsistent.

Although Article 2 has never been the subject of a book-length study, some scholars over the last 25 years have come to be intrigued by various aspects of Article 2’s history or by apparent peculiarities in the Article 2 jurisprudence of the Court. Oussama Arabi, Killian Bälz, Nathan Brown, Baudouin Dupret, Enid Hill, Baber Johansen, Nathalie Bernard-Maugiron, Rudolph Peters, Adel Omar Sherif, and Frank Vogel have written articles that touch upon issues related to Article 2. These works vary in their scope and methodologies. As a result, the authors disagree about how the SCC is interpreting Islamic law in Article 2 cases, what relationship exists between the SCC’s theory and other theories of Islamic law, why the SCC has developed its method and finally, what the long-term ramifications of Article 2 jurisprudence will be.

For instance, scholars dispute the relationship of the SCC’s theory of Islamic law to other theories of Islamic law. Some scholars have described the Court’s Article 2 jurisprudence as reflecting an essentially classical or neo-classical approach to Islamic legal interpretation.2 Others insist that modernist Islamic legal theory has been the primary inspiration for the Court.3 Still others have suggested that the SCC’s interpretative scheme cannot be easily placed in the Islamic tradition at all and might be considered pseudo-Islamic.4


Scholars have also disagreed about the practical effects of Article 2 jurisprudence in the future. Some articles are unabashedly enthusiastic about the Court’s theory, arguing that it may represent the beginning of an authentically ‘Islamic’ theory that harmonizes the Islamic tradition with international human rights norms. Others are more cautious, suggesting that Article 2 jurisprudence could be a Trojan horse, which to date has been used for progressive ends but through which regressive policies may later be imposed judicially. Still others suggest that Article 2 jurisprudence might be more or less irrelevant to the evolution of Egyptian law—because, they argue, it tends to reinforce “secular” norms that would be imposed anyway.

In this book, I will wade into the thicket of Article 2 studies and try to answer some of the questions that Article 2 jurisprudence (and the scholarship about it) raises. A monograph-length study provides an author with the space necessary to contextualize Article 2 and Article 2 jurisprudence more fully than is possible in shorter works. It also permits the author to trace the relationship of Article 2 both to earlier theories of Islamic law and to trends in contemporary constitutional jurisprudence in Egypt.

In order to properly contextualize the SCC’s Article 2 jurisprudence, I have structured this book essentially as a “biography” of Article 2. This biography will discuss Article 2’s ancestors, the general milieu in which it was conceived and born, the specific circumstances surrounding its birth, and the eventual maturation of Article 2 jurisprudence into a distinctive part of the Egyptian legal system.


INTRODUCTION

Part I provides the background to Article 2. It is comprised of six chapters which discuss the formation of consensus on questions of Islamic legal theory during the classical era, the collapse of that consensus in the modern era, and the appearance in Egypt of important political factions, each espousing a different theory of Islamic law. Chapter 1 outlines the formation of the Sunni consensus about Islamic legal authority and methodology. Chapter 2 describes the method that classical jurists used to come up with interpretations of the shari’a. Chapter 3 discusses the development of a theory that courts in an Islamic state should apply (and rulers should enforce) laws that (a) were consistent with the “rulings of the shari’a” that the jurists had discovered and (b) did not impede the achievement of social results that jurists had identified as divinely-favored “goals” of God’s law. It points out the significance of Islamic state law. By cooperating with the classical jurists and appointing them to serve as legislative advisors and judges, some states, including the Ottoman Empire, were able to endow the law of the state with considerable Islamic legitimacy.

Chapters 4 through 6 turn to the collapse of the classical consensus on basic questions of Islamic legal theory, the rise of competing theories—each trying to become the new “consensus” theory—and the crisis of Islamic legitimacy that this created. Chapter 4 discusses how and why consensus on basic issues of legal theory broke down. Chapter 5 describes some of the new theories of Islamic law that arose in modern Egypt, as different thinkers appropriated classical concepts and vocabulary and re-imagined the proper method both of interpreting the shari’a and of creating a body of Islamic state law. Chapter 6 discusses how competing Islamist factions in modern Egypt came to champion different modernist visions of interpretive authority and of interpretive method. It also addresses the problems that the breakdown of consensus posed for governments who wished to establish their legitimacy in Islamic terms.

In Part II, this book turns to Article 2 of the Egyptian constitution, which represented a commitment by the government to attempt to establish its legitimacy in Islamic terms. When the government failed to develop an effective program of Islamization that could do this, Article 2 jurisprudence became the means through which the Egyptian judiciary tried to establish a new consensus theory of Islamic law. When the 1971 Constitution was drafted, it carved out a specific role for the shari’a. Article 2 of this Constitution stated, “the prin-
principles of the Islamic shari’a” would be one “chief source” of Egyptian legislation. Chapter 7 places the decision to enact Article 2 in its larger context, as part of a broad (albeit short-lived) policy of executive-sponsored Islamization. Shortly after the enactment of Article 2, the government actually began to reach out to Islamists and, tentatively, to prepare Islamic revisions to Egyptian law. Although this plan was considered risky by some, President Sādāt became convinced of its feasibility and utility. As a sign of his regime’s commitment, the captive legislature amended and strengthened Article 2 to state that Islamic law would henceforth be “the chief source of legislation” [emphasis added]. This language suggested that all Egyptian law would henceforth be required to be consistent with the shari’a.

After the assassination of President Sādāt by Islamists in 1981, the new president and head of the ruling party dismissed the executive-sponsored Islamization program as quixotic. Notwithstanding the recent amendment of Article 2, the political branches abandoned their policy of revising Egyptian laws to make them more Islamic. However, the judiciary had during the Sādāt years, established considerable independence from the executive. Sensing that the judicial branch might be willing to challenge an apparently unconstitutional policy, Islamists began to bring suits challenging Egyptian laws as un-Islamic and thus unconstitutional under Article 2. At this point, the responsibility for creating and implementing an official government theory of Islamic law moved from the executive and legislative branches to the increasingly independent judiciary.

Chapter 8 describes the Egyptian judicial system that was saddled with the responsibility of deciding Islamists’ Article 2 claims. It focuses on the Supreme Constitutional Court (the SCC), an institution that had only been established in 1979. By the mid-1980s, however, it had already established itself as a strong champion of liberal constitutionalism and was incrementally imposing a liberal rule of law in Egypt. The SCC, eager to maintain its growing reputation for integrity and independence, could not afford to be accused of supporting a willful violation by the political branches of a constitutional obligation. At the same time, they had reason to be concerned that any attempt to resolve the question whether (or how) Islamization should take place would do more harm than good.

Chapters 9, 10 and 11 turn to the SCC’s emerging interpretation of Article 2. Chapter 9 discusses the SCC’s handling of a preliminary question: should the new constitutional court interpret Article
2 at all? As this chapter explains, it was not clear that the constitution permitted them to do so, and it was not clear that, as a policy matter, it made sense for the Court to enter into the increasingly violent debates about the government’s failure to carry through with its Islamization policy. In considering whether (or how) to interpret Article 2, the newly-established and still weak Court was naturally concerned about the political ramifications of becoming involved in the heated debates about the role of Islam in Egyptian society. On the other hand, it was also concerned that, if it did not play a role in interpreting and applying Article 2, the demand for Islamization might impede the establishment of a progressive, liberal constitutional rule of law. Ultimately, the SCC compromised by saying that it did not have the authority to review for consistency with “the principles of the Islamic šari‘a” any laws that were in force prior to the 1980 amendment of Article 2. However, it had the power to review laws enacted or amended thereafter.

Chapter 10 first discusses the SCC’s early Article 2 opinions in which it decided cases with little explanation of its reasoning. This chapter then gives an overview of the theory of Islamic law that the Court has then developed and applied since 1993. In its Article 2 jurisprudence to date, the SCC has systematically borrowed concepts and vocabulary from a range of modernist theories of Islamic law. At the same time, the Court has avoided taking a clear position on some of the most controversial issues of legal theory. In short, the chapter argues that the Court has developed an embryonic ‘pastiche’ theory of Islamic legal interpretation. That is to say, it has produced a theory that draws widely, but directly, from the Islamic tradition and appeals rhetorically to a wide range of very different Islamist groups. It is, however, a theory that is ambiguous in certain particulars. The SCC has been applying its theory in a way that reflects an implicit preference for liberal development of its theory. It has not, however, explicitly built its liberal assumptions into its theory, and thus, later panels seem to have the freedom to take the theory in different directions.

Chapter 11 provides a series of case studies, which demonstrate how the SCC’s theory has been applied. This chapter examines how the justices of the SCC have consistently used the discretion that their theory leaves them to interpret Islamic law in a manner that reinforces the liberal constitutional principles. In its Article 2 opinions, the SCC has been able to use familiar Islamic legal concepts.
and vocabulary to develop an interpretation of Islamic law that is consistent with and indeed reinforces the evolving liberal rule of law in Egypt.

Chapter 12 looks briefly at the reception of the SCC’s evolving Article 2 jurisprudence, both by academics and by lower courts in Egypt. Lower courts have by and large accepted the essential components of the SCC’s theory and its general liberal thrust. Nevertheless, these courts have indicated some concerns. In areas where the Court has left its theory ambiguous, they have applied the theory in a way that seems to show more deference than the SCC to classical Islamic norms. Interestingly, although political Islamists disagree with many of the SCC’s conclusions, they have to date accepted the legitimacy of the SCC’s approach—as demonstrated by the fact that they continue voluntarily to litigate before the Court. This suggests that the SCC has been able to create broad support for a theory of Islamic law that is capable of co-existing with a liberal constitutional philosophy.

The conclusion ties together the two halves of this book by drawing some larger conclusions about Islamic law in the modern world. It argues that the great challenge facing contemporary Islamic legal theorists and political parties is how to deal with the collapse of consensus on questions of Islamic legal theory. In the period during which the classical consensus held sway on questions of Islamic legal theory, Muslim legal thinkers developed a reservoir of sophisticated concepts and vocabulary that allowed them to grapple effectively with questions of morality and effective governance. In the modern era, Muslims have come to agree that the classical method of Islamic legal interpretation and the classical model of the Islamic state are no longer appropriate. There is deep disagreement, however, about what should replace it. Different thinkers have appropriated the insights of classical theory in different ways and refashioned them into many new Islamic legal theories. Different factions have called on states to apply different theories. The result is a situation in which there is a broad desire for Islamization in the abstract, but violent disagreement about what form Islamization should take—disagreement that is rooted in very different ideas about how to interpret the shari’a.

In at least one country, then, constitutional Islamization has made judges an important new voice in the debates about Islamic legal theory—and particularly on the crucial question of what makes a state law “Islamic.” There is no guarantee that other countries will
follow the lead of Egypt, or even, for that matter, that later courts in Egypt will continue to embrace the SCC’s liberal vision of Islamic legal theory. Nevertheless, the SCC has publicly articulated and applied a decidedly liberal, rights-protecting approach to Islamic legal interpretation. The acceptance of its precedents to date and the constructive dialogue that its approach has generated reveal that Islamic law can realistically be conceived of as a source of liberal legal norms. Under the right circumstances, Islamization can reinforce movements trying to develop the liberal rule of law in the Muslim world.