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The Islamist Trend in Egyptian Law

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Abstract: The past four decades have witnessed profound transformations in the Egyptian legal system and in the Egyptian legal profession. Article 2 of the Egyptian Constitution now enshrines Islamic jurisprudence as the principle source of law, thus establishing an important symbolic marker at the heart of the state and opening avenues for Islamist activists to press litigation campaigns in the courts. Additionally, the Islamist trend gained prominence within the legal profession, a development that is particularly striking given the long and illustrious history of the Lawyer's Syndicate as a bastion of liberalism. Despite these significant shifts, however, Islamist litigation has achieved only limited legal victories. This article traces the political and socio-economic variables that underlie the Islamist trend in Egyptian law, and examines the impact of Islamist litigation in the Egyptian courts.

INTRODUCTION

One of the most striking developments in Middle Eastern politics over the past several decades has been the steady growth of Islamist movements, which have eclipsed secular modes of political and social activism and today present perhaps the most credible challenge to the established political order. Although Islamist political parties, non-governmental organizations, and activists are tremendously diverse in terms of their objectives and strategies, most share a common concern for affecting changes in the law and legal institutions. Just as the secular and religious contours of state and society are fought in the American judicial system, many of the most prominent debates concerning the proper place of religion are at heart struggles over the law.

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This study examines the increased prominence of religion in the Egyptian legal system. I first trace the early development of the Egyptian legal system and the legal profession through the first half of the 20th-century, attributing the emergence of a secular system of law to the state-building project and the exigencies of trade and commerce. Next, I focus on the transformation of the legal profession from its liberal-elite orientation for most of the 20th-century to one with far less ideological and class coherence. Finally, I examine the strategies and impact of Islamist litigation with a review of cases initiated by Islamist lawyers in the Supreme Constitutional Court, the Civil Courts, and the Administrative Courts of Egypt.

THE DEVELOPMENT OF LEGAL INSTITUTIONS AND THE LEGAL PROFESSION IN 19TH AND EARLY 20TH CENTURY EGYPT

As in many other countries (Halliday and Karpik 1997; Tigar and Levi 1977), the development of the modern Egyptian legal system and legal profession were driven by the twin engines of state-building and the advance of trade and capitalism. Beginning with the rule of Muhammad ‘Ali, new legal codes and legal institutions were rapidly deployed to regulate commerce and extend the reach of the state. The first unified legal code, *al-Muntakhabat*, was promulgated in 1829 and Councils of Merchants were established in Cairo (1845) and Alexandria (1846). Mixed Courts were established in 1876 to arbitrate business disputes involving foreigners, and the National Courts were established in 1883.

In most cases, judicial reforms resulted in the increased secularization of the legal system and the marginalization of once-dominant, traditional centers of Islamic jurisprudence, such as al-Azhar. Just as the civil, commercial, penal, and procedural codes for the new National Courts were built on a foundation of primarily French law, the jurisdiction of the Shari‘a Courts was formally restricted to matters of personal status in 1897.[1] With law 462 of 1955, Gamal ‘Abd al-Nasser abolished the Shari‘a Courts altogether, along with all other confessional courts, and personal status cases were combined into the jurisdiction of the National Courts. Henceforth, personal status codes were derived from certain aspects of religious law, but applied by judicial officials without extensive training in religious law *per se*.

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This secularization of legal institutions was paralleled by a transformation of education in general and legal training specifically. The rapid expansion of the state generated a great need for state administrators, and law became a principal field of study for those entering government. Egyptians were first sent to Europe for legal training in the 1820s under Muhammed ‘Ali. Later, they were increasingly schooled domestically in the new School of Administration and Languages (founded 1868), which later became the School of Law (1886), and later still part of Cairo University (1925).[2]

These and other state institutions quickly eclipsed the religious training that al-Azhar had provided for the better part of a millennium. A rapidly expanding Cairo University surpassed al-Azhar’s student enrollments by 1928 (Reid 1990, 141) and the new state universities left al-Azhar graduates with fewer opportunities and less influence in the expanding government bureaucracy. State policy further accelerated this seemingly unstoppable trend by requiring that all lawyers practicing before the National Courts come from the state’s secular institutions of study rather than from al-Azhar.

Meanwhile, religious institutions themselves faced daunting economic and political pressures throughout the 19th and 20th centuries. As part of his program to build a modern Egyptian state, Muhammad ‘Ali reorganized land ownership and nationalized 623,000 acres of waqf land that had previously financed mosques and religious schools. Nasser continued this assault in 1952 by placing all waqf land (a full 12% of all arable land) under the control of the new *Wizarat al-Awqaf* (Ministry of Endowments). Finally, the 1961 nationalization of al-Azhar formally reorganized the university and put it under direct government administration (Moustafa 2000). Under state domination, the shape of legal education changed dramatically within al-Azhar. The curriculum at the Shari‘a Faculty was transformed away from intensive study of *usul al-fiqh* (Islamic legal theory) to substantive issues in Islamic law. Together, these and other changes undermined the distinct underpinnings of traditional Islamic education and jurisprudence (Cardinal 2005).

While the opportunities for Shari‘a Court lawyers with training in Islamic law continued to decline, the opposite was the case for the new class of lawyers with secular training.[3] The surge in commercial activity in the late 19th and early 20th centuries provided lucrative opportunities for lawyers with civil law training. Law also became dominant among the political elite, with 14 of the 19 prime ministers from 1919 and 1952 having their formal training in the law and nearly all cabinets during the same period featuring a majority of lawyers (Reid 1980, 118). The

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close relationship between prominent lawyers and the nationalist cause further served to boost the prestige of the profession.

Throughout the inter-war period, the legal profession became an important political force in and of itself. The Lawyers' Syndicate, established in 1912, became a focal point for national debates, as did its professional publication, *al-Muhamah*. Although it would be misleading to portray the legal profession as a monolithic block, the dominant trend in the profession could be characterized as having a liberal and secular set of political tendencies, with a majority of the profession through the inter-war years being drawn from the upper socio-economic class. The Wafd Party's domination of Lawyers' Syndicate elections through most of the inter-war years gives a good indication of the dominant political trend in the profession.[4] By contrast, lawyers were relatively underrepresented in the Muslim Brotherhood (Reid 1980, 157), which drew from a different socio-economic background, and represented a wholly different mode of mobilization.

In sum, the 19th and early 20th centuries were marked by the secularization of Egyptian law and legal practice. New legal codes were based primarily on European models. New judicial institutions were established that overtook or incorporated confessional jurisdictions. And perhaps most importantly, the nature of legal education changed dramatically with the establishment of secular faculties of law and the marginalization of traditional centers for the study Islamic jurisprudence such as al-Azhar. Yet, despite these many transformations, further changes in economic and education policy under Gamal ʿAbd al-Nasser's new regime (1952–1970) soon undermined the liberal-elite character of the profession.

THE ISLAMIST TREND IN EGYPTIAN LAW

Education, once available only to a tiny fraction of wealthy Egyptians, became more and more accessible to the masses through the 20th century. Fees for primary schools were removed in 1943 followed by secondary schools in 1950. At the university level, the majority of students received a free education by 1955, and beginning in 1962 university education was made free for all.[5] The populist orientation of the new regime seems to have precluded the adoption of selective entrance requirements, and university enrollment skyrocketed. The Faculty of Law, once the most prestigious of faculties in the social sciences at Cairo University, suffered from the flood of new students. The quality of legal education

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deteriorated quickly and the overproduction of lawyers, already a problem by mid-century, was exacerbated enormously.[6] Adding to the overproduction of lawyers from Cairo University was the addition of new faculties of law at the new University of Alexandria (1942) and 'Ayn Shams University in Cairo (1950).

Political developments also aggravated these problems. The Free Officer's coup of 1952 marked a decisive split from the old political order; the Constitution was abrogated by executive decree, the parliament and political parties were dissolved, the Lawyers' Syndicate and prominent members of the *Majlis al-Dawla* were purged, and a series of exceptional courts were established to sideline opponents of the new regime. Together, these measures undermined the political and legal institutions that had given lawyers such a prominent role in Egyptian political life in the inter-war period.

The legal profession additionally suffered from the decline in private-sector activity during Egypt's socialist transition. Nasser's sweeping land reform program crippled the economic class that had provided lawyers with their most lucrative clients. Furthermore, the waves of private sector nationalization in 1956 and 1960–1964 brought private commercial activity to a near standstill and the most profitable commercial cases supporting the legal profession were lost. Lawyers were left to work on civil or criminal cases that generated only a fraction of the revenue of commercial cases. As a result of these dual trends of an overproduction of lawyers and the decline of private sector activity, the legal profession fell from being perhaps the most attractive, lucrative, and respected profession in pre-revolutionary Egypt to one of the least desirable career paths.

Government policy seems almost to have intentionally accelerated these cumulative pressures. The Ministry of Education, for example, plays a key role in allocating incoming students to various faculties. Each year, after secondary students complete their dreaded *Thanawiyya 'Amma* exams, the Ministry of Education determines the minimum scores required to enter various faculties at public universities, thereby determining which programs will remain elite in caliber and which will be less selective. The number of new law graduates entering the job market could have been restricted by making Faculty of Law admissions more selective, but the Ministry of Education did the opposite; it became the easiest faculty to enter at the university.

This shift was already pronounced within the first eight years of Nasser's rule. By 1960, Cairo University and Alexandria University required lower entrance scores for the Faculty of Law as compared

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with Engineering, Pharmacy, Medicine, Economics and Political Science, the Sciences, Commerce, and Architecture. In fact, the Faculty of Law ranked lower than every other faculty, with the exception of Fine Arts (Fig. 1).

The position of the Faculty of Law at Cairo University was further undermined with the establishment of a separate Faculty of Economics and Political Science in 1960. The best students entering the law faculty now had more attractive options, and Economics and Political Science quickly displaced the legal field as the avenue through which young Egyptians sought careers in government. Finally, the further proliferation of faculties of law at the new Mansoura University (1974), Zagaziq University (1974), Assiut University (1975), Helwan University (1975), Tanta University (1981), and other public universities exacerbated these trends.[7]

By 1980, the minimum entrance scores required by the Ministry of Education had fallen even lower relative to other disciplines. Out of 10 faculties, the Faculty of Law ranked dead last in terms of the rigor of its entrance requirements (Fig. 2). The minimum score had fallen to half of what was required for entrance to most other faculties. The profession that once attracted the best and the brightest of Egyptian youth was now the field of last resort.

The rapid proliferation of universities across the country, free tuition, and lax entry standards for law in particular produced a dramatic increase

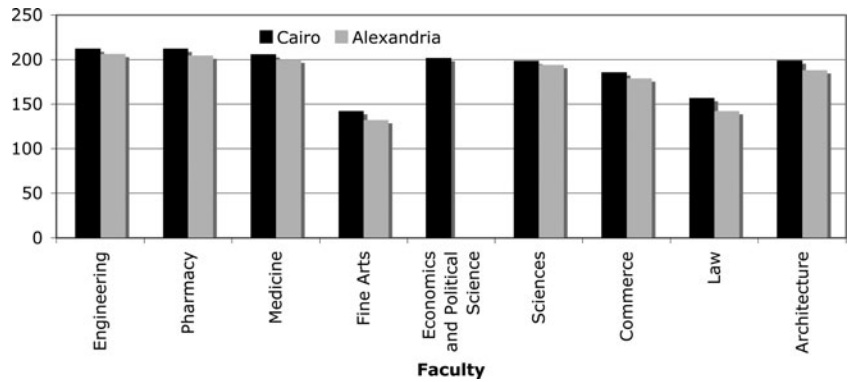


FIGURE 1. Minimum entrance scores for various faculties at Cairo University and Alexandria University, 1960. Source: *al-Ahram*, 10 September 1960.

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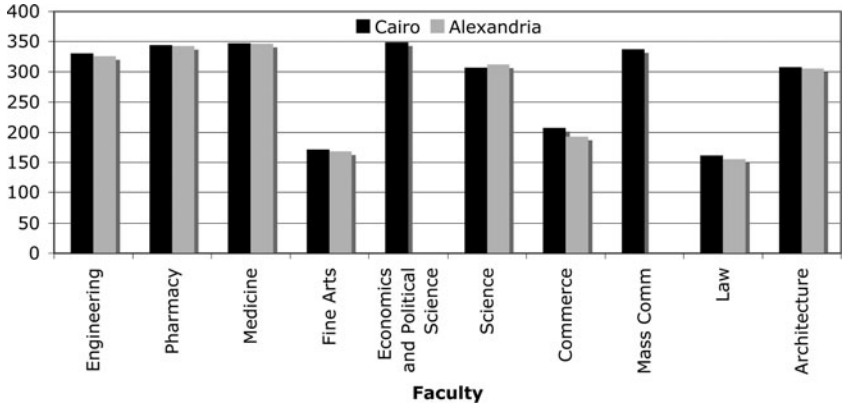


FIGURE 2. Minimum entrance scores for various faculties at Cairo University and Alexandria University, 1980. Sources: *al-Ahram*, 19 August 1980; 5 September 1980; 21 September 1980.

in the number of new law graduates beginning in the 1970s (Fig. 3). The overproduction of lawyers sent the profession into a downward spiral. As more lawyers entered the workforce, the wages of their colleagues steadily deteriorated; the more that wages stagnated, the less elite the standing of the profession. Many of the brightest of students who once flocked to the Faculty of Law now pursued engineering, medicine, and economics and political science. The legal profession began to pull from a different socio-economic profile than it had in the early 20th century. The legal

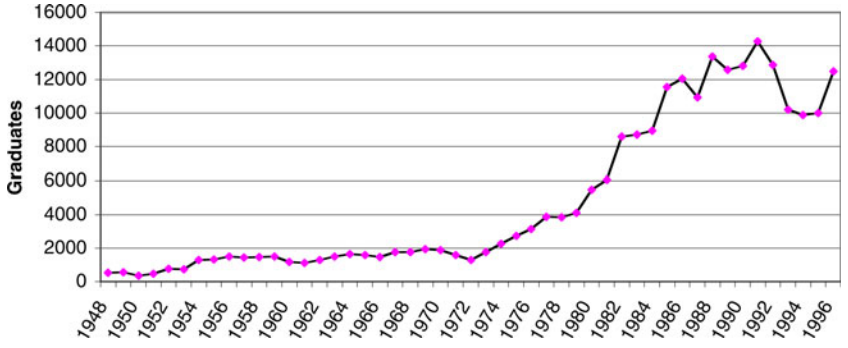


FIGURE 3. Egyptian Law School Graduates by Year, 1948–1996. Source: Arab Republic of Egypt. 1960–1988. *Statistical Yearbook of the Arab Republic of Egypt.* Cairo: Central Agency for Public Mobilization and Statistics.

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profession would henceforth have far less ideological and class coherence.

Coupled with this socio-economic shift, the Islamist trend emerged as a powerful force in Egyptian student politics in the 1970s. Eager to consolidate his power, the "Believer President," Anwar Sadat (1970–1981), encouraged the emerging Islamist trend to counter leftists on university campuses (Abdullah 1985; Beattie 2000; Rosefsky Wickham 2002). Islamist-oriented student groups took control of student unions and became the dominant political trend on campuses across Egypt.

As new law graduates left the university and spilled into private practice, they found themselves among a vast surplus of lawyers, most with poor training compared to their predecessors and many coming from more disadvantaged socio-economic backgrounds. The same ideological divisions that students had witnessed on university campuses were present within the legal profession, with an additional generational dimension. Cleavages between old-school liberals, on the one hand, and disadvantaged but highly motivated Islamist lawyers, on the other hand, took shape within the profession.

By 1985 these transformations were evident not just in the Lawyers' Syndicate membership but also in the formal programs organized at the Syndicate. Shari'a committees were established in all syndicate branches across the country to offer social and cultural services to lawyers and their families. Conferences and seminars were organized around various themes related to Islamic law. Finally, these shari'a committees set to work drafting legislation that would be submitted to the People's Assembly for consideration with the aim of bringing contemporary laws into conformity with the *shari'a*.

Here, the Shari'a Committee of the Lawyers' Syndicate was simply following the lead of their believer president, Anwar Sadat, who had issued a new constitution in 1971 declaring Islam the religion of the state and the *shari'a* a principal source of law.[8] The language of the 1971 Constitution was further strengthened when Article 2 was amended on 22 May 1980 to declare, ". . .the principles of the Islamic jurisprudence are *the* chief source of legislation."[9] The simple amendment of one word from "*a*" principal source to "*the*" principal source was interpreted by almost everyone as meaning that all laws must be in conformity with Islamic law. What this meant in concrete terms and how this would be put into action was not entirely clear and is still a matter of some debate.

Article 2 was almost certainly intended to bolster the religious credentials of the regime at a time when Sadat was using the Islamist trend to

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counterbalance Nasserist power centers within the state and society. Just as Sadat gave free rein to the Islamist trend to organize on university campuses, for tactical purposes, so too was religion used to build a new base of legitimacy in contradistinction to the failures of the Nasser era in achieving economic growth and pan-Arab unity. Sadat probably never imagined that Article 2 would open the door to constitutional challenges by both Islamist-oriented activists in civil society and lower court judges sympathetic to the Islamist movement, but after Sadat's assassination, Islamist activists attempted to challenge what they believed to be the secular foundations of the state.

The first avenue for challenging legislation was the new SCC, which was established in 1979 with powers of judicial review and considerable independence from direct government interference. The SCC is the sole authority to interpret the meaning of the Constitution and it is the only body empowered to strike down unconstitutional legislation. Beginning in the 1980s, the SCC proved to be the most credible avenue to challenge the status quo from within the formal legal/political system (Moustafa 2007). Leftists, liberals, and Islamists all used litigation as a tool to challenge government legislation. Within its first decade of operation, 215 challenges were transferred to the SCC invoking Article 2 of the Constitution. What follows is a brief review of some of that litigation.

ISLAMIST LITIGATION IN THE SUPREME CONSTITUTIONAL COURT

The first Islamist challenges to reach the SCC concerned the compatibility of Article 2 of the Constitution with provisions for interest charges on delinquent payments as stipulated in the Egyptian civil code. According to some interpretations of the *shari'a*, Islamic law prohibits *riba*, or unearned accretion such as interest charged on loans. Islamist activists set their sights on striking down Article 226 of the civil code concerning state-mandated interest charges on overdue payments. The first such case reached the SCC in its second year of operation (Case 31, Judicial Year 2).[10] Two more cases challenging the same provision in the civil code reached the SCC just one month later, and the SCC quickly dismissed both cases on technical grounds (Cases 21 and 72, Judicial Year 6).[11] However, with 53 more challenges reaching the Court's dockets within a few years, it was clear that the SCC would have to confront the issue of *riba* and Article 2 of the Constitution directly.[12]

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On May 4, 1985, the SCC issued a landmark ruling on the constitutionality of interest in a case launched by none other than the *Sheikh al-Azhar,* ‘Abd al-Halim Mahmud, against the offices of the President of the Republic, the Prime Minister, and the President of the Legislative Committee of the People’s Assembly, in addition to Fuad Gudah, who had a concrete, personal interest in the case (Case 20, Judicial Year 1). The challenge was a spectacular clash between the head of state versus the most authoritative Muslim religious figure in Egypt and arguably throughout the Muslim world. The case at hand concerned a mere 592 Egyptian pounds that an administrative court had ordered al-Azhar medical school to pay for medical equipment in addition to the 4% interest rate that had accrued on the overdue payment. Sheikh Mahmud used the dispute as an opportunity to challenge Article 226 of the civil code, which provides for interest on overdue payments.[13]

Al-Azhar’s position was simple: Article 2 of the Constitution declares Islamic jurisprudence the principal source of legislation and by the *Sheikh al-Azhar’s* reading of Islamic law, Article 226 was in clear violation of the prohibition on *riba*. The implications of such a decision were tremendous because any ruling of unconstitutionality would have far-reaching effects on the entire Egyptian economy and on the regime’s relationship with the Islamist movement.

In its ruling, the SCC drew on the Report of the General Committee, which had prepared the amendment of Article 2 of the Constitution in 1980:

> The departure from the present legal institutions of Egypt, which go back more than 100 years, and their replacement in their entirety by Islamic law requires patient efforts and careful practical considerations. Hence, legislation for changing economic and social conditions that were not familiar and were not even known before, together with the innovations in our contemporary world and the requirements of our membership in the international community, as well as the evolution of our relationships and dealings with other nations — all these call for careful consideration and deserve special endeavors. Consequently, the change of the whole legal organization should not be contemplated without giving the lawmakers a chance and a reasonable period of time to collect all legal materials and amalgamate them into a complete system within the framework of the Qur’an, the Sunna and the opinions of learned Muslim jurists and the ‘Ulama . . . (*al-Mahkama al-Dusturiyya al-‘Ulia*, Vol. 3, 222).

The SCC agreed with the reasoning of the General Committee and argued that, if citizens were allowed to challenge laws that were issued before the

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1980 amendment to the Constitution, it would "lead to contradictions and confusion in the judicial process in a manner that would threaten stability" (*al-Mahkama al-Dusturiyya al-'Ulia*, Vol. 3, 223). The SCC concluded that the legislature must be given the opportunity to review all laws and bring them into conformity with the *shari'a* over time. In the interim, the amended Article 2 of the Constitution would not have retroactive effect and instead would be applied only to laws that were issued after the 1980 amendment that had made Islamic law *the* principal source of legislation.

With this ruling, the SCC neutralized a significant Islamist legal challenge and dismissed dozens of similar challenges to Article 226 that had been collecting on its docket.[14] Simultaneously, the ruling provided a legal basis to reject scores of other Islamist challenges to a wide variety of pre-1980 legislation, from personal status laws to aspects of the criminal code.[15] In the process, however, the SCC also implicitly suggested that laws issued after the 1980 amendment were justiciable and that they must be in conformity with the *shari'a*.

It should be noted that not all constitutional petitions based on Article 2 were Islamist challenges *per se*. The majority of petitions invoking Article 2 of the Constitution most likely did so in instrumental ways designed to strengthen claims of unconstitutionality. For example, litigants used the *shari'a* to strengthen claims in property rights cases.[16] Similarly, dozens of cases dealing with personal status issues of divorce,[17] alimony,[18] and child custody[19] used Article 2 to contest family law regulations, despite the fact that personal status provisions in the Egyptian legal code are generally based on accepted interpretations of the *shari'a*.[20] Although some of the constitutional claims in these cases may have been made by litigants who sincerely believed that the personal status codes deviate from the *shari'a* and therefore impose legal norms that conflict with their understanding of religious duty, it is probably safe to assume that many of these petitions simply used the *shari'a* to strengthen their claims in instrumental ways.

Other cases, it seems, were launched in order to create a public spectacle, even when there was little chance of favorable rulings. In one petition, for example, Islamists contested the constitutionality of a series of laws governing alcohol and the gambling industry. The plaintiff claimed that these laws violated Article 2 of the Constitution as well as Article 12, which states that "society shall be committed to safeguarding and protecting morals, promoting the genuine Egyptian traditions and abiding by the high standards of religious education, moral and national

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values . . . and public manners within the limits of the law. The State is committed to abiding by these principles and promoting them." The plaintiff demanded not only that the laws be struck down and that the state actively confiscate alcohol and gambling paraphernalia but he also demanded that the state build mosques in the place of nightclubs throughout the country as moral compensation to the people. The presiding judge on the civil court agreed with the applicant's constitutional claim and advanced the challenge on to the SCC, where the petition was soundly rejected on the grounds that the plaintiff did not have a direct interest in the case (Case 3, Judicial Year 12). It is likely that the petitioners launched this case fully aware that it would be rejected by the Court, but the case itself gave Islamists an opportunity to highlight what they contended was a yawning gap between government rhetoric and practice.

Perhaps the most interesting petitions dealing with Article 2 were not those that were initiated by litigants bringing disputes to court, but rather those cases brought by lower court judges themselves, using their power to refer questionable laws to the SCC for judicial review *on their own initiative*. For example, in presiding over a case concerning drinking in public in 1982, the judge of a Cairo criminal court decided to suspend the proceedings and petition the SCC to review the constitutionality of law 63/1976 on the consumption of alcohol (Case 61, Judicial Year 4). It was the judge's opinion that law 63/1976 did not conform to the requirements of Islamic law because it mandated prison time rather than lashings as the punishment for drinking in public.[21]

In a similar case, a primary court judge suspended a trial concerning prostitution to request that the SCC evaluate the constitutionality of law 10/1961(Case 89, Judicial Year 12). It was the judge's opinion that this law, which punished prostitution, did not conform to the requirements of Islamic law and therefore did not conform to Article 2 of the Constitution. The judge argued that in Islamic law the crime of adultery is to be punished by stoning if the adulterers are married and by lashings if the adulterers are unmarried, whereas law 10/1961 only provided for a prison sentence.[22]

Again, the surprising aspect of the examples just cited is that these constitutional challenges were initiated by lower court judges themselves. Dozens of similar challenges to a variety of laws highlight broader tensions within the Egyptian legal establishment. Some lower court judges were sympathetic to Islamist challenges, but Islamist

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litigation made little headway once constitutional petitions reached the SCC.

These schisms in the Egyptian legal community also came to a head most visibly in the Lawyers' Syndicate elections of 1992. Already, Islamist candidates had won a controlling majority on the boards of directors in the Doctors' Syndicate (1986), the Engineers' Syndicate (1987), and the Pharmacists' Syndicate (1990). But when Islamist candidates won 18 of 24 seats in the September 1992 Lawyers' Board election, the nation was especially stunned. The Lawyers' Syndicate, perhaps more than any other organization in the country, had been dominated by liberals for decades. The 1992 election marked a sea-change that many had previously considered unthinkable. Changes from inside and outside the legal profession — the overproduction of lawyers, the decades-long slump in private economic activity, the decline in the prestige of the profession, and hence the change in its socio-economic composition — combined with the Islamist revival sweeping the country to produce the first Islamist board of directors in the Lawyers' Syndicate.[23]

The Syndicate election outcome was partially the result of low voter turnout.[24] Energetic, motivated, and organized Islamists were able to carry the day when matched with a Syndicate membership that had become relatively disengaged.[25] The 1992 victory should therefore not be seen as a direct measure of the strength of the Islamist trend in the Egyptian legal profession. Still, it was a notable marker of how much the legal profession had changed over the years.

By the early 1990s, it became increasingly difficult for the SCC to dismiss Islamist challenges based on the non-retroactivity claim established in the al-Azhar interest case. New laws promulgated after the 1980 constitutional amendment were open to judicial review based on the Court's own reasoning, and new Islamist challenges based on Article 2 were launched with increasing frequency.

One of the most interesting challenges sought to overturn a decree by the Minister of Education, who had prohibited students from wearing the *niqab* (full veil) while attending public schools.[26] In response to the policy, the father of two school girls launched a legal challenge that made its way to the SCC. The father argued that the school dress code violated Articles 2 and 46 of the Egyptian Constitution, the first of which declares that Islam is the religion of the state and that the *shari'a* is the principal source of legislation, and the latter which guarantees the freedom of belief and the freedom to practice religion. The SCC

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ruled that the ministerial decree did not interfere with any fundamental requirement of Islam (Case 8, Judicial Year 17).

> There is no indicator in the Qur'anic texts or in our honorable *sunna* that legally conforming women's clothing, to be approved by the *shari'a*, must veil totally; [that it must] include a *niqab* draped over her so that nothing appears except her eyes and two eye sockets; and [that it] must require the covering of her face, palms, (and, according to some, feet). This is not an acceptable interpretation, nor is it known by necessity of religion.[27]

Awad al-Murr, the Chief Justice of the SCC, was even more emphatic in his writings outside of the court's formal decision:

> It would be impractical to regard as mandatory a phantom-like dress for women. . ..The Quar'an, along with the sayings of the Prophet do not portray women as figures hidden under a screen, draped from head-to-toe, with no part of their bodies except their eyes revealed (al-Murr 1997).

The SCC ruled that the Minister of Education's decree was well within his right to regulate school uniforms and that it did not violate Article 46 of the Constitution, which the Court interpreted as guaranteeing that "no one may be compelled to believe in a religion which he denies; to declare the religion to which he adheres; to withdraw from the one he has chosen, or to favor a particular religion in prejudice to another, by way of contempt, defamation or renunciation."

With this ruling, the Court entered deeper into the business of constitutional adjudication around issues of religion and public policy. But as Lombardi and Brown (2005) explain, the *niqab* ruling is a good illustration of how interpretation and application of Article 2 of the constitution has not automatically resulted in increased religion in the public sphere.

CASES IN THE CIVIL AND ADMINISTRATIVE COURTS

Hisba cases emerged as another avenue for Islamist litigation in the 1990s. By far, the most high profile *hisba* case concerned Nasr Hamid Abu Zayd, a professor of Islamic and Arabic Studies at Cairo University. Abu Zayd had stumbled into a national debate when, upon submitting his file for consideration of promotion to full professorship, his promotion was rejected. The grounds for his rejection were that his scholarship was inadequate, but one critical report also charged that his work was blasphemous. In the ensuing debate between university

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committees, Islamist lawyers launched a case against Abu Zayd in a Giza Court of First Instance, accusing him of apostasy and demanding, therefore, that the court annul Abu Zayd's marriage to his wife.[28]

The case was unusual because the lawyers did not have a direct interest in the case, and therefore lacked the legal standing that is typically required.[29] The plaintiffs argued that they should be afforded standing on the basis of *hisba*, a concept in Islamic jurisprudence that allows for individuals to initiate cases in some circumstances related to the "rights of God" for the common good, without direct interest in the case at hand.[30]

The Court rejected the claim. But upon appeal the lawyers won a stunning victory against Abu Zayd. The ruling was as surprising for its practical effect as for what it could mean in other *hisba* petitions that lawyers were eager to bring to court under the same procedural rational. In its verdict, the Cairo Court of Appeal concluded that:

> What [Abu Zayd] had written contravenes not only religion, but also the Constitution of the Arab Republic of Egypt. Its Article 2 states that Islam is the religion of the State .... Thus, an attack on the [foundation of Islam] is an attack against the State which is founded upon it. He also contravenes Article 9 of the constitution that states that the family is the basis of society, and its basis is religion...

The Court went further, advising Egyptians to bring forth more *hisba* cases, going so far as describing it as a duty incumbent on all Muslims.

> *Hisba*, according to the Court and the Islamic scholars, is for God, and is for the regulation of good and the prevention of evil, and is therefore a necessary practice for all Muslims. It is the duty of all, and all Muslims should practice it by going to the court to file suits, or to provide testimony.[31]

The case quickly attracted international media attention. The Court of Cassation (*Mahkamat al-Naqd*), Egypt's highest appellate court in the civil court hierarchy, considered the legal issues at stake. To the surprise of many, the Court of Cassation affirmed the Cairo Court of Appeals the following year. Abu Zayd was deemed an apostate.[32] It was the first ruling of its kind in an Egyptian court and a major victory for radical Islamists.

Encouraged by the Abu Zayd case, Islamist lawyers initiated more *hisba* lawsuits. A total of 134 cases were initiated between 1995 and 1998 against a variety of public personalities such as Nobel award

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winning author Najib Mahfuz, the prominent actress, Yusra, and well-known film director, Yusif Shahin (Bayat 2007, 172; Bernard-Maugiron 1999). Although the *hisba* lawsuits stoked considerable consternation among secularists from 1993 to 1998, none of the cases had such profound impact as the lawsuit against Abu Zayd.

Recognizing the considerable social and political havoc that these lawsuits were creating, the government intervened in 1998 and issued legislation preventing individuals from initiating *hisba* petitions directly in court. Henceforth, citizens could only make appeals to the public prosecutor's office, which would then decide whether to prosecute the case. By monopolizing this legal innovation, the government may have precluded the emergence of further controversial cases, but it also placed the burden of moral policing on the state itself.

Our final case for consideration comes from Egypt's *Majlis al-Dawla* (the State Council), which sits atop the hierarchy of the administrative court system. One of the chief roles of the *Majlis al-Dawla* is to arbitrate between different jurisdictions within the administrative apparatus of the executive branch of government. In July 1993, the *Shaykh al-Azhar* submitted a letter to the *Majlis al-Dawla* requesting clarification concerning which institution had jurisdiction over the censorship of audio and audiovisual productions dealing with Islam. Although al-Azhar had previously acted as an adviser to the Ministry of Culture, with this petition it now sought to gain a monopoly on censorship rights.

In the following year, the *Majlis al-Dawla* had arrived at a decision in favor of al-Azhar's request for jurisdiction, declaring: "the Honourable Azhar is the final arbiter in the assessment of the Islamic factor, whose opinion is binding for the Ministry of Culture concerning the granting or refusing of a license for audio and audiovisual productions." Egyptian intellectuals were particularly stunned by the ruling because the *Majlis al-Dawla* has a long history of supporting liberal values and promoting secular principles.[33] Interestingly, Tariq al-Bishri, a respected judge and formidable intellectual, had authored the ruling in his capacity as Chairman of the General Assembly of the Board of Legislation within the State Council. Al-Bishri was a well-known personality who had himself gone through something of an intellectual rebirth from former leftist to Islamist. As in the Abu Zayd case, this signaled too many secularists that the Islamist trend held sway up to the highest levels of the Egyptian judiciary.

Al-Azhar's control over censorship rights on productions relating to Islam might be seen in some sense as a reversal of the trends described

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in earlier portions of this study. In other words, the granting of censorship rights to al-Azhar relieved the Ministry of Culture of the duty of deliberating on the "Islamic question." However, the 1961 nationalization of al-Azhar essentially incorporated the institution as an arm of the state. Moreover, the government was charged, through the *Majlis al-Dawla* ruling, with enforcing the decisions of al-Azhar's censorship committee. This was hardly an easy way for the government to extract itself from the messy business of regulating issues of religion and public policy.

ASSESSING THE IMPACT OF ISLAMIST LITIGATION

What impact has the Islamist trend had on Egyptian law? I argue that despite the far-reaching implications of some of the cases discussed here, they are best understood as the exception rather than the rule. If we examine the broad sweep of Egyptian history from the early 19th century to the present, it is hard not to conclude that the general trend in Egyptian law has been strongly secular in most respects. Legal education is almost thoroughly secular, with most students taking only one course in Islamic law and even the Faculty of Law at al-Azhar University training students primarily in civil law rather than Islamic law. Legal institutions are based on the civil law model, in terms of both institutional structure, and procedural function. Finally, only personal status law is based upon religious law, but even here religious law is codified with a completely different set of organizing principles from traditional Islamic jurisprudence.[34]

Turning to the legal profession, we have seen in this analysis that a variety of pressures converged to undermine the liberal-elite profile that had dominated from the 19th through the mid-20th centuries. The 1992 Islamist victory in the Lawyers' Syndicate elections served as a striking sign of the ideological drift that occurred within a substantial portion of the profession. However, it should be observed that an Islamist majority on the board was not repeated in subsequent Syndicate elections. The Islamist victory in 1992 had more to do with low voter turnout and stronger organizational capacity of the Islamist trend rather than true majority support within the legal profession.

Nevertheless, splits between liberal and Islamist legal professionals were played out within the judiciary itself. Lower court judges tended to be more sympathetic to Islamist claims, some initiating petitions for judicial review on their own initiative. Yet despite hundreds of such

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petitions, Islamist litigation made little headway once it reached the SCC. The SCC proved to be remarkably adept at circumventing a number of thorny questions related to religion and public policy through the non-retroactivity principle. In other cases that were addressed directly, the SCC used its power to interpret Article 2 of the Constitution in a fashion that granted virtually no concessions to Islamist activists (Lombardi and Brown 2005; Roesler 2006). Similarly, in the civil and administrative court hierarchies, the vast majority of Islamist litigation that found success in lower courts was quashed upon reaching appellate courts. The Abu Zayd case and al-Azhar censorship cases should therefore be seen as (not insignificant) exceptions among rulings from the Egyptian judiciary.

Are we to conclude, therefore, that most Islamist litigation is inconsequential? Despite the fact that Islamist lawyers won very few favorable rulings, I maintain that this litigation has had a notable impact on Egyptian state and society for at least three reasons. At the most basic level, the Abu Zayd case in particular set a landmark precedent in Egyptian law. Never before had a citizen been deemed an apostate in an Egyptian court of law. Although the government later blocked the ability of citizens to initiate *hisba* lawsuits of their own, trial for apostasy is a legal principle that has not been challenged. This constituted a major, concrete legal advance for Islamists.

But the more important impact of the Abu Zayd case, as well as other Islamist litigation, is the "radiating effect" that it has on Egyptian state and society. As Glicksberg (2003) persuasively shows, public debate over the Abu Zayd case overshadowed the facts of the case itself. Debate raged in the press for years and through the process a notable shift in political discourse took place: secularists lost more of their footing in the "war of position" (Gramsci 1971). The public spectacle around the Abu Zayd case acted as a catalyst for a discursive shift that was already underway, providing at least as much of an opportunity to Islamists to advance their project outside of the courts as within (Glicksberg 2003). It is not surprising, therefore, that Islamist lawyers continue to mobilize through judicial channels even in the vast majority of cases where litigation has little or no promise of a favorable result.

This brings us to a third major impact of Islamist litigation, which is once again more indirect in nature. Islamist litigation acts as a constant source of pressure for the state to actively police public morals. Even when Islamists lose in courts, they are afforded an opportunity to advance their narrative in the court of public opinion. In this way,

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lawsuits provide ample fodder for Islamist leaning newspapers like *al-Sha'ab* to claim that the government has failed to put its stated commitment to Islamic law into concrete action.

NOTES

1. Prior to the establishment of the National Courts in 1884, the Shari'a Courts could claim to be the courts of general jurisdiction, although in practice their de facto influence was always circumscribed. The decree of 1897 formally restricted their jurisdiction to matters of personal status.

2. Cairo University itself was known first as the Egyptian University through 1936 and Fu'ad I University from 1936 to 1953.

3. The most comprehensive histories of the legal profession and the Lawyers' Syndicate through the mid-20th century in English are Reid (1980) and Ziadeh (1968).

4. The Wafd Party was the dominant political party in Egypt during the liberal era of 1919 through 1952.

5. According to Reid (1980), 75% of Cairo University students were attending without fees by 1955 due to financial need or high test scores.

6. The number of lawyers increased at six times the rate of general population growth through the mid-20th century (Reid 1990, 131).

7. From 1970 to 1980 alone, university enrollment jumped three-fold, from nearly 180,000 students to over 550,000 students.

8. This was not the first time that Islam had been mentioned in an Egyptian Constitution, for even the liberal 1923 Constitution declared Islam to be the religion of the state in Article 149. However, the 1971 Constitution went much further, by explicitly declaring that ". . .the principles of Islamic jurisprudence are a chief source of legislation."

9. *Mabadi' al-shari'a al-Islamiya al-masdar al-ra'isi li al-tashri'*.

10. The plaintiff rescinded his petition for constitutional review before the SCC considered the case.

11. The cases were dismissed on the grounds that the law in question was not specified in the petition.

12. See *al-Mahkama al-Dusturiyya al-'Ulia*, Vol. 3, 245, 301 for a listing of the *shari'a*/interest cases that reached the SCC.

13. The case was continued after Sheikh 'Abd al-Halim Mahmud's death by his successor, Sheikh Gad al-Haq 'Ali Gad al-Haq.

14. See *al-Mahkama al-Dusturiyya al-'Ulia*, Vol. 3, 245, 301 for a listing of other cases contesting the constitutionality of Article 226 with Article 2 of the Constitution. Further challenges were rejected by the SCC from 1991–1997 in case 12, Judicial Year 14, ruled 2 September 1992, *al-Mahkama*, 5 (2):40–46; case 26, Judicial Year 15, ruled 2 December 1995, *al-Mahkama*, 7:226–239; case 93, Judicial Year 6, ruled 18 May 1996, *al-Mahkama*, 7:709–715.

15. For a sample of the variety of laws that were contested by Islamists based on Article 2 of the Constitution and rejected by the SCC based on its precedent set in case 20, judicial year 1, see the listing in *al-Mahkama al-Dusturiyya al-'Ulia*, 4:253–255.

16. See, for example, case 36, Judicial Year 9, *al-Mahkama al-Dusturiyya al-'Ulia*, 5:224–259; case 65 Judicial Year 4, *al-Mahkama*, 5:307–323; case 6, Judicial Year 9, ruled 18 March 1995, *al-Mahkama*, 6:542–566; case 116, Judicial Year 18, ruled 2 August 1997, *al-Mahkama*, 8:789–808.

17. For example, case 35, Judicial Year 9, 1 Judicial Year 16, 4 Judicial Year 16, 21 Judicial Year 13, 25 Judicial Year 9, 54 Judicial Year 13, 25 Judicial Year 15 ruled on 14 August 1994, 1 October 1994, and 5 November 1994, *al-Mahkama al-Dusturiyya al-'Ulia*, 6:331–357; case 37 Judicial Year 16, ruled 5 August 1995, *al-Mahkama al-Dusturiyya al-'Ulia*, 7:102–105.

18. For examples, see cases 29 Judicial Year 11, 5 Judicial Year 14, and 21 Judicial Year 16 ruled 26 March 1994, *al-Mahkama al-Dusturiyya al-'Ulia*, 6:231–256; case 5 Judicial Year 8, ruled 6 January 1996 and case 46 Judicial Year 17, ruled 4 May 1996, *al-Mahkama al-Dusturiyya al-'Ulia*, 7:347–387.

19. For examples, see case 7, Judicial Year 8, ruled 15 May 1993, *al-Mahkama al-Dusturiyya al-'Ulia*, 5 (2):260–290.

20. For analysis of the SCC's reasoning in these cases, see Lombardi (2006).

21. Just as it had done previously in the al-Azhar interest case, the SCC denied the petition on the grounds that the law had been issued before the 1980 amendment to the Constitution, which had made the *shari'a the* principal source of legislation rather than simply *a* source of legislation.

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22. The SCC again dismissed the challenge based on the non-retroactivity requirement.

23. The 1992 board elections brought the Syndicate and the government into direct confrontation. The regime quickly pushed through law 100/1993, which required a minimum turnout in Syndicate elections for the results to be valid. Eventually, the Syndicate was brought under government sequestration between 1996 and 2000, paralyzing one of the most important institutions in Egyptian civil society.

24. Only about one-third of active Syndicate members voted, representing only about 10% of all registered members.

25. Rosefsky Wickham (2002) provides a good account of how the Islamist trend leveraged superior organizational skills to their advantage.

26. Decrees 113 and 208 of 1994 by the Minister of Education.

27. For a full translation along with more extended analysis of SCC jurisprudence in this case, see Lombardi and Brown (2005).

28. Marriage between a non-Muslim man and a Muslim woman is not permitted in Egyptian law.

29. See Berger (2003) for more on apostasy in Egyptian law.

30. For more on the practice of *hisba* historically, see Stilt (2004). For more on how lawyers in this case transformed and imported the concept of *hisba* in the case of Abu Zayd, see Agrama (2005) and Sfeir (1998).

31. Cairo Court of Appeals, case 287, 1995. Quotes are from Agrama (2005, 58, 82).

32. Abu Zayd and his wife left Egypt before the Court of Cassation ruling were implemented. However, the court ruling still stands and Abu Zayd and his wife remain in the Netherlands to this day.

33. For more on the case and the response of secular activists, see Egyptian Organization for Human Rights (1994).

34. In the day-to-day application of personal status law, judges do not typically think of their work as application of Islamic law, per se. Rather, their attention is dedicated to a procedural routine as dictated by the civil codes (Dupret 2007).

Case 31, Judicial Year 2, December 3, 1993, *al-Mahkama al-Dusturiyya al-'Ulia*, 2:177–179.
Cases 21 and 72, Judicial Year 6, 26 January 1985, *al-Mahkama al-Dusturiyya al-'Ulia*, 3:158–161.
Case 20, Judicial Year 1, 4 May 1985, *al-Mahkama al-Dusturiyya al-'Ulia*, 3:209–224.
Case 3, Judicial Year 12, 2 January 1993, *al-Mahkama al-Dusturiyya al-'Ulia*, 5:124–130.
Case 61, judicial year 4, 23 April 1988, *al-Mahkama al-Dusturiyya al-'Ulia*, 4:84–87.
Case 89, Judicial Year 12, 16 May 1992, *al-Mahkama al-Dusturiyya al-'Ulia*, 5:338–343.
Case 8, Judicial Year 17, 18 May 1996, *al-Mahkama al-Dusturiyya al-'Ulia*, 8:344–367.

REFERENCES

Abdallah, Ahmed. 1985. *The Student Movement and National Politics in Egypt, 1923–1973*. London, UK: Al-Saqi Books.

Agrama, Hussein. 2005. *Law Courts and Fatwa Councils in Modern Egypt*. Ph.D. Dissertation. Baltimore, MD: John's Hopkins University.

Arab Republic of Egypt. 1960–1998. *Statistical Yearbook of the Arab Republic of Egypt*. Cairo: Central Agency for Public Mobilization and Statistics.

Arab Republic of Egypt. *Constitution of the Arab Republic of Egypt.* http://www.egypt.gov.eg/english/laws/constitution (Accessed March 26, 2010).

Arab Republic of Egypt. 1980–2007. *al-Mahkama al-Dusturiyya al-'Ulia*, vols. 1–10. Cairo: al-Ahram.

Bayat, Asef. 2007. *Making Islam Democratic: Social Movements and the Post-Islamist Turn*. Stanford, CA: Stanford University Press.

Beattie, Kirk. 2000. *Egypt during the Sadat Years*. New York, NY: Palgrave.

Berger, Maurits. 2003. "Apostasy and Public Policy in Contemporary Egypt." *Human Rights Quarterly* 25:720–740.

https://doi.org/10.1017/S1755048310000192 Published online by Cambridge University Press

Bernard-Maugiron, Nathalie. 1999. "Legal Pluralism and the Closure of the Legal Field: The *al-Muhajir* Case." In *Legal Pluralism in the Arab World*, ed. Dupres Badouin, Maurits Berger, and Laila al-Zwaini. The Hague, The Netherlands, 173–190.

Cardinal, Monique. 2005. "Islamic Legal Theory Curriculum: Are the Classics Taught Today?" *Islamic Law and Society* 12:224–272.

Dupret, Baudouin. 2007. "What is Islamic Law? A Praxiological Answer and an Egyptian Case Study." *Theory, Culture and Society* 24:79–100.

Egyptian Organization for Human Rights. 1994. *Freedom of Opinion and Belief: Restrictions and Dilemmas, Proceedings of the Workshop on the Azhar's Censorship of Audio and Audiovisual Productions*. Cairo, Egypt: Egyptian Organization for Human Rights.

Glicksberg, Joseph. 2003. *The Islamist Movement and the Subversion of Secularism in Modern Egypt*. Ph.D. Dissertation. Philadelphia, PA: University of Pennsylvania.

Gramsci, Antonio. 1971. *Selections from the Prison Note Books of Antonio Gramsci*. New York, NY: International Publishers.

Halliday, Terence, and Lucien Karpik. 1997. *Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries*. Oxford, UK: Oxford University Press.

Lombardi, Clark, and Nathan Brown. 2005. "Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights - How Egypt's Constitutional Court Reconcile Islamic Law with the Liberal Rule of Law." *American University International Law Review* 21:379–435.

Lombardi, Clark. 1998. "Islamic law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State." *Columbia Journal of Transnational Law* 37:81–123.

Lombardi, Clark. 2006. *State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari'a into Egyptian Constitutional Law*. Leiden, The Netherlands: Brill.

Moustafa, Tamir. 2000. "Conflict and Cooperation between the State and Religious Institutions in Contemporary Egypt." *The International Journal of Middle East Studies* 32:3–22.

Moustafa, Tamir. 2007. *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*. New York, NY: Cambridge University Press.

Murr, 'Awad al-. 1997. "Judicial Sources for Supporting the Protection of Human Rights." In *The Role of the Judiciary in the Protection of Human Rights*, eds. Cotran Eugene, and Adel Omar Sherif. The Hague, The Netherlands: Kluwer Law International, 14–19.

Reid, Donald. 1980. *Lawyers and Politics in the Arab World, 1880–1960*. Minneapolis, MO: Bibliotheca Islamica.

Reid, Donald. 1990. *Cairo University and the Making of Modern Egypt*. Cambridge, UK: Cambridge University Press.

Roesler, Shannon. 2006. Modern Legal Reform in Egypt: Shifting Claims to Legal Authority. *Cardozo Journal of International and Comparative Law* 14:393–428.

Rosefsky Wickham, Carrie. 2002. *Mobilizing Islam: Religion, Activism, and Political Change in Egypt*. New York, NY: Columbia University Press.

Sfeir, George. 1998. "Basic Freedoms in a Fractured Legal Culture: Egypt and the Case of Nasr Hamid Abu Zayd." *Middle East Journal* 52:402–414.

Sherif, Adel Omar. 1988. *al-Qada' al-Dusturi fi Misr*. Cairo, Egypt: Dar al-Sha'ab.

Stilt, Kristen. 2004. *The Muhtasib, Law, and Society in Early Mamluk Cairo and Fustat (648–802/1250–1400)*, Ph.D. Dissertation. Cambridge, MA: Harvard University.

Tigar, Michael E., and Madeleine Levi. 1977. *Law and the Rise of Capitalism*. New York, NY: Monthly Review Press.

Ziadeh, Farhat J. 1968. *Lawyers, the Rule of Law and Liberalism in Modern Egypt*. Stanford, CA: Hoover Institution on War, Revolution, and Peace.

https://doi.org/10.1017/S1755048310000192 Published online by Cambridge University Press