One of the main characteristics of “modernity” in the view of modernisation theorists, is the separation of the world into differentiated spheres like religion, economy, politics, and aesthetics, while the “traditional” world view was holistic, linking these fields so that what is “good” in religion is also “good” or “beautiful” in the other systems (cf. e.g. Kwark 2004, 128-129). The term “Islamic law” would in itself be an example of such a holistic merging of two spheres, conflating a person’s faith with his rights, or even three, if “law” is seen as a natural aspect of state politics that in a modern differentiated system should not be separated from religion, in its institutions and its rules.

There are two possible problems with such an approach. One would be, is it true that the “traditional” (premodern) world did not differentiate between these systems? Or is it only an assumption that the modernity sociologists make by constructing “the traditional” as the conceptual opposite of their “modern”? And, following from that, did “modernity” really make such a total and earth-shattering transformation in how Islamic law was practiced in actual reality? Did “modernity” triumph, and what is the relation between religion, the state, and rights today in the Muslim world?

The two topics are thus related: we cannot establish how the “modern transformation” was a break with the past without knowing what that past was. In the practical world of premodern law, there is no doubt that there was a differentiation between the “political institution” – the state, caliph, or sultan – and the “religious institution,” which in Islam was not so much an institution as a category of independent scholars who formulated and discussed the shariʿa rules (Vikør 2005). There were of course areas of contact between the scholars and rulers; many ‘ulama’ took the sultan’s money to perform functions for him, be it as his advisor or to sit on his council. Indeed the function of qadi was a “state function” – the judge was appointed by the sultan or his representative, and could be fired by him. But in order to become a qadi, a candidate first had to get a scholarly education and be recognised as a learned man, and this did not come from a public appointment, but from his relation to the “civil society” of religious scholarship, the ‘ulama’.
Even more so, the law itself that the state, sultan, and court should practice was developed by these independent scholars over the centuries, scholars who were not bound to one particular state or country. Thus, the law transcended the state borders, nor should it change when one sultan conquered or inherited a state from another. There were of course divisions, primarily between the schools of law, madhāhib, but also regional differences within the schools (cf. e.g. Johansen 1999a). However, these did not coincide with the political borders, but followed the distribution of scholars. In the main centres of learning where many scholars gathered – Cairo, Damascus, and others – there were also a plurality of madhāhib.

It must be added that this ideal model of division between a “civil society” formulation of law and “state” implementation of it was never complete, and did not last. From the beginning, the caliphs and later sultans made moves to strengthen their influence not only over the courts, but also over the law (Vikør 2005, 185-205). Independent muftis were drawn into the sultan’s circles and some became dependent on his largesse, while others refused money that, since it came from a sultan’s purse, could only be tainted with blood and oppression. The Ottomans took major steps towards drawing the law under the state’s authority, partly by appointing a “state mufti,” the shaykh al-islām, and giving him supreme authority over interpretation of the law, and specifically by formulating legal rules on the authority of the sultan himself, the kanun (Imber 1997; Jennings 1979). Relevant only in certain fields of law, and often conforming to what the traditional fiqh jurisprudence stated, it was still a major step towards giving the sultan authority over the legal field (Gerber 1994).

This did not mean that the sultan in this way gained control over “religion” in a holistic way; that was still under the ‘ulama’ and the shaykh al-islām did not have any authority in matters of theology. It was rather a shift of power, part of a general process during which the Ottoman state strengthened its authority and bureaucratized elements of social life that earlier rulers and states did not control. Islamic law was on the move to become state law. Again, we can find traces of this process of “statification” of the law all the way back to Islam’s earliest history in the caliphate. There had always been courts or councils where the state authority had greater influence than in the shari‘a courts proper; the Ottomans only continued this established premodern trend.

There were of course still links between law and religion, in particular in terms of legitimacy: the sultan would refer to the Qur’an’s exhortation to “obey those charged with authority” (Qur’an 4:59), that is, themselves, and later Ottoman sultans claimed a fragment of religious legitimacy by
proclaiming themselves to be caliphs and thus having the right to obedience from all Muslims. The *kanun* was to be based on the shari‘a, and the shari‘a was the practical embodiment of God’s will as expressed in the divine revelation. Certainly, all creation came from God and was in this way one “holistic” whole. The rights of man came not from man’s innate nature, but from God because man was created by God. But as long as the scholars recognised that God’s will could not be understood except through the fallible interpretations of men, present in the world through a field of “religious knowledge,” ʿilm, that was the arena of the scholars, and that the practical matters of government were given to a separate and differentiated sultanic state, then the “holistic” concept refers only to the transcendental God, not to the actual matters of this world. Thus, the term *ḥuqūq Allāh*, “the rights of God” (over men) could in Islamic thought be used not to shore up the state and ruler’s control over its subjects through any divine authority, but the opposite: it was a way to limit the sultan’s power and subject him to the law that he could not control (Weiss 1998, 182-184; Johansen 1999b, 210-218). God was higher than the sultan, so the sultan himself was subject to *ḥuqūq Allāh*, which, in as far as they were expressed in shari‘a laws, were determined on earth by the differentiated “institution” of religious scholarship.

1 Colonialism and Modernity

The influence of European thought and politics in the Muslim world in the nineteenth century evidently brought great changes also to the field of law. But in many ways these changes only continued the process of transformation or shift in balance that had already been underway for centuries. In Europe, “law” as practiced in the courts had by this time been largely divorced from the religious or church (canon) law, even though religious conceptions still influenced what was considered “right” and “proper” in many areas of life. As European conceptions came to have an impact on the Middle East, it thus reinforced the already existing tendency to see the legal field as under the control of the state rather than the religious scholars. But the duality between a “religiously sanctioned court system,” the qadi courts, and the “politically sanctioned court system,” the “civil” or state courts, already in place in the medieval period, continued to be the way this relation between the state and law was practiced in most Muslim countries throughout the century.1

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1 For criminal law, see Peters (1997).
The most definite change from the earlier period was the issue of legitimacy. While the kanun law acquired its authority from the political power of the sultan, its legitimacy was that it was supposedly a practical implementation of the siyāsa sharʿiyya, “shari’a politics,” the ruler’s best way to implement the morality and underlying tenets of the shari’a in our imperfect world (Vikør 2005, 208). The fiqh lawyers’ elaboration of the true rules of the shari’a remained the ideal solution for any question, but the realities of our imperfect world meant that these rules could not always be implemented, or they would, if taken to the letter, impose hardships that were at variance with the general tenet that the law should promote the welfare of man. Thus, the sultan could and should instead seek in his own way to promote the shari’a’s principles, even if he thus had to change and even contravene the letter of that law, which the qadi could not. This may have seemed to be merely a justification for the sultan to impose his own will, but it was without doubt the support that the sultan sought and marked a link between his siyāsa decisions and the divine revelation.

That link was broken in many of the new laws that were enacted from the middle of the nineteenth century. The penal, administrative or economic laws were increasingly based on European laws and practices which of course had few or no shari’a references. It was not a sudden change; most of the nineteenth century constituted rather a transitional period. Thus, the celebrated Ottoman Mecelle laws (for economic and administrative matters mostly) were largely based on Hanafi Islamic law, but restructured and systematised in such a way as to be practical in the new political and social environment that increasingly took its cue from Europe (Starr 1992, 33-36; Findley 1960-2005, vi, 972). From the 1880s, European powers also came to control many Muslim countries directly, and had even less compunction with imposing European-inspired laws, certainly in cases where their own citizens in the Middle East were involved.

But both they and the Ottoman and other Muslim rulers left some areas of law largely untouched, in particular family law and laws of personal status. These thus became more of a “reservation” for shari’a law, based on fiqh rules, and often administered by separate qadi courts that had lost their competence in all other areas of law. There may be several reasons why these fields of law were so much more resistant to “modernisation” or Europeanisation. It may be that the Europeans were more interested in changing laws that directly affected themselves or the state authorities they now controlled, and found it easier to let Muslim families comport themselves as they wished internally. More important was probably the necessity that laws are accepted by those touched by them. Not only do
family laws relate to the most intimate and personal matters of each individual – everyone is affected by issues of paternity, marriage, and inheritance, while fewer are concerned with crime, administration, and political systems. Issues of family matters also concern deeply held ideas of morality, honour, and “family values.” While an individual may accept that a distant and powerful state could meddle in how he should write a contract or register land ownership, he would be far less willing to accept that the state decides whom he should marry and how he should share his wealth with his family. Thus, a fundamental change in family laws in a “European” direction would neither have been understood nor accepted by the subjects. The authorities, European as well as modern Muslim, found it acceptable not to rock that boat too rapidly.

Even so, the twentieth century saw the beginning of change even within Muslim family laws. Virtually every Muslim country introduced some, and successive, changes to their rules for marriage and divorce, some more than others, although only Turkey separated itself completely from the legacy of the shariʿa. The basis for this change and the possibility for the state to intervene and influence these fiqh-based laws point to perhaps the more important change in legal development in the twentieth century and “modernisation,” although still foreshadowed by the sultan’s kanun: the process of codification.

Codification refers to the form that a law takes: rather than being expressed in a shared understanding of “existing custom” (in customary law) or in the legal precedence found in records of previous lawsuits (in common law systems), the law is fixed in a written code of law (Bogdan 1994). Such a law code is structured and systematic and should ideally be so principled that it would cover every possible case, past or future. This code is formulated and fixed by someone; it has a known author, a clearly defined legal authority. This authority could be a parliament, a legislative assembly, or a single autarch or dictator; the central point is that there is an agent behind the law, and the authority of the law is based on acceptance of the legal authority of this agent.

The existence of a codified law system is not a sign of modernity in itself; the Roman law of antiquity was a model for codification, and even the laws of Hammurabi constitute a rudimentary codified law. But in the Muslim world it coincided with the advent of the European models, and it signalled the final decisive transfer of legal authority from the independent class of ʿulamaʾ to the state itself. Now the agent of codification, the body that formulated the law codes, was always the state. This was evidently the case for the new Europeanised laws that came to prevail in economic and
penal law, but also in the one area that was left as a “reserve” for the shariʿa, family and personal law.

It was only in the twentieth century that the process of codification of family law really took hold, perhaps with the Ottoman family law of 1917 as a decisive turning point. Although the Ottoman Empire collapsed soon after and modern Turkey soon abandoned this Ottoman law for a European imported law, it remained influential in the earlier Ottoman provinces of the Arab world, and it can still be seen to underpin the modern family laws of many of the republics that followed from the mandate era.²

Most Muslim countries followed up by introducing smaller or greater changes in their family laws, such as establishing a minimum age for marriage, posing conditions on polygamy, improving the wife’s access to judicial divorce, or limiting the husband’s ability to unilaterally divorce his wife (ṭalāq), and similar measures.³ The legislators in these cases seldom directly banned practices such as ṭalāq or polygamy that had a clear religious basis. Instead, they circumscribed the husband’s rights with conditions to make it more onerous to practice them, adding conditions such that he must have the permission of the first wife in order to contract a second marriage, or that by doing so, he automatically grants his first wife the right to khulʿ, consensual divorce.

Preserving the rights supported in religion, such as ṭalāq and polygamy, could of course be argued to show a remnant of a “holistic” approach by merging the fields of religion and law. However, for that to be the case, it must be the religious basis itself that is the reason they exist. Given the modifications that were made to them, many of which must be said to contradict or at least manipulate the ‘ulama’š classical fiqh, that is perhaps not the best understanding. If it was religion, then the legislator would have had to conform to the religion as defined by the religious authority, the scholars, which they did not.⁴ It may be better to see this as the function of public perception of what is proper. That must always limit any lawmaker that has less than absolute totalitarian power. The modern lawmakers would thus rather work under the assumption that the public (or the legislators

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² This can be seen, for example, in the surveys in An-Na‘im (2002). In fact, the Ottoman family law is still the prevailing law in what may be called the last legal remnant of the Ottoman Empire: the Muslim minority population in Greece, under the unchanged agreements following the Greek-Turkish War of 1919 (Rohe 2004).
⁴ Rather the opposite: the qadis more or less half-heartedly accepted the modifications of the state because they were dependent on the state (see Shaham 1997).
themselves) would not have accepted a law that broke too directly with what they considered “right and wrong” in their established norms and customs, which they identified in turn with religion.

In this sense, the process of legal reform of family matters in the last century is not a partial and imperfect implementation of the global transition from “tradition” to “modernity,” but the result of a general truism, that laws have to reflect in some way the subjects’ normative system, and that these normative systems are ever changing. But there is also a different tendency that appears clearly from the family law reforms of the twentieth century, again one not related to a “modernist break,” but a continuity of the trend we saw from the medieval period onwards: the inexorable advance of the state in the legal field. Superficially, the family law reforms seem to strengthen the position of women: access to divorce, limitation of polygamy, and so on. But in practical matters, it is not so much the women's position that is strengthened, but that of the court (the state). Access to judicial divorce was improved, but what the wife was now allowed was to petition the court for divorce (cf. Carroll 1996). Particularly in Hanafi law, the judge had very limited, or no, possibility to hear divorce cases initiated by women. By various means, such as borrowing from Maliki law, far more liberal in this respect, the court now accorded itself greater rights to decide on a wife's plea. Also, all the restrictions put on the husband’s right to ṭalāq went in the direction of giving the courts the right to decide the framework surrounding the divorce, and similarly with most other reforms. In other words, the reforms tended very clearly to take family matters that had been deemed to be “private” and make them “public,” under state authority. Thus it continued the process of “statification” of legal matters. This is certainly a clear marker of change, but the continuation of one that began in the eighth century.

2 Islam in the Egyptian Constitution

An important element of codification and the accompanying systematisation of laws was the idea that a state should have a basic constitutional law that regulates the political system of the country and is the foundation for its other laws. The first constitution in the Arab world was established in Tunisia in 1861 but was soon repealed after France, already a serious influence in Tunisian affairs, came to believe that it could be used to counter their interests in the country (Perkins 2004, 24-30). As the new nation-states were created around and after World War I, however, most Middle
Eastern countries passed constitutional laws. In theory, of course, this contravened at least one common conception of the shari‘a, which was that either the shari‘a itself or the Qur’an, was the only possible “constitution,” the mundane state laws passed by parliaments or presidents only at best being siyāsa, practical implementations of the shari‘a ideal according to the best efforts of the sultan, the ruler in place.

These constitutions were thus faced with the question of how to relate the actual laws of the land to the concept of the shari‘a. A common form was to introduce classical fiqh as one of several sources for jurisprudence. Typically, the constitution could specify that if there was a rule in the codified law that could be applied, then the judge should use that. If he could not find such a relevant rule, he could search in the established fiqh rules of a specified madhāhib. Thus the United Arab Emirates gives Maliki and Hanbali fiqh precedence, so the judge should first go there, and if no answer could be found there either, then to the Shafi‘i and Hanafi madhāhib. Custom could then also be added at the end, if the case could not be satisfactorily answered by either codified law or the established madhāhib. Other countries rank the madhāhib differently, according to the position of each madhhab there (Ballantyne 1990; Vikør 2005, 251).

Here, then, the codified law has precedence, but a space is left open for uncoded fiqh. More controversial is to let codified laws be subservient to the shari‘a in that a body of fiqh specialists are given the competence to vet and strike down codified laws introduced by the legislative assembly. This is the case in post-revolutionary Iran, where this led to considerable problems as the religiously trained scholars of the Guardian Council were not at all able to keep up with the pace of legislation, and the system had to be modified to reduce their ability to create bottlenecks (Schirazi 1997). Similar review bodies have also been suggested elsewhere (Hussain 1994, 62).

One of the most controversial attempts to bring references to the shari‘a into the constitution, and probably one that also had most effect on the legislation of other Middle Eastern countries, was that of Egypt. The earliest constitutions from 1923 on did not have any particular phraseology about Egypt’s religious identity, except to establish freedom of worship. It seems that it was in the post-Nasser constitution of 1956 that we first get this sentence (then §3), which has remained in this form ever since: “Al-Islām dīn al-dawla, wa-l-lugha al-‘arabiyya lughatuhā al-rasmiyya”

5 Saudi Arabia is an exception, with its principled opinion that only shari‘a is “real law” and the rules established by the state (the king) are no more than “ordinances.” For how this works in practice, see Vogel (2000).
(Islam is the religion of the state, and the Arabic language is its official language).6

The paragraph remained in this form until Sadat came to power following Nasser’s death in 1970. His main political rival in his first year was the socialist left wing, and to counteract their influence, he opened up a space for Islamic tendencies. As a part of this, he added a sentence to the paragraph (now moved to be §2) in the revised constitution of 1971: “wa-Mabādiʾ al-shariʾa al-islāmiyya maṣdar raʾīsī li-l-tashrī’” (and the principles of the Islamic shariʾa is a main source for the legislation).

This was a reasonably vague formulation, giving rise to three questions: What was to be understood by “the principles” of the shariʾa?, What did it mean to be “a main source”? and, of immediate concern, What effect should this new law have for already existing laws – should they now be vetted against the “principles of the shariʾa” and changed if they did not conform to them? There were views in favour of such a review, and towards the end of Sadat’s rule, plans were made to review existing legislation and “Islamise” a wider set of laws (Lombardi 2006, 129-140). However, when Mubarak came to power after Sadat’s murder in 1981, the policy changed, and nothing came from these plans. The issue was brought before the new Supreme Constitutional Court, which established that the paragraph introduced in 1971 did not have a retroactive effect, so it only applied to new laws passed thereafter.

The Islamisation drive of the late 1970s did, however, have one lasting effect, in that an amendment was made to §2 in 1980, adding a small but crucial element. Where the 1971 text had “maṣdar raʾīsī” (a major source), the revision read “al-maṣdar al-raʾīsī” (the major source), thus taking care of the second issue above: the shariʾa principles should now be paramount over any other possible source for legislation. As long as it was not to be applied retroactively, it still did not have any immediate effect, but after time some issues were brought to the Constitutional Court for review to see if they contravened §2. In dealing with them, the court developed a methodology of its own, which basically equated the “principles” of the shariʾa to be its general intentions, maṣlaḥa or social welfare, which the court deemed to include contemporary principles of general human rights. Thus, only if a law contravened the principles of social welfare could it be in contravention with §2. In almost all cases under consideration, the court

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6 All the Arabic texts of the constitutions have been retrieved from the Egyptian government website (http://www.sis.gov.eg/Ar/LastPage.aspx?Category_ID=2128).
decided that the law did not do so. Thus, the controversial paragraph §2 had little actual effect on Egyptian legislation.

Nevertheless the paragraph, innocuous as it may have been in actual legal practice, generated a heated public debate in Egypt and abroad, and was seen as a possible back door to Islamise Egypt’s mainly secular laws, if the court or any other legislative body were to change their conception of “principles.” Abroad, many English-language sources also inadvertently made the text of the paragraph stronger than it was. It was commonly presented in the English translation provided by the Egyptian government, which had slipped on the word pair “principle” and “principal.” The paragraph is here rendered in English as: “Arabic is its official language, and the principal source of legislation is Islamic Jurisprudence (Sharia),” (thus still on their website⁸). Apparently, “principal” here covers both the Arabic original *mabādiʾ* (principles) and *raʾīsī* (main, or principal). This caused some confusion when the Salafis, as we shall see below, attacked the word *mabādiʾ* which had disappeared in this shortened English translation most Western newspapers used.

### 2.1 The Debates of 2012

After the 2011 revolution, it was clear that the old constitution would have to be revised, and after the very strong showing of the Islamist parties in the first parliamentary elections of January 2012,⁹ the question of what role the shariʿa should have became very controversial. The political situation was fairly chaotic, with the parliamentary election being set aside by the Supreme Constitutional Court and the new president elected in June, Muhammad Mursi from the Muslim Brotherhood, unsuccessfully trying to overturn that decision. However, parliament was able to appoint a Constitutional Assembly where the two Islamist parties held fifty out of a hundred seats, but in reality came to dominate the proceedings. The issue of the shariʿa and §2 of course also dominated the public debate surrounding the constitution.

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⁷ The exceptions seem to concern matters of economy and property; the court has been consistently liberal on issues of family law (Lombardi 2006, 201-258).


⁹ In which the Muslim Brotherhood’s Freedom and Justice Party received 37 percent and the Salafis, dominated by the new al-Nour Party, 28 percent of the vote, but took respectively 45 and 25 percent of the seats.
Viewpoints changed and were sometimes contradictory, but some general tendencies could be discerned. On the “liberal” side of politics, a small secularist tendency arose that wanted to remove all or as much of the religious references as possible from the constitution, and thus an outright suppression of §2. Some Coptic voices also supported this view so as to establish an equality between Muslims and Copts. Other Copts, and apparently also the fairly cautious Coptic Church authorities, did not go so far, and accepted §2 as it stood, but wanted instead an addition to the paragraph that established the rights of the “traditional” or historic role of the Coptic community in the national fabric of Egypt. The shariʿa for the Muslims; Christian law for the Copts. Most centrist groups also accepted the status quo as the best way not to rock the boat, with the retention of §2 in an unchanged manner. This was also the view of the Brotherhood, according to statements they repeatedly issued (Brown 2012).

The new political force on the Islamist side, however, the Salafis, pushed hard for changes in the law to impose the shariʿa. Various Salafi politicians and polemicists suggested many possible forms for this, such as to simply declare the shariʿa to be the constitution. However, the most concrete proposal to carry some weight was to replace the word mabādiʾ, principles, with aḥkām, rules: the rules of the shariʿa are the main source of legislation. This would mean that the actual fiqh jurisprudence, not the vague maṣlaḥa (welfare) was to be the measure that any law was to be compared to.

The original cooperation between liberals and Islamists, such as it was, broke down with most of the liberal parties and forces, including the Coptic Church, withdrawing from the Constitutional Assembly. The final draft that was put forwards and was quickly passed in a referendum in December 2012, was thus mainly the work of the Brotherhood with the remaining other Islamist forces, both Salafis and some liberal Islamist parties that remained in the commission. The overly rapid passing of this law, only a couple of weeks after its text had been made known, caused an upheaval of political life in Egypt, and was a major factor in the social unrest that followed in the ensuing weeks. The main charge was that the Brotherhood and Salafis had implemented a coup and forced the shariʿa onto the revolution. This was also how it was perceived abroad: Egypt has now introduced the shariʿa into the constitution. Also the Salafi and partly also Brotherhood voices triumphantly presented the law in the same vein: now we have passed our shariʿa, go out and defend it! Given Egypt’s central position in the Muslim world, such a change would indeed have been a very significant event for our analysis of the “modern role of the shariʿa.” It may therefore be useful to look closer at the text of the 2012 Egyptian constitution to see what kind
of overtly Islamic or shariʿa elements could be found in it, compared to the one it replaced.

2.2 The Law in Paragraphs

As expected, the major point of contention earlier, §2, remained unchanged from its 1980 version:

Islam is the religion of the state, the Arabic language is its official language, and the principles of the Islamic Shariʿa is the main source for the legislation. 10

§3: Christians and Jews

Instead of the Copts’ request for a particular mention in §2, a separate and new §3 was added:

The legal principles [mabādiʾ sharāʾī] of the Egyptian Christians and Jews are the main sources for the legislation concerning their laws of personal status, religious matters and the election of the spiritual leaders.

This of course largely reflects the actual situation today, but thus received a constitutional basis.

§4: Al-Azhar

However, the following paragraph, also new, was much more controversial, although it may also be considered open-ended. It concerned the question who were to decide what the “principles of the shariʿa” are. So far, this had been decided by the Supreme Constitutional Court that was set up in 1980. But §4 seemed to remove this central right from the legal establishment, and arguably from state authority, and placed it in the hands of the major independent religious establishment of the country, Al-Azhar University:

Al-Azhar is an overarching and independent Islamic institution, which governs its own affairs, with the task of spreading knowledge and science about Islam and the Arabic language in Egypt and the world [beyond]. The views of the Collegium of high scholars at Al-Azhar shall be taken into account in matters related to the Islamic shariʿa [Yuʾkhadh raʿy

hayʾat kubbār al-ʿulamāʾ bi-l-Azhar al-sharīf fī al-shuʿūn al-mutaʿallaqa bi-l-sharīʿa al-islāmiyya].

This was originally suggested by the Salafi parties, who are normally not well-received at Al-Azhar, but they may hope to achieve greater impact once Al-Azhar gains more real independence from the state. Thus the paragraph continued, after asserting that the state should fund the university,

Al-Azhar’s Grand Shaykh is independent and cannot be deposed. The law for the method of his election from among the members of the Collegium is to be determined.

The text of this paragraph can thus, in a benevolent perspective, be read to mean no more than that Al-Azhar scholars are allowed to express an opinion on matters relating to §2, but also that they are the final arbiter of all laws, depending how “taken into account” is interpreted.

§219: The Role of Fiqh

However, this issue was clearly a matter of discussion and negotiation in the Constitutional Assembly, and they ended up adding a paragraph at the end of the constitution, §219, which should establish more clearly what is meant by “principles of the shariʿa” and how they were to be established. Possibly because of the committee work, or because the paragraph is more imbued with religious than with legal thought, it hardly clarified the matter, and the various translations that were made of it into English were not always very helpful to penetrate what it says. The Arabic text is:


An English translation published in the daily Al-Masry Al-Youm provided this text: “The principles of Islamic Sharia include general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community.”11 Again, the exact meaning is not crystal clear.

A probable interpretation could perhaps understand the terms in this way: adilla, plural of dalīl (indications or evidence for an interpretation), is often

used for arguments found in the revealed texts, the Qur’an and sunna. With *kullī* (total or general), this indicates the first part of the process required to establish “principles”: “The principles of the Islamic shari’a include the general rule texts [on the issue in the Qur’an and shari’a].” *Qawāʿid* (foundations) is in law normally used for the abstract principles that *fiqh* scholars have formulated as underpinning the shari’a, along these lines: “an act is measured by its intention” (Heinrichs 2002, 368-369; Vikør 2005, 165). Although *uṣūlī* is here paired with *fiqhī* rather than the more common *furūʿī*, it is reasonable to read the two words as the conventional pair of “methodology” and “legal content,” thus: “its methodological and legal basic rules.”

This may still be open to broad interpretation, so it is probably the last element which is most important, “and its legal sources as they are recognised in the schools of law of the ‘people of the Sunna and Community,’” that is the Sunni *madhāhib*. Shi’ism is thus ruled out, but the four Sunni *madhāhib* are given equal authority.

Read in this way, it shows how any new law taken under review of §2 should be processed. It should first be tested if it contradicts a rule in the Qur’an and sunna; then against the general *qawāʿid* and basic *fiqh* rules, and finally the established rules that are *recognised* in the four schools. The paragraph does not rank the *madhāhib*, so arguably a law that could be supported in one of the four schools should still stand. But the term “recognised” does not seem to allow much leeway beyond that; it leaves it to the specialists of the schools to close the door on interpretations that, however well they may be argued to follow the “general principles,” including the *uṣūl* and *furūʿ*, are not considered by Al-Azhar scholars to be “recognised” by the schools.

**§§10-11, 44: The Family and Religious Freedoms**

A few other paragraphs also refer to religion. §10 reads, “The family is the foundation for the society and is based on religion, morality, and patriotism.” Following it, §11 states: “The state should promote a high level of education in religious and patriotic virtues, scientific thought, Arabic culture and the historical and cultural heritage of the people.” Both of these stem from the 1971 constitution, which also contained a paragraph on religious education which has been removed.

There was a heated debate about a paragraph on women’s rights which included the wording, “as long as it does not contradict the shari’a.” This was however also taken from the 1971 constitution. In any case the paragraph was removed completely, both women’s rights (covered more briefly in another paragraph) and the shari’a reservation.
§§43-46 are concerned with freedoms of belief, thought, opinions, information, and creative work. To this group was added a new §44: “To insult or denigrate all religious messengers and prophets is forbidden.” The ban on blasphemy was thus taken into the constitution. As expected, only the three Abrahamic (sawāmi) religions were awarded protection.

2.3 Religion and State in the 2012 Constitution

What does this mean in relation to the discussion on modernity and Islamic law? As we mentioned, the main elements that appeared with the modern period were codification of laws, restriction of the shari’a’s domain to family and personal status law, and moderate changes to the contents of those laws. The 2012 constitution touched upon all of those elements.

Egypt’s laws were of course still to be enacted in a codified form by a legislative assembly such as parliament as before. However, the constitution allowed a non-legal body, the scholars of Al-Azhar, the possibility to vet and potentially overturn laws they found to be contrary to the shari’a. Previously the Supreme Constitutional Court had that same right, but moving the deciding authority out of the legal system and to the body of religious scholars can certainly be considered a step away from what is the core of the codification process: that legal authority lies with the state (including the judiciary), and not with anybody independent of state authority, such as Al-Azhar is here explicitly said to be. We do not know, of course, how Al-Azhar would have exercised this right, or what their view being “taken into account” was to mean. Were they to be the final authority de facto or de jure, or were they only allowed to voice an opinion which a different deciding body – presumably the Constitutional Court itself – could overturn at will. The constitution cannot be said to be clear on this issue.

As for limiting the shari’a influence to family and personal law, this was of course still the case as substantive law was not changed in any significant manner. But the review process outlined in §2, §4, and §219 made no distinction here. Laws in all fields could be vetted in this process, and this was already the case for some laws considered under §2 by the Constitutional Court, some of which concerned economic matters. The 2012 constitution does not specify whether the review process only concerns new laws, such as was decided after the 1980 revision, although that may perhaps be implied; but that was in any case only a postponement as new laws will have to be enacted continuously. In other words this was not a change from existing practice, but could have had a greater impact than the zero effect §2 actually had made during its first forty years.
As for Al-Azhar’s practical role in any changes to the contents of the laws, the constitution was ambiguous; §219 did not mention the word *ahkām* (actual legal rules), only the *maṣādir al-madhāhib* (sources of the schools of law). It could thus mean only “sources” at the same abstract levels of principles as before, but the language would also allow for an interpretation where a law actually has to conform to, or at least not directly contradicts, the *fiqh* of the matter in the four schools.

These processes would of course be constrained by the political environment. Major changes to Egypt’s laws in line with the traditional shariʿa could not have been possible without major political confrontations, and it is not obvious that Al-Azhar, known mostly for its closeness to what is politically correct at any moment, would have been in the forefront of such a challenge to society. The 2012 constitution can thus be said, in the most dramatic reading, to try to open the way for a reversal of the modernisation process Egypt and most Muslim countries have taken over the last century, but it would probably take a more thorough Islamist revolution than the political power surge of 2011-2012 to make that a reality.

2.4 An Islamist Project Aborted

As it turned out, this Islamist revolution did not take pace, and the 2012 constitution had only a brief and tumultuous life. It was one of the major themes in the widespread popular protests that eventually led to the removal of president Morsi from office on 3 July 2013. The 2012 constitution, implemented only seven months earlier, was immediately frozen. The new regime quickly set down a commission to revise the constitution. While the Salafist al-Nour Party, which supported the coup, attempted to argue for the preservation of some of the paragraphs introduced in February, the revised constitution reversed most of the contentious changes.12

The text of §2 remained as it had been, while the new §3 on Christians’ and Jews’ rights was retained.13 However, the uncertainty of who was to define the “principles” was removed. The independence of Al-Azhar was still stated in what is now §7, but its task is now that “it is the fundamental arbiter [al-marjaʿ al-asāsī] on the sciences of religion and Islamic matters," with no

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13 A new § 235 requires the new parliament to pass a law regulating the construction and renovating of churches, in a manner respecting Christians’ rights.
particular reference to the shari‘a, while the preamble to the constitution says that the interpretation of the principles of the shari‘a lies in the previous rulings of the Supreme Constitutional Court. The controversial §219 was thus completely suppressed.14

This revised constitution was then put to a referendum, with as brief and unconvincing public discussion as in the previous year, and was passed with an overwhelming majority.

The 2012 constitution was thus not to become the framework of politics in Egypt. However, its paragraphs and the debates surrounding it can still give us useful perspectives on how the Muslim Brotherhood, with its allies in the constitutional process, envisaged the integration of Islamist politics and existing constitutional law in practice, and thus the legal role of the “Islamic state.”

The issue of Egypt’s Brotherhood-inspired constitution does not conform to a conception of a sharp break between “tradition” and “modernity.” Modernisation theorists may, of course, say that this reflects an imperfect modernisation, or a reversal from “modernity” to traditional values, represented by the Islamists and Al-Azhar. If so, it would rather indicate the possibility of a hybridity between the “modern” and the “traditional,” meaning that there is no absolute break. However, given how this process plays out in “modern” institutions such as constitutional debates, parliamentary elections, and codifications of the legal process, it seems more fruitful to consider them different; contemporary political and cultural viewpoints and trends with the conceptual dichotomy of “modern” and “traditional” or “classical” are of less explanatory value.

Bibliography


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14 Of the other paragraphs discussed, § 10 remains unchanged in the 2014 constitution, while § 11 was reformulated with less emphasis on morality. While § 43 (now § 64), still limits religious protection to the “Abrahamic” religions, the ban on insulting “messengers and prophets” was removed.


