

Introduction

In the aftermath of the 2011 uprising against the three-decade-long rule of Egyptian President Hosni Mubarak, a striking mural appeared on the external wall of one of the former buildings of the American University in Cairo. In it, a figure in black, holding something that looks like a rosary, attached to which are the symbols for Judaism, Christianity, and Islam, appears to be bowing before a pharaonic figure. This pharaonic figure, which is accompanied by a leopard, is reminiscent of the paintings of men that appear on ancient Egyptian reliefs. To the left of the mural is the word “ta’addab” or “Be polite!” The mural is one of a large number of pieces of graffiti that appeared on walls and buildings around Tahrir Square following the ouster of President Mubarak. The graffiti was painted and drawn by multiple artists and included images of those killed in the uprising as well as pictures and slogans protesting the brutal actions of the Supreme Council of the Armed Forces. Such art formed a response to—and commentary on—the revolution of 2011 and the violence and power struggles that took place before the counterrevolutionary coup of 2013.

In this particular picture, a man, who appears to represent religion in Egypt in a generic sense, is bowing before a symbol of ancient Egypt that predates and transcends the three religions. Ancient Egypt is often invoked as something that binds Egyptians together and is therefore often used as a

symbol for Egyptian nationalism and the Egyptian state. The picture suggests the artist's desire for religion to submit before Egyptian national identity. It seems to say that religion's submission to Egyptian nationalism and the Egyptian state is the appropriate basis on which Egypt should form its political future. Notwithstanding the complexity involved in reading artistic intention, the mural represents some kind of commentary on the question of the relationship between religion and politics in postrevolutionary Egypt. Such a question has always been deeply fraught. This was particularly the case during and after the stalled so-called Arab Spring.

Art was one way in which Egyptians tried to capture and define the relationship between religion and politics. Another way Egyptians attempted to delineate this relationship was through law, specifically through the writing and rewriting of constitutions. Constitutional debates, constitutional writing, and the annulment of constitutions featured consistently in the political discussions that took place after the ouster of President Mubarak. Constitutional debates became the main focus of different political constituencies—nationalist, Islamist, liberal, and secular—that jostled to shape the postrevolutionary order.

This book charts the relationship of the religious to the political as evidenced in Egypt's constitutions since the late nineteenth century, with particular attention paid to the most recent two (2012 and 2014). In postrevolutionary Egypt, key political players—including the Muslim Brotherhood and other Islamist groups; secular, socialist, and liberal parties; members of the former National Democratic Party; al-Azhar; the military; and the Coptic Orthodox Church—all presented their views on what the future of Egypt should be like. Views on the appropriate relationship between religion and politics involved debates about what the source of legislative and judicial authority should be; who has the authority to speak for the sharia (premodern Islamic law); and what aspects of the sharia should be applied in the modern Egyptian state. The relationship of the religious to the political also included answering questions about what role Egypt's Coptic Christian minority would have in the postrevolutionary order; how this role would affect other religious minorities, such as Baha'is; and the extent to which the Coptic Orthodox Church would continue to represent Coptic Egyptians as a community. Important also were the role of women and the family and the extent to which Egyptians should be treated as individual citizens or as part of familial structures and religious communities.

In these discussions, the question of what role the sharia should or should not have took central stage. Here, I am using the term the "sharia" as opposed to the broader English-language term "Islamic law," in order

to distinguish the sharia from what I term modern Islamic state law. The sharia refers to the law that encompasses premodern jurists' law, rooted in the multivalent tradition of the four Sunni schools of law. The full scope of the sharia is impossible to capture. As Wael B. Hallaq has shown, the sharia is a colossal project: the sharia consists of "a hermeneutical, conceptual, theoretical, practical, educational, and institutional system."¹ In premodern Islam, the sharia, as jurists' law, was distinct from the law of the ruling polities. At the same time, it was connected to and informed by the needs of governance.

The status of the sharia in the modern Egyptian legal system is a complex question. The common narrative is that, in the nineteenth century, the sharia was relegated to the sphere of family law and the Egyptian legal system was based on Western, mainly French, law for its civil and criminal codes. The turn away from Ottoman and Islamic sources was in part due to the influence of colonialism, but was also due to the fact that Egyptians wanted to establish a judicial system that centralized state power. Egypt emerged from the nineteenth century with the sharia having become mostly limited to the sphere of personal status law, which encompasses marriage, divorce, inheritance, and guardianship. It was not until the Constitution of 1971 that the sharia was given a greater role in other aspects of Egyptian law. Since then, Egypt's Supreme Constitutional Court has taken a cautious and flexible approach regarding the extent to which it has allowed the sharia to influence other aspects of modern Egyptian law.

Discussions of the role of the sharia in postrevolutionary Egypt were based on an enduring binary that constantly pitted the secular and the Islamist as diametrically opposed entities. Islamist groups such as the Muslim Brotherhood and the Salafis desire to make the Egyptian legal system consistent with Islamic legal norms. Islamists are unified by their wish to see Islam expressed politically. Yet they differ over what kinds of political rights and duties such a political expression of Islam would entail. Such a vision of Egypt's political future is often set in opposition to the vision of what are termed secular parties, which are much less strident in their desire to see Islam influence Egyptian politics.

The binary between the Islamist and the secular was used by different parties in the constitutional debates to legitimize themselves and delegitimize others. The Constitution of 2012 was delegitimized within much of the Egyptian press—as well as within the Western media and academia—by claims that it was Islamist. The 2012 Constitution was decried as Islamist with reference to clauses that were seen as leading to the establishment of the sharia as state law. For example, there were many claims that the 2012

Constitution undermined the equality of women. Opponents of Article 10, which emphasized the importance of the Egyptian family, maintained that it consigned women to the domestic sphere. The 2012 Constitution was also criticized for being detrimental to the principle of legal equality because of Article 3, which stated that “the principles of the religious laws of Christian and Jewish Egyptians are the main source for the legal regulation of their personal status affairs, their religious affairs, and for the nomination of their religious leaders.”² Part of Article 4, which stated that the Council of Senior Scholars should be consulted in matters pertaining to the sharia, was singled out as leading Egypt in the direction of a religious state, or a theocracy like that of Iran. Narratives that framed the Islamist nature of the constitution as troubling evoked a particular conception that posited a binary between the religious, often deemed as retrograde, antimodern, and unsupportive of human rights, and the secular, which is often defined as modern and democratic.

The delegitimization of the 2012 Constitution as Islamist laid the foundation for the removal of President Muhammad Mursi—a member of the Muslim Brotherhood—in 2013 and the establishment of a new constitution in 2014. The Constitution of 2014 was praised as secular, tolerant, rational, and civil. The Cairo Institute for Human Rights Studies praised the new constitution as a positive development in citizenship rights.³ The International Bar Association stated that “Egypt is turning a corner in 2014, and the new constitution provides a solid basis for this fresh start.”⁴

This is not to deny that there were important differences between the Constitution of 2012 and the Constitution of 2014. For example, Article 44 of the 2012 Constitution which stated that “insulting or opposing all messengers or prophets is forbidden” was removed from the Constitution of 2014.⁵ Yet, while the 2014 Constitution was lauded for its secular—and therefore modern and democratic—nature, it had a number of important continuities with the Constitution of 2012. Zaid Al-Ali, the senior adviser on constitution building for the International Institute for Democracy and Electoral Assistance (IDEA), stated that the draft of the 2012 Constitution “is not as controversial as many people assumed it would be. For better or worse, it is generally in line with Egyptian constitutional tradition.”⁶ Al-Ali contends that many of the controversial articles in the constitution were “merely left-over provisions from the 1971 constitution.”⁷ In addition, a number of the controversial clauses that related to Egypt’s minorities, women, and to the religious scholars, continued—either in full or in partial form—in the Constitution of 2014.

This book cuts across the polarity between the Islamist and the secular that characterized legal debates to analyze the complex effects of constitutional commitments to the sharia. In speaking of constitutional commitments to the sharia, I refer to articles in the constitution that specifically mention the sharia and those that are seen as implicitly related to the sharia. I maintain that constitutional commitments to the sharia have caused the sharia to be recast in modern Islamic state law. I use the metaphor of recasting to imply that, when articles relating to the sharia are inserted into the constitution, the result is that much of the material and substance of the sharia is reused, while that substance is molded into a new form. The new form that the norms of the sharia take is defined by the needs of the modern nation state.

Of course, the sharia is not in itself a fixed body of law. It is a multivalent tradition, central to which was “open-ended argumentation,” as Brinkley Messick has shown.⁸ When the sharia is applied as modern Islamic state law, some aspects of this multivalent Islamic legal tradition are brought to the fore, while other aspects are deemphasized. Modern Islamic state law is therefore characterized by a myriad of shifting continuities and discontinuities with the sharia. As a result, neither religion nor politics emerges as dominant, but each is consistently brought to bear upon the other.

In showing the particular forms that the sharia takes when it is applied as modern Islamic state law, I push back against an underlying assumption that introductions of the sharia into modern state law result in some kind of revival of medieval Islam. This assumption was popularly encapsulated by Graeme Wood, for example, in describing ISIS as “very Islamic,” since, he claimed, the “religion preached by its most ardent followers derives from coherent and even learned interpretations of Islam.”⁹ In making a neat connection between learned interpretations of Islam and ISIS’s application of those interpretations, Wood missed a consideration of the ways in which those interpretations of Islam are changed when they are applied by the modern state. Current academic scholarship on Islam is not immune from the view that the sharia is immutable and inflexible. Islamist movements also replicate this assumption. In calling for an ideal past to be retrieved, they underestimate the extent to which reviving the past irretrievably changes it. This book illustrates the unsustainability of such assumptions by explicating the complex and varied relationships that modern Islamic state law has with its premodern antecedents.

More importantly, however, the book’s engagement with the question of the effects of constitutional commitments to the sharia also complicates

some excellent scholarship from the last decade that has emphasized the ways in which modern secular power has transformed the sharia and drawn it far away from its premodern antecedents.¹⁰ Modern Islamic state law, such a perspective holds, is primarily a product of the modern nation state or of secular power. From such a perspective, modern secular power is invested with a far-reaching determinism to impact the forms that modern Islamic state law takes. In emphasizing the ability of modern secular power to transform law, at times one is left wondering what it is precisely that the modern secular state is being contrasted to. For example, Andrew March critiques the binary that Hussein Ali Agrama draws between the understanding of *hisba* in the sharia and its incarnation in modern Egypt. *Hisba* refers to the individual or collective duty to intervene to command what is good and forbid what is wrong. Such a binary, he states, “feels heavily scripted” and strongly stated.¹¹ Khaled Fahmy has also critiqued Agrama for delineating a fundamental disparity between premodern *hisba* and *hisba* in modern Egypt by portraying *hisba* in the premodern context as disconnected from state power and violence.¹² Likewise, the late Saba Mahmood’s emphasis on the secular state as being responsible for the intensification of interreligious conflict and for the increasingly precarious situation of minorities is in danger of leading to a binary by which the Ottoman or premodern legacy is pitted against the modern.¹³ In a similar vein, Wael B. Hallaq contends that the Islamic state is an impossibility and a contradiction since the sharia is, he argues, incompatible with the positive law of the state and its sovereignty. In the modern period, he maintains, the sharia was effectively “dismantled” and “eviscerated” and then “*re-created* according to modern expediency” (Hallaq’s italics).¹⁴

Considering modern Islamic state law’s discontinuities *and* its continuities with premodern sharia, this book suggests that the sharia is not so much eviscerated by the modern state when it is applied as modern Islamic state law, but is rather recast in its service. More specifically, however, it explicates those discontinuities and continuities through definite empirical examples. An explicit engagement with the granular nature of such change is called for and provided by a close reading of four different case studies to illustrate the precise and subtle ways the sharia is recast through—and brought to bear upon—constitutional commitments. Change does not work in a unitary way, but often takes multivalent directions. Such change often carries the legacy of the past with it. Employing a broad historical scope and engaging deeply with premodern law and the Ottoman legal and political legacy illustrates the means by which the present inherits—and departs from—the past.

Thus, modern Islamic state law contains ideas and concepts derived from the sharia, but such ideas and concepts have been reshaped into a different form. The form that this takes is dictated by the needs of the modern Egyptian state. Just as Nimer Sultany has shown that revolutions maintain “varying levels of legal rupture and continuity with the pre-existing legal order,” this book illustrates the specific ways in which the sharia, when attached to constitutional commitments, becomes modern Islamic state law.¹⁵ Modern Islamic state law constitutes neither a break from nor a continuation of what went before, but is rather the result of a recalibration of legal norms derived from the sharia.

Constitutional commitments recast the sharia in a way that involves the recasting of premodern debates about religious and political authority and the role of the ulama of al-Azhar (chapter 4) and the formation of particular forms of inclusion and exclusion for Egypt’s religious minorities (chapter 5). They also involve an altered conception of the relationship between the sharia and the concept of the public interest in relation to women’s rights (chapter 6) and the reshaping of the nature and extent of personal status law for Egyptian Christians (chapter 7).

One of the striking things about Egypt’s history, and about the revolution of 2011–13 in particular, was how constitution writing and debating featured so prominently. Constitution writing was invested with defining and answering fundamental questions about the identity of Egypt and about the will of the people and of the nation. In these events, the constitution was not seen dispassionately as a document for managing the internal workings of governance and of various institutions of the state. The amount of energy and political capital that was expended on constitutional articles was perhaps disproportionate given the extent to which constitutions are actually adhered to. The vitriol and misrepresentation of particular constitutional articles that occurred in Egypt in the aftermath of the Arab Spring suggests something about the power of constitutions. The most recent Egyptian constitutions were invested with a kind of power that transcended their particular articles. This occurrence indicates that constitutions mark important moments when society and the state look backward in terms of understanding how the present is the sum total of the past. They also look forward in the sense that they reflect how key figures who have captured the state at that moment envisage how it will develop in the future.

All constitutions—in shoring up the power of the modern nation state—undertake to manage the relationship between religion and politics. In thinking about constitutions in such a way, this book draws upon recent theorizations of secularism that see secularism not so much in terms of the absence

of religion but in terms of a particular position toward religion itself.¹⁶ Such theorizations have framed the secular as the way in which the state manages and intervenes in religious affairs, along with seeing the parameters for this management and intervention as subject to renegotiation.¹⁷ As Hussein Ali Agrama maintains, defining the relationship between religion and politics is at the heart of the modern state and such a definition is a constant, ongoing process.¹⁸ Both Islamic and secular constitutions function in this way.

Constitution debating, constitution writing, and laws and public attitudes informed by constitutional articles show how the state manages the relationship between religion and politics. Constitutions represent moments when the state manages and defines who is the minority and who is the majority and what the relationship between the two is.¹⁹ Constitutions involve the state defining who has religious authority and what sphere religion should inhabit. They also represent the attempt to mold what citizenship and national culture are. The modern nation state needs to define a nation's particular cultural commitments and to speak in the name of the national will that it claims to represent. While the extent to which constitutions—and those interpreting them and applying them—manage religion varies, they are unified by this common project.

In looking at how constitutions delineate the relationship between religion and politics, I draw on constitutional articles, constitutional and political debates, party and governmental and nongovernmental manifestos, along with legal cases and documents, interviews, Islamist political tracts, and on Islamic political and legal theory. I examine not just constitutional articles, but also the idea of constitutions, their function, their role in contemporary Egyptian politics, and the charged discourse surrounding these constitutions. Tamir Moustafa has called for investigating the “radiating effects of law” in the sense of looking beyond the direct effect of legal decisions to examine the ways that courts provide a platform from which activists can assert broad claims about Islam and the role of the state.²⁰ I do this with constitutions in Egypt.

Discussions of constitutions in the Middle East have tended to focus on the extent to which constitutions advance democracy, the balance of powers, and human rights.²¹ Some work on Islam and constitutions has investigated the concept of Islamic constitutionalism in Islamic political theory, in terms of Islamic understandings of human rights, equality, and the separation of powers.²² Nimer Sultany has addressed the role that constitutions have played in revolutions and in legitimizing new regimes in the Arab Spring. He shows that constitutions worked to institutionalize and entrench the emerging

political order and that “constitutions in particular exemplified both law’s centrality and its contradictions.”²³

While questions of democracy, human rights, and political legitimacy are important, what we need to examine more closely is the role of constitutions in defining national culture and, following from the work of James C. Scott and Timothy Mitchell, making the state and the citizenry representable and readable.²⁴ Here, I ask the reader to think about the way constitutions embody an expression of the goals and aspirations of the nation. Hanna Lerner contends that such a “foundational aspect of the constitution has been generally neglected by studies in comparative politics.”²⁵ Constitutions function to craft national culture and fashion citizenship in the service of the state. When Islamic legal norms derived from the sharia are attached to constitutional commitments, Islamic legal norms are utilized—and partly altered—by the constitution’s role in fashioning citizenship and crafting national culture.

In the study of religion, law and constitutions have not figured prominently, in part because law is assumed to be separate from religion. However, Moustafa argues that “legal institutions play important roles in *constituting* struggle over religion” and in adjudicating debates over the role of religion.²⁶ He contends that “law and courts do not simply stand above religion and politics. Instead, they enable and catalyze ideological conflict.”²⁷ Winnifred Fallers Sullivan has shown how law’s entanglement with the question of religion is at the heart of the modern state. The US Constitution institutes freedom of religion through the First Amendment. Sullivan has shown that American courts must decide what counts as religion and what religion is.²⁸ Law in Egypt faces a similar challenge: under a constitutional commitment to the sharia, the Egyptian courts must decide what gets to count as the sharia and who gets to speak for it.

This book is divided into two parts. The first part, chapters 1 through 3, provides a theoretical and historical look at constitutions, national culture, secularism, and the sharia. The second part, chapters 4 through 7, looks at individual case studies that illustrate the broader claims made.

Chapter 1 calls for a closer look at the significance of constitutions for thinking about how national culture is crafted and the ways that citizenship is fashioned in the service of state formation. Engaging with recent theorizations of secularism that view the secular as the state’s project of defining the relationship between religion and politics, the chapter calls for rethinking the way that the concept of Islamism is commonly framed. When constitutions—whether they appear secular or Islamist—undertake to

manage the relationship between religion and politics, Islamic legal norms are recast in the service of the modern Egyptian state.

Chapter 2 investigates the history of the sharia and addresses the nature, scope, and underlying philosophy of premodern sharia and its presumed relationship with the state. While complicating the narrative that the sharia is incompatible with state law, it addresses the extent to which premodern sharia is conceptually different from modern state law and contends that contemporary Islamic states which seek to apply the sharia as state law encounter a number of challenges. The chapter then looks at aborted attempts to codify the sharia in the nineteenth century and attempts to reintroduce the sharia through constitutional commitments in the latter part of the twentieth century.

Chapter 3 surveys constitution making and writing in Egyptian history and shows how constitutions in Egypt have formed an inherent part of the ending of old political orders and the making of new ones. Constitution making has become inextricably bound up with the ongoing making and remaking of Egyptian nationalism. Constitutions are a means by which the state makes itself legible to its citizens and in so doing lays out the social and political expectations that the state has of its citizens, as well as the expectations those citizens have of the state. The chapter examines the commitments that Egypt's constitutions have made to religion, Islam, and the sharia.

Chapter 4 addresses contemporary debates about the locus of Islamic legal authority, about who gets to speak for the sharia, and about the relationship among Egypt's legislative bodies, the Supreme Constitutional Court, and the ulama of al-Azhar. The chapter argues that such debates, while echoing their premodern antecedents, reflect a recalibrated conceptualization of the relationship between the sharia and the state. While tensions over the role of al-Azhar vis-à-vis the state and legislative authority have a number of parallels in premodern political theory, one of the ways in which this tension manifests itself in contemporary Egypt is in struggles over the distinction between what is Islamic and what is non-Islamic. After the revolution of 2011 such a distinction was a mechanism by which al-Azhar and the Muslim Brotherhood tried to establish their own spheres of authority and limit those of others.

Chapter 5 examines how the principle of the "heavenly" or the "divinely revealed religions" has become a key component of Egyptian nationalism. As a result, Islam and Christianity have become more deeply intertwined through the utilization of the concept of "divinely revealed" in contemporary Egyptian nationalism. While the nationalization of the concept of the

divinely revealed religions has formalized the difference between the heavenly and the nonheavenly religions, in this chapter I call for complicating the assumption that the modern secular state has necessarily intensified inter-religious conflict. Rather, I contend that the concept of the divinely revealed religions has created new forms of inclusion and exclusion by connecting Judaism, Christianity, and Islam, and by excluding other religions in the process.

Chapter 6 illustrates the way in which the concept of the family has become entangled in modern constitutional debates about the religious or the secular nature of the constitution. Women's rights and the family came to be used as a delegitimizing or legitimizing tool in debates about the Constitutions of 2012 and 2014. The chapter shows how constitutional debates about the family and women's rights elucidate a particular conception of the relationship between state, society, and law. Those identified as Islamist have adopted a deep and pervasive understanding of the role of the state by supplementing and moving beyond the specific regulations of the sharia in order to represent the interests of the governed.

In chapter 7, I argue that the judicial autonomy of non-Muslims over personal status law has taken on a particular dynamic since the 1950s. While discussions of the so-called *millet* system have often assumed that this system meant that non-Muslims were left alone and had considerable autonomy, this chapter shows that the nature of this negotiation in contemporary Egypt is predicated on a new dynamic, in which non-Muslims are free to apply their own law only by way of exemption from national law. As a result of the promulgation of Article 3 of the 2014 Constitution, a number of Coptic Christians are seeking to negotiate an exemption from Islamic inheritance law. One of the consequences of the negotiation of this exemption is that Copts are articulating differences between Christianity and Islam—and therefore between Christians and Muslims in Egypt—on questions of gender.

All four of the chapters in Part II address the specific ways that Egyptian constitutions delineate the relationship between religion and politics. Just as the mural mentioned earlier represents one vision of what the relationship between religion and politics should be, this book examines the myriad ways in which this relationship plays out in the lives of contemporary Egyptians.

