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Islamic Law and Constitution-Making: The Authoritarian Temptation and the Arab Spring

Mohammad Fadel

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Islamic Law and Constitution-Making: The Authoritarian Temptation and the Arab Spring

Abstract

In the wake of the Egyptian military coup of 3 July 2013, much commentary has focused on the religious-secular divide in Egypt as the principal division that laid the groundwork for the subsequent coup. Less attention has been paid to the profound divisions within religiously-minded Egyptian political actors regarding whether democratic or authoritarian government is more desirable from a religious perspective. This article explores the division between Islamist supporters of a “republican” conception of a modern Muslim constitutional and religious order, and Islamist supporters of an “authoritarian” conception of constitutional government in alliance with a state-supported religious establishment. The article discusses the intellectual resources Sunnī Islam provides for each trend, and uses this division to explain the otherwise inexplicable divisions between the Muslim Brotherhood and the Egyptian Sunnī religious establishment, particularly as manifested in the contrary positions taken by Yusuf al-Qaradawi and ‘Ali Jumu’a, former Mufti of Egypt, regarding the coup’s legitimacy.

Keywords

Arab Spring, 2010-; Constitutional law; Islamic law; Islam and politics; Egypt

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Islamic Law and Constitution-Making: The Authoritarian Temptation and the Arab Spring

MOHAMMAD FADEL*

In the wake of the Egyptian military coup of 3 July 2013, much commentary has focused on the religious-secular divide in Egypt as the principal division that laid the groundwork for the subsequent coup. Less attention has been paid to the profound divisions within religiously-minded Egyptian political actors regarding whether democratic or authoritarian government is more desirable from a religious perspective. This article explores the division between Islamist supporters of a "republican" conception of a modern Muslim constitutional and religious order, and Islamist supporters of an "authoritarian" conception of constitutional government in alliance with a state-supported religious establishment. The article discusses the intellectual resources Sunnī Islam provides for each trend, and uses this division to explain the otherwise inexplicable divisions between the Muslim Brotherhood and the Egyptian Sunnī religious establishment, particularly as manifested in the contrary positions taken by Yusuf al-Qaradawi and 'Alī Jumu'a, former Mufti of Egypt, regarding the coup's legitimacy.

À la suite du coup militaire égyptien du 3 juillet 2013, plusieurs commentaires ont identifié la division religion-laïcité en Égypte comme la principale division qui a mené au coup suivant. Moins d'attention a été portée sur les divisions profondes entre les acteurs politiques égyptiens religieux quant à la question de savoir si un gouvernement démocratique ou autoritaire est plus désirable d'un point de vue religieux. Cet article explore les divisions existantes entre les islamistes partisans d'une conception « républicaine » d'un ordre moderne musulman constitutionnel et religieux, et entre les islamistes partisans d'une conception « autoritaire » d'un gouvernement constitutionnel en alliance avec un establishment religieux soutenu par l'État. Cet article traite des ressources intellectuelles que l'Islam Sunnī avance pour chacun de ces deux courants d'idées, et utilise cette division pour expliquer les divisions autrement inexplicables entre les Frères musulmans et l'establishment égyptien religieux

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Sunnī, plus particulièrement comme étant illustrées par les positions contraires prises par Yusuf al-Qaradawi et ‘Ali Jumū’a, un ancien Mufti d’Égypte, concernant la légitimité du coup.

I. NORMATIVE SUNNI CONSTITUTIONAL THEORY	477
II. NON-IDEAL SUNNĪ CONSTITUTIONAL THEORY	480
III. ISLAMIC MODERNISM, ANTI-DESPOTISM, AND THE IDEAL OF POPULAR PARTICIPATION IN GOVERNMENT	487
IV. THE DIVIDE BETWEEN REPUBLICAN ISLAM AND AUTHORITARIAN ISLAM IN POST-REVOLUTIONARY EGYPT	493
V. THE MUSLIM BROTHERHOOD AND ESTABLISHMENT ISLAM IN EGYPT	501
VI. CONCLUSION	505

WHEN ‘ABD AL-FATTAH AL-SISI, then the Egyptian Defense Minister, announced that the Egyptian military had removed Egypt’s first democratically-elected president, Mohamed Morsi, al-Sisi was flanked by the heads of Egypt’s twin religious establishments—the Shaykh of al-Azhar, Ahmad al-Tayyib, and the Pope of the Coptic Church, Tawadrus II—and by the head of the ultra-conservative Salafist religious party, Yasir Burhami. The sight of these religious heavyweights at the side of the military strongman and other senior members of Egypt’s armed forces announcing a coup against a democratically-elected president who himself represented a religious-political social movement—the Muslim Brotherhood—might come as something of a surprise to those observers of Egyptian politics who had reduced post-Mubarak political conflict to a struggle between theocrats and secular democrats. The symbolism of the 3 July 2013 coup, as well as subsequent developments in post-Morsi Egypt, both make clear that contesting *theocratic* conceptions of religion and state are as much at stake as an alleged conflict between secular democracy, on the one hand, and theocracy, on the other. One of these theocratic conceptions vests the people with the responsibility for articulating and implementing divine law, while the other vests this power in a paternalistic condominium between the holders of coercive power and the possessors of religious authority.

When discussing the phenomenon that has come to be termed “political Islam,” commentators have generally been most interested in exploring the political thought of groups such as the Muslim Brotherhood, whose politics, while theocratic, also aspire to certain republican ideals of self-government, broad-based participation, and the establishment of accountability through

competitive elections.¹ Far less attention, however, has been paid to the continued vitality of traditionalist conceptions of religion and politics in Sunnī thought, particularly in the context of the official religious establishments found in various Muslim-majority states. This oversight is especially damaging to our understanding of the relationship of religion to the state in Egypt, where the state nationalized the institution of al-Azhar and expanded it in an attempt to appropriate religion as a tool for governance.² The intellectual bias of political scientists, theorists, and lawyers towards groups like the Muslim Brotherhood—which are the product of modernizing reformist movements at the expense of the political thought of establishment religious intellectuals—may very well be the reflection of the modern conceit that Muslim religious modernists are destined to triumph over religious traditionalists, all as part of an inevitable march towards a more liberal (and secular) future.

In short, the battle that is currently playing out in Egypt is not only between those who would like to see a secular Egypt in contrast to a more religious one—it is also, and maybe even primarily, a battle between different conceptions of the relationship of religion to the state: a battle between a “republican” form of Islam and a “traditionalist” form of Islam that is sympathetic to authoritarian politics. Differences between what I am calling “republican” Islam and “traditionalist” Islam do not necessarily translate into sharp differences regarding the content of what it means to be an observant Muslim in the modern world, or even the degree of rigour in religious practice. Rather, their disagreement arises largely in domains such as the proper mode by which religious knowledge is to be acquired and in their affective dispositions to the tradition itself.

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1. See e.g. Carrie Rosefsky Wickham, *The Muslim Brotherhood: Evolution of an Islamist Movement* (Princeton: Princeton University Press, 2013); Jeffrey R Halverson, *Theology and Creed in Sunni Islam* (New York: Palgrave-MacMillan, 2010) at 75 (attributing to a leader of the Egyptian Muslim Brotherhood in the 1980s the view that “Islamic government is, in fact, a civil government that depends on the consent and support of the people”). See generally *ibid.*, chs 3-4. This is of course not to say that the Muslim Brotherhood has an internally coherent view on democracy, even one within an explicitly Islamic reference. Wickham’s discussion of the contradictions that the embrace of party politics in the 1980s imposed upon the Brotherhood is especially helpful in highlighting the internal divisions between the Muslim Brothers over whether their role is purely one of religious teaching (*da’wa*) or that of a political party. See Wickham, *supra* note 1, ch 3.
 2. Malika Zeghal, “Public Institutions of Religious Education in Egypt and Tunisia: Contrasting the Post-Colonial Reforms of Al-Azhar and the Zaytuna” in Osama Abi-Mershed, ed, *Trajectories of Education in the Arab World: Legacies and Challenges* (Oxford: Routledge, 2010)111 at 115-16.

For traditionalist Islam, it is not sufficient for one to hold the correct beliefs, and practice outwardly Islamic rituals in the proper sense; one must also acquire one's knowledge of authoritative doctrine and practice from a teacher who is himself well-grounded in the "tradition" through an established chain of teachers, real or imagined, going all the way back to the Prophet of Islam (ideally at least). Tradition is indispensable to the acquisition of religious knowledge and virtues, from this perspective, because the mastery of religious values emerges through a process of acculturation (*tarbiya*) that enables novices to embody those values. This process of acculturation is distinct from, and transcends intellectual cognition ('ilm) of, religious truth.³ While religious truth may be a proper subject of instruction (*ta'lim*), mere instruction, without reliable teachers who properly embody Islamic teachings, cannot produce properly acculturated religious subjects.⁴ For this reason, what I am calling "traditionalist" Islam continues to place great emphasis on Sufism, sometimes called Islamic mysticism, because of the belief that the institutions and practices that Sufism cultivates, including the hierarchical relationship between the teacher (*al-shaykh*) and the student (*al-murid*), are indispensable in the production of a properly embodied practice of Islam. Under the traditionalist conception, then, individuals lack the independent capacity to achieve virtue and need assistance from others in order to enable them to live virtuous lives—a position that generates sympathy for authoritarian rule, at least if it is appropriately pious.

What I am calling "republican" Islam does not deny the traditionalist difference between the embodiment of religion and the intellectual cognition of its truth, but it denies the necessity of tradition as a pre-condition for embodying Islamic religious values. It believes that any properly motivated Muslim who has sufficient intellectual skills may study the basic sources of Islam independently and obtain an adequate degree of religious knowledge and virtue. "Republican"

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3. *Tarbiya* is the verbal noun from the verb *rabbā*, which means "to rear" or "to nurture," while *ta'lim* is the verbal noun from the verb 'allama, which means "to teach, instruct." The object of what is taught is called 'ilm, which means "science" or "knowledge." Knowledge is simply a product of propositional reasoning, and does not, on its own, lead to certain embodied virtues.
 4. See e.g. Imām al-Zarnūjī, *Instruction of the Student: The Method of Learning*, translated by GE von Grunebaum & Theodora M Abel (Bridgeview, IL: Starlatch Press, 2003) at 13-17. Hamza Yusuf, an American convert to Islam and a leading US traditionalist Muslim theologian, expresses support for the notion that proper Islamic education is dependent upon immersion in tradition when he wrote in the forward to this translation, "We are indeed spiritual and intellectual children, and until we mature through learning and mastering our own tradition, we can not safely trust ourselves to delve into primary texts for other than blessings and moral guidance" (*ibid* at ix).

Islam is not constituted by a particular stance towards the Islamic tradition; however, it is consistent both with a healthy respect for the intellectual content of the tradition, and with complete indifference or even hostility to that tradition. What unites “republican” Islam is simply the proposition that the “tradition” is not necessary for living as a good Muslim in the modern world. The potential for each person independently to acquire an adequate conception of Islamic virtue and manifest it without the need for authoritative teachers recognizes each person as a potentially self-governing virtuous actor. This proposition is what gives this conception of Islam its republican disposition.

While it would be an error to assume that the positions articulated in this contemporary debate in Egypt are simply a recapitulation of medieval debates on the relationship of religion to political ordering, both lines of debate can plausibly lay claim to parts of the long tradition of Islamic political thought. Given the depth of support among traditionalist theologians for the coup in Egypt, more attention should be given to these non-republican, authoritarian forms of political Islam.

This article attempts to address this gap in the literature by considering arguments in Sunnī Islam that might cause traditionalist theocrats to favour authoritarianism over a republican form of theocracy. Part I of the article provides a brief overview of normative constitutional theory in Sunnī thought. Part II introduces Sunnī conceptions of non-normative, emergency rule, how they relate to the normative Sunnī legal order, and how emergency rule provided for the development of a quasi-Platonic philosophical theory of religion and the state that helped to justify a hierarchical, and indeed, authoritarian political order. Part III discusses Islamic modernism as an attempt to restore normative constitutional rule against a state of emergency. Part IV then applies this framework to the current religious divides by focusing on the positions taken by two well-regarded representatives of each tradition towards the Egyptian Revolution of 2011 and the military coup of 2013—Yūsuf al-Qaraḏāwī for the “republican” camp and ‘Alī Jumū‘a for the authoritarian camp.⁵ Part V discusses the passage of the *Ṣukūk* Law, a law enacted during the brief tenure of the deposed President Morsi that authorized the state to issue bonds in conformity with Islamic law, and the

5. A full exploration of the authoritarian Islam camp would include a treatment of the extreme right-wing Salafi movement, whose leader Yasir Borhami, also supported the coup. Space limitations, however, preclude specific discussion of Salafi political thought. For an essay exploring the relationship of contemporary Salafi political thought to democracy, and why they supported the coup, see Jonathan Brown, “The Rise and Fall of the Salafi al-Nour Party in Egypt,” *Jadaliyya* (14 November 2013), online: <www.jadaliyya.com/pages/index/15113/the-rise-and-fall-of-the-salafi-al-nour-party-in-e#_ftn4>.

reluctance of the Muslim Brotherhood to involve the senior theologians of the Azhar in the law-making process. This incident, I suggest, brings into sharp relief the different models of Islam and the state: one, advocated by the Muslim Brothers and its supporters, that believes that a representative state is the best interpreter of Islamic law, and the other, represented by scholars like ‘Alī Jumū‘a, which believes that Islamic law is best articulated by a specialized body that exists above and outside the state. The article then concludes.

I. NORMATIVE SUNNĪ CONSTITUTIONAL THEORY

Normative Sunnī constitutional theory is comprised of the rules governing the caliphate, including the rules governing the selection of the caliph, the powers he exercises, and the manner by which those powers may be exercised; and the rules governing the establishment of lesser offices, their powers, and how those powers may be exercised. In Sunnī theology, the caliph lacks prophetic authority despite being a successor to the Prophet Muḥammad. Instead, he is charged with protecting the worldly interests of the Muslim community. Alongside the secular duties of defending the frontiers, collecting and distributing taxes, upholding justice, making appointments of lesser public officials (*e.g.*, regional governors and judges), and leading the construction of public works, the caliph is also responsible for protecting religious orthodoxy against both non-Muslim enemies of the Muslim community and heretical Muslims whose heterodox belief undermine true religion.⁶

In Sunnī constitutional theory, appointment of a caliph is an obligation on the entirety of the Muslim community (*farḍ kifāya*), and is understood to be a contract (*‘aqd*) between the community and the duly-appointed candidate. The duty is discharged pursuant to a deliberative process involving a group of electors, known as *ahl al-ḥall wa’l-‘aqd*, “those who loosen and bind.” These individuals are entrusted with selecting an appropriate candidate for the office in accordance with the requirements that Islamic law imposed on the office and in light of the community’s particular circumstances at the time of the selection. Alternatively, the incumbent caliph is authorized to act as the sole elector and to designate his

6. Mohammad Fadel, “Back to the Future: the Paradoxical Revival of Aspirations for an Islamic State,” Book Review of *The Rise of Fall of the Islamic State* by Noah Feldman, (2009) 14:1 *Rev Const Stud* 105 at 109-13 [Fadel, “Back to the Future”] (giving an overview of the Sunnī theory of legitimate government). For a more thorough account of the normative Sunnī conception of the state, see Mohammad Fadel, “Islamic Law Reform: Between Reinterpretation and Democracy – Neal Coulson Memorial Lecture School of Oriental and African Studies” 18 *Yrbk Islam Mid East L* [forthcoming].

successor (*walī al-‘abd*) during the incumbent’s lifetime. In both cases, once the electors have settled on a candidate for the office, or the incumbent caliph has selected a successor, the electors or the incumbent caliph extends an offer to the selected candidate to accept the duties of the office. Only upon the candidate’s acceptance of the offer is the contract concluded, and the communal duty to appoint a caliph discharged.⁷

In both scenarios, Islamic law understood the electors and the incumbent caliph to be acting in a representative—not personal—capacity on behalf of the Muslim community as a whole. Thus, they were not permitted to select a candidate based on personal preferences; rather, they were entrusted to use their discretion to pick the most appropriate candidate in light of the requirements imposed by the law and the best interests of the community at the time of the election. The electors were not permitted to change their minds and depose the incumbent caliph unless the caliph breached the contract by which he became caliph. So too the incumbent caliph was not permitted to dismiss a duly appointed successor in the absence of legal cause. In each case, Muslim jurists reasoned that the authority used by the electors to appoint the caliph, or by the caliph to designate a successor, was limited to discharging the right of the community to see that the office of the caliph was duly filled. Once that obligation was discharged, the electors, or the caliph, as applicable, were divested of any authority they might have until such time as the law re-authorized them—for example, if the caliph commits a material breach of the contract and loses the right to continue in office, or if the designated successor becomes physically or legally incapable of fulfilling the terms of the office.⁸

The representative capacity of the electors and the caliph in the process by which caliphs are selected is part of a broader Sunnī understanding that the caliph—and by extension all public offices—are representatives of the Muslim community, and that their authority is dependent upon contractual delegation and not inherent personal authority, whether understood as coming from God or good fortune. In normative Sunnī legal theory, then, all public officials exercised powers pursuant to a proper delegation: The caliph is appointed as a representative of the public, and he then delegates various powers to lesser officials, with each official’s authority being limited to the terms set out in the relevant act of delegation. The representative rather than personal character of the caliph’s authority, and the authority of other public offices, is confirmed

7. Al-Māwardī, *The Ordinances of Government*, translated by Wafaa H Wahba (Reading, UK: Garnet, 1996), ch 1.

8. *Ibid* at 110.

in various discussions on the jurisdiction of public officials, and whether they terminate upon the death or dismissal of the relevant appointing official. Jurists, for example, carefully distinguished between public officials who were personal delegates of the caliph, such as ministers, and public officials, such as regional governors and judges, who were delegates of the public. The class of officials who are personal delegates of the caliph are automatically divested of their offices upon the death or removal of the caliph who appointed them, while officials who were deemed to be delegates of the public continued in office, even after the caliph who appointed them died or was removed from office.⁹

The contract of the caliph, because of its representative character, imposed upon the caliph and other public officials the duties of a fiduciary. The fiduciary nature of the powers that the caliph—and by extension, other public officials—enjoys is manifested expressly in the term used to describe the caliph's designated successor: *walī al-'abd*, the holder of the covenant.¹⁰ “The covenant” itself is that of the Muslim community and entails that the Muslim community entrusts the ruler and the public officials he appoints to use the powers delegated to them for the good of the community and not their own personal good. The fiduciary character of the power exercised by public officials in turn creates a duty of obedience on the part of the Muslim community. Accordingly, the contractual basis of public office, which creates a principal-agent relationship between the ruler (and other public officials) and the Muslim community, combined with the fiduciary powers of public officials over the affairs of the Muslim community, provide two alternative but mutually-reinforcing moral grounds that limit the power of public officials while simultaneously justifying the duty of obedience to the public order on the part of the public.¹¹

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9. See e.g. Abū al-Ḥasan ‘Alī b. Muḥammad b. Ḥabīb al-Māwardī, *al-Aḥkām al-Sulṭāniyya* (Beirut: Dār al-Kutub al-‘Ilmiyya, [nd]) at 37 (distinguishing between a governor who was appointed by the caliph, whose appointment survives the appointing caliph's death, and a governor appointed by the caliph's prime minister, whose appointment comes to an end with the death of the prime minister, because the caliph's appointments are in “right of the Muslims (*niyāba ‘an al-muslimin*)” while the appointments of the prime minister and other ministers are in “right of himself (*niyāba ‘an nafsihi*)”).
 10. Fadel, “Back to the Future,” *supra* note 6 at 111, citing Abu Bakr b. Mas‘ud al Kāsānī, *Badā’i al-sanā’i‘ fi tartīb al-sharā’i‘* (Beirut: Dār al-Kutub al-‘Ilmiyya, 1986) at 16.
 11. Fadel, “Back to the Future,” *supra* note 6 at 111, n 22, citing Abu Bakr b. Mas‘ud al-Kasani, *Badā’i‘ al-sanā’i‘ fi tartīb al-sharā’i‘* (Beirut: Dār al-Kutub al-‘Ilmiyya, 1986) at 16.

II. NON-IDEAL SUNNĪ CONSTITUTIONAL THEORY

In an ideally constituted Sunnī state, the caliph sits atop the public order, having either been duly selected by electors who acted in good faith for the public good, or having been appointed by the previous caliph who diligently considered all possible candidates and selected his successor in accordance with the law and the best interests of the community. So, too, lesser officials—governors, judges, market inspectors, generals, tax collectors, et cetera—are also appointed based on the legal requirements established for their respective offices, which include knowledge of applicable substantive law and possession of an adequate degree of personal integrity. All public officials, moreover, from the caliph to the lowliest tax collector, know the substantive law that applies to the exercise of their powers, dutifully follow its requirements, and are careful to refrain from exceeding the territorial and substantive limitations of their jurisdiction, which are spelled out in the terms of their appointment.

This ideal description of the Sunnī constitutional order suggests a conception of public order that is wholly indifferent to questions of power. In certain respects, one could say—at a minimum—that Sunnī theologians and jurists *aspired* to establish a public order that was justified entirely by reference to legal norms. It is perhaps this tendency of Sunnī constitutional thought that Orientalist historians had in mind when they referred, often derisively, to Sunnī constitutional law as expressing a utopian ideal that was disconnected to the actual circumstances of historical Muslim states.¹²

It would be a mistake, however, to think that ideal Sunnī theory was completely indifferent to questions of power. Two of the earliest comprehensive legal treatments of the caliphate both include the requirement that the successful candidate for the caliphate possess martial qualities that gives him effective power, not only to deter external enemies, but also to uphold and defend the public order.¹³ Unlike the other legal requirements such as learning, integrity, and physical fitness, the requirement of effective power—with the political and martial qualities implicit in that requirement—was not something that could be presently ascertained in any particular candidate. At best, it could be hoped

12. Mohammed Fadel, “State and Sharia” in Rudolph Peters, ed, *The Ashgate Research Companion to Islamic Law*, (Surrey, UK: Ashgate, 2014) at 95-96.

13. Al-Māwardī, *supra* note 7 at 6 (discussing courage and boldness for the confrontation of external and internal threats); Abū Ya‘lā Muḥammad b. al-Ḥusayn al-Farrā‘, *al-Aḥkām al-Sulṭāniyya* (Beirut: Dār al-Kutub al-‘Ilmiyya, 1983) at 20 (observing that a successful candidate must be competent in military and political affairs and capable of defending the community).

that the nominee would turn out to enjoy the functional attributes that were demanded of the caliph.

The ability of the caliph to wield effective power introduced an element of political realism into Sunnī constitutional thought that was otherwise overwhelmingly legalistic in its outlook on public law. As a practical matter, this manifested itself in the recognition of jurisdiction by acquisition (*imārat al-istīlā*)¹⁴ rather than delegation. Under the terms of the ideal Sunnī constitution, the caliph is responsible for the public order in its entirety, appointing and dismissing public officials, including regional governors, in the good faith exercise of his discretion. What happens, however, if the caliph lacks effective power to enforce his decisions, or if a local politician, who himself might be a military commander or in alliance with a local military commander, seizes the apparatus of the government without the caliph's prior consent? In such a circumstance, the local politician is acting without right and is therefore a rebel insofar as he is acting in defiance of the public order represented by the caliph. If, however, the usurper is prepared to acknowledge the legitimacy of the public order, and to uphold it, including by recognizing the caliph, Muslim jurists were prepared to legitimate the rebel's position through an *ex post* process known as the ratification of jurisdiction (*tashīh al-wilāya*). Ratification was justified on the functional grounds of the public welfare: Insofar as the rebel was prepared to lay down his arms and uphold the public order, the public good would be better served by re-establishing peace and stability than by engaging in further conflict that would undermine the interests of the local community affected.¹⁵

But the recognition of usurpers on functional grounds was not the most crucial channel through which the spectre of violence entered into the constitutional order. Although there was an ideal that the caliph should be appointed through the consent of the community as represented by the electors' deliberations, pre-modern jurists never provided a conclusive procedural means for determining how many electors were needed to support a candidate in order for that candidate to be selected as caliph. Al-Māwardī, for example, reported various positions on the minimum amount of support a successful caliph required, with some theologians and jurists holding that the selection of a suitable candidate by even one elector was sufficient for the contract to be constituted. This position was allegedly based on historical precedents from the early Muslim community when it was little more than a city-state in western Arabia, but the indeterminacy of the role and number of electors needed to select a caliph also served an important

14. Al-Māwardī, *supra* note 7 at 39-40.

15. *Ibid.*

functional purpose: to classify combatants as either supporters of the legitimate order or rebels that could be legitimately targeted and killed so long as they defied the legitimate order.

The division between supporters of the legitimate order and rebels was derivative of the Sunnī notion that formation of the public order was itself obligatory, and once that obligation was discharged, all Muslims were under an obligation to submit to that authority. Thus it followed that those who refused to recognize the putative caliph by, for example, recognizing another ruler in whose name taxes were collected, judges were appointed, and judicial verdicts enforced, were legally rebels—at least from the perspective of those who recognized the putative caliph—and could be legitimately fought.¹⁶ Al-Māwardī's contemporary, the Ḥanbalī jurist al-Farrā', recognized that a consent-based theory of the state, if taken seriously, would require that the successful candidate garner the choice of the vast majority (*al-jumhūr*) of the electors.¹⁷ In the absence of such a candidate, the successful candidate would inevitably be the one who conquered and subdued (*qahr*) his rivals, with each one of them having a colourable claim to be caliph until the moment he was defeated (and thus shown to be a pretender).¹⁸ For Farrā', then, consent as the basis for appointing the caliph was as a practical matter utopian, even if it was an aspirational ideal. The real basis of the ruler's authority was his effective ability to subdue his rivals. Al-Ghazālī, a leading jurist in the generation following Māwardī and Farrā', proposed to resolve the contradiction between consent and power by reaffirming Māwardī's contention that the consent of the electors was crucial, but incorporating Farrā''s critique of the consent-based theory. He did so by specifying that it was not the consent of a pre-determined number of electors that made the appointment effective, but rather the candidate's success in receiving the support of those electors, *e.g.*, military leaders, who could provide the candidate with the effective power (*shawka*) to discharge the functions of the caliph.¹⁹

16. *Ibid* at 74-75.

17. al-Farrā', *supra* note 13 at 23.

18. *Ibid* [translated by author] (“*wa ruwiya ‘an [Aḥmad b. Ḥanbal] mā dalla ‘alā annahā tathbut bi’l-qahr wa’l-ghalaba wa lā taftaqir ilā ‘aql*”). This translates to: “The view that the Caliphate can be formed through conquest and defeat [of the other candidates], without a need for a contract, has been attributed to [Aḥmad b. Ḥanbal].”

19. Richard Joseph McCarthy, *Freedom and Fulfillment: An Annotated Translation of al-Ghazālī’s al-Munqidh min al-Ḍalāl and other Relevant Works of al-Ghazālī* (Boston: Twayne Publishers, 1980) at 277. Al-Ghazālī also asserted that the means by which social choice settles on a single candidate is never, and can never be, the product solely of human choice. Rather, God’s choice manifests itself through the dynamics of social power that settles on the successful candidate (*ibid*).

The solution proposed by al-Ghazālī has been described as resulting in an effective separation of the secular, worldly aspects of governance—which would become the responsibility of the holders of effective coercive power, *i.e.*, the military—and the religious aspects of governance, *e.g.*, the maintenance of courts, supervision of public rituals, et cetera, which would remain the responsibility of the caliph and of the religious officials he appointed to fill largely religious posts.²⁰ In this scheme, the religious class was to act as the advisors to the holders of power by teaching them the requirements of justice through instruction in Islamic law. The military class would uphold the requirements of the law, if only out of self-interest, because it understood that the economic foundations of its power depended upon maintaining a basic system of justice. This theory was known as “the circle of justice” and was popularized through numerous hortatory works written by the scholarly class to the rulers of their day.²¹

Al-Ghazālī, however, did more than offer a reconciliation of the normative elements of the caliphate with its realistic elements; he also offered a philosophical account of politics that justified a dualistic polity, one that separated its symbolic and normative order from its coercive order, and arranged the various classes of society hierarchically. Accordingly, he posited four different kinds of politics: prophetic, princely, rational, and affective.²² This taxonomy of the modes of political life was itself dependent upon other conceptions, such as the social division between the elite (*al-khāṣṣa*) and the commoners (*al-‘amma*), and a radical disjuncture between the rational capacities of each group. According to al-Ghazālī, prophetic politics was the highest mode of politics because unlike the other modes, it exercised universal jurisdiction. It governed the political and the moral, the elite and the commoners. Princely politics was similar to prophetic politics insofar as it exercised universal jurisdiction over the elite and the commoners, but it was ultimately inferior to it on al-Ghazālī’s account because it had jurisdiction only over the outward aspects (*zāhir*) of people’s lives, not their inner moral lives (*bāṭin*). Unlike prophetic politics, which unified power with rationality and morality, princely politics enjoyed only the outward power of coercion, without any authority over the moral lives of either the elite or the commoners.

20. Patricia Crone, *God’s Rule: Government and Islam* (New York: Columbia University Press, 2004) at 237-49.

21. For a description of the circle of justice, see Wael Hallaq, *Shari‘a: Theory, Practice and Transformation* (New York: Cambridge, 2009) at 199-200.

22. Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī, *Mizān al-‘Amal*, ed by Sulaymān Dunyā (Cairo: Dār al-Ma‘ārif, 1964) at 329.

In the absence of prophetic politics, religious scholars, saints, and philosophers are entrusted with the government of the moral life of the elite, while preachers and jurists are entrusted with the government of the moral life of commoners. The moral government of the elite is based on rational argument and demonstration, while that of commoners is vested in preachers who use affective rhetoric, rooted in imagination, to motivate the masses to virtue, since the masses are incapable of understanding rational argumentation. Because of the impossibility in Islamic dogma of prophetic politics following the death of the Prophet Muḥammad, it is not surprising that al-Ghazālī concludes that the noblest kind of post-prophetic politics is that pursued by saints, philosophers, and religious scholars who, unlike other classes of society, pursue the good solely for its own sake.²³ The ruling class, although they are capable of understanding rational demonstration, are in fact moved by honour—the love of praise and the fear of blame—not the pursuit of the good for itself. What this means, however, is that they can *practically* live good lives if their conceptions of honour and dishonour are truthful, which will be the case when they are derived from the teachings of the religious-philosophical elite.²⁴ The masses, however, are moved only by the desire for pleasure and the fear of pain, and accordingly, they must be controlled by law, which is primarily a means for restraining their passion (*shahwa*).²⁵

Al-Ghazālī's taxonomy of the various kinds of politics in turn derived from his tripartite conception of the soul's powers, his conception of justice as the proper ordering of these powers, and the justice of the polity being a macrocosm of the microcosm of justice in an individual. In al-Ghazālī's psychology, the soul has three different powers, the intellectual (*al-tafakkur*), the spirited (*al-ghaḍab*), and the animal (*al-shahwa*).²⁶ Justice is not an independent virtue, but is rather a condition (*ḥāl*) that is achieved when the three parts of the soul are ordered appropriately according to a natural hierarchy with the intellectual at the apex, the spirited in the middle, and the animal at the bottom.²⁷ A person is just, then, when his or her rational power is in control of his or her spirited and animal powers.²⁸

23. *Ibid* at 287-88.

24. *Ibid*.

25. *Ibid*.

26. *Ibid* at 232-33.

27. *Ibid* at 272. Al-Ghazālī writes: “wa ammā al-‘adl fa-huwa ḥāla li’l-quwā al-thalāth fi’-n-tizāmihā ‘alā al-tanāsub bi-ḥasab al-tartīb al-wājib fi’l-isti’lā’ wa’l-inqiyād.”

28. *Ibid* at 234. Al-Ghazālī writes: “wa mahmā aṣḥaḥat al-quwā al-thalāth wa ḍubīṭat ‘alā al-wajh alladhī yanbaghī wa ilā al-ḥadd alladhī yanbaghī wa ju’ilat al-quwwatān munqādatayni li’l-thālitha allati hiya al-fikriyya al-‘aqliyya fa-qad ḥaṣalat al-‘adāla.”

Al-Ghazālī applied this tripartite conception of the soul's powers to understand the political life of the polis (*al-madīna*), which is also made up of three different classes: classes that are served by others, classes that serve and are served, and classes that only serve others. Justice in the polis, like that in the individual, is a problem of proper ordering: It exists when the relationship of the various social classes is maintained according to their natural hierarchical order. He writes:

Justice in politics, as we have mentioned in our discussion of the powers of the soul, is attained when the different parts of the city are arranged in the fashion that imitates the parts of the soul such that the city becomes, with respect to its harmony, the relationship of its constituent parts, and the cooperation of its various elements, in accordance with the purpose of living together, like a single body. Each thing, therefore, must be placed where it belongs. Its residents are divided [into three classes]: the first, which is served, but does not serve [others]; the second, which serves and is not served [by others]; and, the third, a group which serves [others] in certain respects, and is served [by others] in other respects.²⁹

Justice in the city becomes manifest, therefore, when the ruler is wise and overpowering (*baṣīran qāhīran*), the soldiery is mighty and obeyed (*dhī quwwa wa ṭā'a*), and the masses are weak and submissive (*du'afā' salsā al-inqiyād*).³⁰

The analogy of the parts of the city to the parts of the soul is not perfect, however, as al-Ghazālī depicts the political class—the rulers (*salāṭīn*) and well-regarded men of society—as having only juvenile command of their reason (*al-'aql al-qāṣir*), being regarded as rational only in relation to the plainly irrational masses. The true possessors of perfected reason (*kamāl al-'aql*) are the saints, scholars, and philosophers (*awliyā' wa ḥukamā' wa muḥaqqiqī al-'uqalā'*). The political hierarchy reflects each class's relative perfection of its reason: The masses occupy the lowest rung of society because they are motivated solely by their animal powers (*al-shahwa*), their desire for pleasure, and their aversion to pain. Worldly rulers and other well-regarded men of society are motivated by honour, the love of praise, and the fear of blame from their peers. Only the third group—the saints, the scholars, and the philosophers—desires the good for the sake of

29. *Ibid* at 273 [translated by author]. Al-Ghazālī writes: “wa'l-'adl fi'l-siyāsa an turattaba ajzā' al-madīna al-tartīb al-mushākil li-tartīb ajzā' al-nafs ḥattā takūna al-madīna fi-'tilāfihā wa tanāsubi ajzā' ihā wa ta'āwun arkānihā 'alā al-gharaḍ al-maṭlūb min al-ijtimā' ka'l-shakḥ al-wāḥid fa-yūḍa' kull shay' fi mawḍi'ihī wa yanqasim sukkānuhu ilā makhdūm lā yakhdīm wa ilā khādīm laysa bi-makhdūm wa ilā ṭabaqa yakhdīmūna min wajh wa yukhdāmūna min wajh.”

30. *Ibid* at 272.

the good, and thus can be said to have perfected reason.³¹ As such, al-Ghazālī seems to argue that justice requires that they be the legislators for society, and indeed, that is the role he prescribes for them: to provide rulers with the precepts necessary to establish a just order.³² Accordingly, he urges rulers to love scholars and heed their advice, making this the second of his ten foundational principles of justice.³³ Given al-Ghazālī's essentially hierarchical conception of justice, it is not surprising that he states that the ruler is chosen by God, and for this reason the people are under an obligation to love him, obey him, and not resist him.³⁴ The ruler's moral obligation is to show gratitude to God by discharging his duties as ruler diligently, humbly, and sincerely.³⁵ Al-Ghazālī's political thought, instead of conceiving the ideal ruler as the ideal agent, conceives of him as the ideal autocrat: rational, pious, and strong.

Al-Ghazālī is often recognized as the theoretical architect of the sultanate as the distinctive Islamic institution of governance dominating the late Islamic Middle Ages and Early Modernity. Although the sultanate was never recognized by the jurists as a distinct legal institution (all holders of public office from the earliest periods of Islamic law were designated with the title *sulṭān*),³⁶ jurists increasingly recognized the legitimacy of rule through the fact of acquisition. Post-al-Ghazālī Mamluk-era Shāfi'ī jurists, such as the well known and much maligned Badr al-Dīn Ibn Jamā'a, openly stated that conquest was a means for the establishment of government, and conquest came to be a third method for assumption of the caliphate in authoritative Shāfi'ī manuals of positive law.³⁷

31. *Ibid* at 287-88.

32. Al-Ghazzālī, *The Book of Knowledge: Being a Translation With Notes of the Kitāb al-'Ilm of al-Ghazzālī's Ihya' 'Ulūm al-Dīn*, translated by Nabih Amin Faris (Lahore, Pakistan: Sh. Muhammad Ashraf, 1970) at 40. Al-Ghazzālī says: "[The jurist] becomes the teacher of the magistrates and their guide in government and control, that through their righteousness the affairs of men in this world may be set in order."

33. Abū Hāmid Muḥammad b. Muḥammad al-Ghazālī, *al-Tibr al-Masbūk fī Naṣā'ih al-Mulūk*, ed by Aḥmad Shams al-Dīn (Beirut: Dar al-Kutub al-'Ilmiyya, 1988) at 18.

34. *Ibid* at 43. Al-Ghazālī writes: "fa-yanbaghi an yu'lama anna man a'tahu allāhu darajat al-mulūk wa ja'alahu zillahu fī'l-arḍ fa-innahu yajib 'alā al-khalq maḥabbatuhu wa yalzamuhum mutāba'atuhu wa ṭā'atuhu wa lā yajūz lahum ma'siyatuhu wa munāza'atuhu."

35. *Ibid* at 14-18.

36. Mohammad Fadel, "Public Authority (*Sulṭān*) in Islamic Law" in Stanley N Katz, ed, *The Oxford International Encyclopedia of Legal History* (Oxford: Oxford University Press, 2009).

37. See Hans Klofer, "Handbuch des islamischen Staats und Verwaltungsrechtes von *Badr al-Dīn ibn Ġamā'a*" (1934) 6 *Islamica* 349; Hans Klofer, "Handbuch des islamischen Staats und Verwaltungsrechtes von *Badr al-Dīn ibn Ġamā'a*" (1935) 7 *Islamica* 1; 'Alī Muḥammad Mu'awwad & 'Ādil Aḥmad 'Abd al-Mawjūd, eds, Shams al-Dīn Muḥammad b. Aḥmad al-Khaṭīb al-Shirbīnī, 5 *Mughnī al-Muḥṭāj* (Beirut: Dār al-Kutub al-'Ilmiyya, 1994) at 423.

While statements by modern commentators such as H.A.R. Gibb and Noel Coulson that these concessions to de facto power amounted to an abandonment of the legal norms of the *Shari'a* in favour of a “secular absolutism”³⁸ can be dismissed as hyperbolic, it is certainly true that Sunnī jurists by the fourteenth century had acquiesced to the legitimacy of ascension to rule through the force of arms. Instead of contesting the *means* by which officials came to hold power, they invested their legitimating resources into influencing *how* de facto power holders exercised their power. The waning of interest in the contractual legitimacy of rulers was further accelerated by the rise of the quasi-Platonic philosophical conception of the just polity such as those articulated by al-Ghazālī. The contractual tradition of legitimacy would, however, be resurrected in the nineteenth century with the rise of Muslim modernism. I now turn to this topic.

III. ISLAMIC MODERNISM, ANTI-DESPOTISM, AND THE IDEAL OF POPULAR PARTICIPATION IN GOVERNMENT

This division of labour, pursuant to which soldiers provided effective power and the religious class provided legitimacy, sustained politics for the remainder of the Muslim Middle Ages and into early modernity. With the rise of the Ottoman Empire, which successfully reunited the Arab Middle East (with the exception of Morocco and parts of Iraq), a political equilibrium was reached between, on the one hand, a powerful executive that could underwrite the security and justice of the territories under its control, and on the other hand, the religious elite, which provided the Empire with effective religious legitimacy by staffing the Empire’s courts and civilian bureaucracy. From the perspective of medieval Islamic political theorists such as al-Ghazālī, the Ottoman Empire could very well have been viewed as approximating late medieval Islamic political ideals: Effective secular power was joined with religion to produce a stable and powerful polity that in important ways lent effective institutional support to Islamic religious and social ideals as well as implementing a system of public justice that was largely derived from the work of the religious class. Although the Ottoman Empire supplemented Islamic law with its own law—known as the *qānūn*—it did not claim that its dynastic law was superior to or intended to supplant the *Shari'a*; moreover, unlike pre-Ottoman dynasties, the Ottomans entrusted

38. HAR Gibb, “Constitutional Organization” in Majid Khadduri & Herbert J Liebesny, eds, *Law in the Middle East* (Washington, DC: The Middle East Institute, 1955) 3 at 23; Noel Coulson, “The State and the Individual in Islamic Law” in J Stewart-Robinson, ed, *The Traditional Near East* (Englewood Cliffs, NJ: Prentice-Hall, 1966) 122 at 131.

ordinary courts with the enforcement of Ottoman *qānūn*, instead of establishing special courts staffed largely (if not exclusively) from the executive and military branch of the state.³⁹

The Ottoman constitution's solution to the relationship of state and religion began to break down early in the nineteenth century, however, when it became increasingly clear that the Ottomans no longer had the ability to provide security against threats from Western Europe and Russia. The external weakness of the Ottomans vis-à-vis Christian powers was also reflected in the various one-sided commercial treaties that the Ottomans entered with European powers throughout the nineteenth century—known as the “Capitulations”—that insulated the nationals of capitulatory powers from the jurisdiction of Ottoman courts and often gave capitulatory powers a veto over internal Ottoman economic policies. Neither the Ottoman state nor Ottoman civil society, however, greeted these negative developments with equanimity or assumed that decline and defeat were inevitable. The Ottoman state, beginning in the second quarter of the nineteenth century, launched an ambitious reform project known as the *tanẓīmāt*, “the new order.” The new order introduced radical institutional innovation throughout the Ottoman military, civilian, and judicial bureaucracies, including the adoption of numerous European legal codes and the creation of new courts to administer them. The new order also introduced new systems of public finance as the Ottomans attempted to place the finances of the Empire on a more secure footing. The Ottomans also embarked on an ambitious project to codify the Ḥanafī school of Islamic law—the official legal school of the Empire—that produced, upon its completion, the highly-influential multi-volume compilation of Islamic civil law known as al-Majalla.⁴⁰

The radical nature of Ottoman institutional reforms, combined with its conscious emulation of European models of governance and its ever-increasing integration into the European state system, produced a backlash, particularly among groups with vested interests in the old institutions. The new order also raised the ire of conservative elements within the religious establishment. Making common cause with other disgruntled interest groups, they accused the new reforms of effectively abandoning the Islamic basis of the state in favour of a European (Christian) conception of the state. Contemporaneously with these

39. Hallaq, *supra* note 21 at 208.

40. For a detailed but critical account of the *tanẓīmāt* as a betrayal of the Islamic tradition, see *ibid* at 401-42. For a more sympathetic account of the legitimacy of the *tanẓīmāt*, see Fadel, “Back to the Future,” *supra* note 6 at 114-19; Butrus Abu-Manneh, “The Islamic Roots of the *Gülhane Rescript*” (1994) 34:2 *Die Welt des Islams* 173.

institutional reforms, many Ottoman intellectuals, including religious scholars, became prominent defenders not only of the new order, but also of the desirability, from an *Islamic* perspective, of the European institutions that Ottoman reforms sought to introduce to the Empire. In making Islamic arguments in favour of the reform, this group of reformers set themselves on a course that challenged the religious establishment, which, for the most part, was either indifferent or hostile to the new order as contrary to Islamic law.⁴¹

Three nineteenth and early twentieth century thinkers were especially prominent in providing grounds legitimating the new order, and ultimately laying the foundation for an Islamic theory of popular sovereignty in opposition to autocratic politics. These thinkers were the Egyptian Rafīʿ Rifāʿa al-Taḥṭāwī, the Tunisian Khayr al-Dīn al-Tūnisī, and the Syrian Rashīd Riḍā. Al-Taḥṭāwī's career as a public intellectual and advocate of reform began in the wake of a lengthy sojourn in Paris as a religious adviser to a group of Egyptians who had been sent by Muhammad ʿAlī, the Ottoman governor of Egypt, to study various modern sciences in Paris. While in Paris, al-Taḥṭāwī mastered French, and proved himself to be an avid student of French culture, politics, and law. When he returned to Egypt, he published a memoir of his days in Paris in which he discussed in detail and with great approval the structure of France's constitutional monarchy and the French commitment to political equality and the rule of law—all of which produced a polity that was capable of upholding justice, promoting prosperity, securing the rights of French citizens, and effectively restricting the arbitrary power of the ruler. For al-Taḥṭāwī, the prosperity of the French state and French citizens was best explained by the justice of its constitution and the rationality of its laws, which guaranteed the citizens freedom from arbitrary government interference in their lives.⁴²

Al-Taḥṭāwī's praise of the French polity did not, however, lead him to question his convictions as a Muslim or the efficacy of Islamic law as the basic law of his civilization. Instead, he argued that the progress he witnessed in France—and by extension all of Europe—was based on Islamic foundations that Europeans were able, through assiduous practice and continual development, to perfect. Accordingly, he called for rulers in Muslim states to commit themselves to a program of legal reform that would provide the same benefits of modern

41. The following account is drawn from Mohammed Fadel, "Modernist Islamic Political Thought and the Egyptian and Tunisian Revolutions of 2011" (2011) 3 Middle East L. & Governance 94 at 98-104.

42. Rifāʿa Rāfīʿ al-Taḥṭāwī, *Takhlīṣ al-Ibrīz fī Talkhīṣ Bārīz* (Cairo: al-Hayʿa al-Miṣriyya al-ʿĀmma li-l-Kitāb, 1993) at 181.

civilization enjoyed by Europeans to the Muslim world. From an ideological perspective, Taḥṭāwī emphasized that such a reform program needed to be grounded in Islamic revelation (*sharʿ*) and not human reason (*ʿaql*), even though he argued that from a substantive perspective, both sources lead to substantially the same results. Crucially, Taḥṭāwī argued that the ruler continued to be bound by the *Shariʿa* as articulated by the jurists, meaning that the state was not entitled to its own interpretations of the *Shariʿa* but could only legislate based on norms developed by the jurists themselves. On the other hand, the state was not limited to mandatory norms of the *Shariʿa*, but could use its supererogatory norms as a basis for implementing progressive legislation.⁴³

The goal of such modern legislation is the moral and material perfection of the homeland, and this requires a practical synthesis between rational and revealed law. But achievement of this goal is not achieved solely through a wise lawgiver. It also requires properly motivated subjects of the law who, because of their own moral commitments to the law—and here religion and patriotism mix—internalize the law and zealously ensure that its norms are upheld not only against others in society who would violate the rights of their fellow citizens, but also against the arbitrary action of the state.

Khayr al-Dīn al-Tūnisī, who was the Prime Minister to the Ottoman governor of Tunisia and later the Grand Vizier in Istanbul, also wrote an influential work in which he argued that the reforms instituted by the Ottomans, far from undermining the role of the *Shariʿa*, were in fact necessary to restore its effectiveness. Arguing that the relative decay of the Ottoman state was a product of the decline of the rule of law and the concomitant rise of lawlessness, he concluded that the *tanzimāt* were intended to reinvigorate the rule of law in the Ottoman state by instituting greater accountability to the law and creating new institutions that were more responsive to the public good. He directed his criticism to two kinds of critics of the *tanzimāt*. The first argument was directed against those who believed that the reforms undermined the *Shariʿa* insofar as they altered indigenous Muslim institutions in favour of non-Muslim models of governance. The second argument was directed against those who believed that the ruler's prerogatives to pursue the public good were absolute and public officials, in order to perform their duties effectively, could not be bound by the views of the ruled.⁴⁴

43. Rifāʿa Rāfiʿ al-Ṭaḥṭāwī, *al-Murshid al-Amin li-l-Banāt wa-l-Banīn* (Cairo: al-Majlis al-Aʿlā li-l-Thaqāfa, 2002) at 123-24.

44. Khayr al-Dīn al-Tūnisī, *Aqwam al-Masālik fi Maʿrifat Ahwāl al-Mamālik* (Tunis, Tunisia: al-Dār al-Tūnisīyya li-l-Nashr, 1972) at 107-11.

To both groups of critics of the reforms, al-Tūnisī argued that the prosperity of states is dependent on the rule of law as the essential means to fight arbitrary and despotic rule. The rule of law was satisfied through *effective* commitments to both revealed law (the *Shari'a*) and rational positive law (*qānūn*). According to al-Tūnisī, when the Ottoman state was strong its rulers were effectively bound by both sets of norms, but decay set in when public officials were no longer effectively constrained by either. The *tanzimāt* were simply a species of rational law necessary to make the *Shari'a* effective and could not, therefore, be fairly accused of replacing the *Shari'a* with non-Islamic law. But at the same time, making the *Shari'a* effective requires its rules to be formulated in a manner that is responsive to contemporary problems and not in the frozen and static manner found in the medieval treatises that the traditional legal elite spent years mastering in their theo-juridical studies. Making the *Shari'a* effective in the modern era would require collaboration between these juristic elites and modern technocratic elites, with the latter explaining to the former the various policy goals sought to be achieved by modern lawmaking, and the former providing technical advice as to drafting rules in a form that would be consistent with the norms of the *Shari'a*.⁴⁵

Similarly, the prerogatives of public officials had to be limited by law in order to ensure that public officials fulfilled their duties. Al-Tūnisī argued that there was no dispute in Islamic law that the exercise of discretion was only legitimate if it furthered the public good (*al-maṣlaḥa*). According to al-Tūnisī, however, a public official who acts unilaterally and despotically—even if sincerely—was likely to err in his determinations of the public good. The world was simply too complex for a single decision maker to discern the public good consistently without the inputs of others—to say nothing of the risks that despotic decision making poses to the public good when the official is corrupt.⁴⁶

The rule of law, which consists of both rational and revealed norms, is necessary to prevent despotic decision making and increase the likelihood that the decisions of public officials are in fact consistent with the public good. Laws, however, are not self-executing, and they cannot prevent arbitrary rule unless groups of people in society stand ever ready to defend the integrity of the law against those who would violate the law's demands, particularly when those who violate the law are public officials. The challenge facing the reformist, for al-Tūnisī, was not to determine the *content* of just law—which by hypothesis included both revealed law and rational law—but rather to establish institutions and produce citizens that would uphold the ideal of the rule of law against the ever-present

45. *Ibid* at 152-53.

46. *Ibid* at 110-11.

risk of despotism. The *tanzimāt* served the institutional demands of the ideal of rule of law: al-Tūnisī stated that parliaments, newspapers, public councils, et cetera, are all institutions that are necessary to monitor the performance of public officials and to ensure that they in fact operate under the rule of law. Religion, more specifically, Islam, supplied the moral, inward force for the vitality of the rule of law. According to al-Tūnisī, a Muslim's religious belief serves as an internal motive (*wāzi*), particularly through the Islamic doctrine of commanding the good and prohibiting the evil (*al-amr bi'l-ma'rūf wa'l-nahy 'an al-munkar*), predisposing Muslims to monitor the performance of public officials and to hold them accountable for breaches of the law.⁴⁷

Muḥammad Rashīd Riḍā, the Syrian disciple of the celebrated Egyptian religious reformer Muḥammad 'Abduh, writing in the wake of the collapse of the Ottoman Empire following its defeat in World War I and the decision of the Turkish Republic to dissolve the caliphate, called upon Muslims to establish a renewed caliphate dedicated to comprehensive religious, political, and moral reform of the Islamic world. For Riḍā, the weakness of the Muslim world that made it vulnerable to the domination of Europeans was despotism, political and religious. According to Riḍā, the rulers and religious scholars entered into a compact pursuant to which the latter would not question the decisions of the rulers, and instead would counsel the people that their duty was to obey the rulers without fail (except in certain narrow circumstances), even if their policies were contrary to the public good. The quid pro quo for this agreement was that the rulers agreed not to interfere with the teachings of the religious scholars, even if those doctrines were contrary to the public good.⁴⁸

The doctrine of absolute (or virtually absolute) obedience in the political realm was thus coupled with the doctrine of absolute obedience in religious matters, both of which stripped Muslims of their individual dignity (*'izza*) and imposed upon them a regime of servility (*dhull*) that rendered them incapable of resisting imperialism. Reform required changes to Islamic law so that it was no longer produced solely through the hermeneutical techniques of traditional jurisprudence and instead would be produced through collective deliberations in which the public good (*maṣlaḥa*) would be more fundamental than fidelity to the text of revelation. Political despotism would be resolved by rejection of the doctrine of an absolute duty of obedience to the ruler in favour of the principle of popular sovereignty, and that all legitimate power came exclusively from the people. Accordingly, Riḍā formulated the notion that Islam required some kind

47. *Ibid* at 101-02.

48. Muḥammad Rashīd Riḍā, *al-Khilāfa* (Cairo: al-Zahrā' li-l-I'lām al-'Arabī, 1988) at 69-72.

of republican form of government as a prerequisite for the moral and political reform of Muslim society to allow it to escape the domination of external powers. This could not take place, however, until Muslims were liberated from the political despotism of their rulers *and* the religious despotism of the theologians. Politically, this required a revived caliphate that was based on the actual consent of the community; religiously, this meant liberation of Islamic law from the shackles placed on it by the doctrine of deference—*taqlīd*—and replacing it with independent reasoning—*ijtihād*—in law, derived through a public deliberative process that took into account both revealed and secular sources.⁴⁹

While none of these thinkers advocated a liberal conception of the state, or even necessarily a liberal conception of religion, they were all united in giving the state a greater role in the formulation of religious norms as a means of promoting both the material and the moral progress of the individuals under its rule. Moreover, they all agreed, even if they deployed their arguments in different contexts and for different ends, that reform required the formation of a new kind of Muslim political subjectivity: one that would produce citizens who would be actively involved in public governance, whether through the articulation of political and moral norms or through monitoring public and private behaviour to ensure its conformity with the law. All three of them, to different extents, then elevated public political life over the interpretive activities of the religious class, which, although not to be dismissed out of hand, were to be largely subordinated to what each of them agreed was the key to reform: a morally and politically revitalized state and citizenry.⁵⁰

IV. THE DIVIDE BETWEEN REPUBLICAN ISLAM AND AUTHORITARIAN ISLAM IN POST-REVOLUTIONARY EGYPT

The religious fissures between traditionalist Islam and modernist reformers described in Part III, above,⁵¹ continued throughout the twentieth century in Egypt, despite the Egyptian state's 1961 nationalization of the Azhar, the oldest centre

49. *Ibid* at 38, 101, 103-04.

50. Indira Falk Gesnik, *Islamic Reform and Conservatism – al-Azhar and the Evolution of Modern Sunni Islam* (New York: IB Tauris Publishers, 2010) at 234. Gesnik writes: “[T]he modernists’ vision of lay *ijtihād* constituted a democratization of religious knowledge that would motivate against arbitrary exercise of power.”

51. See *ibid* at 165-96. Gesnik provides a thorough overview of the (at times) nasty politics that took place between and among the Khedive of Egypt, British officials in Egypt, traditionalist religious scholars suspicious of religious reforms, and modernist reformers.

of religious education in Egypt.⁵² When the Azhar re-emerged as an independent institutional actor in the 1970s during the reign of President Sadat, it remained thoroughly committed to a top-down conception of Islam's relationship with the state, standing for the proposition that the state was obligated to implement Islamic law without prior democratic deliberation.⁵³ The Muslim Brotherhood, while nominally allied with the Azhar insofar as the principal demand of both was the restoration of Islamic law as Egypt's basic law, began halting steps toward embracing democracy in the 1980s, when it agreed to compete in parliamentary elections.⁵⁴ Any tension that existed in the respective approaches of the Azhar and the Muslim Brotherhood, however, was largely irrelevant so long as Egypt was firmly governed by an authoritarian state, and in light of their mutual opposition to the violence of Islamic militants and their mutual commitment to Islamizing Egyptian civil society through preaching. In such circumstances, both the Azhar and the Muslim Brotherhood could pursue their respective agendas without worrying about their deeper political disagreements. Divisions over how Islamic law should be implemented, however, could no longer be ignored after the success of the 2011 Revolution. The Muslim Brotherhood took the position, even if only for tactical reasons, that the representative institutions of the state should be given the final word in defining the content of Islamic law, while the Azhar strove for recognition that it would serve as the ultimate arbiter of Islam, including the content of Islamic law, in Egypt.⁵⁵

The post-revolutionary battle between the advocates of what I am calling "republican" Islam and "authoritarian" Islam was fought out largely in the media. While many religious figures were involved in these debates, two figures stand out: Yūsuf al-Qaraḏāwī (born in 1926), as the exemplar of "republican" Islam, on the one hand, and 'Alī Jumū'a, as the exemplar of "authoritarian" Islam, on the other. Both are Egyptians, but their respective careers took radically different paths as a result of their respective stances towards the Egyptian state. Qaraḏāwī,

52. Following the Free Officers' coup in 1952, however, both traditionalist religious figures and reformists suffered at the hands of the military regime, with the regime doing its best to domesticate the Azhar (and largely succeeding, at least throughout the 1960s), and to eliminate the Muslim Brotherhood. See Malika Zeghal, "Religion and Politics in Egypt: The Ulema of al-Azhar, Radical Islam and the State (1952-94)" (1999) 31:3 *Int'l J Middle East Stud* 371.

53. *Ibid* at 382-83.

54. See Wickham, *supra* note 1, ch 3.

55. Clark Lombardi & Nathan J Brown, "Islam in Egypt's new constitution," *Foreign Policy* (13 December 2012), online: <foreignpolicy.com/2012/12/13/islam-in-egypts-new-constitution/?wp_login_redirect=0>.

who grew up in the inter-war era when parts of Egypt were still under British occupation, developed from early on an adversarial stance towards the Egyptian government and was imprisoned at various times by both the monarchy and, following the overthrow of King Farūq in 1952, Egypt's military rulers. He left Egypt for Qatar in the early 1960s, not returning until the Egyptian Revolution of 2011. During his lengthy and prolific career, Qaraḍāwī sought to maintain what he called a centrist "*wasatī*" conception of Islam, one that was neither slavish to inherited historical doctrines, nor one that would secularize Islam and reduce it to private belief. By the time the Egyptian Revolution of 2011 broke out, Qaraḍāwī had become a leading figure of global Islam, a position earned in part as a result of his prolific writings and his weekly satellite television show *al-Sharī'a wal-ḥayāt (Shari'a and Life)*, which was broadcast throughout the Arab world on the Qatari news station, *al-Jazeera*.⁵⁶

ʿAlī Jumuʿa, by contrast, pursued a career within the official Egyptian religious establishment, eventually becoming the official Mufti of Egypt when Hosni Mubarak appointed him to that post in 2003.⁵⁷ The Mufti of Egypt is head of the *Dār al-Iftā'* (Department of Islamic Legal Opinions), a division of the Egyptian Ministry of Justice, which was established by a decree of the Khedive ʿAbbās Ḥilmī in 1895. One of several governmental institutions that represent establishment Islam in Egypt, the *Dār al-Iftā'*'s position inside the Ministry of Justice gives it a more central role than other state religious institutions in the legal articulation of Islam insofar as it is expected to rule on the legality, from an Islamic perspective, of certain actions of the state, particularly when the state chooses to deploy capital punishment against convicted criminals.⁵⁸

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56. Western academics have published several works on Qaraḍāwī's life and thought. See e.g. Jakob Skovgaard-Peterson & Bettina Gräf, eds, *Global Mufti: The Phenomenon of Yusuf al-Qaradawi* (New York: Columbia University Press, 2009); Gudrun Krämer, "Drawing Boundaries: Yūsuf al-Qaraḍāwī on Apostasy" in Gudrun Krämer & Sabine Schmidtke, eds, *Speaking for Islam: Religious Authorities in Muslim Societies* (Leiden, Holland: Brill, 2006) 181 at 184-200 (providing a useful biography); Deina Ali Abdelkader, *Islamic Activists: The Anti-Enlightenment Democrats* (New York: Pluto Press, 2011) at 43-65. For an accessible online biography of Qaraḍāwī, see Ana Belén Soage, "Shaykh Yusuf al-Qaradawi: Portrait of a Leading Islamist Cleric" (5 March 2008), online: Rubin Center for Research in International Affairs <<http://www.rubincenter.org/2008/03/soage-2008-03-05/>>.
57. ʿAlī Jumuʿa's life and writings have not been as extensively studied as al-Qaraḍāwī's. For a basic overview of his life and work, see Heba Raouf Ezzat, "Gumaa, Ali" in John L Esposito, ed, *The Oxford Encyclopedia of the Islamic World* (New York: Oxford University Press, 2009).
58. For background on the relationship of the *Dār al-Iftā'* to the Egyptian state, see Jakob Skovgaard-Petersen, *Defining Islam for the Egyptian State: Muftis and Fatwas of the Dār al-Iftā'* (Leiden, Holland: Brill, 1997). See also Peri Bearman, "Dār al-Iftā'" in Emad El-Din Shahin, ed, *The Oxford Encyclopedia of Islam and Politics* (New York: Oxford University Press, 2014).

In many respects, it is difficult to find major substantive disagreements between Qaraḍāwī or Jumu‘a on fundamental matters of Islamic law and how it should be applied in the modern world. Both of them, for example, reject an interpretation of Islam that would limit the faith to a question of private belief.⁵⁹ Although both of them reject slavish adherence to the historical tradition of Islamic law, neither has much sympathy for those who would cast it out in its entirety. While each believes that the historical tradition of Islamic law should be drawn upon in formulating practical solutions for both individual Muslims and Muslim-majority societies, they do not believe that respect for historical Islamic law precludes adopting new solutions in light of the present circumstances and needs of the Muslim community. Theologically, both accept an ecumenical understanding of Islam that rejects sectarianism and anathematization of dissident Muslim sects, as evidenced by their common adherence to *The Amman Message* of 2006.⁶⁰ Finally, ‘Alī Jumu‘a, like Qaraḍāwī, repeatedly emphasizes the need to call people to a centrist conception of Islam (*wasatī*).⁶¹

Prior to the Arab Spring, with the durability of Arab authoritarian orders unquestioned, the differences between the two men and their conceptions of the relationship of religion to state authority could be—and largely were—ignored. Once the Tunisian fruit vendor Muhammad Buazizi immolated himself, however,

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59. See e.g. Aḥmad al-Buḥairī, “‘Alī Jumu‘a Mutafā‘il bi-Mustaqbal Miṣr wa Lastu Nādīman ‘alā Ziyārat al-Quds – Ḥiwār” (“‘Alī Jumu‘a is Optimistic About Egypt’s Future and ‘I do not regret visiting Jerusalem’ – a Dialogue”), *al-Masrī al-Yawm* (1 July 2014), online: <www.almasryalyoum.com/news/details/473719> [translated by author]. When asked about the relationship of Islam to politics, ‘Alī Jumu‘a, while denying its role in partisan politics, affirmed that “al-siyāsa ... ri‘āyat shu‘ūn al-umma ... wa naẓaran li-‘anna al-dīn yar‘ā shu‘ūn al-umma fa-huwa yata‘arrāḍ li’l-siyāsa min hādhihi al-nāḥiya” (*ibid*). This translates to: “[I]nsofar as politics is concerned with the good order of the community’s affairs ... and because religion is concerned with the good order of the community’s affairs, it must be involved in politics from that perspective.”
60. The principles of *The Amman Message* were three: (1) mutual recognition of Islamic sects and the prohibition of declaring adherents of these sects to be apostates; (2) affirmation that the disagreements among Muslims is less important than what unites them; and (3) the impermissibility of issuing legal opinions in the absence of the requisite qualifications or, under the guise of independent interpretation, to issue rulings that contradict well-established principles of Islam that are held by the various historical interpretations of Islam. See “The Three Points of the Amman Message V. 1” (Speech delivered at the True Islam and Its Role in Modern Society Conference, Amman, Jordan, July 2005), online: Royal Aal Al-Bayt Institute for Islamic Thought <https://web.archive.org/web/20130202045430/http://ammanmessage.com/index.php?option=com_content&task=view&id=91&Itemid=74>.
61. On ‘Alī Jumu‘a’s substantive interpretations of Islamic law, see Ezzat, *supra* note 57. On al-Qaraḍāwī’s views regarding modern Islamic law, see Krämer, *supra* note 56 at 197-200.

setting off a chain of revolutionary events across the Arab world, the political differences between Qaraḍāwī and establishment representatives of Islam like ‘Alī Jumu‘a were thrown into sharp relief. Qaraḍāwī, for example, while falling short of categorically absolving Al-Buazizi of the sin of suicide, placed responsibility for his actions on the authoritarian regime in Tunisia, and by analogy, condemned the entire Arab state system for producing a generation of youth pushed to the brink of despair.⁶² He also went on to express not only his profound hope that God would forgive Buazizi his transgression, but also declared that Islam provides sufficient lawful means to resist tyranny so that there is no need for Arab youth to resort to suicide instead of agitating for political change.⁶³ On the other hand, Arab religious establishments, such as al-Azhar, merely reaffirmed orthodox Islamic teachings that suicide is a grave sin, no matter what the cause, while completely ignoring the underlying political message of Buazizi’s suicide.⁶⁴

When the 25 January Revolution broke out in Egypt, the differences between the two men’s understanding of politics and religion became even starker, with Qaraḍāwī standing staunchly on the side of the revolutionaries, and ‘Alī Jumu‘a defending the regime of Hosni Mubarak.⁶⁵ When the 3 July coup took place, their roles, predictably, were reversed—with ‘Alī Jumu‘a embracing the 30 June protestors and resurrecting the pre-modern Islamic doctrine that a legitimate ruler who loses his effective power due to a coup or the like ceases to be the legitimate ruler, while Qaraḍāwī insisted that legitimacy in the modern

62. “Al-Shaykh al-Qaraḍāwī wa Ra’yuhu fi’-ntihār Muḥammad al-Bū‘azīzi” (16 January 2011), online: YouTube <<https://www.youtube.com/watch?v=mJzS11WJXrI>>.

63. “Al-Qaraḍāwī Yuwaḍḍih Mawqifahu min al-Bū‘azīzi” (“Al-Qaraḍāwī clarifies his stance towards Buazizi”), (19 January 2011), online: Al Jazeera <www.aljazeera.net/news/arabic/2011/1/19/%D8%A7%D9%84%D9%82%D8%B1%D8%B6%D8%A7%D9%88%D9%8A-%D9%8A%D9%88%D8%B6%D8%AD-%D9%85%D9%88%D9%82%D9%81%D9%87-%D9%85%D9%86-%D8%A7%D9%84%D8%A8%D9%88%D8%B9%D8%B2%D9%8A%D8%B2%D9%8A>.

64. “Al-Azhar: al-Islām yuḥarrim izhāq al-rūḥ [Al-Azhar: Islam Prohibits the Taking of Life],” (18 January 2011), online: Islam Today <www.islamtoday.net/albasheer/artshow-12-144845htm>.

65. Yūsuf al-Qaraḍāwī, “Rudūd ‘Ilmiyya ‘alā al-Shaykh aw al-Janirāl ‘Alī Jumu‘a” (“Scholarly Replies to the Shaykh or ‘General’ ‘Alī Jumu‘a”), *Qaradawi* (18 September 2013), online: <www.qaradawi.net/new/Articles-6844> [*Scholarly Replies*]. Recordings of some of his pro-Mubarak statements are available on YouTube. See e.g. Hossam Shork, “Al-Muftī ‘Alī Jumu‘a Athnā’ Thawrat 25 Yanāyir Yuqaddim Taḥiyya li-Mubārak wa Yuḥarrim al-Khurūj ‘alayhi” (“The Mufti ‘Alī Jumu‘a During the 25 January Revolution Saluting Mubarak and Declaring the Sinfulness of Opposing Him”), (27 August 2013), online: YouTube <www.youtube.com/watch?v=IFjg0pKk5qA>.

world can only be the result of free and fair elections, not military-supported popular demonstrations.⁶⁶ Indeed, ‘Alī Jumu‘a not only supported the coup, he also incited the Egyptian military, in a sermon given to the armed forces in the presence of its senior leadership, to kill supporters of the deposed president, urging them to “shoot to kill” (*iḍrab fi’l-malyān*).⁶⁷

It would be too easy to dismiss ‘Alī Jumu‘a’s pro-military position as simply that of a sycophant or a hypocrite ready to exploit religious doctrine to support his political master, a position that Qaraḍāwī, in his various post-coup polemics against ‘Alī Jumu‘a, has regularly taken. The more interesting question is why so many well-known religious scholars who are part of the religious establishment in various Muslim countries consistently oppose democratization, even when, in the case of the Muslim Brotherhood, there was no attempt to remove them from their positions as interpreters of a state-supported religion. While it would be speculative to claim that the politics of ‘Alī Jumu‘a and other traditionalist scholars who support authoritarian orders in the Muslim world is a direct result of their adherence to the political philosophy articulated by medieval theologians such as al-Ghazālī, these scholars share a certain political aesthetic with al-Ghazālī that assumes that a hierarchical order that unifies symbolic (religious) authority and coercive power is necessary for the maintenance of social and religious unity.

Accordingly, in various interviews published in Egyptian newspapers ‘Alī Jumu‘a stressed the need for national unity as a precondition for progress.⁶⁸

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66. *Scholarly Replies*, *supra* note 65; Yūsuf al-Qaraḍāwī, “Radd ‘alā Muftī al-‘Askar” (“A Reply to the Mufti of the Armed Forces”), (11 October 2013), online: <www.qaradawi.net/new/Articles-6891>.
67. *Ibid.* See also “Video Musarrab Li-‘Alī Jumu‘a li-l-Sisī fi Ḥuḍūr al-Sisī ‘Iḍrab fi’l-Malyān” (“A Smuggled Video of ‘Alī Jumu‘a in the Presence of al-Sisī ‘Shoot to Kill”), online: YouTube <www.youtube.com/watch?v=L0TVL_H-eak>. In this video, ‘Alī Jumu‘a exhorts the armed forces to cleanse Egypt of the former president’s supporters, even claiming that the army’s position was vindicated by, among other things, the “innumerable visions (tawātarat al-ru‘ā) of the Prophet of God” that came to Egypt’s living saints in which he communicated to them his support for the military against the former president.
68. When asked by the interviewer how Egypt is to survive the transitional period safely, he replied, “by means of agreement and keeping far from disagreements (‘an ṭariq al-ittifaq wa’l-bu‘d ‘an al-khilāf).” Ibrāhīm ‘Imrān, “al-Duktūr ‘Alī Jumu‘a: Fawḍā al-Khitāb al-Dīnī wa’l-Furqa wa’l-Tanāḥur bayna Abnā’ al-Waṭan Abraz al-Taḥaddiyāt Amām al-Muftī al-Jadīd” (“Dr. ‘Alī Jumu‘a: Chaotic Religious Discourse and Division and Conflict Among the People Are the Gravest Challenges Facing the New Mufti”), *al-Ahrām* (28 February 2013), online: <www.ahram.org.eg/NewsQ/133883.aspx>. Jumu‘a’s suspicion of disagreement and contention as destructive of national unity echoed concerns of religious conservatives of the nineteenth century who feared that calls from religious reformers to abandon traditional legal doctrines in favour of rules derived from renewed independent

In another interview, he expressed his view that “freedom means adhering to [proper] authority and legitimacy, not escaping [from them] and following capricious whims or desires.”⁶⁹ What is most dangerous to national unity, in the opinion of ‘Alī Jumū‘a and other traditionalists, is religious division, which they dismiss as “chaos in religious discourse (*fawḍā al-khiṭāb al-dīnī*).”⁷⁰ One of greatest accomplishments of the 25 January Revolution was the birth of a robust public sphere in which Egyptian citizens of all stripes were free to express their views on a broad range of topics—including religion—that for the previous fifty years had been subject to strict state control. Religion was one of the fields that had suddenly become open to a radical pluralism that establishmentarian theologians such as Jumū‘a had found deeply troubling. Instead of taking robust public discussion about religious affairs as evidence of a people deeply committed to a deeper self-understanding of religion and its relationship to their lives, establishment theologians took the extent of public religious debate—and the disagreement it necessarily produced—as a threat to the existence of religion:

Q. Recently, non-specialists have given many religious opinions (*fatāwā*) which have produced much contention (*jadal*) and confusion (*balbala*) in society. What is your opinion about that?

A. We refer to this condition as “chaos in religious discourse (*fawḍā fīl khiṭāb al-dīnī*)”, and it is the result of [the actions of] some individuals who are only expressing their personal views, not [the views of] official establishments (*jiba rasmiyya*). They have created chaos in religious discourse. You might come across one of them speaking about religion, and you are surprised to find yourself in front of a zealot (*mutashaddid*), then go to another, and find him licentious (*mutasayyib*). You might then go to a third and he is moderate (*wasāṭan*) or a fourth who reduces religion to spiritual matters (*rūḥāniyyāt*) or a fifth who reduces religion to politics (*siyāsa*), and so on and so forth. This produces a general condition among the people of confusion and contention as a result of the numerous religious controversies emerging from religious discourse.⁷¹

Nor was ‘Alī Jumū‘a the only establishmentarian theologian in Egypt to express fears about the subversive consequences of religious pluralism in Egyptian society. Shaykh ‘Abd al-Ḥamīd al-Aṭrash, for example, complained that “the

interpretations of Islamic law would undermine established beliefs and practices of the community and undermine the community’s unity. See Gesnik, *supra* note 40 at 179-80.

69. Al-Buḥairī, *supra* note 48 [translated by author] (‘Alī Jumū‘a saying, in Arabic, “Inna al-ḥurriyya ta‘nī al-iltizām bi’l-marja‘iyya wa’l-shar‘iyya wa lā ta‘nī al-tafallut wa’ttibā‘ al-ahwā’”).

70. *Ibid.*

71. *Ibid.*

people have become confused and contentious as a consequence of differences of opinion.”⁷² ‘Alī Jumu‘a, at a speech delivered at Singapore’s Nanyang Technological University on 10 June 2014, even blamed the rise of religious extremism in the Muslim world on the breakdown of religious authority and the concomitant spread of pluralistic religious interpretations at the hands of unqualified religious autodidacts:

Among the problems that confront the modern world is the problem of authority. In Islam and also other religions, we are witnessing the phenomenon of non-specialists who lack sufficient religious education but who nevertheless hold themselves out as religious authorities, despite the fact that they lack the preparation that would enable them to speak about Islamic law (*al-shari‘a*) and morality (*akhlāq*). This tendency has cast the door wide open for extremist interpretations of Islam which have no foundation. The reality is that none of these extremists have studied Islam in any recognized center of Islamic learning. Rather, they [and their interpretations] are only the product of social conditions brimming with problems. They have relied on perverted and distorted interpretations [of religion] and they seek to spread chaos.’ He went on to insist that ‘Our role as an Islamic religious leadership which has spent its entire life studying religious texts is to restore [religious] authority by returning those who have solid foundations of learning (*qadam rāsikha fi’l-‘ilm*) [to their rightful position].’⁷³

In light of establishment theologians’ fears of religious pluralism as a source of political instability and religious disorder, it is unsurprising that they demanded that the state put an end to the perceived crisis in religion stemming from the pluralism of the post-Mubarak period. Accordingly, they asked the state to pass a law that would, among other things, criminalize the public dissemination of religious opinions unless the person giving the opinion was part of an official

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72. Walīd ‘Abd al-Rahmān, “Miṣr: Ṣaḥwa Azhariyya li’l-ḥadd min Fawḍā al-Fatwā” (“The Azhar Awakens to Place a Limit on the Chaos of Religious Opinion”), (11 September 2012), online: al-Sharq al-Awsat <archive.aawsat.com/details.asp?section=17&article=694740&issueno=12341#.VNYMMPnF8d8> (Shaykh ‘Abd al-Ḥamid al-Aṭraḥ quoted as saying in Arabic, “Al-nās taḥayyarat wa tabalbalat min ikhtilāf al-ārā’”).
73. Ziyād Mujāhid, “Alī Jumu‘a: ‘Ghayr al-Mutakhaṣṣiṣīn Yunaṣṣibūna Anfusahum Marji‘iyyāt Dīniyya li-Ithārat al-Fawḍā” (“‘Alī Jumu‘a: ‘Non-Specialists Are Making Themselves Religious Authorities to Spread Chaos’”) *Al-Bawwāba* (10 June 2014), online: www.albawabhnews.com/628139.

institution.⁷⁴ When a journalist from the *Ahram*, the flagship newspaper of the state, asked ‘Alī Jumū‘a for his opinion on this issue, he replied that in light of the gravity of the function of giving religious opinions, “it is necessary that this matter should be restricted to specialized scholars, and that scholars who wish to assume this position be trained thoroughly so that they possess the requisite qualifications for this grave task.”⁷⁵ Al-Qaraḍāwī’s writings also are cognizant of the danger of religious extremism that emerged in a context where enthusiasm surpassed learning. Unlike his establishmentarian colleagues, however, he took the view that what was needed to prevent extremism was *tarshīd*, guidance, not suppression.⁷⁶ As he explained in his essay, *al-Fiqh fī Marātib al-Aḥkām wa Adab al-Khilāf* (*Jurisprudence in [Light of the Definitiveness of] Legal Rulings and the Etiquette of Disagreement*), the proper antidote to both fanatic attachment to religious opinion and to confusion that may arise in the mind of the laity when faced with numerous opinions on the same question of religious law was to educate them about the role of interpretation in determining the content of Islamic law. He added that, differences of opinion on the detailed questions of Islamic law are both inevitable and enriching to the community, not contrary to its unity or the interests of Muslims.⁷⁷

V. THE MUSLIM BROTHERHOOD AND ESTABLISHMENT ISLAM IN EGYPT

The previous discussion highlights the anxiety that establishment theologians experienced when they witnessed the wave of religious pluralism that broke out as a result of the breakdown of Mubarak’s authoritarian order. While these theologians do not explicitly name the Muslim Brotherhood as the party responsible for the “chaos in religious discourse” affecting Egypt and other Muslim societies, it is

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74. Abd al-Raḥmān, *supra* note 60 [translated by author] (“ṭāliba ‘ulamā’ azhariyyūn fī miṣr al-sultāt al-miṣriyya bi-qānūn yujarrim faḥḍā al-fatāwā . . . wa akkadū anna ‘al-azhar ḥasama amr jihat al-fatwā wa manaḥa dār al-iftā’ al-ḥaqq al-wahīd fī iṣḍār al-fatwā fī l-bilād.” This translates to: “Azharī scholars in Egypt have demanded that the Egyptian authorities promulgate a law criminalizing the chaos in religious opinions . . . and they also affirmed that the Azhar has resolved the issue of where religious opinions are to be obtained, and gave the Dar al-Iftā’ the exclusive right to issue religious opinions in the country.”
75. ‘Imrān, *supra* note 57 [translated by author] (“lā budda min qaṣr al-amr ‘alā al-mutakhaṣṣiṣīna min al-‘ulamā’ li’l-iftā’ min khilāl al-ma‘āyir allatī yanbaghī an tatawaffara fī man yataṣaddar li-hādhihi al-muhimma al-‘azīma”).
76. Krämer, *supra* note 45 at 199-200.
77. Yūsuf al-Qaraḍāwī, “al-Fiqh fī Marātib al-Aḥkām wa Adab al-Khilāf” (12 Dec 2004), online: <www.qaradawi.net/new/Articles-3959>.

clear that they believe that the Brotherhood's approach to religion and religious renewal, with its populist focus, is a big part of the problem, and most definitely not part of the solution. Because the Muslim Brotherhood was perceived as a political actor using religion for its own partisan political interests (their opponents often contemptuously referred to them as *tujjār al-dīn* ("merchants of religion")), establishment theologians worried that opposition to the Muslim Brotherhood as a political party would translate into opposition to religion as such.⁷⁸ Just as worrisome, however, must have been the fact that the Muslim Brotherhood had its own hierarchical structure of religious authority that was independent of the established religious institutions of the Egyptian state. And despite the hue and cry over various provisions in the Egyptian constitution of 2012 that secular critics claimed would empower the Azhar to exercise a supervisory role over state legislation, the Muslim Brotherhood was largely indifferent to the constitutional role of the Azhar in the Egyptian state because "it controlled the presidency and looked forward to a strong parliamentary role. ... [I]t was happy to pursue Islamization of the Egyptian legal order slowly—by legislation, for instance."⁷⁹

The Muslim Brotherhood's preference for the democratically expressed will of the people as an equally (if not more) legitimate interpretation of Islamic law manifested itself in an obscure controversy that took place during the brief term of President Morsi when there was an attempt to pass a law authorizing the state to issue bonds that were in compliance with Islamic law, known as *ṣukūk*. The government of Egypt, because of its financial crisis, was desperate to attract foreign capital. One previously untapped source of funding had been Islamic finance, and although numerous jurisdictions and private companies had tapped the Islamic finance market in the decade preceding the Egyptian Revolution of 2011, Egypt had not. One reason that Egypt had not sought to raise funds from this sector was that the government had not promulgated a law that would enable it to issue such bonds, which, because of their non-conventional, asset-backed structure, required special legislation. The proposed law was intended to remedy this problem.

78. For example, the Egyptian Minister of Religious Endowments has justified his Ministry's attempt to exercise direct control over all of Egypt's mosques in the wake of the coup partially on the ground that in the polarized political atmosphere, political debates degenerate into incitements to violence and apostasy. See *e.g.* Ahmed Morsi & Nathan Brown, "Egypt's al-Azhar Steps Forward" (7 November 2013), online: Carnegie Endowment for International Peace <carnegieendowment.org/2013/11/07/egypt-s-al-azhar-steps-forward#>.

79. Clark Lombardi & Nathan J Brown, "Islam in Egypt's new constitution," *Foreign Policy* (13 December 2012), online: <foreignpolicy.com/2012/12/13/islam-in-egypts-new-constitution/?wp_login_redirect=0>.

Islamic finance, including *ṣukūk*, however, is not free of controversy. Many Muslims are critical of these instruments as subterfuges intended to circumvent the Islamic prohibition on interest-bearing loans. At the time the law was proposed, the 2012 Constitution had been approved, but the House of Representatives, *Majlis al-Nuwwāb*, had not yet been elected, having been dissolved earlier in the year by the Supreme Constitutional Court. As a result, only the second chamber of the Parliament, the *Majlis al-Shūrā*, was in session. For reasons not relevant here, the Muslim Brotherhood and the more theologically conservative Salafī Nūr Party dominated membership of this chamber, but the Muslim Brotherhood's Freedom and Justice Party held the majority of seats. The proposed *Ṣukūk* law troubled the minority Salafis insofar as they believed it was an illegitimate attempt to circumvent Islamic law's prohibition on the payment of interest. Lacking sufficient votes in the *Majlis al-Shūrā* to block the law, they invoked Article 4 of the new constitution in an attempt to block or modify the proposed law—Article 4 provided that the Council of Senior Scholars of Azhar should be consulted on matters related to Islamic law.⁸⁰

The response of 'Iṣām al-'Aryān, representative of the majority Freedom and Justice Party, the political wing of the Muslim Brotherhood, could not have been reassuring to the religious establishment. Despite language in the 2012 Constitution that provided that “the opinion of the Senior Council of Scholars of Azhar is taken [into account] in matters connected to Islamic law,”⁸¹ al-'Aryān stated that this provision, in fact, did not make the Azhar the exclusive or final adjudicator on the law's conformity with Islamic teachings. Rather, the provision merely authorized the parliament, in its capacity as sole lawmaker, or the justices of the Supreme Constitutional Court, in its capacity as supervisor of the constitutionality of legislation, to consult with the Azhar's senior scholars

80. *Ibid.* For an overview of the debate that took place in the *Majlis al-Shūrā*, see Aḥmad Sāmī Mutawallī et al, “Jadal bi'l-Shūrā Hawl Musammā Qānūn al-Ṣukūk wa 'Adam 'Arḍihī 'alā Kibār al-'Ulamā'; al-'Aryān: al-Barlamān Yakhtaṣṣ bi'l-Tashrī' wa'l-Dustūriyya Turāqib al-Qawānīn” (“Debate Around the Nomenclature in the *Ṣukūk* Law and Whether it Should be Reviewed by the Councils of Senior Scholars [of Azhar]; al-'Aryān: Parliament is Responsible for Making Laws and the Supreme Constitutional Court Supervises Whether They are Constitutional”), *al-Ahrām* (18 March 2013), online: <www.ahram.org.eg/NewsQ/137308.aspx>.

81. The New Constitution of the Arab Republic of Egypt (*Dustur Jumhuriyat Miṣr al-Arabiyyah*), 30 November 2012, pt I, ch 1, art 4, online: <constitutionnet.org/files/final_draeft_of_constitution_as_of_30_nov_2012.pdf> [2012 Constitution]. For an English translation, see The New Constitution of the Arab Republic of Egypt (*Dustur Jumhuriyat Miṣr al-Arabiyyah*), 30 November 2012, pt I, ch 1, art 4, online: <www.constitutionnet.org/files/final_constitution_30_nov_2012_english_-idea.pdf>.

independence from the state, but also with what could reasonably be viewed as the exclusive *legal* authority for the teaching and supervision of Islam in Egypt.⁸⁶

VI. CONCLUSION

From a liberal perspective, it is tempting to view constitutional battles in Egypt from the perspective of western history, a history that was characterized by a battle between the powerful institutions of the Catholic Church, on the one hand, and European monarchs, on the other. A simplistic attempt to apply this model of religion-state relations to the Arab world is not likely to cast much light on the actual dynamics of the current struggle taking place insofar as there is no religious institution in the Arab world that plays a political role comparable to that played by the Catholic Church in European political history. Instead, one is witnessing a different kind of battle, one in which the question is how religion should be incorporated in the state and practiced in society: Should it be subject to a state monopoly, or should a religiously pluralistic public sphere be tolerated, one that would include not only “moderate” conceptions of religion that are consistent with state policies, but also “radical” or “extremist” conceptions of religion that challenge the state’s religious message? Such challenges could come from within a religious discourse that finds the state’s religious policies too lax, for example, or from an atheistic perspective that rejects religion altogether and finds the state’s attempts to promulgate a state-sanctioned version of religious orthodoxy oppressive.⁸⁷

86. Constitution of the Arab Republic of Egypt (*Dustur Jumhuriyat Misr al-Arabiyyah*), 18 January 2014, pt II, ch 1, art 7, online: <www.constitutionnet.org/files/final_constitution_-2_dec_2013-arabic-_signed.pdf> [2013 Constitution] (stating that, “The Noble Azhar is the primary authority for religious learning and Islamic affair” (“*Al-Azhar al-Sharif... al-Marji' al-Asasi fi'l-'Ulum al-Diniyya wa'l-Shu'un al-Islamiyya*”). For an English translation, see Constitution of the Arab Republic of Egypt (*Dustur Jumhuriyat Misr al-Arabiyyah*), 18 January 2014, pt II, ch 1, art 7, online: <www.constitutionnet.org/files/dustor-en001.pdf>.

87. One of the ironies of the coup has been that the new President of Egypt has, in addition to outlawing the Muslim Brotherhood and declaring it a terrorist organization, has launched a very public campaign confronting the “threat” of atheism. See *e.g.* Mona Eltahawy, “Egypt’s War on Atheism,” *New York Times* (27 January 2015), online: <www.nytimes.com/2015/01/28/opinion/mona-eltahawy-egypts-war-on-atheism.html?_r=0>; Louisa Loveluck, “Egypt’s Sisi urges religious moderation, but no space for insulting images,” *Christian Science Monitor* (14 January 2015), online: <www.csmonitor.com/World/Middle-East/2015/0114/Egypt-s-Sisi-urges-religious-moderation-but-no-space-for-insulting-images>; Brian Whitaker, “Sisi’s Egypt to ‘eliminate’ atheism,” *al-bab* (19 June 2014), online: <www.al-bab.com/blog/2014/may-june/egypt-to-eliminate-atheism.htm#sthash>.

While the Muslim Brotherhood is certainly not a liberal movement, its conception of religion and its role in politics is tolerant—even if grudgingly—of pluralism in the religious public sphere. This practical toleration, even if born of necessity and not principle, produced, for the first time in recent Egyptian history, a genuinely pluralistic public sphere in which religious topics could be freely debated in public and in an arguably civil spirit.⁸⁸ In the language of Jeffrey Stout, the 25 January Revolution produced, even if for only a relatively brief period of time, a substantially more *secularized*—but not *secular*—public space in Egypt.⁸⁹ In a secularized public space, appeals to religious arguments decline not because the citizens necessarily lose religious faith, but as a result of the combination of the increasingly pluralistic theologies of citizens themselves, and the increasing realization that religious arguments, because of their malleability, are inconclusive for political purposes. In response, citizens resort to other, non-theological, rhetorical strategies in attempts to forge broader agreement, not because they have suddenly become non-believers, but rather because they realize that they can no longer assume deep agreement on theological principles. Something akin to this process was clearly taking place in post-Mubarak Egypt, and Egypt's Muslim religious establishment (and probably its Coptic counterpart as well) found these developments quite dangerous. Their support of a military coup was likely motivated by a desire to put an end to the increasing secularization of the religious public square that took place following the 25 January Revolution, a phenomenon that the political ascendancy of the Muslim Brotherhood only served to accelerate, and that the continued existence of competitive politics would only further entrench as different conceptions of religion and the state would be articulated in the course of political competition.

From the perspective of the pre-modern Islamic tradition, the state was supposed to both protect religious orthodoxy *and* act in a representative capacity. In modern circumstances, however, it cannot act in a representative fashion

AZIDvDPu.8RUyMIn8.dpbs>; Marwa Morgan, "Sisi's Quest to Maintain 'Moral Discipline' Returning Egypt to Authoritarianism," *Al-Akhbar English* (12 January 2015), online: <english.al-akhbar.com/node/23169>; Sarah Lynch, "In Egypt, atheists considered a 'dangerous development,'" *USA Today* (1 February 2015), online: <www.usatoday.com/story/news/world/2015/02/01/egypt-atheists/22038645>.

88. See e.g. Kristin Deasy, "Debating Atheism in the Heart of Cairo," *World Affairs Millennium Letters* (21 February 2013), online: <www.worldaffairsjournal.org/blog/kristin-deasy/debating-atheism-heart-cairo> (describing public meetings debating theism, atheism, and Islam held in a mosque in downtown Cairo).

89. Jeffrey Stout, *Democracy and Tradition* (Princeton: Princeton University Press, 2004) at 93-97.

without weakening its commitment to the protection of religious orthodoxy. While advocates of republican Islam such as al-Qaraḏāwī do not seem to be overly fearful of the spread of heterodoxy in the wake of democratization, traditionalist theologians such as ‘Alī Jumū‘a have clearly decided that protection of religious orthodoxy is more important than establishing a representative government. In making this choice, they are clearly vindicating a well-established line of reasoning in Islamic political thought. The Muslim religious establishment of Egypt believes that in Sisi it has found the pious autocrat idealized by pre-modern Muslim theologians such as al-Ghazālī. From their perspective, a religious autocrat who can control religious debate is preferable to a religious president presiding over a political system in which religious teachings become a subject of public contestation. Whether this strategy can provide long-term political and theological stability for Egypt and other Muslim-majority countries is questionable, however. The foreseeable future looks bleak for any kind of republican Islam to become ascendant in Egypt, and it is the turn of the religious establishment to try to create a stable resolution to the problem of state-religion relations in the Arab world.