ISLAMIC LAW AND HUMAN RIGHTS IN THE THOUGHT AND PRACTICE OF THE MUSLIM BROTHERHOOD IN EGYPT

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Declaration

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Abstract

This thesis explores the development of the Muslim Brotherhood's (MB) thinking on Islamic law and international human rights and argues that the MB has exacerbated, rather than solved, tensions between the two in Egypt. The organisation and its scholars have drawn on hard-line juristic opinions and reinvented certain concepts from Islamic traditions in ways that limit the scope of various human rights and to advocate for Islamic alternatives to international human rights. The MB's practices in opposition and in power, have been consistent with its literature. As an opposition party, it embraced human rights language in its struggle against an authoritarian regime, but advocated for broad restrictions on certain rights. Yet, its recent and short-lived experience in power provides evidence for its inclination to reinforce restrictions on religious freedom, freedom of expression and association, and the rights of religious minorities, and to reverse previous reforms related to women's rights. I conclude that the peaceful management of political and religious diversity in society cannot be realised under the MB's model of a shari'a state. This thesis advocates for the drastic reformation of traditional Islamic law and state impartiality towards religion, as an alternative to the development of a shari'a state or exclusionary secularism. This transformation is, however, contingent upon significant long-term political and socio-cultural change, and it is clear that successfully expanding human rights protection in Egypt requires not the exclusion of Islamists, but their transformation. Islamists still have a large constituency and they are not the only actors who are ambivalent about human rights. Meanwhile, Islamic law also appears to continue to influence Egypt's law. I explore the prospects for certain constitutional and institutional measures to facilitate an evolutionary interpretation of Islamic law, provide a baseline of human rights and gradually integrate international human rights into Egyptian law.

Note on the Transliteration

I have standardised the International Journal of Middle Eastern Studies (IJME) transliteration system, with few diacritical marks. Words that are anglicised, such as shari‘a, Qur’an, jihad and ijtihad are not italicised. All other Arabic anglicised words are italicised. I have used the English spellings of words that are most commonly used in the English-speaking world for the names of Egyptian and Arab politicians and public figures, as well as the Muslim Brotherhood’s General Guides and leaders.

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This thesis is lovingly dedicated to my father Ahmed Elfegiry, my sister Gina Elfegiry and the memory of my mother, Fatma Shalaby Safa.

Contents

Abbreviations

AFTE	Association for Freedom of Thought and Expression
ANHRI	Arab Network for Human Rights Information
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CIHRS	Cairo Institute for Human Rights Studies
CPJ	Committee to Protect Journalists
CRC	Convention on the Rights of the Child
ECtHR	European Court of Human Rights
EIPR	Egyptian Initiative for Personal Rights
EMHRN	Euro-Mediterranean Human Rights Network
EOHR	Egyptian Organisation for Human Rights
FGM	Female Genital Mutilation
FJP	Freedom and Justice Party
GC	General Comment
HRC	Human Rights Committee
HRW	Human Rights watch
ICCPR	International Covenant on Civil and Political Rights
IHRL	International Human Rights Law
IICWC	International Islamic Committee for women and Child
MB	Muslim Brotherhood
NCW	National Council for Women
SCC	Supreme Constitutional Court

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Chapter One: Introduction

1. Defining the Research Problem

This thesis examines the way in which the thinking of the Muslim Brotherhood (hereinafter MB) has developed on the relationship between Islamic law and human rights in Egypt. The Arab world[1] has witnessed profound political transformation over the last five years. Since December 2010, massive popular uprisings in Tunisia and Egypt led to the ousting of two Arab authoritarian rulers and set in motion tumultuous political transitions elsewhere in the region, the outcomes of which remain uncertain.[2] The common feature in all countries in the Arab world since the outset of the so-called 'Arab Spring' is the unprecedented political influence of Islamists (Sadiki 2011; Tibi 2013b). Although political Islam did not lead the popular protests in Tunisia and Egypt, Islamists were ostensibly the first to benefit from them, by drawing on their organisational superiority and the weakness and division of liberal factions (Tibi 2013b; Mikail 2012; Bradly 2012).

The MB enjoyed unprecedented political freedom in post-Mubarak Egypt and up to the removal of President Mohammed Morsi on 3 July 2013, and it was able to establish its political party, the Freedom and Justice Party (hereinafter, FJP) (Trager 2011:114-126). The MB became the leading political bloc in the 2012 Parliament, with one of its leaders elected as the President of Egypt on 18 June 2012. It also led the 2012 Constitution-making process. However, its experience in power was short-lived: President Morsi was deposed by the military on 3 July 2013, and the Islamist-backed Constitution was suspended following massive popular protests across Egypt against Morsi and the MB (Brown 2013). [3]

[1] In this thesis, the Arab world refers to the 22 member states of the League of Arab States.
[2] For a critical evaluation of the Arab Spring, see Sadiki (2014), Brownlee et al (2015) and Achcar (2013).
[3] See Statement by General Abdel Fattah el-Sisi, Commander-in-Chief of Egyptian Armed Forces and Minister of Defence and Military Production, *Official Gazette* no.26bis of 3 July 2013.

The rise of Islamist movements in many Muslim states[4] has long triggered serious concerns among academics and human rights practitioners regarding their commitment to international human rights (Benard 2003; Scientific Council for Government Policy 2006; Emerson et al. 2009).[5] Islamism, or political Islam,[6] as articulated by prominent Islamist ideologues, is centred on two key assumptions. The first assumption is that Islam mandates Muslims to establish the Islamic state, in which Islamic law regulates all aspects of the state and society. The second assumption is that determination of the normative content of shari'a is only acceptable if it complies with the methods developed by the mainstream traditional Muslim jurists.[7]

The assertion of these two assumptions as the authentic expression of Islam is, however, contested by other Muslim scholars (Tibi 2013a; An-Na'im 1990; 2008). The institutional and social settings in which shari'a developed and was applied during pre-modern Muslim governance are paradigmatically different from the modern nation state, and therefore the idea of incorporating shari'a into it (Hallaq 2013). This has prompted many scholars to maintain that Islamism is a modern construction that cannot be seen as an extension of the tradition (Tibi 2012; Iqtidar 2011:39-40). An-Na'im (2008:8) has held that 'the notion of an Islamic state is in fact a postcolonial innovation based on a European model of the state'. In this thesis I use the term Islamic law to mean legal rules that are extracted from the Qur'an and *Sunna,* Islamic sources. The substance of these rules varies among Muslim jurists and scholars according to their different epistemological and methodological approaches to the

[4] In this thesis, Muslim states refer to states where the majority of populations are Muslims, members of the Organization of Islamic Cooperation (OIC), or states that recognise Islam as their official religion or consider Islamic law an official source of domestic legislation in their constitutions.
[5] See the Journal of Democracy (2008:5-8).
[6] Islamism and political Islam are used interchangeably in this thesis.
[7] For a general discussion of the nature of Islamism and its distinctive features, see Tibi (2012).

Islamic sources. The diversity of opinions on what constitutes Islamic law opens the relationship between Islam and human rights to significant contestation and evolution.

Some scholars express pessimistic attitudes towards Islamist movements' responses to human rights and liberal democracy (Huntington 1996: 192-198; Tibi 2008; Haqqani 2013). This pessimism has been influenced by previous experiences of governance in the name of Islam in particular Muslim states such as Iran, Pakistan, Sudan, and Afghanistan under the Taliban, which have created strong concerns over the respect of Islamist movements for international human rights norms (Mayer 2012:36-46; Marshall 2005; Haqqani 2005). The commitment of Islamist parties to human rights law has also been a matter of enquiry by the European Court of Human Rights (hereinafter ECtHR). In a famous case involving the Turkish Welfare Party in 2003, the Court upheld Turkey's decision to dissolve the party due to its adoption of a platform through which it sought to implement Islamic law. The court opined that the party's religious programme conflicted with the protection of basic rights and liberties in the European Convention on Human Rights (hereinafter ECHR).[8]

Nevertheless, given the popularity of Islamist parties in many Muslim states, other scholars and human rights advocates argue for the integration of 'moderate'[9] and peaceful Islamists into political processes as a tool of de-radicalisation and moderation (El-Ghobashy 2005, Kausch 2009; Hamid 2011; 2014; Roth 2012:4).[10] In this context, Baker (2003:1-14) suggested using the expression 'Islam without fear' to refer to the emergence of a 'moderate' trend among Egyptian Islamists. The term 'post-Islamism' has meanwhile been coined by political scientists (Bayat 2013) to explain the transformation of some Islamist parties, such as the Justice and Development Party in Turkey (AKP), into 'a conservative democratic party

[8] See Refah Partisi and Others v. Turkey, ECtHR, 13 February 2003. The Court, however, ignored other possible liberal interpretations of Islam and shari'a, see a commentary on this case by Abou Ramadan (2007).

[that] defends change, reform and transformation in favour of democracy, human rights and rule of law' (Sambur 2009:117).[11]

Since the 1980s, political repression and restricted political space in Egypt has created a common agenda of political activism for various political actors and human rights defenders in Egypt, including the MB (Shehata 2010). During the decade before the 2011 uprisings the MB embraced human rights language in its political discourse and, by harnessing other political forces, pressured Egyptian authorities to respect the right to free assembly, association and expression, to judicial independence and to a fair trial (Brown and Hamzawy 2010). After the MB won 88 seats in the 2005 Parliament, the Deputy General Guide, Khairat al-Shater (2005), wrote in *The Guardian* newspaper that the MB's main objective was to 'trigger a renaissance in Egypt, rooted in the religious values upon which Egyptian culture and society is built'. He added that 'the success of the MB should not frighten anybody: [the MB] respects the rights of all religious and political groups'.

It was not clear at the time whether the MB's shift towards human rights language was a question of political convenience, or reflected a genuine intellectual change in the organisation. However there was no consensus between the MB and other human rights activists on the content of certain rights and the acceptance of international human rights treaties as a term of reference. Ideological disparities between the MB and other political forces, as well as the restricted political space during Mubarak's governance, had not allowed

[9] The term 'moderate Islamists' has been largely used in the literature to refer to Islamists who condemn violence and peacefully participate with other political parties in the constitutional and political institutions. However, I subscribe to other views (Tibi 2012:9-10) that find that what constitutes 'moderate' is ambiguous and misleading. Tibi (2012:10) suggests 'institutional Islamists' as a more neutral concept than moderate Islamists.

[10] Kenneth Roth (2012:4), the executive director of HRW stated that 'Islamic movements are hardly monolithic or implacably opposed to rights. Yet rather than engage with them to demand respect for rights, Western governments have often treated them as untouchable'.

[11] See also Kuru (2013). However, other scholars argue that the AKP still embraces an Islamist agenda and engages in what they call 'creeping Islamisation' (Tibi 2012:98-102; Baran 2010).

such a consensus to emerge (Shehata 2010; Hicks 2002). Among other areas, this thesis will explore whether the political climate after Mubarak has provided an opportunity for this consensus to develop, or rather deepened divisions between Islamist and non-Islamist forces.

My interest in this research is founded on my direct engagement with the debate on Islamism, Islamic law and human rights in Egypt and other Muslim states as a human rights practitioner since 2003. The intersections between the MB and international human rights, along with increasing scholarship on the transformation of Islamist movements across the Muslim world, has motivated me to explore to what extent the MB has the potential to gradually legitimise international human rights in Islamic terms. While the experience of the MB in power after Mubarak was too short to comprehensively judge the party's actual record in human rights, it does enable us to compare the MB's literature and experience in opposition with its positions in power.

A great deal of research has been conducted on the MB, much of it dealing with the political history of the organisation, its institutional development and its ideology (Mitchell 1993; Lia 2006; Zollner 2007; al-Awadi 2004; Pargeter 2010; Ruben 2010). Scholars have examined the cooperation between the MB and human rights non-governmental organisations, the MB's approach to constitutionalism, and its position on the rights of religious minorities, on political pluralism, and gender equality (Hicks 2002; MacQueen 2008; Rutherford 2006; Dalacoura 2007; Slit 2010; Scott 2010; Tadros 2012a). However, this thesis is the first legal research to investigate the development of the MB's thinking on the relationship between Islamic law and International Human Rights Law (hereinafter IHRL) over the last three decades.

Religious actors and their involvement in the struggle over the meaning of human rights has increasingly become a subject of academic inquiry (Cismas 2014; Hopgood 2013; Chase

2015). The aim of this thesis is to put the debate between Islamic law and human rights in context through a systematic assessment of the thought and practice of a major Islamist movement. As proposed by Preis (1996:286-315), there is a need to study human rights as cultural practice within certain political and social contexts in order to understand the dynamics of the evolution of human rights discourses in different societies. The future of Islamic discourses is contingent on the political and social dynamics in Muslim states. As stated by An-Na'im (2004:9) 'the relationship [between Islam and human rights] is open to engagement and transformation precisely because it is contingent on an interactive web of internal and external factors and forces'.

This research focuses on the MB as one such force to be influencing the debate on Islamic law, in Egypt and the whole Muslim world. The thesis is structured to answer the following questions: how has Islamic law influenced the MB's conception of human rights? What have its reactions been to the development of IHRL? To what extent has there been change or continuity in the thought and practice of the MB towards human rights issues? In which areas has the MB expanded or restricted its understanding of human rights? Is there consistency between the MB's practices and the positions taken by its ideologues and scholars? And finally, how have the MB's thought and practice influenced the evolution of the debate on human rights in Egypt?

Although Islamists share common goals, one cannot generalise about their detailed attitudes to different human rights issues, or the extent of their respect for these rights. Islamists' different responses to human rights in post-uprising Egypt and Tunisia since 2011 are illustrative in this regard (El Fegiery 2012). The major argument of this thesis is that the MB has exacerbated rather than solved tensions between Islamic law and international human rights. The organisation and its scholars have drawn on hard-line juristic opinions and

reinvented certain concepts from Islamic traditions to limit the scope of freedom of association, freedom of expression, religious freedom, rights of religious minorities and women's rights, and to advocate for Islamic alternatives to international human rights. The MB's positions on human rights, while in opposition and in power have been consistent with its intellectual literature. In opposition, it embraced human rights language in its struggle against an authoritarian regime but advocated for broad restrictions on certain rights. The MB's short-lived experience in power provides evidence for its inclination to reinforce restrictions on the freedom of religion, expression and association, and the rights of religious minorities, while reversing previous reforms related to women's rights.

Since the literature and discourses of the MB were developed in different historical phases, in the following section I present a brief introduction to the main historical developments of the organisation since its establishment. The third section examines the research methods and sources, and in the last section I explain the structure of this thesis.

2. The Muslim Brotherhood: A Historical Background

Founded in 1928 by Hassan al-Banna (1906-1949), the MB in Egypt represents the oldest and largest organisational manifestation of Islamism in the Muslim world, from which other groups emerged in many Muslim states (Lapidus 2002:522; Ruben 2010:1). The call for the enforcement of Islamic law is a central characteristic of its political and legal identity (Mitchell 1993 245-250; Pargeter 2013:17), however it is the MB's stance on the use of violence to achieve its goals, that is a particularly contentious issue. During the 1940s the group was involved in violent actions through a secret apparatus (al-Majid 2010:21-29). MB leaders argue that this apparatus was established by al-Banna to engage in the struggle against colonialism. They admit that the secret apparatus assassinated some civilian figures.

However, they assert that al-Banna and the leadership of the organisation were not directly involved in these killings, invoking certain statements made by al-Banna that condemned the killings and the perpetrators (al-Shamakh 2011a; al-Banna 2006:757-785). Other observers however, argue that the use of violence was justified and supported by al-Banna himself ('Ali 2007:82-90). The increasing political power of the MB and its involvement in violence led to its dissolution by a military order on 8 December 1948,[12] and to the assassination of al-Banna on 13 February 1949 (Mitchell 1993:58-79; Pargeter 2010:29-30).[13] Once the state of emergency had ended, the Court of Administrative Justice held on 17 September 1951 that the dissolution of the MB by a military order was void.[14]

On 23 July 1952, the Free Officers' Movement came to power after a military coup. This was well received by many Egyptians, who considered it to be a relief from the political and social crises prevailing in Egypt under the monarchy. The MB was a political ally of the Free Officers' Movement before 1952 and backed its political move. However, political tensions quickly erupted between the MB and the new leader of Egypt, Gamal Abdel Nasser, and reached a peak in 1954 when Nasser was subjected to an assassination attempt, allegedly planned and implemented by MB members. Consequently, the Leading Council of the Revolution ordered the dissolution of the MB and a considerable number of its leaders and members were sentenced to death or life imprisonment in military trials (al-Majid 2010:29-37; Pargeter 2010:33-34).

Between 1957 and 1964, the MB ideologue Sayid Qutb (1906-1965) shifted the MB to a more radical direction via his book *Milestones* (1990), in which he asserted that all societies,

[12] Egypt was under martial laws since 31 May 1948. See Military Order No.63/1948 Concerning the Dissolution of the MB, 8 December 1948.
[13] Some members of what was called at the time the Political Police were convicted for the killing of al-Banna after the 1952 Military coup but 'higher responsibility has never been proved' (Reid 1982:636).
[14] Court of Administrative Justice, Case No.190/3, 17 September 1951.

including Muslim societies who do not submit to the sovereignty of God in all spheres of life, are in a state of ignorance (*jahiliyya).*[15] Qutb (1990:43-57) asserted that pious Muslims should revolt against this *jahiliyya* to establish the Islamic state and then initiate a holy war globally to 'liberate' all other peoples. These ideas contributed to the emergence of violent Islamist movements (Shepard 2003: 521-522; Calvert 2010). In response to this wave of radicalisation, the former General Guide of the MB, Hassan al-Hudaiby (1977b), wrote a book titled *Preachers not Judges* to distance the MB from the hardline thought developed by Qutb and his followers (Zollner 2007). However, the book did not explicitly state that it was refuting the ideas of Qutb. It defended the application of Islamic law in the Muslim state as a fundamental component of Islam and did not abandon the possibility of declaring Muslims to be apostates and sentencing them to death, but rather subjected this to certain conditions. The MB has not yet directly denounced Qutb's ideas ('Ali 2012). Instead, they have repeatedly stated that the words used by Qutb were mistakenly interpreted by his readers, and argue that Qutb used the term *jahiliyya* as a metaphor to reject un-Islamic laws and morals that have become common in Muslim societies (Al-Bahnasawi 1985; 2000).[16]

During the 1970s and 1980s, the MB was able to reconstitute itself in Egyptian politics. Former president Anwar al-Sadat tolerated the activities of Islamists in an attempt to counterbalance his leftist and Nasserist critics, and so the MB leaders were released from prison and resumed their political, social, and cultural activities in Egypt (Kepel 1993:139-141; Shehata 2010:53). During the 1970s, the group was allowed to republish its magazine *al-Da'wa,* which was vocal about the Islamisation of Egypt's constitution and laws (Kepel 2005:127; Mustafa 1996:206). The MB was not the only Islamist player in Egypt at that time.

[15] The term *jahiliyya* is mentioned in the Qur'an (3:154; 5:50; 33:33; 48:26) to describe the state of affairs in the Arab Peninsula before Islam.
[16] See an interview with the General Guide of the MB Mohammad Badie (2010).

Other Islamist trends emerged. Ultra-conservative Salafism[17]expanded in Egypt, and both Islamist trends influenced each other (Abdel Latif 2012; Tammam 2010b; Brown 2011:5). Despite its subjection to strict legal restrictions and harassment by security forces, the MB had established itself as a major political actor in Egypt and enlarged its popular constituency under former President Mubarak. Members of the group controlled the boards of major professional syndicates and university students unions during the 1980s and 1990s (Shehata 2010:53-54).

The Egyptian electoral system in this period did not allow non-partisan or independent candidates to run for elections, and the MB was not legally recognised as a political party. In 1984 the MB allied with the liberal *al-Wafd* Party and won eight seats in Parliament (Shehata 2010:85). In 1987 it established the Islamic Alliance with the Socialist Labour Party and the Liberal Party, and won 38 seats (Shehata 2010:87). The Islamist agenda of the MB (1987) was strongly manifested in the electoral platform and activities of the Islamic Alliance. Taking a position that was common among various opposition parties, the MB boycotted the 1990 elections to protest the heavy interference of the Ministry of Interior in the electoral process. In 1995 one candidate of the group won in the elections, but the 1990s saw a harsh security campaign by the regime against the MB, to contain its increasing political influence (Stilt 2010:78).

In 2000 the group became politically active again after the Supreme Constitutional Court (hereinafter the SCC) decided that elections must be judicially supervised. The MB won seventeen seats in the elections of 2000 and 88 seats in 2005 and became the largest opposition block in the Parliament (Stilt 2010: 78-79). Yet between 2006 and 2010, the

[17]This term is usually used to refer to Islamists who have been influenced by the Wahabism that was developed in Saudi Arabia. The principal characteristic of those Salafists is their emphasis on the strict and literal interpretation of the Qur'an and *Sunna* (Denoeux 2011:59-60).

government adopted a set of repressive measures against both secular and Islamist opposition parties. On one occasion in 2007, in response, a group of students affiliated to the MB organised a show that resembled a para-military parade – causing the MB to apologise, and to claim that this action was undertaken without consulting the organisation. Yet this had triggered intense public debate, and questions about the continued existence of a so-called secret apparatus among the MB, and soon after, a group of MB leaders (including the Deputy General Guide) were arrested and referred to military trial on charges of terrorism and money laundering (al-Majid 2010:144-154).

In 2007, a package of constitutional amendments banned the establishment of religious political parties, which also curtailed the judicial supervision of elections (Bernard-Maugiron 2008). To show its commitment to peaceful political participation, the MB declared its intention to establish a political party and suggested a draft platform for public debate (Stilt 2010:76), yet it and other political parties failed to gain seats in the first electoral phase of parliamentary elections in 2010. Reported irregularities during this phase led the opposition to boycott the run-off elections (CNN 2010). However, massive popular protests swept Egypt from 25 January 2011, leading to the resignation of Mubarak on 11 February 2011. After this, the MB established its political party (Trager 2011:114-126), and obtained a legal status as an association in March 2013.[18] In the parliamentary elections of November 2011-January 2012, the FJP won 47% of the seats in the People's Assembly, the lower chamber of Parliament and the Salafist al-Nour Party won 24% of the seats and became the second largest political group in Parliament (BBC 2012b).

[18] See Ministry of Insurance and Social Affairs, Decision No.644/2013, 19 March 2013, *al-Waqa'i' al-Masriyya* no.129 of 5 June 2013, pp.5-6. After the removal of President Morsi, Cairo Court for Urgent Matters banned the MB and all of its affiliated organisations on 23 September.

3. Methods and Sources

The analysis in the following chapters examines the thought and practice of the MB in comparative consideration to IHRL and traditional and modern approaches to Islamic law. I apply a legal qualitative analysis of various primary and secondary sources that relate to the legal thought and practice of the MB, between 1984 and 3 July 2013 (the final day of MB rule). Considerable attention is given to the political context in which the MB has developed its doctrines and practices. The selected research period provides rich sources on the interaction between the MB and the Egyptian legal system. It also allows the study to track the change and continuity of the group's thought and practice on human rights issues in different political contexts.

The study proposes a set of categories of sources for analysis. The MB has not developed comprehensive written positions in respect to all the topics of this research, yet the practices of the MB as a political entity, and of MB leaders in political and legal institutions, help to answer the questions identified in this study. For instance, parliamentary deliberations inform the researcher about the group's approach to some human rights issues, as discussed during the research period, and MB leaders have commented on diverse legal and political issues through a range of media. Official positions of the MB can be derived firstly from the official documents and pamphlets that it has issued, and secondly, from the positions taken to human rights issues by its representatives, as revealed in official parliamentary records. Thirdly, I analyse the writings and documents published by the MB's General Guides, the highest authority in the MB, and its official mouthpiece.[19] This analysis also covers the organisational leading bodies which involve members of the Guidance Bureau and the

[19] The names of the General Guides: Hassan al-Banna (1928-1948); Hasan al-Hudaiby (1949-1973); Umar al-Tilmisani(1973-1986); Mohamed Hamid Abou El Nasr (1986-1993); Mustafa Mashhur (1993-2002); Ma'mun al-Hudaiby (2002-2004); Muhammad Mahdi 'Akef (2004-2010); Mohamed Badie (2010 until present time).

Executive Office of the FJP. This includes the leaders of the Department of *Da'wa,* who conduct research on Islamic law and develop legal opinions, which are published online.[20]

The school of thought of the MB is very broad and has been shaped by jurists and intellectuals from Egypt and other Muslim states. Scholars or jurists who are members of the group and shape its day-to-day public discourse are covered within the leading bodies of the organisation. Historically, Hassan al-Banna has been the principal ideologue of the group, and leaders of the MB intensively cite his articles and messages. However, many Egyptian scholars influenced by Hassan al-Banna have emerged from the school of thought of the MB. The work of Islamist scholars from Lebanon and Jordan also contributed to the development of the group, particularly during the 1950s and 1960s when the Egyptian government severely repressed their leading members (al-Anani 2007:136-137). Given the practical difficulties of covering non-Egyptian scholars in this study or even all Egyptian scholars in this category, I focus on those whose writings have been produced and distributed over the last three decades by the MB. This group includes: 'Ali Jirisha (d.2011) and Tawfiq al-Shawi (d.2009), two jurists with close ties with the organisation, who are among its intellectual and legal figures; Salim al-Bahnasawi (d.2006), a prominent jurist who wrote intensively on the rights of women in Islam; and Mohammad al-Ghazzali (d.1996) and Yusuf al-Qaradawi,[21] both former MB leaders who represent a major intellectual trend in Egypt's Islamist movement.

Significant challenges were experienced during the collection of primary and secondary sources in Egypt in 2013. This was due to political and violent clashes, which intensified

[20] The Department of Da'wa has been headed respectively by Abd al-Satar Fathalla , Abdallah al-Khatib, Hassan Gudah-Abd al-Mun'im Ti'ylab, Khayrî Rakwah, Abd al-Rahman al-Barr, and Abd al-Khaliq al-Sharif. Al-Khatib and then al-Barr are two prominent jurists and members in the Guidance Bureau of the MB during the research period.

[21] I give special attention in this thesis to the work of al-Qaradawi given his spiritual and ideological guidance for the global movement of the MB, see Soage (2010) and Tammam (2009).

after the removal of Morsi on 3 July 2013, including the detention and killing of thousands of MB members, and their declaration as a terrorist group in December 2013 (HRW 2014; BBC 2013). In this climate, it was no longer possible for me to directly communicate with the MB or any of its affiliate institutions.

4. Structure of Thesis

This thesis is composed of nine chapters. After this introductory chapter, **chapter two** examines the main conceptual issues and theoretical trends in the debate on Islamism, Islamic law and IHRL. The following chapters examine the evolution of the MB's thought on human rights universality, international human rights treaties, political pluralism, freedom of association, expression and religion, and the rights of religious minorities and women. **Chapter three** critically engages with the doctrine of the supremacy of shari'a – as the central doctrine to have informed the MB's political activism since its establishment in 1928 – and argues that it presents substantive and procedural challenges for the development of human rights in Egypt. The chapter examines the MB's philosophy on human rights in Islam, and concludes that Islamic law determines which international human rights are accepted by the MB. Chapter two also analyses the 2012 Constitution-making process and argues that the MB, post Mubarak, was strongly driven by the will to entrench its political powers in the emerging political regime, rather than to work with other political forces to consolidate the transition to democracy and human rights.

Chapter four discusses the MB's stances on political pluralism and dissent. The relationship between freedom of association and religion is problematic in Egypt. A general ban on religious parties was applied for decades, in order to exclude Islamists from political participation, but this was motivated by politics and was not an outcome of societal

consensus. Policies of exclusion also shaped the MB's philosophy on political pluralism, which advanced certain Islamic arguments to exclude secularists, and any form of opposition that could threaten the rule of shari'a. **Chapter five** discusses the relationship between religion and freedom of opinion and expression in the thought and practice of the MB by focusing on three issues: academic freedom, artistic creativity and blasphemy. It analyses the MB's literature and practice, and argues that massive restrictions on expression in the name of religion were introduced by the MB to serve religious conformism in society and guard its religious dogma.

Chapter six examines the position of the MB towards the rights of religious minorities, with focus on the rights of Christian and Baha'i minorities. It begins with the meaning of citizenship under the rule of shari'a, and how this significantly differs from a human rights-based concept of citizenship. The chapter then explores the reactions of the MB to thorny issues in the status of religious minorities in Egypt, including: non-Muslim legal autonomy, the building of places of worship, the right to hold public office, inter-faith marriage and the status of unrecognised religious minorities. This chapter shows that the MB's contribution to the debate on the rights of religious minorities has furthered the discrimination rooted in Egyptian law, and legitimated it in Islamic terms.

Chapter seven addresses freedom of religion, including apostasy or conversion from Islam and proselytising, noting that, while the MB has become less assertive on the imposing of the death penalty for apostasy, it has hesitated to establish that religious freedom involves the right of Muslims to convert from Islam. It argues that the MB's activities have sustained restrictions on religious freedom in Egypt and blocked development in this area. **Chapter eight** discusses issues related to family law, including equality in marriage and divorce, and polygyny. It also discusses the issue of Female Genital Mutilation (FGM) and

child marriage. Its main conclusion is that the MB rejects gender equality as articulated in international human rights treaties, and advances the concept of complementary roles between men and women. This understanding has then influenced the discriminatory positions of the MB towards marriage, divorce and certain aspects of the political rights of women, and has prompted the group in opposition and in power to resist certain partial reforms achieved in Egypt in this area since the 1980s.

In Chapter nine, I conclude that the peaceful management of political and religious diversity in society cannot be realised under the MB's model of a shari'a state. The primary argument of this thesis is that traditional Islamic law must be drastically reformed, and the state must be impartial towards religion, as an alternative to the shari'a state[22] or exclusionary secularism. This transformation is, however, contingent upon long-term political and socio-cultural change. Successfully expanding human rights protections in Egypt requires not the exclusion of Islamists, but their transformation. Islamists still have a large constituency and they are not the only actors who are ambivalent about human rights. Meanwhile, Islamic law also appears to continue to influence Egypt's law. In the concluding chapter, I explore the prospects for certain constitutional and institutional measures to facilitate an evolutionary interpretation of Islamic law, provide a baseline of human rights and gradually integrate international human rights into Egyptian law.

[22] *The Shari'a Sta*te is a title of a recent book published by Bassam Tibi (2013) where he critically engages with the overall objective of Islamists to establish states governed by Islamic law.

Chapter Two: Islamic Law and Human Rights: Conceptual and Theoretical Issues

1. The Nature and Evolution of Islamic Law

In this section, I examine the historical evolution of Islamic law, and explore how the debates on Islamic legal theories matter to the application of international human rights in the Muslim world. I also analyse the place of Islamic law in Egypt's legal system and explore the debate on religion-state relationships.

1.1 The Divine and Human Aspects of Islamic Law

Opinions and practices in the name of Islamic law have been remarkably diverse (Afshari 1994:271). The sources of Islam, the Qur'an and *Sunna*[23] do not stipulate systematic rulings that can be applied by Muslims. Thus, the role of human agency in the interpretation of these sources is inevitable (An-Na'im 2008:11). This has led to the plurality of legal opinions among jurists, which has manifested itself throughout Islamic history (Masud 2009:71). The articulation of Islamic law as a legal system involving rulings, methods and principles did not systematically begin until the second century of Islam. This does not mean that Muslims did not previously apply law derived from Islamic sources, but there was no systematic and coherent legal system by which to do so (Hallaq 1997: 16-17; An-Na'im 1990:16-17). Zubaida (2003:4) explains that the development of Islamic law was not the task of rulers but 'pious private individuals who sought to live by the rules of God and avoid the sin and corruption of rulers and their courts' gradually systematised Islamic law. The plurality of Islamic legal thought was manifested in the establishment of different schools of law in the

[23] *Sunna* or Tradition is 'the exemplary biography of the Prophet. The *hadiths* are the literary expressions and context-specific accounts of the Sunna' (Hallaq 2009a:177).

early years of the Muslim community, 'but most of them disappeared and others merged by the beginning of the third century of Islam' (Baderin 2003:37). Four principal schools of law in *sunni* jurisprudence have survived in the Muslim world: The Hanafi, Maliki, Shafi'i and Hanbali schools (Hallaq 2009:31).

The definition of shari'a and *fiqh* is a contentious and important issue. The ways by which these terms are defined influence Muslims' responses to human rights in Islam, as well as their positions on independent juridical reasoning (ijtihad). In this thesis, I generally distinguish between two key approaches: the traditional and the transformative approaches. shari'a rulings, by the traditional approach, are derived in accordance with sources, methods and principles developed by classical Muslim jurists in what is known as the science of jurisprudence. These sources hierarchically include the Qur'an and *Sunna,* and the methods include consensus (*ijma'*) and analogy (*qiyas*). Then, other principles involve juristic preferences (*istihsan*), interest (*istislah*) or (*maslaha*), and presumption of continuity (*istishab*). Pre-modern Muslim jurists utilised these principles differently in legal reasoning. For instance, while the doctrine of *maslaha* was a supplementary principle to the method of analogy, some jurists used it as a source of law in its own right (Opwis 2007:80; Masud 1995:252-255).

The science of jurisprudence developed rules by which jurists can approach the Qur'an and *Sunna*. Among these is the distinction between those shari'a rulings derived from clear and authentic texts, and other rulings derived from ambiguous and non-authentic texts. While the former rulings are considered fundamental for the whole construction of shari'a and must not be subject to change, the latter can be a subject of independent juristic reasoning (al-Qaradawi (2011:20-21). However, human reflection is not totally absent in the interpretation of clear and authentic texts For instance, if usury (*riba*) is prohibited in the Qur'an, the

enforcement of this rule in reality requires human reflection to define usury and determine the exact conditions of its application. The criminal penalties (*hudud*) are also stipulated in the Qur'an in clear texts, but jurists have disagreed on the conditions of the application of these penalties and the law of evidence (An-Na'im 2008:35-36).

Many Muslim jurists use certain methods or principles of Islamic law – such as the doctrine of *maslaha*, the objectives of shari'a, or selection (*takhayyur*) between different jurisprudential opinions – to solve possible tension between Islamic law and international human rights (Baderin 2003). In Egypt, Rashid Rida (1865-1935) was the pioneer of what is called 'the utilitarian Islamic legal theory', which has a far-reaching effect on Muslim states and scholars (Hallaq 1997:218-219). In his work, al-Qaradawi (2011:20-21) followed this approach as well (Graf 2009). He argues that many of the techniques developed in the science of jurisprudence have gained the consensus of jurists for centuries and cannot be reformulated. However, he suggests that Muslim jurists can choose the suitable legal opinions from the work of Muslim jurists without being restricted by a specific school of law. Al-Qaradawi adds that Muslims can utilise the theory of the objectives of shari'a to develop new rulings.

These methods allowed al-Qaradawi to uphold some opinions congruent with human rights, such as his arguments for the prohibition of FGM, or for setting a minimum age for marriage (see chapter eight). In its recent documents, the MB (2007) and FJP (2011a) explained their position on Islamic legal theories along these lines, and as explored in the following chapters, this helped them to develop more progressive views on human rights. On the other side, the SCC) was keen to harmonise Islamic law and human rights in Egypt, and did so by drawing on the theory of the objectives of shari'a (Lombardi and Brown 2006). Yet even though the use of these methods can expand human rights under Islamic law, I assert that some

differences in the scope and application of human rights in international law and Islamic law will continue,[24] unless the science of classical Islamic jurisprudence is revisited.

This takes us to the transformative approach, which distinguishes between the divine and human aspects of religious traditions and argues for a contextualist reading of the Qur'an and *sunna* (Saeed 2014; An- Na'im 1990; Mir-Hossein 2009:26; al-'Ashmawi 1996:57-59; Abu Zayd: 2006). Thus, Mir-Hosseini (2009:25) defines shari'a as 'the totality of God's will as revealed to the Prophet Muhammad', and dissociates it from *fiqh,* which literally refers to Muslim jurists' understanding of Islamic sacred sources. The Egyptian jurist Mohammed Said al-'Ashmawi (1996:57) argued that shari'a in the Qur'an means the pathway (*al-minhaj*), and that the term was given a strict legal meaning in Islamic legal thought. He maintained that religion is the totality of principles that were revealed to the Prophet, while religious thought is the understanding and application of these principles in different historical contexts (al-'Ashmawi 1996).

Other scholars brought new ideas about the nature of the revelation, and argued for the historicity of the Qur'an. For example, the Pakistani scholar Fazlur Rahman (1980) and Iranian scholar Abdolkarim Soroush (2009; 2000) argued that the revelation was internal, in the mind and heart of the Prophet, who transmitted it in his language, reflecting his life experience and knowledge. This perspective opens new horizons for an epistemological shift in the Muslim world, from scriptural based-knowledge to rationalism. To conclude, some scholars argue that it is already possible to establish rulings that are friendly to international human rights from within traditional Islamic law, while others argue that the transformation

[24] This is the conclusion of Baderin (2003: 219) who extensively depended on *takhayyur* and *maslaha* to address areas of tensions between Islamic law and international human rights.

of traditional methods of Islamic law is first necessary in order to legitimise international human rights in the Muslim world.

1.2 Islam and Egypt's Law

Islamic law has been subject to immense structural developments in the Muslim world during the modern era. Hallaq (2004:22-25) shows how the interaction of the Muslim world with modern political, economic, military and intellectual developments in the West, and Western domination over the Muslim world since the 19th century, led to the demise of shari'a as a source of a coherent legal system in most Muslim states. New secular education gradually marginalised traditional religious legal education, and the graduates of these modern schools were recruited as judges and lawyers in the newly established judicial systems. As noted by Hallaq (2004:42-44) Islamic law did not have the chance to develop on its own terms to accommodate the challenge of modernity. Moreover, the emergence of authoritarian political regimes in the Muslim world, and their absolute control over Muslim jurists in the post-colonial era has hindered the development of new Islamic legal theories. Some of these regimes instrumentalised Islamic law to increase their grip on power (Hallaq 2004:42-44).

Egypt witnessed a rigorous programme of modernisation in the 19th century. Modernist legal schools emerged in the second half of the 19th century and the first half of the 20th century, which aimed to merge Western legal systems and Islamic legal traditions, and legitimise state laws in different areas of life. For this purpose, modernists developed new methods and techniques for ijtihad without discarding the principles or hermeneutics of the traditional science of jurisprudence. As concluded by Schacht (1982:100), 'modernist criticism is in the first place directed against Islamic law in its traditional form, not indeed against the concept of a religious law'. Egypt adopted codified laws in the areas of civil, commercial, criminal,

and procedural law that were based on European models. New national courts were established to implement these laws. However, traditional Shari‘a Courts continued to apply un-codified Islamic law to family issues until they were abolished in 1955. The family law was first partially codified in 1920 based on the Hanafi school of law (Berger and Sonneveld 2010:54-58). Modern legislators codified certain shari‘a rulings from different schools of law to meet new political, economic and social challenges. This method was used in family and civil laws, and it contributed to the promulgation of testamentary inheritance law in 1946 and enabled the government later to reform substantial parts of personal status law (Anderson 1976:48-51; Welchman 2004:3).

The Egyptian Civil Code of 1949 merged European civil laws and Islamic jurisprudence. Article 1 of the code provides that: ‘In the absence of any applicable legislation, the judge shall decide according to the custom and failing the custom, according to the principles of Islamic Law’.[25] The drafter of this law, the Egyptian jurist al-Sanhuri, considered the application of shari‘a in Egypt and the Muslim world to be a sign of cultural and civilizational independence. He developed a comparative method to enable Muslims to apply Islamic law in modern legislation. He basically proposed that Muslims subject the work of the different schools of jurisprudence to rigorous comparative analysis to identify the universal rulings and principles of Islamic law that must be respected by Muslims in all times (Lombardi and Brown 2006: 413; Hill 1987). However, Hallaq (2004:24) has observed that the result of this process is that legal rules have been ‘uprooted from their indigenous context’. To conclude, these methods have not led to a genuine and coherent methodological reform of traditional Islamic legal theories. One can also argue that the methodological limitations of the modernist movement, as well as the codification of certain rulings of Islamic law, unwittingly legitimised the cause of Islamists and their call for the Islamic state.

[25] Article 1 of Law No. 131/1948 promulgating the civil code, *Official Gazette* no. 108 of 29 July 1948.

1.3 Shari‘a and the Constitution

The reference to shari‘a in the constitutions of Muslim states has been a contested issue in the contemporary Muslim world. The idea that the modern nation state should be bound by the rulings of Islamic law goes back to the traditional doctrine of *siyasa shar‘iyya* (Lombardi 2006:49). This doctrine has been expounded in the writings of Muslims scholars since the 11th century and it ‘justified the idea that a ruler, within bounds set by the jurists, could enact and enforce statutory rules and to order judges to apply these rules instead of rulings of f*iqh’* (Lombardi 2006:53). In modern Islamic history, this doctrine was reinvigorated to accommodate the administrative and legal expansion of the state. Modern Islamic legal theories suggested methodologies that allow Muslim modern states to promulgate laws that serve the public interest of Muslims and at the same time maintain the universal rulings of Islamic *fiqh* (Lombardi 2006:54).

Baderin (2010: 135-136) argues that the reference to Islamic law in the constitutions of Muslim states is a double-edged sword. He shows that the interpretation of a constitutional provision on Islamic law is contingent on the institutional and political settings in different states. In the experiences of some Muslim states, the constitutional clause of Islamic law has been supportive of human rights and good governance (Lombardi and Brown 2006; Lombardi 2010). Yet, on the contrary, An-Na‘im (2008:1-3) challenges the model of the Islamic state ‘as a post-colonial discourse that relies on European notions of the state and positive law’. According to An-Na‘im, in the paradigm of the modern nation state, state law cannot be labelled as Islamic even if it pretends to be so, and this law reflects only the understanding of shari‘a by ruling elites. According to him, the enforcement of Islamic law by the machinery of the state goes against the nature of the whole body of shari‘a as moral and ethical norms that are followed voluntarily by individuals based on their free conviction

and understanding. An-Na‘im (2008:267) adds that ‘the Qur’an addresses Muslims as individuals and community, without even mentioning the idea of a state, let alone prescribing a particular form for it’

As an alternative to the Islamic state, An-Na‘im (2008:52-54) maintains that the secular state as a neutral body is more consistent with Islamic history. He explains that the Prophet enjoyed the religious and moral authority to adjudicate on religious and political matters, but that after the death of the Prophet, Muslim rulers struggled in different ways to settle the permanent disputes between religious and political authority, as ‘none of those rulers have been accepted by all Muslims as capable of holding the supreme position of the prophet, who defined Islam and determined how it could be implemented’ (An-Na‘im 2008:53). However, under a secular state, according to An-Na‘im (2008:7), Muslims can still propose public policies based on their understanding of Islam, but they should deliver their proposed policies to other citizens through civil and not religious reasoning that can be accepted and comprehended by all people regardless of their religious convictions.

It will be established by this research that the secular state proposed by An-Na‘im proposes a pragmatic solution for regulating the relationship between state and religion in the Muslim world and ensuring that human rights are protected, and are not contingent on changing interpretation of Islamic sources. Islamist parties can also survive a secular state by focussing on the Islamic ethics and values instead of being overwhelmed by the Islamic state and the application of shari‘a. If the option of the secular state is not possible due to an agreement among different social and political forces that a provision on Islam and Islamic law should be included in the constitution, the constitution can contain powerful safeguards for the protection of human rights, citizenship and the rights of religious minorities. Otherwise,

human rights can become threatened when the interpretation of this provision is left to day-to-day politics.

The constitutional experience in Egypt is instructive in this regard. Lombardi (2006:49) submits that 'the decision to constitutionalise Islamic law in late twentieth-century Egypt represents a commitment to the idea that state law must be a modern analogue of *siyasa shar'iyya'*. Egyptian Constitutions, since 1923, have referred to Islam as the official religion in Egypt.[26] The principles of Islamic shari'a were adopted for the first time as a source of legislation in the 1971 Constitution.[27] In the constitutional amendments of 1980, the reference to Islamic law was consolidated by stipulating in Article 2 that 'the principles of Islamic shari'a are the main source of legislation'.[28] This advanced status of Islamic law came as a reaction to the rise of Islamic political opposition in Egypt, and the emergence of Islamisation projects in other Muslim states in the 1970s (Zubaida 2003: 155). Since the 1970s, the MB advocated for Islam to become the main source of political, social and economic guidance for the Egyptian state, and that an explicit reference to shari'a in the Egyptian constitution is beyond question. The introduction of Article 2, however, did not substantially change the Egyptian legal system, which has maintained its secular features. As noted by Berger and Sonneveld (2010:84), 'a form of compromise has been found between shari'a and Western law'. Political authority, as well as the constitutional judiciary, has kept the incorporation of Islamic law into the Egyptian legal system to a minimum (Berger and Sonneveld 2010: 82-84).

[26] Article 149 of Royal Decree No.42/1923 Establishing Constitutional Regime Egypt, Al-*Waqa'i' al-Masriyah* no. 42 of 20 April 1923.
[27] Article 2 of the Constitution of Egypt, *Official Gazette* no.36 of 12 September 1971, pp. 1-16.
[28] Amendments to the Constitution of Egypt, *Official Gazette* no.26 of 27 June 1980, pp. 4-9.

There were some official and non-official initiatives in Egypt to codify shari'a in the 1970s and 1980s. In 1978, the Egyptian parliament formed a committee to codify Islamic law in different legal fields. In 1982, the committee produced new drafts of civil law, penal law, commercial law, maritime commercial law, law on evidence and procedures of litigation (People's Assembly 1983: 129). The committee said that it relied on the Qur'an, *Sunna*, the consensus of Muslim jurists, and the opinions of jurists without being restricted by a certain school of law. It also utilised the principle of interest *(maslaha)* to codify new provisions in conformity with the universal rulings and principles of shari'a (People's Assembly 1983: 115). The MB was supportive of these drafts during the 1980s. These efforts failed, as the government at the time was not encouraged to officially adopt these initiatives (Skovgaard-Petersen 1997: 208-213).

The SCC was very cautious about developing an authoritative interpretation of Article 2. It took several years until judges reached a theory that they believed would ensure the stability of the existing political and legal order, while satisfying the Islamic religious establishment, and Islamist opposition (Lombardi 2006:174). The SCC developed a flexible theory of Islamic law that provided the legislator with a wide margin of discretion. It held that legislation would be declared unconstitutional if it was inconsistent with rulings based on unambiguous verses of the Qur'an or *hadiths* (rulings established by the consensus of Muslim jurists), and the objectives of shari'a. To maintain the political and legal order, the Court affirmed that the SCC's jurisdiction would be applied only to laws promulgated after the enforcement of the constitutional amendment of Article 2 (Lombardi 2006:199-200). For example, the case law of the SCC shows that the Court has not taken a hard-line position with regards to the rights of women, and it has been consistently progressive in the interpretation of Islamic sources (Lombardi and Brown 2006: 379-435). The SCC has backed personal status law reforms initiated by the government over the past three decades, and it has

arguably found a middle ground between the liberal agenda of women's rights movement and the hardline agenda of Islamists. According to Abu-Odeh (2004:1193-1145), it has opted to improve the status of women in the family without challenging the hierarchal relations between husbands and wives.

Lower court judges have given diverse reactions to the SCC's theory. Although some judges have incorporated the SCC's approach to shari'a in their judicial practice, Lombardi and Berger have explained that others remained in favour of the conservative approach, particularly on cases related to freedom of religion, heresy and blasphemy (Lombardi 2006:263; Berger 2003). Moreover, Lombardi argues that the theory of the SCC will be subject to the normative and values-bias of judges. Therefore, the progressive interpretation of Islamic law will not always be guaranteed if conservative judges take leading positions in the judiciary and the SCC (Lombardi 1998: 122). I explain in chapter three that the MB in 2012 took some steps to reconstitute the SCC and curtail its roles.

Despite efforts made by the Egyptian government and the constitutional justices to minimise and contain the conservative understanding of shari'a, the scope of some international human rights has been restricted in Egypt based on references to Islam as the official religion, and shari'a as the main source of legislation in the Constitution. Most reservations made by Egypt to key international human rights treaties are justified by respect for shari'a (see section 2.2 below). The case law of Egyptian courts on apostasy, the right to freedom of expression and the rights of unrecognised religious minorities show that judges consider Islam to be a constitutive element of the public order, by which they have accordingly restricted the scope of certain human rights (Berger 2002; 2003).

After Mubarak, the debate on the application of Islamic law was renewed. Islamic codes drafted by Parliament in 1982 were used as a reference by Islamists who advocated for the codification of shari‘a (Ghanim 2012: 41-49; al-Bishri 2012: 40). The main political forces in Egypt agreed that Islam, as the official religion, and shari‘a, as the main source of legislation would be included in the post-Mubarak constitution. A well-known Egyptian political analyst has asserted that liberal and secular forces conceded on this issue, retreating from their previous positions on either the abolition or amendment of Article 2 (Said 2012). However, I show in the following chapters that the practical implications of shari‘a on the state's commitment to international human rights has been a matter of political controversy among political actors and human rights advocates.

Egypt's official Islamic religious institution, al-Azhar, took part in this debate. Traditionally, Egyptian rulers have been eager to subordinate al-Azhar to their political power in order to control the Islamic discourse in Egypt, and the MB and Islamist movements in general have always been critical of this control (Zubaida 2003: 163-165). The state's alignment with al-Azhar was politically necessary to counter Islamists but it has also set limits to the reform processes since the support of al-Azhar for certain human rights were not guaranteed (Barraclough 1998; Moustafa 2000) (se chapters five, six, seven and eight).

It has been apparent since 2011 that al-Azhar wanted to restore its role in Egyptian religious and political life after being subjected to political control since the 1960s, and its public activities over this period seem also to be driven by the increasing influence of Islamist parties in the debate on Islamic law in Egypt (Brown 2012). The current Grand Sheikh of al-Azhar, Ahmed al-Tayyib, sponsored a series of dialogues with the various political forces in Egypt, and proposed a set of guiding principles for constitutional and legal reform via two documents (Al-Azhar 2011; 2012). In these documents, Al-Azhar affirmed that the new

constitution should refer to the general principles of Islamic law as the main sources of law in Egypt. The documents highlighted the centrality of human rights and democracy in the new political regime of Egypt, but did not define the limits by which Islamic law can restrict human rights.

2. Human Rights and Religion

In this section, I explore the evolution of international human rights in Egypt's changing international political landscape. I highlight the global appeal of human rights as well as its limitations. I then address philosophical and legal issues in the debate on human rights universality and the challenge of cultural relativism.

2.1 The Evolution of Human Rights

The establishment of the United Nations (UN) in 1945 was the cornerstone of the development of IHRL. The Universal Declaration of Human Rights (hereinafter UDHR),[29] adopted on 10 December 1948, was the first comprehensive international human rights document, and was followed decades later by tens of international treaties that create an international community, and make the rights of all human beings a matter of international law (Szabo 1982:21-23; Bentekas and Oette 2013). It has been widely maintained that the most direct historical precedents of IHRL are the paradigm of rights manifested in the philosophical writings and the bills of rights in England, America and France during the 'Enlightenment' era of the 17th and 18th centuries (Cranston 1973:1; Morsink 2009; Grayling 2007).

[29] Universal Declaration of Human Rights (adopted on 10 December 1948) GA res. 2171 (III), UN Doc. A/810 at 71 (UDHR).

However, on one hand, scholars (Baxi 2003:92-93) have argued that the model of international human rights represents an epistemological break with the Enlightenment traditions of the rights of man, in which 'the notion of being human was all along constructed on Eurocentric or racist lines'. On the other hand, Moyn (2010) argues that the emergence of the language of IHRL is a recent phenomenon, and affirms that 'human rights were peripheral to both wartime rhetoric and post-war' (Moyn 2010:7). He shows, through a historical analysis of the development of the international human rights movement that the explosion of human rights at a global level started only in the middle of the 1970s and before that the idea of rights continued to be 'part of the authority of the state, not invoked to transcend it'. According to Moyn (2010: 8) the emergence of IHRL since the middle of the 1970s was catalysed by the beginning of the collapse of other political utopias propagated by the Soviet Union and its allies, as well as the legitimacy crisis of the new post-colonial nation states. At the same time, Europe attempted to search for an identity different from the dictionary of the cold war, and the US declared officially its adoption of liberal and moralised foreign policy as a reaction to the moral disaster that hit American politics after the war in Vietnam. Moyn (2010:8) explains that 'an internationalism revolving around individual rights surged, and it did so because it was defined as a pure alternative in an age of ideological betrayal and political collapse.'

Forsythe (2000:21) argues that the recent development of international relations 'caused some to see a radical reformulation of state sovereignty'. Human rights abuses committed in one state can easily become a common concern of the international community. The constituency of the culture of human rights has enlarged remarkably across the globe. This reality prompted a human rights theorist to argue that human rights are neither universal nor relativist but have been proved to be strongly appealing (Goodhart 2008). Research shows that international human rights norms and regimes have influenced domestic practices in

different states (Riss and Ropp 1998:275). The campaigns and activities of international, cross-regional and domestic human rights non-governmental organisations have brought about substantive changes in human rights landscapes domestically and globally (Forsythe 2000:17-20; Keck and Sikkink 1998).

However, this global momentum of human rights seems to be at crisis today (Hopgood 2013). Human rights norms are 'under attack as never before by conservative nationalist and religious forces' (Hopgood 2013:3). 'The distribution of power globally towards a more multipolar world' empowered many states from different continents to reject human rights (Hopgood 2013:3). This is evidenced by intense ongoing disputes between states over the interpretation of human rights in the UN. Cross-regional coalitions between Islamic and Christian religious actors are working in collaboration with other global powers like Russia and China to reinforce conservative interpretations of some rights and block the development of others (Hopgood 2013:158-160; Chase 2015).

On the other hand, the intensive use of the language of human rights in international relations by Western powers has been also a source of politicisation, inconsistency, and double standards (Mutua 1996:648-650). While some Western states criticise human rights violations in other countries, they turn a deaf ear to international human rights on many occasions in order to maximise their own political, economic and security interests. In the aftermath of 9/11, the United States and other Western states have repeatedly infringed on the human rights of people at home and abroad, and side-lined public international law in the name of security and counter-terrorism. People in Iraq, Pakistan, and Afghanistan and other Muslim states have been victims of these policies. Mayer warns that these developments 'could energize Islamist hostility to human rights, confirming suspicions that human rights are part of a nefarious Western plot' (Mayer 2007: 27). As noted by An-Na'im (1996:240-

241), the cultural resistance to international human rights has been usually driven by sentiments against Western policies. This confrontational climate between Western and non-Western societies encourages governments and political forces in the latter to demoralise the domestic protagonists of international human rights and portray them as part of the Western political project (Mayer 2007: 25-26).

Judging the performance of Islamists by international human rights standards does not mean that they are perfect and free of limitations. The assumption upheld both by the proponents of universal human rights and the relativists that IHRL is a coherent and linear discourse has been increasingly questioned (Bhuta 2012; Emon, Ellis and Glahn 2012; Baderin 2003:24; Glendon 1999:8-12). States, international and regional human rights organs and NGOs disagree on the scope of many rights, in Western and non-Western countries. As noted by Bhuta (2012:126): 'The catalogue of rights found today in [international treaties] represent a word-smithed bricolage of rights claims derived from heterogeneous traditions and specific political projects'. Rosenblum (2002:306) shows that the texts of international human rights can also become a source of tension among conflicting discourses, such as the possible tension between individual and group rights. IHRL is, in other words, unfinished business (Glendon 1999). 'Unlike most other legal disciplines, human rights has no ultimate arbiter' (Rosenblum 2002:315). The door is open for states and non-state actors to challenge the scope of rights and present different interpretation of rights. The expansion or restriction of the scope of rights and the settlement of conflict of rights is an open battle in international and regional human rights mechanisms and among domestic actors in different states (Chase 2015).

2.2 Interpretation of International Treaties

The application of IHRL is not absolute. It can be subject to certain restrictions by states, and also interpretations. In the International Covenant on Civil and Political Rights (hereinafter ICCPR),[30] for example, there are certain rights that are absolute and non-derogable in all circumstances,[31] but states can restrict other rights during states of emergency on the condition that these restrictions are necessary and proportionate, to contain the eminent threat.[32] Many other rights such as rights to freedom of expression, freedom of assembly, freedom to manifest religion and belief, and freedom of association can be subject only to such limitations 'as are prescribed by law and are necessary to protect public safety, order, health, or morals, the fundamental rights and freedoms [or] . . . reputation of others'.[33] Moreover, Article 20 of the ICCPR stipulates certain further restrictions on freedom of expression, such as propaganda for war, or advocacy of forms of hatred that constitute incitement to discrimination, hostility or violence.[34] States, and international and regional human rights organs follow different approaches in explaining the application of these limitations in some human rights issues, like freedom of expression (Langer 2014; Temperman 2012), human rights implications of legal pluralism (Quane 2013) and state-religion relations (Temperman 2010).

The main international human rights treaties that will be cited in this thesis are the ICCPR, the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter CEDAW)[35], and the Convention on the Rights of the Child (hereinafter CRC)[36].

[30] International Covenant on Civil and Political Rights (adopted 16 December 1966 and entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[31] Article 4(2) of the ICCPR. See UNCHR 'Human Rights Committee, General Comment No.29' (2001) U.N. Doc. CCPR/C/21/Rev.1/Add.11.
[32] Article 4(1) of the ICCPR.
[33] Articles 18(3),19 (3),21,22(2) of the ICCPR
[34] Article (20) of the ICCPR.
[35] Convention on the Elimination of All Forms of Discrimination against Women (adopted on 18 December 1979 and entered into force on 3 September 1981) 1249 UNTS 13 (CEDAW).

Egypt has ratified the three treaties,[37] but it explicitly referred to the rulings of shari'a as a reason for its reservations to Articles 2 and 16 of the CEDAW.[38] Both Articles are concerned with states' obligation to ensure gender equality in domestic legislation. Egypt also made a general declaration upon signing the ICCPR that it will comply with the provisions of the Covenant 'to the extent that they do not conflict with shari'a'.[39]

In international law, states have the ultimate authority on whether to accede to international human rights treaties, and can also make reservations to particular articles of any treaty. However, 'international human rights obligations rest primarily on the existence of customary international law' (Donoho 1990:376). In order to challenge the applicability of certain norms of customary international law, a state should prove that it has been a persistent objector 'from the norm's inception and during its evolution' (Donoho 1990:376). Many of these customary norms are now peremptory norms of international law, which nullify any legal practices that violate these norms (Brownlie 2008:562-564). Moreover, in public international law, states' power to make reservations to treaties is not absolute. Article 19(3) of the Vienna Convention on the Law of Treaties stipulates that if a treaty does not include specific regulations on reservations, no state can make a reservation that is 'incompatible with the object and purpose of the treaty'.[40] The Human Rights Committee (HRC) takes a strict approach to the issue of reservations to human rights treaties, asserting that states cannot make reservations to provisions of the ICCPR that are considered customary

[36] Convention on the Rights of the Child (adopted on 20 November 1989 and entered into force on 2 September 1990) 1577 UNTS 3 (CRC).

[37] Egypt signed the ICCPR on 04/08/1967 and ratified it on 14/01/1982, see Presidential Decree No.536/1981 Concerning the Ratification of the ICCPR, *Official Gazette* no.51 of 17 December 1981. Egypt signed the CEDAW on 30/07/1980 and ratified it on 18/09/1981, see Egypt signed the CRC on 05/02/1990 and ratified it on 06/07/1990, see Presidential Decree No.260/1990 Concerning the Ratification of the CRC, *Official Gazette* no.7 of 14 February 1991.

[38] ibid.,

[39] ibid.,

[40] Article 19 (3) of Vienna Convention on the Law of Treaties (adopted on 23 May 1969 and entered into force 27 January 1980) 1155 UNTS 331.

international law or peremptory norms of international law.[41] It has also expressed its concerns over general reservations made by states to avoid obligations under the ICCPR that conflict with domestic law,[42] and was critical of the general reservation made by Egypt to the ICCPR on the basis of Islamic shari'a.[43]Also, the Committee on the Elimination of All Forms of Discrimination has considered Egypt's reservations to Article 2 and 16 of CEDAW (which urges states to eliminate all forms of discrimination against women in all areas including marriage) to be 'incompatible with the object and purpose of the convention'.[44]

But although states' ability to accept or reject human rights norms may have become limited, they continue to broadly and controversially interpret the application of these norms at the domestic level. Scholars have defended this range of interpretations. Donoho (1990:386) points out that the application of many human rights norms by states might vary in light of the domestic institutional, social and cultural traditions, although he also maintains that a detailed definition of international rights is needed to avoid conflicting interpretations that can go against the essence of human rights norms. Jones (1994: 214-215) asserts that 'if a diversity of practice is simply a response to differences of circumstance, it need not embody any fundamental difference of value'.

In the absence of a world court of human rights, the UN treaty bodies and independent experts have been guiding the interpretation process of the international human rights treaties. The International Court of Justice (ICJ) has examined numerous human rights cases involving issues such as the right of self-determination, states' reservations to human rights treaties, and human rights in occupied territories. Its case law has played a crucial role in

[41]UNCHR 'Human Rights Committee, General Comment 24' (1994) U.N. Doc. CCPR/C/21/Rev.1/Add.6, para 8-12
[42] ibid.,para.12.
[43] UNCHR 'Comment on Egypt's Third and Fourth Periodic Report on the Implementation of the ICCPR' (2002), para.5.
[44] UNCHR 'Comment on Egypt Combined Sixth and Seventh Periodic Report on the Implementation of the CEDAW' (2010), para.14. See also 'Comment on Third and Combined Fourth and Fifth Periodic Reports' (2001), para.327.

disclosing the existence of rules of customary international law (Higgins 2007: 745-746). Regional human rights systems have also developed remarkable jurisprudence on human rights (Bonello 2005:117; Roht-Arriaza 2006).

2.3 Universality and Cultural Relativism

The accelerating development of positive IHRL has not quietened the hot debate on the interrelation of moral philosophy, culture, religion and human rights. The idea of universality has been constantly challenged by the claim of cultural relativism. Cultural and religious arguments have been invoked repeatedly by many states, including Muslim states, to reject the applicability of some human rights norms, as apparent during the drafting of the UDHR, the ICCPR, the CEDAW and the CRC (Abiad 2008). Some philosophers and social scientists have also flatly challenged the idea of international human rights, using arguments related to cultural relativity. McIntyre criticises the assumption that all societies have valid transcendental moral values stating that: 'outside a particular community an individual would have no reason to be moral, since he would not have access to the goods which justify morality' (McIntyre 1984 cited in Nino 1991:88). Renteln (1990) has proposed a cross-cultural approach to human rights, in which human rights universals can be empirically identified in different societies. However this has not satisfied proponents of the universal doctrine of human rights. Jones, for example, contends that human rights is a moral doctrine and not just a scientific exploration of shared values in different cultures (Jones 1994:217).

Traditionally, the theory of cultural relativism has provided various repressive political regimes with an ostensibly rational justification for the commission of serious human rights violations (Donnelly 2003:100). In the meantime, the pessimistic analysis of Huntington (1996:207-245) of the fault lines of conflicts among cultures and civilizations has

underestimated the diverse and even conflicting traditions inside each culture. One can find now supporters for IHRL in regions where the cultural relativist argument has been continuously made (Mayer 2012). While harmonisation between IHRL and Islamic law is still problematic in many Muslim states, there are increasing practices among these states, scholars and even Islamists that aim to blend Islam and human rights (Baderin 2007; Dalacoura 2007; Mayer 2008).

Dozens of human rights NGOs have been established in Egypt over the past three decades, and an increasing number of advocates emphasise the universality of human rights, with the UDHR and other international human rights treaties as their frame of reference (Qa'ud 1997; Hassan 1998; Crystal 1994). According to a leading Egyptian human rights defender, these NGOs have become vocal domestically and globally, even in relation to sensitive issues in the Muslim world such as the right to religious freedom, the rights of religious minorities, and gender equality (Hassan 2009: 27; CIHRS 2004: 2). In spite of their uncertain results so far, the uprisings that hit the Arab world in 2011, in particular, have shown the popular thrust for democracy and human rights values (Dunne and Radwan 2013). As noted by Hassan (2011), these developments challenge the assumptions that the human rights framework has no social base in the Arab world, and that conservative Islamist forces are the sole political alternative in the region. Although Islamists have consolidated their political influence as a result of the political transitions in Tunisia, Egypt and Libya, the political and intellectual diversity of these societies are obvious.

Other scholars have attempted to establish a sound justification for the idea of universal human rights. There were some attempts during the drafting process of UDHR to explicitly refer to God or nature as a source of human rights values, but due to different views among

delegates, the final document avoids explicit reference to any metaphysical justification of rights (Morsink 1999: 285-286). There are also those who rigorously appeal to comprehensive moral philosophical doctrines to establish that a universal morality exists, and Morsink defends this moral foundation as a necessary guarantee of the universal validity of human rights (Morsink 2009:1-15). Gewirth (1982; cited in Freeman 2004:392) argues that the existence of universal human rights cannot simply be justified as a legal enterprise because human rights will exist even without this law, through the power of moral argument.

Some foundational arguments apply Kantian moral constructivism to establish that the universal conception of human rights is the outcome of reasonable reflection by rational human agency. An-Na'im (1990:162) refers to the moral maxim that 'one should treat other people as he or she wishes to be treated by them'. This 'golden rule' of reciprocity is an old moral principle embraced in many cultures all over the world. An-Na'im (1990:163) argues that if any person put himself or herself in the same position as another, this person should wish to provide others the same rights that he/she demands for himself/herself. An-Na'im (1990:163-164) is nevertheless aware of the difficulty of applying this principle to cultural or religious traditions that uphold discriminatory practices, and argues that this challenge needs to be addressed from within each tradition through the reformulation and re-interpretation of the sources of these traditions. In the tradition of moral arguments, Gewirth (1982, cited in Morsink 2009:116-117) maintains that a rational human being will recognise his/her right to freedom and well-being as generic rights necessary to his/her human condition, and to all other human beings.

Other theorists argue that moral intuitionism is the most plausible justification for universal human rights. Morsink argues that 'the doctrine of inherent human rights' has been the salient justification of human rights documents and treaties since the UDHR. According to Morsink

(2009:5), this doctrine involves two theses that are deducible from the text of the UDHR. The first thesis is 'the metaphysics of inherence' whereby 'we have our human rights by virtue of our humanity alone and not by any executive, legislative, or judicial procedures or decisions'. The second thesis is that human beings can become aware of these rights when they are subject to grave injustice and violations, as found in the UDHR in the term, 'obeying the conscience of humanity'. Morsink (2009: 8-9) named this awareness 'a moral epistemology of rights', in which certain 'moral birth rights' are realised by the human family after hard lessons were drawn from the human suffering generated by certain historical incidents such as the Holocaust and the second world war. Morsink (2009:119-120) argues that the golden rule of reciprocity cannot alone justify universal human rights, since a person 'must have a healthy conscience and good moral intuition to be able to use it properly'. The doctrine of inherent human rights is the basis of this moral intuition.

Sachedina (2009:10) defends the position of Morsink, observing that 'while the search for universality through secularization of human rights norms paved the way for pluralistic sources of morality, it led to their inevitable relativity'. However, while this doctrine is largely articulated in the West, this does not mean that it does not exist in other cultures. Sachedina (2009:26-27) attempts to articulate an Islamic version of the doctrine, engaging in a dialogue with the theological traditions of Muslims and the ethical foundations of the Qur'an to explore whether the concepts of inherent human dignity and inalienable rights are rooted in Islam. He concludes that these concepts can be justified in Islam through 'the doctrine of the innate nature *(fitra)* of humanity bestowed by God through His act of creation' (Sachedina 2009:30).

Other scholars have been critical of concepts relating to universal metaphysical and transcendental moral foundations, and instead find human rights to be contingent upon

history, social reality and politics. Ignatieff (2001:53) argues that the belief in a metaphysical foundation of human rights can turn it into 'a species of idolatry'. Ignatieff (2001:55) instead presents a justification of universal human rights by which humans have realised across history, and particularly within the context of World War II, that their lives and dignity were subject to grave risk without international norms and mechanisms to provide protection for individuals. According to Ignatieff (2001:56) it is not the function of human rights to determine a universal meaning of a good life but, based on the historical experience of societies, a consensus is possible among diverse cultural and civilizational traditions on what is wrong. This utilises a minimalist or thin universalism that, he asserts, should not undermine cultural or religious traditions.

Due to religious, cultural and ideological diversity among peoples and individuals, the ontological doctrine of inherent human rights might not be persuasive for members of different comprehensive doctrines. Instead, human rights can be justified as the most plausible formula of co-existence among multiple religious, and cultural communities in a well-ordered society regulated by the values of human rights. In this regards, the work of the American Philosopher John Rawls on the conception of freedom and justice in liberal democratic societies can synthesise between the foundational and non-foundational theories of human rights. Drawing on Rawls' (2005) methods and concepts in his seminal book *Political Liberalism*, human rights can be seen as a conception of political justice in well-ordered societies, developed through overlapping consensus among different comprehensive doctrines. According to Rawls, a political conception of justice is a freestanding conception. Some individuals can justify it through comprehensive doctrines such as moral intuitionism, Kantian moral constructivism, or utilitarianism. However, it only becomes acceptable in domestic or global level through reasonable overlapping consensus on the principles needed to maintain well-ordered societies (Rawls 2005; 1993).

Donnelly (2007:292-293; 2003:85) doubts that a moral foundation to human rights can be shared by all cultures and religions in the world. He is instead in favour of a functional universalism whereby the idea of human rights represents the best remedy to the threats and challenges posed by the political, social and economic transformation that has taken place in the modern nation state. Human rights in such states protect individuals from increasing threats from the state apparatus and capital market. This functional analysis makes human rights relevant to all states that have gone through similar modern structural transformation. Inspired by the philosophy of Rawls, Donnelly (2007: 289-291) adds that international human rights is one product of an overlapping consensus between different moral, religious and ideological comprehensive doctrines, used to reach a political conception of justice that can be accepted by opposing comprehensive doctrines. The consensus is partial, since it aims only to reach an agreement on certain regulations for the human community, although through multiple moral foundations and grounds. In this framework, the issue of cultural relativism need not to be approached as a conflict between an arrogant universal human rights morality and other relativist moralities. Jones (1994:219) points out that 'the world is in much larger measures one characterized by rival universalisms'. The universal morality of human rights is rather introduced as a tool by which to settle potential conflict between rival universalisms.

The major challenge is that some rights might be rejected on cultural grounds by some societies during the process of overlapping consensus. This results in a gap between what already exists in international human rights documents and what can be accepted by the different cultural or religious doctrines. Donnelly (2007:290) argues that history demonstrates that adaptation and transformation can occur gradually in every kind of culture, resulting in the acceptance of international human rights. He highlights that this has been the case in

Western societies. He states that 'no culture or comprehensive doctrine is by nature, or in any given or fixed way, either compatible or incompatible with human rights' (Donnelly 2007:291). Preis (1996) has refuted assumptions that culture is static, essentialist and homogenous, and has argued that the study of culture and human rights should consider the complexities and the evolving nature of cultural interactions in different context. In the words of Merry (2005:9): 'Culture is hybrid and porous and … the pervasive struggle over cultural values within local communities are competitions over power'. Mayer (1994) has argued that the conflict between Islam and human rights is not a conflict between Western and Islamic civilizations but between different forces within the same civilizational construct.

Scholars have paid considerable attention to the importance of, and the best method by which to legitimise international human rights in different cultural and religious traditions. Orentlicher (2001:155) argues that 'universal acceptance of the human rights idea depends upon its legitimacy within diverse religious traditions and not just alongside them'. An-Na'im (1999a:319-323) argues that human rights should be legitimised in different cultural and religious traditions through domestic and cross-cultural dialogue. In the same direction, Merry (2005:1) explains that: 'in order for human rights ideas to be effective . . . they need to be translated into local terms and situated within local contexts of power and meaning. They need in other words to be remade in the vernacular'. I point in the following section to various strategies developed by Muslim scholars and human rights defenders to legitimate human rights in their societies.

Another relevant issue in this debate is to what extent IHRL can tolerate the violation of its norms in the name of culture or religion? Baderin (2003:28-29) proposed the concept of 'inclusive universalism' to realise human rights in non-Western societies through 'a multi-cultural or cross cultural approach to the interpretation and application of human rights

principles'. He argues that there is no global homogeneous legal understanding of the substance of human rights, neither between western and non-western states nor within western states (Baderin 2003:28). This leads him to the conclusion that international human rights schemes should consider the contextual cultural values of non-Western societies such as Muslim societies, but he also invites Muslim communities to demonstrate an evolutionary interpretation of their legal traditions (Baderin 2003:6). Baderin (2003:235) argues that the doctrine of margin of appreciation, which has been recognised by the ECtHR, can provide the international human rights system with 'the flexibility needed to avoid confrontation between Islamic law and IHRL' The scholar acknowledges that there are tensions that might not be solved by applying his methodology, however, Baderin (2003:234) considers that these tensions are not substantial. In a similar appreciation for the possible multiple interpretations of certain human rights, Donnelly proposes the concept of relative universality as an appropriate way to mediate the tensions that arise from the multiple interpretations given to international human rights norms. Donnelly states that societies should be given certain flexibility to deviate from international human rights norms when 'a particular conception or implementation is, for cultural or historical reasons, deeply imbedded within or of unusually great significance to some significant group in society' (Donnelly 2007:231).

Other scholars, however, have been suspicious of the idea of relative universality or weak relativism. Orentlicher (2001:143-144) wonders by which criteria some cultural practices will therefore be tolerated, and other practices not. She submits that engaging with the foundational sources of domestic cultures to legitimatise human rights will effectively promote and defend the moral validity of universal human rights to all human beings (Orentlicher 2001:154-156). Mayer (2005:302-306) believes that the method developed by Baderin provides Muslim states with an excuse to escape their international human rights obligations on the ground of cultural and religious values. Moreover, Shah (2008:471) refers

to the possible dangers of applying the margin of appreciation in international human rights system, as suggested by Baderin. He argues that states will apply it to misuse their discretionary powers and unjustifiably limit human rights. This concern has been expressed by Baderin himself (2003:231-232) when he explains the reluctance of the UN's Human Rights Committee to adopt this doctrine. Meanwhile, according to Shah 'the statutory laws of many Muslim states do not prevent polygyny, which can be condoned under the doctrine of marginal appreciation, making it difficult to achieve gender equality' (Shah 2008:472).

According to Brems (2004:14), margin of appreciation doctrine is applied by the ECtHR in cases for which there is no agreement among states on the means for protecting or restricting a right. In this situation, it asserts that states are best suited to decide as long as this principle is not used arbitrarily to justify violations. Sweeney (2005:474) asserts that 'The doctrine has been presented as a valuable tool for recognising and accommodating limited local variations within a nevertheless universal model of human rights'. I submit that while different cultural and religious traditions should be invited to contribute to IHRL within the dialogue among civilisations and inclusive universalism, international human rights bodies should not tolerate practices which fall short of its well-established interpretations of international human rights treaties, such those to protect and promote gender equality, freedom of religion, equality between Muslims and non-Muslims, and the prohibition of torture and cruel punishment.

It is argued by Brems (2004:13-14), that the international human rights system should be flexible enough to accommodate the cultural and socio-economic conditions that might obstruct the application of IHRL in some societies. As proposed by Brems, the principle of progressive realisation of human rights, which is recognised in the International Covenant on Economic, Social, and Cultural Rights (ICESCR), can be extended to other human rights, whereby states can delay their compliance with certain human rights due to contextual

cultural or political factors. Brems (2004:14) explains that in order to invoke this principle, states should clearly demonstrate their commitment to comply with these rights and adopt practical steps to doing so. Certain core rights and some aspects of human rights cannot be violated in the name of the principle of progressive realisation of human rights.

To conclude, the view of what is and is not a violation of international human rights norms, in many situations, is deeply intertwined in complicated networks of social, economic, political and cultural power, and cannot be treated only by technical and abstract legal norms. While the principle of progressive application of human rights is not a judicial doctrine, such as the doctrine of margin of appreciation, it can guide the human rights treaty bodies to consider contextual factors in societies without sacrificing the essence of some fundamental human rights norms. The use of this principle might be necessary in some Muslim societies where, even if some states have the political will to enforce certain rights, they still need to lay the groundwork domestically, and engage in dialogue with certain cultural, religious and social groups. These states need to be politically and technically supported by human rights treaty bodies.

3. Islam and Human Rights: Theoretical Perspectives

A mounting body of research argues compellingly that Muslims' responses to international human rights are not monolithic, and that harmonisation between Islamic law and IHRL is possible (Akbarzadeh and MacQueen 2008: 1-11; Bielefeldt 1995; Abou Ramadan 2007; Abiad 2008). In this context, harmonisation means the intellectual and legal efforts that aim to solve the areas of tension between Islamic law and IHRL through various techniques and methods. Baderin (2007) argues that this harmonistic perspective can become a catalyst for the respect of human rights in the Muslim world. Narrowing the gap between Islamic law and

international human rights can occur from within methods and principles developed by the principal schools of jurisprudence. Baderin (2003:39) argues that the method of selection *(takhayyur)* and the principle of public interest *(maslaha)* are viable tools by which to choose relevant opinions from one of the principal schools of Islamic law.

Applying this hypothesis in a comparative study between international human rights norms and Islamic law, Baderin concludes that many of the areas of tension between Islamic law and international human rights can be solved. For instance, Baderin found evidence to support freedom of religion, including the rights of Muslims to convert to another religion without being threatened with death. He reviewed opinions that improve the status of women in family and public life within the traditional model of complementarity of roles between men and women. He also argues that many modern Muslim jurists have developed opinions supportive of citizenship and equality between Muslims and non-Muslims. Morocco followed this strategy and was able to significantly improve the protection of women's rights in its new Family Code, adopted in 2004 (Mir-Hosseini 2007). Egypt also adopted some reforms for its personal status law over the past 30 years based on Islamic law, and the SCC confirmed their compatibility with the constitutional provision on Islam (chapter eight).

Nevertheless, I distinguish between the critical engagement with Islamic legal traditions for the purpose of coherent Islamic law reform, and the pragmatic engagement with traditional Islamic law in an eclectic way to facilitate the implementation of some human rights without challenging underlying assumptions of IHRL and undermining other human rights. For example, neither the doctrines of *maslaha* nor the method of *takhayyur* allow Muslims to consistently review certain rulings originating from clear and definite texts in areas such as polygyny, the discrimination against women in the family, the marriage between Muslim women and non-Muslim men, and the civil consequences of apostasy (An-Na'im 1990:51).

As noted by An-Na‘im (1990:46): ‘The temporary and insufficient relief that is introduced through these devices is subject to loss when there is a forceful reassertion of shari‘a’ (An-Na‘im 1990:46).

Other theorists have argued for new approaches to Islamic law. For example, al-‘Ashmawi (1996:58-60) argued that the traditional conception of the Qur’an as an eternal text, which was common in the classical periods of Islamic thought, had led jurists to deal with it as a closed system, transcending the human and social milieu. Al-Ashmawi underlined the connection between shari‘a and the socio-political conditions of pre-Islamic society. He affirmed that the interpretation of shari‘a should be contingent upon changing human and social conditions (Shepard 1996). Other Egyptian Muslim scholars such as Jamal al-Banna (2011), Faraj Foda (2005), and Hussein Ahmed Amin (1992) applied a contextual interpretation of Islamic sources. However, the socio-political conditions in Egypt have not allowed this liberal trend to flourish, and indeed those liberal scholars were subjected to harsh persecution and intimidation, which culminated in the assassination of Foda by violent Islamists in 1992 (Zubaida 2003:176-180).

Islamic feminism is another harmonistic perspective in the debate on Islamic law and international human rights, which aims to establish, through interpretative methods of Islamic sources, that Islam is committed to gender equality. Mayer notes that ‘Islamic feminism enables Muslim women to remain within the ambit of Islamic principles while demanding equality in rights’ (Mayer 2008:17). The significant feature of Islamic feminism is that Muslim women themselves have become vocal in the realm of Islamic law, since for centuries, men have dominated the construction of this law (Hassan 2005:46). Islamic feminists are critical of the patriarchal characteristic of classical and medieval Islamic *fiqh,* which according to them is a result of specific social context and is inconsistent with the

egalitarian moral foundation of the Qur'an (Ali 1997; 2000). Hassan (2005:60) points out that 'the Islamic tradition [like other religious traditions] developed in a patriarchal culture, one that was male-centred and male-controlled'. In her analysis of Islamic *fiqh* and gender equality, Mir-Hosseini concludes that 'while shari'a ideals call for freedom, justice and equality, their realisation was impeded in the formative years of Islamic law by Muslim social norms and structures' (Mir-Hosseini 2009:43).

Islamic feminists have proposed a contextual interpretation of Qur'anic texts. According to Wadud (2009: 95-107), the interpreter of the Qur'an should approach certain verses within their social contexts and in light of the overall principles and values of the Qur'an. Reading Islamic sources according to this methodology affirms the moral commitment of Islam to gender equality. Moreover, Wadud (2009: 107-109) argues that the patriarchal subordination of women to men is not consistent with the doctrine of the oneness of God (*Tawhid*), which is the core principle in Islamic belief whereby all people are subordinated only to God, and any other horizontal relationships between individuals should be based on the principle of reciprocity (*mu'awada)*. Islamic feminism has been recently transformed from theory to action through the establishment of regional and global networks of human rights activists who believe in the approach. A prominent example is Musawah, a global movement for equality and justice in the Muslim family that combines human rights defenders and scholars from different Muslim states. The Musawah Framework for Action (2009:12) underlines that the values of justice and equality constitute the core universal values of the Qur'an. Musawah (2009:15-17) asserts that the adherence to justice and equality between men and women in Muslim family laws is possible through a new interpretation of Islamic sources that is consistent with the Qur'anic universal values of justice and equality.

Despite the contribution of Islamic feminists to the construction of new, progressive ways of reading Islamic sources, recent literature highlights their methodological limitations (Moosa 2011; Ali 2006; Abu Zayd 2009; Hidayatullah 2014). Rhouni (2010:251) maintains that 'Islamic feminist theory based on the postulate of the normativity of gender equality in the Qur'an has reached a theoretical dead end'. In her book *Sexual Ethics and Islam*, Kecia Ali (2006:128) argues that the hierarchy of men over women is limited not only to family-related issues, but is found in other verses that aim to support men's sexuality in the Qur'an (2:222-223). In these verses 'women are spoken about and men are spoken to in a way that presumes male control'. The same point is addressed by Wadud (2006:261) in her second book *Inside the Feminist Jihad*. Wadud (2006:189) cites certain verses in the Qur'an (4:3; 2:223; 52:20; 55:72; 56:22) which are 'directed toward men and men's sexual desires, while women and women's sexuality remains passive'.

In the same line, Hidayatullah (2014:135) concludes that: 'The historical contextualization method helps explain the patriarchal language and framing of certain statements, but it does not change that the Qur'an is not only describing but also prescribing behaviour based on a presumption of male control'. I believe that this critique is relevant not only to Islamic feminists, but to the intellectual trend of Islamic reformation in general. I see it as an alert that the interpretation of the Qur'an may not be enough for a meaningful reformation project, without questioning many of the common assumptions about the nature of the Qur'an and the revelation.

The Egyptian reformer Nasr Hamid Abu Zayd (2004) was aware of the limitations of the interpretative approaches of the Qur'an and developed an innovative theory on the nature of the Qur'an that can solve many of the incoherencies and contradictions seen in interpretative methods. Abu Zayd aimed to free the Qur'an from being 'at the mercy of the ideology of its

interpreter; for a communist, the Qur'an would reveal communism, for a fundamentalist the Qur'an would be a highly fundamentalist text and for a feminist it would be a feminist text' (2009:98). Abu Zayd (2013:154) was concerned with questioning the common assumptions regarding Qur'anic phenomena, arguing that 'to reconnect the worlds of the Qur'an, we need to approach the Qur'an differently'. He concluded that the Qur'an should be viewed as independent discourses rather than a text, explaining: 'The concept of 'text', with its underlying assumption of authorship, is the cause of this paradoxical entrapment between historicity and divinity, or between the chronological order and the *mushaf* order [of the Verses]' (Abu Zayd 2013:155). [45]

According to Abu Zayd: 'It is not enough to invoke modern hermeneutics to justify the historicity and hence the relativity of every mode of understanding, while in the meantime claiming that our modern interpretation is more appropriate and more valid'. Rhouni (2010:257) joins Abu Zayd in search of 'a coherent and confident contextual approach' and to overcome 'the crisis of interpretation and counter-interpretation' of the scripture. She argues that 'by revisiting the concept of the Word of God' or revelation, scholars can consider [the Qur'an androcentric discourse] as historical and contextual rather than eternal and divine' (Rhouni 2010:252). The idea of the historicity of the Qur'an is theorised by the Iranian scholar Abdolkarim Soroush (2000) who maintains that 'revelation is a phenomenon that adapts itself to the environment and takes on the colour of the environment in every way'.

These critical approaches can help to transform the system of knowledge among Muslims from scripture-based to reason-based knowledge. I see this route as necessary in coming to

[45] According to Abu Zayd (2013:154) the different discourses of the Qur'an were collected, arranged and written down in the *mushaf* after the passage of the Prophet. The chronological revelation of the verses is not the same arrangement in the *mushaf*. 'The *mushaf* gave the Qur'an the form of a book, which in its turn redefined the Qur'an as a text.

terms with Islamism and what has been called by Tibi (1988) as the 'crisis of modern Islam' – and in avoiding inadequate interpretative methods that unwittingly legitimise the goal of Islamists to present the Qur'an as a comprehensive text with valid answers for all aspects of life. I argue in the following chapters that interpretations and counter-interpretations of the Qur'an and *Sunna* have trapped Muslim human rights defenders in an open-ended religious argument, and blocked other ways of thinking. Finally, the debate on Islamic law and international human rights has been mostly concerned with the substance of Islamic law, without addressing other human rights limitations which are inherent in 'the very system of those forms of political organisation that are premised on state enforcement of religious law' (Temperman 2010:189). I submit that the challenge in the thought of the MB and other Islamists in general is not just related to the expansion or restriction of the substance of rights provided under the model of the Islamic state, but the idea of Islamic law as the state law itself obstructs the development of human rights-based citizenship. .

4. Conclusions

This chapter has addressed the main conceptual and theoretical issues that arise in debates on Islamism, Islamic law and international human rights, and has examined the influence of Islam and Islamic law in Egypt's constitutional and legal system. One of the key purposes of human rights, as underlined in this chapter, is the management of diversity, and the peaceful coexistence of individuals with different religious, sexual, ethnic, linguistic, social and political backgrounds in societies. Despite the progress achieved so far in determining its scope, the disputes over the meaning of international human rights is a salient and ongoing feature of the international human rights system, involving states, non-states actors and international and regional human rights organs.

In this chapter, I have examined different theoretical perspectives that address possible tensions between Islamic law and international human rights. It is clear that while Islamists can develop their positions on many human rights from within traditional Islamic law, this approach has limitations. Namely, it fails to address possible tensions that can arise between human rights and clear texts in the Qur'an and *Sunna.* This approach also takes for granted the idea of applying Islamic law as the state law, without questioning the compatibility of the latter with the nature and history of Islamic law, or addressing the potential implications for human rights and citizenship in the modern nation state. Other Muslim scholars have questioned the principles and methods developed by traditional jurists and argued for epistemological and methodological shifts in the interpretation of Islamic sources.

Chapter Three: Human Rights under the Rule of Shari‘a

This chapter examines the foundations of the MB’s legal thought. The first section discusses the MB’s approach to Islamic law and its enforcement in Egypt. The second section addresses the foundation of human rights in the thought of the group and its position on IHRL. The third section focuses on the debate over the constitution-making process in the post-Mubarak era, and the role of the MB in it.

1. The State-Religion Relationship

1.1 The Supremacy of Shari‘a

The central idea of the MB’s thought is that Islam is a comprehensive system covering all aspects of life (al-Banna 2006:275. This comprehensive view of Islam has dominated the ideology of the MB until now and justifies the call for the establishment of the Islamic state and the application of shari‘a as state law (Amin 2005:44-59). According to al-Qaradawi (2001:7), Islam should guide and regulate all spheres of Islamic society: its morals, policies, constitution, laws, economy, and arts. He adds that this Islamic society should replace current societies in the Muslim world that comprise different forms of Islam and *jahiliyya* (al-Qaradawi 2001:7). According to the prominent Islamist ideologue Fathi Yakan (2004:97), ‘the task of the Islamist movements is to restore the Islamic society which derives its laws from the Qura’n and *Sunna*’. The Former General Guide of the MB, Hassan Al-Hudaiby (1952), explained the MB’s slogan, ‘the Qur’an is our Constitution’, stating that the group believes that the guidance of the Qur’an covers the constitutional, legal, and political realm, and it also provides Muslims with a comprehensive approach by which to purify and reform morals, and prevent crimes. In the literature of the MB, this comprehensive approach is a

fundamental feature of the cultural and political independence of Muslim societies (al-Banna 2006:151; al-Qaradawi 1974; al-Shawi 1987; Ghanim 2012).

For the MB, the application of shari‘a is a religious obligation for Muslims, and evidence from the Qur’an is invoked to support this belief. Amongst these verses are those revealed in *Surat al-Ma’ida* which say that ‘those who do not judge according to what God has revealed are rejecting God’s teachings (Qur’an 5:44) . . . are doing grave wrong . . . (Qur’an 5:45) . . . are lawbreakers (Qur’an 5:47)’.[46] Other verses are also cited to support this proposition (Qur’an 4:60-65; 24:47-51; 33:36). Al-Qaradawi (2005c:101-112) argues that these verses establish that the submission of Muslims to the orders of God and the Prophet is part of the Islamic creed. According to al-Qaradawi (2005c:107) deviation from shari‘a is a grave sin and a Muslim can be declared an apostate if he/she intentionally denies the application of shari‘a.

According to (Jirishah 1986a; al-Shawi 1987), the supremacy of shari‘a is the source of legitimacy of the Islamic state. Accordingly, no provisions in the constitution or legislation can override shari‘a. The ijtihad of Muslims is derived only from the Qur’an and *Sunna* but it does not override them (Jirisha 1986a: 224-225). Al-Shawi (1987) argues that the doctrine of consultation (*shura*) is the Islamic model of democracy whereby popular sovereignty is restricted by the doctrine of the supremacy of shari‘a. In this model the people are the source of political power but sovereignty lies in the divine law. The Former Guide of the MB Mustafa Mashhur (1987:10) explained that the application of shari‘a as a principle cannot be put to the approval of people or their representatives in the parliament because Muslims are

[46]The Arabic word used for judge in these Verses is *yahkum*. Those who do not judge (yahkum) by the revelation of God are *kafir*un, *al-zalim*un, and *al-munafiqun.*

obliged to apply shari'a. He added that the function of the parliament is only to discuss and suggest suitable procedures and mechanisms for the application of shari'a.

It was only in the 1971 Constitution that the principles of Islamic shari'a became a main source of legislation in Egypt. Article 149 of the Constitution of 1923 referred to 'Islam as the official religion of the state'.[47] For the MB, Article 149 meant that all legislation should be consistent with shari'a (al-Banna 2006:360).[48] In 1952, the MB proposed a model of an Islamic constitution.[49] Article 1 said that 'Egypt is an Islamic state of a parliamentary system'. It continues to assert that all laws should be consistent with the rulings and teachings of Islam (Articles 10, 44, 45, 48, 63 and 102), and the constitutional clauses on the supremacy of Islam are not amendable (Article 101). During the 1970s, the MB advocated for the modification of Article 2 of the Constitution, so that Islamic law would become the main source of legislation, rather than one of various sources. It also pressured the government, along with other Islamists, to codify Islamic laws in the different fields of law (al-Qaradawi 1974:83; Jirisha 1976:4; 'Ashmawi 1976:39-41;). In doing so, the MB official magazine called on Egyptian judges to judge directly according to Article 2 without waiting for legislation, and to refrain from applying laws that are inconsistent with Islamic law (Tammam 1981:24-26). Some judges sympathised with this call and in some cases examined in lower courts, they used Article 2 to justify their direct application of Islamic law.[50]However, higher courts overruled these judgments (Ghurab 1986- 'Ashmawi 1981:12-13).

[47] Article 149 of Royal Decree No.42/1923 Establishing Constitutional Regime in Egypt.

[48] Al-Banna (1938) sent a memorandum to the Minister of Justice urging the government to repeal all laws that were inconsistent with *shari'a.*.

[49] The MB adopted this draft constitution on 26/9/1952, see al-Bahnasawi (2006: 134) and *al-Da'wa* (1978:18-19).

[50] For instance, in criminal cases, judges in some lower courts bypassed Egypt's Penal Code and referred to Islamic (*hudud*) and Islamic criminal procedures in their judgments. Other judges invalidated the payment of interest, arguing that it is a form of usury (*riba)* that is prohibited under Article 2 of the 1971 Constitution. Other judges applied Egypt's laws but in their judgments, they urged the government to comply with Islamic law. For samples of these cases, see Ghurab (1986).

In the 1980s, the application of shari‘a had been a central issue in the political platforms of the MB (1987). In the Reform Initiative of 2004, the MB (2004:322) asserted that its objective is ‘comprehensive reform through constitutional and legal channels to apply the shari‘a of God as a way to reform the state and religion’. It also stated that the application of shari‘a requires the formation of pious Muslim citizens and families then the Islamic government. The MB’s documents do not give detailed information about the interpretive methods used by the group to define the content of Islamic law. Since its establishment, the MB has not aligned itself with any particular school of law, involving members whose juristic backgrounds are diverse. However, the MB reiterates that Muslims who engage in ijtihad should be trained in the methods of Islamic jurisprudence (Amin 2005:297). In *The Message of Teachings*, al-Banna (2006:275) explained that ‘the Qur'an and *Sunna* are the reference points for every Muslim to acquaint himself with the rules of Islam’. In his emphasis on the flexibly of Islamic law, al-Banna (2006:275) said:

> The opinion of an Imam or his deputy is acceptable in matters which are of proven benefit to the public, provided that his opinion does not conflict with any established principle of Islam. It may change in light of circumstances, customs and habits.

In the Draft Party Programme of 2007, the MB (2007) stated for the first time that it accepted the interpretation of Article 2 introduced by the SCC, considering it a centrist Islamic vision. The FJP (2011a:3) asserted that the general objectives of shari‘a determine the public policy of the party, pointing out that the eternal and unchangeable part of shari‘a is the fixed rulings of shari‘a governed by certain texts in their meaning and authenticity. Other rulings are derived through ijtihad according to changing time and place and the achievement of justice and interest. Nevertheless, I prove in the following chapters that the MB has not translated its talk about the flexibility of Islamic law into moderate positions on certain human rights.

Furthermore, the MB used the 2012 Constitution to curtail the SCC's approach to Islamic law (see further below Section 3).

1.2 Civil State with Islamic Background

In the post-Mubarak era, the MB has repeatedly stated that it aims to establish a civil state with an Islamic background. The group coined this term as a response to critics who argue that the MB attempts to establish a 'theocratic' or 'religious' state. Most Egyptian liberals and leftists use the term civil state (*dawla madaniyya*) to avoid the popular criticism of the term secular state that has been always been portrayed by Islamists as anti-religion or atheist (Tadros 2012a:50). Those liberals have a different conception of the civil state than Islamists, but for many Egyptian liberals reference to the civil state does not necessarily mean the total exclusion of Islamic law as part of state law.

'Issam al-'Iriyan (2011: 27-28) argues in a document published in 2011 by the MB that the Islamic state is presented as neither a theocracy nor a secular state. It is a state where the majority of its population are Muslims and its legislation is derived from shari'a, with the general function of fulfilling the interests of its people in this life and the hereafter. According to the document, the source of powers in the Islamic state is the people, while state institutions protect the teachings of Islam (al-'Iriyan 2011:30-31). In this state there is no clergy that monopolises religious knowledge or speaks on behalf of God because Muslim jurists are experts in their field and any Muslim can be trained to become a jurist (al-'Iriyan 2011:15-16). Al-'Iriyan (2011b:22-24) argues that the Islamic state is a constitutional and contractarian state, and that the presidency is a contract between the president and the representatives of the nation. The scholar maintains that in modern democratic constitutional states the elected parliaments are the representative of the nation. The regulations of this state

and its institutions, as well as the rights and liberties of its citizens are stipulated in a constitution, and according to al-'Iriyan (2011:44-45) this constitution is based on the principles of shari'a. State institutions govern in accordance with God's revelation. Consultation (*shura)* is performed by an elected parliament whose outcomes are obligatory for the executive.

It should be noted that historically there was no agreement within the MB on the obligatory nature of *shura*. Al-Banna maintained that *shura* is only instructive for the ruler. Other scholars of the MB such as al-Qaradawi, al-Ghazali, and al-Shawi argue that the *imam* should comply with the decisions of the representatives of the nation (Tadros 2012a:61-62). In 1994, a document published by the MB (1994) on the doctrine of *shura* in Islam asserted that this doctrine is practiced in modern democratic states through elected parliaments, whose decisions are obligatory for the executive. However, in Islamic states the parliament legislates in accordance with Islamic law.

Al-'Iriyan has pointed out that the SCC oversees the compatibility of these laws with the principles of shari'a. Nevertheless, in the literature of the MB there is a tendency to ensure that Muslim scholars who are trained in Islamic law participate in the law-making process. Al-Banna (2006:667) advocated the reform of the electoral law at this time to make sure that certain categories of qualified people, including Muslim jurists, are represented in the parliament. Al-Shawi (1987) proposed an elected council of jurists should take part in the legislative process. In its Draft Party Programme of 2007, the MB proposed the establishment of a council of jurists to assist parliament in making laws that are consistent with shari'a. The document did not set out the exact powers of the council, whether its decisions would be obligatory, or the mechanisms of choosing its members (the MB 2007). This proposal has been subject to harsh critique by commentators and political forces who opposed the idea of

giving legal powers or any kind of advantages to a religious council (Brown and Hamzawy 2010:19-20). In 2011, the FJP (2012:28) emphasised that the SCC is the competent organ to review the constitutionality of laws. However, the 2012 Constitution obliged the Parliament to consult a religious body on the content of shari'a (see further below Section 3).

On the other hand, Egyptian liberals do not share the meaning of the application of shari'a upheld by the MB. Some of them have advocated for a significant departure from traditional Islamic law; in their proposed civil state, shari'a could still represent a source of reference for society, but in its ethical meaning and not as specific rulings (al-'Ashmawi 1996:182-193; Foda 1993). However, in the public debate over the new constitution of Egypt in the post-Mubarak era, most liberal forces did not call for the abolition of the reference to Islamic law in the constitution (Said 2012).[51] Rather, human rights defenders and some liberal political activists proposed basic provisions by which to protect citizenship and human rights (CIHRS et al 2011), while other liberals have attempted to soften the constitutional and legal impact of a constitutional provision on Islamic law though a general reference to religious values as a source of legislation among other sources.[52]

This does not mean, however, that there have been no voices in Egypt calling for a secular state. Writing in the 1980s, Faraj Foda (2005:7-26) argued that to portray the secular state as anti-religion is to be ignorant of its meaning; in the secular state, authorities perform their functions in accordance with a constitution that ensures equality between all citizens, and guarantees religious freedom without restrictions. He asserts that legislation is made on the basis of public and private interest; that the system of governance is civil with its legitimacy gained from the constitution and the law, and that it should be committed to international

[51] For instance, Article 2 of the 1971 Constitution was copied in a draft constitution prepared by *al-Wafd* Party (2012).
[52] See the draft constitution proposed by the leftist *al-Tagammu'* Party ('Alam 2012).

human rights. Other Egyptian writers have pointed out that the term civil state is confusing and implies multiple conflicting definitions. Anwar Mughith (2011) suggests that liberals should not be reluctant to use the term secular state, instead, because he does not consider the secular state to be hostile to religion, but one that shows neutrality before all religions. According to Mughith, the cornerstone of such a state is comprised of the principles of equality and human rights, which should be stipulated in the constitution; he adds that in the secular state, lawmaking is based on rational deliberation among citizens and does not take the label of a certain religion.[53]

A substantial amount of scholarship provides an evidential basis for the critique of the MB's views on the place of Islam and Islamic law in its envisaged Islamic state. A lot of scholars have established certain arguments based on the historical reality of Islamic law in order to challenge the authenticity of the Islamic state model (An-Na'im 2008; Hallaq 2012; Tibi 2012; Iqtidar 2011). Historically, Islamic law was developed and applied at large by jurists and judges, and not by the ruler (Layish 2004). With the expansion of the Islamic empire and administration, there was a double administration of the legal affairs of the Muslim community, whereby the substance of shari'a became under the jurisdiction of Muslim jurists and judges, and the ruler dominated the secular sphere of politics (*siyasa*) (Schacht 1982:54; Tibi 2012:160). Hallaq (2009:74) states that in 'the functioning of pre-modern *siyasa*, the political regimes were subordinated to independent shari'a, whereas in modernity the state has come to sit on top of a largely dismantled shari'a'. Under the modern trend of shari'a-based order propagated by Islamists, shari'a has become the supreme law in the constitution, and certain laws are codified and labeled Islamic and applied by the coercive powers of the

[53] A group of Egyptian academics and political activists under the leadership of Murad Wihba (2006), professor of philosophy, held a conference in Cairo in 2006 to defend the separation between state and religion in Egypt and explicitly called for the removal of Islamic law from the Constitution. Wihba (2012) continued his advocacy for the secular state after Mubarak.

state. As noted by Tibi (2012: 160), this is 'an invention made by Islamism of a non-existent Islamic tradition of law'.

Al-'Ashmawi (1996:35-38) explained that the word shari'a is mentioned just once in the Quran (45:18), and it meant at the time of revelation 'the way or path of God or Islam', not specific legal rulings that should be applied by Muslims at all times. The term was given a legal meaning by Muslim jurists in later stages of history. In the words of Tibi (2011:159) 'all other uses of the term are post-Qur'anic constructions'. In his explanation of the three verses in *Sura al-ma'ida* that label those who do not judge by the revelation of God as unbelievers, sinful or lawbreakers, al-'Ashmawi (1987:41-42;1996:46:47) argued that these verses were revealed in specific historical circumstances when the Prophet was arbitrating between Jews in a specific case.[54] The word *al-hukm* in the Qur'an (4:58) means judge, arbitrating among disputants (the Qur'an 39:3) or wisdom (the Qur'an 12:22; 26:21; 45:16; 6:89). In these verses the word *hukm* does not mean the political authority. Al-'Ashmawi (1987:38-39) addressed other verses in the Qur'an (4:65; 4:105) cited by Islamists to establish that Muslims should judge by the revelation of God, and concluded that these verses were directed only to the Prophet, who communicated directly with God through the revelation. Al-'Ashmawi (1996:68) maintained that the interpretation of the Qur'an should start from the causes of revelation (*asbab al-nuzul*) and not the occasions of revelation (*munasabat al-nuzul*). He argues that the former approach interprets the texts against the context of revelation, but the latter leads to the erroneous generalisation of certain rulings that were revealed in specific circumstances.

The introduction of Islamic law as the state law as understood by the MB, is likely to limit

[54]In the interpretation of these verses, al-'Ashmawi has cited famous classical books of the *Qur'an* exegesis for al-Tabari, al-Suyuti, al-Baydawi, al-Wahidi, al-Nasfi and al-Zamakhsari (al-'Shmawi 1987:42).

the scope of constitutional rights. There are also other concerns inherent 'in the very system of those forms of political organisation that are premised on state enforcement of religious laws' (Temperman 2010:189-190). Before discussing these concerns, it is important to note Bielefeldt's distinction (2013:55) between 'political secularism' and 'doctrinal secularism'. The former 'operate[s] in the service of a non-discriminatory implementation of freedom of religion or belief for every one', but the secular world view in the latter 'claims an ideological priority over freedom of religion or belief'. In addition, the practical meaning of state neutrality towards religious communities is also of course contentious (Boothby 1998). An obvious example is found in the case-law of the ECtHR, where the Court held that prohibiting schoolteachers from wearing the headscarf is an acceptable limitation under the ECHR in order to maintain the neutrality of education and protect children's religious freedom.[55] In another case the Court found that the crucifix on the wall of a school classroom in Italy is a passive symbol with no influence on religious beliefs of students nor the neutrality of the educational process.[56]

Nevertheless, in this section I discuss a model of strong identification between state and religion in which the state is clearly biased in its legislation and policies on specific religious belief, and monopolises the right to interpret its content. I submit that this brings far-reaching consequences on religious minorities and non-religious people. It is argued that the law-making process under a constitutional provision that makes any religion the main source of legislation lacks 'transparency, legal certainty and checks and balances' (Temperman 2010:196). It will be always up to the parliament and judiciary to introduce certain interpretations of shari'a. Each parliamentarian majority will claim its correct understanding of shari'a, and consequently, the law-making process is not an outcome of inclusive and

[55] See Dahlab v. Switherland, ECtHR, 15 January 2011. See also Leyla Sahin v. Turkey, ECtHR, 29 June 2004

[56] See Latusi and Others v. Italy, ECtHR, 18 March 2011.

reasonable deliberation between parliamentarians.

Moreover, the powers of the elected parliament to make laws in accordance with shari‘a is monitored by other supreme organs, whether a constitutional court or a council of jurists, and those who dominate these supreme organs are thus able to define what constitutes religion, and impose their religious views on all citizens. This preferential treatment of a certain religion in the constitutional and legal process undermines state neutrality towards the religious beliefs of the people, and alienates those who believe in other religions, since they will be required to follow the religious rationale of the dominant religion in the law making process. The Islamic model of citizenship proposed by the MB requires all citizens to admit the moral superiority of Islamic law and values as a precondition for being a citizen in the state, which is not impartial. Citizens must debate laws and policies within the limitations of the dominant religious worldview. It is difficult to call this an equal citizenship between Muslim and non-Muslims.

On the interpretive methods of Islamic law, the MB portrays the traditional science of jurisprudence as the only legitimate way to derive law from Islamic sources. This traditional construction reflects religious thought of Muslims in specific time and space and according to other Muslim scholars (An-Na‘im 1990; 2008; Al-‘Ashmawi 1996), it is not an eternal and uncontested tenet of Islam. The MB asserts that in the Islamic state no one monopolises the interpretation of shari‘a, and that ijtihad is open for all Muslims. However, in reality a certain understanding of Islam is institutionalised and protected by the state as the authentic reading of the tradition. Thus, any religious thought that diverts from the mainstream version of Islamic law can be considered heresy. This conclusion is supported by evidence in chapters three and four of this thesis which show that the MB has systematically discredited the religious piety of other Muslims for their different religious views.

Even though secular political parties can be established in the Islamic state, the recognition of shari‘a as the supreme law of the state would jeopardise political pluralism and the right of individuals to participate in the conduct of public affairs. Contesting political parties would have limited political choices, and would have to justify their policies and proposed laws in Islamic and not secular terms. As stated by Temperman (2010:309) ‘concrete legislative decisions will not be made because they are supported by the majority of the people, but because they are the only decisions permitted’. If non-Islamist forces replace Islamist majority in parliament, the outcomes of legislative processes are still limited by the dominant Islamic law unless the whole constitution is modified. An-Na‘im (2008:85) has clarified in this regard that ‘civic reason and reasoning processes are required for the adoption of public policy and legislation in a democratic state because they are publicly contestable by all citizens’.

Individuals in all societies adhere to different moral and religious doctrines and world views. This plurality needs to be justly and peacefully reconciled without coercing individuals to concede to a specific moral or religious worldview. This was the concern of the liberal philosopher John Rawls (2005) in his theory of political liberalism. This theory does not require citizens to abandon their moral convictions to participate in the political sphere but to accept minimum rules of equal citizenship that are necessary for a well-ordered society in which citizens settle their fundamental differences in accordance with an idea of public reason. According to this concept ‘the political value of a public life [is] conducted on terms that all reasonable citizens can accept as fair’ (Rawls 2005:98). As an alternative to the Islamic state, An-Na‘im (2008) has proposed the secular state, in which laws reflect the contribution of all citizens regardless of their religious affiliation. According to An-Na‘im, the process of open and inclusive deliberation of laws and policies known as ‘public reason’ or ‘civil reason’ is the essence of equal citizenship. This understanding of citizenship is

necessary, according to An-Na'im (2008:34), to manage religious diversity in modern territorial states. Muslims' right to citizenship is dependent on their recognition of non-Muslim equal right to citizenship. Muslims themselves will be able to freely live their own understanding of Islam much better than in an Islamic state where a specific understanding of Islam is enforced by state authorities (An-Na'im 2008:1-2).

Temperman (2010:151) explains that many human rights scholars have held that the 'establishment of religion is not per se in conflict with human rights law'. But this view has been challenged by another argument to the effect that 'the rights of people adhering to non-dominant and non-traditional religions, and the rights of non-believers, may in fact be *ipso facto* threatened by the existence and preservation of an official religion' (Temperman 2010:160)[57]. Under Article 18 of the ICCPR 'a person may not be 'subject to coercion which would impair one's right to freely choose a religion or belief'. The UN Special Rapporteur on Freedom of religion or belief, Heiner Bielefeldt (2013:52) has held that:

> In order to operate as the guarantor of freedom of religion or belief for everyone in a fair and non-discriminatory manner, the state should not identify itself with one particular religion or belief and, in this sense, should remain neutral.

UN treaty bodies have repeatedly noted 'the difficulty of reconciling the very existence of an established religion with the state's human rights obligations' (Tempera 2010:150-151). As argued by Durham (1996:16) and Temperman (2010:160-196), equality and non-discrimination is not reconcilable with the strong model of identification between state and religion. The superiority of religious law in the state is an example of this model. Those who argue that the establishment of religion is not per se incompatible with human rights draw on General Comment No.22 of the Human Rights Committee. In this opinion, the HRC has held

[57] See De Long (2000), Durham (1996), Brugger (2007) and Shelton and Kiss (1996).

that ‘states where a religion is recognised as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population’ should respect the substance of the ICCPR.[58] However, the reference in this sentence is made to weak forms of identification between state and religion, and not to making the law of a specific religion the supreme source of legislation.

2. Reactions to International Human Rights

In this section, I address the foundation of human rights as proposed in the literature of the MB, and explore the extent to which this theoretical foundation is reconcilable with IHRL. I then assess the interplay between the concepts of rights and religious duties and obligations in the philosophy of human rights proposed by the MB. I also discuss the MB’s stances on international human rights treaties and their application in Egypt.

2.1 The Historical Roots of Human Rights in Islam

One often finds in the literature of the MB an assertion that the origins of human rights date back to Islam, and that the protection of human rights in Islam is more advanced than in any other culture and religion in the world. According to the basic documents on human rights published by the group: ‘Islam is the only ideological and political system that has honoured man and humanity to the utmost degree’ (MB 1995; al-Hudaiby 1999:33). Tawfik Al-Wa’i (2001:39) states that ‘Islam was the first to stipulate human rights when the world was living in a state of darkness and slavery’. Al-Ghazzali (2005b:6) stated that ‘human rights principles which were previously exported by early Muslims to other peoples are being exported today to us by the West as a distinctive human achievement’. He added that the discovery of these

[58] HRC GC 22. para.9.

principles was something new for the West but not for Muslims. Mahmoud Ghuzlan (2011:98) writes that Islam guaranteed individual liberties fourteen centuries before they became recently known.[59] This trend is also found in the early writings of the MB on constitutional rights in Islam, where writers have also attempted to show that Islam established individual rights and liberties many centuries before Western positive constitutions and laws (‘Auda 1960:24-47).

This defensive tone is shared by many other Islamic human rights schemes. As noted by Mayer (2012:59) the authors of these schemes have asserted that ‘human rights originated in Islam, asserting falsely that the Western and international principles from which they are heavily borrowing are the derivative ones’. [60] In most cases, the sources under assessment in this section presents new interpretations of Islamic sources after their authors have been influenced by the content of the international human rights framework. For instance, in his comparative study on human rights in Islam and the UDHR, al-Ghazzali cited verses from the Qur‘an and *Sunna* and referred to certain historical precedents to prove that certain rights were recognised in Islam. He did not however explain that his interpretation of the tradition in many cases is new and that pre-modern Muslim jurists did not interpret Islamic sources in the same way. Mayer has addressed this point in her critical analysis of the work of the Islamist ideologue, al-Mawdudi, and concludes that:

> There is an utter failure to deal with the historical reality that, although research in the Islamic sources may uncover ideas that have foreshadowed human rights principles, Islamic statements of human rights principles did not appear until after IHRL was produced (Mayer 2012:59).

[59] The same assertion made by al-Bahnasawi (2003:110), al-Qaradawi (1998: 178) and Jirisha (1986b: 25-26).
[60] In her book, Mayer (2012) analyses Cairo Declaration of Human Rights in Islam, Universal Islamic Declaration of Human Rights, the writings of the Pakistani Islamist al-Mawdudi and Iranian scholar Tabandeh.

This critical assessment of the methodological flaws in the position of the MB on Islam and human rights does not suggest that Islamic traditions are irrelevant to international human rights. Human values can be found in the different cultures of the world. As argued by Donnelly (1982), pre-modern cultures had multiple means by which to express appreciation of human dignity, social justice, and solidarity. However, it was in the West in the 18th century when, for the first time, the idea of rights as individual entitlements against society and state was theorised and formalised in the constitutional and legal system of modern nation states. Donnelly (2009) argues that this idea was new and radical for Western and non-Western societies. International human rights treaties in the 20th century represented another new wave of thinking about human rights, by which all human beings are endowed with inherent human rights by the virtue of their humanity.

Baderin (2001:85) holds that Muslim jurists knew a system of legal rights under Islamic *fiqh,* arguing that 'rights are . . . interwoven with duties under Islamic law. The two are seldom treated in isolation of each other'. A right enjoyed by certain individuals requires the fulfilment of duties by others. However, Abou El Fadl (2009:153) states that: 'Muslim jurists did not imagine a set of unwavering and generalised rights that are to be held by each individual at all times. Rather, they thought of individual rights as arising from a legal cause brought about by the suffering of a legal wrong'.

Historical traditions of Muslims introduce valuable sources and precedents for Muslims today that can certainly help develop an Islamic approach to human rights, but the defensive strategy applied by the MB and its scholars is not helpful in the harmonisation of Islamic law with international human rights. This strategy fails to address the conceptual differences between modern human rights and the historical legal traditions of Muslims. This difference is not unique to the traditions of Muslims; international human rights challenge inherited

traditions in Western and non-Western societies alike (Donnelly 2009). A historical analysis of human rights in Islam should examine the tradition in its own terms and institutions. It appears that this defensive strategy has been motivated by a desire to defend Islam and shari'a against accusations of backwardness and inferiority, but for Islamist movements, the defensive strategy also legitimates their political struggle to establish the Islamic state and the application of shari'a.

2.2 Human Rights: Its Sources and Limitations

The MB holds that respect for human rights in Islam is a religious duty and obligation, and that the major sources of rights are the Qur'an and *Sunna*. The Former General Guide of the group Ma'mn al-Hudaiby (1997) wrote that:

> From the beginning, Islam has protected the blood, privacy, property and honour of all individuals and considered any violation of these sanctities a forbidden act or sin. It has also made their protection a religious duty and an Islamic act of devotion, even if non-Muslims do not oblige themselves with such standards.

Similarly, Ali Jirisha (1986b) stated that human rights in Islam are sanctities (*hurumat*), proposing the expression 'the sanctities of human beings' rather than human rights, to show the extraordinary status of human rights in Islam.[61] Al-Qaradawi (2007c:190) argues that the philosophy of human rights in Islam is founded on the extraordinary value of human beings and human dignity in the Qur'an and *Sunna*. According to him, when Muslims fulfil their duties, they consequently enhance human rights because each right has a correspondent duty in Islam, and emphasises that duties and obligations in Islam take priority over the language of rights as human beings are accountable *(mukalaf)* to God (Al-Qaradawi 2007c:194-195). Al-Qaradawi (2007c:47-48) adds that the substance of human rights in Islam can evolve

[61] See also 'Umara (1985).

through ijtihad, by which Muslims can accommodate new developments in the field of human rights provided that they are consistent with the texts of the Qur‘an and *Sunna*.

The argument that human rights in Islam reach the status of religious duties, obligations or sanctities stimulates believers to be committed to these rights in order to fulfill their obligations to God. However, problems arise when certain aspects of shari‘a are inconsistent with international human rights. The practice of ijtihad, as proposed by al-Qaradawi, is limited by the texts of Islamic sources, and has not enabled him to solve substantive tensions between Islamic law and certain international human rights as such equality between men and women, and Muslims and non-Muslims. Moreover, the emphasis on shari‘a as the main source of rights and duties blurs the boundaries between the voluntary religious duties of individual Muslims and the law enforced by the state. A state might believe that certain rules are necessary to maintain religious duties, yet these rules prevent the enjoyment of international human rights. For instance, Jirisha (1986b: 63-66) suggested that in Islam, the state should protect, amongst other sanctities, the sanctity of women. For Jirisha, this protection in reality means restricting the rights and liberties of women in the public and private spheres.

Moreover, the foundation of rights as religious obligations defined by shari‘a obstructs the possibility of developing an Islamic rational foundation of rights that appeal universally. It is understood from Article 1 of the UDHR that each individual in the universe can recognise his/her human rights by appealing to human reason and conscience.[62] This does not exclude the role of religion as a basis of human rights but, as argued by An-Na‘im (1990), Islamic sources are open to renewal and reinterpretation by Muslims. The position of the MB,

[62] Article 1 of the UDHR.

however, resembles many other Islamists who 'uphold the primacy of revelation over reason' (Mayer 2012:48). In the words of Tibi (1994:297) this is the major source of the conflict that lies between 'a man (reason) - centered and a cosmological theocentric view of the world'.

In the thought of the MB, the cultural interaction between Muslims and international human rights norms is determined in accordance with the idea that Islamic morality is superior to all other cultures. Consequently, in the literature of the MB, shari'a qualifies the acceptance of international human rights norms. The call for values that are inconsistent with shari'a is seen by Jirisha (1986b:74) as an attack on Islam. Al-Wa'i (2001:41) states that 'the Muslim society is not free to deviate from the principles of Islam . . . Muslims cannot accept apostasy or the freedom to disseminate immorality (*al-fawahish*)'. The intrusion of religious morality into the sphere of state law is problematic. Muslims are free to identify certain conduct as sinful but according to IHRL, certain conduct may not be prohibited and criminalised under domestic law. Al-Qaradwai (2007:200), affirms that international human rights documents can be accepted generally but the application of these instruments should consider the cultural particularities in each society. For instance, he expresses his opposition to many articles in the CEDAW as being incompatible with Islamic law. He explains his position by saying that 'the Muslim nation would not abandon the rulings of its shari`a to comply with the UN's rules'.

MB theorists address the issue of constitutional rights and human rights in Islamic terms and within the boundaries of Islamic law. In the early period of its history, the group did not oppose the concepts of modern constitutionalism, such as limiting the powers of the ruler, representative democracy and the rights and liberties of citizens. Early MB ideologues asserted that these concepts are not alien to Islamic traditions ('Auda 1960:10-28; 1977b:105-123). Nevertheless, 'Auda (1960:28-29) understood these rights as to be within certain

Islamic restrictions. For example, he advocated the privileged position of men over women as a justifiable exception to the principle of equality.

Human rights have been present in the political platforms of the MB since 1987. The electoral platform of the MB (1987) in 1987 stated that 'human rights should form a basis for constitutional, legal, and political reform'. The Draft Programme of 2007 (MB 2007) asserted that: 'Freedom, justice, and equality are gifts from God to human beings. They are inherent rights in all citizens regardless of belief, sex, and colour'. The FJP (2011a:3-4) points to certain universal values such as freedom, justice, rule of law, constitutionalism and democracy. According to the party, these values are products of the universal human heritage. The substance of human rights are however limited in these platforms by ambiguous reference to Islamic law and morality. The FJP (2011a:39) reiterates that IHRL provides for safeguards for the protection of human rights on a domestic level, but it clearly affirms the superiority of shari'a over international treaties.

Thus, many rights proposed and advocated by the MB intersect with international human rights norms. However, its literature is clear in stating that some international rights are not relevant to Muslim states and Islamic legal traditions; and while the differences between Islam and human rights are addressed, the group and its scholars have not invested intellectual efforts to overcome these differences. On the contrary, the political platforms of the MB and the FJP point out that Muslims take only from international human rights that which is consistent with their religious traditions; the MP literature does not however engage with the fact that this tradition is, however, understood by Muslims in different ways.

3. Shari‘a and Human Rights in the 2012 Constitution

In this section, I address the MB's approach to the constitution-making process in the post-Mubarak era. The literature increasingly considers the constitution-making process to be a means to conflict resolution in divided societies (Hart 2002; Haysom 2005; Horowitz 2008; Hatchard et al. 2004:28-42).[63] According to this view, durable constitutions are devised through inclusive, representative and transparent processes in which different political elites are ready to compromise and reach consensus. Landau (2013:926) maintains that 'in many situations, the central challenge of the design of constitutional politics may be in finding ways to control uses of power, and in particular, in ensuring that powerful individuals and groups are not able to use the constitution-making process to impose unilateral projects'. This section shows that the constitution-making process in post-Mubarak Egypt intensified polarisation and the lack of trust between Islamists and non-Islamist forces, and was a factor behind increasing unrest, set against President Morsi and Islamists. In this process, all attempts to integrate efficient safeguards for human rights, citizenship, and the neutrality of the state towards religions in the new constitution failed. Political and civil forces as well as religious minorities that actively took part in the 2011 uprising were marginalised. The MB also used different legal and coercive measures to shield the constitution-making process from judicial oversight. The substance of the new constitution strongly reflected the ideological and political vision of the MB and its allies, who firmly resisted any attempts to negotiate the future of shari‘a in Egypt and refused to refer to international human rights treaties in the new constitution.

Former president Mubarak transferred his power to the Supreme Council of Armed Forces (hereinafter the SCAF),[64] which led Egypt's transition from 11 February 2011 until August

[63] The Secretary General of the UN (2009) highlighted these principles.
[64] See Constitutional Declaration of Egypt, *Official Gazette* no.6bis of 13 February 2011, pp.3-4.

2012, when President Morsi gained full presidential powers, and settled his struggle with the SCAF.[65] In the early months of the transition there was harmony between the SCAF and the MB. They agreed on a transitional plan whereby the SCAF suspended the 1971 Constitution[66] and formed a committee to prepare constitutional amendments; it was headed by a prominent Islamist jurist, Tariq al-Bishri, and included another leading member of the MB, Sobhi Salih. Liberal and leftist forces complained at the unrepresentative nature of the committee and its bias to Islamists (Moustafa 2012:3; Stilt 2011:7). This committee proposed that a new elected parliament would be entrusted with selecting members of the Constituent Assembly. The constitutional amendments also allowed for a competitive presidential election. This proposal engendered deep divisions between Islamists and liberals. Drawing on their organisational capacity, the MB and its Islamist allies were confident that they would gain the largest number of seats in Parliament and then lead the constitution-making process. Liberals opposed this plan, arguing that a consensual constitution must be devised before the parliamentary elections. They were concerned at the prospect of leaving the constitution-making for a parliamentary majority that would be keen to defend its political interests, at the expense of an inclusive and participatory constitution (Stilt 2011:7-8).

The proposed constitutional amendments were put to public referendum on 19 March 2011, and Islamists mobilised their constituencies to support these amendments. The supporters of the amendments argued that this was the best way to ensure stability and to retain constitutional institutions without delay. Islamists also argued that writing a new constitution before parliamentary elections might put the constitutional provisions of Islamic law at risk (Moustafa 2012:4). The constitutional amendments were approved in the public referendum

[65] President Morsi adopted a new constitutional declaration on 12 August 2012 where he took over presidential powers from the SCAF, see Constitutional Declaration, *Official Gazette* no.32 bis of 12 August 2012, p.3.
[66] Article 1 of Constitutional Declaration of Egypt, 13 February 2011.

and a new interim Constitutional Declaration was adopted by the SCAF on 30 March 2011.[67] Although the public referendum was about a package of constitutional amendments to the 1971 Constitution, the SCAF incorporated the amendments into a new Constitutional Declaration that copied many articles from the suspended constitution. The Declaration gave the SCAF executive and legislative powers until the parliamentary and presidential elections were held, on 28 November 2011. The MB and the Salafist al-Nour Party led this parliament. The parliament convened from 23 January 2012 until 14 June 2012 when the SCC struck down the electoral law and dissolved the lower chamber, the People's Assembly (see further below).

To reduce the domination of Islamists over writing the new constitution, liberals advocated the development of a set of supra-constitutional principles on human rights, citizenship, and democratic governance to which the Constituent Assembly should be committed.[68] The first document was proposed by the liberal opposition figure Muhammad al-Baradei on 26 June 2011 and was sponsored by secular political groups such as the Egyptian Social Democratic Party. Some key Egyptian human rights organisations contributed to the development of the document as well. The document referred to the principles of shari'a as the main source of legislation, however Article 10 of the document says that 'nothing in the document can be interpreted in a way that gives the state, any groups, or individuals a right to threaten or violate the rights and liberties included in the document'. Moreover, article 11 provided that 'the rights included in the document are non-amendable, and non-derogable and that the violation of any of the document's rights is a crime against the constitution'.[69]

[67] Constitutional Declaration of Egypt, *Official Gazette* no.12 of 30 March 2011.

[68] One can mention the experience of South Africa where drafting the constitution was abided by a set of constitutional principles adopted by the Multi-Party Negoting Forum (MPNF) (Hatchard et al. 2004:37-38).

[69] See the text of the document in Ta'lab (2011).

A coalition of 27 human rights NGOs proposed a draft bill of rights to be considered by the drafters of the new constitution. The manifestation of international human rights in this document was very clear. The coalition explicitly stated that its proposed bill of rights set 'guarantees for the protection of a secular state, as inspired by the values of the January 25 Revolution'. In explaining its framework of reference, the document states that:

> All rights and guarantees found in international human rights conventions and international law must be incorporated as the base line for the new constitution and these sources of law should be the prime reference used to elaborate these rights in the constitution and in legislation (CIHRS et al 2011).

Instead of calling for the abolition of the constitutional clause on 'the principles of shari'a as the main source of legislation', the document suggested that the new constitution should refer to multiple sources of legislation in Egypt to reflect the diversity in society, and to provide Egyptian citizens with different choices based on their beliefs. The document proposed the establishment of an independent constitutional council to be entrusted with the protection of the fundamental provisions from possible infringement by the parliamentary majority (CIHRS et al 2011).

The FJP (2011c) rejected these principles, insisting that the elected parliament and the Constituent Assembly are the highest organs by which to define the content of the constitution. The FJP (2011c) also opposed this reference to international human rights, arguing that these treaties often 'reflect Western conceptions of human rights'. Finally, the Party refused to identify the certain criteria by which the constituent assembly should be formed. According to the FJP, the elected parliament is the competent institution to set these criteria and choose the members of the assembly. After rejecting the previous two proposed

documents, the MB referred to another document produced in July 2011 by the Egyptian Democratic Alliance, a coalition that included 28 political parties aligned with the MB.

Many articles of the document are similar to the content of the political platform of the FJP. The first principle recognised 'Islam as the official religion of the state and that the principles of shari'a are the main source of legislation', and the document also reiterated that 'religious values and moral principles are fundamental in the formation of human beings'. It stated that 'the nation should maintain its foundations *(thawabit),* its identity, and spiritual values which are established by monotheistic religions'. The document spoke about 'the protection of public morals and religious values in the society' and that 'the respect of human rights is guaranteed in accordance with international treaties provided that they are not in conflict with Islamic shari'a (al-Wafd Party 2011).

The idea of having a set of constitutional principles was fully defeated in November 2011 after the transitional government and the SCAF presented draft constitutional principles that 'sought to entrench the power of the military in domestic governance' (Moustafa 2012:4). The document was initially suggested by the former Deputy Prime Minister Ali al-Selmi, and its declared purpose was to address the fears of liberals and religious minorities by making sure that certain principles would guide the constituent assembly while they wrote the constitution, particularly the principles of human rights, citizenship, and democratic governance. However, the document proposed that the military budget should not be under civilian oversight for the purpose of national security and suggested that 'the SCAF becomes exclusively competent to approve all bills relating to the armed forces before they come into effect'. Another controversial proposal was to entrust the army with defending constitutional legitimacy (Moustafa 2012: 4-5). Al-Selmi's document triggered profound political outrage among many political forces including the MB. Although al-Selmi amended some of the

controversial provisions, the whole document was withdrawn under public pressure and the debate on the constitutional principles ended.

Having the majority in Parliament, Islamists dominated the first Constituent Assembly selected by Parliament on 23 March 2012 (Ottaway and Brown 2012). However, the harmony between the SCAF and the MB did not last long. The vague language of certain articles in the Constitutional Declaration paved the way for judicial challenges to the parliament and the Constituent Assembly. On 10 April, the Court of Administrative Justice dissolved the first Constituent Assembly formed by Parliament on the grounds that Parliament's members should not have been elected as members in the Constituent Assembly.[70] On 14 June 2012, SCC struck down the electoral law under which the first post-Mubarak parliamentary election was held. The SCC held that the law discriminated between independent and partisan candidates by allowing the latter to run for elections as either part of party lists or individual candidates while the former could only run as individual candidates. The Court argued that the law violated the principle of equal opportunities among candidates, a well-established doctrine previously applied by the Court in 1986 and 1990.[71] Many commentators at the time of drafting the electoral law had warned that the constitutionality of the law would be questionable, but the MB did not listen to the advice (Sha'ban 2012). The SCAF was the only entity that had the power to amend the Constitutional Declaration to shield the law from the oversight of the SCC. It appears as though the SCAF wanted also to keep this constitutional ambiguity in order to be able to disrupt the political process if it went against its interests.

The dissolution of Parliament allowed the SCAF to entrench its powers through an addendum to the Constitutional Declaration, released unilaterally by the SCAF on 18 June. The

[70] Court of Administrative Justice, Case no. 26657/66, 10 April 2012.
[71] Supreme Constitutional Court, Case no.20/34, 14 June 2012. On the jurisprudence of the Court on similar cases, see Case no.131/6, 16 May 1987 and Case no.37/9, 19 May 1990. See also Gabr (2000).

addendum gave the SCAF legislative powers until a new parliament was elected. It also allowed the SCAF to appoint a new constituent assembly if the Assembly formed by Parliament before its dissolution encountered an obstacle that would prevent it from completing its work. The Declaration included an ambiguous article that gave the SCAF and other organs the power to refer any draft constitution to the SCC 'if they found that the new constitution contains one or more articles which conflict with the revolution's goals and its main principles or which conflict with any principles agreed upon in all of Egypt's former constitutions'. Moreover, the military set itself above all other civilian bodies. The Declaration stated that 'the incumbent SCAF members are responsible for deciding on all issues related to the armed forces'. Article 54 of the Constitutional Declaration stated that 'a council entitled the National Defence Council will be headed by the president and tasked with evaluating affairs concerned with means of security and its safety'.[72] The structure of the Council was left to the law. On 19 June, the SCAF adopted a decree forming the Council that was overwhelmingly controlled by military leaders.[73]

In his first two months in office, President Morsi backed by the MB underwent a power struggle with the military leaders. In a step seen as a challenge to the SCC, Morsi reconvened the previously dissolved lower chamber of the parliament by a presidential decree released on 8 July 2012.[74] The SCC considered this decision void and without any legal effect (al-Wafd Newspaper 2012b). However, the People's Assembly met and decided to refer the ruling of the SCC to the Court of Cassation which, according to the MB was competent to decide on the legality of the status of members of Parliament. Morsi and the MB argued that they respected the ruling of the SCC and agreed that the Court had the power to decide on the

[72] See Addendum to the Constitutional Declaration *official Gazette* no.24bis of 17 June 2012.
[73] See Supreme Council of Armed Forces Decree No.348/2012 Concerning the Membership of the National Defense Council, *Official Gazette* no.24 bis of 14 June 2012, pp. 5-6.
[74] See Presidential Decree No.11/2012*, Official Gazette* no.27bis of 8 July 2012.

immediate dissolution of the parliament, but that the timing of the implementation of the ruling was subject to the discretion of the executive (al-'Iriyan 2012). The Court of Cassation decided that it was not competent to examine the case (al-Sharq al-Awsat 2012) and in another case, the Supreme Administrative Court also confirmed the judgment of the SCC.[75]

President Morsi did not reconvene Parliament. Nevertheless, he was eventually able to endorse his powers as a president and settle his power struggle with the SCAF. Then, in a sudden and unexpected response to SCAF's increasing grasp on power, on 12 August, President Morsi removed the top military leaders Field Marshal Tantawi, Commander-in-Chief of the Armed Forces and Minister of Defence alongside his Chief of Staff Lieutenant, General Sami Anan, as well as other senior military leaders. He also declared the addendum of the SCAF's Constitutional Declaration as null and void and replaced it with new amendments by virtue of which the SCAF's legislative and constitutional powers were transferred to the president. The article that gave the power to the SCAF and other entities to refer the draft constitution to the SCC was deleted. The president also retained his powers over the military.[76]

Before its dissolution by the SCC, the Islamist-led parliament had established the second Constituent Assembly that was also dominated by Islamists. Many liberal forces refused to join the second assembly (Ottaway 2012). President Morsi failed to deliver on his electoral promises to political forces that upon his elections, he would reconstitute the Constituent Assembly to reflect the diversity in Egyptian society (Hassan 2012). Moreover, on 22 November 2012, President Morsi issued a Constitutional Declaration granting him immunity from any judicial oversight until a new constitution was enacted (Article 2). He unilaterally

[75] See Supreme Administrative Court, Case no 17355/66, 22 September 2011.
[76] See Constitutional Declaration, *Official Gazette* no.32 bis of 12 August 2012, p.3.

appointed a new General Prosecutor (Article 3), in violation of the Constitutional Declaration of 30 March 2011 and the Law of the Judicial Authority.[77] This Declaration was used as a preventive measure from the President to obstruct the SCC and the State Council from examining cases related to the constitutionality of laws regulating the Constituent Assembly and the upper house of Parliament.[78]

Liberal and leftist parties as well as human rights NGOs strongly opposed this step and escalated their street protests, demanding the immediate abolition of this declaration and the reconstitution of the Constituent Assembly. A wide number of judges across Egypt announced a strike, calling on the president to cancel the Declaration and annul the appointment of the new General Prosecutor (Daily News Egypt 2012). On 30 November 2012, the UN High Commissioner of Human Rights, Navi Pillay (2012) expressed her deep concerns about the provisions of the Constitutional Declaration, considering it a grave encroachment on the rule of law, the independence of the judiciary, access to justice and the right to effective remedy. She also expressed her dismay at the composition of the Constituent Assembly, affirming that 'any proper constitution making process must include adequate representation of the full political spectrum, men and women, minorities, and civil society'. When the SCC refused to submit to the President, and announced that it would fulfil its oversight role, Islamists besieged the headquarters of the SCC and prevented its judges from getting into the Court in an attempt to postpone potential judgments on the constitutionality of the upper house of Parliament and the law regulating the Constitutional Assembly (Ahram on Line 2012a).

[77]Article 47 of Constitutional Declaration of 30 March 2011 says that 'judges are independent and cannot be dismissed'; Article 67 of Law No.46/1972 says that 'judges and members of the General Prosecution are not subject to dismissal'.
[78] Article 5 said:'No judicial body can dissolve the Shura Council [upper house of parliament] or the Constituent Assembly', see Constitutional Declaration of 21 November 2012, *Official Gazette* no.46bis of 21 November 2012, pp.2-3.

Under pressure, President Morsi released another Constitutional Declaration on 8 December 2012, cancelling the Constitutional Declaration of 21 November 2012. But in order to validate the appointment of the new General Prosecutor, the new declaration stipulated that the legal effects of the November declaration continue to be enacted, and that the judiciary could not review constitutional declarations.[79] Morsi's constitutional declarations, as well as the siege of the SCC, allowed the MB and its allies to hastily pass the new constitution before any possible challenge from the judiciary. The Draft Constitution was put to a public referendum on 15 December 2012 and it was officially adopted on 24 December 2012.[80] There was not enough time for the SCC to decide on the constitutionality of the law regulating the Constituent Assembly before the referendum. Moreover, the new constitution entrusted the upper house of Parliament, dominated by Islamists, with legislative tasks until a new parliamentary election was held in 2013.[81]

Literature on the SCC argues that this Court cannot be simply labelled as a model of a corrupted or politically manipulated Court just because it was established by an authoritarian regime (Moustafa 2007; Lombardi 2009). There is sufficient evidence from the SCC's case law to argue that this Court was active in limiting the executive power and was supportive of human rights and political participation, despite political and legal constraints on the judiciary under Mubarak (Boyle and Sherif 1996; Moustafa 2007; Lombardi 2009).[82] The SCC's precedents were appreciated by human rights defenders and members of the political

[79] Articles 1 and 4 of Constitutional Declaration, 8 December 2012, *Official Gazette* no.49bis of 8 December 2012, p.2.

[80] For an official result of the referendum see *al-Waqa'i` al-Masriyyah* no.394bis of 27 December 2012. 63.8% of voters said yes in the referendum and 36.3% said no. The turnout was 32.9%. These figures indicate that the constitution was approved by a small segment of the Egyptian society.

[81] Article 230 of Constitution of Egypt, 25 December 2012, *Official Gazette* no.51 bis of 25 December 2012.

[82] In one of its landmark judgements, the SCC in 2000 upheld full judicial oversight over general elections in Egypt (Case No.11/13, 8 July 2000). This judgment partially improved the integrity of elections in 2000 and 2005 and allowed the MB to gain seats in the Parliament. In a reaction to this judgement, some measures were taken by Mubarak since 2007 to circumvent the involvement of judges in elections (CIHRS 2013). Some of the SCC's judgements were supportive of civil rights (Case No.3/19, 2 January 1993) and freedom of expression (Cases No.25/16, 3 July 1995, 37/11, 6 February 1993 and 153/21, 3 June 2000).

opposition, including the MB (Lombardi 2009:328; CIHRS 2013a). However, in a different political context after Mubarak, the MB clearly felt that the judiciary and particularly the SCC threatened its attempts to tighten its grip on power, and seized the opportunity of drafting the 2012 Constitution to begin its reformulation of SCC membership and roles.

To demonstrate this further, I begin with the appointment of its members. The 1971 Constitution did not stipulate a specific mechanism for the appointment of its judges or their number. From its establishment and up to 2011, the President of Egypt influenced the appointment process. Article 5 of the provisional articles of Law 48/1979 concerning the establishment of the SCC provided the President with the absolute power to appoint the first chief justice of the Court. Under the same Article, the President had the power to appoint its first members, but after consulting the Supreme Council of Judicial Bodies.[83] Article 5 of the Law maintained the President's power to appoint the Court's chief justices. It however involved the Court in the selection process of its members by stating that 'the President appoints members of the Court after consulting with the Supreme Council of the Judicial Bodies from among two candidates, one is chosen by the general assembly of the Court and the other by the chief justice'.[84] The SCC became a 'self-perpetuating body' (Haimerl 2014:15) in June 2011 when the SCAF amended the SCC law, providing the SCC's general assembly with the power to approve the appointment of the chief justice from among the Court´s three most senior members, and the appointment of the Court's members.[85]

One can agree that the appointment mechanism for SCC members and the chief justice needed to be revisited in the post-Mubarak era to address a legacy of executive interference

[83] Article 5 of Law No.48 /1979 on the Establishment of the Supreme Constitutional Court (SCC), *Official Gazette* No.36 of 6 September 1979, p.530.
[84] Article 5 of Law No.48/1979, p.531.
[85] Law No.48/1979 Amended by Decree No.48/2011, Official Gazettes nos.36 of 6 September 1979 and 24bis of 19 June 2011.

in its internal structure. Providing the SCC's general assembly with the full power to choose its members and its chief justice was also a matter of concern since it isolates the Court from the society and risks turning it into a guardian of narrow political or economic interests. This goal however was not achieved by the 2012 Constitution which simply endorsed the executive's powers over the Court by stating in Article 176 that: 'Appointments take place by a decree from the President of the Republic'. Moreover, Article 233 reduced the number of judges in the Court from 17 to 11, and accordingly, six of the SCC's most recently appointed members were removed from the bench. [86]

The Constitution of 1971 (with its 1980 amendment) left the explanation of the principles of Islamic shari'a open to the SCC. Article 219 of the 2012 Constitution altered this situation by giving a specific explanation of Islamic shari'a.[87] This explanation was intended to be binding for all judicial and political bodies in Egypt. The explanatory article is very vague and broad. It presents the sources, methods and principles of Sunni jurisprudence, paving the way for all kinds of Sunni juristic choices that range from hardline to moderate opinions. Article 219 'tie[d] the Egypt constitution to traditional Islamic jurisprudence' (Lombardi and Brown 2012). This explanation is different from the modernist approach taken by the SCC in the 1990s when it upheld that the legislator should not override fixed rulings of shari'a derived from authentic and clear texts in the Qur'an and *Sunna*, and then emphasised ijtihad in all other cases to accommodate the changing public interest. The SCC drew on this reasoning in several cases to harmonise between Islamic law and constitutional rights[88] (Lombardi 2006; Lombardi and Brown 2006; Lombardi 2009:230-237). Moreover, in some of its judgements, the Court 'adhered to the notion that internationally recognised principles

[86] Articles 176 and 233 of Constitution of Egypt, 25 December 2012.
[87] Article 219 of the 2012 Constitution says 'the principles of Islamic shari'a include its general evidences (*adilla kulliya*), rules of jurisprudence (*qawa'id usuliyya*) and juristic principles (*qawa'id fiqhiyya*) and the sources considered by the Sunni schools of law'.
[88] Most of these cases are related to women's rights under Islamic law. I discuss some of them in chapter eight of this thesis.

of human rights must be accorded due respect and, together with the written provisions in the Constitution, constitute the basis for judicial protection of human rights in Egypt' (Sherif 1997:45:46).[89] To reduce Islamists' pressure on the state to Islamise Egypt's legislation, the SCC developed in 1985 what is known as 'the doctrine of the non-retroactivity of Article 2' under which the Court declared inadmissible all 'cases involve[ed] laws that had been enacted prior to the amendment of Article 2 in 1980' (Lombardi 2006:167).

Moreover, Article 4 of the Constitution established a consultative role for religious scholars in the law-making process by stating that: 'Al-Azhar Association of Senior Scholars was to be consulted in matters pertaining to Islamic law'.[90] Giving a legislative role for the Association of Senior Scholars at Al-Azhar was another attempt to challenge the SCC's interpretation of Islamic law. The FJP was silent on the idea of giving authority to Muslim scholars for its interpretation, but the idea was mentioned in the draft political platform of the MB in 2007. Many scholars of the MB have also upheld this proposal since Hassan al-Banna. Moreover, the deputy leader of the MB, Khairat al-Shater, who had been the original presidential candidate[91] of the MB, had promised in his electoral campaign that he would form a committee of Muslim jurists to assist him in applying Islamic law (Dabash 2012). The inclusion of Article 4 in the constitution has been also seen as a concession made by the MB to satisfy its Salafist allies (Trager 2012). Article 4 provoked outrage from a wide range of liberals and human rights activists. In a public statement, 23 Egyptian human rights NGOs declared this to be a blatant move towards theocracy, where unaccountable religious scholars intervene in the work of the elected bodies (CIHRS et al 2012). Even though the opinions of the Association of Senior Scholars were not mandatory, the constitution provided religious

[89] See Supreme Constitutional Court, Case No.22/8, 4 January 1992.
[90] Article 4 of the 2012 Constitution.
[91] The MB chose first al-Shater to be its formal candidate but the Electoral Commission disqualified his candidacy for his previous criminal conviction (BBC 2012c).

scholars with a powerful moral and religious authority over elected parliamentarians, and their opinions would be hardly ignored.

Moreover, the constitution contained other limitations on constitutional rights. Article 81 provided for a general limitation on the exercise of constitutional rights by stating that: 'Rights and freedoms shall be practiced in a manner not conflicting with the principles pertaining to state and society of the Constitution'. These principles include Islamic Shari'a (Article 2) and other constitutional provisions pertaining to 'the preservation of the genuine character of the Egyptian family' (Article 10), 'ethics, public morality and public order' (Article11), the cultural and civilisational foundations of society (Article 12) and national unity (Article 5) determined the scope of constitutional rights.[92] These limitations were very broad and could be easily abused by lawmakers. Given the strict position taken by the MB during the constitution-making process towards international human rights treaties, it was obvious that these limitations would restrict certain constitutional rights. I discuss in the following chapters restrictions found in other constitutional provisions on gender equality, religious freedom, freedom of expression and rights of religious minorities.

4. Conclusions

This chapter has examined the ideological underpinnings of the MB and FJP. It has focused on two main issues: the application of shari'a as state law and the foundations and substance of human rights. For the MB, Islam is not just a religion but is also a tool for political mobilisation and governance. The intellectual underpinnings of the group comprise old aspects of Islamic traditions and new aspects of modernity. The MB portrays traditional interpretive methods of Islamic law as the only legitimate way to derive law from Islamic

[92] Articles 2,10,11,12 and 5 of the 2012 Constitution.

sources, but its conception of Islamic law as state law is a modern project shaped by a reinvention of tradition. For the MB, not all international human rights norms can be applied to a Muslim society like Egypt; it argues that the implementation of shari'a as the state law is a religious obligation and a sign of the cultural and civilisational independence of Muslim societies. Accordingly, it considers the divine legislator to be the source of rights. The Qur'an and *Sunna,* and the methods and principles of ijtihad as developed by Muslim jurists set the limits and scope of these rights. Human rights cannot be known only through human reason, and shari'a defines rights. This theoretical foundation of rights has led the group to embrace ambivalent positions on certain rights and to refuse other rights in IHRL. As illustrated in the literature of the MB and its scholars under assessment, the Islamic state protects Islamic law and morality in all state and societal activities. Consequently, the limits of public order and public morals are set by shari'a and 'Islamic morality'. However, state interference in certain areas of public and private life to comply with the state religion goes beyond the limits acceptable in IHRL.[93]

The MB in the post-Mubarak era has been strongly driven to entrench its political powers in the emerging political regime rather than working with other political forces to consolidate the transition to democracy and human rights. The domination of Islamists over the constitution-making process increased the mistrust between the MB and its Islamist allies on the one hand and secular political forces on the other hand. The reference to Islamic law in the new constitution of Egypt has been a non-negotiable issue for the MB and other Islamists. For the MB, human rights should be defined by the tenets of Islamic law. By addressing

[93]On the limitations on human rights, see the HRC GC No. 22. The Committee says 'The fact that a religion is recognised as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant' (para 9). The Committee also states that 'the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition' (para8). See also the HRC GC No.34.

specific themes of human rights in the following chapters I will shed the light on the particular areas of tension between IHRL and Islamic law as articulated by the MB.

Chapter Four: Political Pluralism and Dissent

Freedom of association, expression and assembly and the right to participate in public affairs constitute key legal safeguards of political pluralism in IHRL.[94] This chapter addresses political pluralism and the treatment of dissent in the Islamic state as articulated by the MB. I begin with the relationship between religion and the establishment of political parties under Egypt's law. Then, I examine the articulation of political pluralism in the intellectual sources of the MB and address the extent of tolerance with non-Islamist, secularist opposition and human rights defenders in the political discourse of the MB.

1. The Establishment of Religious Political Parties

Under certain limitations provided in Articles 22 (2) (freedom of association) and 19 (3) (freedom of expression) of the ICCPR, states are permitted to restrict the establishment of certain political associations whose programmes and objectives threaten human rights protected under the ICCPR. Article 5 says that rights included in the ICCPR may not be interpreted as implying for any state, group or person the right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised [in the covenant]. For example, the Human Rights Committee found in 1981 that the reorganisation of the dissolved fascist party in Italy was not protected under Articles 19, 22 or 25 (political participation) of the ICCPR.[95] Moreover, Article 20 of the ICCPR obliges states to prohibit by law 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. The application of these limitations should be

[94] See HRC GC No.25.
[95] M.A. v. Italy, 198, para.13.2.

prescribed by law, necessary and proportional. The ECtHR followed a similar reasoning in 2002:

> A political party may campaign for a change in the law or the legal and constitutional structures of the state on two conditions: firstly the means used to that end must in every respect be legal and democratic, and secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite to violence and the flouting of the rights and freedoms recognised in a democracy cannot claim to the convention's protections against penalties imposed on these grounds.[96]

Applying this test, the Court found in 2003 that the dissolution of the Islamist Welfare Party in Turkey was justified under the European Convention of Human Rights (ECHR) because of its plans to introduce Islamic law in Turkey. The Court stated that Islamic law is:

> Incompatible with the fundamental principles of democracy, as set forth in the Convention noting particularly its criminal law and criminal procedures, its rules on the legal status of women and the way it intervenes in all spheres of public and private life in accordance with religious precepts.[97]

For decades, Egyptian authorities curtailed the establishment of Islamist political parties, using the restrictive Political Parties Law No.40/1977, which established a Committee of Political Parties that was charged with providing licences for new parties. The president and the ruling party controlled the membership of this Committee.[98] This Law was used by the Mubarak regime to control the establishment of new parties (HRW 2007) and no Islamist parties were registered under this Law. This is despite the fact that since the beginning of the multi-party system in Egypt, all political parties have been required under the 1971 Constitution to respect the constitutional provision on Islamic law. Article 5 provided that

[96]Yazar and Others v. Turkey, ECtHR, 9 April 2002, Para. 49.

[97]Refah Partisi (The Welfare Party) and Others v. Turkey, ECtHR, para. 123.

[98] According to Article 8 of Law No.40/1977 before the amendments of 2005, the Committee of Political Parties was composed of the minister of justice, the minister of interior, the minister of state for parliamentary affairs, the head of the upper house of Parliament and three former judges. All of these were appointed by the president except the head of the upper house of Parliament. Law No.177/2005 increased the members of the Committee from 7 to 9 members but still all members were being appointed by the president except the head of the upper house of Parliament. See Law No.177/2005 Amending Law No.40/1977, *Official Gazette* no.27bis of 7 July 2005, p.3.

'the political system in Egypt is a multi-party system within the fundamental principles of the Egyptian society'.[99] All political parties accordingly should respect Article 2 of the constitution, which recognises the principles of Islamic Shari'a as the main source of legislation. The Political Parties Law No.40/1977 stipulated that the platforms of political parties should be consistent with the principles of Islamic Shari'a.[100] This condition was replaced in 2005 by a general provision, saying that 'platforms, activities and methods of all political parties should not be inconsistent with the Constitution'.[101]

To increase restrictions on the establishment of Islamist parties, Article 4 of the Law of Political Parties was amended in 2005 to prohibit the establishment of political parties founded on 'religious basis or on the manipulation of religious feelings'. Furthermore, a new constitutional provision was adopted in 2007, stating that 'no political activity shall be exercised or political parties established on a religious referential authority, on a religious basis or on discrimination on grounds of gender or origin'.[102] This move primarily targeted Islamists, the major political rival of Mubarak at that time and cannot be seen as an attempt to separate between state and religion in Egypt, since Article 2 of the Constitution was left without amendment (Bernard-Maugiron 2008:412). During the debates on the amendments, some political forces and intellectuals petitioned the government to insert certain amendments to Article 2 in order that it not to be used to curtail fundamental human rights and equality before the law.[103]

[99] Article 5 of the 1971 Constitution, Amendments to the Constitution of Egypt, *Official Gazette* no.26 of 27 June 1980, pp. 4-9.
[100] Law of Political Parties No.40/1977, *Official Gazette* no.27 of 7 July 1977.
[101] Law No.177/2005 Amending Law No.40/1977, p.3.
[102] Article 5, Amendments to the Constitution of Egypt, *Official Gazette* no.13 of 31 March 2007, p. 3.
[103] On 5 March 2007, a petition signed by 165 well-known politicians, intellectuals and human rights defenders submitted to President Mubarak, calling for the amendment of Article 2 to ensure respect for international human rights and the neutrality of the state towards all religious beliefs in the society (CIHRS 2007b:279-288).

The MB refused the constitutional provision on religious parties, arguing that the amendment contradicted Article 2, under which political parties can adopt Islamic platforms and promote the implementation of shari'a (al-'Iriyan 2007). According to a prominent Egyptian judge, Islamists parties gain their legitimacy from this article. [104] Under the ICCPR, the advocacy for the application of Islamic law may be considered a permissible ground by which to restrict the freedom of association of the MB. But since Egypt's Constitution already endorses Islamic law as the main source of legislation, and some forms of discrimination against citizens are already in place under the law, lawmakers chose an absolute ban on religious parties, which allowed the state to outlaw the MB without substantively discussing its programme. However, this absolute ban appears not to be acceptable under the ICCPR (Temperman 321-322).[105] The same position was taken by the ECtHR, which stated that 'a political party animated by the moral values imposed by a religion cannot be regarded as intrinsically inimical to the fundamental principles of democracy'.[106] A prominent human rights NGO in Egypt followed the same reasoning, stating that political parties can refer to religious principles in their platforms provided they do not call for discrimination between citizens, incite to violence, or undermine democratic society (CIHRS 2007a:310).

The legal regulations on political parties were softened in 2011 and Islamists were able to gain legal standing. In March 2011, the SCAF amended the Political Parties Law by Decree No.12/2011[107] under which 'political parties are established by presenting a notification signed by 5000 founding members in at least 10 Egyptian governorates. The minimum number of signatures in each governorate is 300'.[108] Notifications are submitted to a judicial

[104]See the legal opinion of judge Tareq al-Bishri published in 1991 when he was a vice president of the State Council and president of its committee of legal experts (in Huwidi 2005:12-16).
[105] See UNCHR 'Comment on Algeria' (1998) U.N Doc. CCPR/C/79/Add.95, para. 17.
[106]Refah Partisi and Others v. Turkey, ECtHR, Para.100.
[107] Decree No. 12/2011 Amending Law No. 40/1977, *Official Gazette* no. 12bis of 28 March 2011.
[108] Article 7 of Law No. 40/1977 Amended by Decree 12/2011, *Official Gazette* no.12bis of 28 March 2011.

committee. Political parties are legally recognised after the passage of 30 days from the submission of their notifications to the Committee. If the Committee opposes the establishment of a particular political party, it submits its decision to the Supreme Administrative Court, which either supports or rejects the decision within 8 days. The same Court is the only competent organ to validate the dissolution of political parties.[109]

The Constitutional Declaration of 30 March 2011 also reduced previous legal restrictions on the establishment of religious parties. Article 4 of the Declaration stated that 'it is not permitted to directly engage in political activity or form political parties on the basis of religion, race or origin' but it omitted the prohibition of political parties based on religious background. [110] The restriction in this Article is applied to parties whose membership is limited only to members of a certain religious community. This was the explanation presented by the judiciary in October 2011 in the Party of Development and Construction case. This case began when the Committee of Political Parties rejected the establishment of this Islamist Party on the grounds that its programme is based on religion, because it explicitly calls for the application of Islamic criminal law. The Supreme Administrative Court overruled this decision, arguing that Article 2 of the constitution allows political parties to call for the application of Islamic law. It further held that among the founders of the party were both Muslims and non-Muslims so according to the Court, the Party did not discriminate on the basis of religion.[111]

Thus, the relation between religion and freedom of association in Egypt is problematic. The state under Mubarak imposed a general ban on Islamist parties that is far-reaching and not justified under IHRL. This exclusionary approach was a practical legal option by the

[109] Article 8 of Law No.40/1977 Amended by Decree 12/2011, *Official Gazette* no.12bis of 28 March 2011, p.3.
[110] Article 4 of Constitutional Declaration of Egypt, 30 March 2011.
[111] See Supreme Administrative Court, Case No.44793/57, 11 October 2011.

government to exclude the MB and Islamist parties from the political process rather than address the implications of religious law for human rights and citizenship in Egypt. The general ban on the establishment of religious parties was removed in the post-Mubarak era, and Islamist parties were allowed to gain legal standing. In the following section, I explain the MB's philosophy on freedom of association which serves its Islamic state's project by excluding secularists and dissidents.

2. Political Pluralism and the Rule of Shari'a

Classical jurists discussed certain restraints on speeches and actions to maintain the integrity and unity of their communities as well as their beliefs. Among these restraints were the prohibition of seditious (*fitna*) speeches or actions that could lead to the spread of doubt or corruption of morals, apostasy, heresy and blasphemy. The exact meaning of these offences was vaguely defined and was repeatedly employed throughout the history by Muslim rulers to repress dissent for political or sectarian purposes (Kamali 1997:190-212). These concepts shape MB theories on the treatment of dissent and political pluralism, freedom of expression and freedom of religion in the Islamic state.

The view of the founders of the MB was that the establishment of political parties is not compatible with Islam. Al-Banna (2006:341-345; 368-370) opposed political pluralism and called for the replacement of the multi-party system that was operating in Egypt under the Constitution of 1923, with a one-party system. Politically, he believed that excessive disputes and fragmentation among Egyptian political parties overshadowed the struggle against colonialism. He argued that the society needs unity and a strong leadership to build its own renaissance. From a religious point of view, al-Banna (2006:244) argued that 'Islam is the religion of unity in all things'. He referred to certain verses in the Qur'an (3:103; 8:46) which

command Muslims to be united and avoid divisiveness. Al-Banna (2006:245) distinguished between partisanship and freedom of expression in Islam. The former is shaped by fragmentation, causing the whole community to lose its direction. On the contrary, Islam according to al-Banna allows people to seek truth and wisdom by the examination of different views, in order to reach consensus or majority but within the general unity of the community. Although the MB has gradually bypassed this view on multi-party systems since the 1980s, the fear of divisiveness and fragmentation among Muslims still influences its theories on political pluralism.

Over the last three decades, a group of scholars affiliated with the MB developed a new legal reasoning supportive of the right to establish political parties in the Islamic state (al-Qaradawi 2005c; al-Shawi 1992; al-Sawi 1992, al-Ghazzali 2005b, al-Wa'i 2001, Qimihah 1998; 'Auda 2005). Their views, however, contained some loopholes that set the stage for arbitrary restrictions on political dissent. I start first by presenting their supportive arguments of political pluralism in Islamic law. Then, I show the incompatibility between their conception of political pluralism and IHRL.

According to Al-Sawi (1992) and al-Qaradawi (2005c), the ruling on political pluralism in Islamic law is a question pertaining to *siyasa shar'iyya,* decided after weighing its potential benefits and harms for Muslim society. They have argued that the benefits of freedom of association in modern Muslim states are much greater than its potential harms, provided that this pluralism is governed by certain regulations. They have viewed political pluralism as an effective way to fulfill the duty of 'commanding good and forbidding evil', a duty that is repeatedly mentioned in the Qur'an and *Sunna*. In traditional Islamic law, this duty is called the function of *hisba,* under which Muslims observe the respect of Islamic ethos in the Muslim community (Kamali 1997:28-33). According to the scholars of the MB (al-Sawi

1992: al-Qaradawi 2005c; al-Shawi 1992), political parties and NGOs act as a means of *hisba* in modern states. They have argued that the practice of consultation (*shura*) in Muslim states can be enhanced under a multi-party system, whereby different groups of citizens work together to realise legitimate objectives such as proposing policies and observing the performance of state authorities.

Moreover, the principle of pluralism, according to al-Qaradawi (2005c: 148-154), is a fundamental feature of Islamic jurisprudence. He has argued that the pluralism of opinions among schools of law in Islamic jurisprudence resembles the multi-party system in modern states. Political parties, according to this view, embrace their own understanding of Islamic shari‘a and peacefully compete with each other in regular elections to gain power and implement their visions. The alternative path to political pluralism is despotic rule which, according to al-Qaradawi, brought destructive consequences in Muslim societies for centuries.

Despite these views, I argue that the conception of political pluralism in the thought of the MB is not compatible with IHRL. The group’s stance on political pluralism starts from a very specific ideological view of the state and society. According to this view, the state is entrusted with keeping the unity of Muslims in a political order regulated by the divine law. Political diversity in society is allowed as long as shari‘a is the supreme authority in the state. In the Islamic state, according to Al-Qaradawi (2005c:147-148), political parties should recognise that Islam is not just a creed or faith, but shari‘a. Political parties can practice their own ijtihad on different issues but within the accepted rules of ijtihad. No party is allowed to insult Islam or to denigrate its teachings and symbols. Those parties that call for atheism, obscenity, or non-religiosity should not be established in Muslim societies.

The latter seminal view was expressed by al-Shawi (1992:346-349) who maintained that political parties and all other kind of associations such as NGOs, professional syndicates or trade unions in the Islamic state are governed by 'the supremacy of Islamic shari'a'. He even proposed 'the establishment of a charter that includes those Islamic principles and texts of the Qur'an and *Sunna* that no individual or groups in the Islamic state can violate in any case'. The charter should also contain the rights and freedoms that all citizens and groups enjoy. In 1994, the MB (1994:302-314) explicitly held that political pluralism in Muslim society is acceptable as long as Islamic law is the supreme constitution of the state. The judiciary, according to the MB, is responsible for taking suitable measures against those who might deviate from the fundamental principles of society, as agreed by Muslim jurists; it added that political parties should not engage in 'disputes that could lead to societal weakness and failure'. The document is silent on the criteria by which one can decide that a particular political association weakens society.

By way of comparison, Tunisian Islamist Rashid al-Ghannushi (2012:93) has held that secular or atheist political parties are allowed to exist and engage in politics in Muslim states. He has argued that throughout history, different Islamic sects and non-Muslims, including pagans and Magus, lived in the Muslim community. He also argued that in a Muslim society, most Muslims certainly opt for the Islamic choice, and that secular parties would not be able to exclude Islam through democratic means. Al-Sawi (1992:101) has rejected this view, arguing that while it is true that early Muslims hosted diverse Islamic sects as well as non-Muslims, this does not allow secular, atheist or infidel political trends to exploit political pluralism to lead the Muslim nation, freely propagate their views and apply their programmes. He has also added that in Islamic history, non-Muslims submitted to the sovereignty of Islam and the political leadership of Muslims.

In IHRL, political pluralism can indeed be subject to certain limitations in order to ensure peaceful and democratic political competition and fundamental human rights but not to generally protect the dominance of a particular ideology or religious doctrine. Commenting on Iran, the Human Rights Committee in 1993 rejected restrictions on freedom of association, assembly and expression designed to protect particular religious doctrines.[112]

In addition to the condition that all political parties concede to the rule of Islamic law, a lot of sources of the MB reiterate that political pluralism in Islam is accepted as long as it does not divide the Muslim community and lead to factionalism. According to these sources, the Western multi-party system exacerbates conflict and opportunistic partisan competition among political factions (al-Shawi 1994:107; al-Sawi 1992:117; al-Shater 2011; 'Auda 2005:70). According to al-Sawi (1992), extreme partisanship is not accepted in Islam because it leads to divisiveness denounced by God and the Prophet. Al-Sawi has added that party discipline is employed by political leaders to oblige members of political parties to blindly follow their partisan positions. This extreme partisanship, according to al-Sawi, should not be tolerated in Muslim society. Al-Qaradawi (2001:153-154) explains that the existence of political opposition in the Islamic state can reflect diversity of views, but should not lead to flagrantly contrasting positions. Al-Ghazzali stated that '[political parties] are unlawful if they aim at dividing the *umma* and sowing the seeds of disunity among Muslims' (Kamali 1997:79).

Moreover, the system of consultation (*shura*) in Islam entails certain regulations for political opposition according to some prominent MB scholars. For example, Abdullah al-Khatib (1999:33) and Khaled 'Auda (2005:77) explained that under *shura* citizens can freely deliberate public policies, but once a decision is taken by the ruler and the representatives of

[112] UNCHR 'Concluding Observations on Islamic Republic of Iran' (1993), para.15.

the people, all citizens must comply with these decisions; it is not acceptable to insult or denigrate these decisions as this could create a state of chaos and nihilism in the community. Moreover, al-Khatib (1999:33) stated that commitment to the outcomes of *Shura* is a practice of obedience to God and the Prophet. The same meaning was previously expressed by ‘Abd al-Qadir ‘Auda (1960:50-51) who considered that Western democracy passes through crises and instability because the minority always questions and challenges laws and decisions already promulgated by the majority in order to isolate and dismiss the ruling power. In one of his weekly messages, the General Guide Badie (2012b) embraced this meaning of *Shura*.

Prompted by the fear of fragmentation, Khaled ‘Auda (2005:74) has clearly argued that Islam does not accept interest groups that advocate only the interests of their members and pressure the ruler to adopt these narrow interests. According to him, this constitutes a violation of the principle of equality because powerful interest groups would be able to influence decision-making at the expense of other disadvantaged groups. The general portrayal of interest groups as selfish institutions confirms that some Islamists are not comfortable with the individualistic aspects of human rights and freedom of expression. They are basically keen to see all societal actors work in harmony for the ideal and messianic goals of the Islamic state. ‘Abd al-Rahman al-Barr (2011) wrote after the 2011 Revolution that ‘Islam prohibits the establishment of political parties which tear and divide the nation and turn the community into conflicting parties’. According to al-Barr, ‘this is an abhorred partisanship that is extremely biased to one view even if it goes against the truth’. Al-Barr has maintained that a political party that aims at fighting Islamic shari‘a and Islam and becomes aligned with enemies of the religion and the nation is the ‘Party of the Devil’ (*hizb al-shaytan*). Evidence from the Qur’an (3:100; 105; 103; 8:46; 49:10) and *Sunna* are cited by theorists and ideologues of the MB to establish that Muslims are under religious obligation to maintain their unity and to refrain from any activity that could split this unity (Jirisha 1986b:62-63).

The top leadership of the MB underlined the value of unity in Islam when the group was under harsh critique from political opponents after the 2011 Revolution. In one of his weekly messages, the General Guide, Mohammad Badie (2012a), stated that 'the Devil tries hard to divide the nation into warring parties which always dispute each other's ideas and exchange accusations against each other'. He added that 'the media triggers enmities, hunts mistakes, accuses honest people, and causes temptation'. Then he urged Egyptians to obey the elected President Morsi and not to be manipulated by narrow partisan interests. In another statement, Badie accused private media outlets of acting like 'the pharaoh's magicians who gathered to bewitch people and turn them away from truth'. This was a reference to the Qur'anic verse (7:124-125) about the magicians who attempted to challenge the miracles of Prophet Musa. Badie also described the media as 'the devil whispering in the ears' (Abdel-Baky 2012).

These statements coincided with a series of lawsuits filed by the government and Islamist lawyers against journalists on charges of insulting the president and other leaders in the MB. Under Egyptian law, journalists can be brought before the criminal courts on a range of charges that restrict the right to freedom of expression (ANHRI 2012). President Morsi and the MB utilised this restrictive legal framework to intimidate journalists who were critical of the president and his political group. According to ANHRI (2013), 24 complaints were presented to the General Prosecutor by the president and his allies against 23 journalists on charges of insulting the president from June 2012 to January 2013. Other human rights groups (AFTE 2012: EOHR 2013; CPJ 2012) documented increasing censorship on journalists and columnists working in state-owned media.

3. Sowing the Seeds of Hate and Violence

The MB has followed a political discourse that questioned the religious piety of liberals, leftists and secularists and attacked their loyalty to Islam. It portrayed Egyptian reformers as heretics, such as Mohammad Sa'id al-'Ashmawi (Abu-Isma'il 1979:60-61; al- Mat'ani 1979:37-39) and Faraj Fuda (Khalid 1988:4-6; 1987:12; 1990:12-13). It does not treat the ideas of secular and liberal Muslims as legitimate alternative understandings of Islamic sources and history, but rather as a deviation from Islam itself. Political and intellectual pluralism cannot flourish in this intimidating environment.

This trend has been found in the intellectual literature of the MB since its inception. In 1938, Al-Banna (2006:258) stated in *The Message of al-Manhaj* that political parties in Egypt apply non-Islamic ideas in their public policies and they should be dissolved. In *The Message of Teachings*, al-Banna (2006:288) called on his followers to 'completely boycott non-Islamic courts and judicial systems [and] also to dissociate [themselves] from organisations, newspapers, committees, schools, and institutions which oppose the Islamic idea'. 'Auda (1977:58) maintained that those rulers who apply laws other than those revealed by God are infidels (*kuffar*) if they deny these laws in favour of other human laws, and they are considered sinful (*fasiqun*) if they ignore the divine law but do not deny it.[113] He affirmed that 'the replacement of Islamic law by other positive laws is a deviation from Islam and a displacement of Islam from the heart of believers' ('Auda 1977:141).

Sayed Qutb (1973:93), whose books are still taught in the MB and cited by its top leaders, considered that Muslim societies that are not regulated according to Islamic law 'share the same characteristic with polytheistic, Christian and Jewish societies, the characteristic of

[113] Classical jurists differentiated between 'the greater kufr' and 'the lesser kufr'. The former is 'the unequivocal renunciation of the faith' and the latter was 'used metaphorically in order to accentuate the gravity of conduct which actually amounts to transgression *(fisq)' (*Kamali 1997:219).

jahiliyya'. In his famous book *Preachers not Judges*, the former General Guide Hassan al-Hudaiby explained that the term *jahiliyya* refers to the state of affairs in societies that deviate from the rules of Islam. These societies are considered sinful and disobedient to God but they are not necessarily infidels (*kuffar*).

Al-Hudaiby firmly stated that a Muslim should not be identified as infidel unless certain strict conditions are met. However, the use of the term *jahiliiyya* in general gives a religious legitimacy for the discrediting of Muslims who do not share Islamists' view on Islamic law as a legal basis for Muslim states. Moreover, according to al-Hudaiby (1977:108), amongst the conditions by which a Muslim can be considered an infidel, is that he/she clearly denies shari'a or the sovereignty of *God.* According to this view, many Muslim reformers or secularists can be easily classified as heretics. Al-Bahnasawi (2005:149-150) and Yakan (2004: 98) used the term *jahiliyya* to describe non-Islamist ideologies that favour laws developed by human beings and dismiss the divine law. Al-Qaradawi (2006a:75) has stated that 'secularism is hostile to Islam and its comprehensive regulations of all aspects of life'. He added that 'secularism is a call for the sovereignty of ignorance (*jahiliyya*) where people rule by their own law and not by the revelation of God'. He has also written that 'a secularist ruler who considers Islamic law inconsistent with progress and civilisation is like the Satan who refused to prostrate to God' (al-Qaradawi 2006b: 326). The former General Guide of the MB, Mustafa Mashhur (1981:9) wrote that the MB rejects worldly political parties whose ideologies are set by human beings because Islam provides Muslims with a comprehensive system revealed from God.

Amid acute political polarisation between Islamists and liberals in 2011, numerous writers affiliated with the MB followed this inflammatory tradition and repeatedly published articles on the official website of the MB that accused secular political currents of corrupting Islam.

Abd al-Qadir Ahmed Abd al-Qadir (2011) wrote that liberals and secularists aim to contain the revival of Islam in Egypt and corrupt the religious awakening of Egyptians in the post-revolution era. According to him, the problem of liberals lies in their imported ideas and their state of ignorance (*jahiliyya*). Using the vocabularies of Qutb, he has accused secularism and Western democracy of being a form of 'paganism' and 'disbelief'.

Abd al-Rahman al-Barr (2012c) stated that supporters of the Islamic solution would prevail despite 'an atmosphere full of enemies and conspiracy against Muslims and Islam and its values from ignorant Muslims, hypocrites or the enemies of religion who aim to undermine the Islamic revival in the Muslim nation'. Nabih Abd Al-Mun'im (2013) wondered how liberals can claim to respect Islam and the Qur'an and at the same time refuse to rule according to shari'a and become hostile to Islamists who seek the rule of God. Helmy al-Qa'ud (2012; 2013c) condemned liberal media and politicians as enemies of Islam and Muslims, and argued that the rise of Islamists in Egyptian politics after the revolution had pushed the liberals to launch a public campaign against Islam and Islamists. On 6 February 2013, the Secretary General of the MB, Mahmoud Hussein, described media outlets as 'swindlers' for 'promoting lies and rumours in favour of the alliance of evil and disbelief with the objective of suppressing the Islamic project' (2013).

In a recent report, the UN Special Rapporteur on religious freedom, Heiner Bielefeldt, warns that policies of religious exclusion are aggravating factors in violence in the name of religion. According to his report, this exclusion is manifested when '[the legitimacy of a state is] based on [its] role as guardian of certain religious truth claims [and] those people who do not adhere to the protected religion or those who follow interpretations deemed deviant [are]

publicly attacked as infidels, apostates or heretics'.[114] In the socio-political and cultural context of Egypt and many other Muslim states this discourse has serious consequences for liberal and secularist Muslims. It is aimed at isolating and stigmatising the political rivals of the MB and Islamists in general, and it paves the way for political violence. Although this discourse has been followed to describe non-Islamist ideologies and political doctrines like liberalism, socialism and secularism, it goes beyond political critique and implies religious accusations of the followers of these ideas, in spite of their declared affiliation to Islam. It could also bring legal consequences under Islamic law. Many Muslims believe that apostates and heretics deserve death. Militant Islamists killed the Egyptian intellectual and politician Faraj Foda in 1992 as a punishment for his call for a separation between state and religion and his critique of the application of Islamic law (Arzt 1996:397). The murder of Foda is well remembered in Egypt today (Maqlad 2012). As noted by Tibi (2009:182) 'Muslims who engaged in secular thinking were warned that they would face the accusation of heresy and share the fate of Faraj Foda if they failed to comply'.

Under the rule of the MB, this climate of religious mobilisation and polarisation led to certain acts of violence against non-Islamists and religious minorities. For example, on 5 December 2012, members of the MB violently dispersed a peaceful sit-in organised by liberal and leftist forces to protest Islamists' domination over the constitution-making process. According to credible reports, Islamists were chanting religious slogans against secularism while they were attacking the protesters (CIHRS 2012b:10-11; HRW 2012b).[115] In his report, Bielefeldt also warns that sectarian violence can occur when 'minorities are demonized as allegedly posing a

[114] UNCHR 'Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt' (2014),p.32.

[115] According to numerous video clips of the clashes posted on YouTube and cited by CIHRS, MB members were chanting 'the people demand the enforcement of shari'a', 'Behold oh God, the people are applying the law of God' and calling non-Islamist protesters unbelievers (*kuffar).*

dangerous threat to the long-term survival of the nation, or they are accused of being involved in clandestine conspiracies'. Several examples in Egypt support this conclusion. In chapter six, I argue that violence against members of Shi'a communities in Egypt was motivated by religious hate speech and exacerbated under the rule of Morsi. In the following section, I show how Christians were major victims of the religious polarisation under Morsi. The relationship between Morsi and the leadership of the Coptic Orthodox Church had deteriorated by the end of 2012. The Church publicly expressed its fears about the future of Christians under the rule of Morsi. When leaders of Christians opposed the referendum on the 2011 Constitutional Declaration and joined liberals in their campaigning against the declaration, the MB and its Islamists allies accused Christians of aiming to undermine the Islamic identity of the state. The same approach was followed during the 2012 constitution-making process when the representatives of Christian churches in Egypt opposed the constitution and withdrew from the Constituent Assembly. When massive demonstrations erupted in November 2012 in protest at the Constitutional Declaration decreed by Morsi on 22 November to grant himself immunity from judicial oversight, top leaders of the MB stated publicly that 'the majority of protesters in front of the presidential palace were Christians' (al-Biltaji 2012; al-Shatter 2012a).

On many other occasions under Morsi, Christians were accused of conspiring with the remnants of the Mubarak regime to undermine the rule of President Morsi. In one of his last speeches before his removal by the military on 3 July, Morsi (2013) blamed the Coptic Orthodox Church for its attitudes towards him and his government. As explained by Tadros (2013c), 'the MB used the Copts as a scapegoat for its failure to build legitimacy within the wider polity'. In parallel to this incriminating policy, sectarian violence increased and Christian churches and properties were repeatedly subjected to attacks in 2013. Incitement against Christians reached a peak in June 2013 when the popular opposition to Morsi and the

MB dramatically increased and the military intervened to remove Morsi from power. In the sit-ins organised by the MB and its Islamist allies from June to August 2013 – to counter other massive protests led by liberal and leftist opposition and to protest the removal of Morsi – Christians came under fierce verbal attack by leaders and allies of the MB (al-Majid 2013). Ishaq Ibrahim of the EIPR stated that 'the MB members were spreading rumours since then saying it is a Coptic conspiracy to exclude them from power' (Daragahi 2013).

Based on field research across Egypt, Ibrahim (2013) documented numerous incidents where the MB's leaders and members incited against Christians from 2011 to 2013, portraying them as an existential threat to the rule of Islam. This conclusion has been also confirmed by a report by HRW (2013c). From June to August 2013, dozens of churches were burnt and damaged across Egypt. These examples show the consequences of a political discourse that created a rift along religious lines between Islamists, other Muslims and non-Muslims. Islamists as represented by the MB consider themselves to be the representatives of the authentic faith of Islam, and any opposition is considered an attack against the true Islam. It is hard for political pluralism to survive in this climate.

4. Freedom of Association and Human Rights NGOs

This section examines the MB's engagement with the question of freedom of association for human rights defenders. Human rights NGOs in Egypt have often been subjected to intense legal and political pressure from the government and security apparatus. Since the beginning of the human rights movement in Egypt in the 1980s, Egyptian authorities used association laws to curtail the ability of human rights defenders to associate, receive domestic and foreign funding and work freely inside and outside Egypt. Despite its tentative openness

under Mubarak towards the work of human rights defenders, once in power the MB chose to reinforce existing restrictions.

Over the past three decades, particular concerns stimulated the MB and the human rights movement in Egypt to cooperate with each other. They both struggled to open up the political space and to end restrictions imposed on political activists and civil society; they spoke up against the continuing application of the state of emergency under Mubarak, the trial of civilians before exceptional courts, and the wide use of administrative detention. At the same time, human rights defenders were vocal about human rights abuses committed against members of the MB (Hassan 2008b). The defenders, however, remained cautious about the MB's commitment to international human rights. For many human rights defenders, the MB was a beneficiary of their services and activism but it was not a trusted partner in the struggle for human rights (Hassan 1997). Some leading MB members were amongst the founders of the Egyptian Human Rights Organisation (EOHR), one of the oldest human rights groups in Egypt. Hassan (1998:68-90) stated that in 1986 when those members nominated themselves to be elected to the board of the organisation, their secular fellows mobilised their supporters in the general assembly to keep them away from leading positions. According to Hassan (1998:70), 'there were doubts among the members of the organisation that the MB aimed to dominate the organisation and to direct its resources to serve its political agenda'. This behaviour was strongly rejected by secular members of the organisation who were aware of the intellectual gap between the project of EOHR and the Islamist agenda of the MB. Discussing the MB's 2007 draft party platform, Hassan (2008a) elaborated the position of Egyptian human rights defenders on the MB's conception of human rights. He stated that the platform generally asserted the commitment of the group to international human rights, but 'when translated into reality, the Platform, no matter how elusive its language is, is far from being consistent with human rights principles'.

Nevertheless, human rights NGOs were keen to involve leaders of the MB in public dialogue about international human rights and the position of political Islam. This allowed human rights actors to raise their concerns about MB's attitudes towards human rights, and represented an opportunity for leaders of the MB to assess their views (Dif Allah: 2003; Dif Allah 2006; Hassan 2008b). This kind of dialogue did not eliminate suspicion between the two parties. However, the emergence of human rights language in official MB documents since the 1990s cannot be separated from the wider context of the development of human rights activism in Egypt.

Islamists were also open to the idea of establishing human rights NGOs. However, they developed their own Islamic human rights standards, and on many occasions their human rights activism went against that of other secular human rights defenders. For example, it is one of the objectives of International Islamic Committee for Women and Child (IICWC), since its establishment in 1994, to counter women's rights and feminist movements in Egypt and the Muslim world by advocating an Islamist form of women's activism (Helmi 2004). The proactive engagement of Egyptian women's rights groups in the International Conference on Population and Development (ICPD), Cairo 1994 and the Fourth World Conference on Women, Beijing 1995 prompted the MB and its female section to develop a discourse on women's rights in Islam as an alternative to international human rights treaties. In 2004, the MB established Sawasya Centre for Human Rights and Combating Discrimination. The Centre recognises the legitimacy of international human rights treaties, provided that they are not inconsistent with Islamic law.[116] A major task of the organisation has been to monitor abuses committed against members of the MB and to provide legal aid to

[116] See the Statute of the organisation in the official web site. Available at: http://www.sawasya.net/news_Details.aspx?Kind=8&News_ID=2

them, while also to manifest the MBs conception of human rights in Islam and give attention to global issues that concern Muslims such as Islamophobia, discrimination against Muslims in Western states, and the protection of Islam from defamation.[117]

Since the military coup of 1952, restrictive association laws undermined the independence and freedom of NGOs.[118] While, over the last two decades, the existence of a human rights movement in Egypt has become a social and political reality that governments could not dismiss, members of human rights NGOs were occasionally subjected to trials on charges of receiving foreign funding or working without legal registration. Many Egyptian human rights organisations were originally established either as not-for-profit companies in accordance with the civil law, or as law firms (HRW 2005; Forum of Independent Human Rights NGOs 2009:31-41). The government however sought to bring all NGOs under the jurisdiction of the Law of Associations No. 84/2002.[119] This Law has been regularly the subject of domestic and international criticism because of its serious infringement on the right to freedom of association (HRW 2005). Under this law, in order for NGOs to operate, they should be registered by the Ministry of Social Solidarity. Founders of NGOs should submit apply their files to authorities. NGOs are considered registered if founders do not receive objections from the authorities within 60 days. If they are rejected, they can challenge this decision before the administrative justice. NGOs cannot operate legally without being registered. International NGOs need to obtain approval from the Ministry of Foreign Affairs to open branches in Egypt (Article 1). Law 84 provides executive authorities with wide discretionary powers under Article 11 to reject the establishment of NGOs for 'the protection public order and morals', or if NGOs aim to 'conduct activities carried out by political parties or

[117] See statements published by the origination on the following link: http://www.sawasya.net/all_news.aspx?Kind=11
[118] See Laws of Associations Nos.32/1964, 154/1999,84/2002
[119] Article 4 of Law 84/2002 requires all NGOs established under other laws to register under Law 84/2002 or they are considered disbanded. This provision has threatened human rights groups established under other laws. See Law of Associations No.84/2002, Official Gazette no.22bis of 5 June 2002.

professional associations' without defining these activities. NGOs are also required to get permission from the Ministry of Social Solidarity for foreign and domestic fund raising activities (Article 17).[120]

When Parliament discussed Law 84 in 2002, opposition political parties in general had reservations, but adopted different views. There was no consensus among political groups on the right of NGOs to receive foreign funding or on the level of autonomy that could or should be given to them in their management and operations. The leftist *al-Tajammu'* Party was vocal in the defence of the independence of NGOs; other parties such as *al-Wafd*, Nasserist and the MB were suspicious of foreign funding, but expressed reservations on the restrictions on the establishment of NGOs and the heavy governmental interference in their internal affairs. In Parliament, most members of the MB rejected the law and a few of them abstained from voting.[121]

Nevertheless, the fact that the MB opposed the Law of Associations in 2002 did not mean that the group's view on the law converged with the demands of Egyptian human rights NGOs. The group attempted to soften the restrictions on NGOs, such as on their establishment and internal operations, but it did not advocate for the liberty of NGOs to receive external funding and to be fully protected against governmental interference.[122] This reservation to foreign funding became apparent after the MB reached power. In their electoral platforms, the MB (2005; 2010) and the FJP (2011) pledged to amend the Association Law to regulate the establishment of NGOs through a simple process of notification to the authorities, rather than a system based on licensing, and to ensure that NGOs are independent

[120] For a detailed analysis of this Law, see EMHRN (2007:28-34).
[121] Official Records of the People's Assembly, Report no.90 of 3 June 2002, pp. 80-89.
[122] ibid., pp.80-89.

from the state. However, it said that foreign funding should be subject to certain restrictions to prevent foreign penetration of the state and society.

Egypt's human rights NGOs began receiving grants from Western donors to maintain and expand their activities and reporting about human rights abuses in Egypt since 1992 (Hicks 2006:78). In a low-income country like Egypt, it has not been easy for local rights groups to collect internal donations. Moreover, the business sector has been also reluctant to support human rights NGOs, fearing that this could jeopardise its relations with authorities. Nevertheless, Egypt's human rights defenders' shift towards foreign funding has been the subject of intense debate within the human rights movement and civil society at large on the associated merits and dangers (Megally 2006:111). The acceptance of foreign funding 'changed the nature of the Egyptian human rights movement' (Hicks 2006:78). The availability of funding encouraged human rights defenders who were working together in one organisation to establish their new professionalised organisations without 'efforts to create a base of local support through developing membership core; instead they relied almost completely on foreign funding' (Hicks 2006:78).

Moreover, some early founders and sympathisers with the movement took a strict position against foreign funding and became vociferous critics of human rights NGOs (Hicks 2006:78). On the words of Megally (2006:111) 'by accepting foreign funding groups provided further ammunition to those who sought to attach them, to question their integrity and loyalty, or to raise suspicions about who really controlled their agendas'. However, Pratt (2006:114) concluded that 'the foreign funding debate does not reflect an objective reality about NGOs and foreign funding. It is not based on rigorous, empirical observation of the impact of foreign funding on NGO operations. Rather, it represents a dominant way of thinking about or interpreting Egypt's relations with the West'. A common argument used in

this debate is that the West threatens Egypt's 'national interests' or 'identity' through human rights NGOs.

However, those who engage in this debate disregard the heterogeneity in Western societies and Egyptian society and put both 'as two diametrically opposed and essentially different entities' (Pratt 2006:126). What is relevant in this debate here is that successive governments in Egypt have long used this argument to stigmatise and marginalise human rights defenders as well as cover up its authoritarian policies. This binary has been also relevant for Islamists, many of whom believe that the international connection of human rights defenders is detrimental to the indigenous Islamic values (Hicks 2002). The massive campaign against human rights defenders after Mubarak is an example of how the foreign funding debate is instrumentalised by different actors for different political ends.

In 2011, the SCAF led a smear campaign against human rights NGOs, accusing them of receiving illegal foreign funding to destabilise national security (HRW 2011). As part of this campaign, the Ministry of Justice established a Commission of Enquiry to probe into foreign funding granted to NGOs. This step appeared to be aimed at intimidating human rights NGOs that had been outspoken about human rights abuses that were allegedly committed by the SCAF during the transitional period. Moreover, the SCAF accused foreign powers of conspiring against the country through the funding of domestic actors to engage in protest and violence (Morsy 2012). However, the SCAF and the General Prosecutor presented no evidence to support these accusations. In its report, the Commission of Enquiry listed the names of 36 local human rights NGOs and three INGOs and accused them of receiving illegal foreign funding and operating without permission. It recommended the dissolution of

these organisations, and the prosecution of their leaders and members.[123] The campaign reached a peak on 29 December when the police, supported by the army, raided the headquarters of six international and Egyptian human rights and democracy NGOs, interrogating the members of these organisations and seizing their files and computers (Morsy 2012).[124] Sixteen Egyptians and twenty-seven foreign activists working for international NGOs were subsequently tried on charges of operating without registration and receiving foreign funding without permission (HRW 2012a).

The MB and FJP's suspicion of Western foreign funding for human rights defenders was apparent in the 2011 crisis. For example, in a public statement, the MB (2011) supported the investigation into the foreign funding of civil society, and criticised US funding provided under the banner of democracy promotion. It accused this funding of corrupting politics in Egypt and buying loyalties to the US, and described it as sinful money (*mal haram*). In another public statement, the FJP (2012) denounced the brutal treatment of NGOs by the security apparatus and affirmed its unlimited support for freedom of association and the role of civil society in the promotion of democracy and human rights. However, it warned against foreign funding and urged the state to take strict actions against human rights organisations that received foreign funding. Another leader of the FJP stated that foreign funding was usually directed by the US to support secularists to undermine the Islamic project in Egypt (Tawfiq 2011). The Secretary General of the FJP at that time, Saad al-Katatny, urged the government to adopt a law banning foreign funding and stressed that the priorities of human

[123] See Ministry of Justice, Report of the Commission of Enquiry into Foreign Funding for NGOs in Egypt, 14 September 2011.

[124] The raid targeted the following international NGOs: Freedom House, National Democratic Institute, International Republican Institute the Arab Center for Independence of Justice. It also targeted the following local groups: Arab Centre for Independence of justice and Legal Professions (ACIJP) the Budgetary and Human Rights Observatory, Future Centre for Judicial Studies.

rights NGOs should stem from the domestic agenda and should be funded only by Egyptians (Ikhwan Online 2011).

In March 2012, the SCAF reportedly made substantive efforts to lift the travel ban imposed on the US and other foreign activists who had been charged. The panel of judges examining the case withdrew after reportedly being subject to pressure to lift the travel ban on US nationals (Egypt Independent 2012b). The trial continued, but only Egyptian activists were present in the sessions; their foreign colleagues were being tried in abstentia (al-Masri al-Yawm 2012b). This alleged interference with the judiciary sparked anger from different political groups, which called for an impartial investigation into the incident. They condemned the fact that the SCAF and the General Prosecutor had led a harsh campaign against civil society and foreign funding, while taking a very lenient position toward accused foreign citizens and letting them leave the country (Al-Arabiya News. 2012).

In Parliament, members of the MB and other political currents complained that the US and international NGOs had violated the national sovereignty of Egypt. They complained about the alleged pressure on judges to free accused US citizens.[125] In his opening speech, Saad al-Katatni, the speaker of Parliament, who became later the president of the FJP, condemned the US's warning of cutting its annual aid to Egypt in order to pressure the Egyptian government to release the accused persons. He pointed out that the US applies double standards in its foreign policies through its silence on the abuses committed by Israel against Palestinians. He affirmed that the Egyptian government should be held accountable because it left these foreign NGOs to work in Egypt without permission, and to use foreign funding to harm national security.[126] A few liberal and leftist members expressed their doubts over the

[125] Official Records of the People's Assembly, Report no.31 of 8 May 2012, pp. 20-21.
[126] ibid.

governmental accusations, pointing out that these NGOs had been working in Egypt for years and that the government had even allowed some of them to monitor the first parliamentary election after the revolution.[127]

In June 2013, the Cairo Criminal Court sentenced five Egyptian personnel of the international organisations to two years in prison, and eleven others to one-year suspended sentences. 27 foreigners were tried in absentia and sentenced to five years in prison. Local and international human rights groups urged President Morsi to pardon the convicted human rights defenders (HRW 2013b; CIHRS et al 2013a);[128] the Legal Advisor of the FJP supported the verdict, accusing the convicted NGOs of 'conspiring against Egypt's national security', in the media (al-Alam 2013).

Article 22 of the ICCPR on the right to freedom of association does not explicitly refer to the right of NGOs to receive domestic and foreign funding. However, UN human rights treaty-bodies and independent experts have largely acknowledged the right of NGOs to mobile domestic and foreign funding to implement human rights activities, and consider it to be an integral and vital aspect of the right to freedom of association.[129] Article 13 of the UN Declaration on Human Rights Defenders provides that 'everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means'.[130] The UN Special Rapporteur on Human Rights Defenders stated in 2011 that: 'When individuals are free to exercise their right to associate, but are denied the resources to

[127] ibid., p.20.
[128] Article 149 of the 2012 Constitution said that: 'The President of the Republic may issue a pardon or mitigate a sentence'.
[129] See UNCHR 'Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association Maina Kiai' (2012), paras. 67-72 and UNCHR 'Report of the Special Representative of the Secretary-General on Human Rights Defenders, Hina Jilani' (2004), paras: 75-78.. See also the decision of UN Working Group on Arbitrary Detention in Aleksandr Bialatski v. Belarus, 23 November 2012.
[130] Article 3 of Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, 1999.

carry out activities and operate an organization, the right to freedom of association becomes void.'[131] The HRC expressed its concerns in 2002 at 'the restrictions placed by Egyptian legislation and practice on the foundation of non-governmental organisations and the activities of such organisations such as efforts to secure foreign funding, which require prior approval from the authorities on pain of criminal penalties'.[132]

The fact that Egyptian NGOs receive foreign funding is clearly not the issue here, since a lot of funding has been received by NGOs in coordination with national authorities within bilateral international cooperation agreements between Egypt and foreign governments. However, the Egyptian authorities have been concerned that a substantial proportion of funding has been channelled directly to NGOs without its prior approval, to be used in human rights and pro-democracy activities (Elagati 2013). Concerns related to the transparency of NGOs and national security are legitimate objectives to be realised in a national Law of Associations. However, the regulation of domestic and foreign funding in Egypt lacks transparency since it provides the executive and security agencies with unchecked powers to approve or reject applications for foreign and domestic funding, and has been used to selectively restrict funding to some NGOs, with political motives (HRW 2005; EMHRN 2007:32).

This trend continued under the MB whose subsequent draft laws of associations, tabled from February to May 2013, indicated that President Morsi and his government opted to keep human rights NGOs under state control (CIHRS et al 2013b; CIHRS et al 2013c; EMHRN 2013). In the following section, I examine a final draft law proposed by Morsi in May 2013

[131] UNCHR 'commentary on the Declaration was provided in the report of the Secretary-General to the Commission on Human Rights' (2000), p.95.
[132] UNCHR 'Human Rights Committee Concluding Observations, Egypt' (2002), para.21.

in relation to the right to freedom of association. The overall defects of this draft are that NGOs would need to apply for prior approval to exist, receive funds and operate domestically and internationally. At the same time, the draft law provided the executive with wide discretion to object to plans, activities and decisions made by NGOs, whose resources could be exhausted in litigation to challenge potential arbitrary decisions by the executive. Moreover, the draft law removed all other legal structures available to human rights defenders by obliging all NGOs operating in Egypt as law firms or non-for-profit companies to be registered under its provisions. This would allow the state to oversee their activities and funding.

Article 1 of the Draft Law obliged all NGOs to apply for legal personality without leaving an option for the practice of the right to freedom of association without registration.[133] Given that Egypt's penal law also penalises 'membership in unregistered organisations',[134] NGOs are required to obtain legal personality to begin their activities. They should engage in a registration process managed by the executive (the Ministry) rather than an independent organ. Applicant NGOs are considered to be registered 30 days after the submission of their application to the Ministry of Insurance and Social Affairs (Article 7). The Ministry can object to the establishment and file a lawsuit before the administrative justice, should there be grounds to reject their application.[135] The list of illegitimate activities of NGOs was clearly defined in Article 10, which prohibited the establishment of military units or organisations or NGOs whose members aim to make profit.[136] However, Article1(1) contained an ambiguous limitation that could be used to reject or intervene in the work of human rights groups by saying that the work of NGOs should be in line with the Constitution. Additionally, Article 2

[133] Art 1 of Draft Law of Associations proposed by President Mohammed Morsi, 28 May 2013,p1.
[134] Art 98bis of Penal Code No.58/1937.
[135] Art 7 of Draft Law of associations, 28 May 2013,p5.
[136] Art 10, ibid.,p.5.

said that: 'All NGOs should comply with the provisions of the Constitution in their statutes, activities and funding'.[137] These provisions could target human rights NGOs that cover human rights issues that might not be considered compatible with certain provisions in the 2012 Constitution

The draft law said that a Coordinating Committee would be established to approve NGOs' funding applications from foreign sources (Article 13)[138], provide licences for international NGOs (Article 54)[139] and permit NGOs to conduct activities in cooperation with foreign NGOs (Article 12)[140] or join international networks or organisations (Article 21).[141] The independence of the Coordinating Committee was questionable since it was required that five of its nine members should represent the executive (Article 53).[142] Article 18 provided the executive with absolute discretion to object to internal decisions taken by NGOs and Article 14 obliged NGOs to obtain permission from the executive to hold domestic fund raising events.[143]

Thus, the MB was not interested in supporting an independent and free human rights movement in Egypt after Mubarak, and its Islamist model was vehemently opposed by human rights defenders. Key human rights NGOs in Egypt were critical of the MB's human rights record in power, particularly the constitution-making process, its demonstrated lack of respect for the judiciary, and its intolerance of political dissent (CIHRS et al 2012). The international agenda for the protection of human rights defenders was a particular source of concern for the MB, while the perceptions of both groups strongly diverged on issues like

[137] Art 1 and 2, ibid.,p3.
[138] Art 13, ibid.,p.6.
[139] Art 54, ibid.,p.11.
[140] Art 12,ibid.,p.6.
[141] Art21, ibid.,p.7.
[142] Art53, ibid.,p.11.
[143] Art 14 and 18, ibid., pp.6-7.

religious freedom, rights of religious minorities, freedom of expression and women's rights. The MB's efforts to bridge the gap with human rights defenders on these issues was very limited. This stands in stark contrast to, for example, the model in Tunisia, where political leaders of the Islamist movement, al-Nahda, engaged in extensive dialogue with secular Tunisian political forces and human rights defenders and reached agreement on many sensitive human rights (Hajji 2007) and transitional issues, including a very progressive Law of Associations, following the rule of President Ben Ali in 2011 (El Fegiery 2012).[144]

5. Conclusion

This chapter shows that political pluralism is irreconcilable with the ideological underpinnings of the MB, in holding that all political parties and associations should abide by the supreme reference of Islamic law. The unity of the Muslim community is underlined as a central value in Islam that should not be jeopardised by political pluralism and partisanship. The attainment of this ideal according to the group is what distinguishes pluralism in Islam from Western societies. However, this vague and broad qualification leads to unjustifiable restrictions on pluralism and freedom of association and expression. Moreover, the thought of the MB has established a fault line between its conception of the shari'a state, and other non-Islamist ideologies. This conviction continues to influence the group's attitudes towards liberals, leftists and secularists who are often portrayed as deviant from Islam.

[144] See Tunisian Law of Associations No.88/2011, *Official Gazette* no.74 of 30 September 2011, pp.1996-2000.

Chapter Five: Religion and Freedom of Expression

This chapter explores the relationship between Islamic law and freedom of expression in the thought and practice of the MB. I first address the concept of freedom of expression in the writings of MB scholars and its official political platforms. Then I analyse the place of freedom of expression in the political activism of the group, in opposition and in power, with focus on issues of heresy, blasphemy and obscenity. These issues are hotly debated in the relationship between Islamic law, and freedom of expression and artistic creativity.

1. Religion and Freedom of expression

The language of international human rights treaties does not provide straightforward criteria for determining the limitations of a complex norm like freedom of expression. The interpretation of human rights norms by international and regional human rights organs can provide some guidance but in some situations, these organs take different positions. For example, in its interpretation of the ICCPR, the HRC tends to expand the scope of freedom of expression and accept limitations only in exceptional circumstances.[145] By contrast, the ECtHR has provided national authorities with wide discretion to determine the limits of freedom of expression. For example, ECtHR has held that the historical revision of the Holocaust amounts to incitement to hatred and discrimination against Jews.[146] The HRC on the other hand has held that 'the [ICCPR] does not permit general prohibition of expression of an erroneous opinion or an incorrect interpretation of past events'.[147] Accordingly, the

[145] See HRC, GC No. 34
[146] See Garaudy v. France, ECtHR, 24 June 2003 and Hans-Jurgen Witzsch v. Germany, ECtHR,13 December 2005.
[147] See also HRC GC No.34, para.49.

circumstances of each case should be carefully considered to decide if certain expressions can be restricted under the permissible limitations of Articles 19 (3) or 20.[148]

A key issue in this chapter is to what extent IHRL allows states to restrict certain expressions deemed offensive to religious beliefs or shocking for certain religious communities. I begin with relevant articles in the ICCPR. In 2011, the HRC has held in its General Comment no.34 that the right to freedom of expression in Article 19 (2) of the ICCPR includes the expression of 'deeply offensive views',[149] adding that 'prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant'.[150] 'Criticism of religious leaders or commentary on religious doctrine and tenets of faith' are also protected.[151] According to the Committee, prohibition can, however, be accepted under Article 20 (2) of the ICCPR, which obliges states to prohibit by law 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. The Committee stresses that any restrictions on freedom of expression under Article 20 (2) should be necessary, proportional and prescribed by law.[152] Article 19 (3) says that freedom of expression may be subject to certain restrictions: 'For respect of the rights or reputations of others'; for the protection of national security or of public order, or of public health or morals'. These limitations are applied within strict conditions and it is not their purpose to protect religious doctrines from criticism or defamation (Temperman 2012:526-527; Langer 2014:109).

[148] See Faurisson v. France, 16/12/1996. The HRC concluded that the restriction of freedom of expression in this case is consistent with Article 19(3). It explained that the statements of Faurisson 'read in their full context . . . strengthen anti-semitic feelings; the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism' (para.9.6).
[149] HRC, GC 34, para.11.
[150] ibid.,para.48. In its comments on states' reports, the HRC was critical of blasphemy laws. See UNCHR 'Comments on Ireland' (1993), para.15.
[151] HRC, GC 34,para.48.
[152]ibid., Para.22.

Moreover, it has been argued that freedom of religion does not encompass the right to respect for one's religious feeling.[153] The protection of religious freedom under Article 18 of the ICCPR is concerned with the protection of followers of religions to freely manifest their religious beliefs, not the protection of religious tenets. As noted by UN experts: 'Defamation of religions may offend people and hurt their religious feelings but it does not necessarily or at least directly result in a violation of their rights, including their right to freedom of religion'.[154] However, under Articles 18, 19(3) and Article 20(2) certain expressions may seriously impair the practice of religious freedom and could be subject to restrictions (Langer 2014:123). It is also argued that understanding a right to freedom of religion or belief as a right to respect for one's religion also jeopardises the right to freedom of religion or belief itself (Temperman 2012:543-544). Under Article 18 of the ICCPR, the manifestation of beliefs covers non-atheistic or atheistic beliefs. Atheists express their beliefs when they make offending commentaries on religions, their rituals and symbols. Dictated by their religious doctrines, some religious people also express offending views on atheists or the doctrines of the followers of other religions.

The ECtHR has taken a different approach by holding that states are not in violation of Article 10 of the ECHR when they restrict offensive attacks on religions.[155] In its case law, the Court has granted states a wide margin of appreciation to ensure the 'respect for other people's religions'[156] or 'the right of others to respect for their freedom of thought, conscience and religion'[157] in response to 'improper attacks on objects of religious

[153] See UNCHR 'Report of the Special Rapporteur on freedom of religion or belief and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance' 2006,paras. 31-39.
[154] ibid., para.37.
[155] See Otto-Preminger-Institut v. Austria, ECtHR, 20 September 1994 and Nigel Wingrove v. UK, ECtHR, 25 November 1996.
[156] Otto-Preminger-Institut v. Austria, para50
[157] I.A v. Turkey, ECtHR, 13 September 2005, paras.24-28.

veneration'[158] when required by domestic circumstances. For this purpose, the Court established a distinction between provocative opinions that can be tolerated, and abusive attacks on one's religion that can be restricted.[159] Meanwhile, the Court held that religious people 'cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith'.[160]

Although this distinction made by the ECtHR leaves wide space for critical engagement with religions,[161] it favours in practice dominant religious doctrines and curtails the ability of critics or atheists to challenge them. It is also difficult to clearly define what can be considered 'abusive attacks'. These concerns were upheld in 2005 by the dissenting opinion of three judges in the case of I.A v. Turkey, stating that: 'The time has perhaps come to 'revisit' this case-law, which in our view seems to place too much emphasis on conformism or uniformity of thought and to reflect an overcautious and timid conception of freedom of the press'.[162] European states' resistance of continuous efforts made by Muslim states in the UN to develop an international legally binding framework against defamation of religion reveals a growing consensus among European states that the legal prohibition of blasphemy or 'defamation of religions' is not compatible with freedom of expression (Leo et al 2011:773-774; Langer 2013:273-280; Temperman 2012). The treatment of this issue is different in the Islamic context discussed in this chapter. When it comes to the protection of dominant religious doctrines, freedom of expression becomes irrelevant to the MB, whether

[158] Otto-Preminger-Institut v. Austria, para50.
[159] I.A v. Turkey, paras.24-28.
[160] ibid, para.47.
[161] See Aydin Tatlav v. Turkey, ECtHR, 2 May 2006. In this case, the Court found that Article 10 of the ECHR was breached by Turkey when a Turkish writer was punished for his criticism of Islam. The Court held that his views could shock Muslims but they contain no abusive attack on sacred symbols.
[162] See Joint Dissenting Opinion of Judges Costa, Cabral Barreto and Jungwiert, in I.A v. Turkey, p.9.

this expression can be considered proper or offensive. With a few exceptions, Egypt's judiciary upholds a similar view.

2. The Literature of the Muslim Brotherhood

This section discusses the scope of freedom of expression in the model of the Islamic state proposed by MB scholars. The functions of this state and its relationship with its subjects inevitably give rise to certain tensions with international human rights. As I discuss in this chapter, this state invasively intervenes in the ways of life and behaviours chosen by its citizens. The substance of freedom of expression is seriously limited, since ideas and artistic expression have to comply with certain Islamic moral codes dictated by those people who control the state.

According to Muslim jurists, the doctrine of *hisba* in Islamic law is founded on the Qur'anic principle of commanding good and forbidding evil (3:114). This principle entitles citizens to take public actions to promote good and forbid evil. Muslim jurists have suggested different conditions for the practice of *hisba* by individuals. For instance, al-Qaradawi (1997:121-125) has argued that there should be a consensus among jurists and clear evidence that certain acts are evil. He has also added that forbidding evil by force is the responsibility of the ruler. At certain phases of the history of Muslims, a public position called *al-muhtasib* was established to monitor the markets and respect for public morals. In the modern nation state, many Muslim jurists and Islamists consider that the function of *hisba* should be fulfilled either by giving powers to the police to monitor respect for Islamic teachings and morality or by allowing citizens to take direct legal action if they observe violations of certain Islamic values (Kamali 1997:28-33; Balz 1997:137-138). As discussed in the previous chapter, the

doctrine of *hisba* has been also used by the MB over the last three decades to permit a certain degree of political pluralism and freedom of expression in Islamic law.

Writing for his Islamist audience since the 1970s, al-Qaradawi (2005b:41) has repeated this meaning by stating that 'Islamic society is based on Islamic beliefs and shari'a. It is guided by Islam in its education, culture and media'. This conception of the Islamic state has continued to inform the MB's political activism. In opposition, it pressured the state to narrow the scope of freedom of expression in the name of religion and morality, and in power, President Morsi, backed by the group, took certain constitutional, legal and administrative steps to gradually impose an Islamist version of freedom of expression.

The traditional Islamic law of apostasy, heresy and blasphemy influences the thinking of the MB's scholars about what is permitted and what is not in the Islamic state.[163] But the definition of what constitutes heretical or blasphemous materials has been a source of tension between the MB and many other liberal Muslims. 'Abd al-Qadir 'Auda (1977:286) maintained that 'anything written or said in the Islamic state should be constrained by the texts and spirit of Islamic shari'a'. Salim al-Bahnasawi (2003:84) pointed out that freedom of expression in Islamic law should not tolerate any challenge to fundamental Islamic beliefs or according to al-Ghazzali (2003:206) 'undermine Islam as a creed and shari'a'. Moreover, certain views can lead their authors, according to al-Qaradawi (2005:60), to the status of apostasy if these views deny what is necessarily known of religion, ridicule Islamic beliefs and shari'a or insult God, his Messengers and the holy books. In traditional treatises of Islamic law, heresy refers to 'a person whose teaching becomes a danger to the state' (Saeed and Saeed 2004:39). Many Muslim jurists have maintained that certain acts constitute apostasy, but the list of these acts have not been clearly defined (Johansen 2003:692). The

[163] Saeed and Saeed (2004) and Kamali (1997) provide a detailed discussion of these concepts in traditional Islamic law.

denial of a legal ruling/opinion subject to consensus can become evidence for apostasy according to many Muslim jurists (Hallaq 2009:319). Answering a question on the Islamic fundamentals that cannot be touched by the exercise of freedom of expression, al-Qaradawi (2006c) said in his widely watched TV show:

> Islamic fundamentals are proven by clear and authentic texts from the Qur'an and *Sunna* and unanimously agreed by Muslims across generations such as the belief in God, his books, the Prophet, messengers, the last day and the Islamic rituals, clear Islamic prohibitions and clear rulings of shari'a in the areas of marriage, divorce, inheritance, buying and selling…etc.

Although al-Qaradawi (2005b:52; 2007b:196) held that there is no consensus among Muslim scholars on the death penalty for apostates, he calls for punishing those apostates who 'spread temptation in Muslim society' by propagating apostasy by written or verbal words. This type of apostasy according to him (2005b:52-53; 2006d:62-63) is a 'hard apostasy' *(ridda mughalaza*), an act that amounts to 'fighting God and the Prophet'. However, this type of apostasy is by definition in conflict with freedom of expression and religious freedom. It is not confined to the act of treason or armed rebellion against the state but represses what can be declared by the state to be dangerous ideas or thoughts. As an example, al-Qaradawi (2005b:52) has held that the British novelist of Indian origin Salman Rushdie committed hard apostasy in his 1988 novel *The Satanic Verses*.[164]

Viewing freedom of expression through the lenses of apostasy, blasphemy and heresy is problematic under international human rights norms, because under these concepts, certain theological and religious issues move beyond political or academic discussion. Muslim reformers, atheists and members of unrecognised religious minorities become vulnerable to

[164]The Satanic Verses treats the story of Islam and the Prophet Muhammad in a satirical way. The novel stirred massive outrage among Muslims and it was banned in many Muslim states. On 14 February 1989, the Ayatollah Khomeini of Iran declared Rushdie an apostate and incited Muslims to kill him (Slaughter 1993).

persecution. As stated by An-Na'im (2008:121-122) 'the risks of manipulation and abuse [of concepts like apostasy, heresy and blasphemy] tend to diminish the possibilities for legitimate theological and jurisprudential reflection and development within any Islamic society'. In the next section, we see that such accusations have obstructed the work of many Egyptian writers and artists.

Although MB ideologues and scholars have found that artistic activities are permitted under Islamic law, these activities, according to them, are restrained by certain moral and religious limitations. They hold that artistic activities in the Islamic state should be clean of obscenity or moral corruption. Al-Banna encouraged the practice of artistic activities such as acting, but within certain Islamic limitations. He established a theatrical team to disseminate Islamic teachings and values through plays (Tammam 2004). Al-Khatib (1993:34) stated that 'arts and literature can influence people like a type of alcohol or drugs, inciting them for sin and corruption, but arts can also become a source of purity and high values'. The MB sources refuse to treat arts as an end in itself, rather artistic creativity should be restrained by moral and religious values (al-Qaradawi 1994:300-307; al-Ghazzali 2005b:194). Al-Khatib (1993:61-62) argued that the Qur'an (24:19*)* warns those people who spread sin and obscenity among believers. Al-Ghazzali (2003:204) maintained that freedom of expression should not create a 'moral chaos' in Muslim society; for instance, he refused to consider the work of the classical Arab poet Abu Nuwas (747-815), who was known for his erotic poems, a legitimate practice of freedom of expression.

Al-Qaradawi (1994:300; 306-307; 2004) pointed out that 'Islam permits singing and acting provided that they are not obscene or harmful to Islamic morals'. Al-Ghazzali (2011:72-99) argued that music and singing are not prohibited in the Qur'an and that the *hadiths* used by

those scholars who outlaw music and singing are weak solitary *hadiths*[165] whose narrators are not reliable. Citing the views of the Andalusian jurist Ibn Hazm (994-1064) and the Shafi'i jurist Abu Hamid al-Ghazzali (1058-1111), he argued that the content of these hadiths contradict other forms of sufficient historical evidence which indicate that singing is not absolutely prohibited, He concluded that the permissibility of songs depends on the meaning of their words and the performance of singers; the prohibited songs are the ones that seduce people to follow their 'sinful desires' (al-Ghazzali 2011:85).

Al-Qaradawi (2010a) and al-Ghazzali (1999:164-165) held that women are allowed to sing, as long as their performance is in line with Islamic morals and does not trigger sexual desire. However, this opinion contrasts with a *fatwa* published by al-Khatib (1977) in *al-Da'wa* magazine where he disallowed women from singing on the basis that most Muslim jurists agreed that 'the voice of women is a source of attraction and temptation' and that it could lead to harmful consequences for Islamic morals. This opinion, however, deviates from the positions taken by al-Banna who, according to Tammam (2004) did not oppose the involvement of women in the arts, and even invited renowned Egyptian actresses to take part in some plays sponsored by the MB. Explaining the reason behind al-Khatib's conservative view, Tammam (2004) argued that in the 1970s, some MB scholars were influenced by hardline opinions of the Saudi Wahhabis. But it does not seem that al-Khatib's view on the voice of women dominates the MB today, as there are female TV presenters who have regularly appeared in the MB's media, such as *Misr25 TV*. It is also noted that the view of al-Qaradawi on singing is the one published on Manarat Web, the official website of the MB's Department of *Da'wa* (al-Qaradawi 2013). But when the MB allows women to take part in artistic activities, it follows certain regulations. 'Abd Al-Khaliq al-Sharif (2013), the head of

[165]A solitary hadith is a report transmitted by a number of narrators does not reach that of a continuously recurrent *hadith*. Muslim jurists classified the hadiths according to the reliability of the narrators into authentic, good, weak and fabricated (Kamali 2006).

the educational section at the MB and the editor of Manarat Web, has stated that women should not be allowed to sing in the presence of men. The Muslim Sisters, the female section of the MB, have formed teams of female singers who perform what they consider 'an Islamic musical performance'; they do not perform in front of men (Si'dawi2012).

Paintings, sculptures and photographs are also subject to certain restrictions, although MB scholars tend to be somewhat more accepting of the latter. Photographs are permissible unless their subject matter is incompatible with Islamic morals, but painting and sculpture are prohibited if they portray living beings. Making dolls or figures made of chocolate or sugar however, is permissible (al-Khatib 1981; al-Qaradawi 1994:119-120; al-Ghazzali 2011:98). Most MB scholars agree that the visual depiction of the Prophet and messengers of God is not allowed in Islamic law. According to al-Qaradawi (2007d), 'there is a consensus among the *Sunni* scholars that picturing the Prophet and messengers is not permitted. This is to protect the ideal picture the believers have in their imagination'. 'Abd al-Rahman al-Barr, a leading scholar at the MB's Guidance Bureau has maintained that the visual depiction of the Rightly Guided Caliphs is also prohibited (al-'Ajuz 2012). However, al-Qaradawi has recently held that Islam permits the depiction of the Rightly Guided Caliphs 'Umar and Abu Bakr in a TV series as long as playing these personalities is conducted in a respectful and objective manner. Other Muslim jurists including top leaders of the MB have not supported this view (al-Hay 2010; On Islam 2012).

The limitations proposed by the MB on freedom of expression and freedom of artistic activities are not just religious injunctions to be observed by Muslims in their private lives, but should inform the daily policies of the Islamic state. This vision of freedom of expression has been manifested in the platforms of the MB since 1987. In the electoral platforms of the MB, the state is responsible for monitoring 'the Islamic values and morals' and confronting

'the waves of Westernisation and cultural invasion' (MB 1987; FJP 2011:140). This task provides a justification for state censorship of media and culture when it believes that the Islamic nature of the state is threatened. The 2012 Constitution reflected the view that Islam and its values and culture constitute the identity of the state and society.

3. The Muslim Brotherhood in Opposition

3.1 Pressuring the State to Restrict Freedom of Expression

In opposition, the MB was active in generating intense political and social pressure on state authorities and the political society at large, to censor intellectual and artistic work deemed offensive to Islam and public morals. After its re-establishment in the Egyptian political scene during the 1970s, the group used its monthly magazine *al-Da'wa* as a platform to attack what it considered to be deviations from Islamic and moral values in the media, cultural and artistic sectors. After 1984, the MB utilised its representation in the parliament to mobilise public opinion against certain types of expression. During the 1984 Parliament, MB parliamentarians posed several questions to the Minister of Information, complaining that the content of Egypt's media did not comply with Islamic morals. It recommended that the government form a committee of Muslim scholars to oversee broadcast materials ('Awad and Tawfiq 1995:198-217; al-Tawil 1992:236-234). This agenda was consolidated in the 1987 Parliament after the establishment of the Islamic Alliance between the MB and the Labour Party. For instance, in 1988 and 1989, members of the Alliance posed a series of parliamentarian questions and an interpellation to the Minister of Culture, protesting his approval for showing certain films at the International Cairo Cinema Festival of 1987 and 1988 which, according to them, were in violation of public morals and Islamic values (al-Tawil 1992:267-277). The group explained in Parliament that 'Islam does not oppose arts which do not violate the rulings or principles of Islamic shari'a' (quoted in al-Tawil

1992:267). Other questions were also directed to the Minister of Information about the content of the broadcasting media (‘Awad and Tawfiq 1995:374-406; al-Tawil 1992:243-251). The group repeatedly declared that its campaign to reform the media and culture was necessary to lay the ground for the application of Islamic law (al-Tawil 1992:237).

The same position on freedom of expression continued in the 2000 and 2005 Parliaments. The parliamentarian block of the MB targeted the work of some Arab and Egyptian novelists. I treat many of these cases in the following section. In April 2004, four members of the MB. Including Morsi, who was the speaker of the MB’s parliamentarian block at that time, protested about the organisation of the ‘Miss Egypt’ beauty contest, arguing that ‘it violates Egypt’s constitution, and the fundamentals and sanctities of the nation’ (al-Markaz al-Dawli li al-I‘lam 2005). Opponents to such contests have been vocal in Western societies since the 1960s, many arguing that they objectify women (Sanghani 2014). But we should keep in mind that the MB’s stance on this issue is motivated by its emphasis on female modesty and women’s segregation from men (chapter eight). Leading members of the MB also urged the government to ban certain types of dancing that for them were not acceptable in a Muslim society. In a famous TV debate broadcasted in 2005, Mohammad Morsi (2005) attacked ballet dance and belly dance, stating that a country like Egypt, whose constitution is based on Islamic law, should not host these kinds of arts. The MB continued its pressure on the Ministry of Information and the Ministry of Culture in the 2005 Parliament to censor TV and cinema material (al-Markaz al-I’lami li al-Ikhwan al-Muslimin 2010).

The MB’s advocacy against certain intellectual and artistic products was backed and legitimised by al-Azhar Scholars’ Front, an NGO established by a group of scholars from al-Azhar in 1946 and officially registered in Egypt in 1967. This organisation has been dominated by scholars from the MB, and its political activities and campaigns have served its

political agenda. One of its key priorities has been to oversee the political and legal roles played by the leadership of al-Azhar, and it was very critical of certain positions taken by al-Azhar leaders appointed by Mubarak in the 1990s. Consequently, the government dissolved the NGO in 1998 (Mustafa 2000:16), although it illegally continued its activities.[166] On many occasions, the Front pressured al-Azhar and the government, in attempts to ban books and movies, or prosecute intellectuals and artists. For instance, its scholars engaged in public campaigns against Faraj Foda and Nasr Hamid Abu Zayd, accusing them of heresy. It also pressured the government in 1997 to ban the Egyptian movie the Immigrant (*al-muhajir),* produced by the Egyptian film director Youssef Shahine, accusing the movie of depicting the life of the Prophet Joseph (Mustafa 2000:14; Abu Dif 2013).

3.2 Selected Cases of Censorship

This section discusses the interaction of the MB with some key cases of state censorship of freedom of expression and argues that the political activism of the MB since the 1980s has contributed to increasing restrictions on freedom of expression. The MB was the main instigator of some cases of censorship, and in other cases was supportive of the interference of al-Azhar and the state to restrict freedom of expression. Al-Azhar has been a key player in defining the scope of freedom of expression in Egypt. Since the beginning of the 20th Century, al-Azhar's scholars have been making recommendations to the state to censor certain publications considered offensive to Islam. This role has been consolidated over the last three decades with the rise of political Islam and state attempts to gain the support of al-Azhar in its competition with Islamists (Moustafa 2000; Barraclough 1998).

[166]Many prominent MB scholars have been members of the Front such as Mohammad al-Ghazzali, 'Abd al-Sattar Fathalla Sa'id, Abd al-Hay al-Faramawi, 'Abd al-Rahman al-Barr, Tawfik al-Wa'i, Kahiri Rakwa, al-Sayd Nuh and al-Sayd 'Askar.

According to Article 30 of Decree No. 250/1975 of Executive Regulation of Law No. 103/1961, al-Azhar provides permission for the publication of the Qur'an and gives opinions on the publication of Islamic books.[167] In 1994, the State Council adopted an opinion *(fatwa)* that held that al-Azhar has a mandate to review the Islamic content of any intellectual or artistic work and its decisions in this area are obligatory for the state authorities. The well-known Islamist judge, Tarek al-Bishri, who was heading the Department of *Fatwa* at the State Council at that time, prepared this opinion upon the request of al-Azhar.[168] During the 1990s and 2000s, Egypt witnessed dozens of cases of censorship and forfeiture of intellectual and artistic production (Abu Si'da 2007:187-216). In most of these cases, the MB and al-Azhar agreed on a restrictive version of freedom of expression. At the same time, 'the Egyptian government increasingly saw its political interest in leading rather than following on issues that it perceived could give it Islamic legitimacy' (Chase 2012:139).

The case of the Egyptian judge and scholar Muhammad Sa'id al-'Ashmawi shows this harmony between the MB and al-Azhar on freedom of expression. In January 1992, al-Azhar ordered the removal of five books written by al-'Ashmawi from a presentation at the Cairo International Book Fair.[169] Responding to international and local outrage over this decision, then-President Mubarak intervened and cancelled the ban within the week (al-'Ashmawi 2004:13-22). However, in 1994, another official religious institution, the Supreme Council of Islamic Affairs, announced the ban of al-'Ashmawi's books, accusing his work of insulting Islam and offending the Prophet and the Rightly Guided Caliphs (O'Sullivan 1997:105). In 1979, after the publication of his first book (*usul al-shari'a*), the MB's magazine *al-da'wa*

[167] Article 30, Decree No. 250/1975 of Executive Regulation of law No. 103/ 196, *Official Gazette* no.13bis of 27 March 1975.

[168] State Council, Statement on the Law No.121, 10 February 1994. According to Article 58 of Law 47/1972 on the State Council, executive bodies can ask for any legal opinions from the Department of *fatwa*.

[169] The titles of these books are *'Usul al-Shari'a, al-Islam al-Siyasi, al-Riba wa al-Fa'ida fi al-Islam, Ma'alim al-Islam, and al-khilafa al-Islamiyya* (al-'Ashmawi 2004).

launched a smear campaign against al-'Ashmawi (Abu Isma'il 1979; 'Ashmawi 1979:12-14; 1980:14-15: al-Mat'ani 1979:37-39). In his writings, al-'Ashmawi (1998) has argued for new interpretive methods of the Qur'an and *Sunna* and posed intense critique of political Islam and the application of Islamic law in the modern nation sate. In response to him, Salah Abu Isma'il (1979:61), a prominent MB leader wrote:

> If al-'Ashmawi thinks that the application of shari'a is not the rulings of transactions mentioned in the Qur'an and *Sunna*, we tell him we disbelieve in you and believe in God, the Prophet. He [al-'Ashmawi] should not be permitted to speak to the Muslim society because he hurts the feelings of Muslims and deviates from Islamic sanctities.

Salih 'Ashmawi (1980:15), another leader of the MB, accused al-'Ashmawi of conspiring against Islam and Islamic law and urged him to publicly repent from his views to avoid being charged with apostasy. At that time, Egypt's Parliament was discussing the enactment of Islamic criminal code along other Islamic codes,[170] and 'Ashmawi blamed former President Sadat for delaying the adoption of these codes. This delay, according to him, 'encouraged al-'Ashmawi and other writers to attack Islam'. He was also critical of the media and the Ministry of Culture for publishing views offensive to Islam. This led to very serious cases of intimidation for al-'Ashmawi, who repeatedly received death threats from violent Islamists during the 1980s (Fluehr-Lobban1998:2), and remained under continuous security protection until 2011.[171]

The harassment of Egyptian secular intellectuals turned bloody in the 1990s. While it was the militant Islamists who were directly involved in violence, the campaigns orchestrated by the MB fuelled the ill sentiment of these militants against liberals and secular Muslims. Militant

[170] In 1977, al-Azhar proposed a draft law of apostasy which stated that a Muslim can be declared an apostate if he/she 'denies what is necessarily known of religion' (quoted in 'Abd al-Fattah 1984:159). Apostasy was also considered a crime in the Islamic criminal law proposed by the People's Assembly (1982:112-120).

[171] In a meeting with al-'Ashmawi in Cairo in January 2013, he informed me that his security protection was cancelled after Islamists took over power in 2012.

Islamists killed the secular Egyptian intellectual and politician Faraj Foda in 1992 in response to his call for a separation between state and religion, and his critique of the application of Islamic law. In his writings and talks, Foda had refuted the ideological underpinnings of Islamists and called for drastic Islamic legal reform (Najjar 1996:4), which many Islamists viewed as deviating from the fundamentals of Islam and heretical, rather than another possible interpretation of Islam. For instance, Muhammad Salim al-'Awa, a famous Islamist thinker claimed in a public debate with Foda that secularism is a form of atheism ('Umara 2011b:36).[172] It was clear from the context of the debate that this statement was made on purpose to delegitimise the idea of the secular state. Foda strongly objected to this statement and considered it an attack on his personal religious faith ('Umara 2011b:48-49).

Islamists participated in public debates with Foda not to engage in thoughtful discussion with his critical views, but to convert him back to Islam. Mohammad al-Ghazzali stated in an interview in al-Ahram newspaper that he was keen to attend a public debate with Foda to encourage him to repent from his views and 'return him back to faith' but he failed, because Foda, according to al-Ghazzali, was 'hostile to Islam and its system' (quoted in al-Qaradawi 2000:290). It comes with no surprise that in his testimony in 1993 before the High Court of State Security – which tried the killers of Foda – al-Ghazzali provided a juristic justification of the assassination of Foda and the persecution of religious dissidents in Egypt. He blamed Foda for his thought, instead of condemning his murderers. Al-Ghazzali publicly stated at the court that 'a Muslim who insults and denies the application of shari'a is an apostate and should be subjected to death sentence if he/she insists on spreading his/her corrupted views in the society' (quoted in al-Qaradawi 2000: 283-284). According to al-Ghazzali, 'it is a

[172] Few months before his assassination, Foda participated in two famous public debates with prominent Islamists on Egypt between the Islamic state and the civil state. Amongst the Islamists who debated, Foda were the MB ideologue Mohammad al-Ghazzali and the mouthpiece of the MB Ma'mun al-Hudaiby. The transcripts of these debates are collected by 'Umara (2011a:2011b).

violation of the ruler's powers if ordinary persons volunteered to implement the punishment', but he informed the judges that there 'is no punishment in Islamic law for that' (quoted in al-Qaradawi 2000:285). In a press interview after the trial, al-Ghazzali said that 'the government can apply discretionary punishment against persons who disregard the ruler and apply Islamic penalties by themselves' (quoted in al-Qaradawi 2000:291). In July 2012, President Morsi pardoned Abu al-A'la 'Abd Rabbu, one of the killers of Foda, along with other violent Islamists who had been subjected to exceptional trials under Mubarak. In a TV show, 'Abd Rabbu justified his crime by accusing Foda of being an apostate ('Abd Rabbu 2012; Al-Mesryoon 2012).

Two years after the killing of Foda, the Egyptian novelist and Nobel laureate Naguib Mahfouz survived an attempt on his life by an Islamist militant. This attempt was preceded by a campaign led by the MB and militant Islamists against Mahfouz and his novels. In a religious opinion (*fatwa*), 'Umar 'Abd al-Rahman, the leader of the jihad militant Islamist group, had accused Mahfouz of apostasy, and Islamists and prominent scholars at al-Azhar had harshly criticised his novels. Among these, in particular, was *The Children of Gaballawi* (*awlad haritna*), which has sparked controversy in Egypt since its publication in 1959, and had been banned for some time by presidential decree due to a report prepared by a committee of scholars from al-Azhar, of which Mohammad al-Ghazzali was a co-author (O'Sullivan1997:108).

After Mahfouz won the prize, the MB's magazine *al-I'tisam* wrote that his novels 'destroy the authentic values and indult God, the Prophet and the messengers', adding that 'the West appreciates Arab novels which are based on atheism and unrestricted by Islamic values' (al-Jindi 1988:21-25). In 1989, the global storm caused by *The Satanic Verses* of Salman Rushdie empowered Egypt's Islamists to take tough positions on secular writers and

novelists. *Al-I'tisam* published that Rushdie and Mahfouz are both part of the Western secular conspiracy against Islam. The magazine stated that *The Children of Gaballawi* closely resembles *the Satanic Verses*, affirming that the two novels insult God and Islam and the Prophet (al-'i'tisam1989b:5-7*)*. *Al-I'tisam* announced that Mahfouz's novel contains clear disbelief and demanded the trial of Mahfouz (al-Jindi 1989b:18-20). In 1994, al-Ghazzali 'condemn[ed] those who advocate the publication of *Awlad Hartina* calling them a 'band of brokers of *kufr* ... heretics ... who hate God and Islam' (quoted in Najar 1998:155).

The MB has not changed its hostile position to the work of Mahfouz, and even distanced itself from a more lenient view developed by one of its prominent leaders, Abdel Moneim Abu al-Futuh. The leader stated that controversial novels should not be published by the state, but that the private sector should be free to publish any book, even if one of these books calls for atheism. Abu al-Futuh had also visited Mahfouz in 2004 and encouraged him to publish *awlad haritna* (Saad 2012:88). The mouthpiece of the MB, Mahmoud Ghuzlan (2012) criticised Abu al-Futuh's opinion on freedom of expression and considered his view a deviation from the thought of the MB.

The first time a court declared an Egyptian citizen to be an apostate was in the famous case of the Egyptian academic, Nasr Hamid Abu Zayd. In this case the defendant did not intentionally convert from Islam, but the Court of Cassation held that Abu Zayd's published views on the development of the Qur'an and jurisprudence proved his apostasy. It consequently ordered the dissolution of his marriage to his Muslim wife (Moustafa 2010:20-21; Najjar 2000).[173] Ma'mun al-Hudaiby (1996), the former General Guide of the MB and the Deputy General Guide at that time, applauded the judgment and expressed his astonishment at those people who opposed the judgment, stating that 'challenging the beliefs of the Muslim

[173] Court of Cassation, Cases Nos. 475,481 and 478/65, 5 August 1996.

umma, the Qur'an and Islamic shari'a is not freedom of expression or a practice of ijtihad'. The legal action against Abu Zayd had been filed by a group of Islamist lawyers. Until 1996, any citizen could file a *hisba* case at family courts, challenging the violation of family law or the doctrines of Islamic law). According to Article 6 of Law No.462/1955 Abolishing the Shari'a and *Milli* Courts, judges apply the most famous opinion of the Hanafi School of law to such cases, if they do not find a resolution for any legal matter in the Personal Status Law. Accordingly, the conversion of one of the spouses from Islam could make the marriage void (Najjar 2000:190-191; Balz 1997). In an attempt to calm the international and domestic outrage caused by this case, the government then moved to restrict the use of *hisba* in Egyptian courts, and according to Law No.3/1996, the General Prosecutor became the only entity that can file *hisba* cases in family matters.[174] Al-Bahnasawi (2003:28) was critical of this legal amendment, because it limits the ability of individuals to observe the rulings of Islamic law.

In 2000, Islamists and al-Azhar considered the novel *A Banquet of Seaweed (walima li a'shab al-bahr),* written by the Syrian novelist Haider Haider, to be blasphemous and offensive to Islam. The novel was published by the Ministry of Culture in 1999. Islamists played a major role in triggering this case. The Islamist newspaper *al-Sha'ab*, the mouthpiece of the Labour *(al-'amal)* Party and a close ally of the MB since 1987, led a media campaign against the novel and its writer, calling for popular demonstrations. This episode started with a provocative article by the Islamist writer, Mohammad 'Abas (2000), in which he attacked the publication of the novel, accusing it of disseminating unbelief. He also declared its writer and publishers to be unbelievers, and quoted sentences said by some characters of the novel in which the Qur'an and God are mocked and insulted. He prompted al-Azhar and its students to protest, and urged the state to ban the novel and prosecute its publishers. As a

[174] Law No.3/1996 on the Regulation of *hisba* Cases in Family Matters, *Official Gazette* no.4bis of 29 January 1996.

reaction to this campaign, massive protests erupted among students at Al-Azhar University. In response, the author of the novel stated that those who attacked the novel extracted some parts of the novel from its literary context to provoke public opinion (Haider 2000). In defense of the novel, other Egyptian intellectuals asserted that literature has special rules of critique, and that the overall message of the novel should be evaluated (al-Namnam 2000:237-244). However the Islamic Research Academy (2000) accused the author of deviating from the rulings of Islamic shari'a and public morals through the novel, adding that it features obscene words and calls for sex outside of marriage.

Although the main instigator of this crisis was the Labour Party and its newspaper, the MB was supportive of the campaign against the novel. The state's crackdown on the MB was intense during the 1990s but the Labour Party and its newspaper provided the MB with a political and media platform. As observed by the journalist Andrew Hammond (2000), who covered this crisis from Cairo, 'if the banned group had card-carrying members, *al-Sha'ab* editor-in-chief Magdy Hussein would probably fit the description'. In a public statement released on 30 April 2000, the MB (2000) expressed its deep concerns at the publication of the novel and asked the General Prosecutor to initiate a case against the state officials who ordered the publication of the novel by the Ministry of Culture. The statement concluded that 'the novel flagrantly insults Islam and God'. At the end of the statement, the MB warned Egyptians against 'a conspiracy against the nation's identity and values undertaken by a minority of people who occupy senior government positions'. This statement indicated the anger of the MB at the policies of the Ministry of Culture (and we see later on that once the group took power in Egypt, it attempted to marginalise secular intellectuals and public servants from the public cultural sectors). The MB also mobilised its members and supporters at al-Azhar University to organise public protests against the novel, and its leaders attended a public conference held in Cairo against the novel under the name of the 'Anger for God' (al-

Namnam 2000:76). The statements made by its leaders and scholars were also supportive of banning the novel (Qimiha 2000; Heshmat 2001; al-Qaradawi2007a).

Some commentators have argued that the intense involvement of Islamists in this incident was driven by their plans at that time to run for the parliamentary elections to be held in November 2000 (Hamond 2000). During this crisis, the Minister of Culture Farouk Hosny, was critical of Islamists' campaign against freedom of expression and defended the publication of the novel. However, this position changed during the 2000s when Hosni started to compromise with Islamists. This change coincided with the political rise of the MB in Egypt's Parliament from 2000.

In January 2001, Mohammad Jamal Hishmat, a MB parliamentarian presented a question to Farouk Hosny about the publication of three novels by a public cultural institution, claiming that the novels contained obscene and sexual phrases and content. The three novels are *Before and After* (*qabil wa ba'd*) by Tawfiq 'Abd al-Rahman*, The Sons of the Romantic Sin (abna' al-khata' al-rummansi)* by Yasser Sha'ban*, Prohibited Dreams* (*ahlam muharama*) by Mahmoud Hamid (Al-Markaz al-Dawli li al-'I'lam 2005). Hishmat held that the novels threatened the societal morals and public order. Commenting on his action, Hishmat (2001) stated that:

> Absolute freedom of artistic creativity does not suit the Arab and Muslim peoples. Egypt's Constitution says that the Islamic shari'a is the main source of legislation and that Islam is the official religion of the state so the Ministry of Culture violated the Constitution and the public morals by publishing these novels.

As a reaction to this campaign, Farouk Hosny banned the publication of the three novels and dismissed five senior officials who were responsible for publishing them. The action of the MB and the reaction of the Ministry of Culture provoked secular and liberal intellectuals and

artists, who feared that the state was conceding to the conservative demands of Islamists (al-Jazeera Net 2001). These fears were indeed valid, as the government then continued its compromises with Islamists at the expense of freedom of expression. In 2003, the Ministry of Culture banned another poetic work titled *Recommendations in the Love of Women* (*wasaya fi 'ishq al-nisa'*) authored by the Egyptian poet Ahmed al-Shawi and printed by the Ministry of Culture. The MB's parliamentarians protested against the sexual phrases in the book and the use of some verses of the Qur'an and Prophetic sayings in the poems (al-Markaz al-Dawli li al-'I'lam 2005).

The Egyptian poet Helmi Salim (1951-2012) was another intellectual whose freedom of creativity was exposed to censorship and intimidation. Salim published a poem titled *The Balcony of Laila Murad* in one of Egypt's state-owned magazines called *Creativity* (*Ibda')* in April 2007. Salim used controversial metaphors in his poem, by for instance, equating God with a villager force-feeding a duck. Salim won the annual state prize in literature in June 2007 in an appreciation for his contribution to literary life in Egypt, yet MB parliamentarians launched a campaign at the parliament to withdraw the prize, claiming that the poem was more offensive to Islam than the satirical Danish Cartoons of the Prophet (Hamad 2007). The Islamic Research Academy at al-Azhar strongly criticised the poem and accused Salim of propagating atheism in society. Based on a lawsuit filed by an Islamist lawyer in April 2009, the Court of Administrative Justice cancelled the decision of the Ministry of Culture to grant Salim the prize, and in April 2009, the Court of Administrative Justice revoked the license of the magazine, *Ibda'*. The court stated that 'press freedom should respect the fundamental religious and moral values of the society'.[175]

[175] Court of Administrative Justice, Case No.1751/61, 7 April 2009.

3.3 Advocacy for Anti-Blasphemy Laws

Egypt's anti-blasphemy laws were repeatedly implemented under the rule of former President Mubarak to prosecute writers, novelists and bloggers accused of offending Islamic doctrines. For instance, in 1991 'Ala' Hamid**,** an Egyptian novelist was sentenced to eight years in prison for the publication of his novel *Distance in a Man's Mind* (O'Sullivan 2003:109-112). In 2001, the Egyptian writer Salah al-Din Muhsin was sentenced to three years in prison for writing critical books about Islam and divinity that the court considered blasphemous (O'Sullivan 2003:99-102). In 2007, the Egyptian blogger, Karim Amer was sentenced to three years in prison for publishing articles on his blog that an Egyptian court considered blasphemous against Islam and al-Azhar.[176]

The criminalisation of blasphemy was integrated in the first codified criminal law promulgated in Egypt in 1883. Article 161 of this law criminalised any contempt of religions practiced publicly in Egypt.[177] The notorious prosecution of the Egyptian intellectual and writer Taha Hussein (1889-1973) in 1926-1927 was based on this article. After pressure from al-Azhar, Hussein was charged with blasphemy for the publication of his book 'On Pre-Islamic Poetry'[178] but the prosecutor closed the case, stating that Hussein was conducting an empirical research and that he did not intend to commit blasphemy against Islam.[179] The Penal Code No.58/1937 criminalises certain offences against religions and public morals. The most famous one is Article 98bis of Law No.29/1982 which says that:

> The imprisonment for a period of not less than six months and not exceeding five years, or a fine of not less than five hundred pounds and not exceeding one thousand pounds shall be the penalty inflicted on whoever makes use of religion in propagating, either by words, in writing, or in any

[176] See General Prosecutor v. Karim Amer, Eastern Alexandria Misdemeanor Court of Appeals, Case No.8240/2007, 12 March 2007.
[177] Article 139 of National Penal Code, 13 November 1883. It became Article 139 under the Penal Code of 1904
[178] In this book, Hussein challenged the authenticity of pre-Islamic Arabic poetry and questioned the occurrence of some incidents mentioned in the Qur'an (Silawi2006).
[179] The full text of the decision of the General Prosecutor in (Silawi 2006:267:282).

> other means, extreme ideas for the purpose of inciting strife, ridiculing or insulting a heavenly religion or a sect following it, or damaging national unity'.[180]

Moreover, Article 160 of the Penal Code provides up to three years imprisonment for 'the destruction, vandalism, or desecration of religious buildings, sites, symbols, cemeteries, and graves, as well as the hindering of religious ceremonies'.[181] The same penalty is prescribed in Article 161 for 'the printing and dissemination of deliberately distorted religious texts for recognised religions, and also criminalises, the mocking or ridicule of religious ceremonies in public'.[182] Article 178 provides up to two years of imprisonment and or a fine of 5000-10000 LE for 'possession, distribution, or manufacturing of documents in violation of public morals'.[183]

The publication of the satirical cartoons of the Prophet Muhammad in the Danish newspaper J*Yllands Posten* in September 2005 intensively renewed the domestic and international debate on religion and freedom of expression. The Egyptian government was amongst the Muslim states that contributed to the transformation of this incident into an international upheaval (Klausen 2009:39). However, this act appears to have been politically motivated, as some have argued that Mubarak wanted to further his domestic popular legitimacy and co-opt his influential Islamist political competitors by appearing as the guardian of Islam (Mayer 2012:198-199; Klausen 2009:167-179; Chase 2012:133-134). Al-Qaradawi (2006c) was outspoken about the crisis. In a Friday sermon in February 2006, he called Muslims all over the world to protest the cartoons in a day he named 'a Day of Rage'. He took this occasion to harshly criticise Arab and Muslim states for what he considered weak political responses to

[180] Law No.29/1982 Amending Penal Code No.58/1937, *Official Gazette* no.16 of 22 April 1982, translated in Farahat, C. (2008).
[181] Article 160 of Penal Code No.58/1937 amended by Law No.113/2008, translated in Freedom House (2010:24).
[182] Article 161 of Penal Code No.58/1937, translated in Freedom House (2010:24).
[183] Article 178 of Penal Code No.58/1937, translated in Freedom House (2010:24).

attacks on Islam, accusing them of acting as subordinates to the US. He also urged Muslims to boycott Danish and European products because of their silence on the cartoons, and urged the international community to ban blasphemy, saying in his sermon:

> The governments must be pressured to demand that the U.N. adopt a clear resolution or law that categorically prohibits affronts to prophets - to the prophets of the Lord and His messengers, to His holy books, and to the religious holy places. This is so that nobody can cause them harm. They enacted such laws in order to protect the Jews and Judaism (al-Qaradawi 2006e).

As the most powerful opposition group at that time, the MB escalated its responses to the cartoons. It led the street protests in Egypt and urged Mubarak to take tough diplomatic measures against the Danish government. It called upon Arabs and Muslims to boycott Danish products.[184] In their campaign against blasphemy, MB leaders cited the criminalization of anti-Semitism and Holocaust denial in many Western states, accusing the West of double standards because of their silence on the contempt of Islam (Sa'id 2006; al-Qaradawi 2006e). The MB's parliamentarians proposed an amendment to the Penal Law in order to allow Egypt's General Prosecutor to prosecute the perpetrators of blasphemy even if the alleged acts of blasphemy were committed by non-Egyptians in foreign states ('Adel 2006).[185] This amendment was dismissed by the parliament but in this tense political atmosphere, the criminalisation of blasphemy in Egypt was strongly legitimated.

Nevertheless, Egyptian human rights NGOs have opposed anti-blasphemy laws and warned against their misuse to restrict freedom of expression. Some key NGOs joined the international human rights movement in campaigning against diplomatic efforts orchestrated by the Organisation of Islamic Cooperation (OIC) to justify blasphemy laws (CIHRS et al

[184] Official Records of the People's Assembly, Report No.15 of 23 February 2006, p.13.

[185] Egypt's criminal law is applied to foreign nationals who commit a crime on the Egyptian territories and other crimes related to state security but blasphemy is not amongst them. The MB proposed that Egypt's courts have universal jurisdiction on the crime of blasphemy. See Article 2 of Penal Code No.58/1937.

2008). In December 2008, dozens of prominent Egyptian and Arab intellectuals and human rights defenders called upon the Arab and Muslim governments in a public petition to refrain from using religion as a pretext to infringe on academic freedom, freedom of artistic creativity and religious freedom. They maintained that state censorship of religious ideas undermines the development of religious thought. This initiative was an outcome of a conference organised in Paris in November 2008 by the Cairo Institute for Human Rights Studies (CIHRS 2008) on religion and freedom of expression in the Arab world.

In conclusion, the MB have firmly blamed Mubarak's regime for its encroachment on freedom of expression. However, its political experience under Mubarak shows that its advocacy for freedom of expression actually meant the protection of political expression, which was necessary for its activities in opposition. In its platforms and in Parliament, the MB was outspoken against restrictions on media and freedom of assembly (Brown and Hamzawy 2010:9-35). However, its political activism obstructed rather than supported the practice of many other aspects of freedom of expression in Egypt. The MB's interventions in the previous cases have exerted pressure on Muslim reformers and secular intellectuals who found themselves pursued by accusations of heresy and apostasy. Moreover, given its organisational and social strengths, the MB's campaigns embarrassed the state and pushed it in many cases to concede to the Islamist version of freedom of expression. This was manifested in the increasing role given to al-Azhar to monitor intellectual and artistic production. We see in the following sections that many intellectuals and artists in Egypt did not trust the political rise of the MB after 2011 because of its record under Mubarak and the continuation of its restrictive approach to freedom of expression in the post-Mubarak era.

4. The Muslim Brotherhood in Power

4.1 The 2012 Constitution

The 2012 Constitution, written by the Islamist-dominated Constituent Assembly, protected freedom of expression but subjected it to broad limitations. Article 45 of the 2012 Constitution said that 'freedom of thought and opinion are guaranteed. Every person has the right to express his opinion in speaking, writing, image, or otherwise'. It also included articles on 'the freedom of journalism, the press, the publishing industry and other media', 'the freedom of scientific research' and 'the right to creative expression in its various forms'. However, other articles entrusted the state with broad powers to restrict freedom of expression. Article 10 said that:

> The family is the foundation of society. The family's foundations are religion, morality, and patriotism. Both state and society seek to preserve the inherent character of the Egyptian family, its cohesion, stability, and moral character, and to protect the family.

Article 11 stated that, 'the state promotes morality, decency, and public order, as well as religious and patriotic values'. The ambiguous moral and religious tasks given to the state in these two articles created fears among liberals and human rights defenders during the constitution-making process. Although similar articles existed in the 1971 Constitution,[186] the changing political context after Mubarak, in which Islamist parties became the strongest actors, increased the fears that these articles legitimate the state's encroachment on personal liberties and freedom of expression. Under the 1971 Constitution, these articles were used by judges to justify certain restrictions on artistic works.[187] What was also at stake is that Article

[186] See Articles 9 and 12 of the 1971 Constitution.

[187] See Court of Administrative Justice, Case No.31328/61,1 April 2008. Article 12 was invoked by the Court in the case of Helmi Salim. See also Court of Administrative Justice. Case No.10355/63, 12 May 2009. In this case, the court cited Articles 9 and 12 of the 1971 Constitution to order the shutdown of pornographic web sites on the Internet.

10 speaks about the responsibility of the state and society in preserving morality and religious values. Critics of this article argued that it would lay the legal ground for establishing religious and moral police, similar to the practices in Iran and Saudi Arabia (Tadros 2013b). Article 81 said that 'all rights and freedoms are practised provided they do not conflict with the essential elements of state and society'. Islamic shari'a comes top of these elements. Thus freedom of expression would be limited in practice by the reference to Islamic law. For the first time in Egypt, the Constitution also explicitly prohibited blasphemous expression. Article 44, which was proposed by Salafists and al-Azhar and backed by the MB (Almasry 2012), said that 'insult or abuse of all religious Messengers and Prophets shall be prohibited'.[188] This constitutional provision protected the blasphemy law from any challenge before the SCC. It would also allow the legislator to toughen the punishment for blasphemy.

4.2 A Strained Relationship with Intellectuals and Artists

A lot of intellectuals and artists were worried about the political rise of Islamists in the post-Mubarak era. Their work had been under attack for decades from the MB. But there were also other worrying signals that increased their fears. Amongst these indicators was the marginalisation of liberal voices in the constitution-making process, as well as the controversial articles in the new constitution on freedom of expression. However, what furthered their fears was the rise of legal actions initiated by Islamist lawyers against prominent movie stars, writers and journalists, accusing them of blasphemy or corrupting public morals. Generally, citizens submit complaints to the General Prosecutor who then opens investigation and refers persons accused of blasphemy to criminal courts. Additionally, Egypt's Law of Criminal Procedure allows citizens to file lawsuits against the perpetrators of

[188] Article 44 of the 2012 Constitution.

misdemeanours,[189] so that lawyers can file blasphemy cases against other citizens without submitting a complaint to the General Prosecutor.

For instance, in January 2012, the popular film star and UN Good Will Ambassador Adel Imam was sentenced to three months in prison on charges of blasphemy. The court held that in his films, Imam mocked Islamic symbols and dress such as the beard and the garment.[190] The Misdemeanor Court of Appeal overturned this judgment on in September 2012, arguing that Imam was critical of certain social and political behaviour and not Islam per se.[191]Another case was initiated against Adel Imam and five prominent film directors and scriptwriters in another court in April 2012, but the Court did not find them guilty.[192] This latest judgment uniquely introduced a new interpretation of the crime of blasphemy and has widened the scope of freedom of expression (see section 3.2.3 below).

Under Morsi, the General Prosecutor received dozens of complaints, accusing journalists and writers of blasphemy and followed up on some of these complaints such as the cases of the prominent journalist and TV presenter Ibrahim Eissa and the renowned satirist Bassem Youssef. These two persons were also known for their critical comments of Salafists, the MB and President Morsi. The General Prosecutor summoned the two persons and interrogated them, but the cases were kept pending without trial (CPJ 2012). However, even though they did not reach the courts, these kinds of cases aimed to intimidate the targeted persons, their media organisations and other critical voices in general.

There is no evidence that members of the MB submitted blasphemy complaints to the General Prosecutor against artists, writers and journalists, but neither President Morsi nor the

[189] See Article 232 of Law of Criminal Procedure No.150/1950, *Al-Waqa'i' al-Massriyya* no.90 of 15 November 1951.
[190] 'Asran Mansur v. Adel Imam, Misdemeanour Court of al-Haram, Case No.24215/2012, 17 January 2012.
[191] 'Asran Mansur v. Adel Imam, Al-Haram Court of Appeal, Case No.24215/2012, 12 September 2012.
[192] 'Asran Mansur v. Adel Imam and others, Misdemeanour Court of al-'Ajuza, Case No.529/2012, 26 April 2012.

Islamist-majority in Parliament took any legal measures to protect intellectuals and artists. On the contrary, the performance of the MB in the constitution-making process and the positions of its platforms on freedom of expression do not suggest that the group wanted to open up the space for freedom of artistic creativity. In January 2012, al-Azhar intervened to set the boundaries between Islamic law and freedom of expression, by publishing a document on this issue. This asserted that Islam tolerates freedom of artistic creativity and academic freedom, but at the same time subjected freedom of expression to ambiguous Islamic qualifications that open the door for arbitrary restrictions (al-Azhar 2012).

Commenting on this document, 'Abd al-Rahman al-Barr (2012a) endorsed previous actions taken by al-Azhar against academic freedom, freedom of expression and artistic creativity, stating that freedom of expression should respect religious sensibilities and societal moral values. The MB's endorsement of blasphemy cases against journalists and intellectuals was also obvious in a statement released by the FJP in support of the investigation against the satirist Bassem Youssif. The FJP (2013) rebuffed US pressure to drop the accusation against Youssif, arguing that he was accused of blasphemy, 'a crime that touches the religious feelings of Egyptians'. The statement added that Egyptian people would understand that Western countries, like the US, 'condone the crime of blasphemy committed by some Egyptian journalists'.

The tension escalated between President Morsi and intellectuals in May-June 2013 because of what was considered by many intellectuals and artists to be an attempt by the MB to control the public cultural sector and marginalise liberal and secular intellectuals and artists. In a limited reshuffle in May 2013, President Morsi appointed Alaa Abdel Aziz, a professor of cinema who was not widely known among Egyptian intellectuals and artists, as the new Minister of Culture, which, in Egypt, controls significant cultural and artistic sectors funded

by public money. Given the long reputation of the MB in supporting state censorship of intellectual and artistic activities, many liberal and secular intellectuals and artists were concerned about the future of freedom of expression under the rule of the MB. The decisions and statements made by the new Minister increased their concerns. Abdel Aziz announced his plan to purge the Ministry of Culture of corrupt officials. He did not submit cases to the General Prosecutor or conduct an impartial investigation, but used his powers to dismiss a group of senior officials in various cultural sectors, including the President of the Egyptian Association of Books and the President of the Opera House (Loveluck 2013).

This action coincided with demands made by Islamist members of the *Shura* Council to ban ballet dance, accusing it of being obscene and immoral. The *Shura* Council also decided to cut the arts budget (Loveluck 2013). A few months before the controversy over ballet, the Court of Administrative Justice had ordered the closure of a famous TV channel specialised in broadcasting belly dance shows. The Court held that 'the content broadcasted in the channel violates public morals and fundamental religious beliefs'. The Court built its reasoning on different constitutional provisions like Article 10 and 11 that give the state and society the responsibility to protect public morals and religious values.[193] A senior member of the MB welcomed the judgment, saying that it aims to 'protect the community's values'. He added 'like rotten food, there are rotten ideas being fed to our society' (quoted in Mekky 2013).

The official website of the MB introduced Abdel Aziz as 'a person who wholeheartedly believes that the identity of the Egyptian people is Islamic' (al-Qa'ud 2013). In an interview with Ikhwan Online, Abdel Aziz stated that 'culture in Egypt is monopolised by leftists and deviant intellectuals', adding that 'the Egyptian people are religious and the Islamisation of

[193] Court of Administrative Justice, Case No.41852/66, 16 February 2013.

culture is a normal thing in a country dominated by Muslims'. Abdel Aziz was firm that 'any intellectual or artistic creativity that is offensive to religions or sanctities cannot be tolerated at all' (al-Qa'ud 2013). The MB's official media supported the new Minister of Culture and explained his decisions to the public. For instance, Helmi al-Qa'ud (2013a) a prominent intellectual affiliated with the MB wrote on Ikhwan Online that:

> Those intellectuals who protest the new minister are the ones who supported Mubarak in his war against Islam and Muslims. They spread corruption, obscenity, apostasy and heresy among Muslims. They defended the communist Syrian novelist Haider Haider who insulted God in his novel A Banquet for the Seaweed. They also excluded any voice defending the religion, culture and values of the Muslim *umma*.

In another article, the same writer encouraged President Morsi to further the Islamisation of state institutions, saying that:

> Islamists should not leave the cultural sector to liberals, Marxists or Nasserists who want to displace Islam. Islamists should know that they committed a grave mistake when they allowed the enemies of Islam to brain wash the minds of Muslims through the ministries of culture, education and media (al-Qa'ud 2013b).

The accusation that Egypt's culture was monopolised by secularists before the MB came to power is ill-founded, since Islamic activities and publications were always sponsored by the state. But for the MB, Islamic culture should guide all intellectual and artistic activities in the state. These statements indicated that the MB government was inclined to censor artistic and intellectual activities as it was advocating for in opposition. The attitudes of the Minister of Culture towards freedom of expression and censorship do matter in Egypt since key artistic institutions and public publishing houses work under his supervision. The Egyptian

Censorship Bureau, which provides licenses to screen audio-visual materials, is also subordinated to the Ministry of Culture.[194]

Hundreds of intellectuals and artists refused to concede to Abdel Aziz and announced their engagement in an open sit-in in front of the Ministry of Culture to pressure Morsi to remove him. They announced that the new minister would undermine the cultural and artistic sector in Egypt. Many other prominent political and human rights activists expressed solidarity with this movement and joined the sit-in (Loveluck 2013). Young activists who opposed the MB's version of artistic creativity used media such as ballet in their protests to express their anger and to show their appreciation of the arts (Mourad 2013). Morsi made no efforts to bridge the gap with his opponents. But the steps taken by Egypt's intellectuals and artists escalated the pressure on the MB at a time when they were facing increasing societal opposition and dissatisfaction.

I explained in the beginning of this chapter that MB scholars agree that government under Islamic law is responsible for observing the respect for Islamic morality and values in society and in different state institutions. The implementation of this theory in practical terms means that one ideological trend is likely to control public institutions and that the state becomes less tolerant of non-Islamist worldviews and ideologies. Under this vision, Islamists risk considering their electoral victory to be a blanket popular mandate to reengineer state institutions and society along their Islamist ideological lines, without limitations. Human rights and constitutionalism becomes very relevant in this regard to provide for certain safeguards in order for the state to avoid becoming 'the immediate agent of the ruling party . . . so that those excluded by the political process of the day can still resort to state organs and

[194] See Law No.430/1955 on the Censorship of Audio-Visual Materials, 3 September 1955.

institutions for protection against excessive use or abuse of power by state officials' (An-Na'im 2008:5-6).

4.3 The Rise of Blasphemy Cases

In the post-Mubarak era, blasphemy cases reached a peak. EIPR (2013:12-13) documented 36 blasphemy cases from March 2011 to December 2012. The defendants in 19 cases were members of religious minorities such Christians, Shi'as and Ahmadis, and the remaining cases involved Sunni Muslims. The high number of cases continued under President Morsi (Chick 2013). According to EIPR (2013:16-17), blasphemy cases in the post-Mubarak era coincided with certain political occasions of high political and religious polarisation in society such as the presidential elections in June 2012, the parliamentary elections in early 2012 and the referendum on the constitutional amendments in March 2011. A new trend in the post-Mubarak era has been for laypersons to be increasingly charged with blasphemy for making statements or actions in their normal daily lives deemed offensive to Islam.

One can argue that the political influence of Islamists in the post-Mubarak era endorsed the use of the blasphemy law. The MB has defended the criminalisation of blasphemy since the crisis of the Danish Cartoons. Salafists and the MB were keen to prohibit blasphemy in the 2012 Constitution for the first time in Egypt's constitutional history. In some blasphemy cases members of the MB and Salafists incited the public against the accused persons (Hubbard and El Sheikh 2013). According to EIPR (2013:15) the highest number of blasphemy cases occurred in Upper Egypt, a region where Islamists have enjoyed significant presence.[195] EIPR (2013:127) has observed the interference of Islamists in some of these cases. For instance, in October 2011 in Minya Governorate in Upper Egypt, members of the

[195] According to a research on voting patterns in the post-Mubarak era published by Rand Corporation, Islamists run strongest in the governorates of Upper Egypt (Martini and Worman 2013:1).

MB and Salafists pressured the government to forcibly evict a Christian family from its housing area in reaction to an allegation of blasphemy against a member of the family. Other similar cases have been also documented in Asyut in late 2011 and early 2012.

In September 2012, the issue of blasphemy came to the fore after the crisis of the *Innocence of Muslims* (2012) film. This crisis began after a group of Egyptian American Christians released on the Internet a low-budget film which accused the Prophet Mohammad of fabricating the Qur'an and portraying him and some of his companions as power-hungry, bloody and sex-crazed. This film sparked fierce popular anger in Egypt and other Arab and Muslim states. A massive demonstration of Islamists was organised in front of the US embassy. The state tolerated the demonstrations in the first day of the crisis, letting some Islamists climb the walls of the embassy and replace the American flag with a black flag with the Islamic declaration of faith (*shihada)*. The US protested the lack of the protection of its embassy and the police started to disperse protesters the following day (Sydow 2012).

In power, the MB was most likely keen to build confidence with the West, and particularly the US, which may explain why its international reaction to this film was much softer than its reaction to the Danish Cartoon when it was in opposition. After the release of the film, the MB (2012) urged the international community to adopt legal measures against the defamation of religion. It supported the trial of the movie's producers but it tried to avoid any political turbulence with the US. The Salafists led the popular mobilisation against the movie. Being under political pressure from Salafists, Morsi was reluctant to disperse protesters who attacked the American embassy but he had to intervene later when Egypt's relations with the US was endangered (Afify 2012). A criminal court convicted the producers of the movie in absentia. Seven Egyptian American Christians were sentenced to death for blasphemy and treason, and an American priest was sentenced to five years in prison for blasphemy. The

charge of treason was based on other statements made by the Egyptian producers of the film where they called for a separate state for Egyptian Christians and invited the international community to intervene to protect Christians from persecution. The judges who examined the case urged the lawmakers to legislate death penalty for the perpetrators of blasphemy.[196]

This crisis was an opportunity for Islamists to reinforce their restricted version of freedom of expression. In a public statement, the FJP (2012) stated that blasphemous speeches are not protected by IHRL, since freedom of expression is limited by public order and morals. The statement accused Christian Egyptians living in foreign countries of conspiring against Egypt by producing this movie. This general accusation came at the time when Egyptian Christians had been strongly critical of President Morsi and Islamists. The MB (2012) openly blamed Western states for tolerating the contempt of Islam and Muslims but prohibiting the denial of the Holocaust. In September 2013, Morsi stated in a TV interview, 'Islamic sanctities and the Prophet Mohammad are red lines for Muslims. We reject any type of contempt to our Prophet for whom we sacrifice our lives' (quoted in EIPR 2013:67).

This crisis fostered the efforts made by Islamists and al-Azhar to prohibit blasphemy in the constitution (Al-Masry 2012). Commenting on the crisis at the Constituent Assembly, Hussein Ibrahim, the Secretary General of the FJP stated that 'freedom of expression does not mean the contempt of the Prophet, Messengers of Allah, the Mothers of the Believers and Companions'. He asserted that since we call the international community to ban blasphemy in international law, Egypt's new constitution should also be clear about that.[197] Liberal members of the Constituent Assembly agreed on the inclusion of this constitutional provision since it was difficult during this tense climate to oppose it (al-Majid 2013:90-91).

[196]General Prosecutor v. Morris Sadiq, Murqus 'Aziz, Nabil Adib and others, South Cairo Felonies Court, Case No.636/2012, 29 January 2013.
[197] Official Records of the Constituent Assembly, Report No.13, 18 September 2012.

It should be noted that Islamists are not the only actors who support the criminalisation of blasphemy in Egypt. Mubarak's government was vocal internationally against blasphemy, and some non-Islamist politicians have also supported the criminalisation of blasphemy. However, we should also consider that the political, social and religious activism of the MB and Islamists in general since the 1970s have influenced positions taken by other political and social actors in Egypt. On many occasions, Sadat and Mubarak encouraged Islamist policies to appease Islamists and counter-balance their political influence. The increasing number of blasphemy cases under president Morsi led some liberal figures to express their dismay at the law. Mohamed ElBaradei, the leader of the Constitution Party (*al-dustur*) said that 'blasphemy accusations exist only in authoritarian states' (Ramadan 2013), while other politicians considered the blasphemy law a political weapon to repress dissidents (al-Wirdani 2013). Key human rights NGOs have been also outspoken about the negative implications of blasphemy laws for freedom of expression (CIHRS et al 2013d).

Morsi (2012) took this issue to the international community in his speech at the UN General Assembly on 26 September 2012. He condemned blasphemy against Islam and called for an international mechanism to protect religions from defamation. In his speech, Morsi (2012) said:

> Egypt respects freedom of expression. One that is not used to incite hatred against anyone. One that is not directed towards one specific religion or culture. A freedom of expression that tackles extremism and violence. Not the freedom of expression that deepens ignorance and disregards others.

Morsi obfuscated the difference between state responsibility to combat incitement to violence or discrimination against members of religious communities, and the prohibition of blasphemy. The former protects individuals and the latter protects religious beliefs and

doctrines. I explained in the first section of this chapter that it has become increasingly acceptable under IHRL that critical and offensive expressions about religions or ideologies be protected under freedom of expression.

The crisis of *The Innocence of Muslims* was followed by a high number of blasphemy charges and trials. The facts of these cases have indicated an increasing climate of intolerance to religious pluralism among a wide sector of Egyptians, particularly in rural areas and poor urban areas where the possibility of sectarian tensions is high (EIPR 2010; Tadros 2013:46-47). In many cases, Muslims involved in the cases complained that those persons accused of blasphemy had a grudge against Egypt's Islamic identity. Such feeling led many Muslims to misinterpret any critical statement made by non-Muslims about Islamic figures or history and consider that to be blasphemy. For example, in some cases, Christian teachers were convicted for blasphemy because of their comments about Islam or Islamic history in class.[198] In other cases, everyday discussions between groups of people ended with blasphemy trials.[199] Selectivity is an inherent problem in blasphemy laws in many states where they often protect states' dominant religions (Leo et al 2011).[200] All blasphemy cases in Egypt from 2011 to June 2013 targeted those persons who commented on Islam; however Islamists who systematically attacked Christianity and other religions were left without punishment. Exceptionally, a Muslim preacher was convicted of committing blasphemy against Christianity after he tore up the Bible in a public demonstration against *The Innocence of Muslims* film which was considered by many Muslims to be offensive to Islam and the Prophet (El-Dabh 2012).

[198] General Prosecutor v. Dimyana Obeid al-Nour, Luxor Primary Court of Misdemeanor, Case No.1647/2013, 11 June 2013; EIPR (2013) documented other blasphemy cases which involve teachers and professors.
[199] General Prosecutor v. Romani Murad, Asyut Primary Court of Misdemeanor, Case No.2939/2013, 1 June 2013.
[200] See UNCHR 'Interim Report of the Special Rapporteur on Freedom of Religion or Belief Asma Jahangir' (2007), p.70.

The prohibition of blasphemy limits the freedom of atheists to question religion. The case of Alber Saber, a young Egyptian atheist of Christian origin convicted for blasphemy is a striking example. The case started with a petition submitted to the police by Saber's neighbours, accusing him of disseminating 'the Innocence of Muslims' movie on Facebook and Twitter, and posting other materials considered by the complainant to be blasphemous to religion. In the interrogation, Saber denied any intention of insulting religion and affirmed that all of his postings on the Internet were related to his study of comparative religions and Islamic philosophy and that he had started to post these materials on Facebook and YouTube in 2010. In his trial, Al-Marj Primary Court of Misdemeanour considered this statement a confession by Saber of committing blasphemy and sentenced him to three years in prison.[201]

Unrecognised religious minorities can also be prosecuted under the blasphemy law. In Egypt, the state recognises only Abrahamic religions (Islam, Christianity and Judaism). Members of these religions can publicly practise their rituals and build their places of worship according to certain limitations and they also apply their religious family laws. The 1923 and 1971 Constitutions did not explicitly limit the practice of religious freedom to Abrahamic religions, but this principle has been well-established in Egyptian courts.[202] This principle was entrenched in the 2012 Constitution which said that 'the state shall guarantee the freedom of religious rites to established places of worship for the divine religions'.[203] Certain Islamic and Christian sects such as the Shi'a and Jehovah's Witnesses have not been treated as recognised religious communities (EIPR 2004; Pink 2005). Article 98bis of the Penal Code protects only Abrahamic religions from defamation.[204] This is evidence that the use of the blasphemy law is selective and discriminatory.

[201] ibid.
[202] See Court of Administrative Justice, Case No.19/4,26 May 1952, Supreme Court, Case No. 7/2, 1 March 1975 and Court of Administrative Justice, Case No.183/58. 29 January 2008.
[203] Article 43 of the 2012 Constitution.
[204] Law No.29/1982 Amending Penal Code No.58/1937.

The religious doctrines of the Shi‘a, the Baha’iyya, and the Ahmadiyya are often considered blasphemous to Islam by Egypt’s courts. Blasphemy cases against Egyptian Shi‘a have persisted in the post-Mubarak era.[205] The political actions and statements made by the MB and Salafists in 2012 and 2013 fuelled intolerance of the Shi‘a. Sunni Islamists claim that the Shi’a do not respect the historical figures of Sunni Islam, and that many of their religious doctrines deviate from the Sunni orthodoxy. Although President Morsi was tentatively interested in restoring the political ties with Iran, he was keen in his first visit to Tehran to show that his new foreign policy did not mean that Sunni Muslims can forget the doctrinal differences with the Shi‘a. In his speech at the OIC conference in Tehran in August 2012, Morsi paid tribute to the family of the Prophet and the Rightly Guided Caliphs, Abu Bakr, ‘Umar, ‘Uthman and ‘Ali. As noted by Ezzat (2012)

> The reference to Ali, the most holy member of the Prophet Mohamed's family in the eyes of Shi‘as, could have been perceived by Morsi's Shi‘a audience . . .as flattering had it not come after references to Abu Bakr, Omar and Othman, who are abhorred by Shi‘as and whose role in early Muslim history is not even mentioned in the history books of Iranian schools.

In most blasphemy cases, Egyptian courts opted for a broad and ambiguous definition of blasphemy that severely restricts freedom of expression and religious freedom. The courts hold in the cases under review that blasphemy law protects the fundamental doctrines of Abrahamic religions and safeguards society from temptation and turbulence. The courts do not censor certain provocative views with a view to protecting public order and social harmony, but rather protect specific understandings of religion and dismiss others even if there are no grounds that the expression of these views would disturb public order. The problem here is how the courts identify certain views as blasphemous or not. The case law

[205] See for example, General Prosecutor v. Mohammad Fahmi ‘Asfou, Kafr al-Zayat Primary Court of Misdemeanour, Case No.13044/2011, 24 April 2012 and Misdemeanour Court of Appeals of Kafr al-Zayat, Case No. 1095/2012, 26 July 2012 and Disciplinary Court of Qina, State Council, Case No.115/20, 24 December 2012.

shows that new interpretations of the Qur'an or *Sunna* can be considered blasphemous, and that those expressing opinions against the idea of divinity and religions are liable to prosecution as well. Accordingly, the criminalisation of blasphemy intimidates atheists and converts when publicly declaring their religious affiliation and views. The HRC stated that 'blasphemy laws should not be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith'.[206]

In the case of Adel Imam, an Egyptian court has followed a different reasoning on blasphemy with the objective of widening the scope of freedom of expression. The Court has held that Egypt's law on blasphemy does not protect religions or religious feelings and that the crime of blasphemy had to be accompanied by a special intent to harm national unity, public order and societal peace. The Court has maintained that if the legal provision on blasphemy is meant to protect religions, it becomes incompatible with Article 18 of the ICCPR. It held that its understanding of blasphemy is in line with the legitimate limitations on freedom of expression in Article 18(3) of the ICCPR. Moreover, the Court has argued that the protection of religious doctrines blocks critical thinking and undermines the development of religious thought. It has also added that the mere invocation of the protection of religious feelings or sensibilities of others does not stand as a justification to restrict freedom of expression unless there is an imminent threat to public order caused by the expression of opinions.[207] The Court was right to emphasise this point, as the argument of the protection of religious feelings of individuals often has attention to the feelings of the majority of the population but does not give equal attention to the feelings of non-believers or the beliefs of few members of the society.

[206] General Comment 34, para.50.
[207] 'Asran Mansur v. Adel Imam and others, 26 April 2012.

The reasoning of the Court in this case is exceptional in the case law and indicates that some Egyptian judges consider developments in IHRL in their judgements. However, the criteria set by the Court in this case still present a justification to censor the public manifestation of provocative or shocking views. Egypt's case law on religious freedom and freedom of expression indicates that concepts such as public order, public morals and national security are often used to violate the essence of rights. According to the HRC, limitations of rights must meet a strict test of justification, necessity and proportionality.[208] The proponents of the prohibition of blasphemy argue that states find themselves under pressure to censor and repress blasphemous expressions to maintain public order, since in many situations blasphemy has led to massive protests and violent reactions. Arguably, this rationale poses a threat not just to freedom of expression but also to any other human rights norms disapproved by a group of persons in any society. They will be easily ready to use coercion and intimidation to silence other views in society. As noted by Langer (2014:107) this approach risks 'provid[ing] an incentive to rampage and cause havoc in order to vindicate future suppression of offensive speeches'. Even though, the ban of certain provocative blasphemous or provocative speeches might be justified in certain circumstances for the purpose of public order, morals and national security, the general criminalisation of blasphemy is not a proportionate response. Therefore, the HRC holds that prohibition of 'displays of lack of respect for a religion or other belief systems, including blasphemy laws, are incompatible with the [ICCPR]' as long as the expression of views do not amount to incitement to discrimination and violence as stipulated in Article 20 of the ICCPR.[209]

[208] HRC, GC34, para.28-29.
[209] ibid., para. 47.

5. Conclusion

Certain ideas and concepts in the thought of the MB inevitably lead to tensions with freedom of expression. Posing critique of religious doctrines or publishing ideas that do not agree with the dominant orthodoxy are not tolerated by the Islamic state, according to the MB. The accusation of apostasy is not applicable only to those who convert from Islam, but can also be used to target Muslims who challenge certain doctrines such as the sovereignty of shari'a as the state law or the eternity of certain rulings of Islamic law. The idea that the state guards Islamic morals in society threatens the right to artistic creativity. The MB's approach to the arts puts artists under the guardianship of ambiguous criteria that is arbitrarily and selectively enforced by the state in the name of Islamic morals. This conception blurs the boundaries between what is observed by individuals in their private lives according to their religious beliefs, and what is enforced by the state. This distinction is crucial for international human rights to be realised in the modern nation state. The practice of the MB in Egypt confirms that the group aims to reengineer society in accordance with its understanding of Islamic morals. The state's interference in order to protect public morals is recognised under IHRL, but without damaging the substance of rights.

This chapter has also shown that the political activism of the MB in opposition obstructed the expansion of the scope of freedom of expression in Egypt, and has done so by utilising its growing political and social strength since the 1970s. Its actions in the cultural and artistic field generated intense pressure on secular intellectuals and artists, and fostered a climate of intolerance for intellectual pluralism. In many cases, the MB's political campaigns against freedom of expression triggered political competition between the state and Islamists to sponsor conservative attitudes towards freedom of expression. In opposition and in power, the MB was a driving force in supporting anti-blasphemy laws, which were used repeatedly

under President Morsi to repress ideas critical of religion. This law was also manipulated to target political opponents.

The group defends the legitimacy of the anti-blasphemy law, but in its political discourses it has confused the difference between the protection of religion from critique and the prohibition of incitement to discrimination or violence. The MB's leaders treat the two concepts as if they have the same meaning but they do not. UN human rights treaty bodies and experts have acknowledged that IHRL does not shield religious doctrines from criticism but it protects members of any religious community if they are targeted by incitement to violence or discrimination. Meanwhile, in power, the MB aimed to gradually enforce its Islamic version of freedom of expression, and the 2012 Constitution provided the basis for the state's censorship of ideas and the criminalisation of blasphemy. The group's plan to control the public cultural sector and its institutions cannot be read in isolation from its approach to freedom of expression and its policy objective to ensure that cultural production meets its Islamic scheme of artistic creativity. However, the resistance of intellectuals, artists and civil society to this plan provides clear evidence that what is considered an Islamic authenticity by the state or Islamists is not necessarily approved by other Muslims.

Chapter Six: The Rights of Religious Minorities

This chapter explores the rights of religious minorities in the thought and practice of the MB. It addresses the concepts of equality and non-discrimination in the MB's model of an Islamic state. It discusses some key issues in the ongoing debate on the rights of religious minorities in Egypt such as the right to construct and maintain places of worship, the rights of unrecognised religious communities, the right of non-Muslims to hold public office, inter-faith marriage and the applicability of Islamic law to non-Muslims.

Religious minorities in Egypt have long been concerned about their future rights under the rule of Islamists. Instead of being encouraged by the fall of Mubarak, religious minorities found their fears exacerbated by the rise of Islamist parties (Halawa 2011; Egypt Independent 2011). The numerical size of religious communities in Egypt is a contentious issue. There are no comprehensive and updated official figures for all religious communities in Egypt. According to an official census conducted in 1986, Christians represented 5.6% of the population (Tadros 2013a:30), and this official figure reached 7% in 1998 (Brownlee 2013:5). Islamists have accepted this figure and have accused the Christian community – which report a greater population – of exaggerating their number, while the Christian community has at times claimed that the state does not report the correct numbers of Christians in order to devalue their weight in the society. Other sources also reject this figure and maintain that Christians represent 11% of the population (Tadros 2013a:30-31). What gives particular significance to this question in the Egyptian context is that some rights claimed by non-Muslims in Egypt are connected with their numbers, such as their representation in political and public institutions, as well as the outcome of an ongoing debate on the right of religious minorities to construct places of worship.

According to the International Religious Freedom Report for 2012 published annually by the US Department of State (2012), 90% of Egyptians are Sunni Muslims; the Shi'a represent less than 1% of the population and there are also a small number of Qur'anist and Ahmadi Muslims. 10% of the populations are Christian, the majority affiliated with the Coptic Orthodox Church, but also Catholics, Protestants, Maronites and Anglicans. There are 1000 to 1500 Jehovah's witnesses and 1500 to 2000 Baha'is.

Regardless of their size, there are certain rights for religious minorities under IHRL that should be guaranteed by the state. Article 27 of the ICCPR protects the rights of religious, ethnic and religious minorities.[210] In its interpretation of this article, the HRC has held that religious minorities should not be subjected to any form of discrimination. Their members have the right to 'profess and practise their own religion' and they have the right to preserve their identity. Under certain circumstances, the enjoyment of these rights may require certain positive legal measures for protection against state and non-state actors, to preserve their identities and to 'ensure the effective participation of members of minorities communities in decisions which affect them'.[211] Many other articles in the ICCPR are also relevant to the protection of the rights of religious minorities, and they come through the discussions in this chapter on protections such as 'freedom of thought, conscience and religion' (Article 18), the prohibition of 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence' (Article 20.2), equality before the law and the prohibition of any form of discrimination (Articles 26 and 2.1) and the right to participate in the conduct of public affairs, to vote and to be elected and to have access to public services

[210] Article 27 of the ICCPR.
[211] HRC GC No.23' (1994), paras. 6-7.

(Article 25). According to the HRC, 'affirmative measures may be taken in appropriate cases to ensure that there is equal access to public service for all citizens'.[212]

1. Religious Minorities, Equality and Non-discrimination

In its literature, the MB has maintained that its conception of the Islamic state does not pose any threat to the rights of religious minorities. Nevertheless, when we analyse the scope of the rights and duties of Muslims and non-Muslims in this state, one comes to the conclusion that the tendency of the MB to use terms such as equal citizenship, non-discrimination and equality does not indicate that the group has completely abandoned the discriminatory rulings of Islamic law on *ahl al-dhimma.* Pre-modern Muslim jurists developed this branch of Islamic jurisprudence as part of the governance enterprise in entirely different social and political settings (Emon 2012b:224-226). As noted by Emon (2012b:225) 'the historical shifts in law and the enterprise of governance present a new context in which old answers lose their relevance'. Despite its claims of renewal, we see in this chapter that these old answers are still present in the thought of the MB. The introduction of the underlying principles of the rulings of *ahl al-dhimma* in the modern nation state cannot be reconciled with equality and non-discrimination as key principles of international human rights treaties, which constitute what can be called 'a human rights based view of citizenship' (An-Na'im 2008:131).[213]

[212]HRC GC No. 25' (1996), para.24.

[213]According to T. H. Marshal (1950:150) 'citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed'. In human rights based citizenship, IHRL defines rights and duties of citizens and individuals living in certain state.

1.1 Citizenship and the Rule of Shari‘a

MB scholars have argued that the expression ‘*ahl al-dhimma’* does not signify that non-Muslims are inferior to Muslims in the Islamic state. According to this view ‘the contract of *dhimma* provides non-Muslims with the same rights of modern equal citizenship with few exceptions. This contract has an authority over Muslims because of its divine source’ (al-Sirjani 2011:68-69). But judged by the standard of IHRL, these ‘few exceptions’, as shown in this chapter, are significant. Since the 1990s and in response to intense critique of their project by members of the Egyptian intellectual and political elite, the MB and its scholars have maintained that if the term *ahl al-dhimma* is not acceptable to non-Muslims today, the term citizenship should be used instead (al-Qaradawi 1999:30-31; 2012a; al-Wa’i 2001:48). The former Deputy General Guide Mohamad Habib explained that ‘identity cards are provided by the state to its citizens so the term *ahl al-dhimma* is not relevant any more to describe non-Muslims living in the Islamic state’ (quoted in al-Shamakh 2008: 106).

According to the scholars under review, certain principles guide Muslims in their behaviour towards non-Muslims in the Islamic state. The Qur’an (60:8) orders Muslims to be righteous toward non-Muslims and to behave justly with them (al-Banna 2006:169-170; al-Sirjani 2011:77; al-Bahnasawi 2004:2). The MB holds that non-Muslims (Christians and Jews) in the Islamic state are to be treated in accordance with the maxim that ‘they [non-Muslims] have the rights that we [Muslims] have and the duties that we have’ (*lahum ma lana wa ‘alayhum ma ‘alyana)* (Sabiq 1973b:665; al-Wa’i 2001:74; al-Bahnasawi 2004:3). The MB’s scholars claim that this is a principle in Islamic jurisprudence. Tadros (2012a:99-104) traced the history of this principle in Islamic law and concluded that this principle ‘has no basis in *fiqh* references’. According to her analysis, this principle was articulated by the Prophet when he was speaking about non-Muslims who converted to Islam. It has, however, been taken out of

its original context and introduced by the MB since the time of Hassan al-Banna to convince non-Muslims that equality between Muslim and non-Muslims has existed since the beginning of Islam, and that non-Muslims should not fear the Islamist project. Regardless of its historical origin, the reference to this principle in the literature of the MB is misleading. While it entails certain rights for non-Muslims, it does not provide for full legal equality with Muslims, and does not change the fact that non-Muslims have a legal duty in the Islamic state to submit to the rule of Islamic law. I show in this chapter that the practice of the MB in power has also demonstrated that non-Muslims can lose the state's protection in certain circumstances if they openly challenge or protest the model of the Islamic state.

The MB's practice also confirms that it can acknowledge the reference to citizenship only if it is presented within the framework of the shari'a state. In this context, the MB rejected a constitutional amendment in 2007 that aimed to declare citizenship to be a constitutive element of the Egyptian state.[214] The MB was the only political block to oppose this provision. One of its leaders explained in the media that 'the concept of citizenship is Western and it means secularism and [that] Islam accepts only a civil state with an Islamic background' (Mohammad 2007). The 2012 Constitution used the term citizenship in Article 6,[215] but other provisions in the Constitution such as Articles 2, 4 and 219 consolidated the Islamic framework so there were no concerns that citizenship could limit the Islamic nature of the state (see chapter three). Article 6 referred to citizenship, democracy and human rights alongside the term *shura* (consultation). The term *shura* in the literature of the MB has been

[214] After the constitutional amendments, Article 1 of the 1971 Constitution said, 'Egypt is a democratic state based on citizenship'. See Amendments to the Constitution of Egypt, 31 March 2007.

[215] Article 6 of the 2012 Constitution said, 'the political system is based on the principles of democracy and *shura* (consultation), citizenship (under which all citizens are equal in rights and duties), multi-party pluralism, peaceful transfer of power, separation of powers and the balance between them, the rule of law, and respect for human rights and freedoms; all as elaborated in the Constitution.

used to refer to the Islamic version of democracy, where the sovereignty of the people is subject to the rulings of Islamic law (al-Shawi 1987; 1992).

Defending the applicability of Islamic law in a multi-religious society, the MB scholars argue that Muslims obey Islamic law as a matter of belief, but non-Muslims living in the Islamic state can treat it like any other secular laws (al-Hudaiby 1977a:84-85). They have added that Islam represents a civilisational identity for Muslims and non-Muslims (al-Qaradawi 1999b:62). The most common argument made by MB leaders and scholars to defend the application of Islamic law despite the presence of non-Muslim communities in the state is that Muslims as the majority of population in Egypt have the right to be governed by their religious traditions provided that they respect the rights of minorities (al-Banna 1938; al-Qaradawi 1999:10-11, al-Sirjani 2011:65; al-Shamakh 2008:92-93). However, analysing the substance of Islamic law, as presented by the MB, confirms that non-Muslims will not be equal to Muslims in the Islamic state and that the majority rule proposed by the MB becomes a 'tyranny of the majority' (El Fegiery 2012).[216] In international law, human rights violations cannot be justified by the consent of the majority. For instance, in 2009 the HRC declared that a referendum sponsored by the Swiss government to ban the construction of minarets all over Switzerland was discriminatory.[217]

One even doubts that the majority of Muslims in Egypt would agree on the meaning of Islamic law. In reality, the application of Islamic law in the modern nation state reflects the attitudes of those actors who dominate the state's institutions (An-Na'im 2008:1-2). The HRC upheld that where a religion becomes the official state religion, it should not lead to

[216] The expression 'tyranny of the majority' was used in the 19th century by some liberal philosophers such as John Stuart Mill (2005) to describe a situation when the dominant majority in a society appeals to its majoritarian power to infringe on individual liberties.
[217] See UNCHR 'Comment on Switzerland's Third Periodic Report on Implementation of the ICCPR' (2009), para.8.

discrimination against individuals in the enjoyment of human rights.[218] As noted by An-Na'im (1990:1), Muslims' right of self-determination in the modern nation state does not justify the encroachment on the rights of non-Muslims living with them in the same state. Yet as I discuss in the following sections, the dominant views among MB scholars and leaders are that non-Muslims cannot hold certain public positions, Muslims are privileged in building places of worship, Muslim males can marry Christians or Jews but non-Muslim males cannot marry Muslim women, and non-Abrahamic religions and non-Sunni Islamic sects are not recognised in the Islamic state.

Nevertheless, the MB has argued that there is common ground between their Islamist project, and that of Christians in Egypt. It has assumed that both share the goal of protecting public morals and confronting obscenity, heresy and atheism, and therefore Christians should not treat the MB with suspicion (al-Shamakh 2008:6; al-Qaradawi 1999:11-13). But this argument is ill-founded, because Christians, like Muslims, adhere to different interpretations of religion and morality, and the political practice of most of their leaders and intellectual figures since the 1970s and even before, demonstrates their opposition to the Islamist model of the MB (Carter 1986:272-279; Zaidan and Cumbria 2007). Some writers of the MB argue that Christian figures have praised the application of Islamic law (al-Shamakh 2008:94-99; al-Qaradawi 1999:69-75). But this should not be taken as evidence to suggest that Egyptian Christians would accept an Islamist state that marginalises non-Muslims. For example, the representatives of Egypt's churches withdrew from the Constituent Assembly in November 2012, protesting against many provisions in the constitution, including those articles that consolidated the reference to Islamic law. They complained that the constitution 'did not reflect the pluralistic identity of Egypt' (Egypt Independent 2012c).

[218] See UNCHR 'HRC GC 22' (1994), para.9.

The MB's leaders and scholars have reiterated that non-Muslims in the Islamic state are not to be forcibly converted to Islam according to the Qur'anic (2:256) principle that 'there is no compulsion in religion' (Auda 1960a:31-32; al-Hudaiby 1977a:81; al-Qaradawi 1999:13). However, the actual realisation of this principle is questionable in the proposed Islamic state, in which non-Muslims face certain forms of direct and indirect pressure that constrain their religious freedom. In this state, the government is not neutral towards all religious communities but openly sponsors Islam and observes its laws. For instance, al-Sirjani (2011:84) holds that 'the Islamic state has a duty to raise the awareness of Muslims about the corrupted doctrines of Christianity and non-Islamic beliefs'.

In the Islamic state, the Islamic identity and moral worldview is superior by the constitution and law over any other identities in the state. This sense of superiority is also conveyed to non-Muslims when prominent leaders of the MB hold that Muslims are not allowed to greet non-Muslims on their religious feasts if these occasions are incompatible with the Islamic beliefs, an example being Christmas (al-Sirjani 2011:166-167; al-Barr 2013b). Moreover, Muslims are not allowed to convert to Christianity, but non-Muslims are encouraged to join Islam by granting Muslims permission to preach Islam while prohibiting non-Muslims from proselytizing, and allowing Muslim men to marry non-Muslim women (al-Sirjani 2011:173-174). [219] These patterns of discrimination create physical and psychological pressure over non-Muslims and non-believers who would be isolated in this Islamic state.

[219] Chapter seven addresses the issue of conversion from Islam.

1.2 Non-Muslims and Legal Autonomy

When Islamic law becomes the supreme source of legislation in the Islamic state, what is the relationship of non-Muslims with this law? The MB's scholars agree that non-Muslims enjoy legal autonomy in their religious and family regulations, but that other laws are applicable to all citizens (al-Hudaiby 1977a:82-83; al-Qaradawi 1999:15). According to al-Ghazzali (2005b:217) the legal autonomy of non-Muslims in the Islamic state is based on the Qur'an (5:42; 43; 47). Al-Bahnasawi (2003:92-93; 2004:31-32) and al-Qaradawi (2012a) referred to the precedent of the Constitution of Medina, in which the Prophet acknowledged the autonomy of non-Muslim communities who lived alongside Muslims. The platform of the FJP (2011a) and the presidential programme of Mohammad Morsi (2012b:8; 20) affirmed that certain non-Muslims (Christians and Jews only) apply their own religious family regulations. The 2012 Constitution recognised the rights of non-Muslims to apply their own religious regulations within their family and religious affairs. Article 3 of the 2012 Constitution stated that 'the canon principles of Egyptian Christians and Jews are the main source of legislation for their personal status laws, religious affairs, and the selection of their spiritual leaders'.[220]

Many observers considered this Article to be a step forward for the rights of non-Muslims, since it was the first time that a constitution recognised the existence of other religious communities in Egypt and guaranteed their legal autonomy in their religious and family matters (al-Majid 2013:85). This autonomy has long been portrayed by the MB and its scholars as a human right and a sign of tolerance of religious minorities, which they consider to be lacking in the West (al-Hudaiby 1977a:83-84). Article 3 entrusted leaders of non-Muslim religious communities with enacting certain laws ruling them. I show in this section

[220] Article 3 of the 2012 Constitution.

that Egypt's law has indeed already allowed Christians and Jews to apply their regulations in marriage and divorce, yet while Article 3 provided constitutional protection for non-Muslims' legal autonomy, it has arguably undermined the equal constitutional rights protection for Egyptian citizens regardless of their religious affiliation.

A key challenge that arises under legal pluralism is how the state can strike a balance between claims made by certain communities to preserve their traditions and the protection of individual rights under IHRL particularly the right to equality before the law and non-discrimination. There is no explicit prohibition of systems of legal pluralism or parallel legal jurisdictions under IHRL (Quane 2013). [221] However, UN human rights bodies have expressed certain concerns over the operation of these systems (Temperman 2010:194-195). In its General Comment No.32, the UNHRC urged States to 'protect the rights under [the ICCPR] of any persons affected by the operation of customary and religious courts'.[222] The UN Committee on the Elimination of Discrimination against Women called upon Egypt in 2010 to 'consider issuing a unified family law on personal status covering both Muslims and Christians'.[223] Liberal theorists argue that a minority group cannot evoke its autonomy as a group to violate the individual rights of its members (Rawls 2005:466-474; Kymlicka 2002:342), and according to this view: 'Individuals should be able to leave the communal track and transfer their disputes to civil courts at their own will, especially when there is a direct and imminent threat by communal norms and institutions to the constitutionally protected rights and freedoms of individuals' (Sezgin 2011:15). However, research shows that members of religious communities in some societies are subjected to intense social

[221] A different approach was taken by the ECtHR which held that the very system of legal pluralism is incompatible with the European Convention of Human Rights, see Refah Partisi and Others v. Turkey, para.119.
[222] See UNCHR 'HRC GC No.32' (2007), para.24.
[223] UNCHR 'Committee on the Elimination of All Forms of Discrimination against Women, Conclusions and Recommendations, Egypt' (2010), Para.28. Similar recommendation was made to Lebanon in 2008 and 2005. See U.N. DOCs. CEDAW/C/LBN/CO/3, para18 and CEDAW/C/LBN/CO/2, para. 24

pressure to not follow laws other than their communal laws (Sezgin 2013:214-215). This challenge would limit the actual impact of having a secular family law applied to all citizens, beside parallel communal family laws in the same legal jurisdiction. In the long term, legal reforms need to be supported by large constituencies in these communities to survive.

In Egypt, the application of legal pluralism in personal status laws restricts certain rights for Muslims and non-Muslims alike. The application of multi-religious family laws is a contemporary version of the *milli* system applied in the Ottoman Empire since the 15th century (Scott 2010:28:31). According to this system 'the organised, recognised, religio-political communities enjoyed certain rights of autonomy under their own chiefs' (Scott 2010:28). It was common historically that non-Muslims voluntarily took their legal disputes to Muslim courts to take advantage of certain Islamic rules (Shaham 2010:410). Egypt's laws in the first half of the 20th century provided non-Muslims with this option (Sezgin 2013: 122-123).[224] However, in the course of the institutional modernisation and normative unification process, the freedoms enjoyed by non-Muslims to choose under which legal jurisdiction they could settle their personal status disputes were limited. Article 3 of the 2012 Constitution limited these freedoms as well by explicitly referring non-Muslims to their canon laws. Thus Article 3 did not typically re-introduce the *milli* system in Egypt before the modernisation of its legal system.

The non-Muslim *milli* courts and shari'a courts were abolished in 1955, and since then all Muslim and non-Muslim family cases are examined by national courts. Egyptian Christians apply their own regulations on marriage and divorce. Codified Islamic law on issues such as

[224] Ottoman Decree of 14 May 1883 entrusted the *milli* courts with adjudicating matters of marriage, divorce and maintenance for members of the Coptic Orthodox Church in case parties did not request the intervention of shari'a Courts. Article 1 of Law 25/1944 required the consent of all interested parties in order for *milli* Courts to adjudicate cases of succession. Otherwise, Islamic inheritance laws became applicable.

inheritance, intestate succession, bequest, capacity and guardianship is applied to all Egyptians (Berger 2001:94).[225] One can argue that Article 3 opened the door for Christians and Jews to claim the application of their own laws on these matters since they are also part of personal status laws, but the debate during the constitution-making process focused on regulations related to marriage and divorce only. The system of religious family laws applied in Egypt and entrenched in the 2012 Constitution does not give any kind of choice for Egyptian citizens to avoid religious family laws and be adjudicated under a secular law applied equally to all citizens. It also adheres to a discriminatory position against non-Abrahamic religions and empowers the leaders of religious communities to decide their regulations. The family law applied to the followers of the Coptic Orthodox Church is an illustrative example to highlight the human rights limitations of this system. This example shows the inadequacy of the MB's Islamic concept of legal autonomy from a human rights perspective.

Many Egyptian Coptic Christians suffer from strict regulations on divorce applied by the Coptic Orthodox Church. Some Christians have converted to Islam or changed their sect in order to apply Muslim family law (Sadiq 2011a; Berger 2001).[226] The leadership of the Coptic Orthodox Church praised the constitutional provision on the legal autonomy of non-Muslims, viewing it as an important safeguard against the interference of the state in its regulations regarding marriage and divorce (Shukri 2012). This provision would shield these regulations from judicial oversight. Previously, some Coptic Orthodox Christians had challenged the Church over its strict regulations on marriage and divorce before the judiciary. In a notorious case in 2010, the Supreme Administrative Court ignored the instructions of the

[225] According to Article 875 and 915 of the Civil Code No.131/1948, Islamic inheritance laws are applied to Muslims and non-Muslims.

[226] According to Law No.462 of 1955, if a spouse converts from one non-Muslim sect to another or converts to Islam, Muslim family law is applied to family disputes.

Church and overrode its refusal to permit a divorced Coptic Orthodox Christian to remarry.[227] The Church was dismayed by this judgement, arguing that it violated its teachings, which do not permit a second marriage for divorced Christians who ended the contracts of their first marriage on grounds other than the commission of adultery by one of the spouses, or conversion (Saad 2010:5). Despite its reservations to the Islamisation of the constitution and law, in this dispute, the Church appealed to Article 2 of the 1971 Constitution, arguing that Islamic shari'a protects the autonomy of non-Muslims in the Islamic state (Saad 2010:6).

This controversy has a long legal background. The 1938 Code of Personal Status for Copts provides several grounds for divorce. This Code was adopted by the Coptic Orthodox Communal Council (*al-Majlis al-Milli*), a lay leadership established by the Egyptian authorities in 1874 and more powerful than the clerical authority of the Coptic Church. However, in the 1950s and 1960s, 'absolute control was returned to the Church' (Shaham 2010:412-413). This began with the abolition of the *milli* courts which were controlled by the Communal Council, and then the dissolution of the Council by former President Nasser in 1962 upon the request of the Church. The 1938 Code has been however rejected by the leadership of the Orthodox Church since 1945, which accused it of being in violation of religious teachings of Copts. But all attempts to repel this Code failed until the Patriarch Shenouda III, the former head of the Coptic Orthodox Church, who adopted a confrontational approach towards the state and issued a decree in 1971 preventing 'Copts who had obtained dissolution of marriage judgements from national courts on grounds other than adultery from re-marrying' (Shaham 2010:413).

Studying the legal history of Egyptian Coptic Christians, Shaham (2010:409) argues that 'the 1938 Code was not innovative, as claimed by Shenouda, and that it relied on medieval Coptic

[227] Supreme Administrative Court, Case No.12244/55, 29 May 2010.

Orthodox legal treaties'. The 2010 judgement of the Supreme Administrative Court challenged Shenouda's decree and considered that the complainer was divorced according to the 1938 Code and was entitled to get permission from the Church to remarry. The Church, however, rejected this judgement. Shaham (2010:409) explains that the strict position of the Church's leadership on divorce and marriage 'was motivated by [its] desire to strengthen communal identity and cohesion in the face of religious and political developments in Egypt'. Patriarch Shenouda III challenged the 2010 judgment before the Supreme Constitutional Court, drawing on its power to settle disputes resulting from two conflicting final judgements delivered by different judicial organs.[228] The Church argued that the Court of Cassation had acknowledged the autonomy of the Church in regulating marriage and divorce in a 1979 ruling.[229] On 7 July 2010, the SCC suspended the implementation of the 2010 judgement from the Supreme Administrative Court until its examination of the case (Suliman 2010). The Church was comfortable with this decision, although complaints by Christians about the strict regulations of the Church continue in Egypt without solution (Mahmood 2012b).

In post-Mubarak Egypt, the Church found itself in agreement with the MB that the legal powers of the Church over Christian citizens on marriage and divorce should be endorsed. This was realised in the 2012 Constitution. But over the last five years, increasing numbers of Christian activists and writers have criticised the position of the Coptic Orthodox Church on family matters, and advocate with like-minded Muslims for the need for a secular family law that is applied equally to all Egyptians (Mahmood 2012b; Kamal 2010).

[228] See Article 25 of Law No.48 /1979 on the Establishment of the SCC.
[229] Court of Cassation, Case No.16/48, 17 January 1979.

1.3 Paying the Poll Tax (*jizya*)

The payment of the poll tax (*jizya*) by non-Muslims living in the Muslim community was a key element of the contract of *dhimma* elaborated by pre-modern Muslim jurists. Many traditional Muslim jurists argued that this tax was a sign of the submission of non-Muslims to the authority of Muslims in the Muslim territories. According to this view, non-Muslims pay the *jizya* to Muslim rulers in exchange for their protection by Muslims, but also as a kind of punishment for their disbelieving in Islam and to encourage non-Muslims to convert to Islam (Zidan 1982:143-144). In Egypt under the Ottoman Empire, the system of *jizya* was amended in 1855 whereby non-Muslims had the option to either serve in the military or pay a tax. The *jizya* was fully abolished in 1909 (Scott 2010:37-38).

Most scholars of the MB argue that historically, the system of *jizya* did not aim to humiliate or subjugate non-Muslims but was part of the contractual relationship between Muslims and non-Muslims according to which Muslim rulers were responsible for protecting non-Muslims living in the Muslim territories (Sabiq 1973c:49; Zidan 1982: 146-147). According to al-Bahnasawi (2004:40), there were historical precedents, in which Muslim leaders exempted non-Muslims from paying the poll tax after they joined the Muslim army. The prevalent view of the MB and its scholars is that the purpose of *jizya* has ceased to exist, as non-Muslims perform military service and defend the nation, and they pay tax now like Muslims (al-Shamakh 2008:103-105; al-Qaradawi 2012a). This opinion was expressed by Hassan al-Banna (1948) when he stated that when non-Muslims serve in the army of the Islamic state, they are not requested to pay *jizya*.

Sayd Qutb (1993:175) was explicit that *jizya* was not just an administrative arrangement between Muslims and non-Muslims but ‘it is also a guarantee that non-Muslims stop resisting

Muslims and Islam and refrain from creating any barriers before its dissemination and sovereignty'. Most MB scholars do not explicitly address the function of *jizya* as a sign of subjugation, but they agree with Qutb that non-Muslims should submit to the ruling of Islam in the Islamic state even though they are exempted nowadays from paying *jizya*. Their position is, however, problematic by the claim that Muslims and Islam are the highest in the hierarchy of religions in the state. As noted by the Egyptian academic Sherif Younis (2011), 'the rule should therefore be the required payment of *jizya*, but a certain historical context, rather than a basic right to equality, provides an exception to the rule'. Since the supremacy in this state is given to Muslims and Islamic law, in theory the door is open for Muslim rulers to decide in certain circumstances that non-Muslims should not be part of the army of the Islamic state and pay *jizya* if their loyalty to this army and its Islamic cause is questionable.

Moreover, there have been some signs that the institution of *jizya* has not been fully removed from the thinking of the MB's members. Some top leaders in the group still believe that under certain circumstances, non-Muslims can pay *jizya* in exchange for not fighting. This was the opinion of the former General Guide of the MB Mustafa Mashhur in an interview with al-Ahram weekly on 3 April 1997. Mashhur explained that:

> When we have an Islamic state, the army will be the cornerstone of its stand against anyone trying to attack this Islamic state. If we have non-Muslims in the army and a Christian country attacks us then Christian members of the armed forces could change their allegiance and become agents for the enemy (quoted in All Africa Press 1997).

This statement triggered fierce reactions from the Coptic Orthodox Church, former president Mubarak and the liberal and leftist opposition (All Africa Press 1997). Consequently, Mashhur was prompted to revisit his position, saying that 'the payment of *jizya* relates to those who fought Islam and Muslims. This would not apply to Coptic citizens… since they

have fought the enemies of this nation' (quoted in Tadros 2012a:90). Another volume on Islamic teachings which is widely read among MB members still maintains that non-Muslims in the Islamic state have two options – either to convert to Islam or to pay the poll tax (*jizya)* (Mahmoud 2011:424).

In conclusion, the declared view of the MB today is that non-Muslims are not required to pay *jizya* because they serve in the army of the Islamic state alongside Muslim citizens. However, this opinion has not been rooted in a belief that Muslim and non-Muslims enjoy equal citizenship in the state. Therefore, it can be revisited. The decision to exempt non-Muslims from paying *jizya* is subject to the discretion of the Islamic state. *Jizya* can be possibly reinstated under different political circumstances, as long as the Islamic state defines its domestic and external policies along religious lines. The debate on paying *jizya* emphasises the limitations of the reform methods utilised by the MB. One cannot focus only on the development of new opinions, rather the coherence of the methods and the reasoning employed to reach the opinion are equally important for Islamic reform to be sustained. As argued by An-Na'im (1990:46) as long as 'the underlying shari'a principles remain intact, [partial reforms] are subject to loss when there is a forceful reassertion of shari'a'.

1.4 Building Places of Worship

IHRL protects the right of religious minorities to build and maintain their places of worship.[230] However, as noted by Villaroman (2012:4), 'the right to establish and maintain places of worship may be said to be only in its nascent stage of normative development because its own substantive content has not been elaborated'. When they intervene to

[230] In its GC No.22, the HRC has held that the construction of places of worship is one of the key elements of the freedom to manifest one's religion or belief. See also Article 6 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981).

regulate the practice of this right, states face the difficult task of reconciling demands made by all religious communities living on their territories. In many states all over the world including Western democracies, one finds religious communities complaining of different types of restrictions on their right to build their places of worship.[231] Nevertheless, Villaroman (2012:295-322) has deduced some principles that explain the normative content of this right, from the work of the HRC and the Special Procedures of the UN Human Rights Council. Foremost, is the right to be protected from discrimination in applications to build places of worship; state regulations should be applied equally to all religious communities without giving privilege to certain religion. Any regulations should be clear and their application should be transparent and accessible to all religious communities. States should also refrain from depriving any religious community of this right.

These principles are not respected in Egypt where the law does not guarantee equal and transparent criteria for the construction and maintenance of places of worship (Rowe 2007). Sunni Muslims, Christians and Jews are the only religious minorities that can build their places of worship, but even those communities are not treated equally. Egyptian law gives wide discretionary powers to the authorities in providing Christians with permission to build or maintain churches, with approval by the President. Giving this power to the top authority of the state has been inherited from the Ottoman era. According to the 1856 Hamayouni edict, all requests for building churches were examined by the Sultan, withdrawing 'the licencing process from the local authorities, which Christians had accused of obstructing construction work' (Fastenrath and Kazanjia 2008:2). As an attempt to simplify the procedures, Mubarak issued Decree No.13/1998 by which the governorates were delegated to permit renovation work in existing churches.[232] Then, this task was moved to municipal

[231] See UNCHR 'Report of the Special Rapporteur on the Elimination of all Forms of Religious Intolerance' (1997) UN DOC A/52/477, paras.34-61 and Amnesty International (2009).
[232] Presidential Decree No.13/1998, *Official Gazette* no.2bis of 11 January 1998.

administration under Decree No.453/1999, [233] and was later cancelled by Decree No.291/2005, which delegated the governorates to grant permission to expand or rebuild existing churches.[234] However, these legal amendments have not satisfied the demands of Christians to find a sustainable solution that ends the state's arbitrary powers in approving or rejecting their applications (Fastenrath and Kazanjia 2008:2).

According to the Central Agency for Public Mobilisation and Statistics, the number of mosques in Egypt amounts to 108,395, and the number of churches is 2,869 (US Department of the State 2012). However, one should note that this figure does not include all mosques in the country because it is easy for Muslims to unofficially establish small public prayer halls in private and public properties. Many of these halls use loudspeakers to call for prayers, and the state often tolerates their presence. In 2001, the Ministry of Islamic endowments adopted certain conditions for building mosques, but in reality these conditions have not been not strictly observed by the state ('Abdalla 2002). Furthermore, religious communities that are not recognised by the state are prohibited from building places of worship. The Baha'is had their own organised communities until 1961 when Nasser dissolved them, and outlawed the activities of the minority.[235] The Supreme Court in 1975 approved this action and ruled that Egypt recognises only the three Abrahamic religions.[236]

The absence of fair treatment of religious communities in Egypt with respect to places of worship has repeatedly led to sectarian clashes. When non-Muslims tried in some cases to defy the law, they were met by strict measures from the state and from Muslim citizens who oppose the establishment of churches in their neighbourhood. The starkest example of this

[233] Presidential Decree No.453/1999, *Official Gazette* no.52bis, 30 December 1999.
[234] Presidential Decree No.291/2005, 8 December 2005.
[235] Law No.263/1960 Dissolving the Baha'i Communities, *Official Gazette* no.161of 19 July 1960.
[236] Supreme Court, Case No.7/2, 1 March 1975.

sectarian episode occurred in 1972 in al-Khanka district in Cairo. The official fact-finding committee, established by the People's Assembly upon the request of former President Sadat and headed by the former parliamentarian Jamal al-Utayfi (1972), found that sectarian violence in this incident was 'associated with the establishment of unlicensed churches'. To avoid the repetition of this incident, the committee urged the government to adopt a simple and clear legal procedure for Christians to build their churches, but successive Egyptian governments have ignored this recommendation.

In its literature and its practice in opposition and in power, the MB has not proposed a solution for this situation, but rather has sustained a discriminatory position. A general recognition of the right of non-Muslims to build places of worship is stated in the literature ('Auda 1960:32-33; al-Hudaiby 1977a:82). However, the exercise of this right is enormously qualified as I explain in the following. The most hardline view was expressed by Abdulla Al-Khatib (1981a:41) in his *fatwa* published in *al-Da'wa* magazine where he stated that:

> Churches should not exist on the territories conquered by force or newly established by Muslims. But Muslims can keep churches built on the territories acquired through agreements with their inhabitants. In this last case, the renovation of these churches can be permitted only if there is an agreement about that between Muslim rulers and Christians.

It was common for classical Muslim jurists to decide on the ability of non-Muslims to build religious sites in accordance with a specific categorisation of Muslim territories (Emon 2012b:119-122). Al-Khatib (2006b) later revised his opinion, stating that Christians can build their churches as long as there is a need for that. Al-Shamakh (2008:114-115) has also pointed out that the 1981 *fatwa* does not represent the official view of the MB. The dominant view today among the MB leaders and scholars is that the establishment of churches in the Islamic state is permitted but it should be decided based on the number of Christians and it

should not in any way threaten the Islamic identity of the state or negatively provoke the feelings of Muslims (al-Qaradawi 1985:10, al-Ghazzali: 1991:67; al-Sirjani: 2011:81-82; al-Barr 2011c; Tadros 2012a:110).

In a public event, Al-Barr (2011d) held that 'the construction of Churches should not be prompted by a desire to show Christian symbols and to compete with Muslims'. These pre-conditions mean that Muslims should be privileged in any regulation of the construction of places of worship. Certain restrictions can be also imposed on Christians to respect the feelings of Muslims. For instance, they should 'not expose their ceremonies or crosses in the Islamic dominions, nor should they erect a church in a city where there had not previously been one' (al-Qaradawi 1985:10). When Muslim jurists in the pre-modern era were restricting the ability of non-Muslims to establish new places of worship or maintain old ones, they were also motivated to ensure 'the Islamic character of lands falling under the imperium of the Islamic enterprise of governance' (Emon 2012b:122).

The right of Christians to build churches was mentioned in the electoral platform of the FJP (2011b), which stated that 'Christians should not be deprived of their right to build their places of worship and [that] there should be a just solution to the unlicensed Churches'. In this document, the FJP acknowledged only the rights of Christians to build places of worship; there was no reference to Jews, the Shi'a or non-Abrahamic religions. Although the party acknowledged the right of Christians to build their places of worship, it did not promise to change the relevant laws governing the building of places of worship, or that certain regulations would be applied equally to Muslim and non-Muslims.

Some official attempts have been made since 2005 to pass a unified law on the construction of places of worship that creates equal regulations for the construction of churches and

mosques. But these draft laws were not supported by the ruling political elite and they failed to gain the support of the main political actors for different reasons.[237] The repeated sectarian tensions over the construction of churches and the increasing political activism of Christians have renewed the debate on this issue in post-Mubarak Egypt. Another draft law was presented in June 2011 by the transitional Prime Minister Essam Sharaf, but it was rejected by most key actors. The law proposed a series of difficult conditions for the building of churches and mosques alike (Shaker 2011).[238] Official churches opposed the draft law, considering it restrictive and below their expectations (Sadiq 2011b), and the same reasons pushed human rights NGOs to oppose the draft. They also condemned the law for its provision that limited the right to build places of worship to followers of Abrahamic religions (CIHRS 2011). The MB and the Salafist al-Nour Party maintained that any regulations must be proportional to the number of Christians and their actual needs, but that this criteria should not be applied to Muslims. Therefore, the law according to most Islamists should treat the construction of churches and mosques separately (Al-Wafd Newspaper 2012a). Al-Azhar has also rejected the idea of a unified law for the same factors expressed by Islamists (al-Ahram 2012).

The right of religious communities to construct places of worship was not adequately protected by the 2012 Constitution. Article 43 states that 'the state guarantees the practice of religious ceremonies and the establishment of places of worship for Abrahamic religions as

[237] In 2005, a leading parliamentarian affiliated with the former ruling National Democratic Party presented a draft for a unified law but it was not considered by the Parliament. The same draft was resubmitted in February 2007 without success as well (Fastenrath and Kazanjia 2008:37). In 2007, the National Council for Human Rights proposed a draft law but the government disregarded it (Saleh 2007).

[238] For instance, the proposed law prohibited the presence of places of worship attached to residential buildings. Places of worship should be built on a 1000 metres land. The draft law did not recognise the needs of different Christian sects. It proposed that the space between any two places of worship should be 1000 metres, a condition that would create practical difficulties for Christians and Muslims to meet the needs of their followers in many regions in Egypt (Shaker 2011 and CIHRS 2011).

regulated by the law'.[239] This article deprived followers of non-Abrahamic religions of the right to publicly manifest their religion. The right of Christians and Jews to build and maintain their places of worship was also uncertain according to Article 43 of the 2012 Constitution. This article did not clearly state that the right to build places of worship is practiced by religious communities equally without discrimination, and it vaguely subjected the right to the regulation of the law, opening the door for arbitrary restrictions on the right itself. President Morsi was not clear in his electoral campaigns on whether he was ready to sponsor a new law for places of worship. He did not address it in his presidential platform (Morsi 2012b). When he was asked about the rights of Christians to build churches, he stated that this issue should be subjected to the law. However, he did not explain whether he meant that the existing law is sufficient or a new law should be adopted (Morsi 2012c). In his year in power, President Morsi did not propose a new legal framework to regulate the construction of places of worship, although sectarian incidents that were associated with this matter continued under his rule. He did however approve the establishment of a new church whose application had been under consideration for 17 years.[240] Christians praised this step but it was not enough for them to trust and support the MB (Ali 2013).

1.5 The Right to Hold Public Office

This area of the debate on the rights of non-Muslims demonstrates the contradictions in the MB's conception of Islamic citizenship. There is an agreement among MB scholars that since non-Muslims are citizens in the Islamic state, they have the right to participate in its political institutions, but subjected to certain qualifications. Al-Qaradawi (1997:194) has maintained that the participation of non-Muslims in the parliaments of Islamic states is permitted as long

[239] Article 43 of the 2012 Constitution.
[240] Presidential Decree No.345/2013 Permitting the Building of a New Church for the Coptic Orthodox Sect, *Official Gazette* no.23 of 6 June 2013, p.7.

as Muslims always dominate these parliaments. In a Muslim majority state, one would expect that the representation of Muslims would routinely outnumber the representation of non-Muslims but making such a statement reveals a belief that the Islamic political system should ensure the domination of Muslims over other non-Muslim citizens. Al-Qaradawi (1997:194-195) has argued that the Qur'an orders Muslims to behave justly with non-Muslims, so they should be allowed to run for parliamentary elections to represent their communities and not be isolated from Muslim citizens. Al-Qaradawi (1997:196-197) has opposed the prohibition of non-Muslims from political participation in the Islamic state based on the Qur'anic (4:144) principle that Muslims must not take disbelievers as allies instead of believers. He has argued that non-Muslims in this verse are the ones who fight Muslims and not non-Muslims in general. On the other hand, he has conceded to the view expressed by most traditional Muslim jurists that the appointment of non-Muslims in executive posts should be under the authority of Muslims. To clarify his idea, al-Qaradawi (1997:194-195) has referred to non-Muslim women who marry Muslim men; in this marriage according to him, non-Muslim women enjoy authority over their children and household, but under the overall authority of Muslim men.

Al-Qaradawi (2008a;2012a) has held that non-Muslims cannot hold certain public positions of a religious nature. At the top of these positions is the leader or the president of the Islamic state who is supposed to undertake certain religious tasks. Therefore, non-Muslims are not allowed to run for this position. Most pre-modern Muslim jurists held this view (Zidan 1982:78). However, al-Qaradawi (2010b) expressed a different opinion in an interview with the BBC Arabic in February 2010 when he argued that the position of the president in modern Muslim states differs from the historical position of the Caliph who is supposed to rule Muslim territories. But according to him, individual Muslims states are provinces (*imarat)* of the Islamic Caliphate. The leader of this grand Islamic state should be a Muslim

because he is the supreme leader of all Muslims and of Islamic affairs, while non-Muslims can preside over the provinces. The underlying concern in this reasoning is not the principle of equality between Muslims and non-Muslims, but the presence of certain guarantees that ensure that non-Muslims will always submit to the authority of Islam in the state. As long as the Islamic framework of the state is protected, non-Muslims can hold top positions. However, given the fact that the grand Islamic state does not exist, one can speculate that until this goal is achieved, Muslim states should be ruled by Muslims. In other writings and media appearances, al-Qaradawi still declares that non-Muslims cannot hold the position of the presidency of Muslim states (Al-Qaradawi 2008; 2012a).

The official position of the MB on this issue is that non–Muslims can occupy any position in the Islamic state except the position of the president, since it is classified under the position of 'the general leadership' (*wilaya 'amma),* which is only occupied by Muslims. The position of the prime minister can come under this category as well if this office enjoys certain powers like the president. This position was mentioned by the MB in the 2007 Draft Party Platform but it was absent in the 2011 programme of the FJP. However, the MB literature and the statements of its leaders continue to repeat the opinion that non-Muslims cannot occupy certain other positions in the Islamic state (Ghuzlan 2006:24; al-Sirjani 2011a:103). However, due to intense political pressure on the MB post-Mubarak, the group stated that any political party can nominate non-Muslims to the presidential elections, but the MB abide by their jurisprudential opinion that only Muslims can represent them in the presidential elections (al-Waziri 2011).

Some commentators might not consider that the issue of the right of non-Muslims to run for the presidency is a priority in a country like Egypt, where the majority of population is Muslim. In this situation, it would be normal that the president be Muslim. But if non-

Muslims are not allowed to occupy certain positions considered *wilaya 'amma*, it becomes possible that other official positions may also be put under this category as well, such as the leader of the army, or governors.[241] Moreover, the explicit statement that certain citizens are prohibited from reaching particular public positions is discriminatory under IHRL, and it sends a very negative message to non-Muslims living in Egypt, as we can see in the writings of Egyptian Christian intellectuals (Fawzi 2009:133).

The following two examples clearly show that the conception of *wilaya 'amma* can be evoked to exclude non-Muslims from occupying other public positions in the state apart from the presidency. For ten days in April 2011, massive sits-in and demonstrations were organised in Qina, a city in Upper Egypt, against the appointment of General Emad Mikhail, a Christian citizen, as the governor of Qina. The demand was to replace him with a Muslim governor. According to field research conducted by the EIPR (2012:30-31), the MB was one of the political entities which sponsored the protests along with Salafist associations and politicians affiliated with the dissolved former ruling party, the National Democratic Party. Consequently, the government suspended its decision and assigned a Muslim official to provisionally act as a governor. The previous governor in Qina, appointed by Mubarak, had also been Christian. According to Safwat Hegazi (2011), an Islamist scholar close to the MB, protesters refused the appointment of a second Christian governor in Qina, fearing that this position would become reserved for Christians.

In his electoral campaigns, Morsi promised his liberal political allies that he would appoint a Christian as vice president once he became president of Egypt, as a gesture of his commitment to equal citizenship (Hussein 2012). Salafists rejected this promise, arguing that

[241]Most scholars under review in this chapter focus on the position of the president but others explicitly state that non-Muslims cannot hold other positions such as leading the army (al-Sirjani 2011a:103).

under Islamic law neither Christians nor women can occupy the position of the vice president because the role replaces the president in certain circumstances, and consequently is considered *wilaya 'amma*. Morsi bowed to pressure and appointed two persons, a Christian man and a Muslim woman as his assistants – advisory positions without any constitutional powers (El Fegiery 2012:18; BBC 2012a). These two examples increased the lack of confidence between the MB and Christians.

Christians have long complained of poor representation in the parliament (Fawzi and Morcos 2012:5-6). Figures show that Christians won a higher number of parliamentary seats in the first half of the 20th century than at any time since.[242] In the 2000 Parliament, only three Copts out of 444 members were elected and only one Copt was elected in 2005 and 2010. In the 2012 parliamentary elections, six Christians were elected out of 498 members (Fawzi and Morcos 2012:5-6). 'Since 1952, successive regimes have used appointments to compensate for the meagre Coptic presence on the political scene' (Fawzi and Morcos 2012:6). The SCAF followed the same tradition and appointed five Christian members in the 2012 parliament. In December 2012 President Morsi appointed 90 members in the *Shura* (consultative) Council, among them twelve Christians.[243] This number reflected the interests of President Morsi at that time to satisfy the opposition and encourage its leaders to engage in the political process under the 2012 Constitution given the intense political polarisation between the MB and liberals in November and December 2012 over the constitution-making process. However, the problem of the appointment mechanism is that those Christian members chosen by the executive usually reflect the political choice of the ruling elite and not the people or the Christian community. But explaining their failure to be adequately

[242] For example, the number of elected Christians in the 1924 Parliament was 16 out of 214 members. In 1926, 23 Christians were elected out of 235 members and in 1936, 20 Christians were elected out of 232 members. In 1924, 27 Christians were elected out of 264 members. The average of the parliamentary representation of Christians from 1924 to 1950 is 6.13%. This average dropped to 2.54% in the period of 1957-1969 and 1.65 from 1971 to 2005 (Fawzi and Morcos 2012:5-6).
[243] Presidential Decree No.432/2012, *Official Gazette* no.51bis of 20 December 2012.

represented in the parliament, Christians complain of two specific barriers. The first is the failure of the electoral system to enable vulnerable groups to be adequately represented in the parliament. The second barrier is the heavy use of inflammatory and divisive religious slogans in electoral campaigns (Fawzi and Morcos 2012:6-7).

I begin with the debate on the electoral system. There is no specific mechanism under IHRL by which states are obliged to ensure the effective participation of minorities in public affairs. The discretion is left to states. The Special Rapporteur on the rights of minorities has proposed different measures to realise this objective. Among these measures are reserved seats as a provisional affirmative action. 'Some types of electoral systems can be [also] more conducive than others to the election of minorities' representatives'.[244] The HRC has held that affirmative action measures are compatible with the ICCPR. It has explained that:

> The principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant . . . Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.[245]

Constitutional and legal measures were taken by Mubarak in 2007 to increase the parliamentary participation of women, but not of religious minorities. The position taken at that time by the MB and other political forces revealed that affirmative action was not popular in Egypt.[246] The MB and other liberal and leftist opposition parties rejected reserved

[244] See UNCHR 'Report of the Independent Expert on Minorities Issues, Gay McDougall' (2010). p.18.

[245] UNCHR 'HRC GC 18' (1994), para.10. O'Hare (2000) has suggested that 'the equality principle in human rights law, not only permits, but arguably may, in certain circumstances, require states to adopt affirmative action in fulfilment of their obligation to respect the equality principle'.

[246] The constitutional amendments of 2007 stated that the electoral system may include 'a minimum limit for the women's participation'. See Amendments to the Constitution of Egypt, 31 March 2007. The electoral law was accordingly amended in 2009, reserving 64 parliamentary seats for women for two parliamentary terms. See Law 149/2009 Amending Law 38/1972 on the People's Assembly, *Official Gazette* no.24bis of 17 June 2009.

seats as a mechanism to enhance the participation of women, considering it a discriminatory practice but not in the sense of affirmative action (Uthman 2011:177-178). After 2011 Revolution, the MB as well as non-Islamist forces[247] did not change their opposition to this mechanism. The new electoral system developed in 2011 abolished reserved seats for women but due to pressure from civil society, the new system stipulated that one female candidate at least was to be nominated by political parties in any electoral lists.[248] In reality most parties nominated women at the end of the lists, so this mechanism was not effective enough to raise the participation of women in the parliament (Badran 2012).[249] Under Morsi, there were some demands to design an electoral system that raised the participation of women and Christians, but it was rejected by the Islamist-dominated Consultative Council. Similar to the 2011 electoral system, the proposed electoral system required political parties to nominate one woman at least for any place in all electoral lists. The declared reason, however to exclude Christians from this system was that the 2012 Constitution allowed for affirmative action only for women (CNN Arabic 2013). It was not on the agenda of the constitutional drafters in 2012 to provide special protection for minorities.

For their part, Christians have been divided on whether affirmative action is a good way to increase their representation in the parliament. The Coptic Orthodox Church has refused it, fearing that reserving some seats for Christians would isolate them and further sectarianism in the society, while other Christians believe that it is a temporary measure to empower Christians in political life (Danyal 2013; Hamid 2013). This mechanism aside, the state still has variable means, provided that it has the political will, to empower minorities and women to participate in public affairs in general, but this has not been a priority for the MB. This was

[247] In 2013, new liberal and leftist parties formed after the 2011 Revolution have become open for empowering women and minorities through affirmative action measures (al-Shami 2013). The 2014 Constitution drafted after the removal of Morsi allowed for affirmative action for women, Christians and youth.
[248] Article 1 of Law 108/2011 Amending Law 38/1972 on the People's Assembly, *Official Gazette* no.28bis of 19 July 2011.
[249] The political participation of women is discussed in chapter eight.

clear in the 2012 constitution-making process, which marginalised non-Muslims and women with respect to their representation in the Constituent Assembly, and the consideration of their demands in the constitution.

The electoral climate can be much more accessible for religious minorities if the state effectively confronts discriminatory slogans during elections. Under IHRL, the use of religious slogans in elections can be banned if they amount to an incitement to discrimination or violence. The legal debate around the use of religious slogans in elections came to the fore in 2000 when the MB decided to re-engage in electoral politics. In Egypt, the use of religious slogans in electoral campaigning has received its legitimacy from the constitutional fact that 'Islam is the official religion of the state and the principles of Islamic law are the main source of legislation'[250] so candidates can propagate their Islamic religious platforms. This is the argument invoked by the MB to defend itself against its critics (al-Shamakh 2008:108-109; Abu Baraka 2010).

The position of Egypt's courts on this issue dismayed the government under Mubarak. During the electoral campaigns of the 2000 parliamentary elections, the Ministry of Interior prevented candidates affiliated with the MB from publicising the famous slogan of the MB 'Islam is the Solution'. It argued that this slogan breached the 2000 regulations of electoral campaigns which prohibited candidates from posing any threats to 'the national unity and social harmony' during electoral campaigns. The ministry of interior did not explain the actual implications of this slogan and how it jeopardises national unity. It seemed that this action was politically motivated to repress MB candidates. The Court of Administrative Justice challenged the Ministry of Interior and held in 2000 that candidates were allowed

[250] Article 2 of the 1971 and 2012 Constitutions.

under Article 2 of the 1971 Constitution to advocate the application of Islamic law, arguing that this did not threaten national unity or security. [251]

Nevertheless, on many occasions, candidates have not only advocated the application of Islamic law but also mobilised voters along sectarian lines. In the 2005 parliamentary elections, the MB in some electoral districts appealed to Muslim voters not to vote for Christians or secularists, questioning their loyalty to Islam. These kinds of campaigning could be considered incitement to religious discrimination. Ironically in other electoral districts the MB was keen to convince Christian voters that it was bound by the Islamic teachings to protect *ahl al-dhimma* (Tadros 2012a:88-89).

To be sure, it is not only Islamists who utilise religious slogans in electoral campaigns. Under Mubarak, there were many incidents of candidates affiliated with the former ruling party who used religion in their campaigns (Tadros 2012a:88-89). This pattern has expanded after Mubarak. According to Tadros (2013a:219):

> Elections [following the 2011 Revolution] represented a manifestation of the extent of communalisation and were a contributing factor to its exacerbation and intensification by framing messages around religion rather than party agendas; by circulating rumours around candidates' religious affiliations and whether they were in God's camp or not; and by using religious symbols, spaces, and discourses to mobilise support.

The SCAF amended the 1956 Law Regulating the Practice of Political Rights, adding Article 50*bis* which prohibited and criminalised the use of religious slogans in electoral campaigns or the use of any other slogans that incited to discrimination based on sex or origin.[252] But this article has not been implemented. For example, in the campaigns ahead of the referendum on

[251] Court of Administrative Justice, Case No.38/55, 17 October 2000.

[252] Any persons violates Article 50bis can be sentenced to up to three months in prison and fined between 5000 to 10000 LE, see Law 124/2011 Amending Law 73/1956 Regulating the Practice of Political Rights, *Official Gazette* no.40bis of 8 October 2011.

the 2011 constitutional amendments, Salafists and the MB '[instrumentalised religion] to the maximum to show that good Muslims should vote yes and that only infidels and unbelievers would vote no' (Tadros 2013a:207). At that time, power struggle was intense between Islamists and non-Islamists on the future of Egypt's transition. Religious slogans allowed Islamists to discredit their competitors. Similar incidents of mobilising voters along sectarian and religious lines were witnessed during the 2011-2012 parliamentary elections (Tadros 2013:220-222; CIHRS 2012a:87).

Under Morsi, the proposed new electoral law did not prohibit the use of religious slogans in elections but prohibited any electoral campaigns that discriminate between citizens based on religion, sex or origin. The early draft of the law prohibited the use of religious slogans in electoral campaigns but was amended upon the request of Islamist parliamentarians. Surprisingly, the SCC disappointed Islamists and held in May 2013 that the use of religious slogans in electoral campaigns is not constitutional.[253] The SCC argued that the preamble of the 2012 Constitution and certain of its articles highlighted the values of equal citizenship, national unity and respect for human rights. It explained that the use of religious slogans in electoral campaigns by itself and regardless of its substance discriminates against citizens based on their religious affiliation. It said that 'these slogans prompt each religious community to show that its religion is superior over other religions'. This according to the Court 'jeopardies the doctrine of equal citizenship and furthers divisiveness in the society'. It also added that 'the use of religious slogans in electoral campaigns would obstruct the ability of voters to assess candidates based on their electoral platforms and violate the principle of equal opportunities between candidates'.[254]

[253] Supreme Constitutional Court, Case 2/35,25 May 2013, *Official Gazette* no.21bis of 26 May 2013, pp.10-11.
[254] ibid.

The prohibition of incitement to discrimination or violence as stipulated in Article 21 of the ICCPR is an efficient framework to make sure that religion is not instrumentalised during elections. The absolute prohibition of religious slogans in electoral campaigns without providing a clear definition of these slogans can possibly lead to unjustifiable restrictions on freedom of expression (Temperman 2010:322). For instance, if electoral campaigns call for the establishment of the application of discriminatory religious laws or defend the position that certain religious law should be superior in the state, one can argue that these slogans are not consistent with Article 21 of the ICCPR and the doctrine of equality and non-discrimination. But this would not be the case if these slogans inspire neutral religious values and ethics without having negative implications for human rights. The task of the SCC in the Egyptian constitutional and political context was very difficult in this case. The SCC was not able to declare the reference to the application of Islamic law discriminatory as an argument like this would not be possible under Article 2 of the constitution. Therefore, the SCC evaded any discussion of Islamic law and limited its arguments to the use of religious slogans. This approach allowed the SCC to effectuate the constitutional provisions on equality, citizenship and non-discrimination but without making a statement on whether the call for the application of Islamic law is discriminatory or not.

President Morsi, the MB and their Islamist allies were unhappy with this reasoning. The SCC deprived them of one of their strongest weapon in elections. However, they had no option but to concede to this judgment to pass the electoral law. The *Shura* (consultative) Council amended the draft law and prohibited the use of religious slogans in electoral campaigns (Sami and Lashin 2013). However, it is yet to be seen how this legal prohibition can be observed in practice in future elections in Egypt and how lower courts would interact with this judgment which is binding on Egyptian courts.

1.6 Inter-faith Marriage

Marriage between Muslim women and non-Muslim men is prohibited under Egyptian law. There is no codified rule but this rule which has been supported by most pre-modern Muslim jurists is enacted in Egypt through Article 280 of the Decree on the Organisation of the Shari'a Courts. This article states that judges apply the prevalent opinion of the Hanafi school of Islamic law.[255] Article 6 of Law 462/1955 on the Abolition of the Shari'a and *Milli* Courts states that Article 280 is applicable to personal status cases.[256] On many occasions, the Court of Cassation has confirmed that marriage between Muslim women and non-Muslim men is null and void.[257] Human rights defenders or politicians who call for a legal change in this area come under fierce attacks from Islamists and al-Azhar. For instance, Amr Hamzawy, a prominent liberal figure and former parliamentarian, declared in 2011 that civil marriage could be a solution to provide Egyptians with the freedom to choose their spouses regardless of their religious affiliation. A smear campaign targeted Hamzawy after this statement, accusing him of being a Jew and of pursuing a foreign agenda. To save his political career, Hamzawy had to apologise for his statement (Madkur 2011).

There is agreement among MB scholars that inter-faith marriage between Muslim women and non-Muslim men is prohibited under Islamic law while Muslim men are permitted to marry Christian or Jewish women (al-Khatib 1980a; al-Qaradawi 1994:184; al-Sirjani 2011:176). This opinion is based on certain verses of the Qur'an (2:221; 60:10) and the consensus of pre-modern Muslim jurists. Explaining this opinion, they argue that Muslims acknowledge Christianity and Judaism so that they will respect the religious freedom of their female partners, while on the contrary, a non-Muslim male will not respect the religious

[255] Decree No.78/1931 on the Organisation of Shari'a Courts, *al-Waqa'i' al-Masriyya* no.53 of 20 May 1931.
[256] Law No.462/1955 Abolishing Shari'a and *Milli* Courts, *Official Gazette* no.73bis of 24 September 1955
[257] See Court of Cassation, Cases No. 28/33, 9 January 1966; No. 16/35, 8 March 1967; No. 9/44, 24 December 1975; No. 61/56, 29 March 1988; Nos. 475, 478, 481, Year 65, 5 August 1996.

beliefs of his Muslim female partner. On this point, al-Qaradawi (1994:185) has wondered 'how can Islam take chances on the future of its daughters by giving them into the hands of people who neither honour their religion nor are concerned to protect their rights?'

However, the assumption that non-Muslims will necessarily disrespect the religious beliefs of their Muslim partners is weak because the contrary can happen as well. The Qur'an (5:72) condemns certain beliefs of Christians and even declares those who embrace these beliefs to be unbelievers, so it is also possible that Muslim males influenced by the Qur'an pressure their non-Muslim partners to convert to Islam. Al-Sirjani (2011:177) says that the Qur'an (6:108) prohibits Muslims from insulting the religious convictions of non-Muslims but in practice, the state cannot ensure that Muslim husbands do not disrespect the religious beliefs of their non-Muslim wives in their daily life or pressure them to convert to Islam, particularly in a country like Egypt where family law is discriminatory against women.[258] The weak position of women's marital status under Islamic law is illustrated by MB scholars when they argue that women are under the guardianship *(qiwama)* of men so that their partners can influence their religious convictions (al-Sirjani 2011:177; al-Qaradawi 1994:185). The problem in this argument is that it takes the assumption of inequality between men and women in Islam for granted without making juristic efforts to change it. This view assumes that Muslim women are weak and not able by definition to defend their religious beliefs.

Most scholars under review in this chapter permit the marriage of Muslim men to women of the People of the Book (*ahl al-Kitab*) based on the Qur'anic teachings. Abd al-Mit'al al-Jabri (1983) opposed this view, arguing that the People of the Book of our age are unbelievers since their beliefs about the nature of the Prophet Isa (Jesus in the New Testament) are corrupted. This theory could lead to far-reaching discrimination against Christians and Jews

[258] The rights of women are discussed in Chapter eight.

in the Islamic state. Al-Jabri also repeated the view of al-Mawdudi and Sayd Qutb (al-Jabri 1983:15-22) that the marriage between Muslim men and non-Muslim women brings harmful consequences to Islam and Muslim families. Al-Jabri (1983:17-18) believes that this marriage is also not allowed for Muslim living in non-Muslim societies, citing the opinion of al-Qaradawi that Muslim men in non-Muslim societies should marry Muslim women for the benefit of Muslim communities in these societies.

In cases of inter-faith marriage, Muslim personal status law is applicable and this brings certain difficulties for non-Muslim women. They do not receive a reserved portion of inheritance from their dead husbands because interfaith inheritance is forbidden under Egypt's law.[259] Their children are automatically registered as Muslims like their fathers (Scott 2010:87) and they can lose the custody of their children if they are divorced from their Muslim partners.[260] In 2008, Zainab Radwan, a famous scholar in Islamic law and a parliamentarian, presented a draft law to permit non-Muslims women to inherit from their Muslim husbands, arguing that there is no consensus among Muslim jurists that Christian or Jewish women do not inherit from their Muslim husbands. But the MB lobbied against the proposal, and it was dismissed by the parliament (Abu Zayd 2008). Some leading figures at al-Azhar supported the proposal, but among others, the Islamic Research Academy did not accept it (Tadros 2012a:113).

Cases of inter-faith marriage and news about the conversion of non-Muslim women in order to marry Muslim men have been a source of sectarian tensions. Because of the discriminatory

[259] Article 9 of Law No. 71/1946 allows Muslims to bequeath their properties to non-Muslims.

[260] See the case of Kamilia Lotfy whose custody to her sons Andrew and Mario were handed to her ex-Muslim husband. In this case her husband was Christian when he married her but then he converted to Islam. Consequently, the two children Andrew and Mario were registered as Muslims despite having spent their childhood as Christians. Kamilia bravely struggled for five years at Egyptian courts to retain custody of her sons and finally the Court of Cassation on 15 June 2009 accepted that she maintain the custody of her sons but on the condition that she brings them up as Muslims (EIPR 2009).

nature of Egyptian law in this area, non-Muslims feel in these cases that they are inferior to Muslim citizens. This might explain why sectarian tensions easily emerge when these cases come to the surface. In 2004, Wafa Qustuntin, the wife of a Christian priest, left her martial home and disappeared. Thousands of Christians protested, alleging that Wafa had been abducted by a Muslim man and forcefully converted to Islam. Because of the profile of her husband and to avoid sectarian violence, State Security Services ordered the arrest of Wafa and allowed the Coptic Orthodox Church to communicate with her. Then she expressed her willingness to remain Christian (Mahmood 2012b:55). In July 2010, the wife of another Coptic priest, Kamilia Shehata, ran away from her family and allegedly converted to Islam. The police found Kamilia and handed her back to the Coptic Orthodox Church. She then appeared in the media and declared that she is Christian, but Islamists accused the church of pressuring Kamilia to convert back to Christianity (Tadros 2013a:104).

The performance of the church, the state and Islamists in these cases has furthered sectarian tension. The church was not transparent on the destiny of Wafa and Kamilia and whether they converted to Islam or not. The behaviour of the church seems to be prompted by the general feeling of Christians that their rights are not secured in Egypt and that they are exposed to discrimination. The state was keen to maintain public order and to maintain its friendly relationship with the Coptic Orthodox Church. Islamists adhere to discriminatory policies against non-Muslims and in these cases they also expressed their dismay at the political power of the Church (Hassan 2011). This feeling has influenced Islamists' attitudes towards Christians and pushed them to believe that Christians have advantaged status in the state and that they attack the identity of the majority population.

Similar incidents have occurred in post-Mubarak Egypt. In May 2011 in Imbaba neighbourhood in Giza, a group of Salafists accused Mar Mina Church of kidnapping Abir

Tal'at, a Christian woman who had married a Muslim man and converted to Islam. Salafists insisted on inspecting the Church to search for the woman. Bloody clashes erupted between Muslims and Christians in Imbaba for two days that led to the death of 15 persons, the injury of around 232 others and the burning of two Coptic churches. Security forces failed to protect citizens and the churches (Egyptian Initiative for Personal Rights 2011). Abir appeared in the media after the clashes and stated that she had voluntarily converted to Islam and that she had been detained at the Mar Mina Church (Ahram on Line 2011). Hamdi Hassan (2011), a leader of the MB stated in a TV interview after the incident that 'Churches are only places for worship and not for detention'. He also reminded his audience of previous similar cases of Wafa and Kamilia Shehata.

In this case, the Church violated the law by detaining a Christian citizen to pressure her to return to Christianity, and Muslims on the other hand gave themselves the right to attack the Church, and insisted on its inspection. Both infringed the rule of law, but the lack of equality and religious freedom escalated the tension between non-Muslims and Muslims in this incident. To contain the social tensions resulting from conversion and interfaith marriage, the political advisor of the Prime Minister suggested after the incident of Imbaba the establishment of an institution composed of Muslim and Christian members to regulate and register cases of conversion (al-Fatah 2011). Previously, non-Muslims could not convert to Islam before attending guidance sessions (*jalasat nusuh wa irshad*) at churches but the Minister of Interior had suspended this mechanism since 2004 (Tadros 2013a:95).[261]

[261]This mechanism is not mentioned in the law but this was the common tradition under Mubarak to appease the Coptic Orthodox Church and to avoid sectarian tensions caused by the conversion of any Christian to Islam. A prominent Christian lawyer filed a case in March 2008 before the Court of Administrative Justice to challenge the decision of the Minister of Interior but the Court held the case inadmissible because the lawyer failed to prove that the minister of interior stopped the advice sessions. See Court of Administrative Justice, Case No.3814/60, 4 March 2008.

The proposal to establish an institution to regulate conversion cases as well as the organisation of guidance sessions is problematic under international human rights because religious freedom is a personal choice, and individuals should not be compelled to communicate with their religious institutions or any other institutions before they convert from their religions and the state has an obligation to protect this choice. However, conversion is not the only problem in tensions such as the Imbaba case because the law allows Muslim men to marry Christian women but prohibits Christian men from marrying Muslim women. Any solution for these tensions from a human rights perspective should ensure that all citizens are equal before the law and that the engagement in a marital relationship is an individual choice that should not be restricted based on the religious affiliation of citizens. The Christian writer Sameh Fawzi (2010:2) has held that these incidents are nothing but the outward manifestation of latent sectarian tensions. A political discourse that is based on denying the root causes of these tensions does not help in treating this intractable problem.

2. Unrecognised Religious Minorities

As noted, Christians and Jews are not the only religious minorities that claim their rights in Egypt. There are other small religious communities who are not recognised by Egyptian law and consequently face multiple hardships in their private and public lives, particularly if they seek to be recognised as an independent religion like the Baha'is. Other communities such as the Shi'a and the Ahmadis define themselves as Muslims but are treated as having deviated from the dominant Sunni Islam. Over the last decade and with the support of human rights NGOs, through advocacy and litigation, the rights claims of unrecognised religious communities have been brought to the surface (Hassan 2009:24).

In pre-modern Islamic law and throughout the historical traditions of Muslims, one finds precedents that non-Muslims other than Christians and Jews who were living on Muslim lands were treated as part of *ahl al-dhimma* and consequently preserved certain rights (Baderin 2003:166-167; Friedmann 2003:84). However, this has not been the situation in contemporary Egypt with regards to religious communities who have recently appeared in society, or whose beliefs are considered heretical in Islam. For example, the Baha'i religion, also known as Babism, originated in Iran in the 19th century and 'teaches veneration for the founder of all the major world religions'; its founders came from an Islamic background and when it originated many Muslims converted to Babism (Mayer 2012:144). Therefore, in the mind of many Muslims, this religion is a heretical Islamic sect which aims to undermine 'authentic' Islamic teachings. The Baha'is however do not consider themselves Muslims and define their religion as an independent one. By contrast, the Ahmadis consider themselves Muslims but their opponents treat them as a heretical sect. Mirza Ghulam Ahmed founded Ahmadiyya in Qadian, India by the end of the 19th century. His followers consider him the promised Messiah who supplements the teachings of the Prophet Muhammad (Khan 2003:218). The Baha'is have long been portrayed in Egypt as agents of Western imperialism and Zionism.[262] One reason for that is that the centre of the world community of Baha'i is located in Haifa, Israel. This political concern explains the tough approach taken by former President Nasser when he dissolved the Baha'i communities in 1960 with a law that prohibited their activities in Egypt and stipulated a punishment of up to six months in prison for violating its provisions.[263]

Since its establishment and until today, the MB has declared the Baha'i and Ahmadiyya to be destructive beliefs *('aqa'id hadama*). Under the leadership of Hassan al-Banna, it advocated

[262] See Supreme Court, Case No.7/2, 1 March 1975 and Court of Administrative Justice, Case No.18354/58, 29 January 2008.
[263] Law No.263/1960 Dissolving the Baha'i Communities.

against the activities of the Baha'is and Ahmadis in the Muslim world (Amin 2003:101-104; 2006:298-305). Al-Khatib (1979a:62) published a *fatwa* in *al-Da'wa* magazine, saying that the Baha'i is a corrupted sect supported financially and politically by the enemies of Islam. He urged Muslim governments to confront its spread in the Muslim world. In opposition and in power, the MB has taken hardline positions towards unrecognised religions. The group's Reform Initiative of 2004 stated that 'religious freedom is guaranteed for the recognised monotheistic religions' (MB 2004:324). A similar restriction can be found in the FJP's (2011a:154) platform which talks about the state's duty to protect only the monotheistic religions. The MB leaders maintain that non-Muslim citizens who are not People of the Book have the right to live in Egypt, but are not allowed to publicly express their religious beliefs or to build their own places of worship (Scott 2010:159; Tadros 2012a:111).

Many of the Egyptian Baha'is are of Muslim origin and this underpins the view that considers them converts from Islam. For instance, the Court of Administrative Justice in 1952 held that the marriage of Baha'is is null and void on the grounds that conversion from Islam invalidates marriage.[264] In 1975, the Supreme Court confirmed that the law which prohibits the Baha'i communities is compatible with the 1971 Constitution, arguing that religious freedom is not absolute and it can be subjected to certain limitations for the preservation of public order. It also stated that Egypt recognises only the three Abrahamic religions. Egyptian courts cite this judgment until now.[265] In 1977, the State Council declared that the government cannot register the marriage contracts of the Baha'is because this religious community is not recognised in Egypt.[266]

[264] Court of Administrative Justice, Case No.195/4,26 May 1952
[265] Court of Administrative Justice, Case No.18354/58, 29 January 2008.
[266] State Council, A Statement on the Law No.544, 13 July 1977.

In an exceptional precedent, the Court of Administrative Justice held in 1983 that Egyptian Baha'is have the right to record their religious affiliation in their identity cards. The Court argued that even though the state does not recognise the Baha'i religion, its members should be able to record their true religious affiliation. It also held that under Islamic shari'a, non-Muslims apart from the People of the Book can live in the Islamic state even if they are not entitled to the same rights like Christians or Jews.[267] This judgment was however overruled by other courts and the government continued its discrimination against the Baha'is (Pink 2005:149-150). In 1985, a group of Egyptian Baha'is were arrested and referred to criminal trial under the 1960 Law on charges of being affiliated to the Baha'i religion. The MB's magazine *al-I'tisam* (1985:3; 1986:22-25; 1987b:29; 1987a:30-32) supported the trial of the arrested persons and started a campaign against the Baha'is and their religious activities in Egypt.

The Egyptian Baha'is' struggle to record their religious affiliation in their identity cards was renewed in 2000 when Egypt adopted a new digital identity card so that all Egyptian were required to replace their paper identity cards with the new computerised ones. The Ministry of Interior refused to register the religious affiliation of the Baha'is (HRW and EIPR 2007). A group of Egyptian Baha'is in cooperation with human rights NGOs filed petitions before Egyptian courts. In April 2006, the Court of Administrative Justice followed the 1983 precedent and ordered the ministry of interior to record the Baha'i religion in the official identity cards of the Egyptian Baha'is.[268] This judgment met strong opposition from the government and the MB. In May 2006, the People's Assembly discussed this judgement and the Egyptian Baha'is found themselves under fierce attack from parliamentarians. Members of the National Democratic Party and the MB led the discussion in this session. Leading

[267] Court of Administrative Justice, Case No.1109/25, 29 January 1983.
[268] Court of Administrative Justice, Case No.24044/45, 4 April 2006.

member of the MB, Sobhi Saleh, urged the government to challenge this judgement before the Supreme Administrative Court and to strictly criminalise the Baha'i religion in Egypt. Akram Al-Sha'ir, another leader of the MB, stated in Parliament that 'the Baha'is are non-believers and they should not be recognised in Egypt which is ruled by Islamic shari'a'; he added that 'Zionists support the Baha'is' (Shalabi 2006a). Maher 'Aql, a parliamentarian affiliated with the MB, declared the Baha'is apostates and called for punishing them by death (Shalabi 2006a).[269] In a public statement, the Arab Network for Human Rights Information (2006) condemned this parliamentary session and blamed the government and the MB for committing incitement to discrimination and violence against the Egyptian Baha'is.

On 16 December 2006, the Supreme Administrative Court overruled the 2006 judgement.[270] Consequently, the Baha'is followed a new legal strategy by limiting their demand to the issuing identity cards without recording any religion and they succeeded in getting a new judicial precedent that partially addressed their rights. In January 2008, the Court of Administrative Justice ordered the Ministry of Interior to put a dash in the space of the religious affiliation in the identity cards of the Egyptian Baha'is.[271] The Supreme Administrative Court confirmed this judgement on 16 March 2009.[272] However, this new precedent does not end other forms of discrimination against the Baha'is and it has not recognised their presence in Egypt. The rise of human rights activism over the last decade and the emergence of new private media have empowered the Baha'is and encouraged them to go public with their demands. This development however has annoyed others forces in Egypt including the MB. Writing for the official web site of the MB, Sayd Nizili (2008), a leader of the group, condemned human rights defenders who support the Baha'is, stating that

[269] Official Records of the People's Assembly Session Held on 3 May 2006, Report No.69, 14 June 2006.
[270] Supreme Administrative Court, Case No.16834/52, 16 December 2006.
[271] Court of Administrative Justice, Case No.18354/58, 29 January 2008.
[272] Supreme Administrative Court, Case No.10831/54, 16 March 2009.

the Baha'is embrace heretical views that undermine Islam and shari'a. Moreover, in a parliamentary meeting held in April 2009 by the Committee of the Defence and National Security and the Committee of Religious Affairs, some members of the ruling National Democratic Party and the MB urged the government to pass a law criminalising affiliation with the Baha'i religion and called for the trial of TV presenters hosting leaders of the Baha'i community in Egypt on their programmes. They also accused the Baha'is of being subordinated to Israel, Jews and Zionism, and distorting Islamic beliefs (Salih 2009).

In the post-Mubarak era, the discrimination against the Baha'is persisted. According to the 2012 Constitution, the exercise of religious freedom was only guaranteed for monotheistic religions. Article 43 said that 'freedom of belief is an inviolable right. The State shall guarantee the freedom to practice religious rites and to establish places of worship for the divine religions, as regulated by law'.[273] Teaching religion is compulsory for Muslims and Christians students in Egyptian primary and secondary schools, and in January 2013, the Minister of Education stated that Baha'i students should attend either Islamic or Christian religious courses (Allam 2013).

In an attempt to confront the dissemination of the Shi'a doctrine in Egypt, the 2012 Constitution stated that Egypt recognises only the sources of Sunni Islam.[274] The MB and its scholars refuse certain beliefs adopted by the Shi'a and consider them innovation (*bid'a*), and they also rejected the criticism posed by the Shi'a of the companions and the prophet's wives. They resist the spread of the Shi'a doctrine in Egypt, which for them should be a Sunni state (Ghuzlan 2009; Amin 2010; Mahmoud 2013). However, certain political factors have influenced the MB's policies towards the Shi'a. Since the Iranian Islamic revolution and until

[273] Article 43 of the 2012 Constitution.
[274] Article 219 of the 2012 Constitution.

the conflict in Syria in 2012, the MB found that the alignment with Iran and the Lebanese Shi`ite group Hizb Allah is necessary to confront Israel and Western powers in the MENA. Therefore, the MB was keen to avoid the engagement in a doctrinal debate with the Shi'a (MB 2006; Altman 2009). This position has changed since post-Arab uprisings because of the support of the Iranian government for the Allawite[275] regime in Syria in its fight against the Sunni militant opposition. This conflict has escalated the rift between Sunni and Shi'a Muslims in the Arab region (Abdo 2013).

Egyptian Islamists have given the conflict in Syria a strongly sectarian flavour, portraying it as a holy war between Sunni Muslims and the heretic Shi'a (Neriah 2012). Consequently, the incitement against the Shi'a has been routinely found in Egypt over the past four years. Under the MB, the state was lenient on incitement to violence and discrimination against the Shi'a. For instance, Safwat Hegazi (2010) a famous religious preacher and a close ally to the MB, incited the killing of Yassir al-Habib, a Shi'a clerk who lives in the UK, accusing him of insulting the family of the Prophet, yet he was appointed by the Islamist-dominated parliament as a member of the National Council for Human Rights.[276]

In a public conference held on 16 June 2013 in support of the Syrian revolution and attended by President Morsi, Salafist leaders made inflammatory statements against the Shi'a, calling them 'unclean and heretics'. They urged Morsi to fight the dissemination of the Shi'a doctrine in Egypt. Morsi did not condemn these statements. On 23 June 2013, a few days after the conference, an angry mob killed four Shi'a men in the village of Abu Muslim, south of Cairo. Amongst those killed was Sheikh Hassan Shehata, a famous Egyptian Shi'a

[275] Allawism is a sect of the Shi'a Muslims.

[276] Consultative Council Decision No.7/2012, *Al-Waqa'I' al-Masriyya* no.190 of 16 August 2012, pp.3-4.
Since 2009, Safwat Hegazi is barred from entering the UK and France after being accusing of fostering extremism and hatred (Daily News Egypt 2009).

preacher. The killers identified their victims as apostates and enemies of Sunni Islam (Amnesty International 2013; EIPR 2013b; HRW 2013a).[277] The MB condemned the killing and denied its involvement in the incitement campaign against the Shi'a; however, public statements made by its leaders on the killing implicitly condemned the beliefs of the victims. For instance, the mouthpiece of the MB said that 'the victims were holding ideas that are alien to our society' (Surur 2013a). Another leader of the FJP stated that the victims might have deserved to be punished but, according to him, the state is responsible for holding them to account, not non-state actors (Surur 2013b). This case clearly shows that systematic discrimination against certain religious minorities and the state's official sponsorship of specific religious doctrines could easily aggravate intolerance and sectarian polarisation in society.

3. Conclusion

This chapter has addressed the rights of religious minorities in the thought and practice of the MB, and has shown that the MB has failed to expand its understanding of the rights of religious minorities. Locating this in the larger context in Egypt, I have shown that many forms of discrimination against religious minorities have long been rooted in its law. However, the MB's contribution to the debate on the rights of religious minorities in Egypt has furthered this discrimination and legitimised it in Islamic terms. The fundamental principle that governs the rights and duties of non-Muslims in the Islamic state is their submission to the rule of Islam and shari'a, and this principle legitimises all forms of discrimination against non-Muslims. This meaning of citizenship has been difficult to reconcile with the principles of equality, non-discrimination and religious freedom. Non-Muslims in the proposed Islamic state are exposed to certain forms of discrimination that obstruct their full engagement in this state as equal citizens. Those religious minorities who

[277] A recent research by Minority Right Group International confirms the rise of incitement against the Shi'a and other Egyptian religious minorities under the MB's rule (Mohieddin 2013:22-23).

are entitled to certain rights are the followers of the Abrahamic religions, but other unrecognised religious communities are subjected to flagrant forms of discrimination. Yet as I have demonstrated, recognised religious communities are not fully equal to Muslim citizens.

The legal autonomy of non-Muslims in family law has meanwhile been portrayed as a sign of tolerance with non-Muslims, where in practice, the application of sectarian religious family laws in Egypt has deprived the followers of religious communities of the right to equality and non-discrimination. Finally, the prevalent view in the MB is that paying *jizya* is not relevant now, but the reasoning used to reach this opinion leaves the possibility of its reinstitution if political circumstances change in the Islamic state. And if non-Muslims challenge the Islamic background of the state, they risk losing the state's protection completely.

Chapter Seven: Apostasy and its Legal Implications

In traditional Islamic law, a Muslim can be declared an apostate after the commission of certain deeds or the utterance of words of unbelief. For instance, the perpetration of blasphemy and heresy can amount to apostasy (Saeed and Saeed 2004:36-40). Under this category, apostasy can be established even though the accused person denies his/her conversion from Islam. As noted by Johansen (2003:688) 'apostasy thus becomes a depersonalised objective fact without any relation to the intentions of the individuals concerned'. I have addressed this type of apostasy in my discussion of blasphemy and heresy in chapter five and I have argued that these concepts influence the MB's thought and practice in the area of freedom of expression. Another ground for the establishment of apostasy is that a Muslim intentionally converts from Islam to any other religion or to non-religious beliefs. The question here is 'the speaker's explicit self-perception of his[/her] religious identity' (Johansen 2003:691). This subjective type of apostasy is the focus of this chapter.

The right to change one's religion has long been a contested issue in Egypt and many other Muslim majority states (Stahnke and Blitt 2005). There have been dozens of cases of conversion from Islam examined at Egyptian courts over the last decade where converts challenge the state's refusal to officially recognise their conversion (El Fegiery 2013). In Egypt, citizens' religious affiliations are recorded in the official documents of identification. In addition to the wish to be identified according to their true beliefs, the legal effort made by converts to gain official recognition from the state is necessary for their normal social life as citizens. Religious affiliation determines certain rights and duties for citizens in many areas of social life such as marriage and education. Litigation by human rights lawyers over the

past five years has achieved little success in expanding the scope of the right to religious freedom. Many legal barriers to conversion from Islam remain in place in Egypt and there seems little prospect that they will be overcome in the near future. This chapter examines the intellectual and political roles of the MB and its scholars in this debate.

1. The Debate on the Right to Change One's Religion

Most traditional Muslim jurists have held that unrepentant apostates are to be executed (Friedman 2003:130). In earlier eras Shafi'i and Zahiri jurists treated the punishment for apostasy as a fixed punishment (*hadd*) but other jurists in the Hanafi, Maliki and Hanbali schools considered it a discretionary (*ta'zir*) punishment (Friedman 2003:130-135). Among the early jurists, Ibrahim al-Nakha'i and Sufyan al-Thawri were of the view that apostates should not be executed but invited back to Islam (Baderin 2003:123). Since the beginning of the 20th century, Muslim scholars have drawn on these differences among traditional jurists to revisit Islamic law on apostasy. The prevalent trend among those scholars is to define apostasy in association with the commission of other crimes against the state. However, as I explain in this chapter, many of them, including the MB scholars, do not define these crimes in a clear and precise manner, leaving the door open for restricting the ability of Muslims to convert from Islam or imposing penalties other than the death penalty for conversion. What has been ignored in this new jurisprudence on apostasy is that apostates can also be exposed to serious civil consequences. An apostate is not permitted to marry a Muslim, and if married, his or her marriage will be deemed void. Apostates are not allowed to claim custody of their children, nor retain their right to inherit, neither are they allowed to maintain the ownership of their properties (Hashemi 2008:38).

For many Muslim states, the substance of freedom of religion and belief has been a contentious issue since the beginning of the codification of international human rights instruments. As noted by Baderin (2008:625) 'while the principle of religious freedom is theoretically recognised by Muslim states, the scope of its practical application is narrower than that of IHRL'. During the drafting of the UDHR, Saudi Arabia and Egypt opposed the reference in Article 18 to the right of individuals to change their religion as a component of freedom of religion and belief (Waltz 2004:815-816) but eventually the right of an individual to change his/her religion or belief was included in Article 18 of the UDHR. The debate on this issue was renewed during the drafting of the ICCPR with the result that Egypt, Saudi Arabia, Pakistan and Morocco succeeded in having the explicit reference to the right to change one's religion omitted from Article 18 of the ICCPR (Waltz 2004:818). However, international and regional human rights organs and the majority of UN member states agree that the right of individuals to change their religion is a fundamental element of freedom of religion and belief.[278] In its General Comment No.22, the HRC has maintained that:

> The freedom to 'have or to adopt' a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief.[279]

The active presence of Christian missionaries in Egypt in the colonial era left negative perceptions of proselytism and conversion among Islamist and nationalist forces. These missionaries have become considered a sign of political exploitation and cultural imperialism (Sharkey 2010; Mahmood 2012a:433). 'Though Christian missionaries in countries like Egypt converted relatively few Muslims to Christianity over the course of more than a

[278] See UNCHR 'Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir' (2005), p.15. This right is recognised in Article 12(1) of the American Convention on Human Rights (1969) and Article 9(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). According to Article 1 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981), freedom of thought, conscience and religion 'includes freedom to have a religion or whatever belief of his choice'.
[279] UNCHR 'HRC GC No.22' (1994), para.5.

century, memories of their efforts loom large for many Muslims today' (Sharkey 2010:57). Historically, one of the original functions of the MB was to confront the activities of Christian missionaries in Egypt and the Muslim world and resist conversion from Islam (Amin 2006: 273-294). In its first meeting in May 1933, the Consultative Council of the MB urged the King of Egypt to protect Egyptians from Christian missionaries and strictly monitor the activities of Christian schools and associations operating in Egypt (al-Shamakh 2011b:74). In 1940, the MB led a campaign to criminalise proselytism, arguing that conversion from Islam was not consistent with the fact that Islam was the official religion of the state under the 1923 Constitution (Amin 2006:294).

Apostasy is not a crime in Egypt's law but it involves civil implications for apostates. The civil consequences of apostasy often arise in civil courts as a result of disputes between citizens over marriage, inheritance or children's custody. Having studied the jurisprudence of Egyptian courts in this area, Berger (2002:584) concludes that apostasy from Islam has serious consequences for matters related to the application of the Personal Status Law, observing that 'it renders the marriage of the apostate null and void, prevents him from entering into a new marriage even with a non-Muslim and excludes him from inheritance'. In 1975, the Court of Cassation held that the traditional Islamic rules on the consequences and the prohibition of apostasy are core elements of Egypt's public order. In 1996, the Court held that the legal consequences of apostasy were derived from Article 2 of the Constitution of 1971.[280] Berger (2003:723) has argued that Egypt's case law in this area is consistent. He surveyed the case law of the Court of Cassation and the Supreme Administrative Court, and concluded that 'apostasy is perceived as a legal impediment to almost all personal status rights by virtue of the apostate having incurred civil death'. Hamad (1999) reached the same conclusion after analysing a set of cases examined before the State Council in which certain

[280] Court of Cassation, Case no. 9/44, 14/12/1975 and Case Nos. 475, 478,481/65, 5/8/1996 cited in Ibid., p.584.

legal principles on the legal consequences of apostasy were confirmed. These principles include the loss of an apostate's right to marry and inherit.

Amid the intense debate on the codification of shari'a in the 1970s, there were efforts made by Islamists and al-Azhar to prescribe a punishment for apostasy in Egypt's law (Skovgaard-Petersen 1997:231-232). At that time, al-Azhar was supportive of the Islamisation of Egypt's constitution and law. Article 71 of the Islamic Draft Constitution, proposed by the Islamic Research Academy of al-Azhar in 1978, stated that Islamic *hudud,* including the punishment of apostasy, should be applied. A committee from al-Azhar prepared a draft law on apostasy. Article 1 of this draft said that 'any adult Muslims who intentionally leave Islam either by explicit utterance or deed or deny what is necessarily known of religion is offered 30 days to repent and then punished by death if he/she insists on apostasy' (al-Fattah 1984:159). The MB sponsored this draft law and Islamist parliamentarians advocated this law in Parliament. Christians, however, felt threatened by this draft law. The Coptic Pope called on Egyptian Christians to fast, protesting the draft law (Hassan 2003:107). The draft law was eventually blocked in Parliament but the discussion of the codification of Islamic law continued.

Writing for *al-I'tisam*, the MB's prominent scholar Jirisha (1979) blamed the government for not passing the law, saying that 'conversion from Islam cannot be considered a liberty in an Islamic state like Egypt'. He maintained that this law is needed to confront Christian missionaries and to prevent people from manipulating religion for personal interests. He referred to Christians who become Muslims to dissolve their marriage then convert back to Christianity. Early MB literature restated the prevalent position of traditional Muslim jurists on apostasy, according to which apostasy is punishable by death (al-Hudaiby 1977b; Jirisha 1979:198). Writing about the purpose of executing the apostates, Sabiq (1973c:457) and Qutb (2003b:158) held that the unity of the Muslim community and its spiritual integrity are

gravely threatened if apostates are left without punishment. In his *fatwa* published by *al-Da'wa* magazine, Al-Khatib (1980c) stated that 'Islam does not compel any persons to become a Muslim but once a person joins Islam, he/she is not allowed to manipulate the religion. Apostasy is a crime of treason against God so apostates are either to repent or to be executed'. As a response to the political rise of Islamists and al-Azhar, former President Sadat sponsored the efforts to put Egypt's law in line with Islamic law. The Parliament formed a committee to codify shari'a. The committee published its report in 1980 and the death penalty for apostasy was included in the draft penal law (People's Assembly 1982:112-120). But during the 1980s, President Mubarak halted this codification project. Nevertheless, although efforts to introduce a strict punishment for apostasy have failed, apostasy and its consequences continue to be a contested issue in Egypt's courts and in the public debate on human rights.

In Egypt, Muslims are not allowed to convert to any other religion, or to give up religion completely. Neither the law nor the successive Egyptian constitutions explicitly prohibit conversion, but this is a rule developed by Egypt's courts. Moreover, the right to change one's religion is still not widely accepted among Egyptians. A recent study of the Pew Research Center (2013) on a sample of 2000 Egyptians shows that although more 75% of the sample supported religious freedom, 64% of the respondents held the view that apostasy from Islam should be punished. Nevertheless, Egyptian converts have been searching for legal recognition since 1980. The number of conversion cases at Egyptian courts has significantly increased over the last decade, and the issue has become also on the agenda of many Egyptian human rights NGOs. Through litigation and domestic and international advocacy, the right of Egyptians to freely choose their religion and beliefs come to the fore (HRW and EIPR 2007). The intense litigation on conversion has partially led to the recognition of some rights for converts, as I explain in the following sections. In 2006, a group of lawyers and

activists established Egyptians against Religious Discrimination, a social coalition supportive of freedom of religion and the rights of religious minorities. A handful of politicians and media figures defend the expansion of the scope of freedom of religion in Egypt and use arguments from Islamic law to support their positions (Youssef 2013; al-Shubaki 2007).

The significant rise of the culture of protest and of claiming rights after the 2011 Revolution has encouraged many Egyptian atheists and converts to be outspoken in the media and Internet about their rights and their views on religion. They wanted to make their voices heard by the drafters of the post-revolutionary constitution. The rise of Islamists and their intense discourse on the Islamisation of Egypt has also led to the increasing emergence of young secularists and atheists who vocally advocate the removal of Islam and Islamic law from the constitution as the most viable way to preserve religious and political pluralism and international human rights (Diab 2013; Fouad 2012; al-Din 2013). The flow of ideas through the Internet has allowed many Egyptian atheists to network with their counterparts in other regions in the world (Whitaker 2014).

Books by atheist thinkers like Richard Dawkins, Christopher Hitchens and Stephan Hawking have become easily accessible in Arabic to young people in Egypt. For the first time in the history of Egyptian cinema, an Egyptian film entitled 'The Atheist' openly discusses the issue of atheism among young people (Gawad 2012), and also for the first time, a debate was convened in February 2013 (during the rule of the MB) at an Egyptian mosque in the heart of old Cairo between atheists of Muslim origin and Muslims (Deasy 2013). The fact that a debate like that was held in Egypt at that time does not mean that the MB was tolerating religious expression; rather, it is an indicator of the courage of those young people who took the risk of engaging in this debate. We have seen in the previous chapters that during this

period, blasphemy cases remarkably increased and the Islamist-led government undertook repressive measures against religious minorities and secularist opposition.

Egypt's politicians do not deny that there are atheists in Egypt. For instance, al-Wafd newspaper, the mouthpiece of the *al-Wafd* Party, published an investigative report in April 2013 on 'the Secret World of Atheists in Egypt' which reported that the number of atheists had significantly increased in Egypt since 2011 (Salama 2013). Some Islamist and non-Islamist parliamentarians urged the government to study the reason behind the spread of atheism in Egypt (Allah 2013). The superstar satirist and columnist Bassem Youssef (2013) has held that 'the spread of [atheism] may carry unperceived benefits, such as modernizing and altering religious rhetoric in order to confront new challenges, instead of burying our heads in the sand'. We have seen before that Youssef himself was a victim of blasphemy law because of his critique of the ideology of the MB. These indicators suggest that the demand for religious freedom is developing from within Egyptian society. But tensions continue because Egyptian law has failed so far to satisfy the needs of this sector in the society. At the same time, the most powerful political forces and institutions like the MB, al-Azhar and the judiciary have been reluctant to hold that Islam does not block individuals to freely choose their religious conviction.

A new trend in the literature on Islamic law on apostasy has emerged across the Muslim world, and among Muslim scholars who argue that apostasy simpliciter is not punishable in Islamic law, but the state can impose discretionary punishment for apostasy if it becomes rebellion against the state (An-Na'im 1986; Baderin 2003:123-124; Kamali 1992; Nielsen 2003:331). Most traditional jurists were ambivalent as to whether apostasy was punishable only for the change of religion, or for posing a threat to the integrity of the Muslim community and its belief systems. Al-Sarkhasi was of the opinion that the death penalty for

apostasy was a precautionary measure against potential hostilities waged by apostates against Muslims (Said and Said 2004:68). In modern times, this discussion has become central for many Muslim scholars who have maintained that apostasy is punishable only if it is associated with other actions committed against the state. But as noted by An-Na'im (1986:215) these views have failed to 'establish a positive right to change one's religion or faith. They admit that adverse consequences may follow upon apostasy. This is inconsistent with freedom of religion'. Therefore, this new trend has not found a legal solution for the civil consequences of apostasy.

Nevertheless, this new scholarship has had a limited impact on the position of the MB on apostasy. The new position developed by MB scholars over the last 20 years is that there is no punishment for apostasy if the act is kept as a private matter, but once apostasy is publicly manifested, the state can impose discretionary punishment to protect public order and the beliefs of Muslim society. This punishment can amount to the death penalty, if the public actions of apostates pose a high threat to society (al-Ghazzali 2005a:205-207; 2005b: 97-82; Al-Bahnasawi 2003:26; Al-Qaradawi 2005b; 2006c 64-65; 2007c:196; Al-Khatib 2010;).[281] President Morsi (2012c) expressed the same view in one of his electoral conferences when he stated that 'the punishment for apostasy is limited to converts who threaten Muslim society by their public manifestation of their apostasy'.

The problem with this view is that the potential actions by which converts can be declared a threat to a Muslim society is not clear and can be easily used arbitrarily to restrict the scope of religious freedom. The revision made to the idea that the punishment of apostasy is a fixed punishment in Islamic law, is the only progress achieved by this reasoning. The authors of this view held that their interpretation of the punishment of apostasy is similar to the

[281] See also al-Mat'ani (1993:91), Al-Shamakh (2008:113-114; 2011:117-118), Abu 'Ajur (2012:276).

punishment of serious crimes committed against any state today, such as armed rebellion against the state or the commission of treason. But these are not the only grounds that allow the state to punish apostates according to the key ideologues of the MB, who believe that the public manifestation of apostasy in and of itself endangers Muslim society. Peaceful activities by converts can therefore expose them to punishment.

Muslim jurists developed the law of apostasy in a time when religion had a central place in defining the community, in the pre-modern governance project. But the punishment for apostasy as a means by which to protect the Islamic political order in the modern nation state is problematic and irrelevant to the concept of equal citizenship in this state. The line between the religious and political functions of the punishment for apostasy is often blurred in the thought of the MB. As long as the overall goal of the Islamic state is the protection of its Islamic belief and identity, public manifestation of apostasy and the practice of proselytism is seen by MB scholars – and the judiciary – as dangerous to the fabric of this state, and public order. In this meaning, the law of apostasy protects the ideological and political project of the Islamic state. This understanding is not supported under IHRL where the public manifestation of religions and beliefs is a constitutive element of freedom of religion and belief, including the right of individuals to publicly encourage other people to adopt their religious beliefs. The new opinion of the MB has not presented a solution for this discordance; on the contrary, positions and actions taken by the group in opposition and power legitimated and exacerbated the legal suffering of converts.

A handful of top figures at al-Azhar such as the former Grand Imams of al-Azhar, Sheikh Mahmoud Shaltut (2001:281), Sheikh Muhammad Sayyid Tantawi (Said and Said 2004:96) and Sheikh Ali Juma'a (2007b), the former Grand Mufti, have challenged the death penalty for apostasy, but their intellectual efforts have not changed the fact that conversion is

prohibited in Egypt and that apostasy cannot be publicly manifested. In May 2006, the House of Islamic Legal Opinions (*dar al-ifta')* said that any person who joins Islam by his/her own free will cannot deviate from the public order of society by publicly announcing his/her apostasy and requesting the change of his/her religious affiliation. This prohibition, according to this *fatwa*, is necessary to protect the rights of other citizens, and to avoid any temptation and confusion for the majority.[282] Egyptian courts have repeatedly cited this *fatwa* to justify their rejection of petitions filed by Egyptian converts who request the state to record their new religious affiliation in their official documents.[283]

In January, Sheikh Ahmed al-Tayeb, the Grand Imam of al-Azhar, released a document on the basic freedoms sponsored by Islamist and non-Islamist political parties. The position of this document on religious freedom is ambivalent. The document is only concerned with the protection of members of the Abrahamic religions, but not the right of individuals to choose or change their religious convictions. Moreover, the document recognises the right of individuals to 'embrace any ideas ... without encroaching upon the right of society to the maintenance of divine religions … and without breaching the public order' (al-Azhar 2012).

The expansion of the substance of religious freedom to include the right to change one's religion is much clearer in the writings of liberal Muslim reformers than in those of the MB or the scholars of al-Azhar. For example, al-'Ashmawi (2004:162-165) held that 'religious freedom is enshrined in international human rights treaties and considered an inalienable right to all human beings'. For him the right of individuals to freely choose their religious conviction is strongly manifested in the Qur'an. The prescription of a penalty for apostasy, according to al-'Ashmawi, was influenced by the nature of the pre-modern Muslim

[282] House of Islamic Legal Opinions, Opinion No.704/2006, 14 May 2006.
[283] See Court of Administrative Justice, Cases Nos. 35647/61, 29 January 2008 and 4475/58, 30 June 2009.

community where religion was a determinant factor in defining the membership in this community. Islamic reformation, according to intellectuals like al-'Ashmawi, Jamal al-Banna and Abu Zayd, applies a contextual and historical understanding of Islamic sources, a project that subjects the rulings in the Qur'an and Sunna, including those rulings derived from authentic and certain texts, to reason and reflection.

One would assume that Islamists whose grand ideal is to establish the Islamic state would be unlikely to accept their project being threatened by apostasy and proselytism. This explains why the main objective of the MB in the debate on apostasy has been to defend the system of beliefs of the Islamic state. But other Islamists like Rachid al-Ghannuchi (2012:72-77), the leader of the MB offshoot in Tunisia, have been able to take a different route to fellow Islamists in Egypt. Despite his struggle for the realisation of the Islamic state, he clearly admitted that no one including Muslims may be compelled to religion. In his view on apostasy, he states that acts of treason or armed rebellion are the only acts that can be punished, opening the door for any other peaceful manifestations of religious views by apostates. However, one should note that because al-Ghannuchi, like other Islamists, maintains a traditional methodological understanding of Islamic law, he has not been able to revisit the potential civil consequences faced by apostates on marriage and inheritance. What also limits the approach taken by al-Ghannuchi is what I have previously made in this thesis that the practice of freedom of religion and the rights of religious minorities is structurally constrained in the *Shari'a* state propagated by Islamists.

2. The Debate on Proselytism

The MB's resistance to proselytism does not in reality aim to confront possible exploitation by foreign missionaries but is rather a position against conversion *per se* and any kind of proselytism among Muslims. In its literature, no distinction has been made between what can be considered legitimate or illegitimate forms of proselytism. This position was clear in the MB's reaction to a document published in April 2005 on religious freedom by Sheikh Fawzi al-Zifzaf, the head of the Permanent Committee of al-Azhar for the Dialogue among the Monotheistic Religions and a delegation of American Christian priests, some of them of Egyptian origin. The document recognised the right of individuals to choose and practice their religious beliefs. It also stated that 'the followers of different religions have the right to peacefully propagate their religious doctrines to other individuals' (al-Khatib 2006a). The MB and other scholars at al-Azhar understood this document as a green light for Christians to dispatch missionaries and attempt to convert Muslims. The publication of this document turned into a scandal for al-Azhar (al-Din 2006). On 17 April 2006, the parliamentary bloc of the MB strongly condemned the document. The Committee on Religious Affairs at the People's Assembly urged al-Azhar to withhold its support for the document. The Grand Imam of al-Azhar, Sheikh Muhammad Sayyid Tantawi, denied any knowledge about this document but al-Zifzaf stated in the Egyptian media that he had signed the document at the request of Tantawi. Al-Zifzaf defended the document, arguing that 'religious freedom and peaceful and non-coercive proselytism do not violate Islamic law and its tolerant message' (al-Khatib 2006a; Shalabi 2006b; US Copts 2006).

The MB and its scholars sponsor preaching activities in the non-Muslim world, including in Western societies, and hold it to be an act of aggression against Islam and Muslims if a

government in the non-Muslim world refuses to host Islamic preaching activities. In his seminal treatise 'In the Shade of the Qur'an', Qutb (2003a:416-417) held that:

> Islam advocates jihad to guarantee the right and freedom of expression and propagation of the faith . . . in order for individuals to make the choice of whether they believe in Islam or not. Nothing should stand between them and God's message.

In his volume on the jurisprudence of jihad in Islam, al-Qaradawi (2010c:64) has maintained that there is no need today to use jihad in the meaning of the use of force to preach Islam in non-Muslim territories, since freedom of religion and the protection of religious minorities are key norms in the international community, and allow Muslims to preach Islam peacefully. But despite this emphasis on religious freedom, the MB and its scholars, including al-Qaradawi (2001a), deprive other religious communities of the same right to propagate their religious doctrine on Muslim territories including, as we have seen in the previous chapter, for non-Sunni Muslims.

In an article published on *Ikhwan Online*, Muhammad 'Umara (2008), a prominent Islamist thinker, has held that Muslims have reasons to refuse the reception of Christian missionaries in their societies but at the same time preach Islam in non-Muslim societies. 'Umara (2008) argued that Islam regulates the state and therefore, the Islamic state cannot stand neutral against any attempts to undermine its belief system. He compares this with the experience of communist states, which protected their dominant ideology with all legal means. This argument, however, gives more consideration to the role of Islam in the state and politics rather than its spiritual message to individuals. The argument certainly hardens the task of human rights activists in convincing Islamists to tolerate conversion and proselytism as long as Islamists consider the prohibition of apostasy a means to protect the ideological and political project of the state.

Another argument made by ‘Umara (2008) is that Muslims are politically weak and easy targets for Western powers, media and missionaries. Therefore, Muslim states should protect themselves from proselytism conducted by foreign actors to maintain their identity and culture. In this argument, the interests of the community trump the rights of individuals. It has become increasingly acknowledged in international human rights discourse that under certain conditions, states can protect their citizens from certain unethical ways of proselytism (Stahnke 2001). However, while religious communities are entitled to be protected from coercive measures aimed at changing or displacing their identities, they in turn cannot impose their religious identity and beliefs over their members. ‘Umara ignored the fact that today many Muslim states generously sponsor the preaching of Islam all over the world in Western and non-western societies. Peterson (2012;774) notes that since the 1970s ‘some Muslim NGOs competed with Christian NGOs, replicating their missionary techniques in attempts to bolster the faith of Muslims and convert non-Muslims’.

In his article, ‘Umara reminded his audience of the correlation between colonialism and Christian missionaries throughout history, giving a recent example of the activities of Christian missionaries after the invasion of Iraq in 2003 by the Western coalition led by the US. On many occasions, developments in global and regional politics have overshadowed the pertinence of human rights norms. Mayer (2012:133) has rightly maintained that ‘critical assessment of discriminatory treatment of non-Muslims tend to be linked in people’s mind with the pursuit of Western imperialist and neo-imperialist agendas’. This is largely attributed to the way that Western colonial powers have used the excuse of protecting religious minorities to justify colonialism; the activities of Christian missionaries under colonialism and the alleged advantaged treatment of religious minorities by colonial powers have been part of the arguments used today to discredit legal rights claimed by minorities (Mahmood 2012a). Yet while the history of colonialism and Western practices are relevant issues in the

discussion of human rights, in many cases they have been used in political maneuvers by both states and non-state actors to hamper respect for and discourse about human rights.

In its explanation of religious freedom, the HRC held in 2011 that 'the right to manifest one's religion includes carrying out actions to persuade others to believe in a certain religion'. This right is also protected by Article 19 of the ICCPR on freedom of expression, which protects 'the freedom to seek, receive and impart information and ideas of all kinds. . . [including] religious discourse'.[284] By way of comparison, the ECtHR has maintained that freedom to manifest one's religion encompasses 'the right to try to convince one's neighbour'.[285] Article 12(1) of the American Convention of Human Rights says that freedom of conscience and religion includes freedom to 'disseminate one's religion or beliefs'.[286] Article 18(2) of the ICCPR says that: 'No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice'.[287] As noted by the Special Rapporteur on Freedom of Religion or Belief 'the term 'coercion' . . . is to be broadly interpreted and includes pressure applied by a state or policies aiming at facilitating religious conversions' or the prohibition of conversions.[288] Proselytism by non-state actors is allowed as part of public manifestation of religion but it should not be conducted through coercive or improper means. This was the view of the ECtHR in its two famous judgements in Larissis and Others v. Greece[289] and Kokkinakis v. Greece.[290] Proselytism is a public manifestation of religious beliefs and its practice is not absolute. However, any restrictions proposed by the state on the activities of proselytism should be strictly in line with the criteria set out in Article 18(3) of

[284] UNCHR 'HRC, General Comment No. 34' (2011) U.N. Doc. CCPR/C/GC/34/CRP.2, para.11.
[285] Kokkinakis *v*. Greece, ECtHR, 25 May 1995, para.31.
[286] Article 12(1) of the American Convention on Human Rights (1969).
[287] UNCHR 'Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir' (2005) UN Doc A/60/399, p.16. See also UNCHR 'HRC General Comment 22' in 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies (1994) UN Doc HRI/GEN/1/Rev.1 (1994), para.5.
[288] ibid., p.16.
[289] See Larissis and Others v. Greece, ECtHR, 24 February 1998.
[290] See Kokkinakis v. Greece, ECtHR, 25 May 1995.

the ICCPR.[291] However, one still cannot easily differentiate between proper and improper proselytism. The analysis of state practice and the jurisprudence of international and regional human rights organs by the UN experts and legal scholars (Stahnke 2001:328-341) give us importance guidance on this issue. The Special Rapporteur on Freedom of Religion and Belief has stated that:

> Missionary activity cannot be considered a violation of the freedom of religion and belief of others if all involved parties are adults able to reason on their own and if there is no relation of dependency of hierarchy between the missionaries and the objects of the missionaries' activities.[292]

Stahnke (2001:330) has held that:

> The more that proselytism interferes with [the ability of an individual] to make a considered and unrestrained choice in matters of religious belief and affiliation… the more the regulatory power of the state may be attracted… coercion exists in a variety of forms. Sources may exert different forms of coercive authority and control over others. Targets may be more or less susceptible to certain types of action or certain sources. The location of the action can contribute to coercion where the freedom of the target to freely move in and out of that place is restricted. Finally, the nature of the proselytism in particular the nature of any proposed exchange between source and target, may be more or less coercive.

The aforementioned sources suggest that state regulation of proselytism should aim only to guarantee that individuals make free choice and not to protect the dominance of certain religion or beliefs in the state. A general ban on proselytism is not consistent with IHRL. For instance, when voting on the UDHR, Saudi Arabia invoked the argument that the inclusion of the right of individuals to change their religion would encourage unethical activities by missionaries (Waltz 2004:815). This is not, however, a sufficient argument to justify a full ban on conversion and proselytism in many Muslim states. As made clear by An-Na'im

[291] Article 18(3) of the ICCPR says: 'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.
[292] UNCHR 'Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir' (2005), p.19.

(1999b:8), the mediation of the competing claims to religious freedom and communal self-determination require states to 'acknowledge the positive aspects of proselytisation while trying to guard against its risks and or/excesses'.

3. Conversion in Egyptian Courts

Egyptian converts have filed dozens of cases before the State Council to challenge the refusal of the Ministry of Interior to record their new religious status in their identity documents. According to Article 47 of Law No.143/1994 on Civil Affairs, 'the change or correction of official data on the nationality, professional or religious affiliation of citizens should be based on official documents or decisions made by the concerned organs'.[293] This article explicitly allows individuals to change their religious affiliation in their official documents of identification without any exceptions, but in practice Egypt's Ministry of Interior and most judges have restricted the scope of this article by prohibiting Muslims from changing their religious affiliation.

The case law in this area can be classified into three categories. The first category involves cases filed by citizens who were Christians but converted to Islam, then converted back to Christianity. They are known in the Egyptian media as returners to Christianity. A considerable number of these petitioners converted from Christianity to Islam in order to apply the Muslim Personal Status Law on divorce, since the Orthodox and Catholic Churches in Egypt take a strict position on divorce (chapter six, section 2.2).

The second category includes cases filed by citizens who were born and brought up as Christians, but whose fathers converted to Islam before they reached 16-years-old and could

[293] Article 47 of Law No. 143/1994 Concerning the Civil Affairs, *official gazette* no.23bis of 9 June 1994.

hold their own identity cards. In this situation, the religious status of those citizens has been changed in their birth certificates, sometimes without their knowledge. Many of these people later filed cases in an attempt to register their original affiliation to Christianity in their identity cards. Around 89 cases were documented under this category from 2005-2007. But the Court of Cassation held that according to the dominant opinion of the Hanafi school of law 'a child follows the best religion of his/her parents'.[294]

Most pre-modern Muslim jurists agreed that a child of Muslim parents is a Muslim and when a Muslim man marries a Christian or Jewish woman, children follow the religion of their father. If a Christian father or mother converted to Islam, his/her children become Muslim. This view is based on a saying of the Prophet which states that 'every newborn is born in the natural condition [(*fitra)*]; his parents transform him into a Jew, a Christian or Zoroastrian' (quoted in Friedman 2003:109). Muslim jurists have commonly understood the term *fitra* in this hadith as a reference to Islam. According to the Hanafi jurist Ibn 'Abdin (2003:370-371) 'this innate nature is kept when a child is born to Muslim spouses but when parents adopt different religions, a child should follow what it is in line with this *fitra* so he/she becomes a Muslim if one of his parents is Muslim'. The same view was restated by MB scholar al-Khatib (1980c), adding that if a pregnant mother converts from Islam, her child continues to be a Muslim, following the religion of his Muslim father.

To avoid any possible sectarian tensions triggered by this principle between Muslims and Christians in Egypt, the former General Prosecutor, Abd al-Majid Mahmoud, attempted to challenge this principle before the Court of Cassation in March 2009 in the case of Andrew and Mario (see the section of interfaith marriage in chapter six). He proposed that when one of the parents changes religion, a child should freely choose his/her religious belief at the age

[294] Court of Cassation, Case No.44/40, 29 January 1975.

of seven. In June 2009, the Court of Cassation dismissed this view and adhered to its previous precedents that children follow the religion of their Muslim parents.[295] The Court of Administrative Justice invoked the same principle two weeks later.[296]

Based on Article 18(4) of the ICCPR and Article 14 of the CRC, the right of parents to provide religious guidance for their children should be guaranteed by the state. When the intellectual capacity of children evolves, they have the right to freely express their own religious choice without coercion.[297] The UN Special Rapporteur on Freedom of Religion and Belief Heiner Bielefeldt has noted that: 'It is important for the state to ensure that conflicts possibly arising from parents having different convictions are settled in an unbiased and non-discriminatory manner'.[298] The proposal presented by the General Prosecutor could have been a possible solution for such a legal dispute. There are a number of arguments adduced in support of the proposal of the Prosecutor. The verse of the Quran (1:256) that says 'no compulsion in religion' can support this view. This verse was revealed when a Christian man converted to Islam and asked the Prophet to forcibly convert his two sons but the Prophet refused (Hawa 1991:600). However, this verse might not be sufficient evidence for some Muslim scholars to allow children to choose their religion freely because in this verse the two sons were adults and in Islamic law non-Muslim adults do not necessarily follow their father if he converted to Islam. Nevertheless, Muslim jurists today can develop their jurisprudence based on the views of some Maliki jurists in the eleventh century and Shiite jurists who hold that every Muslim from the age of maturity can choose his/her own religious beliefs (Friedman 2003:114-115; Hashemi 2007:215).

[295] Court of Cassation, Case No.15277/78, 15 June 2009.
[296] See Court of Administrative Justice 4475/58, 30 June 2009.
[297] See Article 14 of the CRC.
[298] UNCHR 'Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt' (2012) UN Doc A/67/303, p.14.

Another rule also in support of this view was established by Abu Hanifa, al-Shafi'i and many other jurists who held that 'the forcible conversions . . . are not valid and a person so converted who reverts to his former faith is not deemed as apostate' (Friedman 2003:144). This rule could be applied to children since they do not have the required intellectual capacity to decide their religious beliefs, and should, therefore, be given the opportunity to state their religious preferences at the age of maturity. However, Egyptian judges are bound by the law to implement the dominant opinion of the Hanafi school of law on legal issues that are not treated in the personal status law and they cannot select from other schools of law unless this view is codified in the law. Nevertheless, no government in Egypt has been willing to use its legislative powers to amend the law on this matter.

The third category of cases involves cases filed by Muslims who converted to Christianity but who were not able to have their new religious status registered in their identity cards. A prominent Egyptian human rights defender has pointed out that there is no accurate figure for the number of Muslims who have converted to Christianity, since the majority of them are afraid of societal revenge if they announce their conversion publicly (Bahgat 2007).

The jurisprudence of the State Council has exhibited three trends in its handling of the issue of conversion from Islam; the hardline, the liberal, and the pragmatic approaches (El Fegiery 2013). Judges using the hardline approach have rejected the complaints of Muslim citizens who want to register their new religious status in their identity cards, basing it on the traditional prohibition of apostasy in Islamic law and the protection of public order in a Muslim-majority country.[299] This pproach has long represented the mainstream. However, it was modified in cases in 2008 and 2011 by a pragmatic reasoning, which maintained the

[299] See Court of Administrative Justice, Cases Nos. 20/29, 8 April 1980; 4475/58, 30 June 2009; 35647/61, 29 January 2008.

same traditional understanding of apostasy, but acted in favour of registering the new religious status of converts who were Christians, converted to Islam and then reverted to Christianity. This reasoning was based on the protection of public order and the requirements of the modern nation state but without invoking support for the principle of freedom of religion.[300]

This reasoning has not, however, been applied to converts who were born and brought up as Muslims and decided to convert from Islam, or converts from Islam for whom one non-Muslim parents converted to Islam during their childhood. Moreover, some judges in the State Council opposed this reasoning, arguing that it was inconsistent with the constitutional provision on the principles of Islamic law as the main source of legislation. Therefore, these judges have challenged the judgments of the Supreme Administrative Court and referred many conversion cases to the SCC to examine the constitutionality of Article 47 of Law N.143/1994 on the Civil Affairs, arguing that this article is not compatible with the constitutional provision on Islamic law by not explicitly prohibiting Muslims from converting from Islam.[301] The SCC has not delivered a judgement yet on this constitutional review case but the referral has prompted some judges in the Court of Administrative Justice to suspend the examination of some conversion cases until the SCC accomplish its review (Masrawy 2010).

There have been a few cases where judges followed a liberal approach towards religious freedom and Islamic law but they were limited to petitions filed by converts of Christian origin. For instance, in the case of Mohammad Mahdi Abdullah, the claimant was a Christian who was born to Christian parents. Then he converted to Islam but he reverted after

[300] See Supreme Administrative Court, Cases Nos. 13496/53, 9 February 2008; 19082/60, 12 February 2011; 33472/60, 3 July 2011.
[301] See Court of Administrative Justice, Cases Nos.444/61, 4 March 2008 and 38719/63, 29 December 2009.

that to Christianity. Consequently, he requested from the Ministry of Interior to change his religion affiliation in his identity card to Christianity but his request was rejected. In this case the Court accepted the claim and ordered the Ministry of Interior to register the new religious affiliation of the claimant.[302] This case is among other 22 cases decided positively by the Court from April 2004 until September 2006. At the time, the Court of Administrative Justice was headed by judge Faruq Abd al-Qadir who adopted a liberal reasoning.

In these cases, the Court considered the refusal of the Ministry of Interior to register the new religious affiliation of the claimant to be an unjustifiable interference in his personal choice. The Court also argued that the official registration of the new religious affiliation of the claimant is just an administrative procedure which reflects reality. This registration is necessary to establish rights and duties based on the correct religious status. In its response to the argument that a Muslim who changes his religion violates public order, the Court affirmed that Article 40 of the Egyptian constitution provides for equality between citizens in all rights and duties without discrimination, based on religion, language, origin and sex. The Court also referred to Article 46, which protects the rights of individuals not only to freely believe in a religion but to manifest religious faith. The Court cited the UDHR and the Arab Charter of Human Rights. It has also argued that many centuries ago, Islam recognised freedom of religion, and in doing so, it cited several Qur'anic verses that highlight the principle of freedom and non-compulsion in religious conviction.[303]

However, the Court's understanding of freedom of religion in Islam seems to be not applicable to citizens who are born and brought up as Muslims and decide to convert to another religion. In explaining this position, the Court ambiguously maintained that

[302] Court of Administrative Justice, Case No. 26103/85, 26 April 2005.
[303] ibid.

according to Islamic jurisprudence, a Muslim cannot be considered apostate unless he/she feels comfortable with his/her apostasy.[304] This argument infers that the Court would only guarantee the right of persons who became Muslims for a while then decided to apostatise from Islam. By this reasoning, the Court avoided engaging in a thorough discussion of the issue of religious freedom and apostasy in Islam. In fact, the cases, which were only examined before this Court, were filed by converts of Christian origins but the Court was not tested in other cases which are filed by converts of Muslim origin.

In conversion cases, judges have faced a subject matter that is not treated in the traditional Islamic law on apostasy. This law was concerned about the punishment of apostates and the legal consequences of apostasy for marriage, divorce, child custody, property rights and inheritance; the registration of religious affiliation in official documents of identification is a new legal matter that has emerged in the modern nation state. The protection of public order has become the focus of legal reasoning, with many judges holding that if they tolerate conversion, the public order of the Muslim state whose official religion is Islam and whose main source of legislation is Islamic law, would be undermined. In their rulings, judges have also been influenced by the view that apostasy is not allowed under Islamic law. For converts of Christian origin, judges are aware that most of them became Muslims for temporary reasons, and therefore, the Supreme Administrative Court has exempted them from the main rule that apostasy is not allowed in Islam since they did not join Islam out of deep conviction. Moreover, the rise of cases involving converts of Christian origin has been also a source of tensions in the relationship between Muslims and Christians in Egypt. This may explain why the Supreme Administrative Court has opted for a more flexible approach in treating their cases.

[304] ibid.

However, as I have shown, not all judges are comfortable with this solution because they blame those converts for playing with religion for personal interests, and hold that a decision to convert to Islam should be done in good faith. This was also the view of prominent MB scholar Mohammad al-Ghazzali (2005b:80-81) who pointed out that 'it is an insult to Islam and its beliefs when a Christian or Jew becomes a Muslim for any temporal purposes such as marriage, then converts from Islam after that'. Al-Ghazzali holds that this practice should not be tolerated in a Muslim society. If the Coptic Orthodox Church were to soften its strict position on divorce, many of these conversion cases would disappear; but as explained in the previous chapter, there is little or no prospect of this in the immediate term.

As a reaction to this intense dispute on apostasy in the Egyptian courts, certain members of the MB in parliament urged the government in 2009 to pass a law criminalising apostasy. However, the leadership of the MB opposed this proposal, arguing that Egyptian society is not prepared yet for such a law (Ali and Jadd 2009; Hidya 2009). Amid this debate, Sheikh 'Abdallah al-Khatib (2010) clarified the position of the MB on the issue of apostasy in an article posted on *Ikhwan Online*. The article confirms that even though the MB has become less assertive on the death penalty for apostates, its scholars still support legal restrictions on conversion from Islam. Al-Khatib states that Islam does not compel people to join it, but that once a person becomes a Muslim, he/she should not manipulate religion and hurt the community of believers by leaving Islam without any kind of accountability. He proposes that judges and Muslim scholars be given the chance to convince apostates to repent, but that if they fail, a discretionary punishment such as a prison sentence should be enacted for apostates who insist on manifesting their apostasy in public, as a protective measure for Muslim society and its identity.

The 2012 Constitution did not protect religious freedom in a manner that conforms with Egypt's international obligations, nor yet, I assert, in a manner that responds to the needs of Egyptian citizens. The public manifestation of religion under Article 43 was only allowed for Abrahamic religions and Article 44 prohibited any insult to the Prophet and messengers; both articles gave a legal justification for repressing non-believers. Article 81 limited the practice of constitutional rights by a vague reference to respect for the fundamental values of the state and society. Moreover, the consolidation of Islamic law in the Constitution (Article 219) would most likely obstruct the practice of religious freedom.

When a state refuses to register a citizen's new religious affiliation, and if apostasy entails civil consequences for apostates such as the dissolution of marriage and exclusion from inheritance, this can amount to a violation of the absolute nature of the freedom of conscience and religion under international human rights law. The practice of the daily private and public life of converts is hindered if they are not able to change their religious affiliation in their documents of identification, and if they are deprived of certain civil rights. The HRC has stated that article 18 of the ICCPR 'does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice'. The Special Rapporteur on freedom of religion or belief, Asma Jahangir, held in 2012 that: 'The right to change religion is absolute and is not subject to any limitation whatsoever. Any legislation that would prohibit or limit the right to change one's religion would be contrary to international human rights standards'.[305]

One can argue that the identification of religious affiliation in the official documents of citizens is a potential source of religious discrimination and an interference with individual freedoms and should be abolished, not only from the identity cards but also from any other

[305] See also UNCHR 'Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt' (2012) UN Doc A/67/303, p.8.

official documents. People can then freely decide which religious rules they abide by with regard to marriage. However there are those who argue that such an abolition, despite being important in principle, it is not a practical solution in a country where religious status establishes certain rights and duties in family matters. The only practical solution in the short term is to enable citizens to freely record their true religious affiliation in their documents (Bahgat 2007; EIPR 2006). In the longer term, however, to avoid any potential legal consequences for conversion, there should be a drastic revision of Islamic law on apostasy, a revision that not only challenges the death penalty for apostasy but also establishes the right to change one's religion without being exposed to any kind of punishment or barrier. It appears unlikely that this option can be foreseen in the near future in Egypt.

4. Conclusion

While MB scholars have become less assertive on the punishment of apostasy with death, they have hesitated to establish that religious freedom involves the right of Muslims to convert from Islam without being repressed or intimidated. An opinion like this from a powerful political and religious organisation like the MB would help to change the restrictive landscape of religious freedom in Egypt. However instead, the activities of MB in opposition and in power sustained the restrictions on religious freedom in Egypt and blocked any development in this area. Although the MB asserts that apostates should only be punished if the public manifestation of their apostasy poses a threat to the Islamic state and its beliefs, this is still a restrictive application of freedom of religion in Egypt. A major part of this breach, for Egyptian converts, is that they are not able to publicly declare their true religious affiliation or give effect to their decision to leave Islam in their daily lives.

The MB has assertively opposed proselytism, but this aims to preserve the superiority of Islam in society, rather than protect people from coercion. Other state institutions have not been also keen to expand the scope of religious freedom and permit conversion from Islam, and this can explain why the MB has not found itself under pressure to change its view on this matter. The judiciary has recently provided some limited rights for converts of Christian origin but its jurisprudence is similarly still dominated by the view that conversion is not allowed under Islamic law and poses a threat to the public order of the state. Nevertheless, the demand for religious freedom is evolving in Egypt, and despite increasing risks, converts and atheists have become vocal about their rights.

Chapter Eight: Women's Rights in Islam

The 2011 Revolution brought mixed signals for the future of women's rights and gender equality in Egypt. Since 25th January 2011, large numbers of Egyptian women from all social and generational backgrounds took part in political protests alongside men, and their roles in the struggle for political and social change were significant. Nevertheless, women's rights did not progress. On the contrary, the political rise of Islamist forces with their hardline stances on women's rights threatened the reversal of previous reforms gained by Egyptian women (Langohr 2011). The prominent women's rights activist, Hoda Badran (2012), stated one year after the fall of Mubarak that 'women [were] the losers of the revolution'.

Since the beginning of the 20th century, Egyptian feminists have been struggling to overcome immense political, cultural and religious barriers in order to expand the scope of their political and civil rights (Younis 2006; Badran 1995). Today, the status of Egyptian women has improved in comparison with their status at the beginning of the feminist movement in the first half of the 20th century. But Egyptian women are still far from realising gender equality as stipulated in international human rights treaties, particularly CEDAW. The dominant religious discourse in society, with its main assumption that the relationship between men and women is based on the complementarity of roles, not equality, has been a major challenge. Certain forms of discrimination against women in public and private are hidden behind this assumption.

The contestation over the meaning of shari'a has been intense in this debate among various actors. The price of this controversy has been high for women, as many important reforms

especially in the area of personal status law have been blocked for decades due to a lack of support from the dominant Islamic discourse. Success was only possible when the official Islamic establishment sponsored such reforms, and when the balance of power between Islamists and the ruling political elite allowed for that.

Two other factors have reinvigorated the struggle for women's rights in Egypt over the past three decades: the significant development of the international women's rights movement and the emergence of the Egyptian women's rights movement with its reference to international human rights treaties (Zulficar 2008; Sharafeldin 2013). However, certain institutional and political constraints have slowed the implementation of CEDAW in Egypt, and the MB's thinking on women and gender roles is very relevant to understand these constraints. Since al-Banna, the literature written about women's rights in Islam by MB scholars and leaders has been vast, and it has challenged the core philosophical underpinnings of international women's rights law and the demands of Egyptian feminists and women's rights groups. This chapter analyses the reactions of the MB towards reforms proposed in Egypt over the past three decades to expand women's rights, with a special focus on the status of women in the family, a particularly thorny area in the relationship between Islamic law and international human rights.

1. The Articulation of Gender Equality

1.1 Intellectual Foundations

Pre-modern treatises of Islamic jurisprudence maintained patriarchal attitudes towards women's roles in society. Drawing on certain verses in the Qur'an and *hadiths,* they developed rulings that discriminate against women in marriage, divorce, inheritance and the

occupation of public posts (Mir-Hosseini 2009: 28:32; An-Na'im 1988:493:497). Nevertheless, within the large body of diverse juristic views were some which were friendly to women. For instance, the Malikis gave women more options for judicial divorce than other schools of law, and many jurists recognised in various degrees the right of women to insert specific stipulations in the marriage contract to protect their interests (Ali 2008:21-23). This diversity of juristic views was employed by successive Egyptian governments and feminists over the 20th century to expand women's rights in the personal status laws. However, as noted by Mir-Hosseini (2009:28):

> The various *fiqh* schools all share the same inner logic and patriarchal conception. If they differ it is in the manner and extent to which they have translated this conception into legal rules.

It should be noted that some women and intellectuals in the early history of Islam contested the patriarchal gender roles presented today as the only authentic conception of gender roles in Islam (Ahmed 1986; 1992:239-240). Moreover, archival research on the practice of pre-modern Shari'a courts in Egypt demonstrates that Muslim women utilised the plural juristic views to their advantage. Sonbol (2003) argues that these courts granted women some kind of protection that can be seen as more advantaged than the protection of women under the modern shari'a-based codes. According to Sonbol (2003:231):

> Those calling for the establishment of an Islamic state demand the establishment of rules that they consider to be Islamic, based on the writings of medieval theologians of their choice with little reference to actual legal practice in Islamic courts.

Feminist consciousness originated in Egypt in the 19th century and took an organisational form in the first half of the 20th century (Badran 2009). Muslim reformers like Rifa'a al-Tahtawi (1801-1873), Muhammad 'Abduh (1849-1905) and Qasim Amin (1863-1908) advocated for the improvement of the status of women in public and private (Hourani 1983).

'Abduh developed some progressive juristic views that are cited by many women's rights advocated until today. But despite the old roots of this movement, the idea of full gender equality especially in the family was not so obvious in the work of most well known Egyptian feminists (Younis 2007:472). This is unlike the experience in Tunisia, where the Tunisian scholar al-Taher al-Haddad (2007) (1899-1956) in 1930 applied a contextual and historical reading of the Qur'an and concluded that men and women should be equal in marriage, divorce and inheritance. He also called for the prohibition of polygyny. In the words of the Egyptian reformer Nasr Hamid Abu Zayd (2006:90) 'it would be no exaggeration to claim that it was al-Taher al-Haddad who first paved the way for the feminist Qur'anic hermeneutics movements that arose in the 1990s'.[306]

Gender equality has been a key demand of Egyptian human rights and women's rights groups over the past three decades. Some of these NGOs have also advocated for gender equality from an Islamic frame of reference. However, in practice many of the initiatives announced by these NGOs have aimed only to ameliorate the status of women in the family but without radically challenging the unequal status of men and women. The Egyptian feminist and legal scholar Marwa Sharafeldin, who works closely with women's rights groups in Egypt, suggests reasons for what she considers 'unavoidable messiness' in the advocacy agenda of Egyptian feminists and women's rights advocates. According to Sharafeldin (2013:72-73), this can possibly be attributed to:

> Personal religious faith that prohibits some activists from making certain demands for equality they feel are in contradiction with that faith; the perceived socio-political willingness, or unwillingness, of society to accept certain demands for women; concerns that some demands, although calling for equality, could be potentially harmful to women and would deprive them of some current advantages; NGOs' structural weakness and lack of ability to mobilise supporters and leverage to effect significant changes in the situation of women; and the fact that the discourse is still gradually

[306] On the intellectual contribution of al-Taher al-Haddad see also Mir-Hoseeini (2013:7-36)

> taking shape, therefore, 'inconsistencies' are to be expected during the process of building and developing it through practice.

Women's rights advocates have been aware that throughout the 20th century, the MB was resisting most legal reforms adopted to improve the situation of women in society. After the revolution, it was clear for them that the group was planning to reverse these reforms and obstruct further development in women's rights (Badran 2012; Langohr 2011; Gomez-Rivas 2011). This reality was depressing for many women who had significantly participated in political protests and strikes as of 25th January 2011.

Under the slogan of the 'implementation of shari'a', Egyptian Islamists have long struggled to preserve what they consider divinely ordained family regulations, and have blocked any attempts to improve the status of women in family. Drawing on traditional Islamic jurisprudence, the MB and its scholars have advanced the argument that complementarity of roles between men and women is an immutable model of gender relations in Islam. This theory paradigmatically challenges the idea of gender equality enshrined in international human rights treaties.

The female section of the MB was established in 1932 as a separate body, not fully integrated into the MB's leading bodies. The general supervisor of this section has been always a man, since women are not eligible to join the top bodies of the organisation (Farag 2012:8-9). This is consistent with the MB's philosophy that women should be excluded from grand leadership positions. Male leaders of the MB have authored most educational books read by the Muslim Sisters. The historical leader of the Muslim Sisters, Zainab al-Ghazzali (1995) wrote regularly in *Al-Da'wa* and *Liwa' al-Islam* magazines but her writings reflected the same patriarchal philosophy of the MB towards women (Lewis 2007).

One possible reason for the poor contribution of the Muslim Sisters in developing the thought of the organisation on women's rights is the organisational hierarchy and rigidity, and the marginalisation of women in decision-making processes (Abdel-Latif 2008; Tadros 2012a:134-135). Another possible reason is the ideological hegemony inside the organisation and the strong belief among the Muslim Sisters that their unequal status with men is prescribed by Islam and they should be committed to this vision to be pious Muslims. As noted by Ottaway and Abdel-Latif (2007:8) in their analysis of the place of women in Islamist movements, most female Islamists including the Muslim Sisters 'do not perceive themselves as lagging behind Western women because they measure their progress and achievements against a different standard'. Based on her research on the historical development of the Muslim Sisters, Tadros (2012a:134) has suggested that:

> Because the Muslim Sisters are expected to be completely subservient to the MB leadership, one which has been very conservative throughout most of its eighty-years history, the women who emerge as leaders tend to espouse the same ideology.

Over decades, the Muslim Sisters have played a key role in supporting the political vision of the MB (Farag 2012; Tadros 2012a:134). In times of repression under Nasser in the 1950s and 1960s, some Muslim Sisters, most notably Zainab Al-Ghazzali, were active in maintaining communication between prisoners and the movement, and provided assistance for prisoners' families. Over the last decade, Muslim Sisters have become increasingly visible within the political struggle of the organisation. They were nominated as parliamentary candidates since 2000 and regularly took part in political protests organised by the group (El Ghobashi 2005:382-383). Despite flagrant manipulation by the state of voting in the parliamentary elections in 2000, 2005 and 2010, these Islamist women insisted on supporting MB candidates and challenged all barriers set by the security forces and supporters of the former National Democratic Party to reach ballot boxes. For those women,

as noted by a former member of the Muslim Sisters, it was a task of jihad to endorse the political struggle of the group (Abd al-Mun'im 2011:158).

Based on interviews with some members of the Muslim Sisters, Farag (2012:10-11) observes increasing demands among them to integrate the female section into other leading bodies of the MB. However, as I show in this chapter, this activism has not led to an improvement in the official positions taken by the MB on women's rights. To the contrary, the Muslim Sisters have been used by the organisation as a defence shield against other critical discourses of secular and Islamic feminists. In its first ever general conference held on 2 July 2011, the Muslim Sisters declared its commitment to challenge any attempts to undermine Islamic shari'a and to confront the conspiracy against Muslim women and families (al-'Ajuz 2011; Sibi' 2011).

The exclusion of women from taking leading positions in the organisational hierarchy of the MB has not been the practice at the FJP. Some members of the Muslim Sisters have been able to occupy leading positions at the FJP and they have become very well known in public, but their positions on gender issues have been conservative and lagged behind the Islamic discourses of the leadership of al-Azhar on many issues as I explain below. However, the FJP does not work independently from the MB, so one might expect female leaders of the FJP to be shaped by the same mentality of the wider organisation.

Some critical female voices have appeared among female Islamists with previous affiliation with the Muslim Sisters. Heba Ra'uf Ezzat, a professor of political science at Cairo University is one example. She grew up at the Muslim Sisters and her mentor was Zainab al-Ghazzali but her critical approach to the status of women in Islam drove her to leave the organisation and to develop her own intellectual project. She has not broken with the model

of complementarity roles between men and women but her views are much more progressive than the official MB positions (Karam 1998:221-225).

Another example is Intissar Abd al-Mun'im (2011) whose book *A Biography of A Former Muslim Sister: My Story with the Brothers* presents an insightful critique of the treatment of women inside the MB and the hardline views taken by the group's leaders and ideologues on the place of women in private and public. Her book confirms the political use of the Muslim Sisters by the MB to advance its political agenda but without any efforts to empower women in society. According to Abd al-Mun'im (2011:112-113), the educational programmes provided for girls and women reinforce the marginalisation of women in society. Female members are taught to obey their husbands and recognise their leadership in the family. They are also instructed that their most precious task is child-bearing and that their commitment to the Islamist project is jihad for the cause of God. This testimony is consistent with the sources authored by male leaders of the group (al-Juhari and Khayal 2000; al-Khuli 1980; al-Jabri 1994; al-Wa'i 2005) to indoctrinate women inside the organisation.

In the following, I address how the question of women has been articulated in the literature of the MB. From Hassan al-Banna to Mohammad Badie, the prevalent view among MB leaders and scholars is that women and men are equal in human value and equal before God, but certain natural and functional differences between the two sexes justify and entail that each sex has different rights and duties in society. This argument is well established in the intellectual sources and official documents of the MB until today. In his notorious publication, *The Message of the Muslim Women*, al-Banna (2006:402) maintained that 'the differentiation between men and women in rights is justified by their inescapable natural differences and the different tasks performed by both of them'. This differentiation according

to him is to the benefit of women because due to their natural physical and psychological attributes, women cannot perform the same roles as men.

Al-Bahiy al-Khuli (1980:317) followed the same line in his book *Islam and the Contemporary Issues of Women*, holding that full equality between men and women goes against 'the innate nature of human beings (*al-fitra al-insaniyya*) and the biological specificities of women'. In their important source, *The Muslim Sisters and the Formation of the Qur'anic Family*, the leaders of the female section of the MB, Mahmoud al-Juhari and Mohammad Khayal (2000:18-19), maintained that the rulings of marriage, divorce and inheritance in the Qur'an are immutable. They condemned 'Muslim states who follow the corrupted Western philosophies of gender equality that would destroy the family, the last bastion of Muslim societies', adding that 'Muslim family laws should consider the psychological and physical differences between men and women'. Salim al-Bahnasawi (1986:38) wrote in *The Status of Women between Islam and Universal Laws* that 'men and women are equal in what they similarly share but because of their natural differences, they are unequal in certain social roles.' Al-Qaradawi (2005a) and al-Ghazzali (2005b) have also defended the complementarity thesis.[307] However, certain positions taken by these two scholars on the status of women in Muslim society can be considered more liberal than the prevalent views at the MB. For instance, both al-Ghazzali (2011:44-57) and al-Qaradawi (2010d) have held that women under certain conditions can hold public positions including leadership of the state or the judiciary (al-Jawad 2009). However, they agree with other scholars that women's duties in the family take precedence over their public roles.

[307] See also the views of the Former Guide of the MB Umar al-Tilimisani (1985:31) who maintained that 'equality between men and women is inconsistent with the nature of the divine creation'.

In 1994, the MB published a document on its position on women. Similar to the intellectual sources, the document begins by stating that the Qur'an establishes equality between men and women in human value and religious duties, but that this equality is not the norm that should govern the relationship between men and women at all times, because there are exceptions. The underlying philosophy behind these exceptions establishes a system of discrimination against women in private and public. According to the document, these exceptions are immutable because they are 'from God, the all-knowing and well aware because it is he who knows His creation best and the exceptions are in those specific characteristics that distinguish the female from male'. The distinction between men and women is aimed at achieving complementarity of roles between men and women that is necessary for the family and marital life. The primary function of women ordained by God is motherhood, procreation and caring for their husbands.

The document asserts that 'these duties must be given precedence over other responsibilities and they are necessary for the stability of the family which is the basic cell of society'. In its discussion of the doctrine of *qiwama*, the document reiterates that it is confined to the family and not practiced by men over women in general. 'It is a leadership and direction over the family practised by men if they fulfil their duties and obligations'. In the marriage, the husband pays the dower and is obliged to maintain his wife and children, and women have no obligations at all to contribute to these expenses, even if they have wealth. According to the document, any group should have a leader and in most cases, the husband is older and it is the husband who is usually the breadwinner of the family and mixes more with a wider range of people'. This *qiwama* requires the wife to obey her husband, so she cannot leave home or go out to work without the permission of the husband.

In this document, the MB displays its willingness to limit the presence of women in public and prevent them from associating with men based on vague criteria of modesty and decency. According to the document, modesty is a condition for women's rights and freedoms. It says: 'The nature of women requires them to maintain their chastity since it is crucial for the integrity of offspring and honour'. The Qur'an, according to the document, requires women to cover their bodies, except their faces and hands, and refrain from mixing with men. The document condemns the status of women in the West, holding that it is based on 'an obscene philosophy that goes against the moral principles and values of shari'a'. The platform of the FJP (2011:113) endorses the same hierarchal relationship between men and women. It says that 'the Party promotes the culture of equality between men and women without prejudice to the complementarity of roles'. It then states that 'the wife has the right to work in all political, social, cultural and economic fields' but 'within the limitations of Islamic shari'a'.

The argument that the Qur'an (4:34) provides for men's guardianship (*qiwama)* over women establishes the basis of discrimination against women in traditional treatises of Islamic law and modern family laws in many Muslim states. This verse is usually cited to rationalise discriminatory interpretations of other verses in the Qur'an and Prophetic sayings, which provide men with superior status over women in the martial relationship, divorce, inheritance, polygyny, testimony before judges and the occupation of certain public posts. The patriarchal interpretation of the doctrine of *qiwama* is also supplemented by another verse in the Qur'an (2:228) that states that 'men have a degree over women'. The interpreters and translators of the Qur'an have disagreed in defining this degree and whether it is a degree of right, responsibility or advantage. The same disagreement is found in the interpretation and translation of the word *qiwama*; for some, it means guardianship or leadership and for others maintenance or responsibility (al-Hibri 1997:28). The doctrine of *qiwama* is commonly understood in Egypt in a discriminatory manner against women.

Despite his progressive views on polygyny and divorce, Mohammad ‘Abduh did not break with the conception of men’s guardianship or in his words, leadership (*ri’asa*), over women in the family, considering it part of ‘the distribution of tasks between men and women’. According to him, this is attributed to the natural features of men and their ability to financially support their wives (‘Umara 1997:69-73). One should consider the social context in Egypt where ‘Abduh developed this view but it is an indicator of the inconsistency of many positions taken by early Egyptian reformers who have attempted to present progressive interpretation of Islamic sources without challenging the epistemological and methodological assumptions of traditional Islamic law.

In June 2013, the Association of Senior Scholars at al-Azhar published a document on women’s rights in Islam (al-Masri al-Yawm 2013). It was seen by many Egyptian commentators as an endeavour to counter the hardline discourses of the MB and other Islamists, because over the previous three decades, al-Azhar had supported many reforms in personal status laws and condemned the conservative approach taken by the MB on these reforms. However, this document reveals the common ground between al-Azhar and Islamists. According to the document, the doctrine of *qiwama* provides for the responsibility of men towards their families. It says: ‘Men are obliged to maintain their families since women perform their natural tasks of procreation and bringing up children’ (al-Masri al-Yawm 2013).

The document begins with the argument that women’s right to work should be qualified by the conditions of families and respect for the ‘Islamic morals and values’. According to the document, ‘this right is urgent to protect poor families from collapse more than being motivated by the purpose of equality between men and women’ (al-Masri al-Yawm 2013). In

this document, women's labour is deemed necessary to save their families, not to fulfill their ambitions and their life plans. This instrumental approach to the integration of women into the labour market can be read within the failure of Egyptian state since the beginning of economic liberalisation in the middle of the 1970s to provide basic social and economic rights for citizens and families. The document does not explain why women who work to assist their husbands due to economic factors are still exposed to certain types of discrimination, and why they should obey their husbands. The concept of gender equality, as presented in CEDAW and defended by many Muslim feminists, and the idea of Islamic reformation go beyond the supposed 'moderate' or 'centrist' (*wasati*) role of al-Azhar. One should remember that as much as al-Azhar has supported some reforms, it has also blocked many other reforms and, as explained in chapter five, legitimated the persecution of Egyptian reformers since the beginning of the 20th century.

The presentation of the doctrine of *qiwama* as 'role differentiation within the family' (Baderin 2003:135) or complementary roles between men and women in reality reinforces discrimination against women and qualifies women's right to political participation, since it supports the assumption that it is the top priority of women in Islam to care for their husbands and children, rather than participate in the public life on an equal footing with men. This theory of 'role differentiation within the family' contradicts the evolving social reality of Muslim families today. In Egypt for instance and as noted by Sharafeldin (2013:75): 'Due to the high poverty levels, most Egyptian households nowadays find it very difficult to get by without the income of both partners, Additionally, in 2000, 22% of households were solely dependent on the woman's income'. Based on her field work and her analysis of case law on family disputes in Egypt, Al-Sharmani (2013:51) has raised the same point, stating that: 'The disjuncture between the lived experience of many married couples and the legal model of marital roles leads . . . to conflicts between the spouses'. This conclusion weakens the

argument that the 'role differentiation within the family' protects the family from disintegration.

To challenge the model of gender equality, some scholars also argue that Islam is concerned with 'substantive justice' rather than 'formal equality'. The practical implications of formal and substantive equality models on women is a topic hotly debated among feminists and human rights defenders across the world (Kapur 2012:269-272), and it has been observed that 'while CEDAW has primarily adopted a substantive model of equality, there are elements of a formal model evident in the text' (Kapur 2012:271). But the contribution of Islamists to this debate has entirely different logic and purposes. While al-Banna and his heirs have argued that the system of complementarity of roles is ordained for the benefit of women, the effect in this context is the perpetuation of existing inequalities.

Other female and male Muslim scholars have treated the model of gender complementary roles as historically contingent, not as an eternal rule of Islam. Muslim feminists like Amna Wadud, Azizah Al-Hibri and Asma Barlas present new interpretations of the Qur'an, arguing that verses in the Qur'an should be read within the Qur'an's overall messages of justice, equality and God's oneness. In her book, *Qur'an and Text*, Amna Wadud (1999:69-70) argues that the *qiwama* of men over women in the family is conditioned on a system of 'reciprocity between privileges and responsibilities' and is not unconditional or absolute. Wadud argues that the Qur'an (4:34) does not privilege men over women in absolute terms and 'all men do not excel over some women in some matters. Some men excel over some women in some manners. Likewise, some women excel over some men in some manners'. This verse according to Wadud is open to many possibilities. She maintains that:

> The ideal scenario establishes an equitable and mutually dependent relationship. However, it does not allow for many of today's

> realities…therefore the Qur'an must be eternally reviewed with regard to human exchange and mutual responsibility between men and females (Wadud 1999:73).

The model of complementarity for Wadud is an ideal option but its realisation in our times is not possible. The possibility that this model had been followed for specific historical circumstances is absent from her analysis. This is not consistent with her contextual and historical reading of the Qur'an on other issues likes obedience and the beating of wives by their husbands. On these two issues, Wadud argues that the Qur'an was attempting to restrict existing practices. Commenting on her work, Raja Rhouni (2010:256) has stated that:

> Contextualisation emerges . . . as a mere strategy invoked to rescue an insufficient and unconvincing interpretative method . . . rather than as a systematic and pondered approach that recognises and asserts the Qur'an historicity.

In her second book *Inside the Feminist Jihad*, Wadud (2006:203) revisits her previous interpretive approach, admitting that she utilised 'the linguistic space of manipulating meaning' to promote an interpretation that the Qur'an perhaps did not intend. Drawing on a linguistic analysis of the verse (4:34), Azizah Al-Hibri (1997:28) argues that this verse bears different meanings, adding that 'where a society was authoritarian, it made sense that interpreters coloured these meanings with their own authoritarian perspectives. As the world changed, modern interpreters tried to regain for the word its original meaning'. Al-Hibri (1997:30) has concluded that *qiwama* is an advisory role that can be practised by either men or women based on their qualities and is not an absolute privilege provided by God for men. For many Muslim feminists, economic factors play an important role in defining the limits of *qiwama*. Accordingly, *qiwama* is not absolutely enjoined by the husband but can also be practiced by the wife in our modern times since women now support their families (Saeed 2014:120:122). But the changing distribution of financial capabilities between the husband and the wife does not adequately challenge the unequal gender status in the family under

Islamic law, as for many Muslim scholars the financial factor is not decisive in stipulating gender roles; discrimination against women is usually justified by essentialising the nature of men and women.

Therefore, the choice of women to go out to work has been treated as a secondary matter by them, and does not change the subordination of women to men. We have even seen this explicitly argued: according to al-Azhar, if women choose to work to save their families from collapse, their subordination to their husbands continues. For most traditional Muslim jurists, the concept of obedience has entailed that a woman to satisfy her husband sexually, not to leave the house without his permission, and ensure procreation and the rearing of children (Mir-Hosseini 2013:30-32). Drawing on the evolving financial capacity of women is therefore not enough to challenge this patriarchal theory. Alternatively, Abu Zayd (2013:163-164) maintained that the regulation of marriage, divorce and inheritance and other legal stipulations is part of the social level of the Qur'anic discourses which addressed the seventh-century milieu and the nascent Muslim community. He added that 'when the Qur'an sustains absolute equality in both the cosmological and the ethical spiritual domain, this is the direction in which the Qur'an would like Muslims to upgrade the societal domain of inequality' (Abu Zayd 2013:164).

In conclusion, the historical and contextual readings of the Qur'an are firmly rejected by the MB, whose conception of complementary roles means in reality that not all the rights enjoyed by men are provided to women. I show in the following sections that this understanding has influenced the discriminatory positions held by the MB towards women.

1.2 Women's Rights in the 2012 Constitution

The protection of women's rights in the 2012 Constitution was one of the thorny issues in the constitution-making process under the rule of the MB (Khattab 2013). This constitution dismayed women's rights advocates, who attempted through public protests and media campaigns to pressure the Islamist-dominated Constituent Assembly to expand the protection of women's rights in early drafts of the constitution (Nazra for Feminists Studies 2012; Kortam 2012). The participation of women in the Constituent Assembly was very modest. The People's Assembly elected seven female members out of 100 members; three of them were affiliated with the MB. Manal al-Tibi, a well-known human rights defender and one of the female members, withdrew from the Constituent Assembly on 24 September 2012 and spoke out in the media against Islamists' hostile attitudes on international human rights norms, particularly on gender equality (al-Majid 2013:83).

On the contrary, in her testimony about the making of the 2012 Constitution , Amani Faraj (2013:172-196), an Islamist female member of the Assembly, complained that human rights defenders and international NGOs like HRW were trying to introduce certain concepts alien to Islam and the Muslim family. According to her, gender equality is not acceptable as far as it means equality in marriage, divorce, inheritance, the prohibition of polygyny, sexual freedoms, homosexual rights and the permission of abortion. To show that women's rights advocates are driven by an alien foreign agenda, she named them in her book the 'globalisation current' (*tayar al-'awlama*). The testimony of Faraj in her book reveals the wide gap between Islamists and international human rights.

Women were explicitly mentioned in the 2012 Constitution three times. Two of these references reduced women to the roles of sisters, mothers and partners, rather than primary

citizens and rights holders. The preamble stated that: 'No dignity is there for a nation if women are not appreciated. Women are men's sisters and partners in gains and national responsibility'. But what 'dignity' entails for women is ambiguous. Islamists present their model of complementarity of roles as a means to protect the woman and preserve their dignity, yet while using terms like 'sisters' or 'partners', which overshadows the aspiration of gender equality. The narrow perspective of the status of women in society is obvious in Article 10, which required the state to 'reconcile between the duties of a woman toward her family and her work'. This provision was mentioned under the constitutional section on the moral foundations of the society, not the human rights section. The same article stated that: 'The family is the basis of the society and is founded on religion, morality and patriotism'. The reference to religion here is ambiguous and irrelevant and could provide a religious basis for discrimination against women. One can argue that Article 10 provides for affirmative action measures to assist women to practice their right to work. For instance, Article 25(2) of the UDHR states that 'motherhoods and childhood are entitled to special care and assistance' but it is made clear in the UDHR and other international human rights documents like CEDAW (Article 16) that motherhood cannot be used as a basis for discrimination against women. Article 16 of the UDHR says that men and women in the family 'are entitled to equal rights as to marriage, during marriage and at its dissolution'.

The analysis of this point cannot be separated from the economic conditions in Egypt and many other states in the world. Hassan al-Banna (2006:404-414) for instance was insistent that women should focus on their families and their public roles should be very limited. However, as mentioned, difficult economic conditions in Egypt have pressured Islamists over the last two decades to increasingly accept that women become integrated in the labour market. I referred in the previous section to the statement made by al-Azhar that women's financial contribution to save the family from collapse is encouraged. In theory the state as

elaborated in Article 10 of the 2012 Constitution is ready to provide women with facilities to work but in return their subordinated status to men in the family does not change. This creates immense hardships for women because in practice the state has provided poor affirmative action measures for pregnant or mother female workers. While this is a situation that is found also in many Western societies (McLarney 2012), its consequences on Muslim women in Egypt is much higher because those women are also requested to fulfill their duties in the family and obey their husbands.

A reference to equality between men and women was made only in the preamble, stating that: 'Equality and equal opportunities are established for all citizens, men and women, without discrimination or nepotism or preferential treatment, in both rights and duties'. But this was very marginal, and accompanied by provisions which restricted the place of women in society. Article 33 stated that: 'All citizens are equal before the law. They have equal public rights and duties without discrimination'. Originally this article prohibited discrimination based on sex and religion, but at the end these grounds were omitted in an indicator that the drafters worried that such a reference might not be in line with shari'a (al-Majid 2013:82).

Islamists insisted on reintroducing Article 10 of the 1971 Constitution that explicitly restricted gender equality and the practice of women's rights by the rulings of Islamic shari'a.[308] But this proposal was opposed and condemned by many non-Islamist forces and women's rights groups. The reference to Islamic law as the main source of legislation was a foundational principle of the state in the 2012 Constitution (Article 2, 4 and 219) and this

[308] Article 11 of the 1971 Constitution stated that:

> The State shall guarantee harmonization between the duties of woman towards the family and her work in the society, ensuring her equality status with man in fields of political, social, cultural and economic life without violation of the rules of Islamic jurisprudence.

allowed for limiting the scope of women's rights and all human rights in the constitution. Women's rights advocates were not ready to demand the omission of Article 2 in the constitution but they were very concerned about any specific reference to the rulings of shari'a in the constitutional provision on women. However, I argue that key women's rights advocates have been fighting the wrong battle during the constitution-making process. The critique of draft Article 36 by these actors was not enough without either calling for the removal of Article 2 or limiting its scope.

The proposed provision referred to the rulings (*ahkam*) of shari'a unlike Article 2, which stated that the principles of Islamic shari'a are the main source of legislation. Women's rights advocates[309] argued that the word *ahkam* is confusing and would enable legislators to draw on hardline opinions from traditional Islamic jurisprudence. For them this was an obvious indicator of the intentions of the drafters to block any doors that could be used to challenge the unequal status of women and men. The contradiction is that the statement of the coalition of women's rights advocates attacked this proposal but overlooked the impact of Article 2 under which women's rights have been restricted. The interpretation of Article 2 by the SCC is broad enough to be abused by any political force once it controlled the judiciary. Finally, Islamists decided to omit any reference to gender equality in the constitution, as for them such a reference cannot be made without limiting its scope by a general reference to shari'a (al-Majid 2013:106-107; Faraj 2013:194-195).

To be sure, many Egyptian liberals and non-Islamist political parties have demonstrated an ambivalent and confusing agenda towards women and Islamic law. During the constitution-making process they argued against the reference to Islamic law in the provision on women'

[309] On this point, I draw on a statement published on 22 September 2012 by a coalition of 14 feminist and human rights groups, 5 political parties, 11 public figures and the Coalition of Feminist NGOs, a coalition of16 feminist groups (Coalition of Feminist NGOs et all. 2013).

rights, but that Article 2 of the constitution on Islamic law was enough to ensure that family matters would be regulated by shari'a. It seems that those liberals supported an improvement of the status of women in the family but not the pursuit of full gender equality in the private sphere. Their commentaries show that they were more concerned about gender equality in public.[310] The experience of the 2012 Constitution shows that Islamists were able to endorse their vision of the status of women in society, while liberal and leftist political forces opposed this agenda, but without being ready to fully and openly challenge the Islamists' constructions on the relationship between men and women.

1.3 Reactions to the International Women's Rights Movement

Given its theological assumptions on gender roles in Islam, it is predictable that the MB would reject the conception of gender equality as articulated in international human rights treaties, particularly CEDAW. These treaties drastically challenge traditional and unequal gender roles in Muslim societies. In modern times, 'women and family law became symbols of cultural authenticity and carriers of religious tradition' (Mir-Hosseini 2009:37). The displacement of Islamic law in many areas of law has prompted many Muslims to consider Islamic family laws 'the last bastion of Islam' (Mir-Hosseini 2009:40) or 'the hard irreducible core of what it means to be a Muslim today' (An-Na'im 2002:9). In the words of Abu-Odeh (2004:1046) 'attachment to medieval patriarchy came to mean attachment to [Islam]'. Any efforts to undermine this traditional framework of gender roles have been perceived by the MB as a threat to the Muslim family and 'Islamic values'.

As noted by Mir-Hosseini (2009:37-38) the struggle for women's rights under colonialism and post-colonialism has been heavily intertwined with the relationship between Muslims and

[310]See for instance the op-eds written by Amr Hamzawi (2012), the President of Egypt Freedom Party and Mohammad Abu al-Ghar (2012), the President of the Egyptian Social Democratic Party.

the West. The literature of the MB is full of harsh critique of feminist voices and movements that emerged in Egypt in the 19th century by treating these movement and its male and female figures as part of a 'colonial, crusade and Zionist conspiracy' to eradicate Muslims values and traditions. Under colonialism, cultural and political resistance to feminist discourses was shaped by a feeling among many Egyptian intellectuals that these discourses serve the colonial political agenda and advance its sense of cultural superiority over the colonised culture and traditions (Ahmed 1992:150-151). 'It was . . . in the combining of the languages of colonialism and feminism that the fusion between women and culture was created' (Ahmed 1992:151). This association between feminists, colonialism and Westernisation has put Egypt's feminist movements under attack in the literature of the MB.

Their struggle has largely been condemned in the writings of Islamists (Yussuf 1998; Mahmoud 2011; 170-188) despite the limited and gradual agenda of early feminists and their interest in building their arguments from Islamic jurisprudence. Islamists have, over the past three decades, taken on many of these views such as women's right to education, work and political participation, but they have nevertheless rejected the feminist movement overall, because its members do not share the Islamist political worldview as a whole. This tone, which increased significantly after the 1970s and has been revived over the last decade with US-led invasion of Afghanistan in 2001 and Iraq in 2003, has overshadowed any possible critical attempts by Muslim feminists to engage with Islamic traditions or to encourage and implement drastic cultural and religious reforms.

Since 1994, the MB, its scholars and associations have been active in campaigning against UN conferences on women's rights. For instance, as a reaction to the Fourth World Conference on Women held in Beijing 1995, a statement was published by six prominent Islamist scholars on 4 November 1995 under the title *A Message for Women All Over the*

World. Three of the authors of this statement are affiliated with the MB (al-Ghazzali, al-Qaradawi, abu-Shuqa) and the other three figures are close to the group and well-respected by its members (Mohammad 'Umara, Fahmi Huwaidi, Mohammd Salim al-Awa). The most notable thing in this statement is that it explicitly discredited the struggle of women all over the world for freedom and equality by using the vocabularies of Qutb and calling this movement 'a new state of ignorance' *(jahiliyya jadida*) (al-Ghazzali et al.1995). The same term was used by the General Guide of the MB Mohammad Badie in October 2012 in his weekly message *Human Rights in Islam,* where he urged his followers to embrace the Qur'an and *sunna* to 'protect women from the temptation of the new *jahiliyya,* which under the slogans of freedom and liberation want to transfer women into a commodity for pleasure and lust'. The application of shari'a is the only means by which to emancipate Muslim women according to Badie (2012a).

The same discourse appeared in 2005 in a message released by the General Guide of the MB Mahdi Akif (2005) titled *Women's Issues from an Islamic perspective,* on the occasion of the 49th session of the UN Commission on the Status of Women. Commenting on CEDAW, Akif attacked what he considered to be 'Western efforts to impose alien concepts to the culture of Islam'. Since his statement came two years after US-led invasion of Iraq, his statement made a connection between Western military and political domination on the Muslim world and its attempts to 'reformulate the structure of Muslim family along Western lines'. Akif and most of his Islamist companions have insisted on presenting CEDAW as a western plot but they have ignored the fact that 'the West is itself divided on the question of women's rights and particularly the merits of CEDAW, as evidenced by disagreement within the United States that have prevented US ratification of the treaty' (O'Connor 2012:347). The defensive mode taken by Islamists places the relationship between Islam with individual rights and gender equality in opposition. It also monopolises the understanding of Islam and discredits other

voices that give different meanings to Islam and its founding texts. Moreover, when these statements were being written and distributed, other Muslim women in the Muslim world asserted that these international conferences are an opportunity to empower their struggle against discrimination and patriarchal practices (Maktabi 2013:287).

The increasing role of civil society and the international human rights movement has pushed the MB to globally advocate for an Islamist alternative to the philosophy of gender equality. The Islamic Charter on Family is the culmination of this effort. This document was adopted in 2007 by the IICWC. The drafting committee of this Charter included the former *Mufti* of Egypt Ali Jum'a and other scholars affiliated with the MB such as al-Qaradawi and Makarim al-Diri, a female candidate under the MB in the 2005 parliamentary election. It also included 'Umara and other scholars from Morocco, Yemen, Saudi Arabia, Lebanon, Sudan and Syria contributed to the drafting, many of them affiliated with MB sections in these states. The participation of the Grand Mufti of Egypt in drafting this document demonstrates that the MB and official Islamic establishments in Egypt share a similar philosophy on women's rights in Islam.

The 'clash of civilisations' thesis is felt in the introduction of the Charter, in which 'Umara (2007) wrote that 'Western cultural invasion of the Muslim world has posed a serious threat to Islam and its system of values. Therefore, it has become necessary to clearly distinguish Islamic concepts from other secular and irreligious frame of references'. For him, the international women rights movement and its concepts stand as 'a declaration of war against the family and its morals and values in Islam'. The Charter defends the different gender roles resulting from what it considers 'physical and mental differences between men and women'. He assert that the denial of this fact according to Article 9 of the Charter 'is not permissible under shari'a or logic. It also humiliates human nature'.

Twenty years after the ICPD, the MB's hostile attitudes towards feminists and the women's rights movement have not changed. This was evident in its fierce reaction towards the 57th session of the UN Commission on the Status of Women held in New York in March 2013. This was used an opportunity for Egyptian Islamists to reiterate their positions on international human rights treaties and the idea of gender equality. Female leaders of the Muslim Sisters were outspoken against the conference (Helmi 2013a; 2013b). The conference was held at a time when the MB was attempting to strengthen its grip on power in Egypt amidst intense confrontation between President Morsi and the non-Islamist opposition and human rights movement, and the increasing concerns of women and religious minorities about their future under the rule of Islamists. One can suggest that the occasion of the UN conference was seized on by the MB as a political opportunity to mobilise the public on a culturally sensitive issue like women's rights, and appear as the protector of 'Islamic authenticity'.

This reaction also was consistent with the MB's plans to lay the ground for reversing some of the reforms achieved in the areas of personal status law and child law under Mubarak. To discredit these reforms, Islamists dubbed the expression 'Suzanne's laws' or *qawanin al-hanim* (al-Hafiz and Ibrahim 2011; al-Zayat 2011) in a reference to the role of Suzanne Mubarak, the former first lady, in pushing for these laws (Badran 2012). In 1979, when President Sadat adopted unprecedented reforms for the status of women in the family, Islamists called it 'Jihan's law', portraying it as top-down and undemocratic reforms. But this description overlooks the struggle launched by Egyptian feminist movement since the beginning of the 20th century and the role of civil society over the past three decades in

pushing these reforms onto the public platform.[311] Moreover, the MB's male and female leaders were not satisfied with the performance of the National Council for Women (NCW)[312] and the National Council for Motherhood and Childhood[313], linking both institutions and their members with the legal reforms adopted in the Personal Status Law and Child Law. The MB as I explain in detail in the following sections rejected these reforms. It was also one of its declared goals to dissolve these institutions and replace them with what they called 'the National Council for Family' (Abu al-Nasr 2012; Helmi 2012; Egypt Independent 2013a).

In their reactions to the 2013 UN conference, the MB (2013) and the International Union of Muslim Scholars (2013) headed by al-Qaradawi reiterated the common Islamist position that women's rights in Islam are based on complementarity of roles between men and women as the way to achieve peace and harmony in the family. They blamed the UN for propagating an agenda that according to them is harmful to the integrity of families, declaring these conferences a 'continuation of the civilizational and cultural invasion of the Muslim world'. They attacked CEDAW, considering its provisions incompatible with the religious beliefs and laws of Muslim peoples, refusing any calls to withdraw the reservations made by Muslim states to CEDAW.

Moreover, these statements have urged Muslim states to be united in their defence of Islam and shari'a. As in the statement made by Islamist scholars in 1995, the MB (2013) questioned the religious piety of Muslim feminists and human rights defenders by calling on them to

[311] For detailed overview of the story of these reforms and the role of Egyptian feminists and civil society see Fawzy (2000); Zulfakar (2008); Sharafeldin (2013).
[312] NCW is composed of 30 members appointed by the President. Presidential Decree No.90/2000 Establishing the National Council for Women, Official Gazette no.5bis of 8 February 2000.
[313] Presidential Decree No.54/1988 Establishing the National Council for Motherhood and Childhood, *Official Gazette* no.5 of 4 February 1988.

'commit to their religion and morals of their communities and the foundations of good social life and not be deceived with misleading calls to decadent modernization and paths of subversive immorality'. This position was condemned by the NCW (2013a; 2013b; 2013c) which advocated for possible liberal interpretations of Islamic sources from within traditional Islamic law to show the possibility of expanding women's rights in Egypt. However, in its statements, the NCW did not go further to challenge discrimination against women on certain issues like inheritance, divorce and the marital responsibilities between men and women. Despite the important roles played by this institution to improve the status of women in the Egyptian society, its alignment with scholars from al-Azhar and the state put certain political limitations on its advocacy.

To conclude, the approach of the MB to the international women's' rights movement as a threat to Islamic values and Muslim identity has overshadowed any constructive engagement between the group and its scholars, with women's rights defenders or international treaties. The group, instead, has been occupied by proposing alternative frameworks for women rights in Islam that legitimise discrimination against women in the private and public spheres.

2. The Reform of Personal Status Law

In this section, I address selected issues on the status of women in the family. I primarily focus on personal status laws since the unequal status between men and women in the family provides grounds for many other forms of discrimination in society at large. If women are not seen as equal to men in the family, it is most likely that they are marginalised in public, even if the law establishes for gender equality in public life. As stated by Maktabi (2013:282) 'family law plays a crucial role in limiting the legal authority of female citizens as full members of the polity'. Throughout the 20th century and thanks to the long struggle of

Egyptian feminists, the rights of women to education, work and political participation have been recognised in Egyptian law. But there are still certain political and legal challenges to adequately effectuate these rights. Over the last decade, some women have been appointed in Egypt's judiciary but although the law does not prohibit women from being appointed as judges, some judicial organs firmly insist on excluding women from the judiciary (HRW 2010).

On the political rights of women, the MB (1994:223) has maintained that shari'a allows women to run for parliamentary elections and to occupy public posts. It was only in 1994 that this position was officially declared and according to the former member of the Guidance Bureau, 'Abd al-Mun'im Abu al-Futuh (2010:131-132), it was not easy to reach consensus on this issue among the leaders of the group. This position began to be articulated among the MB's scholars as of the 1980s, by revisiting the teachings of the founder of the MB, Hassan al-Banna (2006:414). These maintained that the public roles of women can be accepted in very exceptional situations, but that women are not allowed to vote in public elections or to be appointed in any public positions. Their work, al-Banna maintained, should be limited to certain jobs that are suitable for women. But this still does not establish a path to full gender equality in public life; the roles of women in the family take precedence over their engagement in public activities, the approval of their husbands is a pre-condition, and women are excluded from running for the presidency of the state. Moreover, the MB's position on the right of women to occupy judicial posts is ambivalent. Its document on the status of women in Islam stated that this issue is open for ijtihad, but it has not decided its juristic preference on this matter (the MB 1994).

The Egyptian state and Islamists agree that women's responsibilities towards their families can qualify their public roles. The MB (1994:220) believes, as above, that the women's right

to work is conditioned on the approval of their husbands. This was the condition under Egypt's law but it was softened in 1985 by a provision requiring the husband who refuses to allow his wife to work to argue before the court that 'her use of this right is corrupted by abuse of the right, or that it is contrary to the interests of the family'.[314] Similarly, according to Article 3 of the Minister of Interior Decision No.3937/1996, women were obliged to get permission from their husbands to have passports issued. In January 2000, the government wanted to allow women to apply for passports without this condition but this proposal was rejected by Parliament, and the MB opposed it as well.[315] In November 2000, the SCC struck down Articles 8 and 11 of Law No.97/1959, which provided the Minister of the Interior with wide discretion to set conditions for issuing passports for all citizens.[316] Consequently, the condition set by the Minister of the Interior was declared void and women became able to have passports issued, although their husbands still can challenge that before courts. This background shows that the restriction of the participation of women in public life is connected with discriminatory family regulations.

From the promulgation of Law No.25/1929 until the 1970s, there were several attempts to reform personal status laws but all ended without success. These initiatives met by resistance from the state, al-Azhar and Islamists (Najjar 1988:318-322). Certain developments occurred over the last three decades that have since renewed the debate on legal reform, including the emergence of the international women's rights movement. International dynamics such as the UN Decade for Women (1975-1985), the ratification of CEDAW by Egypt on 18 September 1981 and the regular organisation of international conferences on women have pushed the language of women's rights and gender equality to the front. This has coincided with the

[314] Article 1 of Law No. 25/1920 Amended by Law No.100/1985.
[315] Official Records of the People Assembly, Report no.23 of 27 January 2000, pp.15-18.
[316] Supreme Constitutional Court Case No.243/21, 4 November 2000.

development of Egypt's human rights movement and the establishment of women's rights NGOs (Zulficar 2008).

Additionally, starting from the second half of the 1970s, Egypt began to increase its political and economic ties with the West and international financial institutions. This political shift prompted the state to sponsor certain reforms in the area of women's rights to improve its international image and to also accommodate domestic economic and social transformation in the country (Hatem 1994; Al-Ali 2000:80-81; Maktabi 2013:287-289). Another factor that should be considered is the roles played by Egypt's first ladies Jihan al-Sadat and Suzann Mubarak, who sponsored some of the reforms undertaken since 1979. But to legitimise these reforms, the state under former presidents Sadat and Mubarak had to mobilise supporters from al-Azhar (Najjar 1988). The reach of these reforms, however, was constrained by the configuration of political alliances in the country (Zubaida 2005:171-173).

The MB and other Islamists became influential in the political scene in the 1970s and they adhered to a very conservative agenda towards women. The state's alignment with al-Azhar was politically necessary to counter Islamists but it also set limits to the reform processes. The state could not always guarantee the support of al-Azhar. For instance, al-Azhar joined Islamists in 1994 in their opposition to the gender agenda of the ICPD (Moustafa 2000:13). The SCC has meanwhile backed the reforms initiated by the government over the past three decades, finding a middle ground between the liberal agenda of women's rights movement and the hardline agenda of Islamists. But it has not challenged the hierarchal relations between husbands and wives in the family (Abu Odeh 2004:1193-1145). In their judgements in the 1990s and 2000s, the SCC held that the unilateral pronouncement of divorce is an absolute right of the husband, but supported all legal reforms aimed at empowering women to

obtain judicial divorce.[317] It also held that polygyny cannot be prohibited or restricted but supported the legal provision that allowed women to seek divorce for harm in case of polygyny.[318] This reasoning, while supportive for previous reforms, does not help expand women's rights. The previous analysis shows that there have been increasing opportunities for advocating women's rights in Egypt over the last three decades and this has led to certain tangible reforms, but there have been also immense institutional, intellectual and political challenges that constrain the scope for more reforms to realise gender equality. In the following sections, I explore some specific issues as case studies.

2.1 The Debate on Polygyny

The Qur'an (4:3) allows men to marry up to four wives. But the interpretation of this verse and the possible forms of its implementation in Muslim family laws has been a contentious issue among Muslim scholars. The Qur'an (4:3;129) requires men to be just with their wives and yet in another verse, (4:129) states that men will never be able to be just. Verse (4:3) was originally concerned with the treatment of female orphans. It proposed that their male guardians who were responsible for managing their wealth could marry up to four of them so they would maintain them and care about their wealth (Wadud 1999:76-77). However, Muslim scholars have disagreed on whether polygyny is permitted in Islam under all circumstances or only to meet exceptional situations. There have been also different views on how men can deal justly with their wives (Ali 1997:141-143), and whether this just a moral duty or entails remedy for its breach (Coulson 1964:19).

[317] Supreme Administrative Court, Case No.5257/43, 28 December 1997.
[318] Supreme Constitutional Court, Case No.35/9, 14 August 1994.

In the end of the 19th century and early 20th century, Mohammad ‘Abduh and Qasim Amin were outspoken against polygyny and openly called for its restriction. While he was serving as the grand *mufti* of Egypt, ‘Abduh was of the opinion that it is within the powers of the ruler to restrict polygyny by allowing husbands to obtain a judicial permission to marry another wife, only if his first wife is infertile. ‘Abduh developed an original juristic view without being limited by the consensus of traditional Muslim jurists. He argued that the Qur’an tends to gradually restrict polygyny, and admits that justice between wives can rarely happen, concluding that the Qur’an leaves the door open to restrict polygyny in accordance to changing social conditions. According to ‘Abduh if polygyny was deemed useful at the time of early Muslims, it has negative implications in our modern times for Muslim families and the whole society. He added that religion is revealed for the interests of human beings and it is one of its primary goals to avert harm. Therefore, ‘Abduh concluded, one cannot accept polygyny without strict conditions in our times (‘Umara 1997:113-120). In his writings, Qasim Amin (2012) followed the same line of arguments, but Egypt’s legislators in the 20th century did not follow this progressive opinion.

In contrast, The Tunisian Personal Status Law of 1956 prohibits polygyny based on a progressive interpretation of the Qur’anic verses on polygyny (Welchman 2007:78; Jansen 2007:205). According to the 2004 Moroccan Family Code, polygyny can be permitted by judges on exceptional grounds and provided that courts are comfortable that men can treat their wives justly. Women can obtain judicial divorce if they do not agree that their husbands marry another wife (Jansen 2007:203). Many Islamic feminists and Muslim reformers have maintained that the institution of polygyny was part of the social-cultural life of Arabs at the time of the revelation and it is not acceptable in our modern times (Abu-Zayd 2004:226-228; Wadud 1999:76-82).

In this section I argue that the MB and its scholars have opted for the most conservative view on polygyny and obstructed all possibilities to reform polygyny law in Egypt. Hassan al-Banna (1944) wrote that the government can intervene to ensure that men treat their wives justly. He did not explain how this would be implemented in reality but it is most likely that he meant that women could complain about their husbands before judges if they are not treated justly. His subsequent opposition to any reforms aiming to restrict polygyny provides evidence for this conclusion.

In the 1940s, al-Banna condemned a draft law presented by Mohammad Aluba Pasha, the Minister of Social Affairs, by which husbands would first have to obtain permission from a judge who should assess their financial capacity and their ability to maintain more than one wife. This proposed law would have allowed the first wife to obtain divorce if she rejected a second marriage by her husband. In its official magazine, the MB rejected this draft, stating that it flagrantly clashed with the Qur'an, and that if it was applied, it would increase illicit sexual relations. It urged the government to encourage marriage to honour women rather than restrict what has been ordained by God (Amin 2006: 155-156). The MB and its scholars followed this thinking against another attempt to reform polygyny law in 1979, as I explain further below.

MB scholars (al-Bahnasawi 1986:193-194; al-Qaradawi 2005a:118; al-Khuli 1980:109-126; al-Juhari and Khayal 2000:117-119) have maintained that men can marry up to four wives provided that they treat them justly. The definition of justice by this group of scholars is limited to material justice, meaning that men must provide their wives with equal maintenance, housing needs and sexual treatment. According to this view, the acknowledgment in the Qur'an (4:129) that men will not be able to treat their wives justly does not cover the psychological aspects of the marital relationships and this is beyond the

ability of human beings, so men will certainly have some emotional preferences for one wife over another. According to them, there are specific cases where polygyny becomes a mercy for men and women, such as the infertility of the wife, the inability of the wife to sexually satisfy her husband, and in cases where the number of women exceeds the number of men in society.

Two contradictions can be highlighted in this reasoning. Firstly, the reasons suggested to justify polygyny can be applied equally to men and women so the emphasis that polygyny is a mercy and moral and humanist option, pertains only to the needs of men and ignores women. Secondly, those scholars have claimed that they believe that polygyny is not the norm in Islam but it is ordained by God to treat exceptional circumstances. However, they contradict themselves when they refuse to even restrict the practice of polygyny by limiting its grounds or requesting men to get the approval of judges before having a second wife, preferring to leave this condition as a moral guidance, without being regulated by the state. Abu Shuqa (2011:311) was the only scholar who stated that judges can check the ability of men to achieve justice before they engage in polygynous marriage, but he was concerned only about the fair treatment of wives but not the restriction of polygyny itself.

The MB and its scholars have opposed considering polygyny *ipso facto* harm that allows women to be divorced without being obliged to prove that polygyny has caused them harm (al-Bahnasawi 1984:144). This approach was followed in Egypt for a short period under Law No.44/1979 which was 'consider[ing] the mere occurrence of a second marriage without the wife's consent as constituting injury'. Women were able therefore to obtain judicial divorce within one year of their knowledge of the second marriage (Najjar 1988:329). The explanatory memorandum of this Law argued that this provision was based on the idea of judicial divorce for harm articulated in Maliki and Hanbali jurisprudence. According to this

view, the definition of harm is left to societal changes and customs. It also pointed out that the emphasis in verse 2:229 obliges men to 'retain women in honour or leave them in kindness' and that all actions should avert harm in accordance with the Prophetic teachings.[319]

The MB dismissed this reasoning, arguing that if men are committed to treating their wives justly, judicial divorce for harm is not relevant. The commentaries published about this provision in the MB's magazines considered that allowing women to obtain judicial divorce if their husbands have engaged in a second marriage is a restriction on the licence provided to men by God. According to them, this provision was a punishment for men and a green light for them to commit adultery (al-Muti'i 1979; Shalabi 1979; al-Fiqi 1979; al-Jamal 1986a). Al-Bahnasawi (2003:115) held that the provision on polygyny in Law No. 44/1977 is void as it treats something permitted by the texts of the Qur'an as if it were causing harm.

The approach chosen in Law 44/1979 to restrict polygyny did not survive, and Law No.100/1985 adopted another model by allowing women to obtain judicial divorce within a year of their knowledge of the polygynous marriage, provided that they prove that this marriage has caused them harm.[320] The determination of what constitutes harm is left to the discretion of judges. In 1994, the SCC held that polygyny is permitted in the Qur'an and that the legislator cannot prohibit or restrict it but the state can ensure that polygynous husbands do not deprive their wives of their marital rights under Islamic law.[321] According to the SCC, the harm that can be invoked by first wives should be 'actual and demonstrable not imagined or assumed and connected with the second marriage'.[322] This definition resembles the view

[319] Explanatory Memorandum of Law 44/1979 on Personal Status Laws, *Official Gazette* no.25 of 21 June 1979.
[320] Article 11bis of Law No. 25/1929 Amended by Law No.100 of 1985.
[321] Supreme Constitutional Court, Case No.35/9, 1994.
[322] ibid.

of the MB and its scholars that the lack of justice between wives stand as a reason for women to initiate judicial divorce for harm.

Law No. 100/1985 presented a limited solution for the problem of polygyny. In August 2000, it became possible for women to stipulate in their marriage contracts that that their husbands cannot marry another wife without written permission from them.[323] The SCC had foregrounded this by ruling in 1994 that the principle of freedom of contract in Islam allows women to place conditions in the marriage contract.[324] Some scholars have proposed this route as a solution to many possible tensions between Muslim family law and IHRL (Baderin 2003:143). Salim al-Bahnasawi (1984:144) suggested this option as an alternative to the approach followed in Law 44/1979. But this proposal overlooks possible pressure on women not to stipulate conditions in their marriage contracts even if the law allows for that (Sezgin 2013:151). Female leaders of the Muslim Sisters argue that allowing women to give a lot of conditions in their marriage contracts discourages men to marry (Mahmoud 2011). This was also the argument made by Sheikh al-Azhar Jad al-Haq in 1994 when women's rights groups were struggling to implement the new marriage contract form (Zulfakar 2008:240).

For some Muslim activists and intellectuals, the prohibition of polygyny is the ideal solution, following the model of Tunisia. According to Abu Zayd (2004:228), arguments developed to justify the practice of polygyny 'simplify men and women in their biological formation and sexual functions and draw on these arguments to legitimise an inferior status of women and ignore their status as human beings with equal dignity'. If the total prohibition of polygyny is not acceptable now in society, he asserts that it can be allowed in very exceptional cases defined in the law and after the approval of judges, as suggested by Mohammad 'Abduh.

[323] Minister of Justice Decree No.1727/2000 Amending Marriage Registrars Regulations, al-Waqai' al-Masriyya no.184 of 15 August 2000.
[324] Supreme Constitutional Court, Case No.35/9, 1994.

However, the SCC's theory on polygyny does not achieve either of the two options. The SCC was clear that the state cannot intervene to ban or restrict polygyny but can only avert its potential harmful implications for first wives. This supports my argument that as long as laws must be legitimated under Islamic law, the debate on the scope of human rights is constrained and views are presented in a mutually exclusive manner since different actors present their understanding of certain rights as the only possible and legitimate one under Islam. Even if reformers become able to convince the state to endorse their liberal proposals, other conservatives will continue their struggle using absolute religious arguments to reverse reforms. This contestation will continue in Egypt and other Muslim states unless these states become open to the conception of a secular state, whose constitution and laws are devised based on inclusive and rational debate open for all people regardless of their religious convictions.

2.2 The Debate on *Khul'*

Under Laws Nos. 25/1920 and 25/1929 as amended by Law No. 100/1985, the wife can obtain judicial divorce on certain grounds based on the discretion of judges (Qassem 2002:25). To adopt these reforms, Egypt's legislators selected opinions from different schools of law to avoid the rigid positions of the Hanafis on divorce (Welchman 2004:3-5). Article 11 of Law No.25/1929 amended by law No.100/1985 allows judges to grant a wife a divorce even if she fails to prove harm after exhausting attempts of reconciliation and after 'it becomes obvious to the court that the spouses cannot live together'. These reforms have however failed to achieve a balance in the marital relationship. While men are able to divorce their wives unilaterally by the pronunciation of *talaq*, women have to engage a long and potentially expensive process of litigation with uncertain results (Chemais 1996:52-74). Egyptian feminists and women's rights groups continued their struggle to improve the status

of women in divorce. This was the purpose of Law No.1/2000 whose Article 20 allows women to obtain judicial divorce known in Islamic legal traditions as *khul',* even though their husbands do not agree, provided that women return the dower and waive all of their remaining financial rights.[325]

The People's Assembly witnessed a heated debate on this article. It was not only Islamists who opposed it but other non-Islamist forces as well (Fawzy 2004:63-67). The debate on this Article shows how immensely difficult it is in Egypt to modify the unequal status between men and women in the family. Both the opponents and proponents of the law invoked shari'a-based arguments. While the draft law was being discussed in the Parliament, *al-Sha'ab* newspaper, the mouthpiece of the Labour Party (Fawzy 2004:67) and the MB newspaper A*faq Arabiyya* (2000) launched a vehement campaign against the law, stating that it was part of a foreign plot to destroy the Muslim family.

The MB established its rejection of Article 20 on the assumption that women in Islamic law cannot end the marriage contract by their unilateral will. One can track some different views in MB sources on whether the mutual consent of the spouses is a precondition of *khul'*, or judges have discretionary powers to enforce it upon husbands if they are satisfied with the claims made by wives. But they all agree that women can only terminate their marriage contracts after decisions made by judges. MB sources invoke certain stereotypes about women to argue that divorce should lie in the hands of men. For instance, Amer al-Shamakh (2010:56) has claimed that: 'Women are emotional and can easily take furious decisions with harmful implications for the family and its cohesion'. This view is expressed in the

[325] Law No.1/2000 Concerning Rules and Procedures of Litigation in Matters of Personal Status, Official Gazette no.4bis of 29 January 2000.

foundational sources on women in Islam written by MB scholars (al-Juhari and Khayal 2000:126; al-Bahnasawi 1986:212; al-Qaradawi 2005a:112; Abu-Shuqa 2011:100-101).

The dominant view of MB political leaders was that the consent of the husband is a pre-condition for *khul'* in Islam. This was the position taken by the MB's representative in Parliament, Ali Fath al-Bab in January 2000. In his statement before the People's Assembly, he argued that Article 20 violates the Qur'anic doctrine of *Qiwama,* stating that 'God ordains the privileges of men over women on certain matters for the benefit of the Muslim family and the society at large'.[326] He held that on a sensitive issue like divorce, the state should follow the prevalent view in Islamic jurisprudence which says that *khul'* should be based on the mutual consent of the spouses, citing the views of the Hanafi, Hanbali, Shafi' and Zahiri schools.[327] Al-Bab's suggestion to choose the prevalent view among traditional Muslim jurists (*ra'iy jumhur al-fuqaha'*) would block many possible reforms of personal status laws. This proposal breaks with the methodology of eclectic choices from different schools of law followed by Egypt's legislators since the early 20th century. In its explanation of Article 2 of the 1971 Constitution, the SCC held that the state can opt for any juristic choice or practice ijtihad in any legal matter that is not regulated by a clear text from the Qur'an and *Sunna* or the consensus of Muslim jurists (Lombardi 2006:199-200).

Accordingly, the SCC held in 2002 that Article 20 of Law No.1/2000 is compatible with Article 2 of the 1971 Constitution, arguing that while the practice of *khul'* is based on a clear text from the Qur'an 2:229, there was no consensus on its detailed procedures among traditional Muslim jurists. According to the Court, the first opinion in Islamic jurisprudence held that *khul'* should be concluded by the mutual consent of the spouses and the second

[326] Official Records of the People Assembly, Report no.23 of 27 January 2000, pp.15.
[327] ibid., pp.16-18.

opinion taken by the Maliki jurists was that judges can order the dissolution of marriage if women insisted. The Court held that since there was no consensus on this matter, the legislator could choose the opinion that preserves the interests of the spouses and averts harm. According to the SCC, marriage is based on mercy, and a wife cannot live with her husband against her will if she explicitly declares that, returns her dower and waives her financial rights from divorce. These goals will not be realised if the approval of the husband is made as a pre-condition for divorce by *khul'*.[328] One should note that the provision of *khul'* in Egypt's law represents a new ijtihad, which did not typically conform to the Maliki view under which judges have discretionary powers to order divorce or not, whereas under Article 20 judges have no options but to order divorce if a wife insists on it.[329]

The views of leading female activists in the MB and FJP were consistent with the position taken by the MB in 2000. In a position paper on Egypt's personal status laws, Hoda Abd al-Mun'im (2006) a leading member of the Muslim Sisters and one of the leaders of IICWC, rejected Article 20 of Law No.1/2000, arguing that Muslim jurists agreed that a husbands' approval is a pre-condition for *khul'* and that this provision jeopardised the Qur'anic doctrine of the *qiwama* of husbands over their wives. According to her, the judicial divorce for harm is adequate to protect women. This statement ignored the difficulties met by women who chose to initiate judicial divorce for harm. Nevertheless, most leading MB scholars (Sabiq 1973b:299, Abu-Shuqa 2011a:284, al-Khuli 1980:140-141, al-Bahnasawi 1986:213; al-Qaradawi 2007c:199) maintained that *khul'* can be decided by judges if there is no mutual agreement on divorce and based on the request of wives, but provided that judges make an assessment for the circumstances of each case. So according to this view, judges are not obliged to enact *khul'* as stipulated in Article 20.

[328]Supreme Constitutional Court, Case No.243/21, 4 November 2000.
[329]For a detailed discussion on the conditions of *khul'* in traditional Islamic jurisprudence, see Muhammad (2011) and al-Zibari (1997).

The rise of Islamists after Mubarak has renewed the debate on the application of judicial *khul'* in Egypt. The official platforms of the FJP (2011a:112) and President Morsi (2012) promised to amend personal status laws to bring them in line with Islamic law without specifying which areas of law needed to be amended. However, statements from male and female leaders of the MB and FJP clearly demonstrate that the amendment of the *khul'* provision was on the agenda. In a paper presented to a conference held by the International Union of Muslim Scholars in Cairo on 27-28 July 2011, Saida Mahmoud (2011), the research director of IICWC and a well-known member of the Muslim Sisters, repeated the argument that Article 2 of Law No.1/2000 violates shari'a because it bypasses the approval of husbands on divorce, a condition that has been upheld by most Muslim jurists, according to her. She was also critical of the fact that judges have no powers to ensure that women do not abuse the *khul'* provision. Mahmoud also claimed that 'judicial *khul'* 'had harmed Muslim families in Egypt', arguing that it had increased the rate of divorce. Kamiliya Helmi, member of the Executive Bureau of FJP, stated that: 'The time has come to review all personal status laws which have been intentionally corrupted to replace Islamic law with international treaties'. Amongst the legal provisions that needed to be amended according to Helmi was the provision on *khul'* and the prohibition of the registration of marriage for males and females under 18 years old (Jalhum 2011).

In March 2012, Mohammad al-'Umda, an independent member of the 2012 Parliament with close ties to the MB, presented a draft law to remove Article 20 of Law No.1/2000. The explanatory memorandum of the draft law claimed that *khul'* divorce as stipulated in Article 20 'was granted to satisfy the NCW, which was chaired by former first lady Suzanne Mubarak, allegedly to save women from persecution in eastern countries. Islamic shari'a has been under siege since then' (Egypt Independent 2012a). Commenting on the draft law, Abd al-Khaliq Sharif, the head of *al-Da'wa* Department of the MB stated that women's resort to

khul' should be subjected to some checks (Sayd 2012). This draft law alerted the NCW and women's rights groups that something they had gained after long struggle was at risk. Al-Azhar and *dar al-ifta'* joined the discussion in Parliament and strongly rejected al-Umda's draft law, asserting that Article 20 is in line with Islamic law (al-Din 2012). In the end, the Islamist majority in the People's Assembly ignored this draft law and stopped the discussion on this matter. This was most likely for tactical reasons as there were other urgent priorities at that time, first and foremost the drafting of the constitution. But Islamists' opposition to Egypt's personal status laws and the women's rights movement has continued.

One can argue that Islamists have not come up with persuasive arguments in their campaigns against *khul'* divorce. The point that Article 20 spoiled the family is ill founded. According to the NCW (2013d) in 2010, 85% of divorce were initiated by men based on their unchecked powers to divorce their wives unilaterally, 13% resulted from judicial divorce for harm, and *khul'* divorce amounted only to 2% of the total cases of divorce. The NCW (2013d) has shown that disputes over the payment of maintenance to women after divorce constituted 81% of family cases. This number indicates the challenge met by many women after divorce to secure their financial rights. It should be also noted that unilateral divorce by men through the pronouncement of *talaq* is open to serious abuse. Women can find themselves unable to prove this *talaq* and in some cases their husbands conceal its occurrence. Women also face hardships when trying to obtain judicial divorce for harm, because judges treat similar cases of harm differently in accordance with the social and educational backgrounds of women (Sezgin 2013:149;HRW 2004:21).

In its interaction with Egypt's personal status law, the MB has claimed that its main goal is to safeguard the stability of the family. Arguably, putting the whole system of divorce under judicial oversight would help achieve this stability more than what is currently applied in

Egypt. Being concerned with the abuse of the right of unilateral divorce by men, this proposal was made by early Muslim reformers. Mohmmad 'Abduh ('Umara 1997a:91-98) established his proposal on the clear moral message in the Qur'an and *Sunna* that divorce is not desirable and should be always the last resort, highlighting the Qur'anic emphasis on arbitration between the spouses before divorce ('Umara 1997a:35). Following the same line of argument in his seminal book *The Liberation of Women,* Qasim Amin (2012:90-91) proposed that divorce is to be ordered only by judges after a set of procedures. According to his proposal, a husband who wants to divorce his wife should first inform a judge about the dispute between him and his wife. Then, the judge should attempt reconciliation between the spouses. If these attempts fail, the judge permits the husband to divorce his wife, but no divorce can be recognised unless it is pronounced before a judge with the presence of two witnesses. The draft law presented by Mohammad Aluba Pasha, the Minister of Social Affairs in 1944, stipulated that 'a notary cannot register divorce before having a judicial decision of divorce by a judge'. The draft law did not invalidate divorce if it was pronounced by a husband without judicial permission, but punished this husband with a prison sentence of up to three months and a fine. The MB condemned this proposal (Amin 2006: 155-156).

The need for these reforms has been debated in Egypt over the last five years. A clear example is the proposal developed by the Network of Women Rights Organisations to reform the Personal Status Law (NWRO) (2010).[330] According to this proposal: 'It is necessary to define divorce as the dissolution of the marital covenant that could be practised by both husband and wife, each according to their own conditions, under the supervision of the judiciary'. The proposal however offers many other legal options to reform the current system of divorce without directly calling for the legal invalidation of the unilateral

[330] The Network of Women's Rights Organisation (NWRO) (2010) was established in 2005. It involves 10 NGOs working across Egypt and led by the Centre for Egyptian Women's Legal Assistance (CEWLA).

pronouncement of divorce by husbands and the equal treatment of the spouses. Perhaps this is for advocacy tactics to accommodate the conservative attitudes of state institutions and political forces, or the coalition is constrained by shari'a reasoning. The Guide tries to develop different progressive legal options from within traditional Islamic law without challenging its methodological assumptions, as done by many other Muslim feminists.[331]

One should note that these NGOs have been working in a very challenging and tumultuous political context. After the 2011 Revolution and under the MB, the task was no longer to improve the current legal framework to protect the family but to shield its limited achievements from regression. The likelihood of feminists and human rights defenders transforming the system of divorce in Egypt and putting it under judicial oversight is very low in the absence of wide social and political supporters. Pursuant to the analysis provided in this chapter, Islamists would absolutely oppose this proposal, which goes beyond their imagination regarding the relationship between men and women in the family. But one can also recall the short-lived experience of Law No.44/1979 whose Article 1 stipulated a procedural restriction over men's power to divorce their wives unilaterally by the pronunciation of *talaq* by stating that:

> The consequences of divorce would become effective as far as the wife was concerned only upon her being officially notified of the divorce. The Wife would be considered officially notified either by being present at the time of certification, or by receiving a copy of the divorce certificate from the court official (*muhdir*) (Najjar: 1988:327).

Najjar (1988:328) reported that 'conservative Muslim scholars rejected the argument that a divorce must be certified in order to become valid. They argued that the unequivocal pronouncement of repudiation by the husband is sufficient'. Law 100/1985 amended this strict procedure by 'constraining this suspension of the

[331] On personal status law reform advocacy by Egyptian NGOs, see Sharafeldin (2015:163-196).

financial effects of divorce . . . to circumstances in which the husband deliberately conceals it from his wife' (Welchman 2007:123) The SCC may not also support the judicial oversight of a husband's divorce since it is not in line with its jurisprudence. The SCC held that unilateral divorce by men is an eternal ruling of shari'a but it confirmed that Islamic law does not reject the right of women to obtain judicial divorce. Explaining why the Qur'an entrusts men with this power, the SCC maintained that men are more competent and wiser than women to consider the serious consequences of divorce.[332]

However, the Court could possibly review this position under different political settings. The claim that men are necessarily more capable than women to decide on divorce would have allowed the SCC to join the MB's concerns and strike down Article 20 of Law No.1/2000, as under this article judges order the termination of marriage if wives insist without being obliged to prove harm. Women are obliged by the law to engage in reconciliation attempts, but the decision is for her to make in the end. Yet the SCC found Article 20 to be compatible with Islamic law. The flexible positions of the SCC may allow for revisions in the future, provided that the state sponsors these reforms.

2.3 Child Marriage

International human rights treaties do not provide for a specific minimum age for marriage. Article 16(2) of CEDAW states that: 'The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry

[332]Supreme Constitutional Court, Case No.82/17, 5 July 1997.

compulsory'. According to Article 1 of the CRC 'a child means every human being below the age of eighteen years unless under the law applicable to the child majority is attained earlier'. But the CRC is silent on the issue of child marriage. The language of the two articles provides a space for states to allow marriage under the age of eighteen. In the Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, the UN General Assembly sets the age of fifteen as the minimum age of marriage (Hashemi 2008:224). As concluded by Askari (1998) there is no adequate protection against early marriage for girls in the two conventions. Yet child marriage for girls is seen to have 'devastating even life-threatening consequences' (UNFPA 2012:11). It has been widely considered a harmful practice with negative implications for children's physical and psychological formation and their enjoyment of human rights in general (UNFPA 2012).

Egypt's law has raised the age of marriage through a 'procedural route' (Welchman 2007:62) whereby marriages below the minimum age may be valid but their contracts are not officially registered, leaving the spouses without means to have judicial recourse for protection. Article 367 of Law No.78/1931 set the minimum age for concluding a marriage contract or registering the contract at sixteen for females and eighteen for males. Article 99(5) of the same law disallowed courts from examining claims arising from a marriage contract of males under the age of eighteen and female under the age of sixteen at the time of the hearing. According to the same article, the existence of an official marriage document was a pre-condition for courts to hear marriage disputes if one of the spouses denied the marriage. Article 17 of Law No.1/2000 added that any written evidence of marriages is sufficient for claims of judicial divorce in the absence of an official marriage contract. This addition was important for females who have married under the legal age without registering the marriage contract but who for whatever reason wanted to obtain judicial divorce. In 2001, the Committee on the Rights of the Child expressed its concerns at the spread of early marriage

in Egypt, requesting the state to prescribe an equal minimum age of marriage for boys and girls.[333] This observation was considered in Law No.126/2008 which does not allow for the registration of a marriage of males and females under the age of eighteen.[334]

Nevertheless, Egypt has failed to eradicate the practice of child marriage in Egypt and the state has not been yet able to strictly confront its legal loopholes. According to a survey published in 2012 by the NCW, 22% of Egyptian girls were married before the age of eighteen, particularly in rural areas (El Masry 2012). Families are able to circumvent the legal barriers through concluding informal or customary marriage contracts (*zawaj 'urfi*).[335] Poverty is widely blamed for the spread of child marriage. It has pushed many poor families to offer their girl children to rich old men in return for a payment to girls' families in what is called in the media the 'business marriage' (*zawaj al-safqa*), or the 'tourist marriage' (*al-zawaj al-siyahi*), because it mostly involve non-Egyptian bridegrooms. Some Egyptian commentators consider these types of marriages 'child prostitution in the guise of a marriage' (El-Masry 2012). These marriages are usually consumed for a short period of time.[336]

Consensual sexual intercourse between adults and children is an offence under Article 369 of the Penal Code No.58/1937 but this provision is not applied to valid marriages between adults and children. The spread of child marriage in certain areas of Egypt is also backed by long cultural traditions and customs. The reference to Islamic law is also clear in this debate and it is one of the reasons that the state is unable to go further in fighting child marriages. In traditional Islamic law, as soon as males and females reach the age of sexual maturity (*bulugh*), they are eligible for marriage (Shaham 1997:51). In an official *fatwa,* the former

[333] UNCHR 'Concluding Observations of the Committee on the Rights of the Child, Egypt' (2001) U.N. Doc. CRC/C/15/Add.145, paras. 25-26.
[334] Article 5 of Law 126/2008.
[335] *Zawaj 'urfi* is 'unregistered marriages concluded outside official procedures' (Welchman 2007:231).
[336] For a socio-legal analysis of this issue see Hasso (2011).

mufti of Egypt Jad al-Haq (1980), held that in Islamic law there is no minimum age of marriage, adding that it is within the legitimate powers of the ruler to set a minimum age for the official registration of marriage, but this is not a condition for the validity of marriage in Islam.

In its reaction to the 57th session of the UN Commission on the Status of Women, the MB (2013) condemned international efforts to raise the age of marriage. This is the position that has been consistently taken by the MB over the last decade. It was clearly expressed in the parliamentary discussions of early drafts of Law No.126/2008 Amending the Child Law No.12/1996. One of the amendments raised the registration of marriages for females from sixteen to eighteen years old. The first argument invoked by the MB's parliamentarians against this amendment was based on the dominant view among traditional Muslim jurists that the age of sexual maturity is sufficient for marriage for males and females. They argued that early marriage is a safeguard against moral corruption and the spread of illicit sex in the society. This prompted the government to reiterate in Parliament that early marriage was not prohibited but only the registration of marriage contracts (Al-Markaz al-I'lami li al-Ikhwan al-Muslimin 2010). This statement reveals the contradictory approach followed by successive Egyptian governments since early 20th century on child marriage. This approach has aimed to challenge the legal consequences of this marriage but not to abolish it.

In a position paper on its positions on the Draft Child Law, the IICWC (2008) rejected this amendment. Drawing on the views of a group of Azhari scholars, the paper asserted that males and females should be allowed to marry if they reach the age of sexual maturity and have financial capacity to start a family. The document added that 'teenagers are exposed to different kinds of sexual attractions and marriage stands as a legitimate solution for that in Islam'. According to the document, the state should not obstruct early marriages. Otherwise,

it forbids what God permits. The Islamic Charter on the Family does not make a statement on the marriage age but it asserts in Article 23 that 'Islamic shari'a encourages youth to get married early to prevent moral and sexual deviance' (IICWC 2007). In its commentary on the provisions of CEDAW, IICWC (2009) expressed shock that states under the CEDAW should tolerate extra marital sexual relationships and provide health services for women who engage in these relationships, but consider it correct to set a minimum age of marriage.

For IICWC, Islam has a different moral philosophy because it 'encourages Muslims to marry early to protect them from sinful behaviours'. Another argument invoked by the MB Parliamentarians in 2008, and President Morsi (2012) in his electoral campaigns, is that the prohibition of the registration of early marriage contracts under Egypt's law deprives females who engage in early marriage of their legal rights, and increases cases of customary marriages (*zawaj 'urfi*). According to this view, the solution is to register these contracts. This proposal may seem concerned with the protection of females married under the legal age. However, it would reinforce child marriage and undermine previous efforts to eliminate it.

This strict position taken by the MB and its female leaders at IICWC against setting an age for marriage has lagged behind views among other Egyptian scholars who have supported the legal steps taken by the state to raise the official registration of marriage of males and females to eighteen years old, including the former mufti of Egypt from 2003 to 2013, Sheik 'Ali Jum'a (Soliman 2010). Moreover, in his programme at al-Jazeera TV, Sheikh Yusuf al-Qaradawi (2010e) stated that the age of marriage is determined by societies according to their social and cultural conditions, and that early marriage is permitted in the Qur'an and *sunna,* but the ruler can restrict it to avert expected harm. According to him, 'child marriage is not appropriate in our present times as it may not suit the physical conditions of girls and early

marriage disrupts their opportunity of attending education'. He then agreed that the age of marriage be set at eighteen years old in Egypt. But it seems that al-Qaradawi reversed this position in 2013, or was under pressure from his allies to revisit this position. This is evident in the declaration he released in his capacity as the leader of the International Union for Muslim Scholars (2013) on 27 February 2013 protesting the 57 session of the UN Commission on the Status of Women, where he attacked international efforts to prohibit marriage for males and females under 18 years old. In conclusion, despite the diversity of juristic views on the issue of early marriage, with increasing authority supporting its prohibition, the leadership of MB has been unwilling to review its position on this issue and has sought to undermine state efforts, in the name of Islam, to challenge this phenomenon in Egypt.

3. Female Genital Mutilation

According to the World Health Organisation (WHO), there are different types of FGM, known also as Female Genital Circumcision. It includes 'the total or partial removal of the clitoris or the total or partial removal of the clitoris and the labiae minora' (al-Hadi 1998:23). The third type of FGM, the most severe one, is found historically in a very limited number of regions, and involves the radical excision of the external genitalia, including the labia, and infibulation (Berkey 1996:27). In some classical sources of Islamic law, FGM is known as *khifad,* the act of reducing or shortening the clitoris. These sources distinguish between *khifad* as a moderate circumcision, which – according to the source – is either obligatory or recommended under Islamic law, and other forms of severe circumcision which is rejected under Islamic law. But this view is contested by many contemporary Muslim scholars who view FGM as a mere cultural custom that is neither recommended nor obligatory in Islam.

The practice of FGM has been widely spread in Egypt. The state started to take measures against it in the 1990s but, in the beginning these measures were met by resistance from the leadership of al-Azhar. The then-Mufti of Egypt, Sheikh al-Azhar, Jad al-Haq held that 'if girls are not circumcised as the Prophet said, they will be subjected to situations that will lead them to immorality and corruption' (cited in Moustafa 2000:13). However, successive leaders of al-Azhar and *muftis* supported the state effort to ban the practice of FGM in Egypt, and Egyptian civil society has been playing a key role in the local and international campaigning against FGM (al-Hadi 1998; Sa'id 2004).

In 1996, the Minister of Health, Isma'il Salam, issued a decree banning the operation of FGM at public or private hospitals. This decree did not please some sectors in society, including Islamist lawyers, who challenged it before the administrative justice. But the Supreme Administrative Court held that the decree was the prerogative of the Minister of Health, that the practice of FGM is not supported by clear evidence from Islamic sources, and that the discretionary powers of the government enabled it to prohibit the practice, to preserve public interest (Balz 2000). While the practice of FGM has continued in Egypt, the rate reduced from 97% in 1995 to 71% in 2005 according to UNICEF (2008).

Jonathan Berkey (1996:26) presents a deep socio-legal and historical analysis of the articulation of FGM in pre-modern Islamic sources, concluding that 'the discourse within the juristic traditions . . . generally approved of female excision, and in some cases held it to be mandated by Islamic law'. For instance, FGM is recommended for the Hanbalis and obligatory for the Shafi's (Berkey 1996:24-25). The Andalusian Maliki jurists Abu al-Walid Muhammad Ibn Rushed held that 'excision for women is a noble deed (*makrama*) although not an absolute requirement of the faith' (Berkey 1996:26).

Berkey (1996:21) points out that 'unlike the circumcision of boys, which is a nearly universal custom among Muslims, the practice of female excision is historically attested to in only parts of the [Muslim] world'. Some non-Muslim societies have practiced it for a long time, especially in Africa. In Egypt, FGM has been common among Muslim and non-Muslims alike and it was known in Ancient Egypt and Sudan. Consequently Berkey (1996:27) notes that 'there is compelling evidence . . . that medieval Muslims, or at least those Muslims among whom female excision was practiced, perceived the custom as one that had religious sanction'. According to Berkey (1996:31) 'a pre-Islamic practice such as female excision might survive the transition to the new religion by attaching itself to, and constructing a justification on, some ethical concern of the new faith'. This is evident in the arguments made by some Muslim jurists like Ibn Taymiyya and Ibn al-Qayyim al-Jawziyya, who viewed FGM as a means to control women's sexuality and ensure their virtue, while circumcision of boys was a ritual of purification (Berkey 1996:31).

Thus over the past decade, the MB has resisted the prohibition or criminalisation of FGM in Egypt and this hardline position has continued to the present time despite the increasing support provided by al-Azhar and *dar al-ifta'* to the state in its efforts to eradicate this phenomenon. Al-Qaradawi has come up with a new thought on this matter by declaring that nothing in Islam opposes the prohibition of FGM if its harmful impact has become obvious. By this statement he joins similar positions taken by other influential scholars of Islamic law in Egypt like Mohammad Sayid Tantawi (2009), 'Ali Jum'a (2007a) and Mohammad Salim Al-Awa (2007). Al-Qaradawi declared this position in an international conference convened in Cairo in November 2006 by *dar al-ifta'* and attended by a group of Egyptian and foreign Muslim scholars, doctors and physicians. The conference was held at the University of al-Azhar under the auspices of the former *mufti* Ali Jum'a.

The Qur'an is silent on FGM. The Shafi'i jurists who argued that circumcision is obligatory for male and female Muslims concluded that Verse 16:123 indicates that circumcision should be followed by the followers of the Prophet Ibrahim. But al-Qaradawi (2007b:6-8) rejected this interpretation, arguing that the Qur'an in this verse is basically concerned about Ibrahim's call for the oneness of God and not specific rulings like circumcision.

Some traditions are cited by traditional and contemporary jurists who have maintained that FGM is obligatory, recommended or permitted under Islamic law. Three *hadiths* are most common in their literature, but their authenticity is questionable and they are classified as weak *hadiths*. The first *hadith* states that 'ablution is obligatory when the two circumcisions (*al-khitanan*) meet'. For instance, Ibn Qudama concluded that 'this *hadith* is an indicator that women were circumcised' (Berkey 1996:22). Al-Qaradawi (2007b:10) does not agree with this understanding, noting that this *hadith* may indicate that circumcision was conducted for males and females among Arabs but the hadith cannot stand as evidence to consider FGM as obligatory or recommended. He also gave another possibility for interpreting this hadith, pointing to *al-taghlib* as an Arabic language rule whereby one expression indicates two different things at the same time, like the word *al-Qamaran* which refers to the moon and sun.

The second hadith narrates that the Prophet told a woman who was conducting FGM 'do not severely cut but shorten [the clitoris], for that is more favourable for the women and preferable for the husband'. Even though this hadith is considered authentic, the Prophet was advising the woman on a temporal matter for not causing other women harm while nothing indicates that the Prophet introduced FGM as obligatory or recommended act (al-Qaradawi 2007b:11). The third tradition mentioned by Ibn Hanbal 'described circumcision as *Sunna* for men and a noble deed (*makrama*) for women' (Berkey 1996:25). Al-Qaradawi argues that

regardless of the authenticity of this hadith, it indicates that FGM was considered a noble deed under customs, but not shari'a. Al-Qaradawi then concludes that FGM was not obligatory, prohibited or recommended but permitted or neutral (*mubah*). Since it is *mubah,* it is not appropriate to stigmatise the action or those who conduct it as long as they follow the advice of the Prophet to circumcise moderately. However, al-Qaradawi is clear that the decision to prohibit or permit FGM is left to doctors.

The dispute over FGM was renewed in 2008 when the government criminalised FGM in the Penal Code.[337] In 2007, an Egyptian girl had died as a result of FGM and there was strong pressure on the government to criminalise the practice and not just to forbid it. The MB parliamentarians vehemently opposed this proposal, arguing that the state is not mandated under Islamic law to prohibit and impose penalty on an action permitted in Islam, adding that there is no consensus among Muslim scholars that this proposal met the interest of the Muslim community; this ignored the positions taken by many scholars in Egypt, including the mufti and the leadership of al-Azhar. They repeated the assumption that what they consider 'the Sunni' FGM is not harmful to women and is necessary to preserve their chastity. In their opposition to the Child Law, Amir al-Shamakh (2010:77-78) and the IICCW (2008) quoted the statement of al-Qaradawi that FGM is permitted in Islam as long as it is conducted as guided by the Prophet, but ignored the rest of his reasoning: that FGM can be prohibited if it causes women harm.

The debate on FGM escalated in post-Mubarak Egypt. Several statements from the MB and the Salafist al-Nour Party revealed their intention to decriminalise the practice of FGM as long as it was conducted under the supervision of specialised doctors (Gray 2012). In an

[337] See Article 242bis of the Penal Code No.58/1937 Amended by Law No.126/2008, *Official Gazette* no.24bis of 15 June 2008.

interview with al-Majd Islamist Satellite Channel, the leader of the *Da'wa* Department, Abd al-Khaliq Sharif (2011) strongly criticised the criminalisation of FGM and urged the new parliament to review this alongside other laws which according to him undermine the values of the Muslim family. International and Egyptian media reported that mobile health Clinics in Upper Egypt organised by FJP offered medical operations with nominal fees for male and female genital circumcision (Badran 2013). The MB and FJP denied this news but Tadros (2012b) investigated the incident and provided evidence for its occurrence, including a copy of the flyer of this campaign with the logo of FJP.

As a reaction, a coalition of human rights groups, revolutionary youth coalitions, liberal and leftist parties and public figures including doctors condemned in May 2012 any parliamentary attempts to modify the Penal Code to decriminalise the practice of FGM, noting that the Child Law was backed by the official religious establishment before its promulgation in 2008, and reminding the public of the dangerous physical and psychological implications of FGM. For its part, *dar al-ifta'* (2013) reiterated its support for the criminalisation of FGM. The constitutionality of Article 242 of the Penal Code that criminalises FGM had been challenged before the SCC in 2008 by Sheikh Yusuf al-Badri, an Islamist lawyer and former member of the MB. In February 2013, the Court found the case inadmissible for procedural reasons [338] but in its report to the Court, the SCC's Commissioners Panel defended the compatibility between this article and Islamic law, repeating the arguments made previously by the Supreme Administrative Court and citing the opinions of senior jurists at al-Azhar and *dar al-ifta'* (Egyptian Centre for Economic and Social Rights 2013).

[338] Supreme Constitutional Court, Case No.289/31, 3 February 2013, *Official Gazette* no.6bis of 12 February 2013, pp.32-39.

4. Conclusion

A systematic analysis of the place of women in MB thought and practice explains why the political rise of the group in post-Mubarak Egypt dismayed women's rights advocates. These concerns have proven to be particularly well-founded over the past three years. Perhaps, it is the MB's position on the human rights of women that best shows the regressive agenda of the group towards human rights. Through its literature and political activism, the group has firmly challenged the idea of gender equality and obstructed the expansion of women's rights in Egypt. The continuous association between women's rights with foreign conspiracy and cultural invasion has undermined any constructive engagement with women rights' advocates on solutions for the considerable problems faced by women in Egypt.

This chapter has shown that the MB has tended to opt for the most conservative juristic views on the status of women in society, having not even drawn on its scholars to review its hardline positions on child marriage and FGM. What is striking is that the group has lagged behind the state and its institutions when it comes to women's rights. The limited reforms taken by the state to ameliorate the status of women in the family has been dismissed by the MB, even though these reforms have been supported by the official Islamic establishment in Egypt and can be justified by traditional Islamic law. This trend has been reinforced in post-Mubarak era, with intentions to reverse these reforms. The theoretical emphasis made by the group in its official documents on ijtihad and the flexibility of Islamic law, has not been translated into practical positions. One cannot track any progress in its official positions on women except the issue of women's participation in public life, and even this has been subjected to certain qualifications.

The MB is certainly part of the problem of the realisation of gender equality in Egypt, but there are other institutional and political barriers that have complicated the tasks of women's rights advocates. The discourses of the official religious establishment and the judiciary, despite being more advanced than the discourses of the MB, are not supportive of full equality between men and women, or even for further legal reforms similar to ones adopted in Tunisia or Morocco. The task is huge for feminists, women's rights advocates and human rights defenders in general, who strive to construct coherent approaches to the relationship between Islamic law and women's rights, and at the same time enlarge the social bases for their advocacy. Their advocacy agenda will, however, remain constrained and can be easily reversed, if they do not challenge the paradigm of Islamic law as the state law, and the methodological assumptions of traditional Islamic law.

Chapter Nine: Conclusion

1. Explaining the Conservative Face of the MB

This thesis has explored the development of the MB's positions on Islamic law and international human rights. The MB is an old and major Islamist movement that has been active in Egypt and the Muslim and non-Muslim world. This thesis has gone beyond abstract enquiry about Islam and human rights, and focused on theories and practices of an Islamist movement in specific political contexts. Previous scholarship has compellingly argued that Islamic law and human rights discourses in Muslim societies are contingent upon an interactive web of changing socio-political conditions. Islamist movements are among the key players who contribute to the making of these discourses.

During the 2000s, many scholars have argued that a moderate version of Islamism has been growing in the Muslim world. Moderate Islamists, according to them, could become a driving force to gradually legitimate democracy and human rights in Muslim and Arab societies, many of which have been ruled for decades under repressive authoritarian regimes. The reason for calling these Islamists moderate has been their commitment to engaging in peaceful political processes and their openness to plural democratic politics. Much academic attention was given to the MB in Egypt to explore whether the group could accommodate democracy. At that time, the debates on constitutional and political reforms were intense in Egypt, and many other Arab countries and Islamists actively engaged in these debates. The MB deployed the language of human rights, citizenship and democracy in its documents and political activism, and sent assurances to domestic and international actors that it could be a trusted partner in a democratic process, and that its activism aimed to free Egypt from authoritarianism.

Being influenced by this optimistic trend on moderate Islamism, my initial hypothesis in this thesis was that a major Islamist movement like the MB might contribute to the development of human rights-friendly interpretations of Islamic law. I systematically examined the MB's literature and its practices to test this hypothesis. During my work on this thesis, I was able to witness the MB in two different political settings: as an influential opposition group under Mubarak, and following his decline, a political party in power (until the removal of President Morsi by the military in July 2013). My main conclusion in this thesis is that the MB has exacerbated rather than solved tensions between Islamic law and international human rights. In the preceding chapters, I have concluded that the organisation and its scholars have drawn on hardline juristic opinions and reinvented certain concepts from Islamic traditions in ways that limit the scope of international human rights, and advocate for Islamic alternatives. I have also concluded that a peaceful management of political and religious diversity in society will be hard to realise under the MB's model of a shari'a state.

The MB's human rights records, while in opposition and in power, have been mostly consistent with its literature. In opposition, it embraced human rights language in its struggle against an authoritarian regime but advocated for broad restrictions on freedom of expression, rights of religious minorities, religious freedom and women's rights. The MB's short-lived experience in power provides evidence for its inclination to reinforce restrictions on religious freedom, freedom of expression, association and rights of religious minorities and reverse previous reforms related to women's rights. I have been also critical of the MB's central theory that shari'a should enjoys a superior status in the state. According to this model, which can be called the 'Islamic state', 'shari'a state' or 'civil state with Islamic background', the constitution should contain a stipulation that Islamic law is the state law and that the state, through its executive, legislature and judiciary, are entrusted with the application of shari'a in

society. As noted above, it will be difficult to peacefully manage diversity in society under this model, as the experience in Egypt after Mubarak well demonstrates.

Throughout its history, the MB has mostly engaged the spectrum of the state, politics and law to try to achieve what it considers a revival of Islam. For the MB, the constitution, law and tools of governance are means to preserve Islamic identity and restore shari'a. The MB and its scholars have been overwhelmed by what has been called by Abu-Odeh (2013:21) 'the identity regulative project', which has guided the MB's performance in opposition and in power. In other words, the MB has failed to strike a balance between its legitimate right to defend what it considers to be Muslims' communal identity, and the rights of others Muslims and non-Muslims to live according to their beliefs without coercion or persecution. The MB's story in Egypt tells us that when Islamists fail to build the confidence of religious minorities and non-Islamist forces and exclude those who do not concede to its Islamist worldview, they motivate their opponents to exclude them in return. This may explain why many liberals, leftists and member of religious minorities protested against the MB and then supported the military's removal of Morsi in July 2013.

I have observed throughout this research that the evolution of the MB's literature has been slow and limited. The MB and its scholars have tended to conform to views and theories developed by its early founders in most of the human rights issues addressed in this thesis, without critical engagement. The organisation has also disregarded the progressive views established by prominent scholars like al-Qaradawi on issues such as FGM, child marriage or the political rights of women and non-Muslims. Since its establishment, the thrust to build a strong organisation and large social base has pushed the MB and its leaders to focus their efforts on recruitment and mobilisation, drawing on general reactionary slogans such as the

protection of Islamic identity, the return of Islamic state and the application of shari‘a. In response to its continuous confrontation with the state since Nasser, the MB has been keen to maintain its organisational structure and social base rather than engage in intellectual reflection or self-criticism. According to many scholars, the hierarchal and closed organisational structure of the MB does not allow its members and leaders to engage in self-criticism or revisit the general intellectual doctrines of the group (Trager 2012; Kandil 2015; Al-Anani 2013). Throughout the history of the MB, disciplinary actions have been taken against critical voices in the organisation. This prompted an Egyptian scholar with close ties with the MB to argue that organisational restructuring and institutional democracy inside the MB is an integral component of its reform, alongside changing its value system (Al-Anani 2013).

One can also argue that the socio-political environment in Egypt has maintained the MB's conservatism rather than motivating the group to renew its thought. This environment has allowed the MB and Islamists in general to mobilise the public along religious lines. Religion, religious law and the religious establishment have influenced laws in Egypt in different forms and intensity since the beginning of its modern legal system. The separation between state and religion and religious reform has never been on the agenda of successive rulers and key political forces under and after colonialism. We have seen in the preceding chapters that the MB, successive Egyptian governments, the judiciary and the religious establishment have shared conservative views on many human rights issues such as freedom of expression, the rights of religious minorities, and religious freedom. The MB has lagged behind the state and its institutions on women's rights, but they all share the general idea that gender relations are based on complementarity not equality.

The political vacuum caused by the decline of pan-Arab nationalism and socialism in the 1970s, was filled by Islamists who became the most organised political force in the country until the removal of Mubarak. By the inclusion of Islamic law as 'a source of legislation' in the 1971 Constitution and then as 'the main source of legislation' in 1980, former President Sadat established what is called 'liberal legalism with Islamist accommodation' (Abu-Odeh 2013:12), which continues to define Egypt's legal system until today. After Mubarak, liberals and leftists were critical of Islamists' domination over the constitution-making process and rejected the reinforcement of the role of religion and Islamic law in the new constitution. However, most of them had no option but to accept the reference to Islamic law in the new constitution, as was the case for the 1971 Constitution (Abu-Odeh 2013:6-7). Moreover, after Mubarak, the main political block that was ready to compete with the MB and win grounds in its Islamist constituency was not liberal or leftist forces but the ultra-conservative Salafists. The rise of Salafists in the post-Mubarak era drove the MB to reinforce its conservative outlook to counter their influence. This explains why the MB agreed to include in the 2012 Constitution a conservative explanation of the principles of Islamic law (Article 219) and the consultative role of al-Azhar in the law-making process (Article 4) despite its previous support of the SCC as the authoritative interpretative body of Islamic law.

2. Prospects for Transformation

In chapters two and three, I argued that human rights provide states with a viable means of peaceful coexistence between individuals of different religious, sexual, ethnic, linguistic, social and political backgrounds. Using the expressions of Rawls (2005), human rights can be considered an outcome of an overlapping consensus to establish a well-ordered and stable society. Religious diversity is a salient feature in most societies today. People subscribe to different religious beliefs and philosophies. Diversity even exists within the same religious

community. The ability of a state that explicitly defines itself as the guardian of certain religious doctrines to inclusively and peacefully manage this diversity is questionable.

The experience in Egypt shows that many Muslims and non-Muslims and particularly minorities have felt that their rights as equal citizens are not secure under a reference to Islamic law in the constitution. This reference has resulted in an open-ended contestation over the interpretation of rights and the state's compliance with international human rights treaties. It has legitimised demands made by political actors in opposition or in power to limit the scope of certain rights, reverse previous reforms and reject international treaties on the assumption that they violate religious law. Even though Egypt's Constitutions have contained sections on human rights, a constitutional provision on Islamic law in each has limited the scope of other provisions on constitutional rights. This contestation, which is based on religious arguments, undermines an objective assessment of the merits of the respect for these rights in society. The final interpretation of the meaning of Islamic law is delegated to judicial or religious organs in the state, which claim that their opinions on contentious issues, are authentic manifestations of Islam.

The shari'a state presents a model of identification between state and religion, and not just a state's symbolic establishment with religion. In the Islamic state, Islamic law and values define the scope of citizenship rights and the different areas of public policies. This model risks alienating religious minorities, secularists, atheists and dissident Muslims. I have discussed that according to the MB, political pluralism is only permitted in the state as long as all political parties and association admit to the rule of shari'a. They can be declared hostile to the state, heretics or apostates if they call for separation between state and religion, or challenge the foundations of Islamic law as defined by the state. Moreover, I have explained in this thesis that Islamists' advocacy for the application of shari'a has been a cause

of polarisation and divisions along religious lines, becoming a source of hate and violence between Islamists and non-Islamists and between Muslims and other religious minorities.[339] Learning from transitional experiences in Egypt and other Arab Spring countries, this thesis invites Islamists and non-Islamists to assess the implications of reducing their political debates to 'a religious-centric debate'. Yet there are risks. Sultany (2014:411) warns that this reductionism is most likely to 'overshadow and distract attention from a myriad of issues like social and economic issues as well as other questions of constitutional design concerned with political structures and institutions'.

My theoretical preference in this thesis has been for the removal of shar'ia from the constitution and the establishment of the impartiality of the state towards religion in a secular state that establishes a set of constitutional and institutional arrangements to manage religious diversity in society. This meaning of secularism is different from other forms of aggressive or exclusionary secularism that aggravate tension, divisiveness and alienate religious people (Bilgin 2011:57-59; An-Na'im 2008:39-43). The secular state that I advocate for is the one that 'is able to unite diverse communities of belief and practice into one political community precisely because the moral claims it makes are limited and thus unlikely to be the source of serious disagreement among citizens' (An-Na'im 2008:276). Under this framework, religious actors can still contribute to political life by proposing policies whose merits are evaluated in an open democratic process under constitutional safeguards for human rights and equal citizenship. Freedom of association allows religious communities to establish their independent forums to voluntary comply with their own religious regulations.

This secular state helps 'secure effective possibilities for preventing an exclusive and authoritarian religious group from threatening the essential interests of any segment of the

339 On this point, see also Sultany (2014:405-410).

population' (An-Na'im 2008:275). To establish this institutional arrangement, social and political forces including Islamists should revisit the application of Islamic law as state law and review certain conservative interpretation of Islamic sources. This transformation can build intersections between religious actors and the human rights movement. Religious actors will not be seen a threat to the expansion of human rights in society. At the same time, human rights defenders need to be open towards religion and religious actors, and acknowledge their potential contribution to the legitimation and evolution of human rights in their societies.

However, the transformation of the state-religion relationship is not likely to occur in the near future in Egypt. Political developments over the past five years also suggest that this contentious and divisive issue cannot be settled in a way that excludes any of the political forces involved in the transition, whether Islamists or non-Islamists. Weiner (2011:10) warns against a situation in which 'factions are essentially seeking to use the constitution making process to defeat, in an irrevocable fashion, those whose interests and visions for the future differ from theirs'. The risk in this zero-sum approach, according to Weiner (2011:12), is that it turns 'the losing faction into a permanent opposition group and ultimately a source of political instability'. Islamists' domination over the 2012 constitution-making process, and their exclusionary policies, turned non-Islamists, secularists and religious minorities into a permanent opposition for the MB and mobilised the public for its removal from power. The military intervened and ousted President Morsi in July 2013. Anti-MB forces drafted an amended version of the 2012 Constitution,[340] while the MB and other opposition groups were being excluded and repressed. The MB and its political party were dissolved and thousands of its members have since been detained and prosecuted. However, the MB refused to admit

[340] See Amended Constitution of Egypt, 18 January 2014, Official Gazette no.3bis of 18 January 2014.

this new political and constitutional, order and has strongly continued its resistance of the new military-backed regime.

I argue that the exclusion of Islamists is not a durable solution, for many reasons. Islamists still represent considerable sectors in society; even without the MB, political Islam is still rooted in Egypt and there are other Islamist movements positioned to rise. Moreover, the exclusion and repression of Islamists may fuel violence and radicalisation among their supporters (Dunne and Williamson 2014).[341] For example, there have been signs that some young members of the MB are less hesitant to consider the use of violence against the state in response to repression (El-Hudaiby 2013:3; Al-Anani 2015). Repressive authorities have also used Islamists' threats as an excuse to repress other non-Islamist critics and disrupt democratic transitions, including in recent years (Filiu 2015). The post-Morsi military-backed regime has steadily expanded the scope of repression by imposing increasing restrictions on freedom of expression, peaceful assembly and freedom of association, not only to stifle the MB and Morsi's supporters, but other liberal and leftists political forces and human rights defenders (Dunne 2015). Most importantly, as I have shown, Islamists are not the only actors who are ambivalent about human rights or defending a constitutional role for Islamic law. Even after the removal of Morsi and the exclusion of the MB, the reference to Islamic law as 'the main source of legislation' was kept in the amended Constitution.[342]

Therefore, in order to protect human rights and democracy in Egypt, the answer is not to exclude Islamists but help to gradually transform their ideas. Drawing on the incremental approach suggested by Weiner (2011:9), any future settlement for the current political crisis

[341] According to Dalacoura (2011), repression and exclusion may motivate some Islamists to join militant groups. However, they are not necessarily the primary cause for Islamist violence.
[342] Article 2, ibid.

in Egypt requires relations between Islamists and non-Islamists to be based on 'a vision of a mutually bearable shared future [under which] each parties feel that they would enjoy a reasonably tolerable existence if the other side's basic aspirations were realised'. Writing about Islamists parties and democracy two years before Arab uprisings, Masoud (2008:19) argued that 'instead of worrying whether Islamists are real democrats, our goal should be to help fortify democratic and liberal institutions and actors so that no group – Islamist or otherwise – can subvert them'. This goal needs to be considered by those actors involved in transitions underway in the Arab world. In the following, I propose certain constitutional and institutional measures to facilitate an evolutionary interpretation of Islamic law, provide a baseline of human rights and gradually integrate international human rights into domestic law.

1.2 A Baseline of Constitutional Rights

A careful design of a constitutional bill of rights may help contain the negative influence of the shari'a clause on human rights. The aim of this proposal is to ensure 'a vision of a mutually bearable shared future' between different communities in Egyptian society through a progressive realisation of human rights. The reference to Islamic law as a fundamental demand for Islamist could be kept in the constitution. However, Islamists need to acknowledge the legitimate concerns of religious minorities, women, secularists and non-Islamists. The main task of this bill of rights is to establish a minimum agreement on basic rights that are necessary for stability in a diverse society. The negotiations on this are not expected to address all potential tensions between the constitutional provision on Islamic law and human rights however, and the scope of constitutional rights can gradually expand through judicial interpretation or emerging consensus among different political forces.

However, I suggest that this bill of rights clearly stipulate that the implementation or interpretation of the constitutional provision on Islamic law should aim to further the protection of constitutional rights and not to undermine any progress achieved in this area. This could open possibilities for expanding the scope of many constitutional rights such as women's rights, freedom of expression and religious freedom. This provision is also proposed to challenge attempts made by conservative forces who wish to undermine progress in the implementation of constitutional rights. For example, proposals to reverse previous reforms aimed to improve the status of women in family, exclude non-Muslims or women from public posts or impose criminal penalty for apostasy are most likely to be dismissed by this suggested provision.

2.2 Interpretation of Islamic Law Provisions

Throughout its history, the SCC has drawn on its flexible Islamic legal theory to expand the scope of many human rights, particularly the rights of women. The SCC was able to counter many of the conservative positions taken by Islamists, and this legal theory may allow the Court in the future to expand human rights in Egypt. In order not to block the SCC's prospects to further develop its Islamic legal theories in the future, it is better if the constitution does not oblige its judges to follow specific interpretative methods as was the case in Article 219 of the 2012 Constitution or as stipulated now by the 2014 amended Constitution, which requires the Court to be limited by its previous jurisprudence.[343]

The liberal jurisprudence of the SCC can also be disrupted if conservative forces succeed in reformulating its membership. As noted by Sultany (2014:420): [Shari'a] clause may . . . politicise the constitutional court by making it an object for power struggle between different

[343] See the Preamble of the Amended Constitution of Egypt, 18 January 2014.

political actors that are trying to tip the interpretive scales to their favour through backing the court with their preferred judges'. Therefore, a key aspect in the consolidation of the SCC is the development of constitutional and legal safeguards for its independence, and a transparent appointment mechanism for its judges that involves different institutions and forces in the state. The interpretive authority of the SCC may be also obstructed by the influence of al-Azhar. Under the MB, the 2012 Constitution obliged the Parliament to consult al-Azhar on legalisation related to Islamic law, and while the 2014 amended Constitution removed this provision, it also upgraded the power of al-Azhar as 'an authority in Islamic sciences and affairs'.[344] Even without these constitutional provisions, al-Azhar historically enjoys a symbolic and moral authority among Muslims in Egypt. The support of al-Azhar's leadership for Islamic law reform and the expansion of human rights would further the legitimacy of the SCC.

3.2 Integration of International Human Rights into Domestic Law

Heyns and Viljoen (2001:522) have concluded that: 'Treaties need a strong domestic constituency to have local impact'. Judges, lawyers and human rights defenders are among these domestic actors that can enhance the impact of international human rights treaties. I propose that the integration of international human rights with domestic law can be realised by upgrading the status of international human rights treaties in the legal system, and consolidating the engagement of NGOs and human rights defenders with international and regional human rights mechanisms. While the ratification of these treaties are not expected to bring about immediate human rights changes, they can help in the long term to integrate international human rights in domestic law and enhance NGOs' domestic and international advocacy on human rights (Keck and Sikkink 1998; Risse and Ropp 1999; Risse et al 2013).

[344] Article 7, ibid.

It has become a well-established constitutional principle in Egypt that international treaties, which are signed and ratified by the Egyptian authorities, are considered domestic legislation after their publication in *The Official Gazette*.[345] According to this system, 'treaties are equivalent to statutes; they rank lower than the Constitution' (Sloss 2011:8). Egyptian lawyers can invoke international human rights treaties before courts, and in some important precedents, judges integrated international human rights treaties in their reasoning (Zartner 2014:145-148) (see chapters five and seven). To support these judicial precedents, comparative constitutional law provides for several scenarios to upgrade the status of international human rights treaties in the legal system (Bilkova et al 2014). For example, the constitution can encourage judges to consider human rights treaties and the jurisprudence of international and regional human rights judicial and semi-judicial organs in their interpretation of constitutional rights. One can refer in this regard to the Constitution of South Africa which requests judges to consider international law when interpreting the Bill of Rights.[346] Lifting shari'a-based reservations to international human rights treaties ratified by Egypt, particularly those to the ICCPR and CEDAW, may also gradually harmonise domestic laws with the provisions of these treaties. However, this step does not guarantee their implementation on the domestic level, since the reference to shari'a remains in the constitution.

The externalisation of human rights demands has allowed Egyptian human rights defenders to energise domestic debates about them (Landolt 2013). I have discussed in this thesis that the development of the international women's rights movement over the past three decades has empowered women's rights defenders to advocate for personal status law reforms. Yet there are currently limited options for international human rights litigation. Egypt has not

[345] See Art 151 of Constitution of Egypt, 12 September 1971, Art 145 of Constitution of Egypt, 25 December 2012 and Art 151 of the Amended Constitution of Egypt, 18 January 2014.
[346] See S. 39(1) of Constitution of the Republic of South Africa, 1996, *National Gazette* no.17678, 18 December 1996.

ratified the Optional Protocols to the ICCPR and CEDAW which provide the HRC and CEDAW Committee with the competence to examine individual complaints of alleged violations of both treaties.[347] The African human rights system has been striving to positively add to the international human rights regime in spite of its lack of resources and the lack of political support from many African governments (Steiner et al. 2008:1063; Bentekas and Oette 2013:261-262). Egypt ratified the African Charter on Human and People's Rights on 20 March 1984.[348] Over the last decade, Egyptian human rights advocates have filed complaints before the African Commission on Human and People's Rights (African Commission) against the Egyptian government.[349] Egypt can also sign and ratify the Protocol to the Establishment of the African Court on Human and People's Rights. The African Court officially started its work in November 2006.[350] It examines cases submitted individuals and NGOs petitions related to states' violations of 'the charter or any other relevant human rights instruments ratified by the states concerned.[351]

However, the success of these constitutional and institutional safeguards is contingent upon the presence of a wide social base for human rights in society, which in itself represents a key safeguard against conservative political forces. Finally, this thesis concludes that the activism of the MB in Egypt is among the factors that have obstructed Islamic law reform and the

[347] See Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December, entered into force 23 March 1976) 999 UNTS 302 and Optional Protocol to the Convention on the Elimination of Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000) 2131UNTS 83.

[348] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (ACHPR). _

[349] For instances see the Arab Orgnaisation for Human Rights v. Egypt, the African Commission on Human and Peoples' Rights, Communication No.244/2011. This case was filed on behalf of a group of human rights defenders who faced charges related to their human rights activism. EIPR and Interights v. Egypt, Communication No.334/2006. In this case the Commission 'found Egypt in violation of the ACHPR for the torture of the three men and their unfair trial in a special emergency court'. See also EIPR and Interights v. Egypt Communication No.312/2005. This case was filed on behalf of an Egyptian scholar who was subject to discrimination on the basis of his religious belief. The issue of gender-based violence was examined in EIPR and Interights v. Egypt, Communication No. 323/2006.

[350] Protocol to the African Charter on the Establishment of the African Court on Human Rights and Peoples' Rights (adopted 10 June 1998, entered into force 1 January 2004) OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997).

[351] Art 7, ibid.

expansion of human rights. Future research on Islamists' discourses and the evolution of Islamist movements in different political contexts may highlight other models in the interaction between Islamists and human rights.

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