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The American University in Cairo

School of Global Affairs and Public Policy

**APPLYING SHARĪ'A IN POST-REVOLUTIONARY EGYPT:
THEORY AND PRACTICE REVISITED**

A Thesis Submitted to the

Department of Law

**in partial fulfillment of the requirements for
the LL.M. Degree in International and Comparative Law**

By

Mohammed Sameh Mohammed Mostafa

February 2013

The American University in Cairo
School of Global Affairs and Public Policy

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The American University in Cairo
School of Global Affairs and Public Policy
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APPLYING SHARĪ'A IN POST- REVOLUTIONARY EGYPT:
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Mohammed Sameh Mohammed Mostafa

Supervised by Professor Amr Shalakany

ABSTRACT

Theoretically, Sharī'a is meant to be an applicable methodology of jurisprudence that governs the state legal system. Applying Sharī'a, or calling for its application, is, further, a must for those who believe in its divinity. In the process of democratic transition in Egypt, Islamists proposed applying Sharī'a, claiming that its mere application provides accurate solutions for the chronic problems Egypt has long been suffering from. However, the obligatory nature of applying Sharī'a and its positive impact on the community's total welfare are not absolute paradigms. The conditions of the society in which applying Sharī'a is proposed should be thoroughly recognized. As with any legal system, attaining the positive outcomes of applying Sharī'a depends on the extension to which law is dominant in society. And since "law" does not "rule" in Egypt, at least in the formal liberal sense of the term, then neither applying Sharī'a nor any other methodology would diffuse its underlying ideology. Therefore, this thesis examines the promises and limitations of applying Sharī'a in post-revolutionary Egypt, on both the theoretical and practical levels, and highlights the major factors that neutralized the rule of law in Egypt so far thereby undermining the claims of applying Sharī'a today.

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I. Introduction:

Just last June, 2012, Amnesty International called on President Morsi to put Egypt on the right path towards the rule of law.¹ Analysts then argued that Morsi's latest reforms, which included ousting the Supreme Council of Armed Forces (SCAF) on the one hand, and appointing the Mekky brothers in key positions on the other,² provide hope that Egypt is on this right track.³ However, others see these latest measures as an attempt to monopolize power, paving the way towards a totalitarian rule by the Muslim Brotherhood (MB).⁴ And so, democratic transition is never a simple task, and such has been the case in Egypt. One vital aspect of democratization is establishing the rule of law. General Assembly Resolution 61/39 highlights that "the rule of law and democracy are interlinked and mutually reinforcing."⁵

Towards a new Egypt that is ruled by law, the MB claims that they are seeking to apply Sharī'a, a reformation that is claimed to have the effect of reshaping the basic system of the state. Generally, such suggestion of establishing the State on the basis of Sharī'a is usually met with either secularists' blind rejection or Islamists' full acceptance. The situation in Egypt is even more acute as applying Sharī'a has become almost a public demand. From the viewpoint of various contemporary Islamists, any isolation of religion is viewed as secularism which marginalizes religion and excludes its methodology.⁶ Those Islamists consider every disengagement of religion as secularism or even atheism and, therefore, demand the full application of Sharī'a.

¹ Egypt: New President Must Restore Rule of Law, Govern for All, <http://www.amnesty.org/en/news/egypt-new-president-must-restore-rule-law-govern-all-2012-06-29> (last visited Sep. 15, 2012).

² The Mekky Brothers are two Egyptian judges, Aḥmed and Maḥmoud Mekky, who led demonstrations in 2005 and 2006 denouncing the forging of the parliamentary elections. The participants in these demonstrations were mainly judges whose activities were in lieu of the judicial reform movement. The two brothers were appointed in key positions by president Morsi: Aḥmed Mekky was appointed as a Minister of Justice, while Maḥmoud Mekky was selected to be the vice-president. As advocates of judiciary independence, appointing the Mekky brothers in such important positions was a positive mark.

³ David Hearst, Morsi Offers Hope in Egypt, <http://www.canberratimes.com.au/opinion/morsi-offers-hope-in-egypt-20120814-246zk.html> (last visited Oct, 2012).

⁴ See Egypt defence chief Tantawi ousted in surprise shakeup, <http://www.guardian.co.uk/world/2012/aug/12/egyptian-defence-chief-ousted-shakeup> (last visited Jan, 2013).

⁵ A/RES/61/39.

⁶ See TĀRIQ AL-BISHRI, AL-ḤIWĀR AL-ISLĀMI AL-'ALMĀNI [Islamic-Secular Speech] at 45 (Dār al-Shoroūk 2006) (1996).

Theoretically, Sharī'a is meant to be an applicable methodology that governs the legal system of the state. Belief in the divinity of Sharī'a is a decisive factor which necessitates its application by the believers. It is, additionally, a privilege of Sharī'a that it defies autocracy and dictatorship. Sharī'a in this respect is in conformity with democracy as a governance system which has been long called for by civilized nations. Sharī'a is, further, effective in handling the "shortcomings of democracy" which are referred to in Carl Schmitt's book *Legality and Legitimacy*.⁷ Sharī'a effectively fits as a higher source of legitimacy in a way that, on the one hand, would resolve the conflict between legality and legitimacy highlighted by Schmitt, and would overcome the impracticality or irrationality of any other proposed norm to be a superior source of legitimacy such as human rights or natural law on the other hand.

Out of their belief that the law to be applied would control the society in accordance with the ideology of the lawmaker, Islamists in Egypt insist on applying Sharī'a to control Egyptian society in accordance with a divine ideology. Islamists, through this belief, admit the direct relationship between the applied law in a given society and the ideology widely held in this society. Although this belief is accurate in theory, the influence of law on a society's ideology is conditioned upon the *role* of law in this society. The outcome of the Islamists' belief would not be guaranteed unless the law in the society *rules*.

However, this is not the situation in Egypt. The law has long been passive while the key ruler in Egypt has been the culture of fear.⁸ Perhaps the country's police force have played the main role in developing such culture in Egyptians daily life, but fundamentalist Islamists⁹ have also played a parallel role in developing a similar culture in the area of intellectual expression. While the police have succeeded in altering the culture of dignity on the basis of a citizen's contribution to society's

⁷ CARL SCHMITT, *LEGALITY AND LEGITIMACY* (Jeffrey Seitzer trans. & ed., Duke University Press 2004) (1932).

⁸ The culture of fear was a predominant ruling mechanism during Mubarak days and I believe it is still prominent after the revolution of 2011. Ruling through fear was to constantly intimidate and humiliate citizens so that their ultimate aspirations become merely to live with dignity. Intimidating people could have been either by unjust application of law, application of unjust laws sentences intentionally by the National Assembly, or by other coercive means such as kidnapping, torturing, or even imposing royalties.

⁹ Religious Fundamentalism is a trend of thought that deprives humans, whether singular or plural, of their right to submit their social, political, or economic issues to reasoning; the only task allowed for is to deduce *aḥkām* or jurisprudential rules from recognized texts and to compel the others to follow these rules under the cover of discouraging *almunkar* or evil. See SHERIF YOUNIS, *SAYYED QUTB WA AL-ŪSULIYYA AL-ISLAMIYYA* [Sayyed Qutb and Islamic Fundamentalism] at 5 (Dar Tiba 1995).

welfare, liberal Islamists¹⁰ have been intimidated by their fellow fundamentalists with respect to freedom of religious discretion.

Accordingly, this thesis argues that no legal system, whether Islamic or secular, would succeed in control society's behaviours in accordance with the ideology of the lawmaker so long as the society is not ruled by law. The developed culture of fear in Egypt needs to be altered by the rule of law and by enhancing freedom of expression in order to advance an updated model of Sharī'a, and for this model to be accurately applied.

In pursuit of fleshing out the above argument, this thesis is divided into two major parts, the first of which explores the theory of establishing a state on the basis of Sharī'a, specifically with reference to the what I call "fundamentalist" perspective. The second part gives special concern to the situation in Egypt today, specifically regarding the rule of law and the situation of freedom of conscience.

I start by tracing the origins of the fundamentalist idea of a Sharī'a-based state by discussing Sayyed Qutb's scholarship in this regard. I then argue in agreement with Carl Schmitt on *Legality and Legitimacy* that Sharī'a is indeed in harmony with democracy, specifically in handling the latter's shortcomings. From there, I thirdly move on to analyse "natural law" as an attempt to allocate a superior source of legitimacy, other than Sharī'a, that may handle the defects of legitimacy in a democratic system and the possible reasons beyond neglecting religious legal norms in action.

The second part of the thesis handles the situation in Egypt regarding the absence of the rule of law, before and after the Revolution of 2011, and the dilemma of freedom of conscience and the its effect on any prospective legal order. It is my firm belief that without the second part of this thesis, all that is said in the first part will remain only theory, and not practice. It is therefore important to understand my thesis in its totality, and thus should be read with both parts in mind.

¹⁰Islamic Liberalism advocates are also called *mujadedūn* or modernists. Liberalism calls for the use of reason in applying religious text and to reconcile religion with the modern world. *See id.* Examples of prominent Islamic modernists are Jamāl al-Dīn al-Afghānī and Muḥammad 'abduh.

II. The Fundamentalist Theory of Applying Sharī'a:

Islamic scripts, such as the Qur'ān and Sūnna, contain a number of provisions directed at regulating the relationships among key members of society such as between the ruler and the citizen. Scripts also provide for a system for both external and domestic affairs. There are two successive verses in Sūrat Al-Nisā' (Qur'ān 4: 58-59) that are said to have such content which are:

God commands you [people] to return things entrusted to you to their rightful owners, and, if you judge between people, to do so with justice: God's instructions to you are excellent, for He hears and sees everything. You who believe, obey God and the Messenger, and those in authority among you. If you are in dispute over any matter, refer it to God and the Messenger, if you truly believe in God and the Last Day: that is better and fairer in the end.¹¹

A common interpretation, supported by Sheikh Yusuf al-Qaradawy, provides that the first of these two verses is directed at the ruler, while the second is at the citizen.¹² Codifying the legal order contained in Islamic scripts has long been subject to great scholarly efforts. Examples of such efforts are *Al-Siyāsa Al-Shar'iyya* for Ibn Taimiah and for Abdul-Wahhāb Khallāf.¹³ Islamic tradition also witnessed the immigration (Hijra) of Muslims to al-Madīna and the establishment of an Islamic society for which the Prophet established rules through *watheqat al-Madīna*, or the Charter of Madīna, which contained the basic rules regulating various relationships in society.¹⁴

Esposito argues and I agree with him that the Hijra, as an event in and of itself, had even political implications, one of which was the importance of community in Islamic civic life. Such a proposition, as per Esposito, suggests the importance of society in Islam from adopting the year of Hijra to date Islamic history instead of any other Islamic event such as the date of Muhammad's birth or his reception of the first revelation in 610 C.E.¹⁵ However, for the purpose of this thesis is to analyze the fundamentalist project in Egypt, it would be most effective to confine our analyses of the

¹¹Qur'ān 4: 58-59. The original Arabic reads as follows:

"إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا. يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنْكُمْ فَإِنْ تَنَازَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ إِلَى اللَّهِ وَالرَّسُولِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ذَلِكَ خَيْرٌ وَأَحْسَنُ تَأْوِيلًا."

¹²YUSUF AL-Qaradāwy, *Fiqh Al-Dawla fi Al-Islam* [State in an Islamic Discourse] at 15 (Dār Al-Shorūk 2009)

¹³IBN TAIMIAH, *AL-SIYĀSA AL-SHAR'ĪYYA FI ISLĀḤ AL-RĀ'Ī WA AL-RĀ'ĪYYA* (Dar al-Helāl 1981); ADUL-WAHHĀB KHALLĀF, *AL-SIYĀSA AL-SHAR'ĪYYA* at 19 (Dār Al-Qalam 1988).

¹⁴SĀLEM AL-BAHNASĀWI, *FIKR SAYYED QUTB FI MIZĀN AL-SHAR'* [Religious Scaling of Sayyed Qutb's Thought] at 90 (Dār Al-Wafā' 2000).

¹⁵JOHN L. ESPOSITO, *ISLAM. THE STRAIGHT PATH* at 8 (New York/ Oxford 1998).

idea of applying Sharī'a to the fundamentalist perspective. Having limited the scope of analysis, there would be no better way than to analyze the idea through studying the thesis of one of the most distinguished ideologues of fundamentalism, Sayyed Qutb.¹⁶

A. Sayyed Qutb's Thesis:

Sayyed Qutb was born in October 1906 in a village called *Mūsha* close to Assiut Governorate, Egypt.¹⁷ Being an Islamic intellectual was not in itself a denunciation; but being a radical Islamist, in the viewpoint of Egyptian secret police, was. Categorizing Qutb as a radical ideologue subjected him to brutality and imprisonment and, eventually, execution. However, Qutb left a legacy of thought, which has influenced many of his successors. Qutb's main thesis was "a lucid, if not systematic, critique of modernity" as a sort of institutionalism predicated on "the accumulation of wealth and power."¹⁸

In a number of his publications,¹⁹ Qutb repeated his belief that every community must be founded on a religious basis. This necessity stems from the nature of Sharī'a itself, which is described by Qutb as *Manhaj Haiāa*,²⁰ or a Methodology of Human Life. In that sense, Qutb reinforced the proposition that Sharī'a is not confined to belief or historical scripts whose application is limited to a certain period of time. Pursuant to this perception, Qutb referred to the role of the Torah, the Bible, and Qur'an in maintaining effective social order, which is derived from absolute knowledge of human nature.

According to Sayyed Qutb, the Islamic religion is a methodology of human life. It includes perceptions of belief, which interpret the nature of *existence*, and determines the *position* of a *human* in this existence, as it determines the purpose from his existence. This methodology includes systems that emerge from that perception and constitute the life of human beings. They include moral principles and the authority from which they are derived, and the socio-political, international and economic systems.

¹⁶ *Supra* note 9, at 9.

¹⁷ *Id.* at 23.

¹⁸ Laith Saud, *The Islamic roots of the Egyptian Revolution*, J. Islamic L. & Culture 12:3, 187-196 (2010).

¹⁹ See *This Religion (Hādha Al-Dēn)*, *Signs Along the Path (MA'ALEM FI AL-TARĒQ)*, and *The Future is for this Religion (AL-MUSTAQBAL L' Hādha Al-Dēn)*.

²⁰ SAYYED QUTB, *Hādha Al-Dēn* at 5 (Dar al-Shorouk 1982). The original Arabic reads as follows:

منهج حياة.

In his book *The Future is for this Religion*, Sayyed Qutb expressed his severe concern about the success of any human experience away from Sharī'a. In his words, "humanity may experience variable tribulations here and there... but we are confident about the end of these experiences."²¹ Qutb is confident that at the end the future will be for this religion, Islam. The confident voice of Qutb was an outcome of not just his strong belief, but also of his doubt about human capabilities. According to him, people may decide for themselves, but they would never succeed as long as their decisions are not guided by God's rulings. The reason given is that the human experience is running through a *vicious circle*. This circle is of the human perception and experience which is blemished by ignorance, deficiency, weakness, and whim; while salvation necessitates escaping this circle and starting a new experience. The new alternative proposed by Qutb was to resort to the divine methodology which is "derived from knowledge rather than ignorance, perfection rather than deficiency, power rather than weakness, and wisdom rather than whim."²²

The reason given by Qutb that gives the privilege for this religion in the future is that Islam, according to the foregoing perspective, includes all the coherent factors of life that arrange all of its pillars and fulfill all the *real* needs of the human. According to this perspective:

this religion is not just a belief which is isolated from the reality of human life... or some rituals that are conducted by some people... in order for them to join this religion, and it is not just a path to the heaven of the hereafter while there is another path ... to the heaven of the here other than rules of religion.²³

Qutb extended his contention to other divine religions. He emphasized that these religions are not historical scripts whose application is limited within a certain period of time or local regimes for a group of people; rather, they are the stable methodologies God assigned for humans.

In this regard, Qutb used the term *'ibada*, or worshipping, in describing the act of humans towards any person when they incorporate that person's methodology in their daily matters. In Qutb's words, "every methodology of life is a religion."²⁴ In that sense, the religion of a certain

²¹ The original Arabic reads as follows:

"إن البشرية قد تمضي في اعتساف تجارب متنوعة هنا وهناك... ولكننا مطمئنون إلى نهاية هذه التجارب، واثقون من الأمر في نهاية المطاف."

²² The original Arabic reads as follows:

"قاعدة المنهج الرباني الصادر عن علم (بدل الجهل) وكمال (بدل النقص) وقدرة (بدل الضعف) وحكمة (بدل الهوى)..."

²³ The original Arabic reads as follows:

"و هذا الدين- بهذا الاعتبار- ليس مجرد عقيدة وجدانية منعزلة عن واقع الحياة البشرية... و ليس مجرد شعائر تعبدية يؤديها المؤمنون بهذا الدين... فتكون لهم صفة الدين! و ليس مجرد طريق إلى الآخرة لتحقيق الفردوس الأخروي؛ بينما هناك طريق آخر... لتحقيق الفردوس الأرضي، غير منهج هذا الدين..."

group of people is the methodology according to which their matters are executed. Consequently, if this methodology is divine, those people would be under the religion of God. But if this methodology is made by a king, prince, tribe, nation, or any human philosophy, these people would be under the religion of whomever they follow.²⁵

Qutb supported his proclamation by referring to the approach of his contemporaries who frankly describe their social philosophies and theories as beliefs tantamount to religion. The example given was the theory of Communism which is not just a social order; it is a perception of belief which is based on the perception of the materialism of this universe. Communism as a theory adopts the economic interpretation of history, originating the evolutions of human life in the evolution of the means of production, and the belief in dialectical materialism. Therefore, Qutb concluded that Communism is not just a social order, but also a perception of belief upon which it is claimed that a social order is based.²⁶

In that sense, the key difference between the methodology of religion and other methodologies is that the believers in the former worship one God from whom they acquire perceptions, values, morality, regimes, and legislations; while humans under any other methodology acquire these values from other humans. This acquirement gives some humans authority over others which is tantamount to divinity, while in fact these humans remain as human as their followers.

The systems where humans follow, or in Qutb's words *worship*, other humans, are called in Islam the regimes of the time of pagan ignorance, (*jahiliyya*), no matter how plentiful its forms are because these systems are founded on the bases for which religions came to destroy. Religions came to free humans from all forms of *worshipping* each other and to unify the God to be worshiped.²⁷

The Arabic term *Islam* means, literally, to submit or to surrender.²⁸ Based on this definition, Qutb composed a broader picture of Islam as a submission to God and a full adoption of His methodology. In that sense, following the methodology of Islam and submitting, or *surrendering*, to God is what is meant by the word *Islam*. Therefore, the word *Muslim* does not only apply to those

²⁴ SAYYED QUTB, AL-MUSTAQBAL L'HĀDHA AL-DĒN at 13 (Dār al-Shorouk 1982). The original Arabic reads as follows:

"كل منهج للحياة هو دين."

²⁵ SAYYED Qutb, MA'ĀLEM FI AL-TARĒQ [Signs along the Path] at 52 (Dar al-Shorouk 1987).

²⁶ See *supra* note 24, at 14.

²⁷ *Id.* at 53.

²⁸ ABI AL-A'LA AL-MAWDŪDĪ, Mabade' Al-Islam [The Principles of Islam] 4 (Dar Al-Arabia 7th ed.).

who believe in Muhammad as a prophet in addition to believing in the only God, it also applies to all of those who completely submit or surrender to Allah:

If God is the lord, then the Muslim is His servant before whom submission (*islam*) or obedience is the most natural and appropriate response. The term "Muslim" means "one who submits" or surrenders to God; it includes everyone who follows His guidance and performs His will. All the great monotheistic prophets are regarded as true Muslims.²⁹

Henceforth, Qutb reached his conclusion, with which I fully agree, that if humans lived under the foregoing methodology as a whole, they would be *Muslims*. But if they lived under any other methodology, they would live under pagan ignorance.

B. Shari'a Application and Choice for Believers:

The reason why I agree with Qutb's thesis is that applying Shari'a is not a matter of choice to believers. The obligation of applying Shari'a is unequivocally stated in the Qur'an:

We sent to you [Muhammad] the Scripture with truth, confirming the Scriptures that came before it, and with final authority over them: so judge between them according to what God has sent down. Do not follow their whims, which deviate from the truth that has come to you. We have assigned a law and a path to each of you. If God has willed, He would have made you one community, but He wanted to test you through that which He has given you, so race to do good: you will all return to God and He will make clear to you the matters you differed about. So [prophet] judge between them according to what God has sent down. Do not follow their whims, and take good care that they do not tempt you away from any of what God has sent down to you. If they turn away, remember that God intends to punish them for some of the sins they have committed: a great many people are lawbreakers. Do they want judgment as in the time of pagan ignorance? Is there any better judge than God for those of firm faith?³⁰

The cited verses refer to the sealing Scripture, Qur'an, revealed to the Prophet Muhammad that complements other preceding Scriptures, Torah and Gospel, and have final authority over them. The

²⁹ *Supra* note 15, at 23.

³⁰ Qur'an 5:48-50. The original Arabic reads as follows:

"وَأَنْزَلْنَا إِلَيْكَ الْكِتَابَ بِالْحَقِّ مُصَدِّقًا لِمَا بَيْنَ يَدَيْهِ مِنَ الْكِتَابِ وَمُهَيِّمًا عَلَيْهِ فَاحْكُم بَيْنَهُمْ بِمَا أَنْزَلَ اللَّهُ وَلَا تَتَّبِعْ أَهْوَاءَهُمْ عَمَّا جَاءَكَ مِنَ الْحَقِّ لِكُلِّ جَعَلْنَا مِنْكُمْ شِرْعَةً وَمِنْهَاجًا وَلَوْ شَاءَ اللَّهُ لَجَعَلَكُمْ أُمَّةً وَاحِدَةً وَلَكِنْ لِيَبْلُوَكُمْ فِي مَا آتَاكُمْ فَاسْتَبِقُوا الْخَيْرَاتِ إِلَى اللَّهِ مَرْجِعُكُمْ جَمِيعًا فَيُنَبِّئُكُمْ بِمَا كُنْتُمْ فِيهِ تَخْتَلِفُونَ. وَأَنْ أَحْكُم بَيْنَهُمْ بِمَا أَنْزَلَ اللَّهُ وَلَا تَتَّبِعْ أَهْوَاءَهُمْ وَاحْذَرْهُمْ أَنْ يَفْتِنُوكَ عَنْ بَعْضِ مَا أَنْزَلَ اللَّهُ إِلَيْكَ فَإِنْ تَوَلَّوْا فَاعْلَمُوا أَنَّمَا يُرِيدُ اللَّهُ أَنْ يُصِيبَهُمْ بِبَعْضِ ذُنُوبِهِمْ وَإِنَّ كَثِيرًا مِنَ النَّاسِ لَفَاسِقُونَ. أَفَحُكْمَ الْجَاهِلِيَّةِ يَنْعُونَ وَمَنْ أَحْسَنُ مِنَ اللَّهِ حُكْمًا لِقَوْمٍ يُوقِنُونَ."

verses also refer to an obligation imposed upon those who believe in God to apply what is sent down By Him. Applying the rules revealed by God is not a matter of choice for those who believe in Him. *Belief* necessitates the unconditional compliance with the Creator's orders. If this omnipotent Creator prescribed some rules, all those who believe in that Creator would also believe in his warnings against non-compliance. There is also no need to examine whether or not these rules are just or not because "it follows from that its rules, directly as they flow from. . . God. . . are as immediately evident as the rules of logic and thus require no force for their realization."³¹

So, it is the matter of belief in the Creator which controls the unconditional obedience to His orders which entails applying what sent down by him to the Prophet Muhammad. But it needless to say that implementing God's revelation, that is to say *Sharī'a*, necessitates a preliminary substantive determination of the fundamental structure of *Sharī'a* itself.

To begin with, the Arabic word 'Sharī'a' "originally meant the path or track by which camels were taken to water, and so by transfer the path ordained of God by which men may achieve salvation."³² In legal terms, using the word *Sharī'a* in that sense refers to a certain methodology or *path*. Pointing at a certain path and determining that it is the one prescribed to walk through has triggered great scholarly effort to analyse all the relevant sources of revelation. Generally:

It is agreed among the Muslim scholars of all their various schools that everything issuing from a human being, whether speech or act, whether an act of worship [*'ibādāt*] or mutual interaction [between men] [*mu'āmalāt*], whether crime, personal status, or any type of contract or legal act, has in the Divine Law of Islam [*al-sharī'a al-islāmiyya*] a legal rule [or status, evaluation, determination, *ḥukm*, pl. *aḥkām*]. Some of these rules are made clear by texts which appear in the Qur'ān and *sunna*, and some of them are not... but: the *sharī'a* establishes proofs of them and provides indications for them such that the qualified legal scholar [*mujtahid*] is able by means of these proofs and indications to arrive at them and discover them.³³

The aggregate of these *aḥkām* is supposed to be the constituent element of *Sharī'a*. In that sense, *Sharī'a* is supposed to constitute of a set of clear, systematic and unequivocal rules. Nonetheless, Islamic law has never been as such. There has never been such thing "as *a*, that is *one*, Islamic law, a

³¹HANS Kelsen, NATURAL LAW DOCTRINE AND LEGAL POSITIVISM at 244 (Wölfgang Herbert Kraus trans., 1956).

³²KNUT S. VIKOR, BETWEEN GOD AND THE SULTAN (Oxford University Press 1999).

³³ABD AL-WAHHĀB KHALLĀF, 'ILM UṢŪL AL-FIQH (Science of the Roots of Islamic Jurisprudence) at 7 (a modern work first published 1942).

text that clearly and unequivocally establishes all the rules of a Muslim's behaviour"³⁴ mainly due to the "great divergence of views, not just between opposing currents, but also between individual scholars within the legal currents, of exactly what rules belong to the Islamic law."³⁵ Such divergence is what establishes for Islamic pluralism known as *ikhtilāf*.³⁶ Statistics show that there is almost no unified vision across the Muslim world regarding what Sharī'a is and what its main components are even with the ever-increasing number of Sharī'a supporters.³⁷

Not only are the rules of Sharī'a subject to disagreement, perceiving how to apply these rules is also not uniform. Considering each and every situation and individual as unique in Islamic tradition necessitated context-specific *ijtihad*, thereby Islamic law did not apply equally to all.³⁸ Hence, "the law was an *ijtihadic* process; a continuously renewed ... effort at mustering principles *as located in life -situations*; a mission requiring the legists to do what is right in a particular moment of human existence."³⁹

Yet, that God is the lawgiver and that the law should be exclusively deduced from His revelation are indisputable paradigms held even among the advocates of different views of what Sharī'a is.⁴⁰

So far, Islamic law is comprised of a set of "sources of revelation and a methodology for making rules from these sources."⁴¹ The divergent outcomes of the rules-making process is what resulted in Islamic law being still indefinite.

Further, there are some scholars who suspect that the outcome of the mere process of deducing *aḥkām* constitute Sharī'a; to them, Sharī'a is "the divine will as only God knows it; an abstract divine law only perceived by Him." Incorporating this perception renders all the efforts of jurists human *fiqh* or law rather than a divine methodology.⁴² But the *fiqh* as described by Wa'el B. Hallāq:

never was "the law" in its full range, in its realisation within a social environment, nor did it ever constitute a totalising statement of the law *in practice*. The *fiqh*, in other words was a discursive practice on its own, playing by its own rules, neither engaged in transforming reality, nor

³⁴*Id.*

³⁵*Id.*

³⁶ *Id.*

³⁷ Wa'el B. Hallāq, *What is Sharī'a*, 151 Islamic & Middle E. L. 154 (2005-2006).

³⁸ *Id.* at 168.

³⁹ *Id.*

⁴⁰ *Supra* note 33.

⁴¹ *Id.*

⁴² *Supra* note 31.

managing or controlling society as modern law does as a matter of necessity.⁴³

Most commonly, the term *Shari'a* is used to refer to all the rules resulted from using the science *fiqh* in deducing the legal rules from their sources by *mujtahids* even with the variant and inconsistent nature of these rules.⁴⁴ Such perception of *Shari'a* can be seen to be adopted in some Muslim countries' legislation such as Egypt where "[t]he preparatory work of the Civil Code shows that [*Shari'a*] means the combination of principles common to the different schools of Islamic jurisprudence."⁴⁵ In that sense, *Shari'a* is not a product of a representative democracy reflected in the parliament; but rather, it is "the result of individual efforts by scholars working with God's revelation."⁴⁶ The pivotal role of jurists in forming this body of law is what gives *Shari'a* its individualistic characteristic giving rise to the so called 'jurists' law.⁴⁷

Human interference in deducing divine laws is necessitated due to the absence of unequivocal divine law-code, and is approached in a fashion similar to that of the judge in common law systems "where society or its custom is the actual 'legislator', and the judge must *discover* what this lawgiver has said, through his particular methodology, precedents."⁴⁸

Another distinguishing characteristic of *Shari'a* is that, unlike the law of the modern nation-state which is made by virtue of state power and "superimposed from the centre in a downward direction,"⁴⁹ *Shari'a* is "originated from, and cultivated itself within, the very social order which it came to serve in the first place."⁵⁰ Such unique characteristic entails another unique concept of self-governance by the society, apart from the state, which is an alien concept to today's governance systems.⁵¹

However, advocating *Shari'a* is by no means an advocacy of self-governance; the pattern of *Shari'a* advocated today is a modernized model of what is regarded as historical *Shari'a*,⁵² in

⁴³*Supra* note 37, at 167.

⁴⁴*Supra* note 31.

⁴⁵LIBERAL ISLAM, A SOURCEBOOK at 50 (Charles Kurzman ed., NEW YORK/ OXFORD 1998).

⁴⁶*Supra* note 31.

⁴⁷*Supra* note 37.

⁴⁸*Supra* note 31.

⁴⁹*Supra* note 37, at 159.

⁵⁰*Id.* at 156.

⁵¹*Id.*

⁵²*Id.*

accordance with *fiqh*, to the extent necessary to “accommodate the exigencies of the modern world.”⁵³

III. Sharī'a and Democracy:

In addition to the obligatory nature of Sharī'a implementation, the second reason why I agree with Qutb's thesis is that it overcomes some of the drawbacks of democracy.

Recently, the concept of democracy has become a subject of debate in Egypt. After it had been called for by activists, fundamentalists denounced democracy as *kufir* or infidelity. For those fundamentalists, democracy contradicts Sharī'a as it calls for the people to rule themselves by themselves; while Islamic scripts assign rule exclusively to God. However, infidelity is not amongst the drawbacks which I think Sharī'a addresses. I further think that the infidelity accusation is a totally disjointed argument. Democracy is a purely political issue; and with *political* I mean those strategic matters of governance such as the relation between the ruler and the rest of the authorities, between the government and the people, and between the state and other countries. The strategies adopted in arranging the relation between all of these actors, and the *procedures* followed within and amongst them, are political in nature which can be freely adopted or abandoned without being accused of infidelity.

Islamic tradition has witnessed acts of importing foreign *procedural* systems, even from non-Muslim countries, without triggering the “infidelity” speech. During the period of military expeditions and conquests, there were novel problems that were faced by Caliphs. Facing such problems necessitated discretion in order to either innovate a new relevant system or to update existing ones. For instance, 'Umar Ibn Al-Khattab decided to retain the conquered territories in the form of public ownership instead of dividing them up among the soldiery.⁵⁴ Likewise, he developed a new concept of land tenure through advancing a new land-tax (*kharāj*) from the occupier.⁵⁵ Further, 'Umar established the pay-roll register, or *diwān*, in 641 to facilitate the distribution of stipends which is a system imported from Persia, a non-Muslim country at that time.⁵⁶ The said instances clearly elaborate the freedom of discretion early disciples, known to be loyal to Sharī'a, enjoyed in importing procedural systems.

⁵³ *Id.*

⁵⁴ NOEL J. COULSON, A HISTORY OF ISLAMIC LAW at 23 (Edinburgh 1964).

⁵⁵ *Id.*

⁵⁶ *Id.*

The same is held true for democracy as a governance system. What makes democracy a purely political issue are the core values it aims at. Although technically democracy means self-governance, its essence is for the people to freely choose their ruler and to have the right to dismiss or change him in case he deviated from core values.⁵⁷ In addition, people under such a system retain the right to choose the governance system.

In that sense, democracy does not contradict the Islamic mandate regarding God's position. Assigning governance to the people, which is the essence of democracy, is the an opposite of autocracy, which is the essence of dictatorship, rather than God's ruling which was earlier called *Al-Hakmiyya* by *Khāwarij* which means assigning every matter related to ruling to God.⁵⁸ Therefore, democracy is in conformity with the Islamic system which combats dictatorship, adopts the principle of governance through consultation, and urges nations not to submit to tyranny.

The accusation of infidelity within the political sphere is not of recent nature; it has its roots in the early struggle between two of Muhammad's disciples, 'Ali ibn abi-Taleb and Mu'awiya ibn abi-Sūfyān, on the occasion of appointing a new caliph in the year of 37 AH. Before that date, struggles that emerged in the social life of Muslims were political in nature. But the split of *Khāwarij* during this particular struggle was the turning point in the nature of the struggle among Muslim Arabs. *Khāwarij* did not just consider struggles as political affairs, but they claimed that they were the faithful and anyone but them the infidel.⁵⁹ The crisis increased when the opponents used the same weapon whereas almost the rest of the Islamic currants involved religion in their political principles.⁶⁰ The resulting extremism and deviance have continued to exist until the present day. They can be seen in today's accusations of infidelity directed towards those who discuss purely political issues. Among these purely political issues is the call for democracy as a way of governance.

Misceivng democracy as a substitute for God's ruling has forced some fundamentalists to reject democracy since the people may consent to any extreme norm. To those fundamentalists, consensus alone renders such norms valid regardless of any superior principle. The proponents of

⁵⁷ *Supra* note 12, at 132.

⁵⁸ *Id.*

⁵⁹ MUHAMMAD 'OMARA, TAYARĀT AL-FIKR A-ISLAMĪ [Trends of Islamic Thought] at 13 (Dār al-Shorūk 2007) (1991).

⁶⁰ *Id.*

this perspective support their contentions by using examples such as the legalization of the marriage of homosexuals in some countries.⁶¹

This argument seems rational on its face. This is especially true because of the extreme nature of the examples given. It might be shocking to know that a woman got married to a vintage warehouse even if that was to defend it against prospective demolition.⁶² It is even more striking for some to hear about that woman who got married to a donkey because she was just *in love* with it.⁶³

Recently in two American States, Washington and Colorado, dealing in marijuana was legalized as an effect of a referendum. It was formally acknowledged by the Washington state governor Chris Gregoire who stated that “the voters have decided to decriminalize marijuana possession and tax its sale and we will follow the will of the people.”⁶⁴

However, I believe that the above contentions underestimate the standards every society imposes on itself according to which their matters are regulated. These standards are often driven from the long agreed traditions and culture within any given society. The main difference between a Muslim society and a non-Muslim one is that in the former *Sharī'a*, as a reference, supersedes any agreed tradition.

In Islam, the supremacy of positive law is subordinate to that of *Sharī'a*. In a typical democratic system, the legislative power is unlimited so long as it is an expression of people’s will through their representatives. But the situation in Islam is quiet different as *Sharī'a* is superior and unalterable by any entity, including national assemblies. In that sense, Islam was the first system to limit the powers of the ruling majority and combat tyranny in conformity with the core goals later adopted by democracy advocates.

On the other hand, although democracy was mainly concerned with combating autocratic tyranny, it did not succeed in combating other forms of tyranny such as transitory ruling majority. The failure of democracy in this respect, inter alia, was best illustrated by Carl Schmitt in *Legality*

⁶¹ http://www.washingtonpost.com/world/specialreports/countries-where-same-sex-marriage-is-legal/2012/05/10/gIQAwOziFU_gallery.html#photo=4 (last visited Nov. 22, 2012).

⁶² <http://abcnews.go.com/blogs/headlines/2012/01/woman-wants-to-marry-seattle-building/> (last visited Oct. 8, 2012).

⁶³ <http://beyondjane.com/family/marriage/american-woman-falls-in-love-with-a-donkey-and-marry-him/> (last visited Oct. 30, 2012).

⁶⁴ http://www.washingtonpost.com/world/national-security/legal-battle-looms-over-marijuana-initiatives/2012/11/07/cce5033e-28f5-11e2-bab2-eda299503684_story.html (last visited Sep. 9, 2012).

*and Legitimacy*⁶⁵ in which he described the collapse of the domestic political condition in Weimar Republic Germany in terms of public and constitutional law. The following is a review of Schmitt's main critiques of democracy followed by my argument regarding how Shari'a handles these shortcomings.

A. Review of Carl Schmidt's Critiques of Democracy:

Schmitt introduced the book by defining the legislative state system of legality compared to other state types: jurisdiction, governmental, and administrative.⁶⁶ According to the author, the legislative state is a political system where norms receive high regard and are a decisive expression of the "community will," a state type governed by impersonal, general, pre-established norms that have a definable, determinable content, and a state where lawmaker, *the legislative*, and officials responsible for legal application, *the executive*, are separated from one another. Consequently, all government acts and powers, other substantive areas, affairs, and public functions are on the basis of law and subordinate to norms.⁶⁷

The parliament in this state type is a legislative organ which only establishes valid norms and has a superior position based on the dignity of the lawmaker. It follows from this state type a concept of legality which means that only valid, impersonal norms are being applied. This system of legality justifies *obedience*, the suspension of the *right of resistance*, and state *coercion*.⁶⁸

There are other political forms of states where the decisive political will emerges in other forms of procedures one of which is the jurisdiction state where the deciding judge has the last word. There is also the type of the governmental state whose characterized expression is found on the exalted personal will and authoritative command of the ruling head of the state. Schmitt describes the administrative state type as a system which applies objective directive rather than higher norms or personal commands or will. Neither men nor valid norms rule; rather, things administer themselves. Its expression is in the *administrative decree* which is determined in accordance with circumstances, in reference to the concrete situation, and motivated only by considerations of factual-practical purposefulness. Executable and easily obeyed command which has a legal value in itself is a characteristic of both governmental and administrative states.

⁶⁵ *Supra* note 7.

⁶⁶ *Id.* at 3

⁶⁷ *Id.*

⁶⁸ *Id.* at 10.

Schmitt referred to the historical fact that linkages and mixtures among all these types appear since in every state there is an element of legislation as well as of administration and even of judicial decision.⁶⁹ According to Schmitt, all of these elements are reunited in the sovereign who is the final source of legality, and the ultimate foundation of legitimacy.⁷⁰

But then, Schmitt highlighted the possible inconsistencies between peoples' will, in the form of *legitimacy*, and the law, in the form of *legality*. Such effect is claimed by Schmitt to be an outcome of the disparity of the sources of legality and legitimacy. Schmitt identified this situation in the Weimar Republic by emphasizing that by the time his book was written, the closed system of legality, in the instance of will that is in conformity with law, emerged in opposition to legitimacy. The example he gave was the dissolution of the *Reichstag* as being legal even if it was a coup d'état on the one hand, while on the other considering the dissolution of a parliament as illegal even if in conformity with the constitution.⁷¹ That shows that the situation in the parliamentary legislative state is that the rationalism of the system of legality is "recast into its opposite."⁷²

As a protective guarantee against possible coercion in a democracy, Schmitt introduced the principle of *trust in the legislator*.⁷³ According to this perspective, the law comes about with the participation of the representative assembly. The lawmaker is the "final guardian of the law,"⁷⁴ the only legislator, and "the conclusive source of all legality."⁷⁵ This presumed harmony between justice and legality dominated the legal thinking of the legislative state. Through this, it is possible to subordinate one self to the rule of law in the name of freedom, remove the right to resistance, and prioritize the state. The confidence in the legislator is a strong guarantee of moderation and secure protection of freedom and property contained in the legislative process against misuse of the legal form and, therefore, there is no need for further restrictions on his powers. This confidence is the prerequisite for every constitution that organizes the legislative state; otherwise, it would be absolutism.⁷⁶ This system of legality has presuppositions that statutes must have substantive relation to law and justice and, therefore, every state act can be made legal through a decision of parliament.

⁶⁹ *Id.* at 5.

⁷⁰ *Id.*

⁷¹ *Id.* at 10.

⁷² *Id.*

⁷³ *Id.* at 19.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 20.

However, Schmitt expressed his concern about this principle as it leads to considering whatever is created by the lawmaker, represented in the parliament's simple majority, as "law" and "right."⁷⁷ In this respect, Schmitt shared Islamic fundamentalists' key caveat about democracy. The shared caveat is the neutral, value and quality free concept of legality without content.⁷⁸

Another guarantee suggested by Schmitt was *constitutional guarantees*.⁷⁹ This form of guarantee was suggested on the occasion of criticizing the rationale behind the requirement of higher majority votes, a qualified two-thirds majority, as a matter of making the process of decision-making more difficult in cases involving substantive law norm with definite substantive law content. Schmitt criticized the requirement of higher majority since it is considered as the current will of transitory two-thirds majority. And this transitory nature is exactly what is supposed to be guarded against by substantive constitutional guarantees.

However, I believe Schmitt did not pay attention to the transitory nature that characterizes the will that establishes the constitutional guarantees as well. In that sense, further guarantees would be needed to guard against the will, whether of the people or of the legislator, which enacts those constitutional guarantees and so on running in a vicious circle.

Schmitt referred to a third extraordinary lawmaker which democracy failed to guard against which is the presidential decree power granted by Article 48 of the Weimar Constitution.⁸⁰ Although this power is subordinate to the ordinary legislator in the sense of being subject to suspension by the parliament in normal situations, it is superior in abnormal or exceptional circumstances which are determined by discretion.⁸¹

I believe that the same syndrome is found in today's Egypt. Although the MB claim that they are in the process of establishing a democratic governance, Morsi, the Egyptian president, has combined in his person both the executive and legislative authorities allegedly because of the abnormal situation Egypt is currently in.

Schmitt criticizes such a situation as it grants the extraordinary lawmaker the right to *determine* the presupposition of his extraordinary powers, state of danger for public security and order, and

⁷⁷ *Id.* at 23.

⁷⁸ *Id.* at 30.

⁷⁹ *Id.* at 45.

⁸⁰ *Id.* at 67.

⁸¹ *Id.* at 69.

the content of necessary measures.⁸² Accordingly, he can also reissue measures the elimination of which the parliament previously demanded.⁸³ This is a ground for great factual superiority and that is considered also in regard to the scope and content.⁸⁴ While the ordinary legislator is permitted to only pass laws, the extraordinary legislator is able to confer on every individual measure he issues the character of a statute. Legislative power becomes a weapon in the hands of a dictator.

In addition to general decrees, the executive can issue individual decrees which are supposed to be resisted by the system of legal protections. The extraordinary lawmaker combines the legislative and the executive characters in his person.⁸⁵ In addition to the power to issue extraordinary measures, article 48.2.2 grants the exceptional lawmaker the informal authority to suspend seven fundamental rights, among which are personal freedom and property.⁸⁶

Pre-war German state theory considered substantive law as an intrusion into freedom and property in addition to the legislative reservation clause which gives the ordinary legislature the exclusive right to intrude into those rights.⁸⁷ This pre-war parliamentary legislative state is considered to be totally changed since those basic rights do not apply to the extraordinary lawmaker.⁸⁸

Schmitt contends that in a system of parliamentary legislative state there must be only one ordinary lawmaker. Measures and decrees must not have the force of law. But since in Germany measures became decrees with the force of law and the extraordinary lawmaker possessed powers over freedom and property, this was considered a then-new heterogeneous way of thought in the constitution's system of legality.⁸⁹

Schmitt concluded that the current will of the present majority is always an expression resulting from a compromise of *current* heterogeneous *powers* which have little interest in logical consistency. That is because of the pluralistic nature of the parliament.⁹⁰

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 70.

⁸⁵ *Id.* at 71.

⁸⁶ *Id.*

⁸⁷ *Id.* at 72.

⁸⁸ *Id.*

⁸⁹ *Id.* at 73.

⁹⁰ *Id.* at 88.

Another consequence of this pluralistic system is that the rest of the parties do not have the same chance to create a majority in a way that is considered a denial of the principle of equal chance. The presupposition of the legality concept of the pluralist parliament collapses in effect. However, it was obvious that everything was running according to the traditional system of justification. These parties only seek the legality of the momentary possession of power no matter if they are running up against the system of a plebiscitary-democratic legitimacy or against the parliamentary legislative state's system of legality. The parliament no longer has the dignity of an assembly that issues statutes in a specific manner and is no longer independent. Elections have become a plebiscitary procedure rather than selecting presenters and founding independent representation.

The plebiscitary expression of will, so Schmitt's argument goes, carries the meaning of a decision of one will, such as referenda, since the people would only answer with yes or no without being able to discuss.⁹¹ But Schmitt then showed the readiness to accept this plebiscitary legitimacy so long as the confidence of not misusing the power of posing questions is observed.⁹²

Schmitt then shows how legality and legitimacy become technical instruments that can be used for momentary advantage in a way that would sharpen social strife.⁹³ Even the possible reformation which can be resorted to in order to avoid using the constitution as an instrument can be used in itself as an instrument of compromise.

Schmitt's proposal for handling the deficiencies of the German democratic system was urging that the constitution must recognize the substantive characteristics of the German people and their right to equal chance;⁹⁴ otherwise, the constitution would end with destroying its own legality and legitimacy. In other words, he only restated the problem without suggesting how to solve it.

In my viewpoint, analysing the above deficiencies necessitates a dramatically different response. The proper response to me is to disperse the sources of legality and legitimacy in order to avoid the identified inconsistencies. Through this dispersion, the source of legitimacy would constitute the frontiers within which legality would operate.

However, legitimacy would not be superior to legality so long as their sources are on the same level, even if they are dispersed. In order for legitimacy to effectively perform this function it

⁹¹ *Id.* at 60.

⁹² *Id.* at 90.

⁹³ *Id.* at 93.

⁹⁴ *Id.*

requires being driven from a superior source. If the source of legality is positive law, then that of legality must not be human. Uninvolving people's will in considering legitimacy and confining their role to positive law making would contribute to the principle of equality between citizens. No group would possess powers that exceed that of the others. This is because no group would possess the transitory power of legislation represented in the parliament, while others hold the residual source of legitimacy, reflected in the people's will. The power of the two groups in that sense would be subordinate to one superior source of legitimacy.

In the remaining pages of this thesis, I propose applying Sharī'a as a divine source of legitimacy thereby materialising the desired dispersion of sources, maintaining equalization amongst citizens, and combating all sorts of tyranny such as that of the transitory ruling majority or of the ruler in abnormal situations.

In a parallel response, democratic systems, usually, seek to deduce general norms, similar to Sharī'a in Islamic systems, in order for them to be superior and not to be exceeded by legislative authority. Examples of such superior norms could be *natural law* or the *International Bill of Human Rights*.⁹⁵

However, unlike Sharī'a, the norms of human rights are still alterable as their legitimacy is derived from the same source, cultural heritage and human discretion.⁹⁶

On the other hand, I conceive adhering to natural order as a source of law as an attempt to allocate a source of legitimacy which is non-human, thereby elevating it over positive law, while still refraining from admitting the existence of divine religions. There are several reasons behind this assumption which are discussed below.

B. Natural Law as a Substitute for Sharī'a:

Natural law as a methodology is perceived as a kind of law that is produced by non-human agency. This definition was expressed by Hans Kelsen in the context of tracing the source of natural and positive laws in order to examine their validity by stating that “[i]t was characteristic of the natural-law doctrine... that it used to operate on the assumption of “natural order.”⁹⁷

⁹⁵ *Supra* note 12, at 38.

⁹⁶ *Id.*

⁹⁷ HANS KELSEN, *NATURAL LAW DOCTRINE AND LEGAL POSITIVISM* at 244 (Wölfgang Herbert Kraus trans., 1956).

Kelsen further illustrated the main characteristic of natural law contending that “[u]nlike the rules of positive law, those prevailing in this “natural order” which govern human conduct are...in force...because they stem from God, nature or reason and thus are good, right and just.”⁹⁸ It appears from this illustration that those who believe in the natural-law doctrine equalize the sources of this law, such as God, nature or reason, as long as they are not human.

The first reason why I think that adhering to natural law is no more than an escape from embracing Sharī‘a is the fact that the former notion is, I believe, based on impractical nonsense. The term natural-law is adhered to by some of those who believe that part of the law can be derived from a source which is not human. They equate the sources of this law such as God, nature or reason, as long as it is not human but they do not identify a particular one of these sources as the only one. The issue is, therefore, still open. It is found as most of the issues of traditional jurisprudence, “masked in the protective camouflage of transcendental nonsense.”⁹⁹ In my view, it is nonsense to base a jurisprudential theory on a belief that an order is made by itself.

If we accept that natural law is that law that is revealed by God rather than nature as a way to escape the nonsense, I believe that we can not continue calling it natural law, we must call it religion instead. In this regard I lean towards sharing Muhammad ‘Abduh’s notion of *sunnat Allāh* which he advanced to describe an ordered system of nature. With the term *sunna*, ‘Abduh described the systematic characteristic of the nature. Conceiving the accuracy of the rules of nature as a custom of God influenced ‘Abduh’s interpretation of the Qur’ānic verse: “Had God not repelled some of the people by means of others, the earth would have been corrupted”¹⁰⁰ so that ‘Abduh observed that the verse refers to “a general custom of God and is today commonly referred to as the struggle for survival (*tanāzu‘ al-baqā*).”¹⁰¹

Those who believe in the idea of “the rule of nature” do not clarify how nature is involved in the process of lawmaking. They do not describe what the elements of this nature are and what it looks like. No clues are given about whether it is a living creature that exists somewhere or a fantasy that describes a hypothetical will of the surrounding inanimate nature. Their idea about

⁹⁸ *Id.*

⁹⁹ FELIX COHEN, *Transcendental Nonsense and the Functional Approach*, XXXV Colum. L. Rev. 841 809-49 (1935).

¹⁰⁰ The original Arabic reads as follows:

"وَلَوْلَا دَفْعُ اللَّهِ النَّاسَ بَعْضَهُمْ بِبَعْضٍ لَفَسَدَتِ الْأَرْضُ."

¹⁰¹ MALCOLM H. KERR, *ISLAMIC REFORM: THE POLITICAL AND LEGAL THEORIES OF MUḤAMMAD ‘ABDUH AND RASHĪD RIDĀ* at 130 (University of California Press 1966).

natural law is not even consistent with Ash'arite theology which perceives "God's custom," rather than any regular system of physical laws, as the key resultant in "the workings of nature."¹⁰²

If it is hypothetical, it would be nonsense to assume something that does not exist. It might be argued that assuming the existence of such a lawmaker is an inevitable consequence of recognizing the systematic nature of nature's rules whose accuracy is unalterable. For the rules of nature to be that accurate is in and of itself a reason to be a proper source of law. However, such an answer would mean that those who believe in the idea of the "rule of nature" believe that someone, or something, has the characteristics of divinity but they do not actually recognize his existence. They may prefer to attribute these characteristics to nature rather than to a God. The main point would then be the way one describes and calls this omnipotent creator. Some may call him *Mother Nature*, while some others may call Him *God*. Therefore, the Ash'arites, based on their belief that the rules of nature are unchanging and dependable, called these rules "God's custom."¹⁰³

Both groups, those who call the creator "Mother Nature" and those who call Him God, believe that every thing must first have been created. However, the former group does not believe in a certain creator but still believes that there is one. This one, according to them, must have powers that exceed that of all humans and the entire world. Their perception in this sense is consistent with the Ash'arites' notion of the unchanging and dependable custom of God. But ultimately, natural law advocates reach an unreasonable conclusion. They say that the creator is Mother Nature as an extraordinary power.

I argue that those who call the creator Mother Nature refrain from attributing these powers to a God because they prefer to stay within the borders of *scientific thinking*. However, their thinking places them outside these borders. They are satisfied with calling the creator Mother Nature as a way of ending this discussion no matter how illogical this name is. They may think that through their denial of the divinity of the creator they would be *practical* and their ideologies would be based on empirical experiences rather than metaphysics.

The second reason why I think that adhering to natural law is no more than an escape from admitting Sharī'a is that for most Western scholars, admitting religion is a submission to coercion

¹⁰² *Id.* at 119.

¹⁰³ *Id.*

and impracticality. There were some historical events¹⁰⁴ which I believe resulted in the emergence of the common belief that religion is responsible for the world's misfortunes and, consequently, the term religion was abandoned and its orders were replaced by the term “rule of nature.”

Those events can be summed up in the European Church's involvement in oppressing scientists for almost one thousand years.¹⁰⁵ The variable accusations for which scientists were oppressed and tortured can be grouped under a unified category: falsifying Christian texts. Those falsified texts were, however, not among the core Biblical teachings, but rather a combined set of theories and information barely known at that time.¹⁰⁶ For the primitive and imperfect nature of these combined texts, the then-developing sciences easily falsified these scripts. But since these theories became sacred through the Popes' action, falsifying them became an act of infidelity as well. The effect of such an accusation could have been of lesser danger if it was not accompanied by the extreme sanctions adopted by the Church.¹⁰⁷ But with the extreme brutality of the Church against scientists, Christianity became the *enemy* and scientists considered religion and science as two opposites that can never converge. Then, the influence of European secularism prevailed and

¹⁰⁴ The beginning of this era was when the Church attempted to combat the extreme deviance in which Romanian emperors indulged. The approach of the Church to stop this destructive deviance was through launching a parallel trend of extreme priesthood. The people then uncovered the truth about the personal life of some monks which was not only full of pleasure and luxury, but also full of extreme obscenity. Some priests lived in luxury similar to that of princes. They were renting the ground of heaven by *tickets of forgiveness*, permitting the violation of the law, granting certificates of survival, and accepting bribes and usuries. A long-term struggle with kings and emperors then started regarding power and authority. The struggle was violent and it ended up with the victory of the Church whereas in 1077 whereas Henry the fourth had to go barefoot to the Castle of Canossa and submit to the Pope who allowed him to repent. In addition to its struggle with emperors, the Church imposed for itself an authority over the people and forced them to pay huge sums of royalties and taxes. The indignant rulers utilized this public pressure to garner public hatred towards the Church and their weapon was to uncover for the people the scandals and outrages of those Popes. The situation exacerbated when the Church preserved for itself the exclusive right to understand and interpret the Bible. See ABUL-ḤASAN AL-NEDWI, MADHA KHASER AL-‘ALAM B’ INḤTĀT AL-MUSLMĪN [What the World Lost due to Muslim's Failure] 158-168 (Dār Al-Qalam 2007).

¹⁰⁵ SALAMA MŪSA, ḤORRIAT AL-FIKR [Freedom of Thought] 38 (Salama Mūsa for Publicity and Distribution 1935).

¹⁰⁶ The Church colored some then-common information about geography, history, and physics with religious color and considered them as religious disciplines in which belief was a must. Books and novels were written about these scripts which were later called *Christian Geography*. All these incidents were happening in parallel with a rapidly rising trend of science. Those scientists introduced their breakthroughs and experiments by which they falsified and criticized the Christians scripts. The Church considered those scientists as infidels and founded the Inquisitions to sanction them. See *supra* note 104.

¹⁰⁷ The number of those who were punished by the Inquisitions was almost three hundred thousand, thirty two thousand of whom were burnt alive. Bruno and Galileo were among the victims who were sentenced to death for their theories which contradicted the Church's. See *id.*

affected various communities including the Arab world and it reached in some instances the total abandonment of the rules of religion.¹⁰⁸

For the foregoing reasons, inter alia, I argue that the outcomes varied between either the total abandonment of religion by some secularists or substituting it with the term “natural order” and calling the creator Mother Nature.

IV. The Situation in Egypt:

With specific regard to the Egyptian system, there is almost no contradiction, from an Islamic perspective, between legality, in the form of positive law, and legitimacy, in the form of a superior legal frame of Sharīʿa. This is because Sharīʿa has been considered in many successive constitutions as the main source of legislation.¹⁰⁹

Conceptually, situating Sharīʿa at an upper level above people’s ruling does not collide with the widespread concept of democracy. The reconciliation between the two systems stems from the unity of their purpose, “. . . to embrace the Eternal Oneness of the Absolute.”¹¹⁰ However, whether Sharīʿa is fully applied or not is currently subject to academic and popular debates.¹¹¹

The first group contends that Sharīʿa is fully applied except in two respects: the issue of interest in civil law and the suspension of *Hūdūd* in the penal code. The opponents, nonetheless, refute that contention and claim that Sharīʿa is not applied since the law allows for some practices which are prohibited in Sharīʿa such as consensual fornication, licensed gambling, dealing in intoxications, and usury.

For the latter group, the path towards applying Sharīʿa seemed closer as the first elected president in Egypt, Morsi, has gathered in his hand the legislative authority in addition to the

¹⁰⁸ *Supra* note 105.

¹⁰⁹ See SAMI ZUBAIDA, LAW AND POWER IN THE ISLAMIC WORLD at 193 (London/ New York 2003).

¹¹⁰ *Supra* note 18, at 190.

¹¹¹ There are some intellectuals, some of whom are Azharits scholars, who contend that Sharīʿa has been fully applied in Egypt since it has been incorporated in the constitution as the main source of legislation. Examples of these intellectuals are Sheikh ‘Ali Gum‘a <http://www.youtube.com/watch?v=DwpWocMaHiw> (last visited Dec. 2012), and Skēna Fu‘ād <http://www.masrawy.com/news/Egypt/Politics/2012/November/9/5428577.aspx> (last visited Dec. 2012). There are even MB members who assert that Sharīʿa is fully applied such as president Morsi <http://www.elbashayer.com/news-223803.html> (last visited Dec. 2012). On the other side, there are some others refute the former groups’ contention and claim that Sharīʿa is not fully applied such as Yaser Burhāmy and Gamāl saber <http://www.alwafd.org/-الشرعية-مُطبَّقة-على-أن-الشرعية-مُطبَّقة-أخبار-وتقارير-13-الشارع-20%السياسي-298407-صاير-الحديث-على-أن-الشرعية-مُطبَّقة-كلام-فاضي> (last visited Dec. 2012).

executive after the parliament was dissolved by a Supreme Constitutional Court decision. That is mainly because of Morsi's pertinence to the MB who have always raised the slogan "Islam is the Solution" through all their parliamentary contests. However, time passes and there is almost no single step taken towards that end. That forced many of the Sharī'a advocates to revolt demanding the full and rapid application of Sharī'a.¹¹² The situation has worsened as the debates regarding the form of application, in case it is applied, has become endless. It has become apparent from these debates that there is no unified vision regarding how to apply Sharī'a amongst Islamists, let alone the remainder of the political currents.

It would appear that all the parties to these ongoing debates have the same impression towards the prospective laws and regulations; they are almost seen as being the ultimate means towards a new nation-state governed by the rule of law. Such concern is very much present in the current discussions regarding the post-revolution constitution. Political powers are accusing each other of attempting to dominate the Draft Constitutional Assembly thereby imposing their respective ideologies on the society. However, it seems like these debates undermine some factors the persistence of which frustrate any attempt to be governed by the rule of law.

A. Egypt and the Rule of Injustice before 25 January:

The rule of injustice in Egypt was not a chaotic phenomenon; it was rather systematically orchestrated through establishing a coalition between the presidency and the police. It is no revelation that one of the main causes of the Egyptian uprising was the brutality of the police. The coalition of the presidency and the police ruled the country through extreme coercive measures, which provided them with the decisive authority domestically. As it was commonly believed, Egypt did not have a rule of law, but rather ruling through law.

1. The Executive Branch and Marginalizing the Rule of Law:

Ruling through law included creating an entity completely outside the scope of law, the police, which had privileges and powers way beyond their mandate. Having worked as a public prosecutor for almost seven years, serving in more than seven Egyptian prosecutions dispersed across the

¹¹² <http://www.masrawy.com/News/Egypt/Politics/2012/november/2/5422001.aspx> (Last visited Sep. 18, 2012).

nation, helped me gain considerable insight in how the police functions and how its culture developed.

I believe the executive branch sought to dominate power through developing an entity whose loyalty was entirely directed towards the interests of the executive. Maintaining this loyalty was a matter of casting powers and privileges to the members of that entity and conditioning their persistence upon attaining the protected interests. That entity was the police.

Empowering the police was not a matter of granting its members unequivocal legal competencies, but it was the fruit of a newly developed system totally outside the domain of law. It was an issue of expanding the involvement of the police in almost all daily dealings. Their severe involvement made it easier for police officers themselves to get their own business done by way of a phone call to their fellow officers in charge. Likewise, it became feasible for a police officer to facilitate a lot of governmental procedures for relatives, friends, or neighbours out of favour. Being close to police officers became a personal gain and that added to their own prestigious position.

On the other side, ordinary citizens usually face numerous difficulties when trying to get the simplest business done. The difficulties range from facing bad treatment to arbitrary refusal of legitimate requests. However, this is not the case for a police officer or his relatives.

Although the monetary element was not among the granted privileges, those already granted were sufficient to maintain the desired loyalty. This is because the newly developed culture made it the ultimate goal for a person to protect his or her dignity. People do not want to be maltreated whenever they deal with an official or to be exceeded when they are in a queue by a person who has connections with those in charge. But since it was impossible to avoid these violations, people had either to surrender to this fact or, alternatively, get closer to the privileged entity, the police.

Getting closer can be through developing connections with police officers or even by trying to join the career. The latter option entailed citizens' paying huge sums of money to whomever claimed an ability to gain the necessary influence among decision-makers.

On the one hand, those who dream about getting closer to the police know by heart what that entails; they know the underlying requirement of absolute loyalty to the executive, being aggressive towards fellow citizens, and obeying every order even if it was unlawful such as torturing, vote rigging, and in some extreme instances, murdering.¹¹³ This automatic adaptation to the new culture may be attributed to the diffused fear as observed by Laith Saud:

When watching World War II films, I find myself curious as to why someone would “hail Hitler” or applaud Mussolini, let alone commit acts of political murder or genocide in the name of the state. The enthusiasm behind such fascist demonstrations or actions is of course alarming. It proves just how easily men can submit themselves to committing atrocities against their fellow men. Such commitments can be explained simply by fear. Human beings fear reprisal from the state, therefore they submit to authoritarianism and even carry out violent acts against their own people or others out of such fear.¹¹⁴

On the other hand, the executive did not close the door of hope before all ranks of society to join such a career; limiting that ambition to a certain rank would have entailed suffering the discontent of those who would never be able to join them. Such a feeling would have isolated the police in a way that would have made it easier to expose them as an isolated entity to revolt against. Therefore, joining the career was not limited to secondary degree holders; room was made for lower ranks such as primary degree holders or even illiterates. This was achieved through creating a senior level of police officers available for secondary degree holders, and developing an inferior layer of lower-class personnel known as ‘*umanā*’ starting from the 1970s.¹¹⁵ Consequently, that entity succeeded in penetrating the society and minimizing chances of being revolted against.

In that sense, being a member of the police force was being a man who is being serviced rather than servicing. That has become a destination for all those who sought to be respected in society. The situation became more acute as people bear no respect for the educated; manifested respect became only to those who are competent to harm others with a decision or a phone call. However, people born to the said group concealed hatred, especially those who were not able either to join the police or to avoid their oppression without due flattering.

The job of the police became more like a box-ticking issue. No actual effort is being paid in tracing criminals or securing society. That was due to a newly developed culture of “effort-based

¹¹³ See <http://www.guardian.co.uk/world/2011/jan/28/egypt-police-brutality-torture-wikileaks> (last visited Dec. 2012).

¹¹⁴ *Supra* note 18, at 189.

¹¹⁵ See <http://www.egyptindependent.com/opinion/behind-lawlessness> (last visited Dec. 2012).

system” as a measure of a police officer’s effort. According to this system, an officer’s effort is evaluated in accordance with the number of reports he writes. Such evaluation is conducted twice a year. More reports indicates more effort. Competition in that respect was through assigning the lower level inspectors the job of making reports and handing them in to a senior police officer who distributes them among his fellow officers each of whom signs a number of reports as his own work. On the other hand, the new mission assigned to the inspectors helped them to seize power in their neighbourhoods as their powers elevated them to that of a police officer. Furthermore, they became much more powerful as their reports are ultimately attributed to a police officer once he signs them and assumes responsibility.

Real investigation became limited only to cases of public interest such as murder. Moreover, their actual job became protecting all the interests of the presidency starting from securing processions and ending with arresting the opposition. This new task assigned to the police has its origins in the period between the 1950s and 1960s when Gamāl ‘Abdel-Nasser “still found logic in turning the police on his own people if it seemed such people were opposed to the revolution or the natural progress of Egypt.”¹¹⁶

The deviation from the rule of law is reflected in the judicial system. Generally, police officers can be complained against either via a devoted inquisitorial body in the Ministry of Interior or before the public prosecution. Strengthening the alliance between the police and the presidency necessitated weakening censorship on their performance. The weakening strategy has been approached through neglecting mandates of the prosecution and by not responding to their calls for investigation. In that sense, the investigative power of the prosecution has been severely weakened. Public prosecutors have become unable to issue warrants of arrest as they will not be executed. They further have to make phone calls on their own expense to witnesses, or even convicted people, to call them in for investigation.

At the time when oppression and injustice were at their peaks in Egypt, a judicial reform movement, starting in the mid 2000’s, provided people with hope. The 2005 judicial reform movement has been an important mark in Egyptian history, not only on the judicial side, but also on the cultural side. In 2005, a group of Egyptian judges started what was called the reform movement. This group of judges took a stance against the forging of results of the 2005 elections. The Mekky

¹¹⁶ *Id.* at 189-190.

brothers in 2005 and 2006 led demonstrations denouncing the forging of the elections.¹¹⁷ This movement was an important catalyst for the civil society movement that prompted Mubarak's ouster in 2011.

The executive branch, namely the presidency, was not fond of this movement. Tension escalated between this movement and the executive. The presidency tried to exert more control over the judicial branch; for instance, the president abandoned the practice of appointing the most senior judge as the Chief Justice of the Supreme Constitutional court, and instead brought judges from outside this court to keep it under control.¹¹⁸ The presidency took further measures against the whole judicial branch as a result of this movement. While these measures strengthened the position of the reform judges, they made other judges, who were not keen on confrontation with the presidency, to detest everything that this movement represented. Consequently, this group of reform judges lost in the elections at the Judges Club.

2. Revolutionary Moments:

In January 2011, Egyptians revolted against police brutality and social injustice. Although a lot of injuries and deaths have occurred amongst protesters,¹¹⁹ the peacefulness of the revolution succeeded in altering “the grandstanding of Western politicians for whom “freedom” only followed bombs.”¹²⁰

During and right after the revolution, people had a moment of reclaiming their dignity outside the grip of the police and the presidency. For a period of time, people actually reclaimed power. When people had the actual authority in the streets, when everyone stood next to one another, and everyone had a specific role in protecting their neighbourhoods, this was the moment when people saw the culture of fear dying and a new culture of dignity arising. Most people when asked about these days, speak about them fondly, and express how at these moments everyone was respectful of one another.

¹¹⁷ Mahmoud Mekky: VP Rose to Prominence Advocating Judicial Reform, <http://www.egyptindependent.com/news/mahmoud-mekky-vp-rose-prominence-advocating-judicial-reform> (last visited Nov. 22, 2012).

¹¹⁸ Nathan Brown, Egypt's Judges in a Revolutionary Age, http://carnegieendowment.org/files/egypt_judiciary.pdf (last visited Nov. 21, 2012).

¹¹⁹ “According to the Ministry of Health, 840 Egyptians died and 6,467 were wounded during police repression of the protests from 25 to 28 January 2011 and in attacks up until 11 February by *baltagiyya*, or ‘thugs,’ known to have been hired by State Security.” See Reem Abou-El-Fadl, *Beyond Conventional Transitional Justice: Egypt's 2011 Revolution and the Absence of Political Will*, 6 IJTJ 318–330, 324 (2012).

¹²⁰ *Supra* note 18, at 188.

Unfortunately, this spirit faded away shortly after the ousting of Mubarak. People went back to submitting to another coercive power, which was the SCAF. While many analysts claim that SCAF's taking over the country was a necessity to insure stability, it made no sense to turn over authority to a power that ran under the same coercive philosophy. The key aspect to identify here is the fact that the rule of coercion was not yet replaced by the rule of law.

3. Injustice and the Persistence of Coercion:

It is evident that injustice in the Egyptian society is still prevalent. For instance, Petr Lom the director of the documentary "Back to the Square" remarked in his post-revolution documentary, "As I collected stories it was clearer and clearer that there was a continuing injustice and lack of human rights that seemed to be the most urgent thing to be tackled."¹²¹ The absence of the rule of law has further exacerbated the situation after the revolution as many incidents took place where people were killed without proper investigation.

Most jarringly, institutions such as the police and prisons function in the same way as they did under Mubarak. New developments have been the unprecedentedly high number of military trials, with 12,000 civilians referred since February 2011. The SCAF's only response to the public outcry and the 'No to Military Trials Campaign' was to pardon 2,000 prisoners ahead of the 25 January 2012 marches. Meanwhile, military police have participated in violently crushing demonstrations. Amongst the most brutal was the crackdown at Maspero on 9 October 2011, in which more than 20 (mostly Coptic) Egyptians died while protesting the burning of churches by extremists. There have also been cases of fatal torture in jail, such as that of Essam Atta, who died in September 2011,³⁴ and of cover-up tactics preserved from Mubarak's era. The autopsies of both Atta and activist Khalid Said, killed by police in 2010, recorded their deaths as caused by swallowing a bag of drugs.¹²²

This situation was described by Egyptian political, labour and human rights activists and scholars as an experience of "obscure continuities of violence and exclusion."¹²³

Unsurprisingly, the perpetrators remain unknown.

¹²¹ Catriona Davies, Victims of Injustice in Post-revolution Egypt Speak out, <http://edition.cnn.com/2012/02/17/world/meast/egypt-back-to-the-square-film/index.html> (last visited Oct. 29, 2012).

¹²² *Supra* note 113, at 328.

¹²³ *Id.* at 326.

Although activists, legal scholars and judges affirm that “there [was] no political will on the part of the SCAF ... ‘to put the real perpetrators of violence behind bars,’”¹²⁴ there has been another major reason that lies in the weakness of the investigative authority, which is a part of the Egyptian judicial system, before and after the revolution.

After the military attacks on the revolutionaries, on March 9th, 2012, detaining and torturing many, it was apparent that the old ideology of rule still prevailed. The majority of people being pro instant stability submitted to the rule of the SCAF, and wanted to see the return of “security” in the Egyptian street. In this sense, a reproduction of the culture of fear and coercion was again seen in Egyptian society, but this time it was even worse. If we consider this coercive power as a currency for authority, we can see that the same currency is still being exchanged. While during Mubarak’s days this coercive power was centralized, now it became dispersed in the hands of many. What we have failed to realize is that we do not need to redistribute the old currency of authority, we need to change it. Applying Sharī’a in that sense would not provide the solution as no methodology, whether that of Sharī’a or of another ideology, would pay off in the absence of the rule of law. The rule of law needs to be the new currency for authority in Egypt; it needs to replace the culture of fear and coercion.

The abolition of fear needs to be not only among citizens, I believe it must also be among intellectuals upon whose thoughts societies develop. Unfortunately, a freedom of conscience in Egypt suffers a severe deficit that is discussed in the following part.

B. Freedom of Conscience:

It is almost universally agreed amongst all trends of Islamists, whether fundamentalists or liberals, that Sharī’a is applicable to all places and times. Although there are some other secular trends that refute such a contention, these trends are not of concern in this discussion as our main concern is freedom of conscience amongst Islamists.

For Islamists, although Sharī’a is applicable to all times and places, I argue that the fundamentalist group’s discourse contradicts their own belief. To clarify, the belief that Sharī’a is applicable to all times and places entails another, indispensable belief that Sharī’a is applicable to the sciences known in these times and places. For the greatest Islamic scholars (‘Ulama’) known during

¹²⁴ *Id.* at 327.

and right after the prophet Muhammad, for a person to perform discretion, *ijtihad*, a set of sciences must be born by this person such as prophetic sayings (*Hadīth*) and the rules of Arabic language. These sciences were only those sciences that were known at the time these scholars lived. However, those scholars limited the right to discretion to those who existed during their times, who necessarily born only the sciences known at their time, and deprived any other scholar of the same right by declaring the closure of the gate of *ijtihad*.¹²⁵ Surprisingly, those scholars still believe that their sciences are sufficient to interpret the Qur'an which is applicable, as they believe, to ages they would not had witnessed. More surprisingly, modern fundamentalists share the same view as their ancestors although they have seen with their very eyes the contributions of modern science to the world today. They did not justify neglecting the incorporation of modern science in interpreting texts that are applicable to the time and place these sciences emerged. In this regard, the fundamentalists' approach contradicts their own belief that Shari's is applicable to all times and places.

Neglecting modernity and adhering exclusively to ancestors' discretion created "[t]ension between Islamic fundamentalists and liberal Muslim intellectuals [which] is as old as the beginning of modernization in the Muslim world."¹²⁶

While liberals, such as Jamal al-Din al-Afghani, Muhammad 'Abduh, and their disciples, attempted to modernize Islam and "to reconcile their religion with the modern world," fundamentalists "[sought] to Islamize the modern age, calling for a return to pristine Islam."¹²⁷

Examples of modern liberal intellectuals include Farag Foda and Nasr Hamid Abū Zayd "who have paid a heavy price for their outspokenness, have waged a war against the 'obscurantist' ideas and schemes of the Islamists, stressing Islam's compatibility with modern civilization."¹²⁸

The instance of Nasr Hamid Abū Zayd is an unprecedented instance as "[n]ever before has an Egyptian court ruled that a husband must be separated from his wife on grounds of apostasy."¹²⁹

Abū Zayd was an Egyptian scholar, a Professor of Islamic and Arabic Studies at Cairo University, who ". . . [did] not regard the heritage as sacred, inasmuch as it is human thought regarding religion. It stands for development, and embraces the future."¹³⁰

¹²⁵See ADUL-WAHAB KHALLAF, *AL-SIĀSA AL-SHAR'ĪYYA* at 19 (Dār Al-Qalam 1988).

¹²⁶Fauzi M. Najjar, *Islamic Fundamentalism and the Intellectuals: The Case of Nasr Hāmid Abū Zayd*, 27(2) *British Journal of Middle Eastern Studies* 177-200, 177 (2000).

¹²⁷*Id* at 177.

¹²⁸*Id* at 178.

¹²⁹*Id*.

Abū Zayd differentiated between Islam as a religion, which is sacred, and Islamic thought reflected in Sharī'a which is subject to discretion. The argument referred to Sharī'a as "human interpretations and applications of fixed religious principles in accordance with changing circumstances, and therefore can now be changed, contrary to the Islamists' claim that they are divinely-ordained and immutable, valid for all times and places."¹³¹

On June 14, 1995, legal proceedings were initiated against Abu Zayd in which occasion:

Cairo's Appeals Court ruled that Naṣr Ḥāmid Abū Zayd ... was an apostate from Islam, and ordered his separation from his wife. The court based its decision, later upheld by the Supreme Court, on its interpretation that the principle of ḥisba is applicable in matters of personal status. Ḥisba is based on the Qur'anic verses entrusting Muslims with the collective obligation to encourage good and discourage evil. In his books and articles, Abū Zayd, a liberal-secularist writer, extended his linguistic research to the study of Islamic texts, in particular the Qur'an and the Sunna, thereby infuriating the Islamists, who charged him with blaspheming Islam, and demeaning Islamic 'Ulamā', past and present... The rejection of Abū Zayd's promotion at the University, the court decision, and his self-exile in Europe, fearing for his life, are evidence that the influence of the Islamists has extended beyond preaching into the Academy and the Judiciary, to the detriment of scientific research, freedom of thought and expression, and social and economic progress.¹³²

Moreover, "The *Jihād*, a radical Islamist organization, called for his death, so did Aymān al-Zawāhirī, one of the leaders of *al-Jamā'a al-Islāmiyya*..."¹³³

As argued by the lawyer Khalil 'Abd al-Karīm, the court exceeded its mandate as it "had no jurisdiction over whether a citizen is or is not a Muslim."¹³⁴

Abū Zayd's offence was that he incorporated his linguistic experience in the study of Islamic texts. (199) The fact that Abū Zayd "has used reason and free thinking, and exercised *ijtihād* in an age that rejects *ijtihād*"¹³⁵ entitled the court to rule on his own belief even with his assertion that he still believed in Islam. For most of the enlightened Egyptian intellectuals, the case of Abū Zayd was

¹³⁰ *Id* at 184.

¹³¹ *Id* at 178.

¹³² *Id* at 177.

¹³³ *Id* at 189.

¹³⁴ *Id* at 190.

¹³⁵ *Id* at 199.

a modern form of an inquisition similar to that of the European Church under the Romanian Empire.¹³⁶

A similar approach was pursued against ‘Ali ‘Abd El-Razeq, a judge and Azharite scholar, regarding his publication *Islam and the Essences of Governance (Al-Islam wa Ūsūl Al-Hukm)*. In his book, Abd El-Razeq asserted the exclusion of the Caliphate from the essence of Islam and from belief. This opinion was heavily criticized by Rashid Reda who later accused Abd El-Razeq of being an apostate from Islam. On August 12, 1925, the Institute of Senior Azharite ‘Ulama’ convened and accused Abd El-Razeq of believing in *distorted* ideas. The decision of this institute was not appealable and included excluding Abd El-Razeq from the ‘Ulama’ group among other coercive sanctions.

Not only has a culture similar to the inquisition emerged in Egyptian society, but also a trend of priesthood has been adopted by modern fundamentalists. The Islamic priesthood can be traced back to the Charter of Al-Azhar in June 2011 in which Al-Azhar tried to preserve for itself the exclusive right to understand and interpret what is agreed upon among Islamic ‘Ulama’. Al-Azhar justified this authority given its nature as an institution to which reference is made to Islamic matters, sciences, heritage, and modern jurisprudential and intellectual discretion.¹³⁷

The granted exclusivity of understanding Sharī‘a is an alien phenomenon to the Islamic discourse as paradoxically highlighted at the outset of the same Charter. I perceive such exclusivity as the essence of the modern Islamic priesthood.

From the discussed examples, it is evident that fundamentalists in Egypt are extremely influential in the political, academic and cultural spheres. That influence triggers suspicions regarding any attempt to apply Sharī‘a. This is mainly because of the indefinite nature of Sharī‘a as a set of inconsistent jurisprudential opinions harmonization of which necessitates *ijtihād*. But in light of the role fundamentalists play in intimidating *mujtahids*, the prospective Sharī‘a to be applied under such conditions would be probably one that is concluded with rational apathy, one that lacks adaptability to reality and demands of the modern age.

¹³⁶ *Id* at 189.

¹³⁷ See ‘AMR SHALAKĀNY, *IZDIHĀR WANHIYĀR ALNUKHBA AL-QANŪNIYYA AL-MAṢRIYYA 1805-2005* [The Rise and Fall of the Egyptian Legal Elite 1805-2005] (Dār Al-Sorūk 2012).

V. Conclusion:

The problem of realizing any actual reform has been the lack of investing in momentum created by a spark of hope. If the Egyptian revolution needs to learn anything, it is the fact that momentum is extremely important to harness, especially if the envisioned reforms already have a critical mass of support.

The proposed follow-up actions need a vision, one that entails the rule of law at its heart. This is why the MB need to get rid of any concealed visions, if they bear any, and rally people around a common vision, which can be the driver for this country.

The MB's claiming to apply Sharī'a might be one step towards the rule of law; however, such a claim is not in and of itself a guarantee of achieving that end. Although Sharī'a is meant to be an applicable methodology that governs the legal system of the state, Sharī'a is only a substance that needs an overarching mechanism for it to be accurately applied. This mechanism is the rule of law.

Having accurately applied Sharī'a, I believe that it would effectively defy autocracy and dictatorship. It would be in this regard even more effective than the common democratic systems as it handles most of the deficiencies of democracy. Such advantages are not even undermined by the indefinite nature of Sharī'a rules; Sharī'a would still be applicable and adaptable to modern age as long as reconciling these rules with modern issues is approached through *ijtihād*.

Yet, the mechanism needed to apply Sharī'a, which is the rule of law, is not of lesser importance. For Sharī'a, or any other methodology, to govern, the law must initially rule the society. Unfortunately, this has not been the situation in Egypt either before or after the revolution of January 2011. The actual ruler in Egypt has long been the culture of fear, a culture that has been jointly and equally developed by the police and fundamentalist Islamists.

I believe that no law, whether Islamic or secular, can succeed in promoting its ideology as long as the society is not ruled by law. For Islamists to apply Sharī'a as they claim, society must be ruled by law rather than the culture of fear.