

The Relationship Between the Constitution, the *Shari'a* and the *Fiqh*: The Jurisprudence of Egypt's Supreme Constitutional Court

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I. *Fiqh* and *Shari'a*

Islamic jurists of the twentieth century often stress the non-identity of *shari'a* and *fiqh*. In the classical period of Islamic law, the *fiqh* was seen as the *shari'a* interpreted by legal scholars. It was thought of as a sacred law, the sources of which were revealed and the norms of which were interpretations of these revealed sources. In the nineteenth and twentieth centuries, jurists, theologians and intellectuals of the Muslim world have found it increasingly difficult to identify the *fiqh*, the system of ethical and legal norms developed by the legal scholars from the eighth to the nineteenth century, with the *shari'a*, the revealed guidance as found in the Koran, the word of God, and the *sunna*, the normative praxis of the prophet, as well as in the consensus of the jurists or the community (*ijmâ'*).¹ These sources are understood as containing not only the fundamental norms of the Islamic religion but also the orientation and guidance for normative decisions and the keys to an open and developing system of normativity. The modern distinction between *fiqh* and *shari'a* treats the *fiqh* as a historical interpretation of the *shari'a*, and the *shari'a* as a metahistorical source of guidance in legal and ethical as well as in other matters. This approach renders legitimate new interpretations of the legal and ethical heritage of Islam. The way in which Egypt's Supreme Constitutional Court [henceforth quoted as SCC] uses its competencies in order to provide such new interpretation is at the core of my lecture.

II. Constitutions and Constitutional Interpretation in the Arab World

In past centuries, the *fiqh* was seen as a sacred law and the elaboration of its norms through the interpretation of revealed texts was the task of learned jurists. The *fiqh*, therefore, was a jurists' law. The political authorities exerted the public functions of steering and directing the political community of the Muslims and,

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¹ For an introduction into the relation between *shari'a* and *fiqh*, see Josef Schacht, *An Introduction to Islamic Law*, Oxford 1964; Noel J. Coulson, *A History of Islamic Law*, Edinburgh 1964; Baber Johansen, *Contingency in a Sacred Law. Legal and Ethical Norms in the Muslim Fiqh*, Leiden 1999.

within that framework, their orders had to be obeyed. These orders were, by their very nature, of a temporary validity. The legal scholars produced the lasting norms of the sacred law. The authorities' "political function" (*siyâsa*) of steering and directing the political community of the Muslims was distinguished from the jurists' normative task. In the twentieth century, the *fiqh* norms that are introduced into the modern codes of the Arab states owe their validity to the fact that the national legislator has enacted them. In other words, these norms no longer qualify as a jurists' law. They are positive law enacted by the state. The notion of the people as sovereign and lawgiver increasingly find its expression in modern codes and constitutions.

The nineteenth century sees the first modern constitutions in the Arab world and the Ottoman empire. Tunisia in 1861², Egypt in 1882³, and the Ottoman empire in 1876⁴ are endowed with shortlived constitutions. In all three states, constitutional movements continue to exist, long after the constitutions have been suspended or abrogated. In the first decade after World War I, Egypt, Iraq, Lebanon, and Jordan became constitutional regimes, Syria followed in 1930.⁵ The end of the colonial regime in the fifties and the sixties was followed by the promulgation of constitutions in Libya (1951), Sudan (1956), Tunisia (1959), Mauritania (1959/1961), Morocco (1962), Kuwait (1962),⁶ Algeria (1963)⁷ and the two Republics of the Yemen (1970)⁸. Many of these states have since seen a number of new constitutions. In the early seventies, the Gulf states followed suit: Qatar's "temporary amended basic system"⁹ was promulgated in 1972, and the United Arab Emirates interim constitution in 1971¹⁰; Bahrain's constitution became effective in 1973. In 1992 Saudi Arabia promulgated a "basic law" (*nizâm asâsî*) the text of which reserves the term "constitution" (*dustûr*) for the Koran and the Prophet's normative praxis (*sunna*)¹¹. This basic law does not create a legislative instance elected by the

² G.S. van Krieken, *Khayr al-Dîn et la Tunisie (1850-1881)*, Leiden 1976, 48-53; Jean Ganiage, *Les Origines du Protectorat Français en Tunisie*, Paris 1959, 76-88.

³ Alexander Schölich, *Ägypten den Ägyptern. Die politische und gesellschaftliche Krise der Jahre 1878-1882 in Ägypten*, Zürich o.D., 27-30 for the chamber of 1866 and 175-199 for the "basic law" of February 7, 1882 and the Egyptian parliament.

⁴ Bernard Lewis, s.v. "Dustûr", in: *Encyclopaedia of Islam, New Edition* (henceforth quoted as EI (2)), Leiden/London 1965, vol. II, 640-643.

⁵ Majid Khadduri, s.v. "Dustûr", in: EI (2), op. cit., vol. II, 647-649, 659-662.

⁶ *Ibid.*, s.v. "Dustûr", in: EI(2), op. cit., vol. II, 638-640, 667-668, 672-674.

⁷ David C. Gordon, *The passing of French Algeria*, London 135-140; Henry F. Jackson, *The FLN in Algeria. Party Development in a Revolutionary Society*, Westport/London 1977, 88-93.

⁸ Sayyid Hasan Amin, *Law and Justice in Contemporary Yemen: People's Democratic Republic of Yemen and Yemen Arab Republic*, Glasgow 1970, 29-31, 48-52.

⁹ Nathan J. Brown, *The rule of law in the Arab world. Courts in Egypt and the Gulf*, Cambridge 1997, 183.

¹⁰ The interim constitution of the United Arab emirates became permanent only in 1996.

¹¹ Article 1 of the basic law.

people¹² and does not create a system of checks on the monarch's power. It is, therefore, doubtful, whether this text should be considered a constitution or a precursor to a constitution. In 1996, Oman promulgated its constitution.¹³ For obvious reasons, Palestine, in 2001, was the last Arab nation to draft a constitution. This draft was accepted by a PLO committee in 2003. In other words, over the last 100 years, all Arab states, with the exception of Saudi Arabia, have developed constitutions that recognize the separation of powers, the legislative authority of an elected parliament and a system of checks and balances between the executive, the legislative and the judicial branches of government.

Beginning in the 1960s, many of the constitutional Arab states added an article to their constitutions that makes "the principles of the Islamic *shari'a*" a or the principal source of legislation. Kuwait was the first state to do so (art. 2 1962/1980), Egypt followed in 1971 and gave this article a much stronger form in 1980; Qatar (1972, art. 1; article 1 in the constitution of 2003), Bahrain (1973, art. 2), the United Arab Emirates (1971, art. 7), and Syria (1973, art. 3, paragraph 2) followed in the 1970s. In the 1990s the Yemen (1991, 1994, art. 3), Oman (1996, art. 2), Mauretania (1991, paragraph 3 of the preamble) and the Sudan (article 65 of the constitution of 1998) adapted similar clauses. The Palestinian constitution drafted in 2001 contains in article 7 a reference to the same purpose.

Since the seventies, many of these states have created either constitutional courts, such as Kuwait and Syria in 1973, Egypt in 1979 and Sudan in the constitution of 1998 (art. 105). Other states founded courts that fulfilled, simultaneously, the functions of a court of cassation and a constitutional court, such as the Supreme Court of the United Arab Emirates (1971)¹⁴, or constitutional councils such as Morocco (1992)¹⁵, Tunisia (1987)¹⁶, Algeria (1989)¹⁷ and Lebanon (1993)¹⁸. Jordan has created a High Council for the Interpretation of the Con-

¹² Article 44 of the basic law distinguishes the "regulatory authority" from the judiciary and the executive authority. The same article attributes to the king the role of "the point of reference for all these authorities". Article 67 of the basic law rules that the "regulatory authority" "lays down regulations and notions to meet the interest of the state or remove what is bad in its affairs, in accordance with the Islamic *shari'a*" but it does not grant the legislative authority in the kingdom to it and it does not define the way in which it is constituted.

¹³ Nicolaus A. Siegfried, *Legislation and Legitimation in Oman: The Basic Law, Islamic Law and Society*, vol. 7, n° 3 (October 2000), 359-397.

¹⁴ Mohammed I.M. Aboul-Enein, *The Emergence of Constitutional Courts and the Protection of Individual and Human Rights: A Comparative Study*, in: Eugene Cotran/Adel Omar Sherif (eds.), *The Role of the Judiciary in the Protection of Human Rights*, London/The Hague 1997, 313.

¹⁵ Articles 76-79 of the Moroccan constitution of 1992.

¹⁶ République Tunisienne, Conseil Constitutionnel, *Sous-Direction des Etudes et du Suivi, Recueil des textes relatifs au Conseil Constitutionnel*, Octobre 1991.

¹⁷ Articles 163-169 of the constitutions of 1976 and of 1996.

¹⁸ On the first crisis of the Lebanese Constitutional Council, see Chibli Mallat, "Lebanon", in: Eugene Cotran/Chibli Mallat, *Yearbook of Islamic and Middle Eastern Law*, vol. 3 (1996), London/The Hague 1997, 221-227.

stitution.¹⁹ The Palestinian draft constitution defines the competencies of a Constitutional Court.²⁰ This list does not pretend to be exhaustive. It is just meant to show that in many Arab states, the growing importance attributed to the interpretation of the constitution has led to the foundation of specialized judicial institutions. Among these institutions, the Supreme Constitutional Court of Egypt (henceforth quoted as SCC), is probably the most active. Not only does it publish its judgments fourteen days after their promulgation in the *Journal Officiel* (*jarîda rasmiyya*), but every two years a selection of the SCC's adjudication is published in a thick volume, the last one coming close to 2000 pages. These publications allow us to follow the court's jurisprudence over more than twenty years. They constitute an important documentation of one of the most interesting developments in modern Arab justice and jurisprudence.

III. The Supreme Constitutional Court of Egypt: The Institution and Its Competencies

In articles 174-178, the Egyptian constitution of 1971 defines a new court, the SCC as "an independent judiciary body, having its moral personality" (art. 174)²¹ and grants it the monopoly of "the control over the constitutional character of laws and regulations" as well as "the interpretation of legislative texts" (art. 175). The details are regulated in the law n° 48/1979.²² The most important competences that the law mentions are the following:

a) Article 25 confers upon the SCC the control of the constitutional character of laws and decrees.

b) Article 26 entitles the court to interpret legislative texts, subject to two conditions: first, that two or more judiciary institutions have given different interpretations of the same legal text and second, that the importance of the text renders mandatory the standardisation and unification of its interpretation. The SCC, in its adjudication, has continuously held the opinion that the second condition is fulfilled only if the difference between the interpretations of several judiciary institutions endangers the citizens' equality before the law.²³

¹⁹ Ghayth M o s m a r, "Jordan". This article of which the proofs were made accessible to me was originally written for publication in: Chibli Mallat/Andrew Allen (eds.), *Handbook of Middle Eastern Law*, London/The Hague. Chibli Mallat informs me that this book was not published. I do not know whether Ghayth M o s m a r has published this article in another book or journal.

²⁰ Articles 84, 102, 124-125, 129, 193-206.

²¹ My translation follows that of A b o u l - E n e i n (note 14), 316.

²² The text of the law is also published in the first volume of the collection of the court's decisions *Al-Mahkama al-dustûriyya al-'ulyâ* (henceforth quoted as *Al-Mahkama*), vol. I, *wathâ'iq inshâ' al-mahkam*. *Al-ahkâm wa-l-qarârât allati asdarathâ hattâ 30 Yûnyô sanat 1981*, Cairo 1981, 69-94.

²³ *Al-Mahkama* (note 22), vol. V, part 2, 419, 423-424 (decision of January 30, 1993); vol. VI, 764 (decision of April 15, 1995); vol. VII, 803, 804, 807, 814 (decision of July 3, 1995), 824-825, 833 (decision of October 21, 1995).

c) Article 25 also empowers the court to decide, in case of conflicts of competency, on the competent judiciary institution and to act as final authority if decisions of courts of last resort contradict each other.

According to article 27 of the law n° 48/1979, the SCC may declare unconstitutional any law or decree submitted to the court in the pursuit of one of these tasks. In addition, the law attributes a special budget to the court, grants it the right to conduct its own disciplinary procedures and to manage its own pension system. Only highly qualified jurists can be admitted to the SCC. The judges of the court, once nominated, are irrevocable and cannot be transferred to another post against their will.

Who can access the court? The President of the People's Assembly, the High Council of Judiciary Institutions or the Minister of Justice acting on behalf of the Prime Minister may ask the SCC to interpret legislative texts (art. 33). The right to request a unified interpretation of legislative texts is obviously a privilege of the highest political authorities. On the other hand, all citizens concerned by contradictory decisions of courts of last resort (art. 32 referring to article 25, al. 3) and all those who are concerned by a conflict of competency between courts (art. 31) are entitled to request the SCC's help. The courts of merit may invoke the SCC's control if they doubt the constitutional character of the laws that are relevant for their decision (art. 29). Most important, in our context, is the fact that any natural or moral person implicated in a trial before an Egyptian court can ask the SCC to control the constitutionality of the laws under which her or his case is decided. If the court before which the trial is pending decides that the demand is serious and that the result of the constitutional action may exert an important influence on the outcome of the pending trial, it sets a time limit during which the persons concerned are entitled to invoke the SCC's decision on the legislative texts in question. If the SCC is persuaded that the legal standing of the petitioner justifies the request it will investigate the constitutional character of these legislative texts.

A legislative text that has been declared unconstitutional by the SCC ceases to be effective from the day following the court's decision. Such decisions have retroactive effects in penal matters and may have retroactive effects in other fields.²⁴

IV. The SCC's Interpretation of Article 2 of the Egyptian Constitution

Due to a symbolic coincidence, one of the first actions against the constitutional character of an Egyptian law was brought by the Azhar, an institution that, since the twelfth century, is one of the most important centers of Muslim religious learning and that, in the 1960s, was transformed into a state university.

²⁴ Al-Mahkama (note 22), vol. I, 98; for the application of this principle, see op. cit., vol. II, 63, 66 (decision of June 5, 1982); vol. IV, 259, 270-271, 290-292 (decision of May 19, 1990), vol. VII, 9-12 (*taqdim*).

Article two of the constitution of 1971 stated that “Islam is the religion of the state and Arabic its official language. The principles of the *sharī’a* are a principal source of the legislation”.

In 1980 the second sentence of article 2 was amended. It now has the following wording:

“The principles of the *sharī’a* are the principal source of the legislation.”

In 1978 the Azhar brought a case against its creditors who sued the university demanding it to pay interest for its delayed payments. The creditors based their claim on article 226 of the Civil Code that fixes the interest rate for delayed payments. The Azhar asked the SCC to annul the article 226 of the Civil Code because, according to the Azhar, that article is in flagrant contradiction with article 2 of the constitution. The Azhar identified “the principles of the Islamic *sharī’a*” with the classical norms of the Muslim *fiqh* and, therefore, considered that these norms had priority over all other legislative texts. In the 1970s, many courts of first instance seem to have shared this view and declared unconstitutional laws that contradicted their understanding of the constitution²⁵. The SCC finally rejected the Azhar’s request on May 4, 1985.

Implied in the Azhar’s request was the demand for a decentralized control of the constitutionality of the state’s positive law. I have not been able to consult the text of the Azhar’s petition, but the SCC renders the Azhar’s argument as follows: the constitution has recognized the principles of the Islamic *sharī’a* as

basic rules of the positive law that supersede implicitly (*naskhan dimniyyan*) all texts of the positive legislation that existed before and that contradict the principles of the Islamic *sharī’a*, because the application of these principles has become mandatory and there is no need to enact legislation that codifies them.²⁶

It is evident that such an approach entitles each judge to act according to his interpretation of the principles of the Islamic *sharī’a*. Judges would become lawgivers. The constitutional control would, by necessity, become decentralized. The SCC objected:

The argument of the plaintiff according to which the principles of the Islamic *sharī’a* are automatically applicable by the courts does not only strike down all of the preceding legislation that (presently) regulates the different civil, penal, social and economic domains and that may eventually contradict the principles of the Islamic *sharī’a*. Even more importantly, the courts will, by necessity, have to apply uncodified norms to the cases which are brought before them. The legislative texts that have been struck down will be replaced by these uncodified norms and that will lead to contradictions between these

²⁵ For the centralisation of the control of the constitutional character of laws and regulations, see the court’s first president, Ahmad M a m d ū h ‘ A t i y a , *Dirâsa muqârina tahlîliyya hawla qânûn al-mahkama al-dustûriyya al-’ulyâ*, in: *Al-Mahkama* (note 22), vol. I, 113. The author describes the opposition of various Egyptian institutions against the principle of a centralized control of the constitutionality of the legislator’s texts.

²⁶ *Al-Mahkama* (note 22), vol. III, 219-220; see also 222 (decision of May 4, 1985). Unless stated otherwise, all translations from the Arabic into English are mine.

norms, to their mutual reversal (*tahâtur*) and will seriously shake the stability [of the judicial system].²⁷

The SCC has been created to centralize the constitutional control of the legislator and the interpretation of the laws. It therefore refused to accept the Azhar's plea for a decentralized control of the legislation's constitutionality. The court based its decision on two arguments. The first one concerns the role of codified legislation in the practice of adjudication. The codification of Egyptian law began in the nineteenth century. The substitution of uncodified principles of the Islamic legal heritage for the codes that Egypt enacted in the more than hundred years of its legislation would reduce the predictability of judicial decisions to such a degree as to jeopardize the stability of the judicial system.

From this arguments follows the second one: the article two of the constitution is not addressed to the courts but to the legislator. The article 2 of the constitution, in the amended form of 1980, does not constitute new law through which the courts could replace the existing law.²⁸ It rather obliges the legislator to formulate, in the future, the legal texts in accordance with the principles of the Islamic *shari'a*. This obligation exists from 1980 on: all legislation promulgated after that date has to be in conformity with the principles of the Islamic *shari'a*. In order to secure the undisturbed functioning of the judiciary, the legislator is not required to immediately adapt the legislation that was enacted before 1980 to the principles of the Islamic *shari'a*.²⁹ The legislator is obliged to bring about this adaptation but he is entitled, according to the SCC, to do so in a long and slow process. For that reason, the legislation enacted before 1980 does not fall under the SCC's scrutiny of the constitutionality of the legal texts: the article 2 does not oblige the legislator to adapt these texts immediately to the new constitutional requirement. In other words, the article 226 of the civil code regulating the interest rate for delayed payment remained in force.

It would appear, in the light of the SCC's decision, that the principles of the Islamic *shari'a* are not *supra*-constitutional norms: they are not extrinsic to the law-making process and they are not given binding force and mandatory character by authorities that exist outside the process of legislation and constitutional jurisdiction.³⁰ It is the task of the legislator and of the judiciary that controls the constitutional character of the legislation to formulate the law in accordance with their understanding of the principles of the Islamic *shari'a*. In fact, the SCC, through its interpretation of article 2 of the constitution, establishes itself as the highest author-

²⁷ Al-Mahkama (note 22), vol. III, 214-215 (decision of May 4, 1985).

²⁸ Ibid., 214, 222-223.

²⁹ Ibid., 209-210, 212-213, 215, 221, 223.

³⁰ Baber J o h a n s e n, *Supra-Legislative Norms and Constitutional Courts: The Case of France and Egypt*, in: Eugene Cotran/Adel Omar Sherif (eds.), *The Role of the Judiciary in the Protection of Human Rights*, London/The Hague 1997, 346-376, see in particular 372-376. See also the careful analysis of Kilian B ä l z, *The secular Reconstruction of Islamic Law: The Egyptian Supreme Constitutional Court and the "Battle over the Veil" in State-Run Schools*, in: Baudouin Dupret/Maurits Berger/Layla al-Zuwaini (eds.), *Legal Pluralism in the Arab World*, London/The Hague 1999, 229-243.

ity and the instance of last resort in questions concerning not only the application, but also the definition of the principles of the *shari'a*.

V. The SCC's Interpretation of the Constitution

The SCC, the highest authority for the interpretation of the constitution, is bound to define the relationship between the principles of the Islamic *shari'a* and the rights and freedoms that Egypt's constitution grants to its citizens. The court starts from the premiss that all constitutional norms form part of an "organic unity" and cannot, for that reason, contradict each other. They are always to be conceived as complementing each other, not as being placed in a hierarchical order in which the higher norm replaces the lower one. This doctrine of the constitution's organic unity was first developed by the court's third president, Muhammad 'Alî Bâlîgh. The court, he said, in analyzing the relation between different constitutional norms, has to establish

a homogeneous understanding that transforms these norms into a coherent texture between whose parts there is no discord. The straight completion of the constitutional building will rise through this organic unity that characterizes the order of constitutional norms. This unity will realize the congruity of the texts of the constitution [...] this court has this organic unity in mind whenever a case put before it is connected with an internal contradiction that the contestant pretends to see between the legal texts that he contests and the norms of the constitution. The investigation into the existence or non-existence of this contradiction is not achieved by simply returning to those constitutional texts only of which it is said that they contradict the legislative (*qânûniyya*) texts. Rather, one has to appeal to all the constitutional norms so that the court may make sure that the contexted texts do not contradict each other.³¹

In other words, the constitutional norms do not contradict each other. They form part of an organic unity in which one norm complements the other. The true meaning of one norm may only be deciphered through its comparison with other constitutional norms. But the court in its constant jurisprudence starts from the premiss that the constitutional norms do not contradict each other and that they are not placed into a hierarchical relation in which one norm supersedes the other totally.³² Therefore, the principles of the Islamic normativity have to be interpreted in a way that does not annihilate the constitutional guarantees for the citizens' rights and liberties. "All new legislation", says the court,

has to conform to the principles of the Islamic *shari'a* and has not to transgress, at the same time, the restraining checks and limits (*quyûd*) that the other constitutional texts have imposed on the legislator in the content of his exercise of the legislative power. These restraining checks and limits – together with this new limitation – define the do-

³¹ Al-Mahkama (note 22), vol. III, 4, preface.

³² Al-Mahkama (note 22), vol. V, 94 (decision of January 4, 1992); vol. VI, 36 (preface), 141, 143, 148 (decision of February 5, 1994); vol. VII, 470, 474-475 (decision of February 3, 1996); vol. VIII, 633 (decision of May 3, 1997), 707 (decision of July 5, 1997), 819 (decision of September 1, 1997).

main in which the Supreme Constitutional Court exerts its judicial control over the constitutional character of legislative texts.³³

VI. The Principles of the Islamic *Shari'a* and the Rules of *Fiqh* in the Court's Jurisprudence

In 1931, the Egyptian legislator obliged the religious courts to apply, in the field of personal status law³⁴, the texts of the national legislation and to fill the gaps of these laws through using "the prevailing opinion (*arjah al-aqwâl*) of the Hanafî school of *fiqh*". In 1955, when the religious courts were abolished, the legislator imposed the same obligation on the secular courts. This obligation was repeated in the law n° 1/2001.³⁵

The dominant opinions of the Hanafî school of *fiqh* have never been registered or codified by any judiciary or legislative institution. They constitute an uncodified source of legal decisions that date from the eighth to the nineteenth centuries. Only the courts are bound by the authority of this uncodified law. The legislator can choose his legislative texts from wherever he wants. The Egyptian parliament, in 1929, introduced into the law of personal status a number of rules stemming from the Mâlikî school that facilitate women's divorce. The same can be said about the law 100/1985 whose introduction of changes in the maintenance payments for children and the divorce facilities for wives owed little to the Hanafî school.

³³ Al-Mahkama (note 22), vol. III, 213, see also 210, 211, 221 (decision of May 4, 1985).

³⁴ Personal status law in modern Muslim law covers a much larger area than in Occidental civil law. Article 13 of the law n° 147/1949 governing court jurisdiction and organization, here quoted from the German translation as given by Bruno Menhofer, *Religiöses Recht und internationales Privatrecht dargestellt am Beispiel Ägypten*, Heidelberg 1995, 74-75, states:

"Die Angelegenheiten des Personalstatuts [...] umfassen alle Streitigkeiten betreffend den Personenstand und die Rechts- und Geschäftsfähigkeit; im Familienrecht: die Verlobung, die Eheschließung, die gegenseitigen Rechte und Pflichten der Ehegatten, das Brautgeld (*Mahr*), die Mitgift (*Dota*), die vermögensrechtlichen Beziehungen der Ehegatten, die Verstossung (*Talaq*), die Scheidung (*Tatliq*), die Trennung, die Kindschaft, das Vaterschaftsanerkennnis und seine Anfechtung, das Verhältnis zwischen Eltern und ihren Abkömmlingen, die Unterhaltsverpflichtungen zwischen Verwandten und zwischen Verschwägerten, die Legitimation, die Adoption, die Vormundschaft, die Pflegschaft, Verfügungsbeschränkungen und ihre Beendigung; Testamente und Intestate sowie andere Verfügungen von Todes wegen; die Abwesenheit und die Todeserklärung."

Donations among spouses are no longer part of the statut personnel since they are regulated in the civil code of 1948, article 486, see Menhofer, 75. Menhofer underlines that in spite of the fact that article 13 of the law n° 147/1949 has been abrogated in 1965, its definition of the statut personnel continues to be used in Egypt's legal literature.

³⁵ Baber Johansen, *The Constitution and the Principles of Islamic Normativity Against the Rules of Fiqh*. A Judgment of the Supreme Constitutional Court of Egypt, in: Muhammad Khalid Masud/David S. Powers/Ruud Peters (eds.), *Seeking Justice in Muslim Courts: Qadis, Procedures and Judgments*, Leiden (forthcoming).

To impose on the courts, in 1931, the obligation to apply the dominant opinion of the Hanafî school of *fiqh* was evidently a means to unify the judiciary's interpretation of the law of personal status.

The SCC, when deciding on the constitutionality of Egyptian laws, does not consider itself bound by the Hanafî (or other *fiqh* schools) doctrine. The SCC's understanding of the principles of the Islamic *sharî'a* can best be followed in its jurisprudence in the field of personal status law. I choose five judgments to illustrate the reasoning of the SCC. The first judgment concerns the constitutionality of the law n° 100/1985 and the way in which it grants the first wife the right to demand a divorce from her husband in case he concludes a polygynist second marriage.³⁶ The other four decisions concern maintenance payments to wives or children. All five judgments were pronounced between March 1994 and May 1997.³⁷

In these decisions, the SCC distinguishes between those principles of the *sharî'a* that have a metahistorical validity and are not affected by changes in time and space (*mabâdi' qat'iyya*) and others that are the product of human reasoning (*al-abkâm al-zanniyya*) and have to be adapted to the changes in and between societies. The court holds that "norms of the *sharî'a* that are definite and final as far as their occurrence and their meaning is concerned" (*al-abkâm al-shar'iyya al-maqtû' bi-thubûtibâ wa-dalâlatihâ*) leave no room for individual legal reasoning (*ijtihâd*). They simply have to be accepted. No legal rule can stand in their way, because these are "the universal principles of the Islamic *sharî'a*, its firm roots that do not tolerate interpretation or substitution".³⁸ Changes in time and space do not affect their meaning. As far as these universal principles are concerned, the SCC wants to restrict its task to the role of a controller who sees to it that "they are adhered to and enjoy priority over any legal rule that opposes them".³⁹

I have not come across any judgment of the SCC that makes a metahistorical, definite and final rule of the *sharî'a* the object of a decision by the court in the sense that this norm appears in the lines that summarize the decision. But in the SCC's judgment on the right to divorce granted by the article 11 *bis* of the law 100/1985 to the first wife of a husband who enters into a second and polygynist marriage, the court treats polygyny as an unchangeable right of every Muslim man that cannot be affected by changes in time and space.⁴⁰ The SCC claims, that its interpretation of the law in question is binding for each and everyone and it defines the woman's right to divorce rather narrowly, as the special form of the general *sharî'a* principle that harm done to the wife entitles her to request a judicial di-

³⁶ Al-Mahkama (note 22), vol. VI, 351-357 (decision of August 14, 1994).

³⁷ Al-Mahkama (note 22), vol. VI, 231-256 (decision of March 26, 1994); vol. VII, 347-387 (decision of January 1, 1996); vol. VIII, 506-521 (decision of March 22, 1997); vol. VIII, 611-638 (decision of May 3, 1997).

³⁸ Al-Mahkama (note 22), vol. VI, 232, 237, 249 (decision of March 26, 1994); vol. VII, 353 (decision of January 1, 1996).

³⁹ Al-Mahkama (note 22), vol. VI, 232, 237, 249 (decision of March 26, 1994); vol. VII, 353, 372 (decision of January 1, 1996).

⁴⁰ Al-Mahkama (note 22), vol. VI, 333, 338, 339, 350 (decision of August 14, 1994).

voiced. The SCC, in this context underlines that the harm cannot be the polygynist marriage itself, but only a harm resulting from it or being connected to it, so as to make sure that the law does not contradict the man's right to polygynist marriages.

Otherwise, the SCC is careful not to list the "norms of the *shari'a* that are definite and final as far as their occurrence and their meaning is concerned". A long list of universal principles that defy legal reasoning and enjoy priority over all other norms could put into jeopardy the court's interpretation of the constitutional norms as complementary elements of a system of "organic unity" that do not contradict each other and do not mutually exclude each other. The court seems to avoid such a danger by increasingly referring to these norms as "universal principles" or the "teleology of the *shari'a*" (*maqâsid al-shari'a*)⁴¹ and to define them as the "framework" in which the development of legal norms has to take place. In a judgment of May 3, 1997 the court defines these "finalities of the Islamic *shari'a*", using a twelfth-century definition of them, as the "protection of the religion, the body, the reason, the honour and the property".⁴² Such a definition of the unchanging elements of the *shari'a* as universal principles, rather than individual norms, can, in fact, easily be reconciled with the court's concept of the "organic unity" of the constitutional norms.

The court contrasts the definite and final rules of the *shari'a* with those that are based on human reasoning (*ahkâm zanniyya*)⁴³ and that are, therefore, subject to change. The adaptation of these rules to changing circumstances and conditions, is, according to the court, an indispensable mechanism by which the *shari'a* preserves its flexibility. The formulation of new norms on the basis of individual or collective legal reasoning (*ijtihad*) is, according to the SCC, a mechanism built into the *shari'a* that enables it to survive as a system of legal and ethical norms under different historical conditions.⁴⁴

The court, therefore, holds that each and every legal norm can be changed as long as the change takes place in the framework of the finalities of the *shari'a* and corresponds to an interest that is legally relevant.⁴⁵ It refuses, I quote, "to confer a holy character on the legal opinions of any one of the *fiqh* scholars in any matter concerning the *shari'a* (*wa-lâ tudfî qudsiyyatan 'ala aqwâli abadin mina l-fuqahâ' fî sha'nin min shu'ûnihâ*)".⁴⁶ In other words: the *fiqh* norms do not

⁴¹ Al-Mahkama (note 22), vol. VI, 239-240, 242, 254 (decision of March 26, 1994).

⁴² Al-Mahkama (note 22), vol. VIII, 629 (decision of May 3, 1997). The twelfth-century definition, that since has won general recognition among Muslim jurists, was developed by Abû Hâmid Muhammad al-Ghazâlî, *Al-Mustasfâ*, part 1, Cairo 1937, 140.

⁴³ Al-Mahkama (note 22), vol. VII, 353, 372 (decision of January 6, 1996); vol. VIII, 703 (decision of July 5, 1997).

⁴⁴ Al-Mahkama (note 22), vol. VII, 349, 353, 356-357, 372, 375-376 (decision of January 5, 1996); vol. VIII, 703, 706 (decision of July 5, 1997).

⁴⁵ Al-Mahkama (note 22), vol. VII, 356 (decision of January 5, 1996); vol. VIII, 706 (decision of July 5, 1997).

⁴⁶ Al-Mahkama (note 22), vol. VII, 356-357 (decision of January 5, 1996); vol. VIII, 630 (decision of May 3, 1997), 706 (decision of July 5, 1997).

necessarily represent the *shari'a*. The fact that they are not identical with the positive law of the national legislator of the twentieth century cannot, according to the court, be construed as a deviation of the lawgiver from the *shari'a*. The SCC holds that the legal reasoning of the present lawgiver, the “deciding authority” (*waliyy al-amr*) in the court’s parlance, enjoys priority over the legal reasoning of past generations as long as it remains within the framework of the universal principles of the *shari'a*.⁴⁷

The SCC has put this reasoning into practice. It has turned down actions of fathers who demanded that the court declare unconstitutional the article 18 *bis* (2) of the law n° 100/1985 that holds the father liable for the maintenance of his children “from the date on which he refuses to provide them with maintenance”. The plaintiff claims, with good reasons, that this article contradicts the dominant doctrine of the Hanafi school of *fiqh*. According to this doctrine, the father’s unpaid maintenance dues for months or years past become his personal obligations only under a set of specified conditions that are difficult to bring about for the children.⁴⁸ In the name of the article 9 of the constitution that obliges the state to protect the family and in the name of the principles of the *shari'a*, the SCC refuses to adhere to the idea that the article 2 identifies the doctrine of *fiqh* schools with the principles of the *shari'a*.

The protection of the family, according to the SCC, requires that the father who fails to pay his children’s maintenance will be forced to do so. Only a strong government that follows its own independent legal reasoning can create the laws necessary for such a policy and oblige the father to comply with them. For these and other reasons, the political authorities’ effort of independent legal reasoning has to have precedence over the legal reasoning of the generations of past *fiqh* scholars. The norms of the *fiqh* scholars do not necessarily represent the principles of the Islamic *shari'a*. The court, attacking the Hanafi doctrine on maintenance payment for children, states:

There is no proof that to defend this doctrine serves the interest of the family and guarantees the strengthening of the mutual compassion between the family members. In fact, it contradicts the essence of their relations and may lead to its destruction. The change of time calls for the abandoning of this type of legal reasoning so as to keep operational the flexibility that the Islamic *shari'a* encompasses in its practical norms. These are open for development, mindful of the law’s ties to the interest of the people and their renewed needs and their changing practices as long as they do not conflict with a definite revealed rule. This flexibility contradicts (the idea) that the political authorities are fettered by specific legal opinions and not allowed to deviate from them or that their effort of legal reasoning should stand still at a moment in time already left behind by those interests that are legally relevant. This Islamic *shari'a* in its roots and sources develops by necessity, and rejects all deadlock and standstill (*jumûd*). In the realm of questions that are not settled by revealed texts, the effort of individual legal reasoning (*ijtihad*) cannot

⁴⁷ Al-Mahkama (note 22), vol. VIII, 612, 629-630, 635 (decision of May 3, 1997).

⁴⁸ For the details, see Johansen (note 35).

be bound by anything except by the general rules and by those reasons that prevent us from paralyzing the teleology of the sacred law. In this framework, it is a rational duty, a requirement of religious ethics, it serves the realization of legally relevant interests to abandon the assumption defended by the Hanafi-s and their followers.⁴⁹

The constitution and the principles of the Islamic *shari'a* may, in this way, form a common front against rules of *fiqh* that no longer correspond to the exigencies of the present society.

The SCC uses the same kind of reasoning in a judgment of December 15, 2002, that is to say, five years after the decisions just quoted. In this judgment, the SCC rejects the claim of a husband whose wife had obtained a judicial divorce against the will of her husband. She had based her claim for a judicial divorce on the article 20 of the law n° 1/2000⁵⁰. This law settles – among other things – the right of a wife to a judicial divorce (*khul'*) from her husband, even if the husband did not commit any fault and if he does not consent to the divorce. It is the first time in the Egyptian legal history, that the law grants married women the right to bring an action for judicial divorce against the will of their husbands even if these are not guilty of any fault and did not cause any damage to their wives. But this right, according to the law, is conditional on the wife's renunciation of all her financial claims against her husband: she has to redeem herself in order to obtain a judicial divorce.⁵¹ The husband, in the case in question, claims that article 20 of the law n° 1/2000 contradicts the *shari'a* and, therefore, the article 2 of the constitution.

The SCC holds, in his judgment, that the authorities who decide in matters concerning the body politic cannot promulgate laws or regulations that contradict definitive *shari'a* norms. The matters settled by such norms cannot be regulated by legal rules established through independent legal reasoning (*ijtihad*). But rules of the *fiqh* that are based on human legal reasoning, the “conjectural norms” (*ahkâm zanniyya*) do not have the same status:

These [conjectural norms] fall into the range of the effort of independent legal reasoning (*ijtihad*) [that serves] to regulate the affairs of God's servants and to guarantee [the realisation] of their interests, [interests] that change and multiply with the development of [social] life and the changes of time and space. Whereas such an independent legal rea-

⁴⁹ Al-Mahkama (note 22), vol. VI, 252 (decision of March 26, 1994). For a slightly different French translation of this text, see Baudouin Dupret, A propos de la constitutionnalité de la shari'a: Présentation et traduction de l'arrêt du 26 mars 1994 (14 Shawwal 1414) de la Haute Cour Constitutionnelle (*al-mahkama al-dusturiyya al-'ulyâ*) égyptienne, Islamic Law and Society, vol. 4, n° 1 (January 1997), 99-113.

⁵⁰ Majallat hay'at qadâyâ al-dawla, n° 187, year 47, n° 3 (July-September 2003), 56-63. I owe access to this text to the courtesy of Professor Omaia Elwan.

⁵¹ The law n° 1/2000 has been published in the *Journal Officiel (jarîda rasmiyya)* n° 4 (January 29, 2000) under the title *Qânûn raqam (1) li-sanat 2000 bi-'isdâr qânûn tanzîm ba'd awdâ' wa-'ijrâ'ât al-taqâdî fî masâ'il al-ahwâl al-shakhsiyya*. It regulates questions of court competencies in personal status matters and is to be applied when the laws of civil and commercial procedure and proof or the Civil Code do not regulate the matters that the legislator settles in this law. Article 20 of the law contains the new *khul'* regulation. I translate *khul'* in the text as “judiciary divorce” because it has to be pronounced by a court. It differs from the classical *fiqh* in that the *khul'*, according to this law, no longer is a consensual settlement.

soning is licit and commendable if [brought about] by the *fiqh* specialists, it is much more mandatory and appropriate [that it should be brought about] by those who decide in matters concerning the body politic (*waliyy al-amr*). These [authorities] have to exert their effort in order to infer from the particular indicant [of the *shari'a*] the legal norms concerning those questions that are not settled by [revealed] texts. They have to apply (*ya'mal*) the judgment of reason in order to arrive at those practical regulations that are required by God's justice and mercy for His servants and that are accommodated by the *shari'a*. The *shari'a* does not attribute holiness to any opinion of any *fiqh* specialist. The *shari'a* does not forbid to reexamine, evaluate and replace such opinions as long as the real interest of the community is respected, [the interest] that does not contradict the highest aims of the *shari'a*.⁵²

Applying these principles to the case brought before it, the SCC reasons as follows: the right of the wife to a divorce is clearly recognized by the Koran and the normative praxis of the Prophet, the *sunna*. But the details of the execution of this right have been discussed controversially among the specialists of the *fiqh*. In order to clarify the matter and to facilitate the judiciary's task, the legislator intervened and promulgated the law n° 1/2000. This law takes into consideration the solution of the Mâlikî school of *fiqh*. It makes the judicial divorce conditional on (a) the proof that the couple's reconciliation is impossible and (b) the wife's relinquishment of all her financial claims against her husband:

This is the pure use of rational thought to the degree required by necessity and in a way that does not contradict the purposes of the Islamic *shari'a* and that takes into consideration its fundamental rules (*bi-murâ'ât usûlihâ*). In this case, the separation of the two married partners serves the interest of both sides simultaneously. It is not licit to force the wife against her will to live with her husband after she declared that she hates the life with him, that there is no way to continue their married life and that she is afraid that her hatered [of her husband] will not allow her to respect the limits that God has imposed. This has led her to redeem herself and to renounce, in his favour, all financial claims that the law grants her and to pay back to him the bridal dower that he gave her. To say that [such a judicial divorce] is conditional on the husband's approval means that one forces the wife to continue a way of life that she hates. [To force her to continue such a life] removes the marital life from its very foundations: tranquillity, love and mutual respect. The husband who has been liberated from all financial burdens that arise from the repudiation, is thus led to keep his wife who hates him for the only purpose of harming her. The Islamic *shari'a* forbids such causation of harm and the Islamic belief (*'aqîda*) suffers from it in the ethical perfection and lofty behaviour on which it is grounded. This causation of prejudice contradicts a basic norm of this *shari'a*: no harm and no detriment.

[...] the contested text is fully inspired by the norms of the Islamic *shari'a*.⁵³ In its basic rule it relies on a norm [of the *shari'a*] that is definitively established (*qat'iyy al-thubût*). In its details it follows the doctrine of one of the schools of *fiqh*. In this way it concords in its entirety with the rules of this lofty *shari'a*. The contestation that blames it

⁵² Majallat hay'at qadâyâ al-dawla, op. cit.(see note 50), 58.

⁵³ Literally: "drinks from the rules of the *shari'a* its complete spring".

for contradicting the *shari'a* and, therefore, the article 2 of the constitution, is invalid and has to be rejected⁵⁴.

In other words, if it is definitively established that a revealed norm exists that regulates a certain problem and if the legal effects of this norm concerning this problem are unanimously agreed upon, the legislator and the courts have to abide by this norm. If the revealed norm definitively exists but its legal effects are not unanimously agreed upon, the state legislator is entitled and even obliged to give his own interpretation so as to facilitate and unify the judiciary's decision in these matters. If *fiqh* norms are not based on clearly established revealed norms, the legislator is free to disregard those rules of the *fiqh* that are based only on the legal reasoning of the jurists of the past. The lawgiver can replace their reasoning by his own that is more appropriate to the circumstances of his own time and society. In this case, the legislator can either choose to replace the classical *fiqh* by his own decisions or he can choose the doctrine that one of the different schools of *fiqh* developed. The legislator is not bound by any particular school doctrine but if it can be shown that one of them corresponds to the promulgated law such a reference is sufficient to prove the compatibility of this law with the *shari'a*.

VII. The Article 2: An Article In and Not Above the Constitution?

The SCC, according to its constant jurisprudence, is the institution of last resort in all matters concerning the legal effects of the principles of the *shari'a*. The legislator may interpret these norms through its legal texts, but it is the SCC that controls the constitutionality of this legislation and that defines its validity for Egypt's judiciary and for the legislator. Outside the court, there is, of course, an ongoing and wide-ranging discussion on the relation of the principles of the *shari'a* to the positive law. But this discussion is not institutionally linked to the court and the judiciary system. It reaches the court only in the form of actions pleading the unconstitutional character of laws or regulations. There is no legally binding representation of the principles of the *shari'a* extrinsic to the court. The SCC defines them and, thus, decides on the metahistorical or historical character of these norms. At the same time, the court decides on their relation with the other elements of the constitution and the norms of the *fiqh*. In other words, the legal effects of the principles of the *shari'a* are entirely controlled by this state court. All this seems to suggest that the article 2 should be seen as an article in and not above the constitution, much as the court is part of the judiciary system and not an institution above it. There are elements in the SCC's jurisprudence that seem to put this definition into question. I have tried to show the most important of them. All in all, I am convinced that the SCC represents one of the most interesting efforts in the modern Arab constitutional judiciary in that it tries to combine Islamization

⁵⁴ Majallat hay'at qadâyâ al-dawla, (note 50), 60-61.

and democratization. In the course of its efforts to bring about a normativity that is Islamic and democratic, it often defines the principles of Islamic normativity as universal and metahistorical indicators of the aims that an Islamic normativity has to fulfil and opposes them to the legal heritage of the *fiqh*, that on many questions is considered to be a historically dated interpretation of the *shari'a* that no longer corresponds to the requirements of a political and legal system that demands far-reaching changes.