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Dilemma of applying Islamic sharia'a through takhayur and talfiq principles in the modern Egyptian legal system

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A Thesis Submitted to the

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By

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DEDICATION

I dedicate this paper to my dear daughter Maleeka who inspired me to finish this work. Special dedication also to my mother and sister who have supported me from the beginning of my masters. And last, but not least, a very special thanks to my wife who suffered a lot with me. I started my masters just two weeks after our marriage, and she has supported me with love and care throughout, so thanks a lot my love.

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DILEMMA OF APPLYING ISLAMIC SHARIA'A THROUGH *TAKHAYUR* AND *TALFIQ* PRINCIPLES IN THE MODERN EGYPTIAN LEGAL SYSTEM

Aly Abdul-Rahman Abdul-Mouty Ahmed

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ABSTRACT

For many Egyptians, the only path to modernity in the Egyptian legal system is believed to be through utilizing Islamic ***sharia'a***. Between the nineteenth and twentieth centuries, the Egyptian legal elite worked to introduce a modern interpretation and application of Islamic ***sharia'a***. The Islamic principles *takhayur* and *talfiq* were used to do this. While the main usage of *takhayur* and *t*alfiq was to legitimize the modern legal system by maintaining the usage of Islamic ***sharia'a***, the legal practice reached a contradictory outcome. The Courts have been unable to decide on the exact relationship between Islamic ***sharia'a*** and other legal texts. This confusion has produced ambiguity and uncertainty in legal practice. This situation of uncertainty in the legal system is inevitable because of the differences in the underlying nature and philosophy of the modern and ***sharia'a*** legal systems. Accordingly, the Egyptian legal system may require additional secular reform to reduce the uncertainty by stressing the superiority of the legal text.

TABLE OF CONTENTS

I. Introduction

Since the 25th of January uprising, laws has been at the core of discussions among Egyptians. Egyptians generally believes that laws are closely connected to the political system, and that developing and amending laws is an important avenue for solving many problems. Despite the fact that the development of laws is demanded by most Egyptians, there is no clear understanding of an appropriate path. Debates about how to best develop Egyptian laws often ends with disagreement on the identity of laws, and specifically whether they are Islamic or secular.

Followers of the debates within Egyptian communities will easily note how the debate often focuses on Islamicity. Even the non-Islamic political groups, whether socialist or mainstream liberal, defend their point of view based on the level of Islamicity of their views and conformity with Islamic legal jurisprudence or *fiqh*.

There is a confused understanding of legal development through the traditions of Islamic *Sharia'a* and *Fiqh*. This is based on ignorance of the nature of both the Islamic and modern legal systems. Modern law is based on the existence of only one legal answer to every legal problem, but Islamic application is based on the existence of multiple legal answers from the different Islamic schools or *madhabs*. So while a modern law system supports one set of connected legal rules for governing, Islamic jurisprudence has its different schools each with its own understandings.

In modern law, all people are obliged to follow the same legal rule; jurists' opinions are not obligatory for any court or state authority to follow. But under the *sharia'a* system, deciding the applicable rule depends on the free will of people and which schools they favor. This difference is very important to understand when considering the melding of both secular and Islamic systems.

This research discusses the application of Islamic principles, *takhayur* and *talfiq,* in the modernization of the Egyptian legal system. It has not created a modern legal system, rather it has created a hybrid legal system with tensions between the ideologies of both *sharia'a* and modernity evident.

The research focuses on an understanding of the historic chronology of the introducing of modernity into the Egyptian legal system, through exploring opinions of well-known thinkers such as Muhammad Abdou and Abdulraziq Al-

Sanhuri in addition to Western influence. It shows how this hybrid modernity has led to problems in the application. This is because of the principles of *takhayur* and *talfiq* in and of themselves has not lead to the Islamizing of the legal system but rather the creation of rigidity in the developing of laws due to the divine nature of Islamic rules. This is clarified in the discussion of Court rulings regarding the interpretation of Article 2 of the Egyptian Constitution, and Article 60 of the Egyptian Penal Code.

The amendment of family laws in 2000 is an example of the hybrid legal system issue. Many social groups opposed such amendment claiming that the new code is less Islamic than the old one. This claim is based on the allowance of self-divorce for women, or *Khul',* in the new code. This is a clear application of *takhayur* and *talfiq* whereby the new text adopted the minor opinion of a group in the *Malikite* School which believes that self-divorce is granted according to their understanding of a prophetic telling.[1] However, many legal experts believe that this law is not in conformity with Islamic ***sharia'a*** and defend the old law as being much more Islamic. At the same time however *takhayur* and *talfiq* was also utilized in the former family law to generate the former rules of marriage. The rejection was not based on the usage of *takhayur* and *talfiq*, but was directed more towards the believed Islamicity of the former law against the new amendment.[2]This is a clear example of the problematic situation of considering state modern laws incorporating Islamic ***sharia'a***. Of course this Islamic dialogue is present in some laws more than others, such as family, criminal and civil laws. But the effect of such a linkage between religion and law affects the legal and political practice as a whole.

This paper argues that modernizing Egyptian laws through Islamic ***sharia'a*** principles of *takhayur* and *talfiq* has confused the understanding of the position of Islamic ***sharia'a*** in the modern legal system. This confused understanding is a result of differences between both Islamic and modern legal systems. This is seen in the Egyptian high courts' decisions regarding the interpretation of Islamic ***sharia'a*** and its position in the legal system.

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[1] *See* Oussama Arabi, *The Dawning of the Third Millennium on Shari': Egypt's Law no. 1 of 2000, or Women May Divorce at Will*, Vol. 16, No.1 ALQ (2001), pp. 2-21**.**

[2] *See* J.N.D. ANDERSON, LAW REFORM IN EGYPT: 1850-1950, POLITICAL AND SOCIAL CHANGE IN MODERN EGYPT, at 209-230, in P.M. HOLT (ED.), London: Oxford University Press, 1968.

I. INTRODUCTION

The following chapter gives a brief background on the transition from the traditional legal system to the current one. This will be shown through the historic reasons for and the philosophy of using *takhayur* and *talfiq* to modernize the legal system. The third chapter analyzes for the use of *takhayur* and *talfiq* in the modern legal system. It focuses on the differences between *sharia'a* and modern legal system, and the unprecedented results of that application. In chapter four, Article 2 of the Egyptian constitution which states that Islamic *sharia'a* is the principal source of legislation, will be analyzed through the judicial verdicts from the Court of Cassation and the Supreme Constitutional Court. In chapter five, Article 60 in the Egyptian Penal code which exempts actions committed in accordance with Islamic *sharia'a* from the application of penal code, will be analyzed. It will be shown through the Court of Cassation verdicts how the *sharia'a* interpretation is very problematic and that the court has classified it at times as being superior to the legal text, and at other times as being inferior to it. The court also uses Islamic *sharia'a* to defend the existing laws and to interpret its legal texts.

II. From Traditionalism to Modernity: The Path of The Egyptian Legal System

Starting in the late nineteenth century, the Egyptian legal system has been transformed from the traditional Islamic *Sharia'a* system into a more modern legal system. This transition has been accompanied by extensive juridical and legal reform. Since this transitional phase, an extended debate regarding the Islamicity of the Egyptian legal system compared to the secular western laws has occurred. This debate has been led by modernist thinkers, whereby they have introduced their new vision and understanding of Islamic *Sharia'a* laws. The modernist thinkers are not only legal figures such as Abdulraziq Al-Sanhuri, but also religious figures such as Muhammad Abdou who headed the religious institution of *Dar el-e'ftaa'* as the *Mufti*. From the beginning it was clear that reform of the legal system and the traditional application of Islamic laws was required. This necessity was aroused by several problems faced by Egyptians during that time especially after the colonization era. While this reform targeted the clarity of the legal rule, it embedded legal uncertainty as it progressed.

One of the major ideas of that movement was introducing Islamic *fiqh* techniques as a development tool. It was thought that legal reform was possible through Islamic *sharia'a* itself. One of the techniques was borrowing the concepts of *takhayur* and *talfiq* from the classical application of Islamic *sharia'a* to introduce legal reform. Although the usage of these techniques was a brilliant innovation, the problematic understanding of the situation of Islamic *sharia'a* in the modern legal system would later introduce contradictions and ambiguity in their application, which continue to this day.

In this chapter, the traditional understanding of *takhayur* and *talfiq* will be introduced through their legal and religious application. The second part focuses on the necessity of an emerging new modern legal system. The ideas of Egyptian legal thinkers and the legal and political situation of the Egyptian state will also be explored.

A. *Takhayur* and *Talfiq*:

The application of Islamic *sharia'a* is historically known through the understandings of various schools or *madhabs*[3]. The Islamic application of divine

[3] To understand the meaning of *Madhab*, *see* W.B.HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW, 150, (Cambridge University Press, 2005).

regulations was generally achieved through different methods of interpretation of religious texts of the holy book Quran, and the prophetic sayings or *Hadiths* of the Islamic Prophet Muhammad. The method of interpretation of the religious texts depended on particular historical chronologies that differed from one school to another; each method of understanding represented a separate school or *madhab*. Each school had its own logic to achieve its particular legal outcome, whether through established legal rules or general understanding of Islamic *Sharia'a*. Traditionally, it was a common practice to apply the jurisdiction of different Islamic schools or *madhabs* at the same time. But not every school had the same chances to be applied. It depended historically on a school's popularity and reputation, or the state's support for such school.[4] Accordingly *takhayur* and *talfiq* techniques emerged due to the existence of different jurisdictions of Islamic schools. *Takhayur* and *talfiq* were organized differently by the traditional Islamic schools. In the following section brief definitions of *takhayur* and *talfiq* will be illustrated with examples of its traditional application and the position of the modern Islamic religious institution of *Dar el-e'ftaa'*.

1. *Takhayur* Definition:

Firstly *takhayur* means literally: the selection. It represents the process of choosing among the different opinions of Islamic scholars and *madhabs* with no limitation on the range of Islamic schools.[5] It is based on the well-known principle that "an ordinary layperson is not a school follower" or "*Al-'amy la' mazhab lahu*".[6] This means that each ordinary human being who is not a scholar or a student of one of the scholars or *sheikh*s, has the right to choose among the different opinions and select whichever opinion applies best to his personal issue.[7]

This principle of *takhayur* was widely accepted in Islamic *sharia'a.* Most Islamic schools did not deny the right of each person to utilize *takhayur*, as long as he/she was committed to the opinion of the selected school. For example, if

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[4] *See generally* W.B. HALLAQ, SHARI': THEORY, PRACTICE, TRANSFORMATIONS, 159-221, (Cambridge: CUP, 2009).
[5] *Id,* at 448*.*
[6] *See* Dr. Abdulaziz Ezzat El-Khayat, *Al'Akhz Bel Rukh'as wa Hukmahu*, Vol. 8, MAJALLAT MUJAMA' AL-FIQH AL-ISLAMI, at 237-255, (2010), available at http://shamela.ws/browse.php/book-8356/page-12243#page-12245; also see the *Taqlid* And *Talfiq Section* on The official website of Egyptian Dar el-e'ftaa website, 20/11/2012, http://dar-alifta.org.eg/AR/ViewFatawaConcept.aspx?ID=127, (last viewed 1/9/2016).
[7] *Id.*

following the *Hanafite* school in marriage, all issues related to the marriage and divorce required the consideration of the *Hanafite* School.[8]

2. *Talfiq* Definition:

Secondly, *talfiq* means the connecting, mixing or amalgamation of schools' opinions. Sometimes a person may combine different opinions of Islamic schools and *madhabs* to reach a new opinion. This is known as *talfiq,* which is an amalgamation of two jurisprudential opinions in order to achieve a third outcome found to be more beneficial. Accordingly, *takhayur* is the first step taken towards *talfiq*. But unlike *takhayur*, the *talfiq* technique was disputed in the traditional Islamic schools.[9] This is because the application of *talfiq* led to new applications of legal rules that may contradict with the logic of ordinary schools. In general Islamic schools were keen on applying their vision of sharia'a, but *talfiq* led to the application of new hybrid opinions that do not represent a single school.

3. Application of *Takhayur* and *Talfiq* in The Traditional Islamic Context:

To best understand the controversy, it is important to understand that in Islamic *Sharia'a* there is a differentiation between relations between people, or *Moa'amalat,* and one's relation to God, or *A'aebadat*. In the *sharia'a* application, the Islamic principles are applied in both instances. Accordingly, *takhayur* and *talfiq* can be applied to the rules organizing religious obligations such as prayers, or intra-personal relations such as contracts and marriage. Traditionally, it was acceptable for *takhayur* and *talfiq* techniques to be used by individuals between each other or to God, but this did not apply to state authorities, unlike the modern trend of its use by the legislative authorities.[10]

Islamic schools took different positions regarding the application of *talfiq.* Some schools strictly limited its scope of application, while others broadened the scope. To understand the traditional understanding of *talfiq*, it is important to differentiate between two types of amalgamation or *talfiq* whether through branches of *Sharia'a* or within certain issues related to one of the sharia'a branches. For

[8] *Id* 6, also *supra note* 2 at 420-421, Modernizing Egyptian law.
[9] *See supra* note 6.
[10] *Supra note 2,* There was another tool of justification for the governor's actions which is *al-Syasa al- Shara'ia* but *takhayur* and *talfiq* were not generally from these tools, *supra* note 4.

example, if one person applied the opinions of one scholar in his prayers, and opinions of another scholar in his commercial relations, it is known as *taqlid* or the "following" of scholars. It is considered to be a form of *takhayur* only, with no *talfiq* or amalgamation taking place.[11]

The second form of application to particular issues is the *talfiq*, which means mixing the opinions of two different scholars to reach a third opinion. For example, *talfiq* is exhibited when a man marries a woman with no custodian or *wali* in accordance with the *Hanafite* School; the same person requires the custodian's approval for his second marriage in accordance with the *Shafiite* School. Here, the same man uses two different and contradictory opinions of scholars to conclude his two marriage contracts.[12]

Generally, Islamic scholars classify *talfiq* into three types: the rejected, the possibly accepted and the preferably accepted.[13] Most classical schools limit the *talfiq* to particular cases, widening the scope of the rejected *talfiq.* Their justification for widening the scope of rejection is that *talfiq* is meant to ease the life of Muslims where different Islamic schools exist, but talfiq is not to waste the essence of Islamic rule through chasing exceptions or *rukhas* of different opinions.[14]

There are several conditions set by these scholars for *talfiq* to be valid. Firstly it must not follow the exceptions and allowances, or *rukhas*, because such following wastes the purpose of the *sharia'a* rule. One example of that is employing *talfiq* among different schools' opinions to conclude a marriage contract with no witnesses, custodian or the marriage payment or *mahr*.[15] Secondly, it must not affect the legal impact and consequences of the opinions employed. For example, if someone claims that according to most Sunni schools all alcohol, or '*Anbeeza,* is strictly forbidden, or *haram*, and according to the *Hanafite* School, alcohol or *'Anbeeza*, except wine, is not forbidden as long as a

[11] *Supra* note *4,* and *supra* note 6
[12] *See* Fahd Bin Abdul Rahman Al-Yahia, *Dwabet el-ikhtiar bayn Aqwal Al-Foqaha' fe masa'il El-Iktsad El-Islami*, or *Guidelines for Selection from the Statements of Muslim Jurists in Matters Relating to Islamic Economics*, at 515-560, (The Seventh International Conference Of Islamic Economy Working Paper Group, April 2008, available at http://www.kau.edu.sa/Files/121/Researches/56917_27234.pdf).
[13] *Supra* note 6.
[14] *See supra* note 6.
[15] *Supra* note 4 and 6.

person does not get drunk. Deduction from the first opinion that wine is a form of alcohol, and then another deduction in accordance with second opinion that wine is not haram as long as no person gets drunk is a form of the rejected *talfiq*.[16] Thirdly, the most essential condition for talfiq to be valid is that it must be concluded by an ordinary layperson or *Al'amy*, who is not a scholar, follower, or student of any *madhab*. However, there were minor opinions accepting the application of *talfiq* by the governor or *sahib wilaya*.[17]

4. Current Official Religious Institution Position

The official institution of *fatwa* in Egypt, *Dar el-e'ftaa*, describes the *talfiq* as an accepted tool as long as it is not against the consensus of scholars or *ijmaa'*, because it is a tool of convenience and development of the people's interest.[18] This institution represents the new trend of Islamic thinking by widening the scope of application of *talfiq* to ease the requirements of life. This coincides with modernist elite thinking about the application of *Sharia'a* in modern law. *Dar el-e'ftaa* makes one single limitation on the application of *talfiq* that is that it not contradict with *Ijmaa'* or the consensus of scholars and jurists of a certain age. According to this understanding of *Dar el-e'ftaa* every age has its own special *Ijmaa'* that must be followed. Accordingly in modern times, the *Ijmaa'* application is narrowed to a few consensual opinions only which allows greater *talfiq* application.

To sum up *takhayur* and *talfiq* are Islamic techniques that have been utilized to solve the problems associated with the multi-jurisdiction of Islamic schools within the same society and under the same authority. While *takhayur* is generally accepted by them, the *talfiq* is limited by most schools, the modern religious institution of *Dar el-e'ftaa'* has widened the scope in favor of modernism.

B. The Necessity of A New Understanding of Islamic Law

Modernism was introduced to the Egyptian state and society with the French invasion of Egypt between 1798 and 1801. Since this time, the Egyptian state and social elite have become increasingly interested in successful modern models of European states. This interest and admiration is not separate from the complex and problematic application of the traditional Islamic legal system.

[16] *See supra* note *2.*
[17] *Supra* note 6 and 12.
[18] *See supra* note 6.

II. FROM TRADITIONALISM TO MODERNITY: THE PATH OF THE EGYPTIAN LEGAL SYSTEM

Reform of the legal system was a very accepted idea especially in the second half of the nineteenth century. The ideology of modernity challenged the Islamic understanding of a legal rule and its application. The conservative Islamic elite rejected the reform on the basis of Western legal systems. In addition to the social and political interest in maintaining the Islamic religious system, the state joined the side of the conservatives in rejecting modernism. Such state support did not last for a long time because of the unprecedented application of Western laws in the Egyptian territories which increased interest in developing the legal system. Accordingly, the only accepted proposition of modernity is that linked to Islamic *sharia'a* to avoid the complications of the traditional system and to maintain the religious sentiment of the social and political elite. Historically, most modern reform ideas were represented in the Islamic context and as a valid application of Islamic *sharia'a*.

The following section will briefly describe the historic reasons for requiring reform of the judicial and legal system. This is followed by a discussion of the most important ideas of modernity introduced to Egyptian society since the nineteenth century by the most influential thinkers of the time, most notably Rifa'a Tahtawi, Muhammad Abdou and AbdulRaziq Al-Sanhuri.

1. Required Judicial And Legal Review

To understand the necessity for modernizing the legal system in Egypt, it is useful to understand the legal system existing at that time and understanding Western influence and interference in the Egyptian legal system.

a. The Existing Legal System

Until the second half of the nineteenth century, the Egyptian legal system was completely based on the traditional application of Islamic laws or *sharia'a*, which is based on the principle of authority or *wilaya*. The traditional principle of *wilaya* means that the governor's authority is the rightful author or *waly al'-amr* which includes the judicial authority. According to this theory there is no clear distinction between the judicial authority and the executive one. Governors, ministers, chiefs of state different councils and even administrative members may make judicial decisions. And parallel to this is the governor or state chief appointing of the

judge or *qadi* to exercise an additional form of judicial and legal authority. In this way there is a dual nature of judicial decisions in the state.[19]

The second feature of the traditional judicial system is the multiplicity of legal answers, which is unlike the modern legal system. The traditional Islamic ***sharia'a*** system is based on Islamic schools' understandings and interpretation of religious texts, which is known generally as *fiqh.* The Islamic *fiqh* is based on a certain understanding and interpretation of religious scripture – the Quran and the prophetic sayings or *hadiths*. Each school defines its own tools for extracting the legal rule from these texts and how to arrive at the correct understanding.

The legal field at that time was multijurisdictional; all of the existing Islamic schools could be applied separately or from drawing among them, unless the ruler or the governor forbade it. It was commonly known that judicial decisions, even from the same *qadi*, who apply different Islamic schools' opinions to the same legal issue, create multiple legal answers for it. This feature of the legal system was commonly known as a judicial forum, whereby litigants chose the favored judge or school to ensure their legal interests.

b.Western Influence And Legal Reform

By the end of the Muhammad's Ali period in 1844, special courts had been created in Egypt known as the consulate courts. These courts were administered by foreign and Western embassies. Judges were not Egyptian, and the governing legal texts were not Egyptian laws or Islamic ***sharia'a*** but the Western laws of each state. When an applicant, whether Egyptian or foreign, was required to stand before this court, and if an appeal was required, it would be held in the foreign state's court of appeal.[20] This situation continued till 1875 when a new judicial authority was established: the mixed courts.[21] These mixed courts were composed of Egyptian and foreign judges who applied laws on Egyptian land, regarding cases involving inter-Egyptian and non-Egyptian parties. Mixed courts played a major role in introducing modern laws to Egypt, and the understanding of the European judges of such modern laws.

Both the consulate and mixed courts were introduced as a privileged system within the Ottoman state in general, under whose authority Egypt rested. Most of

[19] *See supra* note 1 and *supra* note 3.
[20] *See* MUHAMMAD 'ABD AL-BARI, *AL-'LMTIYAZAT AL-AJNABIYYAH*, 23-32, (Al-Qahirah: Lajnat Al-Ta'lif Wal-Taijamah Wal-Nashr, 1930).
[21] *Id.*

the cases decided before these courts were commercial in nature due to the common trade enjoyed by the Western states. By 1850, it was not an unusual phenomenon for the Ottoman state to issue a commercial code to be used by the mixed courts to ensure foreigners' interests in the state; this new commercial code was translated from the French code with no apparent change.[22]

At this point it is important to focus on the French judicial system which inspired the new legal system. By this time in the nineteenth century, the new French legal elite, including judges and lawyers, still maintained the theological understanding of laws. Through these understandings, many attempts by French courts were made to utilize those understandings in the interpretation and application of civil code texts. French courts applied texts of their own civil code of that time in accordance with their own religious and theological understandings, but with no reference to that process in their legal work. Such application was introduced by the French judges in the mixed courts as an ideological innovation, and was adopted later by the Egyptian legal elite. [23]

By 1883, national courts had been established to solve the multijurisdictional problems existing at that time. However, these national courts did not totally replace the authority of the traditional judges. The total replacement would not happen until a few decades later with the abolishment of the traditional judicial system of *qadi shara'i*. The clearest sign of the transformation taking place during this period was the existence of new codifications, such as the commercial and civil codes. Both the civil and commercial codes were translations of the corresponding French codes. This was obvious in the work of the national court judges who were required to navigate the ambiguity of the legal texts of the French system.[24]

c. Codification Trend:

The codification of legal rules was the most popular focus since the national courts' establishment in 1883; it was not restricted to the Egyptian legal system but extended to other Islamic states which adopted forms of codification. Even

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[22] *See* Heba Abdel Halim Sewilam, *The Jurisprudential Problems of the Early Codification Movement in the Middle East: a Case Study of the Ottoman Mejelle and the 1949 Egyptian Civil Code*, at 130, (PHD dissertation in Islamic Studies, University of California, 2011); also *supra* note *20*.
[23] *See id* Heba Sewilam, at 60.
[24] *See* ENID HILL, AL-SANHURI AND ISLAMIC LAW, THE PLACE AND SIGNIFICANCE OF ISLAMIC LAW IN THE LIFE AND WORK OF ABDALRAZZAQ AL-SANHURI, 120, (Cairo Papers In Social Sciences, Volume 10, Monograph 1, Spring 1987).

the Ottoman state, which represented the last Islamic caliphate, adopted the codification of legal rules, whereas the Hanafite doctrine was represented in *an* equivalent code to that of the civil code. [25] This code was called *Al-Majalla al-ahkam al-'adliyya*, or the Magazine of Justice Rules. While it was not actually applied in Egypt, the experiment influenced the legal thinking of Arabs and Muslims including Egyptian thinkers alike.[26]

Another codification attempt of the Islamic *sharia'a* was by Muhammad Qadri Pasha, a former judge and legal thinker of that time. He believed in the mechanism of the Napoleonic code while maintaining his deep belief in applying the religious rules of Islamic *Sharia'a*. Accordingly, he worked with others on codifying the Islamic *sharia'a* in *Al-murshid* or The Guide*,* which he considered as an Islamic replacement of the corresponding French civil law and to organize commercial transactions. Later on, he attempted to codify the personal status code based on the Hanafite doctrine, similar to the *Al-Majalla* in the Ottoman state. They introduced *al-waqf* law, or religious endowments, also named *qanun al-'ada wal- insaf*, which later on was heavily criticized by Al-Sanhuri for being an exception to the civil code rules by deviating from and minimizing its grounds.[27]

2. Introducing Modernity:

By the end of the first half of the nineteenth century, many Egyptian writers and thinkers promoted the concept of the modern Western legal and political systems as successful examples that could also be employed in Egypt. Emphasis on the similarity between these systems and Islamic *sharia'a* systems was made.

a. Rifa'a Tahtawi

Rifa'a Tahtawi, one of the well-known Egyptian thinkers of that era, introduced in his book *The Extraction of Gold or an Overview of Paris* the French legal and political system. He published that book after finishing his education in France, which was organized under the authority of Muhammad Ali. In his book, he included an early Arabic translation of the French constitution existing at that time. He did not simply translate the constitution. He also introduced his vision

[25] *See* GUY BECHOR, THE SANHURI CODE AND THE EMERGENCE OF MODERN ARAB CIVIL LAW, 32-37, (Brill, Leiden Boston, 2007).
[26] *See id*; even Al-Sanhuri started his invitation for adopting more modern legal system through analyzing and criticizing *Al-Majalla* application in Iraq and Syria, *see supra* note 23 at 60.
[27] *See supra* note 23 and *supra* note 20.

and ideas about the similarity between French constitutional principles and Islamic *sharia'a* principles, with repeated emphasis on the consistency between modern legal texts and Islamic *sharia'a*. Tahtawi not only translated what he saw in the French legal system, but indirectly proposed the adoption of the modern French system in Egypt. One of the ways Tahtawi did this was by using Islamic terms in his translation. For example, he translated democracy as *shura*, which is an Islamic term referring to the reconciliation methodology of making decisions. He affirmed that the *shura* principle in Islamic understanding is equivalent to democracy. Another example is Tahtawi's translation of taxes into *zakat*, in an effort to compare the monetary system of the Western state to that of the traditional Islamic one, whereby *zakat* was collected by the state as its main financial resource and based on a religious obligation.[28]

The most important innovation of Tahtawi was to consider law as being equivalent to both *Shari'* and *Sharia'a*, bridging the difference between both legal systems. He claimed that the Western legal system is the same as traditional Islamic *sharia'a*, and suggested adoption of modern legal techniques to develop the Egyptian legal system.[29]

b.Muhammad Abdou

Tahtawi's attempt to relate modernization to Islamic sharia'a was not unique to that century. This idea continued to develop among thinkers including Muhammad Abdou, a well-known Egyptian Mufti in the late nineteenth century. Muhammad Abdou, who was an *Al-Azhar* student and politician fighting the authoritarian political system of the British occupation,[30] was granted a very unique position as judge of the national courts in 1888.[31] Abdou, who believed Aristotle's philosophy of reason, introduced a new understanding of traditional Islamic Sharia'a. He affirmed the acceptance of all Islamic schools as long as these schools did not contradict the basic core of religion. Accordingly, all Islamic schools whether Sunni or Shiite were considered to be valid legal sources.

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[28] *See*, RIFA'A RAFI' AL-TAHTAWI, AN IMAM IN PARIS, ACCOUNT OF STAY IN FRANCE BY AN EGYPTIAN CLERIC (*TAKHLIS AL-EBRIZ FI TALKHIS BARIZ AW AL-DIWAN AL-NAFIS BI-IWAN BARIS*), 15-29 &189-194, Daniel L. Newman trans. &ed., SAQI, 2004), (1826-1831).
[29] *See id*.
[30] *See*, Aswita Taizir, *Muhammad 'Abduh And The Reformation Of Islamic Law*, at 7-10, (MA Dissertation In Islamic Studies, The Institute Of Islamic Studies, MCGILL University, Montreal, Canada, 1994).
[31] *Id*, at 12.

II. FROM TRADITIONALISM TO MODERNITY: THE PATH OF THE EGYPTIAN LEGAL SYSTEM

Abdou believed that God gave to humankind practical and theoretical authority and through them the development of laws was accepted as long as it did not reject major Islamic beliefs.[32] Abdou, who was known as a religious reformer, introduced the *takhayur* technique as the preferred legal implement that could be applied by state authorities to achieve development and modernity, especially through judicial and legislative authorities. [33]

In an article in al-Ahram, Abdou emphasized the necessity of benefiting from modern science. He suggested, as a revolutionary idea, studying other religious and legal systems to create such development:

> The 'ulama (scientists) who are the spirit of the nation have failed so far to see the benefit of the modern sciences. They continue to busy themselves with what might have been suitable for a time that is long gone by, not realizing the fact that we are living in a new world. We must study the affairs of other religions and states in order to learn the secret of their advancement. We see no reason for their position of wealth and power except their progress in education and the sciences in their countries.[34]

Abdou proposed the reform of traditional Islamic courts or *Mahakem shara'ia*, which were still employing traditional judicial procedures. These ideas were the grounds for later reform of the Islamic law application in the modern legal model.[35]

Abdou faced the problem of the contradiction between the traditional application of *talfiq* and its new approach. Traditionally, *talfiq* could only be concluded by an ordinary layperson who is not a school follower. Abdou suggested that *Ijtihad*, the Islamic principle of getting legal rules out of religious scripts, is necessarily concluded by the governors of the state or *wali al-amr*.[36] Such a requirement was necessary because the state governors were qualified by their positions to determine and achieve the people's interests or *maslaha musrsala*.[37] The state also got help from a wide range of experts including scientists and jurists, who could maintain the people's interests or *maslaha musrsala* and the Islamicity of application. [38]

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[32] *id* at 24 – 27.
[33] *See supra* note 22.
[34] *Supra* note 30, at 7.
[35] *Supra* note 30, at 14-15.
[36] *Supra* note 30, at 29 & 34 – 38.
[37] *Supra* note 30, at 24-29.
[38] *Supra* note 30, at 34-38, Abdou stated that *Ijtihad* could be concluded by army chiefs, head of universities, physicians, and commercial experts and so on.

As a judge, Abdou sought the singularity of the legal answer which is a modern approach. He realized that people would never unify their religious school or opinions of interpretation. Abdou mentioned one of the Quran verses, Hud 118, which states that "Lord God did not will to create one people". God's will is represented by the existence of numerous schools and interpretations of the same text. Each opinion is based on a different vision of what the interests of the people or *masalih are*.[39] At the same time, Abdou criticized the existing modern codes issued after the creation of the national courts. Those laws were more or less a translation of the corresponding French laws. He considered them as ignoring the message of God and Islamic *sharia'a*. He proposed an entirely new *talfiq* among Islamic schools to achieve a sort of modern legal system, similar to that of Western states but in Islamic form. This *talfiq* is based on the interests of society and not bound by certain *madhabs* or methodologies of interpretation.[40] There was a broader field from which to formulate new legislation deemed justifiable on the basis of new *ijtihad* rules. He rejected the old application of Islamic schools who considered this set of rules as the only representation of Islamic messages from God, while other interpretations considered them as *kufr*, or ungodly.[41] And, he considered all Islamic schools as being valid. Abdou's idea was that all Islamic schools emanated from an understanding of the same Islamic scripture to achieve God's will. Thus, they all target the goodness of people, and represent good faith.[42]

c. Abdul-Raziq Sanhuri

Another thinker who believed in modernity through Islamic *sharia'a* was Abdul-Raziq Sanhuri. He, as a well-known legal thinker, imagined a broader solution for such chaos in the juridical and legal application in Egypt. He believed in the new modern understanding of Islamic sharia'a that was adopted by Muhammad Abdou. He employed these ideas through comparative legal thinking as a law professor and judge, and considered Islamic jurisprudence or *fiqh* as a source of modern civil law.[43]

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[39] *Supra* note 30, at 34-36.
[40] *Supra* note 30, at 51-54.
[41] *Supra* note 30, at 46-51.
[42] *Supra* note 30, at 19-21.
[43] *Supra* note 25.

II. FROM TRADITIONALISM TO MODERNITY: THE PATH OF THE EGYPTIAN LEGAL SYSTEM

Sanhuri emphasized the special nature of the proposed modern civil code as leading to the emergence of a new modern Islamic jurisprudence in his speech before the Egyptian senate in 1948:

> In it we put together the codified provisions of the Islamic law and set them beside western law, as represented in the new Egyptian code…and this paves the way for the third and final stage, the rebirth of Islamic jurisprudence, … for the day when this jurisprudence becomes the source of modern civil provisions, when it becomes as well- adapted to the currents of the civilization of the present age as the most modern and progressive codes. [44]

Sanhuri adopted a clear understanding of Islamic *sharia'a* as a source of law similar to Roman law in Western legal systems. He believed that modernizing the Egyptian legal system should take place through the principles of Islamic *sharia'a*. He classified Islamic *sharia'a* into two sets of rules: religious and legal. Sanhuri's idea were based on the historical classification of *sharia'a* into rules governing relations between people and relations with God. The parts that are related to relations with God are the rules of faith that cannot be challenged or changed by any legal rule.[45] On the other hand, the legal rules that organize the relationship between people is the core of Islamic *sharia'a* that are incorporated in comparative and legal work.[46] Sanhuri emphasized the formulation of Islamic *sharia'a* into a large source of law by separating the religious from the secular.[47] Sanhuri's belief was made clearer in his speech before the Egyptian Senate on the introduction of the new civil code. He emphasized the point that the application of the new civil code representing Islamic law was inherited from within and maintained *sharia'a* role in its application.

Later on, Sanhuri promoted the inclusion of Islamic *sharia'a* in the application of the civil code in several respects.[48] First, Islamic *sharia'a* was to be the judge's tool in solving civil cases in the event of the code silence for an applicable rule. The judge could extract a general rule from Islamic *sharia'a* to be applied in such cases. It is akin to Roman law which acted as an open legal source for the judiciary in the event of textual absence.

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[44] *See supra* note 22.
[45] *Supra* note 25
[46] *Supra* note 25
[47] *See supra* note 22.
[48] *See supra* note *22, at* 83 -88.

Secondly, there are a lot of legal terms used in the civil code which correspond to terms in Islamic *sharia'a*, however, the new terms carried particular meanings and understandings by the Sanhuri committee, to be clarified in the illustrative drafts, such as explaining customary rules , or *al-'urf*, or the ownership rights, or *hu'quq al-melkya*, through Islamic opinions.[49] He included in his landmark textbook about the sources of right a comparative study between Islamic law and Western law, with emphasis on the existence of civil rights in the Islamic *sharia'a* compatible with Western legislation.[50] Even those legal rules or articles originating directly from foreign legal systems could be linked jurisprudentially to Islamic *sharia'a* whereby they can be applied in a very wide sense, and not be bound by certain schools or *madhab*,[51] or certain categories whether Sunni or *Shiite* schools', all schools are considered as equal sources of the new application of the law.[52]

This new version of the civil code, which includes Islamic *sharia'a* principles, was considered an Egyptianizing of the civil code. It solved the problem of the dual nature of the preceding civil code as existing between the Egyptian and the French legal systems. The Senate's chairperson commented on the new civil code which would solve the judicial problem:

> The Egyptian judge was entitled to deal with both the Egyptian civil code and the French civil code that when he targets any problem he need to return back to French code to find an interpretation or a solution. [53]

Sanhuri's vision looked like a brilliant solution to Egyptian legal system problems. It was a very revolutionary vision which changed the legal system and adhered to Sanhuri's wish. According to Sanhuri, the 1948 civil code was intended to create new legal thinking which would develop in the future in consistency with Egyptian culture.

C. **Conclusion**:

[49] *Supra* note 25.
[50] *See* Hesham Nasr, *The Effect Of The Legal And Judicial Models On The Development Of The Modern Arab State*, at 175 -177 (PhD Dissertation in Juridical Science, Submitted to the Faculty of the Washington College of Law of American University, 2010).
[51] *See Supra* note 25, at 77 -81.
[52] *Supra* note 50, and *supra* note 25.
[53] See *supra* note 22, at 91.

II. FROM TRADITIONALISM TO MODERNITY: THE PATH OF THE EGYPTIAN LEGAL SYSTEM

The Egyptian state evolved from the classical application of Islamic law into a more modernized system by the end of the nineteenth century. There were different approaches to modernity, but it was largely based on the ideas of modernist religious thinkers such as Abdou, Tahtawi and Sanhuri. This mechanism utilized Islamic principles themselves to develop the legal system and modernize it. From these principles *takhayur* and *talfiq* were used as grounds for modernization. It was necessary due to existing weaknesses in the legal system and political interference from Western states which accelerated it.

III. Dilemma of Application of Islamic *Sharia'a* Principles

The application of Islamic law principles in the modernization process of the Egyptian legal system, especially the use of *takhayur* and *talfiq*, produced an unexpected hybrid system. The Islamic *sharia'a* legal system is different in structure and philosophy from a modern positivist one. This hybrid system has led to uncertainty in actual legal practice.

With the spread of this new ideology crowned by the approval of the modern civil code in 1948,[54] an extended dialogue about the nature and identity of the new legal system and whether it was primarily Islamic or a modern Western one ensued. Because each ideology had its proponents, the political system benefited by tilting the policies towards one of the ideologies or the other as politically required.[55] Despite the incorporation of both ideologies within the legal system, neither was ever clearly identified even after the 1980 amendment of constitutional article 2 which transformed Islamic *sharia'a* principles into the principal source of legislation.

Most legal thinkers questioned whether the current Egyptian legal system was purely Islamic or purely modern even with the usage of *takhayur* and *talfiq* techniques which allowed temporary social acceptance of the new legal system. This chapter clarifies why the usage of *takhayur* and *talfiq* have not led to an Islamic legal system and explores the unexpected problems of application.

A. *Takhayur* And *Talfiq* Did Not Create An Islamic Legal System

There are several reasons why *takhayur* and *talfiq* have not led to the creation of an Islamic legal system. These reasons are based on fundamental differences between the Islamic legal system and the modern legal system. Differences in the essential features of each model of law have led to the ongoing inability to create such a modern Islamized legal system.

1. The First Difference: *Takhayur* and *Talfiq* by State Instead of Individuals.

The first difference between the Islamic legal system and the modern legal system is the replacement of the role of the ordinary layperson with the state in

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[54] *See supra* note 22.
[55] *Supra* note 25.

the application of *takhayur* and *talfiq. Takhayur* and *talfiq* tools were justified historically for use by the ordinary layperson, because he/she was not qualified jurisprudentially to deduce the legal rule.[56] Within a system of multi-jurisprudential application, it was necessary to choose which legal opinion was to be applied from the different schools. At the same time, each Islamic school had its own system of analysis of the religious texts which produced different legal outcomes. Even with common reasoning grounds among schools, legal rules or *ahkam shara'ya* differed considerably between these schools.[57]The layperson thus faced different opinions with the authority to choose among them which is *takhayur.* The layperson was able to mix those opinions by also employing *talfiq*, which is predictable and justifiable because of the layperson's assumed ignorance of the various *sharia'a* schools' ideologies.

Islamic law is based on the superiority of divine law; and divine law is represented by the Quran and prophetic sayings or *hadiths*. Thus, it is necessary to interpret these texts in order to realize and follow God's revelation.[58] Interpretation, as was mentioned above, is based on each schools' methodology of deduction. Historically, it has been almost impossible to limit legal application of one religious school verdicts over others. To solve such a dilemma, Islamic doctrine created several principles to regulate the application of schools' opinions amongst the jurists and the *u'lama* such as *al-Ijtihad la yazol bil Ijtihad,* or no jurists' *ijtihad* can be overthrown by another jurists' one. And to regulate the multi-existence of schools amongst ordinary laypersons who did not follow a certain school, the Islamic doctrine accepted principles such as *takhayur* and *talfiq*.[59]

On the other hand, the modern legal system whereby state authority presides over the legislative authority does not recognize the superiority of divine law. Despite this fact, the state itself is entitled to act on behalf of ordinary laypersons and utilize *takhayur* and *talfiq* and thus characterizing the system as being modern at its core.[60] This substitution of the state for the layperson, which was suggested by such thinkers as Abdou and Al-Sanhuri, was originally intended to relieve the tension between the Islamic and Western application of law. But in reality it changed the importance and focus of the techniques. *Takhayur* and

[56] *Supra* note 2 and 4.
[57] *See supra* note 2.
[58] *See supra* note 1.
[59] *See supra* note 1.
[60] *See supra* note 22.

talfiq were applied by the ordinary layperson to reconcile conflicting decisions between different schools' opinions.[61] Usage of the same techniques by the state were meant to avoid social clash, and to widen state authority over legislation. In other words, the usage of *takhayur* and *talfiq* changed from being a tool for resolving personal tensions between schools to a tool for distracting people from state policies.

To clarify the problem of the substitution of the state for the ordinary layperson, it is useful to understand the schools' methodology for deciding on the applicable legal rule. *Madhab*s, in the traditional Islamic system, state the means of deduction for the accurate understanding of religious texts in order to achieve the will of God.[62] Sources of religious texts are both the Quran and the prophet's sayings or *hadiths*. The Quran's textual accuracy is generally agreed upon; it is not the same with the *hadiths*. Due to the late recording and collecting of the Prophet's sayings, elements of fabrication interfered in the texts of *hadiths*. Accordingly each school had to verify its methodology to differentiate the genuine sayings from the fake ones. For example, the Hanafite School defines certain qualifications for the *hadith* tellers. If any of these qualifications are absent, the authenticity of the saying is doubted and its legal impact voided. For these reasons, the Hanafite School considers the prophetic *hadith* concerning the conditionality of marriage through the custodian as being doubtful because of the non-fulfillment of the conditions of its teller, *Al-Sayda Aa'esha,* who allowed a woman to marry in the absence of her custodian. This is because one of the requirements when considering the truth of the *hadith* is that the teller worked in consistency with it all his life, which was not fulfilled by *Al-Sayda Aa'esha* according to the Hanafites. However the Hanafite School does not deny the right of the custodian to approve or disapprove of a marriage based on other sayings.[63] The same prophetic saying of *Al-Sayda Aa'esha* is recognized by other schools, which requires absolute custodian approval when considering the validity of a marriage contract. So, each school deduces its own legal rules based on its own judgment regarding the authenticity of the Prophet's sayings.

In modern family law, the state has approved through the *takhayur* mechanism the legal rule of the Hanafite School whereby a custodian is not required to fulfill

[61] *Supra* note 1 and *supra* note 25.
[62] *Supra* note 1 and 2.
[63] *Supra* note 2.

the marriage contract of a woman.[64] At the same time it ignores the complementary Hanafite School's opinions concerning the right of the custodian to disapprove of the marriage. The law limited such right of the custodian to disapprove of the marriage only for minor women in contradiction with Hanafite doctrine which allows the disapproval of custodian for both adult and minor women.[65] And in other cases, it relies on another school's opinion, such as the Maliki, when considering the right of women to self-divorce based on harm, which is contrary to the Hanafite School's position. This type of *talfiq* among different schools which is based on interpreting the same texts depending on its authenticity, creates the law that organizes marriage laws in Egypt. Here, the state utilizes both *takhayur* and *talfiq* to achieve legal outcomes different from the traditional Islamic application, in spite of its roots in Islamic jurisprudence. Whereby the valid *talfiq* was traditionally required to maintain the consistency of the legal outcome of each school's opinion, it is not required by modern laws or even represented there.[66] This makes the usage of *takhayur* and *talfiq* methodologies very different from the traditional application, whether for the purpose of application or establishing conditions for validity. In other words, *takhayur* and *talfiq* are used as a method for justification rather than as a legal mechanism for the new legal system. Even modern religious institutions such as *dar el' e'ftaa'* which approve wider usage of the principle of *takhayur*, maintains its silence about the usage of *talfiq* by the state in such a manner.

2. *Takhayur* and *Talfiq* have not led to Singularity in Legal Answer

The second difference between the Islamic and modern legal systems is the singularity of the legal answer. The application of *takhayur* and *talfiq* within different jurisdictions reflects the plurality of the Islamic legal system, while the modern state is supposed to have a single legal system with a single legal authority. According to this modern positivist understanding of the singularity of the legal answer, there have been attempts to codify doctrines of one of the Islamic schools to present an equivalent unified system. A well-known attempt was the codification of the Hanafite School in *Al-Majalla al-ahkam al-'adliyya,* or

[64] *Supra* note 3.
[65] *See supra* note 2 and *supra* note 12.
[66] *See supra* note 2 and 4.

the Magazine of Justice Rules, by the Ottoman state.[67] The Ottoman sultan ordered a committee headed by Ahmet Jevdet, the Turkish nationalist and legal thinker, to codify the Hanafite doctrine. The application of *Al-Majalla al-ahkam al-'adliyya, or* the Magazine of Justice Rules was widely criticized for being a very selective codification, which neglected the jurisprudential grounds of the other schools. It forced jurists, judges and lawyers, who were convinced of *Al-Majalla's* inaccuracy, to consider the same legal texts along with other schools' opinions. A common starting point was the application of Article no. 16 of the *Al-Majalla* which stated that "no *ijtihad* can be overthrown by another equivalent *ijtihad"*. The judges and jurists widen its scope of application by considering *al-Majalla* articles as an *ijtihad* and equivalent to other schools' *ijtihad*, keeping the application of all schools parallel to *al-Majalla*.[68] This was the case with forum legislation which ended with the failure of the Ottoman state and the issuance of new national laws. Most new civil laws in Arab countries were influenced by the Egyptian civil code and Al-Sanhuri's ideas. This application of *taqlid*, which is *takhayur* of a single school's opinions as a source of codification failed in achieving legal stability. *Talfiq* between schools lead to the first difference between Islamic and modern laws by not ensuring the shared legal outcome of different schools.[69]

The codification of one school of Islam did not solve the problem. *Al-Majalla's* representing only the Hanafite School in accordance with the political order of the Ottoman state gained extensive criticism by ignoring the rest of the Islamic doctrines. At the same time the problems associated with applying different schools' doctrines also prevented the full embrace of Islamic legal thinking.

3. The Divinity Of Legislation

The third difference between the Islamic and modern laws is the divinity feature. Islamic law is based on the divinity of the legal rule. It requires deep understand of religious texts, such as the Quran and *hadith*s, as the grounds and main source of Islamic teachings and *sharia'a*. Accordingly, what is stated directly in the religious texts cannot be ignored, changed or substituted. But the Islamic schools and *madhabs* reached different understandings of the same religious texts based on an understanding of the texts' authenticity and place within Islamic history.[70] Quranic verses are interpreted in conformity with two factors,

[67] *Supra* note 22.
[68] *Supra* note 22.
[69] *Supra* note 2.
[70] *See supra* note 1.

asbab el-nzool or the historic occasion of the text creation, in addition to the Prophet's sayings. These two features determine the application of the Quranic texts. The recognized Islamic principle is that the *u'lama* or scholars' findings, in and of themselves, are not divine in nature. Stated as *kulun yoa'khaz a'lyh wa yurad ila Allah w rasuluhu,* this means that every scholar's findings can be criticized and refuted except for God's and the Prophet's.[71] The legitimacy of the scholars' opinions came out of their connection with the Quran or *hadiths* through either the mechanism of *al-qias* or *ijmaa'*. In *qias* or deduction*,* scholars try to deduce the applicable legal rule from a similarly stated verdict. For example*,* alcoholic drinks are prohibited in the Malikite School because they lead to drunkenness. This rule is deduced from the wine or *Khamr* drinking prohibition in Quranic verse, as the reason behind wine's prohibition is drunkenness, which can be extended to other alcoholic beverages.[72] *Ijmaa'* or consensus legacy, whereby an agreement between scholars is essential, is based on the prophetic *hadith* stating that Muslims must never consent to wrongfulness or falseness.[73] In this way each legal rule is related in one way or another to the divinity of texts as the source of legitimacy. This is unlike the modern legal rules which are justified on more secular grounds. Modern laws are justified as being representative of people's will, or reflective of state authority, or even sometimes the natural understanding of justice. All of these reasons separate the divine from the profane. Even considering Islamic law as a general source of law, according to Al-Sanhuri's model, will not forfeit the modern feature of laws as being Islamic. It is similar to relying on historic legal culture, whether Islamic or not depending on each legal school's position.[74] Where modern laws accept *takhayur* and *talfiq* as comparative legal tools in order to develop the legal system, there is no overriding religious umbrella for the legal outcome.

B. Unprecedented Results of Takhayur and Talfiq Application.

Takhayur and *talfiq* application led to unprecedented and unexpected results, which often contradict with the purpose of their usage in the legal system. The engineer and designer of the new Egyptian civil code, Al-Sanhuri, intended to create a modern legal system like that of other European states especially that of

[71] *See supra* note 1 and *supra* note *12*.
[72] *See supra* notes 2 and 4.
[73] *See supra* note 1.
[74] *See supra* note 22.

France. But Al-Sanhuri, who was both a nationalist and a socialist, believed that sources of civil code should not contradict national culture and society. He supported lower classes in the civil code by borrowing legal rules from Islamic *sharia'a* such as *waqf* and *al-uluu wal-sufull*.[75] He then delineated a hierarchy of four legal sources comprised of written legal texts, custom, Islamic *sharia'a* principles, and rules of justice and equity. In his attempt at positivism, Sanhuri elevated legal text over all other forms of legal rules, using custom as the second source which was similar to other Western laws in the event of textual gaps. The most controversial work of Sanhuri's was his identifying Islamic *sharia'a* as the third source after custom and before the rules of equity and justice.[76] Order was strictly enforced. If a written text was absent, a judge is obliged to rely on custom, Islamic *sharia'a*, or rules of equity and justice in that order. Considering that Roman law was the general legal source of law in Europe, Sanhuri tried to place the Islamic *sharia'a* in a similar position. Accordingly, Islamic *sharia'a* would not be applied by its schools or opinions. Just the selected rules by legislative authority would be applied to the legal texts. In the event there were no texts or customs to rely on, a judge would be allowed to search Islamic *sharia'a* for the applicable rule. In this way, Islamic *sharia'a* served as a pool of rules, which the legislative and judicial authorities could pick from as needed.[77]

Sanhuri and the other modernist thinkers heavily debated the civil code and its Islamicity. Sanhuri defended the Islamicity of the new code seeing it as representing the will of the divine, especially on the basis of the *takhayur* and *talfiq* techniques. Under the new understanding brought by Abdou and Tahtawi, the *takhayur* and *talfiq* tools could be used by state authority. Al-Sanhuri defended the new civil code against accusations of Westernization. This was rejected by Qadri Pasha,[78] who tried to issue an alternative draft law by codifying Hanafite school doctrine similar to *Al-Majalla al-a'dlia*. But Sanhuri, between 1933 and 1948, succeeded in convincing the legislative authority and the legal elite through his writings and advocacy that the new draft of the law was Islamic. This success ended the debate about other alternatives to the new civil code.[79] In the following years, with the explicit and implicit understanding of lawyers, judges

[75] *See supra* note 25, at 106-108; also *see* RICHARD A. DEBS, ISLAMIC LAW AND CIVIL CODE, THE LAW OF PROPERTY IN EGYPT, 80-84 (Columbia University press, New York, 2010).
[76] *See supra* note 25, at 81-89.
[77] *Supra* note 22.
[78] *Supra* notes 2 and 22
[79] *Supra* notes 2 and 22.

and jurists about the Islamicity of the newly adopted modern system, the new system operated on hybrid grounds.

Unexpectedly, the actual application of the new hybrid system did not follow the expected trajectory of Sanhuri's ideas that the new civil code would deepen modernity in the legal system. On the contrary, the legal system, through its hybrid nature, produced a new form of legal plurality combining Islamic and modern laws and increasing the uncertainty of legal rules' application. It also forced the lawyers, judges and legislators to adopt regressive thinking about the legal system.

1. Undecided Position For *Sharia'a* And Modern Laws

The legal system's hybrid nature was intended to resolve the contradiction between modernist and Islamic legal systems. But the tension between the supposed superiority of the legal rule over divine law affected legal thinkers and practitioners. Judges, lawyers and jurists were accustomed to interpreting legal texts by drawing on Islamic opinions. Even Sanhuri himself was used to interpreting the civil code articles through Islamic *sharia'a* and *fiqh* texts.[80] Such a methodology of interpretation directed the judicial attention to a different interpretation of law. Courts interpreted legal texts in consistency with traditional *fiqh* which could contradict with the legislative purposes of the text. Of course this was not the case for all legal rules but, theoretically speaking, legal texts complement each other. Thus, preferring certain texts over others lead to changes to the entire outcome of law.

For example, one of the later modern jurists, Haraga, explained that concluding marriage contracts for girls under eighteen years of age is valid with the approval of the custodian, even if it is not authenticated by an official registrar. He interpreted the family law marriage age of 18 years as a limitation, but it did not negate the marriage contract itself as long as it maintained the same *sharia'a* conditions such as the widow payment, acceptance of parties and declaration of the marriage contract. Accordingly, a minor woman marrying is still a legal marriage despite its contradicting criminal and family laws. Family law gives the marriage age as eighteen years to be valid, and criminal law considers sexual

[80] *See* Amr Shalakany, *Between Identity And Redistribution: Sanhuri, Genealogy And The Will To Islamise*, Vol.8 No. 2, ISLAMIC LAW AND SOCIETY, Brill 201, 204-206 (2001).

acts with minors as a sexual crime. Generally, this opinion is expressed in the current legal field through courts and lawyers.[81]

2. Legal Uncertainty:

Legal uncertainty is the second unexpected outcome of the new hybrid legal system. The modern legal system should state clearly a single legal answer, but this was not the case with the new system. Some Egyptian laws clearly identify the Islamic ***sharia'a*** as active modes of application, even clearer than the civil code. This is primarily found in personal status and family laws. Al-Sanhuri completely rejected the separation of the personal status code from the civil code considering it as a form of "*code civique*" ideology found in most modern states guaranteeing the rights of persons on the same grounds as the civil code.[82] But in the Egyptian personal status code, the Hanafite School is explicitly stated as the applicable law for all family issues not included in the code. It is a clear example of the uncertainty of legal practice. To explain such uncertainty, we need to understand the court's authority in establishing the applicable rule through the Hanafite doctrine. The problem with that application is that courts are bound by two sets of rules: the family code texts and the Hanafite doctrine in that order. The abbreviated code texts regulate a few types of family disputes, unlike the Hanafite doctrine which is very detailed and includes different Hanafite scholars' opinions. Such practice lead to uncertainty and ignorance in the application of legal rules in the family disputes, given the difficulty in predicting the actual opinion applied by courts.[83]

To understand the extension of the legal rules that could be applied within the personal status code which stated Hanafite doctrine as applicable during textual silence, it is important to recognize that the main Islamic schools such as the Hanafite School had many followers including jurists. Each of those jurists added their own opinions concerning the application of Islamic laws. The Hanafite doctrine includes also sub-doctrines of the subsequent jurists, who follow Abu

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[81] *See*, JUSTICE MOSTAFA HARAGA, COMMENTARY ON PENAL CODE, 689, Vol. 3 (2014 ed.), *المستشار / مصطفى هرجة " التعليق على قانون العقوبات " طبعة ٢٠١٤ المجلد الثالث صفحة ٦٨٩ (...الركن المعنوى " القصد الجنائى " و يتحقق بانصراف إرادة الجانى إلى الفعل المخدش بالحياء العرضى بالمجنى عليه غير انه قد استقر الفقة على أن الجريمة لا تقع بين الزوج و زوجته فكل ما يأتيه عليها مباح شرعاً بغض النظر عن سنها).*

[82] *See supra* notes 2 and 22.

[83] *See supra* note 2, also *see* Leila Al-Atraqchi, *The Women's Movement and the Mobilization for Legal Change in Egypt: A Century of Personal Status Law Reform*, 381-392, (PhD Thesis in the Humanities Doctoral Program, Concordia University, March 2003).

Hanifa doctrine. Such practice of the doctrine created a body of mainstream Hanafite doctrine that Hanafite jurists often consent upon, and a minor stream that stemmed from different legal opinions in each juristic case. There are the official verdicts of the Hanafite school of Abu-Hanifa - the school founder, and of the well-known followers such as Abu-Yusuf, and Muhammad Al-Sheybani; their contribution is referred as *masa'il al-usuliya* or the main cases. *Masa'il al-usuliya* embodies the main Hanafite opinions for interpreting the Quran and *hadiths*. There is a second type of Hanafite doctrine which is known as *masa'il al-nawadir* or the rare cases, which is composed of Hanafite opinions about rare cases that are not faced by the mainstream scholars.[84] Also, there are writings of other Hanafite scholars that give legal opinions by following the Hanafite methodology of interpretation in cases. The decisive opinion amongst these various points of views is the judge's, as the judge is the only authorized person to choose according to family law. *Takhayur*, in such an application, is practiced by the judge himself who is authorized to choose among all of the Hanafite doctrine, either from *masa'il al-usuliya, masa'il al-nawadir,* or the other descendant's writings. The judge may also do a sort of *talfiq* between different Hanafite opinions reaching a new legal outcome. All of these scenarios are legal and acceptable in the legal field, and accordingly the uncertainty of the legal application is found through the practice of law.[85]

The other issue about these laws is that they represent *takhayur* and *talfiq* techniques broadly, because nearly every group of articles in family law represent an Islamic school. Egyptian family laws are not limited to the Sunni schools, but also include some rules derived from the Shiite schools.[86] The most innovative example of *talfiq* here is the *khul'*, or self-divorce, which is based on a minority opinion in the Malikite School. This opinion gives women the right to self-divorce with no restrictions on the husband's agreement. The *Khul'* rule has been widely debated as to whether it is Islamic or non-Islamic. The Supreme Constitutional Court decisions have avoided that claim as long as it is based on one of the *madhab*s' opinions, which is a usage of the *takhayur* rule. The *Khul'* legality was very controversial and not common among the Malikite scholars and represents a very minority opinion among the Malikite. Contrarily, the Egyptian legislator and in the judicial decisions considered it an Islamic derivative; the

[84] *Supra* notes 20 and 22.
[85] *See supra* note 81.
[86] *Supra* note 2.

opposition of such laws by radical Islamists and religious groups is based on the ignoring of the husband's exclusive right in divorce according to the practice of traditional Islamic sharia'a. The problem with this debate is that it is considered to be the use of *takhayur* and *talfiq* to produce an Islamic version of law that can be discussed through its level of conformity with Islamic ***sharia'a***, not as a modern law representing the state's intent in achieving equality between men and women in marital contracts, and evaluated accordingly.

3. Contradictory Positions Between State Courts And Parliamentary Figures

Although even modern laws are uncertain, the traditional uncertainty regarding Islamic laws is accompanied by a problem in identifying the applicable rule. Relating laws to Islamic ***sharia'a*** does not separate the application of law from *fiqh* texts, creating additional ambiguity or even derailing the legal texts by un-written *fiqh* opinions.

Although the Court of Cassation has mentioned in its ruling that stating Islamic ***sharia'a*** as the primary source of legislation in the Egyptian constitution is directed towards the Egyptian parliament which is responsible for editing and issuing laws, it is not the same position for the constitutional court. It has found several rulings unconstitutional based on their non-conformity to Islamic ***sharia'a*** as stated in the second constitutional article.

This is true even at the legislative level. In 1985, Mumtaz Nassar, who was a member of the Egyptian parliament, encouraged parliament members to proceed with the Islamization of the legislation hinting that:

> Since 1976, the *majilis al-sha'b* (Egyptian parliament), began the preparation of studies with the formation of committees and gathering materials, a number of the studies which… [Concerned] legislating the sharia'a in all the texts of the present laws.[87]

As we see, Islamic ***sharia'a***'s position in the modern legal system is not clear, and Islamic preference is not based on a practical or legal basis, but rather on the sense of its obligation to ***sharia'a*** principles. This thinking includes Egyptian courts, which also experience a similar ambiguity to that of the French application of the civil code in the nineteenth century. There, judges and lawyers accepted the application of legal rules without ignoring Christian morality and theology.

[87] *See supra* note 22.

Historically, such application by French courts was applied implicitly to avoid claims of illegality or unconstitutionality.

C. Conclusion:

The application of *takhayur and talfiq* as a mediation process to achieve an Islamized modern legal system has not achieved the expected goals due to the differences between the Islamic legal system and modern law, and the misunderstanding of the position of Islamic law texts in the modern legal system.

The differences between the Islamic legal system and the modern legal system are about the nature of and sources of justification for each system, and differences in how *takhayur and talfiq* are used in both. As a modern legal system seeks the singularity of its rules, Islamic law is about the plurality of its jurisdictions. In addition to the different source of legitimacy between the Islamic and modern legal systems, Islamic law is about divinity and modern laws are legitimized through non-divine avenues. The making of legal rules in both systems are quite different. Accordingly, *takhayur and talfiq* were introduced into the Islamic legal system as logical methods to solve the matter of plurality. In modern law they are used more as tools for concealing modernity in Islamic form to be socially acceptable.

The unprecedented problems that the creation of such a hybrid legal system entails has evaded the purposes of modernity in legal practice. Judges, jurists and lawyers faced problems in figuring out the nature of the legal system which increased the uncertainty of the legal practice. The hybridity of the legal system is also affected by the existence of Islamic schools in some laws, especially personal status and family law.

IV. The Egyptian Constitutional Article 2 Position and Interpretation

To gain a sense of the legal dilemma within the modern Egyptian legal system, which is hybrid in nature and suspended between modernity and traditionalism, the second constitutional article is a very good start. In the current constitution of Egypt,[88] Article 2 states that "Islam is the religion of the state, Arabic its official language, and the principles of Islamic *sharia'a* are the principal (major) source of legislation". This article was inserted into the Egyptian Constitution for historic, political and cultural reasons, and since its inclusion has generated additional ambiguity in the application of the law.

This chapter begins with a brief historical background on the adoption of Article 2. Then, an overview of the judicial decrees emanating from this constitutional article from both the Supreme Constitutional Court and the Court of Cassation, and a hint at parliamentary and political positions from it is given. The chapter concludes with an analysis of the uncertainty created by inclusion of the Article 2 in the Egyptian legal system.

A. The Historical Background On The Adoption Of Article 2:

Since the modernization of the Egyptian legal system, endless negotiations about the identity of that new legal system and the position of Islam and *sharia'a* within it has ensued. Western interference in Egypt, because of economic interests, increased the influence of modern European laws especially French and British. By 1882, British colonization had settled officially in Egypt as a controlling authority. The colonial authority worked on accelerating the creation of bureaucratic and modern state authorities. In 1883, legal decrees substituted for the 1882 constitution which had only been recently created prior to the British invasion. Attempts at changing the identity of the state from an Islamic province under the Ottoman state into a British province were clear. This change was neither popular nor readily accepted by Egyptian society, who looked at the British as both foreign and non-Muslim who threatened their new national identity.

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[88] See Michael Meyer-Resende, *Egypt: In-Depth Analysis Of The Main Elements Of The New Constitution,* 6-8, EU ed., April 09, 2014, available at http://www.europarl.europa.eu/RegData/etudes/note/join/2014/433846/EXPO-AFET_NT(2014)433846_EN.pdf. (The current constitution was intended at the beginning to be just an amendment project for the 2012 constitution, but the committee, formulated by former president Adly Mansour, extended its work to make a nearly new constitution).

IV. THE CONSTITUTIONAL ARTICLE 2 POSITION AND INTERPRETATION

By 1917, members of the Egyptian political and cultural elite claimed the right to represent the Egyptian people before the League of Nations to promote self-determination. The claim of self-determination was not accepted by the British government, which lead to oppression of the political group known as *al-Wafd* or the Delegation.[89] The *al-Wafd* group consisted mainly of legal figures such as lawyers Saa'd Zaghloul, Ahmed Lotfy El-Sayed, and Abdul-Aziz Fahmy, who later became a judge and the first head of the Court of Cassation. It was soon clear that this group was comprised merely of law professionals, who had a new liberal vision about the relationship between the state and the people.

After the rejection of the independence claims, Egyptians began resisting colonialism culminating in the 1919 Revolution. This movement favored Egyptian nationalism consistent with an Islamic religious identity. Accordingly Christians and women participated in this Revolution on nationalist grounds. After declaring independence from Britain in 1922, a call for a new constitution was raised, and accepted by King Fouad.

1. **1923 Constitution Position From Islamic Sharia'a**: **Article 149**

The Egyptian elite claimed to have a modern liberal constitution like that of European nations. Accordingly the king of Egypt, Fouad, under pressure, accepted the formulation of a committee to write this constitution. In 1923 the constitution was created and signed by the king; it was the first operational constitution in Egypt.[90]

Article 149 of the 1923 Constitution stated that "Islam is the religion of the state, and Arabic language is the official language." This article was agreed upon by the formulating committee with no objections, even from its non-Muslim members. It shifted state identity from being an informal understanding to the highest and most formal legal document. Article 149 was an attempt to place the issue of the Islamicity of the state alongside its nationality, through the same hybrid model of thinking which joined modernity with Islamicity. Essentially, Egypt was a state in the modern sense, but identified with Islam. This Article was

[89] *See supra* note 25 , at 21 -31, (it will turned from a political group into political party after the 1919's revolution, this party will be the most popular liberal party which will win in the most of elections in between 1923 and 1952).

[90] *See supra* notes 2 and 80, (Actually one of the main critiques for 1923 constitution that the formulation of committee was away of the national movements and by single decision of the monarchy in Egypt. Later on 1923 constitution will be considered the most liberal constitution in Egypt).

maintained in the subsequent Egyptian Constitutions of 1930, 1956 and 1964. While the Constitutions of 1923 and 1930 were adopted through a royal decree with no referendum, the 1956 Constitution was adopted by referendum under Nasser's authority; and the 1964 Constitution was declared by presidential decree as a temporary constitution after the dissolution of the Arab Republic - the union between Egypt and Syria. Only the 1958 Constitution, which was the Arab Republic temporary Constitution, ignored article 149. There was no clear outcome from adopting Article 149 in any of these constitutions, or even in its omission in the 1958 constitution.

2. 1971 Constitution To The Current 2012 Constitution Which was Broadly Amended In the 2014 Referendum

The 1971 Constitution included the same article number 149 in the 1923 Constitution, placing it as the second article of the new constitution, and modifying it with the addition of the words "and the Islamic sharia'a is a principal source of its legislation."

Some analysts claim that this new wording was connected to the political tension existing between leftists groups who favored Nasserist policies and President Sadat whose policies were considered to be against state socialism. Due to this tension, Sadat tried to deal with Islamic religious groups, who were oppressed under Nasser's authority, by supporting them against leftists. Part of that deal was the modification of Article number 149 to include Islamic principles as a main source of legislation.[91]Egyptian authorities depended on Islamic groups to support, justify and popularize state decisions. This support was based on claims of the Islamicity of the Egyptian state, society and regime. Even Egyptian President Anwar Sadat was called a president of faith.

Tension between the Islamic movements and the state cannot be isolated from the nature of decisions taken by the state. For example, Islamic movements did not show support for the historic peace treaty between Egypt and Israel. On the contrary, in 1980 they supported the presidential referendum amending Article 2 to state that "the principles of Islamic sharia'a are <u>the</u> principal source of

[91] *See*, Clark Benner Lombardi, *State Law as Islamic Law in Modem Egypt: The Amendment of Article 2 of the Egyptian Constitution and the Article 2 Jurisprudence of the Supreme Constitutional Court of Egypt*, 126-135, (PhD dissertation submitted at Graduate School of Arts and Sciences COLUMBIA UNIVERSITY, 2001).

legislation."[92] This emphasis on Islamic *sharia'a* principles was interpreted by political groups as transforming the modern legal system into one inspired by Islamic *sharia'a* in all respects. Tragically, Sadat was assassinated by one of the Islamic extremist groups at the end of 1980, which disallowed him from benefiting from that deal amending Article 77.[93]

B. Interpretation of Article 2:

The amendment of Article 2, in 1980 led to questions about the new meaning and application of Islamic *sharia'a* within the legal system. This was interpreted differently by politicians in the Egyptian parliament, Court of Cassation and Supreme Constitutional Court.

1. Political Point Of View In The Egyptian Parliament

Some parliamentary figures, especially with Islamic affiliations, such as Mumtaz Nassar, believed that this amendment to article 2 should be followed by more extensive revisions of legal texts to ensure the application of Islamic *sharia'a*. Accordingly, parliament saw additional proposals for new Islamic codes, but these new codes were never realized.[94]

Rifat Mahjub, the head of the People's Assembly in 1985, tried to re-open the debate on Islamic codes that had been prepared by the preceding assembly under Sufi Abu-Talib, but the governing party, the National Democratic Party, rejected by a majority such a motion and thus ending it for all.[95]

The official religious institutions represented by *U'lama' Al-Azhar*, surprisingly proposed action against the government's position regarding the interpretation and application of the new constitutional article. They claimed that the government was not serious about applying the new constitutional text, and thus denied the direct application of Islamic sharia'a. In the end, they also failed to impose their understanding of *sharia'a* on state authorities. [96]

In the end, neither the political nor religious institutions' position was able to resolve the legal issue surrounding the application of Article 2 in the legal

[92] *Id*, at 143-152.
[93] *See*, Alain C. Seckler, *Religion Is Not The Answer: How To Turn Restlessness Into Meaningful Change - The Egyptian Conundrum,* 17-19 (A master's thesis submitted to the Graduate Faculty in Liberal Studies for the degree of Master of Arts, the City University of New York, 2014).
[94] *Supra* note 80.
[95] *See* generally *supra* notes 3 and 4.
[96] *Supra* note 4.

system. It was more connected to the sense of Islamic nationalism than actual legal practice.

2. The Court Of Cassation Interpretation of Article 2

It is important to begin a discussion of Court of Cassation's interpretation of article 2, in recognizing it as the highest juridical entity in the Egyptian judicial system since its creation in the first half of the twentieth century. Accordingly, the Court of Cassation was entitled, in general, to interpret laws and exercise its authority over claims of unconstitutionality. But due to the absence of legal procedures to decide the unconstitutionality, the Court of Cassation did not exceed its interpretation authority. By the 1970s, the Supreme Court challenged the legal texts as being unconstitutional, succeeded by the Supreme Constitutional Court in 1979. During the 1970s and the first half of the 1980s, the jurisdiction of both the Court of Cassation and the Supreme Constitutional Court over interpreting constitutional texts remained unclear.

When considering the position of the Court of Cassation during the period following the 1980's amendment of article 2, a lot of Islamist lawyers, who were supported by a number of judges, raised court motions claiming the unconstitutionality of laws in accordance with Article 2. In response, judges stopped deciding those cases, and referred them to the Supreme Constitutional Court to address first the unconstitutionality claims. [97]

Some of these claims of unconstitutionality reached the Court of Cassation, which found itself obliged to make a decision. In Cassation Appeal no. 7846 for the judicial year no. 58, a claim regarding the application of article no. 7 in the Egyptian penal code was raised. Article no. 7 in the Egyptian penal code states that "Penal law shall not diminish the personal rights in accordance with Islamic *sharia'a.* "[98] The plaintiff claimed the right of the accused to punish his family members in accordance with Article 2 of the Egyptian Constitution and Article 7 of penal code, claiming that the court's decision of imprisonment was based on a misinterpretation of constitutional Article 2.

Accordingly, the Court of Cassation was entitled to respond to such a claim. The problem encountered by the Court was that there was no precedent

[97] *Supra* note 4.

[98] Egyptian Penal Code, Article 7 stated that "*Penal law shall not diminish the personal rights in accordance with Islamic sharia'a,*" *مادة ٧ من قانون العقوبات المصري تنص علي "لا تخل أحكام هذا القانون في أي حال من الأحوال بالحقوق الشخصية المقررة في الشريعة الغراء*

interpretation of Article 2 by the Court of Cassation or the Supreme Constitutional Court. The Court of Cassation held the duty to interpret Article 2 for the first time after the amendment of 1980. It stated in its verdict of 18 January 1990 that Article 2 is just an opportunity for the legislator to consider Islamic *sharia'a*, with no further obligation on the Egyptian courts to apply *sharia'a*:

> Article 2 of Egyptian constitution about considering Islamic sharia'a as the principal source of legislation is an invitation for the legislator to ensure the application of Islamic sharia'a in the laws issued through its authority […] and it should be represented within legal texts issued through legislative authority to be executed by judicial authorities… Accordingly Islamic sharia'a shouldn't be applied by the essence of article 2, in itself, unless legislative authority stated it into laws.[99]

In this court decision, the Court of Cassation considered Article 2 as an invitation for the legislator to apply Islamic *sharia'a*. The Court of Cassation supported the application of legal texts over Islamic *sharia'a* principles, deciding that the only way to apply *sharia'a* was through adoption of it through legislation.

In another case, Cassation Appeal no. 1089 of the judicial year no. 57, the Court of Cassation forfeited deciding a claim of unconstitutionality of a civil code article. The claim was in regards to Article 226 of the civil code which allowed up to four percent interest on the payment of debts. The plaintiff claimed contradiction between this article and Islamic *sharia'a* and Article 2. On the 8th of January 1990, the Court of Cassation issued its verdict. Similar to the Supreme Constitutional Court position, it stated that legislation prior to the adoption of the new Article 2 was valid and applicable. It rejected the claims of unconstitutionality of these laws as the new Article 2 should be applied to legislation only by giving the legislator a chance to amend older legislation.[100]

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[99] *See* Appeal no. 7846 for the Juridical year 59, Court of Cassation, 18th of January 1990, vol.41, at 182:
"النص في المادة الثانية من الدستور علي أن الشريعة الإسلامية المصدر الرئيسي للتشريع. دعوة للشارع بالتزام ذلك فيما يسنه من قوانين، تطبيق أحكام الشريعة الإسلامية منوط باستجابة الشارع لدعوة الدستور وإفراغ أحكامها في نصوص تشريعية محددة ومنضبطة تنقلها إلي مجال التنفيذ.
لما كان ما نص عليه الدستور في المادة الثانية منه من أن مبادئ الشريعة الإسلامية المصدر الرئيسي للتشريع ليس واجب الإعمال بذاته إنما هي دعوة للشارع كي يتخذ الشريعة الإسلامية مصدرا رئيسيا فيما يسنه من قوانين . ومن ثم فإن أحكام تلك الشريعة لا تكون واجبة التطبيق بالتعويل علي نص الدستور المشار إليه إلا إذا استجاب الشارع لدعوته وأفرغ هذه الأحكام في نصوص تشريعية محددة ومنضبطة تنقلها إلي مجال العمل والتنفيذ."

[100] *See* Appeal no. 8081 for the Juridical year 57, Court of Cassation, 8th of January 1990, vol.41, at 137*: " النص في المادة الثانية من الدستور على أن الشريعة الإسلامية المصدر الرئيسي للتشريع. ليس واجب الإعمال بذاته إنما هو دعوى للشارع بأن تكون هذه الشريعة المصدر الرئيسي فيما يضعه من قوانين ومن ثم فإن المناط في تطبيق أحكام الشريعة الإسلامية استجابة الشارع لدعوته في إفراغ مبادئها السمحاء في نصوص القوانين التي يلزم القضاء بإعمال أحكامها بدءاً من التاريخ الذي تحدده السلطة الشرعية*

IV. THE CONSTITUTIONAL ARTICLE 2 POSITION AND INTERPRETATION

Surprisingly, the Court of Cassation assumed a different position in Cassation Appeal no. 1800 for the juridical year no 61. It analyzed Article 29 of lease law no. 49 for the year 1977, on the Islamicity claim. The Court interpreted lease contracts based on *fiqh* and *sharia'a,* justifying the application of the legal text as not contradicting Islamic *sharia'a* as follows:

> […] the second article of constitution stated that "the principles of Islamic sharia'a are the principal source of legislation', and as article no. 29 of law no. 1977 regarding leasing places stated that among beneficiaries of the article, including the lessee parents, the condition of keep staying within the leased unit by the original lessee till death or acquittal, and what is meant by staying in this legal context is the staying for a legal cause with no contradiction with Islamic sharia'a rulings.[101]

Apparently, the Court of Cassation in this ruling extended interpretation of legal texts through an understanding of Islamic *sharia'a*. But it was not the final position of the Court. It would be influenced by a later interpretation of a decision by the Supreme Constitutional Court reinterpreting Article 2 on new grounds.[102] The Court of Cassation declared its commitment to principles of Islamic *sharia'a* which are certain in authenticity and meaning as being notable in its verdict:

> [A]s this court followed its stable jurisdiction, [that applying article 2 of the Egyptian constitution], it may not be issued any legal text under its jurisdiction that violate the decisive certain rules of Islamic sharia'a, that is certain in authenticity and meaning, because of such certainty Ijtihad is forbidden as such certain rules of Islamic sharia'a represent its essence that could not be changed nor reinterpreted, But other rules of Islamic sharia'a that is not certain in its authenticity or meaning, are allowed for

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لسريانها، والقول بغير ذلك يؤدى إلى الخلط بين التزام القضاء بتطبيق القانون الوضعي وبين إشتراع القواعد القانونية التي تتأبى مع حدود ولايته، ويؤكد هذا النظر أنه لما كان الدستور المصري قد حدد السلطات الدستورية وأوضح اختصاص كل منها وكان الفصل بين السلطات هو قوام النظام الدستوري مما لازمه أنه لا يجوز لإحداها أن تجاوز ما قرره الدستور بإعتباره القانون الأسمى، وكانت وظيفة السلطة القضائية وفق أحكامه تطبيق القوانين السارية فإنه يتعين عليها إعمال أحكامها، وفضلاً عن ذلك فإن المادة ١٩١ من الدستور تنص على أن كل ما قررته القوانين واللوائح من أحكام قبل صدور هذا الدستور يبقى صحيحاً ونافذاً ومع ذلك يجوز إلغاؤها أو تعديلها وفقاً للقواعد والإجراءات المقررة في هذا الدستور"

ومن ثم فإنه لا مجال هنا للتحدي بأحكام الشريعة الإسلامية ما دام أن السلطة التشريعية لم تقنن مبادئها في تشريع وضعي لما كان ذلك وكانت المحكمة الدستورية العليا قد قضت بجلسة٤/٥/١٩٨٥ برفض دعوى عدم دستورية نص المادة ٢٢٦ من القانون المدني ونشر هذا الحكم في الجريدة الرسمية بتاريخ ١٦/٥/١٩٨٥، وإذ جرى قضاء الحكم المطعون فيه رغم ذلك على تأييد الحكم المستأنف فيما انتهى إليه من إهدار لنص المادتين ٢٢٦، ٢٢٧ من القانون المدني لتعارضهما مع أحكام الشريعة الإسلامية التي اعتبرها الدستور مصدراً رئيسياً للتشريع، فإنه يكون قد خالف "القانون وأخطأ في تطبيقه

[101] *See* Appeal no. 1800 for the Juridical year 61, Court of Cassation,12th of April 1998, vol.49, at 306: " مبادئ الشريعة الإسلامية....." المادة الثانية من الدستور قد نصت على أن المصدر الرئيسي للتشريع"، وتشترط الفقرة الأولى من المادة ٢٩ *من القانون ٤٩ لسنة ١٩٧٧ بشأن إيجار الأماكن فيمن عددتهم من المستفيدين بميزة الامتداد القانوني ومن بينهم الوالدان - الإقامة الدائمة المستقرة بالعين المؤجرة من المستأجر الأصلي حتى الوفاة أو الترك، والمقصود بالإقامة في هذا المعنى الإقامة المستندة إلى مسوغ قانوني لا يخالف أحكام الشريعة الإسلامية".*

[102] *Supra* note 91.

> ijtihad process…[as it is allowed] it will be allowed for *wali al-amr* for the beneficiary of society[103]

The Court here referred to several terms representing a new understanding by the Court of Cassation of Article 2, and *sharia'a*. The state is considered as *waly al-amr* or the governor*,* in the Islamic context, and is entitled to do *Ijtihad* through courts and legislative authorities. The areas of *Ijtihad,* according to that verdict, are the uncertain areas of Islamic *sharia'a* whether its authenticity or meaning. Those uncertain areas were not identified by the verdicts of the Court of Cassation but rather through the Supreme Constitutional Court.

3. Supreme Constitutional Court Interpretation Of Article 2:

The Supreme Constitutional Court, which was established to substitute for the Supreme Court through law no. 48 for 1979,[104] is entitled to conduct judicial monitoring of the constitutionality of jurisdictions and regulations, to decide on court jurisdiction competency amongst different judicial authorities, and to decide the validity of judicial verdicts in event of the existence of two contradicting judicial verdicts from different judicial organs regarding the same issue.[105] Law no. 48 of 1979 never stated clearly the authority of the court to interpret the constitution articles in themselves, but it was understood from the legal jurisdiction that it required interpretation of the constitutional article before deciding on the constitutional claims.

a. First Interpretation of Article 2 Before The Amendment Of 1980:

Under the jurisdiction of the Supreme Court in the 1970s, questions of constitutionality arose regarding the second article of the Constitution. Article 2 before its 1980 amendment stated that "Islamic *sharia'a* is a principal source of legislation." The Supreme Court in its 1976 verdict interpreted the second

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[103] *See* Appeal no. 70 for the Juridical year 18, Supreme Constitutional Court, 3rd of November 2002, vol.10, at 682: *" ذلك أن النص في المادة الثانية من الدستور بعد تعديلها في عام ١٩٨٠ على أن "مبادئ الشريعة الإسلامية المصدر الرئيسي للتشريع"، يدل، وعلى ما جرى عليه قضاء هذه المحكمة، على أنه لا يجوز لنص تشريعي يصدر في ظله أن يناقض الأحكام الشرعية القطعية في ثبوتها ودلالتها معا، بإعتبار أن هذه الأحكام وحدها هي التي يمتنع الإجتهاد فيها لأنها تمثل من الشريعة الإسلامية ثوابتها التي لا تحتمل تأويلا أو تبديلا، أما الأحكام غير القطعية في ثبوتها ودلالتها أو فيهما معا، فإن باب الإجتهاد يتسع فيها لمواجهة تغير الزمان والمكان، وتطور الحياة وتنوع مصالح العباد، وهو اجتهاد إن كان جائزا ومندوبا من أهل الفقه، فهو في ذلك أوجب وأولى لولى الأمر ليواجه ما تقتضيه مصلحة الجماعة درءا لمفسدة أو جلبا لمنفعة أو درءا وجلبا للأمرين معا."*

[104] The decree of law no. 48 for 1979 replaced the Supreme Court law issued by 1970, transferring all the claims of constitutionality to the new supreme constitutional court. Revise the introductory clause of law no. 48 for 1979.

[105] Article 25 of Law no. 48 for 1979.

constitutional article as an invitation for the legislative authority to choose among any of the different Islamic schools, as all Islamic schools are equal to each other. There was no obligation to follow a certain opinion or school. The Supreme Court considered Article 280 of the *Sharia'a* courts law, which stated that judges are obliged to follow the opinions of the Hanafite School only, as limiting the scope of *ijtihad* and Islamic *sharia'a* and contradicting with Article 2. [106]

Accordingly, it was understood that the Supreme Court rejected Article 280 which limited the authority of judges to do *takhayur*, considering it against Article 2 and legislative purposes.

b.Second Interpretation To Article 2 After The Amendment Of 1980 And Before 1985

The Supreme Constitutional Court, which was established in 1979, was obliged to confront Article 2 after its amendment in the 1980s referendum. The new article emphasized the application of Islamic *sharia'a* by finding it as "the principal source of legislation." It was controversial in that it changed the understanding of the Supreme Constitutional Court from its predecessor court. This policy of supporting *takhayur* which was directed at *sharia'a* courts and family disputes, coincided with the legislative philosophy of Sanhuri and the new modern legal system as represented by the verdict of the Supreme Court in 1976. The new Supreme Constitutional Court, however, tried from the beginning to evade direct interpretation of the new article.

In 1985, the Supreme Constitutional Court issued verdicts regarding two cases, deciding on claims of unconstitutionality against doctrines, based on the new version of Article 2. The first case involved a challenge to a civil law that allowed creditors to charge interest on overdue accounts. The second case concerned a

[106] *See* Appeal no. 10 for the Juridical year 5, The Supreme Court, 3rd of July 1976, available at http://hccourt.gov.eg/ , " *من حيث أن المدعية تنعى على هذه المادة أولاً مخالفة نصين من الدستور أولهما نص المادة الثانية التى تنص على أن "الإسلام دين الدولة ومبادئ الشريعة الإسلامية مصدر رئيسى للتشريع" والثانى نص الفقرة الأولى من المادة التاسعة منه التى تنص على أن " الأسرة أساس المجتمع قوامها الدين والأخلاق والوطنية" وذلك للأوجه الآتية:- الوجه الأول: أن المادة الثانية من الدستور إذ نصت على أن مبادئ الشريعة الإسلامية مصدر رئيسى للتشريع، فإنها تعنى توجيه المشرع إلى أحكام الشريعة الإسلامية كمصدر كلى ينتظم كافة المذاهب الفقهية على السواء، دون التقيد بمذهب معين من تلك المذاهب أو بأرجح الأقوال فيها، وإذ كانت المادة (٢٨٠) من لائحة ترتيب المحاكم الشرعية قد نصت على إلزام القضاء التقيد بأرجح الأقوال من مذهب أبى حنيفة دون سواه، وكان هذا التقييد مما لا يملكه ولى الأمر فإنها تكون قد خالفت المادة الثانية من الدستور. الوجه الثانى: أن إلزام القضاء التقيد بمذهب معين من مذاهب الشريعة الإسلامية من شأنه إغلاق باب الاجتهاد وتجميد الشريعة السمحاء، مع أن الاجتهاد واجب على أهل كل زمان."*

challenge to a 1979 family law article that increased women's rights in divorce proceedings.

In these two decisions, the Court's interpretation of Article 2 was illogical. The Supreme Constitutional Court declared that both cases were non-justiciable. It stated that as the challenged articles were issued prior to the new amendment of the constitution, and that according to the merits of the committee issuing the amendment, Article 2 should be applied to subsequent laws. The challenge against those articles were out of the court's jurisdiction. However, the minutes of the constitutional committee referred to the amendment within a time frame for the legislative organ to revise the legislation. The Supreme Constitutional Court decided to refute its own powers of challenging the law with these two verdicts and five years after the amendment's adoption.[107]

In both case no. 20 of Judicial Year 1, May 4, 1985, and case no. 28 of Judicial Year 2, May 4, 1985, the Supreme Constitutional Court strictly rejected challenges of constitutionality. But the Supreme Constitutional Court in case no. 20 of Judicial year 1 criticized the family law, which was popularly known as Jihan's law, because it was issued through the exceptional authorities of the presidency under emergency law. The court considered such an amendment of family law as non-urgent and to be declared by the single authority of the president. It also referred to the new amendment as contradicting general Islamic principles. Due to its issuance prior to the amendment of Article 2, the challenge was declared not-justiciable.

In case No.28 of Judicial year 2, the Court followed the same rule of forfeiting the challenge as the challenged text was older than the amendment. The court stated that the 1980 amendment obliged the legislator to only depend on Islamic *sharia'a* sources and to choose among the different opinions of its schools – *takhayur*- with no right to depend on other sources; and in the event of the absence of equivalent jurisdiction in Islamic *sharia'a*, *Ijtihad* was allowed through the legal thinking of Islamic schools. The court emphasized the necessity of giving the legislative authority time to revise legislation and issue new Islamic laws, and at the same time it affirmed the absence of the court's authority to

[107] *Supra* note 91.

review the constitutionality of the civil code article which was issued in 1949 and prior to the new constitutional article. [108]

c. Third Interpretation Of Article 2 : Case No.7 Of Judicial Year 8 (May 15, 1993),

In 1993, the Supreme Constitutional Court exercised its authority in interpreting the controversial second constitutional article. According to the Supreme Constitutional Court, the search through Islamic law heritage lead to classifying

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[108] *See* Appeal no.28 for the Judicial year 2, Supreme Constitutional Court, 4th of May 1985, available at: http://hccourt.gov.eg/Pages/Rules/Rules_Search.aspx#rule_text_1, " *وحيث إن المدعى بصفته ينعى على نص المادة (٢٢٦) من القانون المدنى أنها إذ تقضى باستحقاق فوائد محددة القدر عن مجرد التأخر فى الوفاء بالإلتزام النقدى تكون قد انطوت على مخالفة لمبادئ الشريعة الإسلامية التى أصبحت طبقاً للمادة وذلك بإعتبار أن تلك الفوائد تمثل زيادة فى الدين بغير مقابل، فهى الثانية من الدستور "المصدر الرئيسى للتشريع". الربا المتفق على تحريمه أخذاً بقوله تعالى "وأحل الله البيع وحرم الربا" وهو من الأحكام الشرعية المقطوع بها ثبوتاً ودلالة والتى أصبحت بموجب المادة الثانية من الدستور فى مصاف القواعد القانونية الوضعية التى من شأنها نسخ ما كان سابقاً عليها متعارضاً معها من نصوص التشريعات الوضعية نسخاً ضمنياً، إذ صارت بذاتها واجبة الأعمال دون حاجة إلى صدور تشريع يقننها. وحيث إن القانون المدنى الصادر بالقانون رقم ١٣١ لسنة ١٩٤٨ فى ١٦ يوليو سنة ١٩٤٨ والمعمول به إبتداء من ١٥ أكتوبر سنة ١٩٤٩ ينص فى المادة (٢٢٦) منه- محل الطعن- على أنه "إذا كان محل الإلتزام مبلغاً من النقود، وكان معلوم المقدار وقت الطلب وتأخر المدين فى الوفاء به، كان ملزماً بأن يدفع للدائن على سبيل التعويض عن التأخر فوائد قدرها أربعة فى المائة فى المسائل المدنية و خمسة فى المائة فى المسائل التجارية . وتسرى هذه الفوائد من تاريخ المطالبة القضائية بها، ان لم يحدد الاتفاق أو العرف التجارى تاريخاً آخر لسريانها، وهذا كله ما لم ينص القانون على غيره". وحيث إنه يبين من تعديل الدستور الذى تم بتاريخ ٢٢ مايو سنة ١٩٨٠ أن المادة الثانية أصبحت تنص على أن "الإسلام دين الدولة، واللغة العربية لغتها الرسمية، ومبادئ الشريعة الإسلامية المصدر الرئيسى للتشريع". بعد أن كانت تنص عند صدور الدستور فى ١١ سبتمبر سنة ١٩٧١ على أن "الإسلام دين الدولة، واللغة العربية لغتها الرسمية، ومبادئ الشريعة الإسلامية مصدر رئيسى للتشريع" والعبارة الأخيرة من هذا النص لم يكن لها سابقة فى أى من الدساتير المصرية المتعاقبة إبتداءاً من دستور ١٩٢٣ وحتى دستور سنة ١٩٦٤ ... إن المشرع الدستورى أتى بقيد على السلطة المختصة بالتشريع قوامه إلزام هذه السلطة- وهى بصدد وضع التشريعات- بالإلتجاء إلى مبادئ الشريعة لاستمداد الأحكام المنظمة للمجتمع، وهو ما أشارت إليه اللجنة الخاصة بالإعداد لتعديل الدستور فى تقريرها إلى مجلس الشعب والذى أقره المجلس بجلسة ١٩ يولية سنة ١٩٧٩ وأكدته اللجنة التى أعدت مشروع التعديل وقدمته إلى المجلس فناقشه ووافق عليه بجلسة ٣٠ إبريل سنة ١٩٨٠ إذ جاء فى تقريرها عن مقاصد تعديل الدستور بالنسبة للعبارة الأخيرة من المادة الثانية بانها "تلزم المشرع بالالتجاء إلى أحكام الشريعة الإسلامية للبحث عن بغيته فيها مع إلزامه بعدم الالتجاء إلى غيرها، فإذا لم يجد فى الشريعة الإسلامية حكماً صريحاً، فإن وسائل استنباط الأحكام من المصادر الاجتهادية فى الشريعة الإسلامية تمكن المشرع من التوصل إلى الأحكام اللازمة والتى لا تخالف الأصول والمبادئ العامة للشريعة". ولما كان مفاد ما تقدم، أن سلطة التشريع إعتباراً من تاريخ العمل بتعديل العبارة الأخيرة من المادة الثانية من الدستور فى ٢٢ مايو سنة ١٩٨٠ - أصبحت مقيدة فيما تسنه من تشريعات مستحدثه أو معدله لتشريعات سابقة على هذا التاريخ، بمراعاة أن تكون هذه التشريعات متفقة مع مبادئ الشريعة الإسلامية ... وحيث إن إعمال المادة الثانية من الدستور بعد تعديلها- على ما تقدم بيانه، وإن كان مؤداه: إلزام المشرع بأتخاذ مبادئ الشريعة الإسلامية المصدر الرئيسى لما يضعه من تشريعات بعد التاريخ الذى فرض هذا الإلزام بما يترتب عليه من إعتباره مخالفاً للدستور إذا لم يلتزم بذلك القيد، إلا أن قصر هذا الإلزام على تلك التشريعات لا يعنى اعفاء المشرع من تبعة الابقاء على التشريعات السابقة- رغم ما قد يشوبها من تعارض مع مبادئ الشريعة الإسلامية، وإنما يلقى على عاتقه من الناحية السياسية مسئولية المبادره إلى تنقيه نصوص هذة التشريعات من أية مخالفة للمبادئ سالفة الذكر، تحقيقاً للإتساق بينها وبين التشريعات اللا حقة فى وجوب اتفاقها جميعاً مع هذه المبادئ وعدم الخروج عليها. وحيث إنه ترتيباً على ما تقدم، ولما كان مبنى الطعن مخالفة المادة (٢٢٦) من القانون المدنى للمادة الثانية من الدستور تأسيساً على أن فوائد التأخير المستحقة بموجبها تعد من الربا المحرم شرعاً طبقاً لمبادئ الشريعة الإسلامية التى جعلتها المادة الثانية من الدستور المصدر الرئيسى للتشريع، وإذ كان القيد المقرر بمقتضى هذه المادة - بعد تعديلها بتاريخ ٢٢ مايو سنة ١٩٨٠ والمتضمن إلزام المشرع بعدم مخالفة الشريعة الإسلامية- لا يتأتى أعمالا له بالنسبة للتشريعات السابقة عليه حسبما سلف بيانه، وكانت المادة (٢٢٦) من القانون المدنى الصادر سنة ١٩٤٨ لم يلحقها أى تعديل بعد التاريخ المشار إليه، ومن ثم، فإن النعى عليها، وحالتها هذه - بمخالفة حكم المادة الثانية من الدستور وأياً كان وجه الرأى فى "تعارضها مع مبادئ الشريعة الإسلامية - يكون فى غير محله. الأمر الذى يتعين معه الحكم برفض الدعوى.*

Islamic sharia'a rules into two types of sharia*'a*: certain and uncertain. The Court defined the certain rules of *sharia'a* as being the binding rules for all Muslims, and the uncertain rules derived through *ijtihad* as not binding. The court mentioned the necessity of identifying those certain rules of *sharia'a*, so legislative work could be practiced without contradicting them. If there were no certain rules of *sharia'a,* legislators must then perform *ijtihad* and devise laws.

The Court referred to the state as the *wali al-amr* or the governor, which is a form of *al-syasa al-shara'ya* theory from traditional Islamic *fiqh,* especially from Ibn Taimia's ideas, to allow state wider authority in legislating.[109] According to the courts verdict, the state is entitled, as *wali al-amr*, to choose the appropriate rule to be applied either through certain rules of *sharia'a* or through implementing *Ijtihad* to formulate rules in the uncertain area. The only barrier before the state is its obligation not to contradict the certain rules of sharia'a. So according to Article 2, the principles of Islamic sharia'a that the state is required to apply is through *Ijtihad*. The state is entitled to do *takhayur* from Islamic schools' opinions to be stated within its laws. There is no problem to do *talfiq* as long as each part of the law had its origins in Islamic heritage and the outcome does not contradict certain areas of *sharia*'a. The Court also identified its role then as a reviser and ensurer of laws to ensure that certain areas of *sharia'a* did not contradict; it had no authority over legislation regarding the issuing of laws through *Ijtihad* in other uncertain areas.

According to the Supreme Constitutional Court verdict in case No.7, the certain *sharia'a* area is characterized by absolute clarity in authenticity and meaning. To be clearly authentic, there should be no doubt about the religious text authenticity. The required certainty of meaning requires the agreement of all Islamic jurists on the meaning of the text, which is almost impossible. Indirectly, the court is stating both conditions together to evade the Qur'anic texts, which are declared by the court as being authentic in wording but with meaning varying among Islamic schools. The Prophet's sayings or *hadiths* are not on the same level of obligation as the Qur'anic text which open the *jtihad*'s. Accordingly, the only way to evade the clear application of Qur'anic text is requiring the certainty of its meaning. The Supreme Constitutional Court required proof of such certainty of meaning with the agreement of all Islamic jurists on the same meaning. This is almost impossible to achieve and narrows the applicable *sharia'a* to a few cases.

[109] *Supra* note 91, at 213- 227.

Case no. 7 concerns the claim of unconstitutionality regarding the right of mothers to child custody till the age of ten for boys and the age of twelve for girls, as stated in law no 25 of 1929 as amended by law no. 100 of 1985.[110] While the mother's party claimed its right to custody till the maximum limit as stated by law, the husband's party claimed that this age limit contradicted the Hanafite School which is the dominant school of personal status law in Egypt, [111] and contradicts Article 2. The court sent the question of its constitutionality to the Supreme Constitutional Court.

According to the new perception of *sharia'a* by the Supreme Constitutional Court and the meaning of Article 2 of the constitution as being an application of certain rules of Islamic *sharia'a*, the Court decided that there was no Qur'anic or other text that is certain in its meaning and authenticity to determine the age for *hadana* or child custody as the age of the *hadana* or custodian is determined through the *Ijtihad* of different schools. The State is not obliged to determine a certain range of age using any of these schools, but contrarily the state has the duty to conduct *Ijtihad* to determine that the age is in accordance with societal and children's interests. [112] The Court also hinted at the legal custodian age as being in conformity with one of the Maliki school's opinions. In its decision, the Court considered the challenge of unconstitutionality as invalid and rejected that claim.

C. **Sharia'a Application has Lead To Uncertainty Of Legal Practice**:

Article 2 has troubled the Egyptian legal system, as it complicates the legal hybridity differentiating it from Sanhuri's, Abdou's and others' ideas. It obliges that all legislation follow the main principles of Islamic *sharia'a*, with no clear definition of what the Islamic sharia'a principles actually are, and with no consideration of those laws inspired by Western legislation. Egyptian high courts, especially the Court of Cassation and the Supreme Constitutional Court hold the responsibility for defining the article. The Supreme Administrative Court has also had a role in interpreting the second article similarly to both the Constitutional and Cassation Courts.[113]

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[110] *Supra* note 91, at 191, (This amendment was issued in law no. 44 of 1979, which was named publicly as Jihan's law, the law was reissued in a new format of law no. 100 of 1985).
[111] *Supra* notes 4 and 91.
[112] *Supra* notes 4 and 91.
[113] *Supra* note 91.

The main actions of the courts reflect ignorance of the constitutional amendment of 1980. Some authors saw it as being politically motivated, but further analysis of the judicial decisions reflect judicial confusion. The judicial authority in general and the legal community in particular did not fully understand how the legal system could work after the amendments. It was understood that laws, as parts of a modern legal system, created a lot of duties and rights in accordance with these texts. Thus, any change to one of the Islamic *sharia'a* rules would change the paradigm and require clarification of the new legal rule, its source and formation. The second point of confusion was the mechanism for choosing sharia'a schools, whether through choosing a particular school or the common *takhayur* and *talfiq* of the modernist idea. [114]

The Supreme Constitutional Court in its verdict of case No. 7 in 1993 worked on solving that problem by finding a new analysis of the text. The simplicity of that verdict in defining Islamic *sharia'a* principles was based on the classification of certain *sharia'a* principles versus uncertain *sharia'a* principles. This classification by the Court was based on the Islamic theory of *al-syasa al-shara'ya* in accordance with Ibn Taimia's ideas about the authority of the *wali al-amr*, or the state, in issuing legislation. [115]

Ibn Taimia's ideas are based on the authority of the *wali al-amr* or the governor to conclude legal rules over the Muslim community in order to achieve the purposes of *sharia'a*, with no obligation to follow the merits or rules of any of the Islamic schools. The only obligation of the *wali al-amr* was to not contradict the recognized aspects of *sharia'a* by all schools. [116]

The Constitutional Court decided that the state had its own authority to choose among the Islamic schools as *wali al-amr*, and accordingly it allowed for the state to conclude its own decisions as long as it was far from the certain areas in Islamic *sharia'a*. The Supreme Constitutional Court's position looks similar to that of Sanhuri's, but it denied as well, the state's right to include laws from sources other than *sharia'a* as long as there was no clear root in *sharia'a*. In such a case, the state was obliged to do *Ijtihad* to reach a new rule consistent with *sharia'a* opinions and purposes.[117]

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[114] *Supra* notes 3 and 91.
[115] *Supra* note 3.
[116] *Supra* notes 3 and 6.
[117] *Supra* notes 3 and 6.

It is clear that the new understanding of Islamic *sharia'a* is not popular among legal professionals and politicians. Until today, there is a debate about the effectiveness of Article 2 in applying Islamic *sharia'a*. That is why Islamic parties after the 25th of January Uprising have tried to promote the application of Islamic *sharia'a* in a more conservative manner.

In the 2012 Constitution, a new article was adopted, number 219, which stated that "The principles of Islamic sharia'a include general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community." The new article was an attempt to widen the scope of application of Islamic *sharia'a* by stating the general evidence, foundational rules and rules of jurisprudence. But at the same time, there is a restriction to only Sunni schools in Islamic *sharia'a*. This article was omitted after the broad amendments to the 2012 constitution after the ouster of the Islamic party in 2014.[118]

D. **Conclusion**:

The uncertainty of the Egyptian legal system due to its hybrid nature - between modernity and Islamic *sharia'a* - is clearly seen through the application of Constitutional Article 2. This controversial article that was first introduced in the legal system in the 1971 Constitution has continued up to the new Constitution and its amendment in 2014.

The Court of Cassation has passed through several stages in dealing with this article including ignoring it or by shifting its duty to the legislative authority. But some verdicts of the Court of Cassation have tried to identify what is Islamic and what is non- Islamic either as a criticism of the legal text or as an interpretation of it. In the end, the Court of Cassation followed the jurisdiction of the Supreme Constitutional Court in classifying the Islamic *sharia'a* into certain and uncertain areas to identify the applicable rules.

The Supreme Constitutional Court which tried to ignore the new amendment in the beginning, lived up to its role in the historic decision of case no.7 in the judicial year 8. In this verdict the Supreme Constitutional Court defined Islamic *sharia'a* and its role in identifying the Islamic principles that should be followed by the legislative authority. It established a new theory of Islamic law under the

[118] *See supra* note 88, it may be considered that the amendment of 2014 is an establishment of a new constitution, that the amendment was very wide to include nearly the whole constitutional order of 2012.

takhayur and *talfiq* principles as proposed by Sanhuri and Abdou. It widened the scope of legislative authority to do *Ijtihad* as long as there is no certain text to follow, and limited the sphere of certain texts by ensuring the certainty on both authenticity and meaning through all jurists' consensus and Islamic schools.

The new application of Article 2 in the Egyptian legal system created a lot of uncertainty and ambiguity that have worked as a trap for Egyptian courts. Even after the decision of the Supreme Constitutional Court in defining the meaning of Article 2, some legal and political parties saw the Supreme Constitutional Court as escaping from its duty to apply the essence of Article 2. There has been an attempt to force the state to follow more the traditional opinions by adding a new article to the Constitution. All of these attempts lack real vision in interpreting the legal rule practice through Islamic *sharia'a* which has been uncertain since its original application. None of the new visions solve the problem of the multi-jurisdiction nature of Islamic schools except through reference to Sanhuri's ideas, or to Ibn Taimia's theory of al-*syasa al-shara'ya*.

V. Criminal Application Of Islamic Sharia'a Under Article 60 Of The Egyptian Penal Code

The Egyptian penal code was adopted in 1937 as a product of the modernization movement at the beginning of the twentieth century. The most notable thing about the penal code is that it has maintained its hybrid nature combining modernity and traditionalism. While modern legal systems are positive in their core beliefs that punishment is not the sole purpose, in and of itself, but is rather a tool for rehabilitation of the criminal,[119] the Egyptian legal system combined deterrence and rehabilitation as goals of punishment. The Supreme Constitutional Court stated clearly in its verdicts that the main goal of the punishment is the personal deterrence of the criminal.[120] Accordingly, the jails and prisons were identified as rehabilitation centers in the constitutional article no. 56,[121] but the work of the penal and criminal codes still focus on deterrence and revenge.

An understanding of this penal system is important through exploring the Islamic criminal system which has affected the formulation of the current criminal system. Through tracking Article 60 of the Penal Code and how it has been interpreted by courts, an understanding of the problem of the uncertainty of Islamic *sharia'a* application in a hybrid system is revealed.

A. The Nature Of Punishment In The Islamic Legal System

The Islamic legal system is based on the divine nature of its ruling. Punishment is either a divine order dictated by *sharia'a* or based on people's interests.

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[119] *See,* Ogechi E. Anyanwu, *Crime And Justice In Postcolonial Nigeria: The Justifications And Challenges Of Islamic Law Of Shari'ah,* Vol. 21, No. 2, Journal of Law and Religion, pp. 315-347, 326-328, (Cambridge University Press, (2005/2006), available at http://www.jstor.org/stable/30040588.

[120] *See* Appeal no. 114. For the Juridical year 21, Supreme Constitutional Court, 2nd of May 2001, vol.9, page 986:

لما كان الهدف من العقوبة الجنائية هو الزجر الخاص للمجرم جزاء لما اقترف والردع العام للغير ليحمل من يحتمل اررتكابهم الجريمة علي الإعراض عن إتيانها وكانت الفقرة الرابعة من المادة ٤٨ تقرر توقيع العقوبة المقررة لارتكاب الجناية أو الجنحة محل الاتفاق علي مجرد الاتفاق علي اقترافها حتي ولو لم يتم ارتكابها فعلا فإنها بذلك لا تحقق ردعا ولا خاصا بل إن ذلك قد يشجع المتفقين علي ارتكاب الجريمة محل الاتفاق طالما أن مجرد الاتفاق علي اقترافها سيؤدي إلي معاقبتهم بذات عقوبة ارتكابها .

[121] Egyptian Constitution 2014, Article 56, stating that "A prison is a place of correction and rehabilitation. Prisons and places of detention shall be subject to judiciary supervision, where actions inconsistent with human dignity or which endanger human health shall be prohibited. The Law shall regulate the provisions of reform and rehabilitation of convicted persons and facilitating decent lives after their release". *السجن دار إصلاح وتأهيل. تخضع السجون وأماكن (٥٦) مادة . وينظم القانون بالخطر الاحتجاز للإشراف القضائى، ويحظر فيها كل ما ينافى كرامة الإنسان، أو يعرض صحته أحكام إصلاح و تأهيل المحكوم عليهم، وتيسير سبل الحياة الكريمة لهم بعد الإفراج عنهم*

V. CRIMINAL APPLICATION OF ISLAMIC SHARIA'A UNDER ARTICLE 60 OF THE EGYPTIAN PENAL CODE

According to Islamic *sharia'a,* punishment is either *hudu'd* or *ta'zir*. The *hudu'd* are punishments stated by God and as understood from the Quran. Most Islamic schools accept that there are five *hudu'd*: murder, theft, fornication, specific defamation, and *ridda* or apostasy.[122] Islamic schools have their own opinions and rules about the specific definition of each crime under *Hudu'd* and their application, especially because *hudu'd* involves severe physical punishment including the death penalty. Among the schools, there is general agreement that *hudu'd* forms the core of the Islamic penal system.

Ta'zir, on the other hand, is the substitute punishment that is decided by the *wali al-amr* or the governor, or *al- qadi,* the judge. This punishment can be for a crime which is not covered by the Quran in *hudu'd*, or as a substitute for *hudu'd*. For example, the Shafiite School accepts punishing thieves through *ta'zir* instead of applying *hadd,* which is a cutting off of the hands.[123] *Ta'zir* can be through physical or monetary forms of punishment. [124]

The punishment system in Islamic *sharia'a* is not different from its medieval forms of punishment, justification, and morality. Deterrence and revenge are the main purposes of punishment within the penal system. It is based on the Qur'anic verse which states that "We ordained therein for them: Life for a life, eye for an eye, nose for a nose, ear for an ear, tooth for a tooth, and one wound equal to another."[125] The traditional Islamic legal system does not distinguish between torts and crimes in the same way that the Western legal systems do. Punishment is concentrated on revenge and deterrence, whereby tort was developed later as a civil law issue. [126]

Generally it is possible to classify other punishments in Islam such as fiscal punishment, through paying money either for *al-dya* or a victim's compensation. Fiscal punishment can be implied for not executing decisions of the *qadi*, governor or other state councils.[127]

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[122] *See supra* note 4, at 311, 312.
[123] *Id*.
[124] *Supra* note 4, at 322, 323.
[125] Quranic Verse no. 45 of Surrat Alma'eda, available at http://www.oneummah.net/quran/book/5.html
[126] *See*, Majid Khadduri & Herbert J. Liebesny, *Law in the Middle East*, with a foreword by Justice Robert h. Jackson, vol.1, (*Origins and Development of Islamic Law,* the Middle East institute, Washington DC 1955).
[127] *Supra* note 80.

V. CRIMINAL APPLICATION OF ISLAMIC SHARIA'A UNDER ARTICLE 60 OF THE EGYPTIAN PENAL CODE

Some crimes in Islamic *sharia'a* are accompanied by a waiver of rights. And there are some complementary punishments such as for those accused of fornication not seen in other cases. [128]

Also, the discretionary power of *al-qadi* can replace all of the previous punishments with an admonition by the *qadi.* In this case, the accused receive just verbal admonition and advice.[129]

There is also a spiritual purpose behind punishment in the Islamic system, which is avoidance of divine punishment in the afterlife. Judgement day, as a part of Islamic belief, requires a person to behave in a correct way and that includes accepting and imposing punishments on criminals.[130] Accordingly, justification of the penal system is based on religious grounds besides revenge and deterrence.

B. The Nature Of Punishment In The Modern Legal System

Although the modern Egyptian legal system is inspired by the Western legal system, it does not fulfill its vision about the purpose of punishment. It mixes the application of modern Western systems with an Islamic understanding of punishment. This is seen in the wording of the penal and criminal codes in Egypt, such as using *hatk al-a'erd* which describes the sexual crimes against women to be for any sexual assault against both genders.[131] The term *hatk al-a'erd* represents an Islamic understanding that committing such actions against women is against the men protecting them, whether husbands, fathers or other relatives. It is thus possible to understand why rape as a crime in the Egyptian legal system is only applied to female victims, with specification that the criminal action is to be in a singular form of the penetration of the female organ by the male organ using force. Such a limitation of rape to female victims is based on other traditional understandings of rape where part of the justification for penalization is risk of pregnancy, rather than harm to the victim.[132]

Although the penal code adopted in 1937, like the modern European codes, did not include physical punishment, it kept the death penalty for several crimes including murder and treason. The classification of crimes is much closer to the modern legal system than the traditional one, where crimes are classified into

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[128] *Supra* note 4
[129] *Supra* note 3 and 4
[130] *Supra* note 3
[131] Egyptian Penal Code article 268, available at http://www1.umn.edu/humanrts/research/Egypt/criminal-code.pdf
[132] *Supra note* 3, and *id,* Article 268 in Egyptian penal law stated that "Whoever indecently assaults a person by force or threat, or attempts such assault shall be punished with hard labor for three to seven years".

felonies, misdemeanors and violations. Accordingly, the severity of the crime defines the punishment. Felonies are generally punished by jailing, and sometimes by the death penalty, and misdemeanors are punished through simple imprisonment and/or fines, and violations by fines below 100 Egyptian pounds.[133]

The purpose of the new penal code was shared amongst revenge, deterrence and rehabilitation, but there is no clear emphasis on rehabilitation, unlike deterrence which is mentioned in court rulings explicitly. The Supreme Constitutional Court ruling in case no.114, for the 21st judicial year, emphasized deterrence as the main purpose of the punishment in the legal system:

> As the purpose of penal punishment is the deterrence for the criminal himself, for what he committed, and the public deterrence for others, to push the ones who intended to commit similar crime to desist from committing it.[134]

It can be understood from this ruling how the value of deterrence is prized in the Egyptian legal system, whereby even the Supreme Constitutional Court justifies the penal rule based on how effective a deterrent it is.

C. Court Of Cassation Interpretation Of Article 60 In The Egyptian Penal Code

There are several controversial articles in the penal code concerning the utilization of Islamic *sharia'a*. Article 60 is a well-known article that refers to an allowance to avoid penal provisions under *sharia'a*. The provisions of the penal

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[133]Egyptian penal code Article 9 stated that "Crimes are of three kinds: First: Felonies, Second: Misdemeanors, Third: Violations ",Article 10 stated that " Felonies are crimes liable to the following penalties: Capital punishment, Permanent hard labor Punishment, Temporary hard labor Punishment Imprisonment", Article 11 stated that "Misdemeanors are crimes liable to the following penalties: Detention, Fine the ceiling of which exceeding one hundred Egyptian pounds", Article 12 stated that "Violations are crimes penalized with a fine the ceiling of which does not exceeding one hundred Egyptian pounds.", available at http://www1.umn.edu/humanrts/research/Egypt/criminal-code.pdf

[134] *See* Appeal No. 114, for The juridical year 21, Supreme Constitutional Court , 2nd of June 2001, vol.9, at 986: *" لما كان الهدف من العقوبة الجنائية هو الزجر الخاص للمجرم جزاء لما اقترف والردع العام للغير ليحمل من يحتمل ارتكابهم الجريمة علي الإعراض عن إتيانها وكانت الفقرة الرابعة من المادة ٤٨ تقرر توقيع العقوبة المقررة لارتكاب الجناية أو الجنحة محل الاتفاق علي مجرد الاتفاق علي اقترافها حتي ولو لم يتم ارتكابها فعلا فإنها بذلك لا تحقق ردعا ولا خاصا بل إن ذلك قد يشجع المتفقين علي ارتكاب الجريمة محل الاتفاق طالما أن مجرد الاتفاق علي اقترافها سيؤدي إلي معاقبتهم بذات عقوبة ارتكابها.*

code may not apply to any deed committed in good faith, pursuant to a right determined by virtue of the *sharia'a*.[135]

Despite the simple wording of Article 60, there are ambiguities about the meaning of the word *sharia'a* and how it can be interpreted. It is the same problem as the multi-jurisdiction of Islamic schools seen in courts dealing with Article 60. Generally, courts favor *takhayur* amongst Islamic schools and some rulings favor an understanding of Islamic *sharia'a* similar to the Supreme Constitutional Court's understanding about certain and uncertain *sharia'a*.

1. *Sharia'a* Is Superior To Legal Text

Court of Cassation verdicts have faced appeals based on the righteous action of the appellant. One of the well-known claims concerns the right of the husband under Islamic *sharia'a* to discipline his wife using physical punishment.

In Court of Cassation case No. 6648 for the judicial year 63, an appeal was made claiming that the appellant's actions against his wife were not intended except as an exercise of his right to discipline his wife. The actions of the husband lead to the death of the wife as confirmed by autopsy reports of forensic experts. The Court of Cassation refuted the claim:

> It is affirmed that husband has a right to discipline his wife, but this right is limited to slight harming, but exceeding such slight harm shall be penalized even if it is only simple abrasions on the wife's body… As it is proved that the appellant did beat his wife causing her the described injuries in the anatomy report… which cause after that her death, it is sufficient to consider his action as out of the husband's rights in accordance to *sharia'a* and he shall be punished according to article 236[136] of penal code[137]

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[135] Egyptian Penal code Article 60, available at http://www1.umn.edu/humanrts/research/Egypt/criminal-code.pdf

[136] Egyptian Penal Code, Article 236 states that "Whoever wounds or beats someone on purpose or gives him harmful material without meaning thereby to kill, but doing that had led to death, shall be punished with hard labor or imprisonment, for a period of three to seven years…", available at http://www1.umn.edu/humanrts/research/Egypt/criminal-code.pdf

[137] *See* Appeal no.6848, for the Juridical year no.63, Court of Cassation, 22nd of December 1994, vol.45, at 1230*: من المقرر أن التأديب حق للزوج ولكن لا يجوز أن يتعدى الأيذاء الخفيف فإذا تجاوز الزوج هذا الحد، فإحدث أذى بجسم زوجته، وكان معاقبا عليه قانونا، حتى ولو كان الأثر بجسم الزوجة لم يزد عن سجحات بسيطة لما كان ذلك، وكان ذلك، وكان الثابت من مدونات الحكم المطعون فيه أن الطاعن قد اعتدى بالضرب على زوجته وأحدث بها الإصابة الموصوفة بتقرير الصفة التشريحية، وكان البين من هذا التقرير أن المجنى عليها كدمة رضيه بأقصى الجزء الأسفل ليسار الصدر وأعلى مقدم يسار البطن تحدث من المصادمة بجسم صلب راض ثقيل نوعا من مثل قالب طوب احدثت تهتكا اصابيا بجوهر ونسيج الطحال نجم عنه نزيف دموى داخلى غزير بداخل التجويف البطنى أدى إلى الوفاة، فإن هذا كاف لاعتبار ما وقع منه خارجا عن حدود حقه المقرر بمقتضى الشريعة ومستوجبا للعقاب عملا بالفقرة الولى من المادة ٢٣٦ من قانون العقوبات، ولا جناح على المحكمة إن هى التفتت عن هذا الدفاع القانونى الظاهر البطلان .*

So it is understood from the previous ruling that the Court of Cassation does not deny the right of the husband to beat his wife as long as it does not leave traces on her body such as abrasions. Accordingly, the severity of the beating is the reason for the punishment not the action itself. This contradicts with what is stated in Article 377 whereby "a penalty of fine not exceeding hundred Egyptian pounds shall be inflicted on whoever commits any of the following deeds… (9) Whoever creates an altercation, aggression, or light mischief that does not result in beating or wounds."

This is a very good example of a court ruling that interprets *sharia'a* in a broad way allowing actions justified in Islamic *sharia'a* even if contradicting the legal text of the penal law.

The preceding example is not a singular case. There are other cases such as case No. 21092 of judicial year 63, whereby the appellant was accused of possessing a firearm without a license. It is a crime under law no 394 for the year 1954; the law states that possessing or obtaining an arm with no license is a felony, regardless of its usage or intent behind its possession. In this case, the appellant used possession of the firearm as justification for having intention to submit it to the public authorities.

The Court of Cassation accepted the appellant's claim according to Article 60 justification although it is penalized in a different code as follows:

> [A]s the article 25 of criminal procedural law allowed any person who is informed by crime occurrence to report it to the public prosecution, which could also proceed its authority with no necessity of request or complaint. However some sorts of reporting will require such person to keep the body of the crime (which is an arm in that case) to submit it to the public authority, and it is possible that the possession or attainting of such body is illegalized, but according to article no. 60 of penal code which stated that the provisions of penal code may not apply to any deed committed in good faith, pursuant to a right determined by virtue of the sharia'a, and as proved from the merits of the challenged court verdict that the appellant possession for the alleged arm was by intention to submit it to the police officer, and that he submitted it directly after the police arrival, which is a proof to negate the criminal intention on his side… Hereby and accordingly the court is to repeal the appealed verdict and restating and declaring the appellant as innocent [138]

[138] *See* Appeal no.21092, for the Juridical year 63, Court of Cassation , 27th of January 2003, vol. 54, page 220*:* *لما كان من المقرر أن المادة ٢٥ من قانون الإجراءات الجنائية أباحت لكل من علم بوقوع جريمة يجوز للنيابة العامة رفع الدعوى عنها بغير شكوى أو طلب، أن يبلغ النيابة العامة أو أحد مأموري الضبط القضائي عنها والتبليغ في بعض صوره يقتضي الاحتفاظ بجسم الجريمة وتقديمه إلى السلطة العامة وقد يكون جسم الجريمة مما يحظر القانون حيازته أو إحرازه إلا أن الاحتفاظ به في هذه الحالة مهما طال*

V. CRIMINAL APPLICATION OF ISLAMIC SHARIA'A UNDER ARTICLE 60 OF THE EGYPTIAN PENAL CODE

In this court decision it is not clear how Islamic ***sharia'a***, in its essence, justifies the deed of the appellant. It can be understood in the texts of the law itself. Law No 394 for 1954 interprets arms possession as an intention to possess the arm accompanied by practice of such intention. There are other understandings but in this case the intention of possession did not exist which negates the legal text. The court ignored previous justifications and decided to interpret the text broadly using justifications from ***sharia'a.*** In both cases the court ruling favored Islamic ***sharia'a*** application over the written law articles.

2. Justifying Modern Judicial Verdicts Based On *Sharia'a* Understanding

In case no. 48168 for the judicial year no. 73, the Court of Cassation faced an appeal regarding a judicial verdict sentencing the appellant in a drug crime as being unconstitutional according to Article 2 of the Egyptian Constitution, and against the rights of the appellant in accordance with Article 60 to evade punishment as long his deed was justified under Islamic ***sharia'a***. The Court responded to this claim by reclassifying the criminalized action in accordance with the Islamic classification. It considered the claim of the witness as wrongful as long as the crime was one of the ***ta'zir*** crimes and not ***hudu'd*** as follows:

> [T]he challenge of unconstitutionality of the court verdict as the accusation was built on singular witness of the police officer, on contrary of the limits of witnesses required by blessed sharia'a is invalid, that is because the witnesses number limit in Islamic sharia'a is for the witnessing in hudu'd and life crimes but the accusation of the trial is related to one of Ta'zir crime that is under judge's discretion with no obligation of following certain tool of proofing.[139]

Here the Court of Cassation surprisingly classified the crimes of the modern legal system into ***hudu'd*** and ***ta'zir*** similar to the traditional classification. The Court avoided the modern classification of crimes into felonies, misdemeanors and

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أمده لا تتغير طبيعته مادام القصد منه وهو التبليغ لم يتغير وإن كان في ظاهره يتسم بطابع الجريمة وذلك عملاً بالمادة ٦٠ من قانون العقوبات التي تنص على أنه "لا تسرى أحكام قانون العقوبات على كل فعل ارتكب بنية سليمة عملاً بحق مقرر بمقتضى الشريعة". لما كان ذلك، وكان البين مما سرده الحكم المطعون فيه أن إحراز الطاعن السلاح المضبوط لم يكن إلا بقصد الاحتفاظ به لتسليمه لمأمور الضبط القضائي وهو ما بادر به بمجرد وصوله إليه، وهو ما ينتفي معه قصد الإحراز بمعناه القانوني، وإذ كان الحكم المطعون فيه قد خالف هذا النظر وجرى في قضائه على توافر القصد الجنائي لمجرد إحراز الطاعن للسلاح المضبوط، فإنه يكون قد أخطأ في تطبيق القانون وتأويله بما يوجب نقضه والحكم ببراءة الطاعن عملاً بالفقرة الأولى من المادة ٣٩ من قانون حالات وإجراءات الطعن أمام محكمة النقض

[139] *See* Appeal no. 48186, for The Juridical year 73, Court of Cassation, 8th of February 2010, vol. 54, at 224 *أما القول بعدم دستورية المحاكمة لقيام الاتهام على شهادة الضابط وحده على خلاف النصاب الذي تطلبته الشريعة الغراء فهو ظاهر البطلان، ذلك بأن المشاحة حول نصاب الشهادة إنما تركزت حول الشهادة على الحدود والدماء بينما التهمة الماثلة تتعلق بجريمة تعزيزية لا يتقيد القاضي في إثباتها بأداة معينة.*

violations, by not justifying the burden of proof on the basis of criminal procedural law which allows the judge to state his decision as long as his belief in the evidence is sufficient to reach its verdict. The Court instead justified its decision on the grounds that *ta'zir* crimes do not require the same proof of authenticity as *hudu'd*. Classifying drug laws as being part of *ta'zir* crimes allows the judge to depend on the presence of one witness as enough proof.

3. *Sharia'a* Is Inferior To Legal Text

The Court of Cassation followed another set of verdicts consistent with modern law philosophy. It kept the legal text's superiority over other *sharia'a* and *fiqh* texts. One of the examples is case no. 1193 for the judicial year 29. In this case, an appeal was raised before the Court of Cassation to challenge the criminal sentence imposed on the appellants for performing an abortion. The merits of the case are that two husbands agreed to the abortions and went to a well-known doctor to perform the medical procedure. Both the husbands and the doctor were condemned for committing the crime of abortion in accordance with the Egyptian penal code, which penalizes abortion even with the free will of the mother. The appellant challenged that court verdict on the basis of Islamic *sharia'a* which allows abortion till the fourth month of pregnancy, considering it as a rightful deed for husbands under *sharia'a*. The Court of Cassation refuted the claim of justification on the *sharia'a* basis on two grounds. The first one is that abortion is criminalized by direct legal text, and the second one is that abortion allowance is not part of the certain *sharia'a* under Article 60:

> [T]hat the appellant stated that Islamic *sharia'a* allowed abortion till four pregnancy months and the Article 60 of penal code allows what is allowed by *sharia'a*, this appeal is unacceptable as long as the law punish abortion action, illegalizing it; that Article 60 allows deeds that are committed pursuant to right stated by law in general, and the illegalizing of abortion by legislator prevent considering it as pursuant to a right but instead it is a crime that its committer deserve punish for it… In addition the court didn't agree that abortion allowance in Islamic *sharia'a* is from the certain area in its authenticity but it's a controversial output of *Ijtihad* of scholars.[140]

[140] *See* Appeal no. 1193, For the Juridical year 29, Court, Of Cassation, 23rd of November 1959, vol.10, at 952: *فإن ما عرض إليه الطاعن في دفاعه أمام محكمة الموضوع من أن الشريعة الإسلامية تبيح إجهاض الجنين الذي لم يتجاوز عمره أربعة أشهر وأن المادة ٦٠ من قانون العقوبات تبيح ما تبيحه الشريعة - ما عرض إليه الطاعن من ذلك لا يكون مقبولاً ما دام القانون يعاقب على الإسقاط ويجعل منه فعلاً محرماً، ولأن المادة ٦٠ إنما تبيح الأفعال التي ترتكب عملاً بحق قرره القانون بصفة عامة، وتحريم الشارع للإسقاط يحول دون اعتبار هذا الفعل مرتبطاً بحق وإنما يجعل منه إذا وقع جريمة يستحق جانيها العقاب الذي فرضه الشارع لفعلته، ولا يعيب الحكم أن لا يتناول في أسبابه هذا الدفاع ويرد عليه لأن هذا الرد مستفاد من سياق الحكم وما هو ماثل فيه من الوقائع التي أسندت للمتهمين بوصف كونها جرائم تنطبق عليها المواد ٢٦٠ و٢٦٣ و٢٣٦*

In this court verdict, the Court presented the legal text as being of a higher level than the unwritten rules of *sharia'a*, applying the criminalizing rule of abortion even with the existence of *sharia'a* allowance according to one or more jurists. The court considered what is meant by *sharia'a* in Article 60 as being the law itself. Accordingly, personal rights that exempt punishment are only those that do not contradict with legal texts. The surprising part of the verdict is the statement that the allowance of abortion is not from the certain *sharia'a*. Here the Court of Cassation is trying to apply the Supreme Constitutional Court understanding of certain and uncertain *sharia'a*, insisting that certain *sharia'a* is the meaning of Article 60. Accordingly, the court required such *sharia'a*'s proof of authenticity and meaning to negate the penal code legislation.

D. Conclusion

The Egyptian criminal legal system maintains Islamic *sharia'a* as part of its application, as seen in Article 60. As the courts are uncertain about the meaning, values and purposes of applying Islamic sharia'a, court rulings reflect interpretation of Islamic sharia'a differently and on a case-by-case basis. Sometimes the courts follow stated legal rules even if they contradict with Islamic *sharia'a*. In other rulings the Islamic *sharia'a* application ignores the legal text. Because the Egyptian Court of Cassation has not formulated a consistent mechanism for applying Islamic *sharia'a* in accordance with Article 60, ongoing uncertainty and lack of consistency in decisions has ensued.

و٤٠/ ١ - ٢ و٤١ من قانون العقوبات، إلا أنه بالنظر إلى أن الطاعن قد أورد ما أثاره أمام محكمة الموضوع في خصوص هذا الدفع على الصورة التي ضمنها الوجه الأول من أسباب طعنه، فإن هذه المحكمة لا ترى بدأ من أن تشير إلى أن ما يقوله الطاعن من إباحة الشريعة الإسلامية إجهاض الحمل الذي لم يتجاوز أربعة أشهر ليس أصلاً ثابتاً في أدلتها المتفق عليها وإنما هو اجتهاد للفقهاء انقسم حوله الرأي فيما بينهم، ولا محل للاعتراض بالرأي الذي يظاهر ما يذهب إليه الطاعن تلقاء الوضع القائم في التشريع المعمول به من تحريم هذا الفعل كما سلف القول.

VII. Conclusion

At the end of this research, it is interesting to note how the legal system in Egypt has been affected by the modernist ideas of the legal elite in Egypt and Western influence at the end of the nineteenth century. The most innovative idea was using Islamic legal principles such as *takhayur* and *talfiq* as modernizing tools. This idea succeeded practically in developing the legal system from the traditional one. The legal elite kept those principles to create a hybrid legal system resting between modernity and traditionalism. It was required to justify the modern legal text and win its acceptance. Incorporating Islamic *sharia'a* in the modern legal system was not only justified for social reasons, but also as being part of Egypt's legal heritage and inspiration for developing the legal text similar to Roman law in the Western legal system.

Such hybridity in a legal system leads to uncertainty in legal application because of the differences between the traditional and modern usages of *takhayur* and *talfiq.* The traditional application of *sharia'a* is based on the divinity of its rules, which justifies *takhayur* and *talfiq* amongst Islamic schools. In general, modern law does not embrace such a holistic approach in the legal texts. In addition, *takhayur* and *talfiq* were applied by laypersons and not state authorities as encouraged by Abdou and Sanhuri. The application of *sharia'a* and *fiqh* in the new legal system allowed courts to rely on different legal opinions which threatened the singularity of the legal answer.

The judicial verdicts interpret Article 2 of the Egyptian constitution reflect very notable confusion regarding the meaning of *sharia'a* and its classification. The Court of Cassation has taken several different positions regarding Article 2, by considering it a legislative issue, and at other times as a general rule applied to legal text through certain *sharia'a* principles. The Supreme Constitutional Court postponed interpreting Article 2 till 1993, when it interpreted it in the well-known case no.7. It classified *sharia'a* into certain and uncertain, whereby the certain sharia'a may not be breached by laws or judicial verdicts as part of the legal system. While the uncertain *sharia'a* is not identified specifically, the court considered it an open field for *Ijtihad* of legislative organs to exercise *takhayur* and *talfiq.* The encouragement of such classification is the court's solution to the dilemma of applying *sharia'a* within a modern legal system. Despite this attempted solution, uncertainty

has remained in the legal system because of the non-clarity of the classification of certain and uncertain *sharia'a*.

The Court of Cassation in its verdicts regarding Article 60 faced the problem of applying *sharia'a* as an exemption from the application of penal laws. But the Court cannot unify its policy regarding *sharia'a*, while the court encouraged the superiority of the legal text in abortion cases over the sharia'a texts, and in favoring the husband's *sharia'a* right in disciplining his wife physically. Such uncertainty in dealing with *sharia'a* is the problem regarding its position it in the legal system.

Efforts of the modernist thinkers to establish a new legal system which favors a precise form of legal application is worthy of respect. The current legal system has evolved as result of these efforts in comparison to the traditional system of the *qadi.* But this development was not sufficient to avoid later complexities and uncertainty of *sharia'a* including within the legal system. It is expected that the Egyptian legal system will be further developed following the January 25th Uprising and its aftermath. It may require separating *sharia'a* understandings from the legal text to achieve clarity of the legal rule. Such efforts to develop the legal system is connected to and not separate from attempts to understand the current legal system and its origins. Understanding the past and the present helps us to understand the future.