

# “Islam is the Solution”: Constitutional Visions of The Egyptian Muslim Brotherhood

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## I. INTRODUCTION

Islamist political parties in the Middle East now form an important part of the political landscape.<sup>1</sup> Previously operating as opposition movements outside the formal process, parties stemming from these movements have succeeded in recent years in countries including Jordan, Morocco, and Kuwait.<sup>2</sup> As part of the national political field, voters can evaluate their accomplishments in office and indicate their approval through the ballot. Political involvement comes at a price, however—to participate, these parties typically have to make some compromises that can involve implicit limitations on the range of criticisms they make of the ruling regimes. Nevertheless, inclusion of these Islamist movements is a crucial step in the development of democratic systems.

Egypt is a significant exception to this trend. The major opposition “party,” the Muslim Brotherhood, is considered the parent of many of the Islamist political parties in the region.<sup>3</sup> Unlike its progeny, the Muslim Brotherhood does not have legal party status, although its members have managed to run for office as independents. In the November-December 2005 lower house parliamentary elections, independent candidates from the Muslim Brotherhood running with the slogan “Islam is the Solution” gained eighty-eight of 454 seats in those elections, many more than the other opposition groups combined, and even with an election process that has been criticized as involving government-supported fraudulent practices.<sup>4</sup> These results, however, should not be seen as indicative of gradual

1. Islamist movements participating in national elections include the Islamic Action Front (IAF) in Jordan, the Islamic Constitutional Movement in Kuwait, and the Party of Justice and Development in Morocco. Nathan J. Brown, Amr Hamzawy & Marina Ottaway, *Islamist Movements and the Democratic Process in the Arab World: Exploring the Gray Zones*, 67 CARNEGIE PAPERS 3–4 (Carnegie Endowment for International Peace & Herbet-Quandt-Stiftung, Mar. 2006). Recently, the Jordanian IAF announced that it will boycott the November 9, 2010 parliamentary elections to protest the electoral fraud that took place in the 2007 parliamentary elections. Muhammad Abu Rumman, *Jordan’s Parliamentary Elections and the Islamist Boycott*, ARAB REFORM BULLETIN, Oct. 20, 2010, <http://www.carnegieendowment.org/arb/?fa=show&article=41769>.

2. Brown, Hamzawy & Ottaway, *Islamist Movements*, *supra* note 1, at 4–5. Ruling regimes largely determined that preventing such popular movements had become more disadvantageous than allowing participation, and that inclusion would hopefully lead to moderation and stem extremism. Robert S. Leiken & Steven Brooke, *The Moderate Muslim Brotherhood, Friend or Foe?*, 86 FOREIGN AFFAIRS, Mar.–Apr. 2007, at 107–08. Exclusion has been justified on the grounds that they were inherently violent movements promoting absolutist views of Islam, which they wanted to enforce on society through a devious form of democracy depicted as “one man, one vote, one time.” *Id.* at 109, 111.

3. Leiken & Brooke, *supra* note 2, at 115–17.

4. *Id.* at 111, 113–14; Samer Shehata & Joshua Stacher, *The Brotherhood Goes to Parliament*, 240 MIDDLE EAST REPORT 32 (Fall 2006). At that time, only 444 of the 454 seats were determined by election; the remaining ten members of the parliament were appointed by the President. Amira Howeid, *Waiting for the Brothers*, AL-AHRAM WEEKLY, (Sept. 23–29 2010), <http://weekly.ahram.org.eg/2010/10167eg6.htm>. The number of total seats has now been increased to 518, with the additional sixty-

informal participation leading toward formal recognition and inclusion by the regime. Brotherhood officials continue to be arrested and there is no indication that the regime will change its position on the group's legality.<sup>5</sup> The next milestone in Egypt is the November 28, 2010 parliamentary elections.<sup>6</sup> Egyptian President Mubarak has already indicated his intent to tighten the political freedoms that flourished slightly but significantly in the 2005 parliamentary elections.<sup>7</sup> Despite recent imprisonments of some of its leaders and the expectation that the new General Guide Muhammad Badi' would focus more on the movement from within rather than on engagement with Egyptian politics more broadly, the Brotherhood has suggested that it could put forward as many as 200 candidates.<sup>8</sup>

Americans need to pay attention to the Egyptian 2010 parliamentary elections, and in particular, the role of the Muslim Brotherhood as the only meaningful opposition. Egypt is the largest Arab country, the U.S.'s most important Arab ally in the region, and the second largest recipient of U.S. foreign aid.<sup>9</sup> President Barack Obama chose Egypt as the site from which he delivered the new U.S. message to the Muslim world, which sought a new beginning between the U.S. and the region.<sup>10</sup> Significantly, American foreign policy has already influenced electoral developments in Egypt, making Egyptian elections an American issue. The Bush administration pressured Egypt to move in the direction of a democratic opening, and Mubarak allowed multi-candidate elections for President in 2005 and more freedom in the November-December 2005 parliamentary elections, which led to the Brotherhood's win of eighty-eight seats.<sup>11</sup> Several analysts of Egyptian politics informally surmised that Mubarak allowed enough Brotherhood candidates to win to show the U.S. what will result from increasing pressure to open up the political system, while not allowing them to obtain enough seats to affect the outcome of legislation. The U.S. subsequently seemed to back away from pushing Egypt for political reforms, in part due to a focus on bigger problems in Iraq.

four seats reserved for female candidates. *President Hosni Mubarak Sets Egypt Election Date*, BBC (Oct. 20, 2010), <http://www.bbc.co.uk/news/world-middle-east-11589354>.

5. Amr Hamzawy & Nathan J. Brown, *The Egyptian Muslim Brotherhood: Islamist Participation in a Closing Political Environment*, 19 CARNEGIE PAPERS 30–32, (Mar. 2010), [http://carnegieendowment.org/files/muslim\\_bros\\_participation.pdf](http://carnegieendowment.org/files/muslim_bros_participation.pdf).

6. *President Hosni Mubarak Sets Egypt Election Date*, *supra* note 4.

7. *Id.*; Hamzawy & Brown, *The Egyptian Muslim Brotherhood*, *supra* note 5, at 18.

8. *Banned Egypt Party Muslim Brotherhood to Run in Poll*, BBC (Oct. 10, 2010), <http://www.bbc.co.uk/news/world-middle-east-11509354>; Interview with Essam al-Arian, Member of the Egyptian Muslim Brotherhood's Guidance Bureau, ARAB REFORM BULLETIN (June 15, 2010), <http://www.carnegieendowment.org/arb/?fa=show&article=40998>. For a discussion of the internal tensions within the Brotherhood over the issue of political participation, see Hamzawy & Brown, *The Egyptian Muslim Brotherhood*, *supra* note 5, at 32 (pointing out that the newly elected General Guide, Muhammad Badi', seems quite interested in refocusing reform efforts at the level of individuals, which seems to suggest a shift away from electoral participation).

9. JEREMY M. SHARP, U.S. FOREIGN ASSISTANCE TO THE MIDDLE EAST: HISTORICAL BACKGROUND, RECENT TRENDS, AND THE FY2010 REQUEST, CONG. RESEARCH SERV., RL32260, at 4 (July 18, 2009). According to the U.S. Department of State, Egypt received \$1,289,470,000 in U.S. Foreign Military Aid in 2008, second only to Israel, which received \$2,380,560,000. "Egypt: Security Assistance," Department of State, <http://www.state.gov/t/pm/64694.htm> (last visited July 14, 2010).

10. Jeff Zeleny and Alan Cowell, *Addressing Muslims, Obama Pushes Mideast Peace*, N.Y. TIMES, June 5, 2009, at A1.

11. Leiken & Brooke, *supra* note 2, at 114.

The stakes and level of responsibility are very high for U.S. policy toward the 2010 Egyptian elections, and U.S. policy makers need to understand the Brotherhood's agenda in a careful and nuanced way, outside the reductionist framework that the Mubarak regime has set up, which presents itself as the only bulwark against radical Islamists.<sup>12</sup> This Article uses documents issued by the Muslim Brotherhood, in particular the lengthy 2007 Draft Political Party Platform, and personal interviews with Brotherhood leadership to examine the group's specific goals and beliefs for the place of religion within the structure of the Egyptian legal system.<sup>13</sup> While many important angles need to be explored, I focus on one topic that has drawn the most attention: the place of religion in the state, or religion defined and enforced by state institutions.<sup>14</sup> I show that while the Brotherhood carefully acknowledges the existing constitutional structure and jurisprudence on the position of Islam in the state, it also significantly expresses a desire to expand the place of Islam in a way that is constructed around and built upon the existing system.

This Article first provides essential background on the Muslim Brotherhood and then briefly explains Egypt's existing constitutional structure with regard to Islam. The main part of the Article discusses in detail the Brotherhood's agenda and its significance. In conclusion, the Article returns to the larger topic of Islamist political parties participating in national legislatures and identifies general challenges that any such party will face in explaining its agenda and, in particular, how it will combine religious sources along with a commitment to public welfare.

## II. THE MUSLIM BROTHERHOOD AS A POWERFUL UNOFFICIAL POLITICAL PARTY

The Brotherhood began as a social-religious organization in 1928 and slowly evolved into what looks in many respects like a political party, albeit an unauthorized one. Founded in 1928 in Egypt by Hasan al-Banna, a schoolteacher stationed at that time in Isma'iliyya, the Society of the Muslim Brothers focused initially on serving the needs of the Muslim community and improving their levels of morality and

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12. See Shehata & Stacher, *supra* note 4, at 36 ("While a healthy dose of skepticism toward any political organization is prudent, commentary on the Brotherhood frequently leaps to unsubstantiated conclusions that paint the group as a monolith bent on oppression and rule by force in the future."); see also Mona El-Ghobashy, *Unsettling the Authorities: Constitutional Reform in Egypt*, 226 MIDDLE EAST REPORT 28–29 (2003) ("The reductive tendency to shoehorn all of Egyptian politics into a deadlock between the regime and the Islamists, one the one hand, and the regime and the unwieldy masses, on the other, has kept most Egypt-watchers from noticing all the meaningful and consequential forms of political expression in the country today.").

13. The Platform covers a vast range of topics, including the economy, education, and foreign policy, to name just a few. An examination of any one of these areas would also help to advance knowledge of the Brotherhood's political agenda.

14. Noah Feldman describes the call for an "Islamic state" by Islamist political parties as indicative of a desire for a state "governed by law and that governed through law." NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* 21 (2008). Rather than calling for any particular rules from within the vast Islamic legal corpus, he argues, Islamist parties are offering an alternative system to the authoritarian regimes that have come into power in the post-independence era in many Muslim-majority countries. That system of reform is based on the notions of rule of law and separation of powers that characterized many pre-modern Islamic societies. See also ABDULLAHI AN-NA'IM, *ISLAM AND THE SECULAR STATE* 1–2 (2008) (objecting to benign characterizations, the author argues that the concept of an Islamic state is a "dangerous illusion" that threatens "constitutionalism, human rights, and citizenship in Islamic societies").

religiosity, which can be referred to as the missionary activity of the organization.<sup>15</sup> Within a decade of its founding, the ideology of the Brotherhood had solidified into three core beliefs: “(1) Islam as a total system, complete unto itself, and the final arbiter of life in all its categories; (2) an Islam formulated from and based on its two primary sources, the revelation in the Qur’an and the wisdom of the Prophet in the Sunna [the normative practice of the Prophet]; and (3) an Islam applicable to all times and all places.”<sup>16</sup> These beliefs have been reiterated throughout the Brotherhood’s history and appear clearly in the contemporary literature as examined in this Article.

Early in its life, the Brotherhood took steps into two additional fields of activity, which created a conflict with the Egyptian state that continues to this day. First, the Brotherhood determined that political activity was part of its agenda and fielded candidates in the general elections of 1941 and 1945.<sup>17</sup> Second, as Brotherhood friction with the government continued to develop, some members formed an armed wing of the organization called the Secret Apparatus, purportedly to defend both Islam and the Brotherhood.<sup>18</sup> As the monarchical period ended with the “Free Officers” who overthrew the Egyptian monarchy in 1952, the Brotherhood’s initial good relations with the state soon became strained, culminating in the attempted assassination of Nasser in 1954 by a member of the Brotherhood.<sup>19</sup> The regime arrested thousands of other Brotherhood members, and courts ordered a life sentence for General Guide Hedaybi, the execution of six members, and prison sentences for hundreds more.<sup>20</sup> One of the Brothers arrested during Nasser’s rule was Sayyid Qutb, whose subsequent writings are considered to have inspired the Brotherhood’s violent offshoot groups such as Islamic Jihad.<sup>21</sup>

When Anwar al-Sadat became President, following the death of Nasser in 1970, he initially treated the Brotherhood favorably, in part as a counterbalance to his predecessor’s support among the leftists.<sup>22</sup> But the good relations between Sadat and the Brotherhood did not last long. In 1979, the Brotherhood took an openly hostile stance toward Sadat’s agreement with Israel at the Camp David Accords. Sadat ordered mass arrests of Brotherhood members and other Islamist groups in September 1981.<sup>23</sup> The Brotherhood’s splinter groups, however, ultimately proved a far greater threat to Sadat: members of Islamic Jihad assassinated Sadat on October

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15. RICHARD P. MITCHELL, *THE SOCIETY OF THE MUSLIM BROTHERS* 7–9 (1969).

16. *Id.* at 14.

17. *Id.* at 26–33 (Banna declared himself a candidate in Isma’iliyya in 1941 but the Prime Minister asked him to withdraw. Banna did so in exchange for several promises, including the government taking action against the sale of alcohol and the existence of prostitution. In 1945, Banna and other Brotherhood members ran again in what were subsequently described as dishonest elections. They were all defeated in races where their popularity would have strongly suggested a victory.)

18. *Id.* at 30–32. During the monarchical period, the Brotherhood was not the only political movement to form an armed division.

19. *Id.* at 24, 151.

20. *Id.* at 151–162.

21. Leiken & Brooke, *supra* note 2, at 110.

22. See Mona El-Ghobashy, *The Metamorphosis of the Egyptian Muslim Brothers*, 37 INT. J. OF MIDDLE E. STUD. 373, 377 (2005) (discussing the release of Brotherhood members as part of Sadat’s “de-Nasserization” of Egyptian political society).

23. Saad Eddin Ibrahim, *Domestic Developments in Egypt, in THE MIDDLE EAST: TEN YEARS AFTER CAMP DAVID* 19, 54–55 (William B. Quandt ed., 1988).

6, 1981.<sup>24</sup> Hosni Mubarak succeeded Sadat and recognized religious extremism as the most immediate threat. He sought to mobilize moderate Islamists, including the Muslim Brotherhood, against extremism, and released many from the Brotherhood from prison.<sup>25</sup> Mubarak tried to distinguish between violent Islamists, whom he wanted to punish, and some moderate Islamists, represented by the Brotherhood, whom he needed on his side.<sup>26</sup>

The Brotherhood wanted more political involvement than Mubarak was prepared to tolerate. In 1984, it entered parliamentary elections in the form of an alliance with the Wafd party and effectively ran on the Wafd ticket, winning eight seats.<sup>27</sup> This early success was followed by another, when the Brotherhood won thirty-six seats in a 1987 alliance with the Liberal Party and the Socialist Labor Party.<sup>28</sup> These wins were not enough to challenge Mubarak's National Democratic Party (NDP), but by the late 1980s, Mubarak recognized that the Muslim Brotherhood posed a serious threat to his legitimacy. As members of parliament, they criticized practices of the state as un-Islamic.<sup>29</sup> The Brotherhood became heavily involved in syndicates and professional organizations, taking the lead in several of these associations.<sup>30</sup> More significantly, in the 1990s, militant groups in Egypt targeted the regime directly and indirectly through attacks on the tourism industry, one of Egypt's main forms of income.<sup>31</sup> The Brotherhood's status as the mother organization of radical splinter groups led to strong measures against it, even as actual Brotherhood involvement in these actions was unclear.<sup>32</sup>

The Brotherhood and other major opposition parties boycotted the parliamentary elections of 1990 because the elections were supervised by the Minister of Interior.<sup>33</sup> The Brotherhood also opposed Mubarak's desire to seek a third term as president.<sup>34</sup> While the Brotherhood condemned Iraq's invasion of Kuwait in 1990, it also criticized the western-led efforts against Iraq, which Egypt joined, and the bombing of Baghdad.<sup>35</sup> After the 1992 Cairo earthquake, the Brotherhood provided greater services to the people than the state, further damaging the state's image.<sup>36</sup> Furthermore, the Islamist victory in Algeria in 1992 showed Mubarak what could happen in Egypt, and the ensuing civil war there gave Mubarak an excuse to keep Egypt's political system closed.<sup>37</sup>

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24. Abd al-Monein Said Aly & Manfred W. Wenner, *Modern Islamic Reform Movements: The Islamic Brotherhood in Contemporary Egypt*, 36 MIDDLE E. J. 336, 359 (1982).

25. HESHAM AL-AWADI, IN PURSUIT OF LEGITIMACY: THE MUSLIM BROTHERS AND MUBARAK, 1982–2000, 50, 57 (2004).

26. *Id.* at 59; *see also* Tamir Moustafa, *Conflict and Cooperation between the State and Religious Institutions in Contemporary Egypt*, 32 INT'L J. OF MID. E. STUD. 3 (2000) (examining Mubarak's strategy).

27. El-Ghobashy, *supra* note 22, at 378.

28. *Id.* at 379.

29. *Id.*

30. AL-AWADI, *supra* note 25, at 57–58.

31. *Id.* at 153–80.

32. *Id.* at 189.

33. The Tagammu' party did participate. *Id.* at 142, 144, 213.

34. *Id.* at 214.

35. *Id.* at 147–50.

36. AL-AWADI, *supra* note 25, at 147–50.

37. AL-AWADI, *supra* note 25, at 170–73.

The tension that had been building since 1990 erupted in 1995. The regime resorted to severe authoritarian methods of dealing with opposition, arresting hundreds of Brotherhood members and trying them in military, not civil, courts.<sup>38</sup> Most of those tried in these military courts were convicted.<sup>39</sup> In the 1995 elections, the Brotherhood won only one seat.<sup>40</sup> The level of state coercion used to prevent success of the opposition was the highest during these elections, and at least fifty-one people were killed during two days of voting.<sup>41</sup> At the same time, Islamist violence continued to rise and Mubarak was the target of an assassination attempt when he visited Ethiopia.<sup>42</sup> Even though Jihad claimed responsibility, the regime made no distinction between radical and moderate Islamists, and Mubarak stressed the similarity between the Brotherhood and Jihad.<sup>43</sup>

Brotherhood members continued to attempt to run for the legislature, and ran as independents once the electoral law allowed independent candidates. Running on the slogan “Islam is the Solution,” independent candidates from the Muslim Brotherhood won seventeen seats in 2000 and went on to gain eighty-eight of 454 seats in the 2005 lower house parliamentary elections, many more than all of the other opposition groups combined.<sup>44</sup> The potential for electoral success had been even higher, but the Brotherhood chose to run candidates in only a limited number of districts, and the state cracked down on the group and its candidates in particular before the elections.<sup>45</sup>

The Brotherhood remains a non-party that is, in effect, the only real opposition to Mubarak’s NDP.<sup>46</sup> This status does not please all Brotherhood members, some of whom want to renew focus on the original social and religious mission.<sup>47</sup> Other members sought to separate out the Brotherhood’s political functions to form a new political party that would reach across the aisle and present a religiously-inspired yet secular message. They left the Brotherhood to form the Wasat (Center) party in conjunction with other politicians, including Christians.<sup>48</sup> Although the Wasat Party has applied for party recognition, the government has refused to grant it.<sup>49</sup> Finally, some in the Brotherhood want the group to function as a legally-recognized political

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38. *Id.* at 170–75.

39. *Id.* at 175.

40. *Id.* at 170.

41. *Id.*

42. AL-AWADI, *supra* note 25, at 179.

43. *Id.* at 179–80.

44. Leiken & Brooke, *supra* note 2, at 114; Shehata & Stacher, *supra* note 4, at 33.

45. TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT* 211 (2007). Hamzawy and Brown point out that the Brotherhood strategically slated only 161 candidates; even if they all won, they would still only have about one-third of the seats. Further, they did not run candidates against prominent NDP candidates. Hamzawy & Brown, *The Egyptian Muslim Brotherhood*, *supra* note 5, at 7.

46. Mona El-Naggat, *New Call for Election Boycott in Egypt*, N.Y. TIMES, Sept. 7, 2010, at A4.

47. Abdul Monem Abu al-Futuh, *Reformist Islam: How Gray are the Gray Zones?*, ARAB REFORM BULLETIN, Jul. 18, 2009, [http://www.carnegieendowment.org/arb/?fa=show&article=20814&zoom\\_highlight=Reformist+Islam](http://www.carnegieendowment.org/arb/?fa=show&article=20814&zoom_highlight=Reformist+Islam); Interview with Ibrahim Houdaiby, Muslim Brotherhood member and columnist for the group’s English-language website, [www.ikhwanweb.com](http://www.ikhwanweb.com) (June 16, 2009).

48. Carrie Rosefsky-Wickham, *The Path to Moderation: Strategy and Learning in the Formation of Egypt’s Wasat Party*, 36 COMPARATIVE POLITICS 207, 219 (2004).

49. *Id.* at 222.

party.<sup>50</sup> Existing law, however, poses a significant obstacle to such recognition. The Political Parties Law prohibits political parties founded on a religious basis or on “manipulation of religious feelings.”<sup>51</sup> Article Five of the Constitution concerning parties as originally drafted did not mention religion, but was amended in 2007 to include the statement that: “Citizens have the right to establish political parties according to the law. It is not permitted to pursue any political activity or establish political parties on the basis of a religious authority, a religious foundation, or discrimination on the grounds of gender or origin.”<sup>52</sup> While this language does not refer to Islam specifically, the Brotherhood claims that this amendment was targeted at them to prevent legal recognition of the party.<sup>53</sup>

### III. THE CURRENT PLACE OF ISLAM IN THE EGYPTIAN CONSTITUTIONAL STRUCTURE

This section overviews the position of Islam and Islamic law in the Egyptian constitutional structure to contextualize the changes called for, explicitly or implicitly, by the Brotherhood. It also explains the basic details of the Supreme Constitutional Court (SCC), the body charged with interpreting the constitution.

The current constitution was promulgated in 1971, early in President Anwar Sadat’s term.<sup>54</sup> The most significant provision dealing with religion is Article Two, the current formulation of which states: “Islam is the religion of the state; Arabic is the official language; and the principles of the Islamic Sharia are the main source of legislation.” The original 1971 version stated that the principles of the Islamic Sharia are “a” main source of legislation; the amendment from “a” to “the” was made by national referendum on May 22, 1980.<sup>55</sup>

The SCC has sole responsibility for constitutional review of laws and regulations.<sup>56</sup> The court’s relative autonomy made it an attractive forum for Islamists

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50. As evidenced by the 2007 Draft Political Party Platform, *infra* note 92.

51. Law No. 40 of 1977 as amended by Law No. 177 of 2005 (Law on the Political Parties System), 6 July 2005 (Egypt).

52. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 SEPT. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 5.

53. See Nathalie Bernard-Maugiron, *The 2007 Constitutional Amendments in Egypt, and Their Implications on the Balance of Power*, 22 ARAB L.Q. 397, 411 (2008) (“The Muslim Brothers accuse the regime of denying them any possibility of legal recognition.”).

54. For a discussion of the drafting history of the constitution, see Adel Omar Sherif and Kristen Stilt, *Egypt’s Constitutional Summer of 1971* (forthcoming).

55. EGY. CONST., art. 2.

56. Law No. 48 of 1979, art. 25 (Law on the Supreme Constitutional Court, as amended by Law No. 168 of 1998) (Egypt). This law and all SCC decisions referenced in this Article can be found at the SCC website, <http://www.hccourt.gov.eg>. The SCC has the exclusive authority to (1) exercise the power of judicial review in constitutional issues with respect to laws and regulations; (2) settle jurisdictional conflicts among judicial bodies when a case of the same subject matter is brought before two forums; and (3) determine the final judgment when two or more judicial bodies have produced contradictory judgments. *Id.* The powers of judicial review are the most significant, and can occur through two paths. First, when in the course of deciding a case on the merits, if a court views that a provision of law or regulation on which the settlement of the dispute depends is unconstitutional, the proceedings are suspended by the court and the case is forwarded to the SCC for adjudication of the constitutional issues. *Id.* at 29(a). Second, when the constitutionality of a provision of law or regulation has been contested by a party to a case before a court, and the grounds are found to be plausible by that court, the court shall declare the postponement of the case and specify for that party a period not exceeding three months within which the constitutional

who were displeased with various aspects of Egyptian law.<sup>57</sup> In early cases, challengers sought to declare unconstitutional legislation they claimed was inconsistent with the vaguely expressed “principles of the Islamic Sharia.”<sup>58</sup> In its decisions, the SCC has made clear that the constitution gives the legislature wide latitude to legislate for the general welfare (*maslaha*) of the nation.<sup>59</sup> While recognizing that religious texts should be a guiding force in determining welfare and thus play a role in the formulation of laws, the SCC has declined to impose any particular kind of law making process regarding Islamic law.<sup>60</sup> Instead, the SCC has focused on Article Two as a “negative criterion” to mean that no legislation may violate rules of Islamic law that are definite in terms of both their authenticity and meaning.<sup>61</sup> Such rules, according to the SCC, neither need nor permit interpretation (*ijtihad*) because their meanings are absolutely clear, and because they are absolutely clear, they do not change with time.<sup>62</sup>

The SCC adopted this test—“definite in terms of authenticity and meaning”—from classical Islamic law sources.<sup>63</sup> It means that (1) the authenticity of the text must be certain; and (2) there must be one clear meaning of the text.<sup>64</sup> As for part one, the authenticity of the Quran in whole is accepted, so this part concerns the Sunna (normative practice of the Prophet), about which there is extensive debate. Part two provides a challenge for both the Quran and the Sunna, since multiple opinions about the meaning of a text is the typical result, rather than clarity and unanimity. As a result, the principles of the Islamic Sharia that the SCC protects are narrow, giving the legislature wide discretion, since “as even classical scholars of [jurisprudence] have acknowledged, few texts of the revelation can be said to have only one possible meaning or interpretation, and few Sunna texts to be authenticated beyond doubt (the Qur’an alone is considered authentic in its entirety).”<sup>65</sup>

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issue is to be presented to the SCC. *Id.* at 29(b).

57. See MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER, *supra* note 45, at 217 (discussing the effectiveness of the SCC as an avenue for change); see also Tamir Moustafa, *The Islamist Trend in Egyptian Law*, 3 POL. & RELIGION 610 (2010) (examining the reasons for the growth of the Islamist trend within the legal profession).

58. See EGY. CONST., art. 2; see also Tamir Moustafa, *Law Versus the State: The Judicialization of Politics in Egypt*, 28 L. & SOC. INQUIRY 883, 884 (2003) (“even Islamists mobilized through the SCC to challenge the secular underpinnings of the Egyptian state”).

59. Frank E. Vogel, *Conformity with Islamic Shari’a and Constitutionality under Article 2: Some Issues of Theory, Practice, and Comparison*, in DEMOCRACY, THE RULE OF LAW, AND ISLAM 525, 528 (Eugene Cotran & Adel Omar Sherif eds., 1999).

60. *Id.* at 532–38.

61. *Id.* at 539.

62. *Id.* at 529; Case no. 7/Judicial Year 8/Supreme Constitutional Court, 15 May 1993. A number of studies deal in whole or in part with the SCC’s jurisprudence on Article Two. See Vogel, *Conformity with Islamic Shari’a*, *supra* note 59, at 541; CLARK LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT 174–200 (2006); see also Adel Omar Sherif, *Constitutional Law*, in EGYPT AND ITS LAWS 315 (Nathalie Bernard-Maugiron & Baudouin Dupret eds., 2002); Kristen Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT’L L. REV., 695, 722–728 (2004).

63. Vogel, *Conformity with Islamic Shari’a*, *supra* note 59, at 528–29. Vogel brilliantly shows how the SCC test replicated the classical Islamic law standards elaborated by the scholars for determining the permissible *siyasa* power of the ruler.

64. *Id.*

65. *Id.* at 531.

For example, a 1993 SCC case involved Law 100 of 1985, which amended existing personal status legislation and added new provisions.<sup>66</sup> While challenging the law generally, the claim focused specifically on Articles 18-b and 20.<sup>67</sup> Article 18-b provides for an extra compensation payment to a woman whose husband divorced her against her will and without any specific cause for which the woman was responsible.<sup>68</sup> The compensation amount is, at a minimum, equal to (and separate from) two years of any maintenance payment she might receive.<sup>69</sup> Article 20 extended the woman's right to custody of minor children post-divorce, providing that her right to custody (and maintenance from the ex-husband) terminates when the male child reaches the age of ten and the female child reaches the age of twelve. At that point, a judge may further allow a boy to remain in her custody until the age of fifteen and a girl until she marries, if it serves the child's interest.<sup>70</sup> In rejecting the Article Two claim, the SCC stated that although the claimant might find some legal view rejecting the provisions of the Law as contrary to Islamic law, this was not sufficient.<sup>71</sup> A law will be struck under Article Two only if it violates a rule that is certain in both its authenticity and meaning. In this case, since scholars disagreed about the obligatory nature and amount of the compensation payment and the maximum custodial age for children under their mother's care, there was no Article Two violation.<sup>72</sup>

The Supreme Constitutional Court judges are appointed by the President.<sup>73</sup> When making an appointment, the President chooses from among two candidates, one nominated by the General Assembly of the Court, which is the body of all the SCC's judges, and the other nominated by the Chief Justice.<sup>74</sup> Although SCC judges cannot be removed, they must retire at the age of sixty-six.<sup>75</sup> The judges can only be disciplined by the General Assembly itself.<sup>76</sup> The President appoints the Chief Justice by Presidential decree, and the person need only meet the minimum qualifications for any member of the Court.<sup>77</sup> From the Court's establishment in 1979 until 2001, the president had always appointed the most senior judge on the SCC to the position of Chief Justice.<sup>78</sup>

The appointment process for the Chief Justice changed dramatically in late 2001. President Mubarak appointed Fathi Nagib, who at the time held the second highest position in the Ministry of Justice.<sup>79</sup> The human rights community,

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66. Case no. 7/Judicial Year 8/Supreme Constitutional Court; Law No. 100 of 1985 (amending several provisions of the Personal Status Laws No. 25 of 1920 and No. 25 of 1929). The law has been translated into English in Dawoud S.El Alami, *Law No. 100 of 1985 Amending Certain Provisions of Egypt's Personal Status Laws*, 1 ISLAMIC L. & SOC'Y 116, 120 (1994).

67. Case no. 7/Judicial Year 8/Supreme Constitutional Court.

68. *Id.*

69. *Id.* In assessing the amount, the judge should take into account the financial means of the husband, the circumstances of the divorce, and the length of the marriage. *Id.* at 120–21.

70. Law No. 100 of 1985 art. 20.

71. Case no. 7/Judicial Year 8/Supreme Constitutional Court.

72. Case no. 7/Judicial Year 8/Supreme Constitutional Court.

73. Moustafa, *Law Versus the State*, *supra* note 58, at 893–94.

74. *Id.*

75. *Id.* at 894, n.11.

76. *Id.* at 894.

77. *Id.* at 893.

78. *Id.*

79. Moustafa, *Law Versus the State*, *supra* note 58, at 924.

opposition parties, and legal scholars expressed concern because Nagib was a man closely affiliated with the regime.<sup>80</sup> On a practical level, the position of Chief Justice controls many aspects of the court’s decision making.<sup>81</sup> One former justice stated that even if a majority of judges voted against the Chief Justice, he can simply refuse to sign the ruling.<sup>82</sup> Nagib immediately appointed five new justices to the Court.<sup>83</sup> Since SCC law does not specify the number of justices, referring only to the requirement of seven judges to form a quorum, the appointments complied with the law while contravening SCC customs.<sup>84</sup> Further, the custom had been to appoint new members at the junior level of commissioner counselor, with an eventual rise to the highest level of justice.<sup>85</sup> Nagib made all five appointments directly to the level of justice, increasing the number of judges by fifty percent.<sup>86</sup> Since then, Mubarak has appointed three Chief Justices from outside the SCC: Mamduh Mara’i Mari in 2003, Maher Abd al-Wahid in 2006, and Farouk Sultan in 2009.<sup>87</sup> Further, the Chief Justice position was given a new and significant responsibility as head of the Presidential Elections Commission through the 2005 amendment to Article Seventy-Six of the Constitution.<sup>88</sup>

As the sole body with the power to interpret the constitution, the SCC plays a crucial role in defining the meaning of Islamic law for the Egyptian state. Because of its susceptibility to presidential control, the SCC could be used to the advantage of the Brotherhood or other political party that reaches a position of power. With this sense of the SCC’s constitutional status and current jurisprudence in mind, this Article now turns to the Brotherhood’s constitutional visions.

#### IV. THE MUSLIM BROTHERHOOD’S CONSTITUTIONAL VISION

This Section addresses in Part (b) areas in which the Brotherhood takes careful pains to accept aspects of the existing constitutional structure in Egypt. It then turns in Part (c) below to areas of proposed change. First, however, it examines the sources that provide the basis for these conclusions.

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80. *Id.*

81. MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER, *supra* note 45, at 200.

82. *Id.*

83. Moustafa, *Law Versus the State*, *supra* note 58, at 924.

84. *Id.* at 924 n. 86; Law No. 48 of 1979, art. 3.

85. MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER, *supra* note 45, at 199.

86. *Id.* Nagib had more plans to remodel of the SCC. He proposed to divide the Court into three sections, corresponding to the three areas of the SCC’s jurisdiction. This proposal, coupled with the court packing move, opened the way to put the most regime-friendly judges into the judicial review section, pushing the others into less significant areas. The SCC judges apparently resisted this division at the time, although the idea apparently is not completely abandoned. *Id.* at 199–200.

87. For the 2003 appointment, see Noah El-Hennawy, *Reigning Supreme*, EGYPT TODAY (Aug. 2006), <http://www.egypttoday.com/article.aspx?ArticleID=6884>; for the 2006 & 2009 appointments, see Gamal Essam El-Din, *Roadmap to the Presidency*, AL-AHRAM WEEKLY (JULY 23–29, 2009), <http://weekly.ahram.org.eg/2009/957/eg5.htm>.

88. EGY. CONST., art. 76; Kristen Stilt, *Constitutional Authority and Subversion: Egypt’s New Presidential Election System*, 16 IND. INT’L & COMP. L. REV. 335, 350–52 (2005–2006).

### A. *Sources for the Views of the Muslim Brotherhood*

This analysis relies mainly on official documents, public interviews, and statements made by Brotherhood officials, along with interviews I conducted with members of the Brotherhood in June 2009. The official documents include the 2004 *Initiative of the Muslim Brotherhood on Principles of Reform in Egypt*, which is a broad statement of goals;<sup>89</sup> the 2005 *Electoral Program of the Muslim Brotherhood*, issued in advance of the elections to the lower parliamentary house (the *Majlis al-Sha'b*);<sup>90</sup> the 2007 *Electoral Program of the Muslim Brotherhood*, issued in advance of the elections to the upper parliamentary house (the *Majlis al-Shura*);<sup>91</sup> and the 2007 *Draft Platform of the Political Party* (the “Platform”).<sup>92</sup> Prior to the Platform, Muslim Brotherhood official documents largely avoided details of the role of Islamic law in state structures.<sup>93</sup> The much lengthier and more detailed Platform finally attempted a statement on key issues of governance, and it was intended to explain the positions that the party would hold if allowed to participate as a legitimate part of Egyptian politics.<sup>94</sup>

The Platform as issued in August 2007 was marked “first draft.” The apparent intent of the Party was to get opinions from a limited group of intellectuals within Egypt to assist in the crafting of a final platform.<sup>95</sup> The document soon became widely available in Egypt and internationally, which resulted in heavy media attention and much criticism that tended to focus on a few of the more controversial points.<sup>96</sup> The “first draft” remains the only version, although Muslim Brotherhood leaders report that it is undergoing internal revision and review and a final draft will appear eventually.<sup>97</sup> Even as a first draft, the Platform has tremendous value in

89. MUHAMMAD MAHDI AKIF, *INITIATIVE OF THE MUSLIM BROTHERHOOD ON PRINCIPLES OF REFORM (2004)* [hereinafter *INITIATIVE*].

90. THE MUSLIM BROTHERHOOD, *THE MUSLIM BROTHERHOOD’S ELECTORAL PROGRAM OF 2005* (Nov. 6, 2005), available at <http://www.ikhwanweb.com/onlinelibrary.php> [hereinafter *2005 PROGRAM*].

91. THE MUSLIM BROTHERHOOD, *THE ELECTORAL PROGRAM OF THE MUSLIM BROTHERHOOD FOR SHURA COUNCIL IN 2007* (June 14, 2007), available at <http://www.ikhwanweb.com/article.php?id=822> [hereinafter *2007 PROGRAM*].

92. THE MUSLIM BROTHERHOOD, *DRAFT PLATFORM OF THE POLITICAL PARTY (2007)* (on file with author) [hereinafter *PLATFORM*]. By beginning with the 2004 document, I do not suggest that the Brotherhood did not think about or publish opinions on the issue of religion in the Egyptian constitution. Indeed the Brotherhood has been interested in legal-political topics from its earliest years. An exhaustive study of the history of the Brotherhood’s views of the Egyptian constitution would begin with these early statements.

93. This is still the case for other policy platforms that have been distributed by Islamist organizations in recent years. One example is the Moroccan Justice and Development Party (known by its French acronym as PJD). The PJD platform was released on September 7, 2007, around the same time as the Platform of the Egyptian Muslim Brotherhood. The PJD platform details policies in areas such as education, economics, and industry, but few details deal with the vision of the constitutional structure of the state. In another example, the “Islamic State” document of Malaysia’s PAS provides no information about its view of the country’s constitutional structure.

94. Nathan J. Brown & Amr Hamzawy, *The Draft Party Platform of the Egyptian Muslim Brotherhood: Foray Into Political Integration or Retreat Into Old Positions?*, 89 *CARNEGIE PAPERS: MIDDLE EAST SERIES 1* (2008).

95. Mahmoud Mohammad, “*Al-Masri Al-Youm*” Publishes the Muslim Brotherhood Platform, *AL-MASRI AL-YOUM*, Aug. 10, 2007, <http://www.almasry-alyoum.com/article2.aspx?ArticleID=71772>.

96. Brown & Hamzawy, *The Draft Party Platform*, *supra* note 94, at 2 n.1.

97. Interview with Muhammad Habib, Deputy Guide of the Muslim Brotherhood (June 11, 2009). Essam al-Arian, Member of the Brotherhood’s Guidance Bureau, specified that the process of revising the Platform will last until the Brotherhood could “survive and grow” as a political party. Interview with

ascertaining the Brotherhood’s views on the role of Islamic law in the Egyptian constitutional system.

The Platform differs from the previous documents in not only length and detail; it is also the first time a Brotherhood document refers to itself as a “party” in such a prominent way.<sup>98</sup> This choice of wording deserves examination. Under the current Egyptian political situation, the Muslim Brotherhood is not a political party, and any application by the Brotherhood to be recognized as a political party would surely be rejected on the grounds that the party is based on religion, which is prohibited by the Political Parties Law and now the Constitution itself.<sup>99</sup> Despite this, the Brotherhood functions as a party in many ways. The Brotherhood-affiliated independents who won seats in the legislature in 2005 generally act as a single bloc and have an administrative structure in place to support the research and information needs of the legislators.<sup>100</sup>

Even with the Platform as a major source, any attempt to present the Brotherhood’s constitutional vision as a unitary one must be approached with caution. Official documents and pronouncements can no longer be considered to represent every member within the group, although they are still highly meaningful. Previously, the official Brotherhood view was typically clear—it was announced by the Supreme Guide and members did not dissent, at least not publicly. As Mona el-Ghobashy explained, “[o]ver the past quarter century, the Society of Muslim Brothers (Ikhwan) has morphed from a highly secretive, hierarchical, antidemocratic organization led by anointed elders into a modern, multi-vocal political organization steered by educated, savvy professionals not unlike activists of the same age in rival Egyptian political parties.”<sup>101</sup> More recently, a younger segment of members have expressed their dissent with the leadership through online blogs, bringing to public view some of the rifts between the reformist and the conservative members and the younger and the older generation.<sup>102</sup> Even with internal Brotherhood disagreements about some aspects of the Platform, a young blogger still conceded that it does officially represent the Brotherhood view.<sup>103</sup>

Very little has been reported or disclosed about the drafting process itself. According to Abdelmonem Mahmoud, a young journalist and blogger, the process

Essam al-Arian, *supra* note 8. An earlier news report relying on sources within the Brotherhood stated that the Brotherhood was putting the draft platform on hold for an indefinite period of time in order to improve relations with the regime in hopes of gaining the release of several of its leaders from prison. Tariq Salah, et al., *The Members of the Brotherhood Agree to Put the Party Platform on Hold*, AL-MASRI AL-YOUM, May 10, 2007, <http://www.almasry-alyoum.com/article2.aspx?ArticleID=246791>.

98. Al Said Ramadan, *The Muslim Brotherhood and Political Party*, Ikhwanweb (June 13, 2007), <http://www.ikhwanweb.com/article.php?id=809>.

99. See *supra* text accompanying notes 51–52.

100. See generally Shehata & Stacher, *supra* note 4. This insightful short article contains significant details about the Brotherhood’s bloc. When parliament is in session, for example, all of the Brotherhood’s members stay in the same hotel so they can continue the day’s discussions and plan for the next. The Brotherhood legislators also maintain their own website, [www.nowabikhwan.com](http://www.nowabikhwan.com).

101. El-Ghobashy, *supra* note 22, at 373.

102. These two sets overlap but not perfectly; Guidance Bureau member ‘Abd al-Mun’im Abu al-Futuh criticized some of the more controversial elements of the Platform. Brown & Hamzawy, *The Draft Party Platform*, *supra* note 94, at 7.

103. Interview with Abdelmonem Mahmoud, blogger, <http://ana-ikhwan.blogspot.com> (June 10, 2009).

initially included individuals with a range of views, including Essam al-Arian and several young members such as himself. When al-Arian was arrested, Muhammad Mursi, whom Mahmoud called the “old guard,” took over the drafting process and several members left the process, including Mahmoud.<sup>104</sup> It is difficult to know, however, how the substance of the Platform might have changed with the involvement of a different set of people in the drafting process. How the revision process will develop under the new Supreme Guide, Muhammad Badi‘, who is considered a conservative member, remains to be seen.<sup>105</sup>

Specifically, Brotherhood members expressed disagreement over two topics in the Platform: the Council of Scholars and exclusion of women and Christians from the position of President or Prime Minister.<sup>106</sup> Although these topics have generated the most public controversy, they are not the only—or even the most important—issues for determining the Brotherhood’s vision of constitutional structure. I discuss these issues below, along with responses from Brotherhood dissenters. Most of the material I rely upon in the analysis, however, comes from language in the Platform that is less dramatic on the surface, but highly significant when read carefully and placed in historical and social context.

Some analysts consider official documents such as the Platform as under representing the degree to which the Brotherhood has actually embraced liberal notions of equality. In this line of thought, the Platform presents a view that is too conservative and not representative of the whole movement. This is in part a rephrasing of the first point, that the Brotherhood has internal divisions, and it may be that the conservative voices had the upper hand in drafting the Platform. In addition, this position says that the Platform (and other documents) do not truly reflect the Brotherhood’s position because it is crafted to appeal to and reassure its core supporters that despite changes, reforms, and an explicit embracing of the democratic process, it has not strayed from core and original beliefs to make society more Islamic. Thus, official documents might overstate the Islamic components in an effort to appeal to the Brotherhood’s longtime and core supporters.

For a different set of critics, reliance on the Platform will be seen as presenting a far too friendly face of the Brotherhood; these critics will claim that the Platform is an effort to mislead both Egyptians and Westerners into thinking that the Brotherhood is a reformist political party with no intention of bringing a strict version of Islam and Islamic law to Egypt. Indeed, one of the main criticisms of the Brotherhood thus far is that it has been so vague on key points for fear that saying exactly what they believe would give critics tangible evidence.<sup>107</sup> Along these lines, then, the Platform may be a careful effort to say what will be broadly accepted while retaining all of their older, more conservative, positions.

As a final caveat to the limitations of the Platform as a source, some of the Brotherhood members I interviewed said that from a legal perspective, the Platform may seem imprecise because there were no lawyers on the drafting committee.<sup>108</sup> It is

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104. *Id.*

105. Husam Tamam, *Egypt's New Brotherhood Leadership: Implications and Limits of Change*, ARAB REFORM BULLETIN (Feb. 17. 2010), <http://www.carnegieendowment.org/arb/?fa=show&article=30995>.

106. Brown & Hamzawy, *The Draft Party Platform*, *supra* note 94, at 7.

107. *Id.* at 3.

108. Interview with Ibrahim Houdaiby, *supra* note 47. Nathalie Bernard-Maugiron suggested that

impossible to verify this statement. Even if that was the case, I am reading the text for deeper concerns that I do not think would have changed if there had been a clearer textual presentation. I also look for trends and corroborations between the Platform and other documents from the Brotherhood. The Brotherhood members who made this comment seem to be saying something more than merely that a lawyer might have clarified language. They also were admitting at some level that the organization has only begun to think about the place of Islam in the state in detail and at the level of practicalities, and this inexperience was revealed publicly when the Platform reached widespread distribution. Although many thinkers and writers on Islamic constitutionalism, notably Tariq al-Bishri, Kamal Abu al-Majd, Yusuf al-Qaradawi, and Salim al-‘Awwa, have influenced the Brotherhood’s thinking, they typically do not deal with detailed and pragmatic questions of constitutional structure that the Platform attempts to address and that I discuss here.<sup>109</sup> This Article is both an effort to explain the Brotherhood’s positions and an effort to prompt the Brotherhood to consider and clarify the questions and problems I pose herein.

Despite these caveats and acknowledgements, the written documents of the Brotherhood, and in particular the Platform, coupled with interviews in the press and those I personally conducted, provide a solid means to discern some of the subtle yet significant points of their constitutional vision. The Article first turns to areas in which the Platform takes careful pains to accept aspects of the existing constitutional structure in Egypt before turning to areas of proposed change.

### *B. Acceptance of the Egyptian Constitutional Structure*

The Platform specifies clearly that the Brotherhood accepts the place of Islam as defined in the constitution. I focus here on three critical areas of acceptance: the specific formulation of Article Two, the Supreme Constitutional Court, and the civil nature of the state.

#### 1. The Constitution and Article Two

The 2007 Platform recognizes the current Egyptian constitution and makes no mention of any plan to prepare a new one.<sup>110</sup> Previous Brotherhood statements indicated that at least some members found the current constitution sufficiently flawed as to merit wholesale replacement.<sup>111</sup> In 2006, Deputy Guide Muhammed

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the Muslim Brotherhood has not studied the SCC’s jurisprudence in any detail. Interview with Nathalie Bernard-Maugiron, senior researcher at the Institute for Research and Development (June 17, 2009).

109. See BRUCE K. RUTHERFORD, *EGYPT AFTER MUBARAK: LIBERALISM, ISLAM, AND DEMOCRACY IN THE ARAB WORLD* 98, 107 (2008) (identifying these individuals as particularly important; they have been writing about a notion of Islamic constitutionalism for many years, typically speaking in general terms and not about any one country’s specific constitutional framework). An exhaustive study of the Brotherhood’s constitutional vision would examine how the Brotherhood developed, expanded, modified, or rejected the ideas of influential intellectuals writing on Islamic constitutionalism. This is beyond the scope of this Article.

110. PLATFORM, *supra* note 92, at 6.

111. El-Ghobashy, *supra* note 12, at 32–33. The call for a new constitution was also made by a broad coalition in 1991, when the heads of all political parties, the Muslim Brothers, and the Communists issued

Habib wrote in the newspaper *al-Sharq al-Awsat* that if the Brotherhood achieved parliamentary power through free elections, it would appoint a committee of scholarly experts in national and Islamic law to draft a new constitution for Egypt.<sup>112</sup> He said very little else about a new constitution, except that it would define Egypt as a democratic and parliamentary republic, clarify the relations between the people and the government (including term limits for president and the right of interrogation), define the rights and responsibilities of the citizens, and separate the jurisdictions of the powers, taking guidance from the fundamentals of the Islamic Sharia and benefitting from the experience of history.<sup>113</sup> His position that the drafters should include Islamic law and national law scholars indicated a strong belief that spokesmen for Islamic law should have an equal place at the drafting table.

The Brotherhood intended the Platform, at least in part, to reassure moderate Egyptians who might have suspected the Brotherhood of wanting to bring an extremist interpretation of Islamic law to Egypt. Given this intention, endorsing Habib's statement in the Platform could have created serious opposition. While the Platform does not mention the issue of a new constitution, it does not foreclose the possibility of a future effort. One possible conclusion is that Habib's 2006 statement was his own opinion. Skeptics might say that the Brotherhood realized this was a losing political strategy but the goal of radical constitutional reform still exists within the organization. However, the number of major problems facing Egypt today and discussed in the Platform suggests that the Brotherhood will not likely expend political capital on drafting a new constitution, or at least not as a priority, even if they have the power to do so.

Within the framework of embracing the existing constitution, the Platform highlights several articles particularly important to the Brotherhood. Chief among these is Article Two. In its introduction, the Platform states, "[w]e present this reformist platform to the Egyptian people . . . based on Article Two of the Egyptian constitution . . ."<sup>114</sup> Article Two of the Constitution is then praised as "the moderate stance and the just position in the Islamic way."<sup>115</sup> Article Two is the crucial link for the Brotherhood because it connects the Party's agenda—which claims to be heavily grounded in Islamic law, morals, and culture—and the current Egyptian state structure. This constitutional article allows the Brotherhood to claim that *they*, not the NDP, are the party of the constitution, because their ideology and positions are firmly supported by Article Two, and in turn they are the ones who want to carry out fully the message of Article Two.<sup>116</sup> For example, the Platform states that "the text of Article Two is just an affirmation of the authority of the Islamic Sharia."<sup>117</sup> By basing itself on the Islamic Sharia, the Brotherhood is thus merely promoting the Egyptian constitution and nothing more than that. Yet, Article Two has been given a precise

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a statement requesting the president to consider a proposal for a new constitution to be drafted by legal scholars. The concern behind this movement was mainly the extensive presidential powers of the current Constitution. *Id.*

112. Muhammad Habib, *What Would Happen If the Muslim Brotherhood Came to Power?*, AL-SHARQ AL-AWSAT (Feb. 6, 2006), <http://www.ikhwanonline.com/Article.asp?ArtID=17810&SecID=0>.

113. *Id.*

114. PLATFORM, *supra* note 92, at 6.

115. *Id.*

116. See Brown & Hamzawy, *The Draft Party Platform*, *supra* note 94, at 3.

117. PLATFORM, *supra* note 92, at 13.

meaning by the SCC.<sup>118</sup> As discussed below, the Platform has to deal with the fact that while on its face Article Two seems capable of embracing the Brotherhood’s agenda, the SCC has already given it a particular meaning that is not necessarily consistent with the Brotherhood’s own constitutional vision.

## 2. Respect for SCC

The Platform’s introduction states that “[w]e present this reformist platform to the Egyptian people . . . based on Article Two of the Egyptian constitution, which provides that the official religion of the state is Islam and that the principles of the Islamic Sharia are the main source of legislation, *according to what the SCC has determined in interpreting the Article.*”<sup>119</sup> This is an important recognition of the SCC’s Article Two jurisprudence. The statement also implicitly recognizes that the SCC has the authority to determine the meaning of the constitutional language “the principles of the Islamic Sharia.”<sup>120</sup> In some ways, this point is obvious: the SCC is the authorized body to interpret the constitution.<sup>121</sup> However, this does not end the analysis—as a matter of constitutional expansion, the Platform accepts the current situation as a floor rather than as a ceiling for the place of Islamic law in the state.

The idea of a national high court determining matters of Islamic law warrants further discussion here. In *The Fall and Rise of the Islamic State*, Noah Feldman discusses this concept, and calls it “Islamic judicial review.”<sup>122</sup> This delegation of religious interpretation to the national courts “transforms the highest judicial body of the state into a guarantor of conformity with Islamic law.”<sup>123</sup> He presents the idea as something the Islamist constitutional theorists have proposed “not merely to ensure [legislation’s] compliance with the constitution, but to guarantee that it does not violate Islamic law or values.”<sup>124</sup> For Feldman, Islamic judicial review could be the solution to conflicts within states over the place of Islamic law in the legal system and over who gets to decide what Islamic law means in that particular national context.<sup>125</sup>

The Platform suggests that while Islamic judicial review by the SCC (with the current roster of judges) may be acceptable to the Brotherhood, it is not sufficient. The concept of the SCC serving as a check to determine, as Feldman describes it, “if the laws passed by the legislature, whether enacted in good faith or not, do not correspond to the ‘true’ content of Islamic law or values” is not a Brotherhood proposal.<sup>126</sup> Rather, this concept is a part of the Egyptian system that the Brotherhood has chosen to acknowledge in order to accept the Egyptian constitution and the SCC’s interpretation of it to date. In contrast to the multiple references to

118. See *supra* text accompanying note 62.

119. PLATFORM, *supra* note 92, at 6 (emphasis added).

120. *Id.* Ibrahim Houdaiby stated that the current Article Two jurisprudence could not be better. Interview with Ibrahim Houdaiby, *supra* note 47. Khalid Hamza stated that the Muslim Brotherhood does not want or need more from the SCC regarding Article Two. Interview with Khaled Hamza, editor of the Muslim Brotherhood’s English language website, <http://www.ikhwanweb.com> (June 12, 2009).

121. Law No. 48 of 1979, art. 25.

122. FELDMAN, *supra* note 14, at 122.

123. *Id.*

124. *Id.* at 121.

125. *Id.* at 122.

126. *Id.* at 121.

Article Two, the Platform makes little mention of the SCC, suggesting that the Brotherhood accepts what the SCC has done as a minimal step but has larger plans that it can accomplish in part through other mechanisms.<sup>127</sup> The Platform also touches on the sensitive issue of how the Brotherhood would like to change the SCC, and this is discussed below.

### 3. Egypt as a Civil State based on Citizenship

The documents from the Brotherhood make clear that it recognizes Egypt as a civil state and does not seek to impose some kind of theocracy. The *2005 Electoral Program of the Muslim Brotherhood* even states that the religion of Islam rejects a religious political power and establishes that the state in Islam is a civil state in which the community determines its system within the framework of the fixed norms of Islamic law.<sup>128</sup> The reference to a religious political power clearly indicates the Iranian state, and the Brotherhood made clear that it deems the Iranian system unacceptable as a fundamental matter of Islam. In part, this statement is an example of Sunni Muslims rejecting Shi'a Islam, along with some nationalistic political posturing.<sup>129</sup> Since Iran serves as such a negative model for Egypt and the Arab world generally, it is essential for the Brotherhood to clearly distance itself from suggesting it supports an Egyptian state that looks like Iran. Yet on a deeper level, the Platform cannot adequately define the boundaries of what the democratic process might produce in relationship to “fixed norms of Islamic law” or other religiously derived points of non-negotiability.

Further drawing fine lines with terminology, the Platform links the labels “civil state” and “Islamic state,” claiming that Egypt is—and should be—both.<sup>130</sup> In doing so, the Platform tries to make the label “Islamic state” sound unobjectionable by saying that the Egyptian constitution confirms that “Egypt is an Islamic state and that Islam is the basic source of legislation in it.”<sup>131</sup> By taking this starting point, the Brotherhood does not need to call for something new, but rather can cast itself as trying to carry out what the constitution already has determined. The problem with this assertion is that the constitution does not actually use the phrase “Islamic state.” In addition, other than citing Article Two, the Platform does not explain the reasons for this assertion. The idea that Islam is the basic source of legislation is not

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127. See generally PLATFORM, *supra* note 92.

128. 2005 PROGRAM, *supra* note 90, at 2.

129. Walid M. Abdelnasser, *Islamic Organizations in Egypt and the Iranian Revolution of 1979: The Experience of the First Few Years*, 19 ARAB STUD. Q. 25, 28–30 (1997). Diplomatic relations terminated between Egypt and Iran after the Iranian revolution in 1979 when President Sadat hosted the deposed Shah in Cairo. Iran also objected to the peace treaty with Israel. After Sadat's assassination, Tehran named a major street after Sadat's assassin, Islambouli, which further harmed relations between the two countries. In the Iran-Iraq war, Egypt, along with the rest of the Arab world, supported Iraq. Relations have recently warmed: the Tehran City Council officially changed the name of the Islambouli Street to Intifada Avenue, in recognition of the Palestinian uprising. *Id.*; *Iran and Egypt to Restore Ties*, BBC NEWS (Jan. 6, 2004), [http://news.bbc.co.uk/2/hi/middle\\_east/3371545.stm](http://news.bbc.co.uk/2/hi/middle_east/3371545.stm).

130. PLATFORM, *supra* note 92, at 82. As explained by Guidance Bureau member 'Abd al-Mun'im Abu al-Futuh, the Brotherhood does not want a religious state; it wants an Islamic state where people are the source of the authority. For him, an Islamic state is one where the majority of residents are Muslim and accept Islam as a reference for society and for behavior. It is a civil state that depends on Islamic principles. A Muslim cannot *not* introduce Islam into the state, he said. Interview with 'Abd al-Mun'im Abu al-Futuh, Guidance Bureau member (June 14, 2009).

131. *Id.* This statement is made after describing classical Islamic criminal law.

constitutional language but a revised form of Article Two, which states “the principles of the Sharia are the main source of legislation.”<sup>132</sup> The significance of this revised language is discussed below.

The label “Islamic state” is not defined, and on its face has little explanatory meaning. The Platform does not attempt to define it but rather simply asserts that whatever it may mean, it is already provided for in the constitution. The Brotherhood’s strategy is to show that Egypt is already both a civil and Islamic state, and then expand from the labels to fill out the content. This rhetorical move allows the Brotherhood to claim it is not calling for any change to the structure and basic constitutional characteristics of the Egyptian state. Rather, the Brotherhood wants to see these important characteristics filled out, given meaning, and implemented.

Complementing the point that Egypt is a civil state, the Platform says that membership in the state is based on citizenship.<sup>133</sup> The clear implication is that Egyptian citizenship, not religion, determines one’s place in the state. This endorses the current Egyptian law, and any deviation from it would have caused serious concern. Christian Egyptians comprise approximately ten percent of the population and are generally very concerned about the consequences of the Brotherhood making major political gains.<sup>134</sup>

### C. *Areas of Desired Expansion*

The Platform implicitly and explicitly stresses the importance of Islamic law in the Egyptian constitutional system. First, it does so through a lengthy definition of Islamic law, which provides important signals about both content and vehicles for implementation. Second, it presents a view of Article Two that goes beyond the SCC’s current jurisprudence, in terms of meaning, application, and enforcement.

#### 1. Definition of Islamic Law

The Platform provides a fairly lengthy definitional discussion of Islamic law that is worth examining in detail. This discussion seems to be presented for purposes of background rather than as a call to implementation, yet it provides important clues when linked to other parts of the Platform. The Platform begins with a very general statement that the purposes (*maqasid*) of the Islamic Sharia, stated as the protection of religion, life, honor, reason, and property, form the Brotherhood’s guiding policies in determining its goals, strategies, and policies.<sup>135</sup> The purposes are a concept from Islamic jurisprudence and are based on the idea that God’s law is more than merely rules, but rather is an entire system that has its own aims or purposes.<sup>136</sup> If humans

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132. EGY. CONST., art. 2.

133. PLATFORM, *supra* note 92, at 15.

134. CIA WORLD FACTBOOK, EGYPT, <https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html>; Steve Stanek, *Coptic Believers Say Extremists are Driving them out of Egypt*, THE GLOBE AND MAIL, July 7, 2007, at F3; see generally RACHEL SCOTT, THE CHALLENGE OF POLITICAL ISLAM: NON-MUSLIMS AND THE EGYPTIAN STATE (2010).

135. PLATFORM, *supra* note 92, at 11.

136. R.M. Gleave, *Makasid al-Shari‘a (a.)*, in 12 ENCYCLOPEDIA OF ISLAM, 2D ED. 569 (P. Bearman et al. eds., 2006). The identification of these five aims is also a product of human interpretation and is

implement the system correctly, then they will be able to bring about God's intentions.<sup>137</sup> The SCC has also said that legislation should aspire to protect these same five purposes of the Sharia.<sup>138</sup>

The Platform's statement that the purposes of the Islamic Sharia determine the goals, priorities, and strategic policies of the Brotherhood does not express a specific parliamentary agenda. It is only a statement of general guidance and direction, and non-controversial except in the most conservative of circles that would object to human's power to understand God's aims or, on the other end, those who do not want religion mentioned in national law. Indeed the Platform presents the aims as a broad concept that goes beyond Islam and can serve as the guiding goals for the state generally: "[t]he aims represent the cornerstone of our cultural values, and are the Muslims' source of faith and culture and the non-Muslims' source of culture."<sup>139</sup>

One person might believe that a particular rule is necessary to preserve life or religion, while someone else might believe that the same rule threatens religion. For example, if prayer is a requirement of religion, then upholding and promoting prayer is an aim of Islamic law. But how should a government carry out that aim? One possibility is a roving state authority that enforces prayer times, as takes place in Saudi Arabia.<sup>140</sup> Other options include building more mosques or strengthening religious education in elementary schools. While all of these might legitimately take place under the heading of carrying out the aims of the Sharia, the impact on people's daily and personal lives differs dramatically from one option to the other. What the Brotherhood would seek to carry out under the heading of the purposes of the Sharia remains unclear.

The Platform then discusses the sources of Islamic law, giving the basic mainstream Sunni view with some nuances. The authority of the Islamic Sharia, according to the consensus of Muslim legal scholars, is limited to two primary sources, the Quran and the Sunna (normative practice) of the Prophet that is considered "*sahih*."<sup>141</sup> The Sunna refers to the speech, action, and tacit approval of the Prophet; each account is called a *hadith* and collectively, they are considered the Prophet's *sunna*.<sup>142</sup> A *hadith* that is considered "*sahih*" (sound) means it has the highest rating of authenticity.<sup>143</sup> The category of *hadith* directly below *sahih*, good (*hasan*), has always been considered by Muslim scholars to be acceptable for purposes of developing law, since the *hadith* considered *sahih* do not contain a significant range of legal topics.<sup>144</sup> However, the Platform seems to suggest a

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malleable; the source texts neither list aims nor even state explicitly that God identified and is guided by higher aims. For example, the modern scholar Ibn 'Ashur added equality and freedom to the list of purposes of the Sharia. *Id.*

137. *Id.*

138. Case no. 7/Judicial Year 8/Supreme Constitutional Court.

139. PLATFORM, *supra* note 92, at 11.

140. See Frank Vogel, *The Public and Private in Saudi Arabia: Restrictions on the Powers of Committees for Ordering the Good and Forbidding the Evil*, 70 SOC. RES. 758 (2003) (noting mandatory prayer times enforced by Saudi Arabian authority).

141. PLATFORM, *supra* note 92, at 11.

142. J. Robson, *Hadith*, in 3 ENCYCLOPEDIA OF ISLAM, 2D ED. 23, 23 (P. Bearman et al. eds., 1986).

143. *Id.* at 24–25.

144. *Id.* at 26–27. The remaining two categories of *hadith* are weak and infirm.

limitation on the range of *hadith* used, without recognizing that most law derived by scholars over the centuries has involved *hadith* not considered sound by compilers.<sup>145</sup>

In addition to these two primary sources, the Platform then discusses the doctrinal rules (*fiqh*) that jurists derived from these sources using interpretative methodologies, namely *ijtihad* (independent legal reasoning) and *ijma'* (consensus of the jurists). The Platform emphasizes that the rules of *fiqh* have changed over time in response to the environment, the needs of the ruler, the relative authority of the sources that support the views, the interest of the public, and other factors that change with time and place.<sup>146</sup> This statement stresses the temporal nature of *fiqh*, and lays the groundwork for the conclusion that rules of *fiqh* produced in one generation are not necessarily authoritative for the next.<sup>147</sup> But not all rules of *fiqh* are or should be responsive to social changes, according to the Platform, as seen below.

After reviewing the sources, the Platform makes general statements about Islamic law that are important for understanding the Brotherhood's goals for the Egyptian state. First, it makes the general statement that the Islamic Sharia is a complete law that deals with the ordering of both religious and worldly matters.<sup>148</sup> Then, it states that the Islamic Sharia is distinguished by complete flexibility and power to face new events and changing practices and customs because God provided it with suitability and lasting power over the spread of time and place.<sup>149</sup> The fact that it is now applied in a growing number of environments and civilizations serves to confirm that Islamic law has a global message and is not limited to one particular historical or cultural context.<sup>150</sup> These statements indicate the view that Islamic law is broad, covering every topic, yet is not detailed, and the actual rules change due to new circumstances. This conceptual framework raises many questions regarding how to turn Islamic law into a legislative agenda, such as: which rules can humans change, and which rules are flexible? How do humans know when they can change a rule? And who has the authority to make these decisions?

In order to deal with these large and significant questions, the Platform then explains that the primary source texts (*nusus*) of the Quran and Sunna can be divided into three types based on the level of detail that the texts provide.<sup>151</sup> The first category includes the texts that regulate subject matters that are not affected by changes in time, place, environment, or customs.<sup>152</sup> A topic falls in this category if the texts concerning it provide a high level of detail; they should be followed precisely and do not change simply because times change.<sup>153</sup> The Platform states that the detailed rules of the Quran and Sunna should be applied just as they appeared in the texts, without independent interpretation and without any changes.<sup>154</sup>

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145. PLATFORM, *supra* note 92, at 11.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. PLATFORM, *supra* note 92, at 11.

152. *Id.*

153. *Id.*

154. *Id.*

The subject matters of these kinds of detailed texts are almost entirely matters of belief and religious devotional practice, such as how one prays.<sup>155</sup> A correlation between matters of religious practice and a high level of detail is not surprising because it is difficult to know what kinds of rules humans would deduce if God had only given a general statement such as “pray justly.” The Platform then states that the topics of this first category are not in its purview.<sup>156</sup> The creeds, practices, and religious ceremonies are the religious part of Islam and are included in the missionary part of the Brotherhood, but the Platform’s view of Islamic law is limited to the Islamic Sharia in the constitutional and legal sense that appears in Article Two of the Constitution.<sup>157</sup> The Platform tries to draw a clear distinction between Islamic law that governs the worldly life in the constitutional legal context and the purely religious side of Islam.<sup>158</sup>

The second category includes texts on subjects that are slightly affected by changes in time and place.<sup>159</sup> These topics have textual rules that provide both general principles and some necessary details.<sup>160</sup> Topical examples given in the Platform include personal status law such as marriage and divorce.<sup>161</sup> Muslim society is based upon these rules and has no value without them.<sup>162</sup> If these rules are lost, then the character of the society that distinguishes it as Muslim is also lost. The Platform does not state that these rules are outside its purview, so presumably they remain part of the Platform’s discussion.

The third category are the texts that regulate the daily, civil, and worldly relations in all their types, such as economic, political, and social, among the people themselves, between people and the state, and among states.<sup>163</sup> These matters are affected by circumstances of time and place, and differ depending on environment, customs, and civilizations.<sup>164</sup> In this third type, the Sharia is content with placing general goals, comprehensive roots, principles, and pliant aims that defer, at the time of their application, to the changing environment.<sup>165</sup> In this area, the Sharia rarely meddles in the details and indeed provides virtually none, leaving the concrete plan to legal interpretation conducted by human intelligence, which can adjust to the conditions and changing public needs.<sup>166</sup> Based on this definition, these matters are squarely within the purview of the Platform and law making generally. The implication is that as long as the general goals and aims are followed in these matters, a wide range of actual rules may be adopted for society.

In addition to the division of texts into three subject-matter categories that correspond to the level of detail of the texts, the Platform explains that substantive areas also can be divided into two groups according to the strength of their proof

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155. *Id.*

156. *Id.*

157. PLATFORM, *supra* note 92, at 11.

158. *Id.* at 12.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. PLATFORM, *supra* note 92, at 12.

164. *Id.*

165. *Id.*

166. *Id.*; *see also* Vogel, *The Public and Private*, *supra* note 140, at 751.

texts.<sup>167</sup> In defining these two groups, the Platform presents the same distinction used by the SCC between texts that are definite in terms of authenticity and meaning and those that are not.<sup>168</sup> To pass this test of definiteness on both grounds, the Platform suggests that (1) the authenticity of the text must be proven, and (2) there must be one clear meaning of the text. For texts that are certain in terms of their authenticity and meaning, there is no room for human interpretation, and there are very few of such texts.<sup>169</sup>

The second large category, per the Platform, includes all primary texts that fail this test of definiteness in terms of authenticity and meaning; all of these are only probable.<sup>170</sup> These texts are open to interpretation (*ijtihad*) and to multiple results, and are especially numerous in rulings that organize daily worldly matters.<sup>171</sup> Presumably, these areas are open to lawmaking, and correlate with categories two and three of the first set of divisions (that is, source texts whose interpretation is only slightly affected by changes in time and place, and source texts that regulate the daily, civil, and worldly relations and are affected by circumstances), although the Platform does not say so. It does state that in these matters, the door is open to consideration and *ijtihad* to those who fulfill the conditions for exercising *ijtihad* and who adhere to its jurisprudential methodologies for deriving *fiqh* from the sources. The issue of limiting *ijtihad* to a particular qualified group is discussed below in the context of the Council of Scholars.<sup>172</sup>

Why does the Platform introduce these two sets of divisions of texts? The first system of division, which separates the detailed religious texts from the political purview of the Brotherhood, presents something of a conceptual jurisdictional limitation, an effort to divide between the Brotherhood as a missionary organization and the Brotherhood as a political party. The Platform states that Islamic law covers all aspects of life, but as a practical matter it takes some aspects of it, notably the detailed rules of religious practice, out of the jurisdiction of the state.<sup>173</sup> These topics of personal devotion are not part of political discussion because their proof texts are detailed, the rules do not change with time and place, and perhaps even the rules themselves are definite in terms of authenticity and meaning.<sup>174</sup> These topics are for the Brotherhood as a missionary society, and members will continue to work on the level of individual piety in that capacity, but they have no place in the political party, the Platform suggests. This statement is probably an attempt to reassure Egyptians that the Brotherhood does not want to interfere in personal religious life.

The statement that the fixed and unchanging rules mainly address areas of personal worship and devotion, and that the Platform does not concern itself with these topics, is not as straightforward as it may sound. First, there will be disagreements about what is considered fixed, unchanging, and not subject to interpretation. For example, in a case before the SCC involving a decision of the Minister of Education that forbade girls from wearing the *niqab*, which is a form of a

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167. PLATFORM, *supra* note 92, at 12.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. PLATFORM, *supra* note 92, at 11.

174. *Id.*

veil that covers the face, the SCC concluded that the issue of the proper form of women's clothing is not one that involves rules that are certain with respect to their authenticity and meaning. While the father of two schoolgirls who were affected by the *niqab* ban asserted that Article Two of the Egyptian constitution should protect their right to wear it, the SCC held that the *niqab* is not based on a rule that is certain in its authenticity and meaning, and thus the ruler, in the form of the Minister of Education, may prohibit it.<sup>175</sup> The Platform does not provide details on what it proposes to include under the heading of the fixed and unchanging rules.

Secondly, even if a rule is considered unchanging and entirely clear, such as the requirement that Muslims fast during Ramadan or the prohibition on the consumption of certain intoxicating substances, how will that rule be enforced? Does the Platform suggest that the rule should not be a part of national law or even part of national political debate? Nothing in the Platform suggests that the Brotherhood is willing to relinquish jurisdiction over matters of this kind. For example, the personal obligation of a Muslim to fast during Ramadan presumably falls under the category of a topic of personal devotion. Indeed, it is probably the case that the Brotherhood has no intention of dealing in legislation that regulates the details of how an individual fasts during Ramadan, but the boundaries between the personal and the worldly are not as clear in practice as presented here. What if someone is openly and publicly not fasting when he should be? Currently there are no laws against this in Egypt, although, as a matter of practice, non-fasting people, Muslim or otherwise, do not openly flaunt their consumption during Ramadan.<sup>176</sup> But if a legislator wanted to increase control of restaurants that operate through the day in Ramadan, would the legislator be overreaching into areas beyond his jurisdiction according to the Platform's division of texts? As a practical matter, it seems difficult without further clarification to keep the topics that might fall under even the first category of detailed doctrinal rules out of the realm of lawmaking and enforcement.<sup>177</sup> Further, it is difficult to claim that detailed rules of ritual that are fixed and unchanging are outside the meaning of Article Two, when in fact the fixed and unchanging are exactly what the SCC has said it will protect.<sup>178</sup> If a national law interfered with some area of religious practice, the Platform probably does not mean to suggest that this is outside the Brotherhood's scope of interest because it involves a matter of religious devotion.

For all other substantive areas of law, the Platform emphasizes the malleability of Islamic law. Who is supposed to decide how to mold that flexibility into tangible legislative ends and on what basis? The Platform puts emphasis on the role of the legislature, calling for "the application of the Islamic Sharia in the view that the *umma* (community of Muslims) agrees upon via a majority in Parliament that is elected in free elections."<sup>179</sup> With this description, the Platform seems to suggest no

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175. Case no. 8/Judicial Year 17/Supreme Constitutional Court, 18 May 1996. A translation of this case along with a commentary is provided in Nathan Brown and Clark Lombardi, *The Supreme Constitutional Court of Egypt on Islamic Law, Veiling, and Civil Rights: An Annotated Translation of Supreme Constitutional Court of Egypt Case No. 8 of Judicial Year 17 (May 18, 1996)*, 23 AM. U. INT'L REV. 437 (2006).

176. See, e.g., Nadia Abou el Magd, *Furore as 155 arrested for not fasting*, THE NATIONAL (Sept. 9, 2009), <http://www.thenational.ae/apps/pbcs.dll/article?AID=/20090910/FOREIGN/709099831/1011/NEWS> (describing arrests in Aswan of people who publicly broke the fast during Ramadan).

177. *Id.*

178. See *supra* text accompanying note 175.

179. PLATFORM, *supra* note 92, at 12.

more than the vision of Muslim legislators (chosen in free elections) representing their constituents and trying to do their best for society according to the needs of the day. They are not bound by any pre-set rules, either because those rules govern topics that are not for the legislators, or because the topics they are dealing with have rules that either change with or are slightly affected by the contextual circumstances.<sup>180</sup> This kind of statement supports the Brotherhood’s vision as a reform party. So long as citizens agree with the starting point of some limits on legislation per Article Two of the Constitution, then the rest is left to the democratic process.

This idea of Islamic law as democratic process, checked by the SCC, is certainly present in the Platform. It is accompanied by, and is perhaps in competition with, several other conceptions of Islamic law, including the idea of limiting the production or interpretation of laws that are Islamically-compliant to certain qualified people. One conception, discussed next, tries to expand the meaning and reach of current Article Two jurisprudence, while another, discussed further below, lodges responsibility for Islamic law in a broader range of actors.

## 2. An Expansive View of Article Two in Terms of Inherent Meaning, to Whom It Applies, and Who Has Standing

The Platform posits an expansion of Islamic law beyond the current constitutional structure through its conception of the meaning, application, and enforcement of Article Two. While embracing Article Two and its jurisprudence, the Platform also makes efforts to assert that “principles of the Islamic Sharia” have a wider meaning than have been determined by the SCC and indeed have application in society in general beyond matters that are specifically constitutional questions as currently defined.<sup>181</sup> The power of the SCC as the sole body with authority to conduct judicial review is never challenged, nor is the SCC’s jurisprudence ever criticized in the Platform. Rather, Article Two’s meaning and force is discussed independently of the SCC, leaving unclear which part of the state, if not the SCC, would carry out these more expansive views.<sup>182</sup>

Point Four of the Platform accepts Article Two’s jurisprudence and at the same time pushes to give it more meaning. It states that the text of Article Two is just an affirmation of the authority of the Islamic Sharia, whether in terms of text, indication, or *ijtihad*.<sup>183</sup> The statement suggests that Article Two merely recognizes and affirms a pre-existing legal order, such that Article Two of the Constitution was not necessary for the Islamic Sharia to have legal force as a matter of state law, but this is not how the SCC interpreted this issue. The SCC’s first Article Two case involved a challenge by al-Azhar University to an article of the Civil Code that required payment of post-judgment interest.<sup>184</sup> The University wanted to avoid

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180. See Abdel Monem Said Aly, *Understanding the Muslim Brothers in Egypt*, MIDDLE EAST BRIEF NO. 23 (Brandeis Univ. Center for Middle East Studies), Dec. 2007, at 5 (“The legislature, in cases that are not related to definitive religious rulings based on irrefutable evidence, has the right to decide by an absolute majority.”).

181. *Id.* at 10.

182. *Id.*

183. PLATFORM, *supra* note 92, at 13.

184. Case no. 20/Judicial Year 1/Supreme Constitutional Court; see also *Supreme Constitutional*

payment on post-judgment interest owed as a result of a commercial lawsuit, and argued that interest payments conflict with the principles of the Islamic Sharia and thus the Constitution.<sup>185</sup> The SCC determined that it did not have jurisdiction over legislation adopted prior to May 22, 1980—the date of the amendment making the principles of the Islamic Sharia *the* main source of legislation.<sup>186</sup> The Civil Code dated to 1949 and thus was not subject to Article Two scrutiny, since the legislative committee that proposed the Article Two amendment said it “requires the lawmaker to resort to the rulings of the Islamic Sharia—and not to any other source—to investigate the compatibility of any legislation under consideration with the Sharia.”<sup>187</sup> For the SCC, its ability to examine the compatibility of legislation with the principles of the Islamic Sharia was created by Article Two, as amended.

This statement from the Platform that Article Two is just an affirmation of the authority of the Islamic Sharia, whether in terms of text, indication, or *ijtihad*, suggests that the Islamic Sharia as protected by Article Two is not limited to a core set of fixed and unchanging rules, however defined, but rather includes any kind of rule produced from the source texts, even if that rule is from a scholar’s individual exercise of legal interpretation (*ijtihad*), which is inherently uncertain. Yet the SCC already decided that it would not protect a rule that was merely the result of a scholar’s *ijtihad* because it is indeterminate, stating explicitly that the rules that are definite in terms of their authenticity and meaning neither need nor permit *ijtihad* because their meanings are absolutely clear and do not change with time. If the SCC’s standard were to strike legislation that violated the results of any *ijtihad*, it could invalidate a wide array of rules, since the range of opinions is vast. The presentation of this concept in the Platform is subtle but suggests a broader understanding of Islamic law as state law than the current SCC rulings.<sup>188</sup>

In addition to expanding the meaning of Article Two, the Platform indicates that Article Two applies to a broader range of decisions than it does currently. The Platform states that Article Two speaks to the parliamentary authority and to the power of the President to issue laws, decisions, and internal and foreign policies.<sup>189</sup> Currently, the law on the SCC states that the SCC has the exclusive authority to exercise the power of judicial review in constitutional issues with respect to laws and regulations only, which includes presidential decrees that contain substantive norms of general application.<sup>190</sup> Proposing to include the President’s decisions generally and domestic and foreign policies under the purview of Article Two is a major expansion of the SCC’s power. Since this proposal is presented in the Platform in such a casual way, it is hard to know whether the authors knew of its significance. By referencing the President’s foreign policies, the Platform appears to be alluding to a foreign policy issue that still receives Brotherhood criticism: Egypt’s relations with Israel.<sup>191</sup>

On at least one occasion, Brotherhood parliamentarians have asserted the use of Article Two beyond its current constitutional realm of applicability. In November

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*Court (Egypt)—Shari’a and riba: Decision in Case No. 20 of judicial year No. 1, 1 Arab L.Q. 1, 100–07 (Nov. 1985) (translating case no. 20).*

185. *Id.* at 102.

186. *Id.* at 104–05.

187. *Id.* at 104.

188. *See generally* PLATFORM, *supra* note 92.

189. *Id.* at 13.

190. Case no. 20/Judicial Year 1/Supreme Constitutional Court.

191. PLATFORM, *supra* note 92, at 4.

2006, the Minister of Culture, Faruq Husni, said in an interview that he considered the headscarf a symbol of backwardness.<sup>192</sup> Egyptians generally were angered by this statement.<sup>193</sup> The Brotherhood parliamentarians immediately called for the President to dismiss Husni. The reason they gave for his dismissal is significant: the Brotherhood claimed that the Minister had gone against the language of Article Two of the constitution (and specifically the clause that “Islam is the religion of the state”) because the headscarf is required by Islam.<sup>194</sup> However, the statement of a Minister is not currently a justiciable event; the power of judicial review is in respect to laws and regulations only.<sup>195</sup> Asserting that Article Two bears on the statements of ministers exemplifies either a simplistic understanding of the Constitution or a creative one. Unlike Article Two’s language that “the principles of the Islamic Sharia are the main source of legislation,” with its extensive jurisprudence, the SCC has not had occasion to interpret the original language of Article Two that “Islam is the religion of the state.” In the absence of a SCC determined meaning, this clause of Article Two might become a blank page upon which a differently constituted SCC could develop a new jurisprudence regarding Islam and the state.

The same concept of extending the reach of Article Two is presented through different language elsewhere in the Platform. The second item listed under goals of the Party is to “disseminate and deepen the morals, values, and true understandings of the principles of Islam as a way of life for the individual and society, and to put into action Article Two of the Constitution as to include all levels of law-making.”<sup>196</sup> These clauses may have been written with a focus on the results desired—further scrutiny of decisions and policies for their compliance with some notion of the Sharia—without attention to the mechanics of the implementation and enforcement or what such enforcement might mean for the SCC. Importantly, the Platform never proposes to modify the law that gives the SCC its jurisdiction; rather it makes these statements of expansion without specifying how it would take place as a matter of constitutional structure.

The final expansion issue deals with standing to make a claim on the basis of Article Two, although the expression of this point in the Platform also echoes the other expansion issues already addressed. The Platform says that every person who has an interest—whatever that may be—should be entitled to appeal to the SCC for any law, decision, or policy claiming that it conflicts with the rulings of the Islamic Sharia as agreed upon by the relevant contemporary scholars.<sup>197</sup> First, the Platform’s language is not limited to laws and regulations, again expanding the sources included under Article Two’s purview. Second, the statement suggests that the test for Article Two is whether a law conflicts with the rulings of the Islamic Sharia “as agreed upon by relevant contemporary scholars.”<sup>198</sup> This test would be far broader than the SCC’s

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192. Editorial, *Not So Veiled Complaints*, EGYPT TODAY (Dec. 2006), <http://www.egypttoday.com/article.aspx?ArticleID=7081>.

193. Yasmine Saleh and Sarah El Sirgany, *Religious Scholars Slam Farouk Hosny for Anti Veil Remarks*, DAILY NEWS EGYPT (Nov. 19, 2006), <http://www.dailystaregypt.com/article.aspx?ArticleID=4033>.

194. *Id.*

195. Law No. 48 of 1979, art. 25.

196. PLATFORM, *supra* note 92, at 10.

197. *Id.* at 13.

198. *Id.*

current test of protecting only those texts from the Sharia that are definite in authenticity and meaning.

Most importantly, this statement adds the new element of expanded standing for Article Two claims by stating that any person with an interest may appeal to the SCC. Currently, an issue can reach the SCC in two ways. First, when in the course of deciding a case on the merits, if a court views that a provision of law or regulation on which the settlement of the dispute depends is unconstitutional, the proceedings are suspended by the court and the case is forwarded to the SCC for adjudication of the constitutional issues. Second, when the constitutionality of a provision of law or regulation has been contested by a party to a case before a court and the grounds are found to be plausible by that court, the court shall declare the postponement of the case and specify for that party a period not exceeding three months within which the constitutional issue is to be presented to the SCC. There is currently no mechanism for individual citizens generally troubled by a law to challenge it before the SCC.<sup>199</sup> The Platform has thus set up a situation whereby it recognizes the current SCC and its decisions, but at the same time gives Article Two more meaning in law and society. How the Platform envisions accomplishing this is the topic of the next section.

#### *D. Mechanisms of Change*

##### 1. Parliamentary

According to the Platform, change begins with free and fair parliamentary elections. The third of the policies and strategies is to apply the authority of the Islamic Sharia in a way agreed upon by the Muslim community. Under this view, Islamic Sharia must be implemented through majority will, in a parliamentary authority elected in truly transparent elections, free of fraud, forgery, compulsion, and state interference.<sup>200</sup> The elections must take place under the supervision of foreign and domestic civil societies that are clearly independent of the executive branch.<sup>201</sup> Indeed, most observers agree that if elections were held this way, far more Brotherhood candidates would be elected.<sup>202</sup> Clearly, an open path to the legislature is a necessary pre-condition for many of the reforms discussed in the Platform.

The Platform assumes officials elected in free and fair elections would carry out the wishes of their constituents, and, consequently, be more attentive to Islamic law. Although the Brotherhood's goals address the process of getting lawmakers into office, they cannot guarantee any tangible legal or statutory results.<sup>203</sup> The Platform and Brotherhood generally put great emphasis on bringing all Egyptian laws into compliance with some notion of Islamic law through the democratic legislative

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199. Law No. 48 of 1979, art. 25.

200. PLATFORM, *supra* note 92, at 12.

201. *Id.*

202. See generally Denis Sullivan, *Will the Muslim Brotherhood Run in 2010?*, ARAB REFORM BULLETIN (May 5, 2009), available at <http://www.carnegieendowment.org/arb/?fa=downloadArticlePDF&article=23057> (debating the electability of Brotherhood candidates in open and fair elections).

203. FELDMAN, *supra* note 14, at 120 (calling this the democratization of the Sharia—"its keeping is given over to a popularly elected legislature charged with enacting legislation derived from the source that is the shari'a").

process. Muhammad Habib stated that while in theory the legislature should not pass any laws unless they are in accordance with Article Two, this does not happen in practice.<sup>204</sup> One way to improve the situation would be to replace members of parliament who hold their seats because of their position in the ruling NDP with members who are genuinely popularly elected.

## 2. Executive

The second avenue of reaching tangible change in the Egyptian legal system is to re-conceive the position of the President as a leader of the Muslim community. The Platform requires that the president be a male Muslim, and that his policies be subject to Article Two. While the current Egyptian constitution does not impose religious or gender requirements on the President, the Platform, in one of the most controversial provisions, adds such a requirement.<sup>205</sup> Under the heading of “civil state,” the Platform says that there are basic religious positions in the state and the officials who hold them are responsible for protecting and encouraging religion.<sup>206</sup> In Egypt, these officials are the President and the Prime Minister—both must ensure that no state action contradicts Islamic practices of worship, propagation, pilgrimage, and the like.<sup>207</sup> The Islamic state also has the responsibility for protecting non-Muslims in their belief and worship.<sup>208</sup> Further, decisions concerning war are decisions governed by Islamic law, and cannot be made by a non-Muslim. Since the leader of an Islamic community must be male, the Platform asserts, the positions of Prime Minister and President must be held by a Muslim male.<sup>209</sup> This notion of the Presidency as a religious position relates to the concept that the President’s policies must be in accordance with Article Two.

In the controversy that this position has created, several lines of thought appeared among members of the Brotherhood. Some rejected the religion and gender requirements, since these positions are created by the modern nation-state and have no religious content.<sup>210</sup> Abu al-Futuh said that the position in the Platform represents merely the Brotherhood’s preference—while the Brotherhood will not put up a woman or a Coptic candidate, others are free to do so.<sup>211</sup> Do the members of the Brotherhood who supported the restrictive language as written mean the religion of the President is part of the flexible zone of Islamic law, so that the rules can change from time and place? If so, why did they choose this view? On the other hand, if the Brotherhood claims that the religion of a leader is within the fixed and unchanging, then how can they defend their position against the several prominent scholars who disagree? This issue of competing sources of authority is revisited in the Conclusion.

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204. Interview with Muhammad Habib, *supra* note 97.

205. Compare with CONSTITUTION OF THE REPUBLIC OF SYRIA art. 3(1), available at [http://www.servat.unibe.ch/icl/sy00000\\_.html](http://www.servat.unibe.ch/icl/sy00000_.html) (requiring the President to be Muslim).

206. PLATFORM, *supra* note 92, at 17.

207. *Id.*

208. *Id.*

209. Brown & Hamzawy, *The Draft Party Platform*, *supra* note 94, at 5.

210. *Id.* at 8.

211. Interview with ‘Abd al-Mun’im Abu al-Futuh, *supra* note 130.

### 3. Council of Scholars

The second issue that generated public controversy, far more than the religion of the President, is the few sentences in the Platform that propose the creation of a Council of Scholars to advise legislators in lawmaking. After explaining the policy to implement the authority of the Islamic Sharia through elected members of the legislature, and describing how free and fair parliamentary elections should take place, the Platform states that “the legislature must request the opinion of a council of senior religious scholars from the Muslim community (the Council).”<sup>212</sup> This raises several questions: who would make up the Council? What kind of opinion would it give? Finally, would its opinion be binding on the legislature?

The Platform says very little about the composition of the Council, merely that its members should be elected freely and directly from religious scholars who are completely independent of the executive branch.<sup>213</sup> The only other information provided is that the legislature should determine the required qualifications for Council members.<sup>214</sup> Not only the legislature but also the President of the Republic is required to consult the Council and request its opinion when he issues decisions that have the force of law and the legislature is not in session.<sup>215</sup> The Platform states that the Council’s opinions will provide guidance, and “in the absence of certain legal rulings based on texts that are certain in authenticity and meaning, it is for the legislature to make the final decision, by absolute majority vote, with regard to the opinion of the Council.”<sup>216</sup> As proposed by the Platform, the legislature may submit revised versions of proposed laws to the Council before adopting legislation. Implied is that if the Council makes the decision on the basis of a “certain legal ruling based on texts that are certain in authenticity and meaning,” then the opinion is binding on the legislature.<sup>217</sup> The reference to texts that are certain in authenticity and meaning is the same that the SCC uses in its Article Two jurisprudence.

Most of the criticism of the Platform centered on these few sentences creating the Council.<sup>218</sup> Yet, this language reveals more about larger concerns of the Brotherhood than the Brotherhood’s desire to implement a Council of the kind cursorily described. The section was inserted rather clumsily into a larger paragraph on the legislature, showing that the Brotherhood is struggling with some fundamental tensions between a bottom up approach to Islamic law in society—that is, the belief that good Muslim legislators will produce good Islamic law—and the sense that at the end of the day, a legal scholar should have the final (or near final) word because the average legislator is not an expert in the legal texts. Legislators, no matter how pious and well-intentioned, might get it “wrong,” and thus need to be checked by someone with greater knowledge and experience with Islamic legal texts and methodologies. Yet it is hard to know what a “wrong” legislative outcome would be other than violating those few texts that are certain in authenticity and meaning since everything else is open to *ijtihad*, as the Platform states.

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212. PLATFORM, *supra* note 92, at 12.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 12; Brown & Hamzawy, *The Draft Party Platform*, *supra* note 94, at 4.

218. Brown & Hamzawy, *The Draft Party Platform*, *supra* note 94, at 2.

Proposing the Council suggests that at least some within the Brotherhood are not sure that relying on legitimately elected legislators, coupled with the later possibility of judicial review by the SCC, is sufficient to reach outcomes they desire. Thus, the raw democratic process needs to be checked by a small elite body, a notion compatible with constitutional review generally and in the case of Egypt the practice of the SCC. Because the Council would apply the same standard as the SCC, according to the Platform, the Council would be able to prevent offensive legislation, rather than having to wait years until the SCC possibly reviews the law following its adoption. In all other matters, the Council’s view is not binding and can be rejected by a majority vote.<sup>219</sup>

If the Council can be characterized as basically a mirror image of the SCC, inserted earlier into the legislative process, why was there so much outrage over the Council? Critics said that it imposed an Iranian-style Council of Guardians on Egypt<sup>220</sup> and that it resembled the government of the Taliban.<sup>221</sup> Intellectuals who had advocated accepting the Brotherhood for what it was functionally—a political actor—distanced themselves from it in the face of what looked like a move toward control by unelected Islamic legal scholars over the democratic process.<sup>222</sup> The objections were based in large part on the assumption that the members of the Council, who would be religious scholars, would have a stricter approach to Islamic law than the members of the SCC. Indeed, the identity of the interpreter is perhaps the most important variable in the interpretation of Islamic law. Some within the Brotherhood criticized the idea of the Council as unrepresentative of the membership’s views. Deputy Guide Muhammad Habib was the first to defend the Council.<sup>223</sup> Others from the Guidance Bureau, namely ‘Abd al-Mun‘im Abu al-Futuh, criticized the Council.<sup>224</sup> Some members supporting Abu al-Futuh even said that “these elements had been introduced in an inappropriate manner, without the process of consultation and consensus building about which the Brotherhood normally boasts.”<sup>225</sup> Subsequently Habib modified his position somewhat, calling the section in the Platform a mistake and opposing the formation of a council with anything more than advisory capacities.<sup>226</sup>

As a result of the controversy over the Council, it is widely expected that if the Party issues a final Platform it will remove any binding role for the Council in order to show that it is not “interested in importing an Iranian-style theocracy to the country.”<sup>227</sup> In an interview with Egyptian daily *al-Masry al-Yaum*, the General Guide at that time, Mahdi Akef, stated that the Brotherhood seeks to form a council of elected religious scholars to serve as merely an advisory body, available to public

219. *Id.* at 3–4.

220. Mohamed Elmenshawy, Op-Ed., *The Muslim Brotherhood Shows Its True Colors*, CHRISTIAN SCIENCE MONITOR, Oct. 12, 2007.

221. Khalil al-Anani, *For the first time since its founding over 80 years ago . . . a party platform for Egypt’s Brotherhood arouses doubts and restores the political project to its origins*, AL-HAYAT, Sept. 25, 2007.

222. Hamzawy & Brown, *The Egyptian Muslim Brotherhood*, *supra* note 5, at 11.

223. Brown & Hamzawy, *The Draft Party Platform*, *supra* note 94, at 7.

224. *Id.*

225. *Id.*

226. *Habib Admits Errors in Party’s Platform*, IKHWANWEB, Oct. 17, 2007, <http://www.ikhwanweb.com/article.php?id=14397>.

227. Brown & Hamzawy, *The Draft Party Platform*, *supra* note 94, at 16.

figures who wish to consult it.<sup>228</sup> Such a council would also choose the Shaykh of al-Azhar, an important religious leadership position. The Brotherhood has criticized the Shaykh as a functionary of the state, rather than an independent religious thinker, because the President currently fills the post.<sup>229</sup>

#### 4. Judiciary

As discussed above, the Platform envisions an expanded role for the meaning of Article Two. How will this meaning translate from conceptual to practical if the SCC maintains its current jurisprudence? The Platform calls for a true separation of powers among state institutions and, notably, for judicial independence from the executive.<sup>230</sup> Brotherhood leaders have stressed that they recognize the authority of an independent SCC with independent judges to determine the meaning of Article Two. Muhammad Habib emphasized this point by stating that if there were an independent judiciary, there would be more room for Article Two implementation.<sup>231</sup> The meaning seems clear: the Brotherhood does not consider the SCC, as currently constituted, to be an independent body, the remedy for which is the separation of powers, implying that judges with ties to the executive will tend to interpret Article Two narrowly and uphold most, if not all, of the legislation challenged. When judges are appointed through a process that ensures their independence from the executive, they will naturally tend toward a more expansive view of Article Two, and strike down legislation more aggressively, the Platform suggests.

### V. CONCLUSION: CHALLENGES OF CLARITY FOR ISLAMIST PARTIES

While the Platform is the most detailed statement of the Brotherhood's political agenda, it still leaves many questions unanswered. The Platform repeatedly calls for a state where the three branches of government function with adequate separation from one another; where elections are free, fair, and supervised by independent monitoring bodies; and where candidates can run for office without state control over political party registration on the basis of the party's beliefs.<sup>232</sup> These simple demands, essential to any liberal democratic society, reflect the Brotherhood's call for a society governed by the rule of law. By accepting the authority of the SCC, the Brotherhood limits itself to influencing the interpretation of the Article through the current legal channels. Presented in this way, the Brotherhood differs little from a political party in the United States that favors a particular interpretation of a provision of the U.S. Constitution and advances it through all appropriate possible mechanisms.

Yet, the Brotherhood's agenda still troubles some in Egypt and worldwide, in particular human rights scholars and activists, women's groups, and religious

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228. *Id.*

229. *Id.*

230. See generally PLATFORM, *supra* note 92.

231. Interview with Muhammad Habib, *supra* note 97. Guidance Bureau member 'Abd al-Mun'im Abu al-Futuh stated that the SCC is the sole authority on constitutional interpretation, but that it does need to be a more independent body. Interview with 'Abd al-Mun'im Abu al-Futuh, *supra* note 130.

232. PLATFORM, *supra* note 92, at 12. According to Ibrahim Houdaiby, the Platform is a statement that "Islam has no problem with democracy." Interview with Ibrahim Houdaiby, *supra* note 47.

minorities.<sup>233</sup> The Platform’s position that women and non-Muslims cannot hold the positions of President and Prime Minister is a clear example of a discriminatory position, although these statements have been rejected or at least softened by many within the Brotherhood leadership. It is difficult to address the criticism that the Brotherhood strategically keeps its many discriminatory intentions private, because the evidence comes from the unspoken. But taking the Platform and other important statements of the Brotherhood as representing their position, as this Article does, then what larger areas of concern does the Platform raise and how can the Brotherhood, or any political party that presents itself as having an Islamic frame of reference, try to address them adequately?

Significant ambiguity persists in three areas of the Platform: the sources of reference for Islamic law and the content they produce; comparative authority of religious-based arguments and arguments of public welfare; and mechanisms for applying law in society. First, the Platform’s references to Islamic law are unclear. The Platform itself recognizes the fallacy that Islamic law is some kind of code of law that can be applied in any environment, and acknowledges that most of the source texts are subject to human interpretation. These are both important recognitions, but the question remains: What is the Islamic legal content of the Brotherhood’s agenda?

One example demonstrates the inability to adequately answer this question based on what the Brotherhood has said thus far. The Platform’s discussion of crime and punishment recognizes two important components to crime reduction: Islamic education and upbringing as well as direct crime prevention.<sup>234</sup> The Platform states that if society achieves these two goals, then any crime that is committed is not done from dire need, and the person responsible is a depraved threat to society, who must be punished according to Islamic law.<sup>235</sup> To explain depravity, the Platform uses the example of theft, which it says is one of the most wide-spread crimes in Egypt.<sup>236</sup> The Platform asserts that throughout Islamic history, the defined Islamic legal punishments (the *hudud*), particularly amputation and stoning, were used infrequently, and only as a result of strict procedures.<sup>237</sup> The Platform then states that Islamic societies that applied Islamic law fully were the most stable and secure societies in history, and had the least amount of crime.<sup>238</sup>

It is unclear whether the Platform suggests that the *hudud* crimes and punishments should be part of Egyptian law, or whether the Platform’s statements are merely unsubstantiated assertions about Islamic legal history as part of a larger discussion on criminal law. While the *hudud* crimes and penalties (or some modern re-imagining of them) are applied in some places in the world today, and while their proponents claim the *hudud* are essential to an Islamic society, the vast majority of countries with Muslim majority populations, including Egypt, have not made the *hudud* part of their criminal laws. Indeed, the Brotherhood has given little other

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233. Amr Hamzawy, *Regression in the Muslim Brotherhood’s Platform?*, DAILY STAR, Nov. 1, 2007, available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=19686>; Elmenshawy, *supra* note 220 (alleging the Muslim Brotherhood’s discrimination against Egyptian Christians).

234. PLATFORM, *supra* note 92, at 80. The classical language of “blocking the means” is used here.

235. *Id.* at 81.

236. *Id.*

237. *Id.*

238. *Id.*

indication of its interest in adopting these laws in Egypt, making this a curious discussion. The Platform's ambiguous position on *hudud* is further complicated by its statement regarding its discussion of the *hudud* crimes and penalties:

[The discussion] is consistent with the Egyptian constitution, which confirms that Egypt is an Islamic state and that Islam is the main source of legislation, just as [the discussion] is consistent with the conclusion of modern studies—some of which are western—that the *hudud* as it appears in the Islamic Sharia is the most effective instrument in controlling crime and preventing it in all types of societies, even non-Muslim societies.<sup>239</sup>

This discussion presents no clear view on the Brotherhood's aims with regard to *hudud* crimes and does not provide clarity to Egyptians who do not want such penalties incorporated into national law and who would not support the Brotherhood if this were part of their agenda.

The second area of ambiguity deals with the comparative authority of religious-based arguments and arguments of public welfare. While the Platform places great emphasis on the importance of free and fair elections, it is also clear that lawmakers are subject to certain limitations derived from Islamic law.<sup>240</sup> Per Article Two, these limitations might merely be the power of the SCC to strike down laws that contradict some core norms of Islamic law. However, the Platform appears to go further, suggesting that some Sharia-derived arguments should trump efforts of the legislators, even when the legislators' efforts are clearly in the public interest.

Two examples illustrate this comparative authority problem. As discussed above, the Platform as drafted included the controversial Council of Scholars. The specific formulation of the Council itself is not as important as the underlying anxieties that seem to have led to it. At least some of the drafters of the Platform did not want to leave decisions completely up to the lawmakers with only a post-promulgation check by the SCC to prevent core Islamic rules from being violated.<sup>241</sup> Therefore, the drafters proposed inserting the Council of Scholars into the legislative process to advise the lawmakers. On the one hand, the wording of the Platform suggests that the binding nature of the Council would only be for a core set of rules, similar to the SCC.<sup>242</sup> However, the religious scholars who form the Council could adopt the SCC's approach to determining the fixed and unchanging rules, but could also adopt their own broader test, potentially leading to significant disputes with lawmakers.

The second example in the Platform is the general principle of non-discrimination that the Platform states is an essential component of true democracy. The concept is described as:

Non-discrimination among citizens in rights and duties on the basis of religion, sex, or color such as the rights of property ownership, internal

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239. *Id.* at 82.

240. PLATFORM, *supra* note 92, at 12.

241. Hamzawy & Brown, *The Egyptian Muslim Brotherhood*, *supra* note 5, at 10 (“On the one hand, the proposed council answered apparent pressure from the movement's more ideologically committed foot soldiers that it not abandon Shari'a behind anodyne formulas, as well as the insistence of some senior leaders to make Shari'a-based rules a viable restriction on rulers.”).

242. See PLATFORM, *supra* note 92, at 12.

migration, education, work, exercising political rights, expression of opinion (in the context of protecting the political values of society), running for representative assemblies, and undertaking all executive and judicial positions, with exception of President. Only Muslim males may run for or hold this office. We view that women have the right in all administrative positions in the country except President, because religious scholars agreed that women may not hold this office.<sup>243</sup>

This presents the position that women may not hold the office of President based solely on one interpretation of Islamic law presented as a scholarly consensus, without any mention of whether such a rule would be in Egypt’s interest or even whether other competing views exist.

On one level, Brotherhood legislators are free to introduce legislation imposing gender restrictions on candidates for President, but in the end they must accept the majority will of the legislative body. But if Brotherhood candidates become the majority in the legislature, will they then seek to impose legislation solely because they believe it to be required by an interpretation of Islamic law without any other reasoning? Could a person adhering to this view and claiming that he is bound to do so because it is a fundamental religious rule be convinced otherwise? And on what basis will this lawmaker decide that a rule is required? What evidence of scholarly consensus will be persuasive to him? And what if other lawmakers do not believe there is a consensus on the issue?

The line of questions raises several types of concerns. If the premise is accepted that a rule presented as Islamic (because accepted by some scholars) can trump other legislative proposals, then legislative debates will turn into discussions of which rule is more Islamic than the other, shifting the debate from public interest to one of Islamic legal methodologies and competing scholarly views. Abdullahi an-Na‘im argues forcefully against the scenario where considerations of public welfare take a back seat, and rejects the idea of Islamic law “enacted and enforced by the state as public law and public policy solely on the grounds that they are believed to be part of the Shari‘a.”<sup>244</sup>

As a final note on this example, it also contains an internal contradiction that highlights the problem of arguing on the basis that all religious scholars have agreed on a position and so it is non-negotiable. The Platform states that women may not be President “*because* religious scholars agreed that women may not hold this office.”<sup>245</sup> Yet this is not an accurate statement. One of the key thinkers who influenced the Brotherhood, Yusuf al-Qaradawi, presented the alternative view that women are only prohibited from serving as the head of the community of Muslims, the *umma*. Because the position of President of Egypt is a position constructed in the modern era of nation-states and conceptually distinct from the Islamic *umma*, Islamic legal rules do not apply to this issue.<sup>246</sup>

The third conceptual problem the Platform raises is the mechanisms for implementing rules based on Islamic law. The Platform accepts the existing

243. *Id.* at 23.

244. AN-NA‘IM, *supra* note 14, at 1.

245. PLATFORM, *supra* note 92, at 23 (emphasis added).

246. *See* RUTHERFORD, *supra* note 109, at 181–82.

institutions and the functions they serve, but it does not limit itself to working through this structure. The Brotherhood suggests it will harness the power of the state for the right cause, develop new institutions, and breathe new life into existing ones to extend the state's power and control with respect to Islamic law. But how exactly will these new powers take effect, and how will they affect daily lives of Egyptians, Muslim and non-Muslim alike?

These three conceptual difficulties will remain until the Brotherhood provides clear guidance as to their agenda. One way to clarify the agenda is through further policy documents, and perhaps the Brotherhood will issue a final Platform. Perhaps the most valuable and meaningful way to study the Muslim Brotherhood's agenda is to observe how its members behave in the legislature.<sup>247</sup> Official statements are helpful, but empirical studies will be even more useful to answer the basic questions: What types of legislation do they propose? What legislation do they oppose? What is their voting record? The Platform and other position papers suggest some answers, but vague praises for the classical Islamic criminal laws cannot predict how elected officials will behave once in office. Samer Shehata and Joshua Stacher began this line of research with the Brotherhood parliamentarians in 2006, and several small studies have followed suit.<sup>248</sup> Far more empirical work needs to be done in this area, in particular a comprehensive study on all Brotherhood parliamentarians in the 2005 session and those who will be elected on November 28, 2010. But if the number of Brotherhood candidates who win seats is kept to some "acceptable" level by the NDP, then voters will only be able to observe the Brotherhood as a minority opposition movement without the numbers to pass or block legislation on their own. In that case, the NDP's suggestion that the Brotherhood will behave differently when in the majority will remain as an unsubstantiated threat.

Egyptians and outside observers alike need to be willing to assess the Brotherhood's agenda in an objective and nuanced way. As this examination of the Brotherhood's Platform and positions has shown, a slogan of "Islam is the Solution" is about as precise as a political party calling for change. Many points of tension and ambiguity remain in the Brotherhood's Platform, and it is quite possible that the Brotherhood has not considered many of the questions raised in this Article. It may be unfair, as Samer Shehata has pointed out, that the Brotherhood is pressed to formulate and provide clearer answers when the same is not asked of the ruling NDP. The practical reality, however, is that the NDP is keeping the Brotherhood outside the formal political process with claims and allegations that the Brotherhood has chosen to attempt to refute. The November 2010 parliamentary elections have the potential to begin to advance a solution for this political impasse, just as they have to further entrench the status quo.

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247. Shehata & Stacher, *supra* note 4, at 33 ("[T]he Brotherhood parliamentary bloc is being noticed in Egypt for its work across ideological lines to serve constituents and increase its collective knowledge of local, national and international affairs. Moreover, the delegation has not pursued an agenda focused on banning books and legislating the length of skirts. It has pursued an agenda of political reform.").

248. *Id.* at 36–39; see RUTHERFORD, *supra* note 109, at 183–90 (summarizing the main areas of concern to the same parliamentary cohort based on Egyptian newspaper reports from 2005–2008); see also Hamzawy & Brown, *The Egyptian Muslim Brotherhood*, *supra* note 5, at 15–27 (surveying at a general level the concerns of the Brotherhood parliamentarians from the 1995–2000 and 2000–2005 sessions).