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**How is Islam the Solution?:  
Constitutional Visions of Contemporary Islamists**

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**Kristen Stilt  
Northwestern University School of Law**

*How is Islam the Solution?:  
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Kristen Stilt<sup>1</sup>

Islamist political parties in some parts of the Arab world now form part of the political landscape.<sup>2</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>3</sup> As part of national political field, voters can evaluate their accomplishments and exercise choices in elections. These cases are not without limitations—to participate, these parties typically have to make some compromises, a kind of “pay to play,” that can involve implicit limitations on the range

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<sup>1</sup> Associate Professor of Law and History, Northwestern University. I thank Ellis Goldberg, Samer Shehata, Nathan Brown, and Sani Umar for valuable comments. Roy Awabdeh provided outstanding research assistance during 2008-2009 and in particular while conducting research in Cairo during June 2009. The author is a Carnegie Scholar 2007, and this Article was made possible by a grant from Carnegie Corporation of New York. The statements made and views expressed are solely the responsibility of the author. Please direct comments to the author at stilt@northwestern.edu.

<sup>2</sup>Islamist movements participating in national elections include the Islamic Action Front (IAF) in Jordan, the Islamic Constitutional Movement (Hadas) in Kuwait, and the Party of Justice and Development in Morocco. Nathan Brown, Amr Hamzawy & Marina Ottaway, *Islamist Movements and the Democratic Process in the Arab World: Exploring the Grey Zones*, 67 CARNEGIE PAPERS MIDDLE EAST SERIES, Mar. 2006, at 4, available at [http://www.carnegieendowment.org/files/cp\\_67\\_grayzones\\_final.pdf](http://www.carnegieendowment.org/files/cp_67_grayzones_final.pdf).

<sup>3</sup>Ruling regimes largely determined that preventing such popular movements had become more dangerous 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 108. 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.” Brown, *supra* note 1, at 7-8. The phrase itself was coined by U.S. Assistant Secretary of State Edward Djerejian in 1992 during the Algerian Civil War.

of criticisms they make of the ruling regimes. Nevertheless, inclusion of these Islamist movements is a crucial step in democratic development.

The case of Egypt stands as 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>4</sup> Unlike its progeny, the Muslim Brotherhood is illegal, although its members have run for office as independents. In the November-December 2005 parliamentary elections, independent candidates from the Muslim Brotherhood running with the slogan “Islam is the Solution” gained 88 of 454 seats in those elections, many more than all other opposition groups combined, even as the process of the elections were criticized.<sup>5</sup> These results, however, should not be seen as indicative of gradual informal participation leading towards formal recognition and inclusion; Brotherhood officials continue to be arrested and there is no indication of any possibility of the regime opening its position on the group. The next milestone in Egypt is the November 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. The Brotherhood has hinted that it might retreat from the levels of its participation in the 2005 elections, in part to avoid

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<sup>4</sup> [need cite for this and for point that in many ways its progeny has outpaced it in terms of political impact]

<sup>5</sup>Leiken, *supra* note 2, at 114. Only 444 of these seats are determined by election ; the remaining ten are appointed by the President.

<sup>6</sup>Gamal Essam El-Din, *Another Political Season*, 968 AL-AHRAM WEEKLY (2009), available at <http://weekly.ahram.org.eg/2009/968/eg6.htm>.

confrontation with the regime that can lead to deadly clashes and the arrests of Brotherhood leadership.<sup>7</sup>

Americans need to focus attention to the Egyptian 2010 elections, and in particular the sole opposition of the Muslim Brotherhood. Egypt is the largest Arab country, the U.S.'s most important Arab ally in region, and the second largest recipient of U.S. foreign aid.<sup>8</sup> Most recently, Barack Obama chose Egypt as the site from which he delivered the new U.S. message to the Islamic world.<sup>9</sup> American foreign policy has already influenced electoral developments in Egypt, making Egyptian elections an American issue. Prior to the 2005 parliamentary elections, 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 88 seats.<sup>10</sup> Some analysts 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

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<sup>7</sup> For a discussion of the internal tensions within the Brotherhood over the issue of political participation, see Amr Hamzawy and Nathan Brown, *The Egyptian Muslim Brotherhood*, 19 CARNEGIE PAPERS, March 2010. They point 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.

<sup>8</sup> Jeremy M. Sharp, *U.S. Foreign Assistance to the Middle East: Historical Background, Recent Trends, and the FY2010 Request* 4 (Congressional Research Service 2009), available at [http://pdf.usaid.gov/pdf\\_docs/PCAAB954.pdf](http://pdf.usaid.gov/pdf_docs/PCAAB954.pdf). According to the U.S. Department of State, Egypt received \$1,289,470,000 in US Foreign Military Aid in 2008, second only to Israel which received \$2,380,560,000. <http://www.state.gov/t/pm/64694.htm>

<sup>9</sup> Helene Cooper, *Looking for the Ideal Spot to Make a Speech*, N.Y. TIMES, Dec. 4, 2009, available at <http://www.nytimes.com/2008/12/04/us/politics/04web-cooper.html>; Roundtable Interview of President Barack Obama by Reporters at Cairo University, [http://www.whitehouse.gov/the\\_press\\_office/Roundtable-Interview-of-the-President-by-Regional-Reporters-Cairo-Egypt-6-4-09](http://www.whitehouse.gov/the_press_office/Roundtable-Interview-of-the-President-by-Regional-Reporters-Cairo-Egypt-6-4-09).

<sup>10</sup> Leiken, *supra* note 2, at 114.

legislation.<sup>11</sup> The U.S. was subsequently seen to have backed away from pushing Egypt for political reforms, in part due to a focus on bigger problems in Iraq.

Now, the stakes and responsibility are very high for U.S. policy towards the 2010 Egyptian elections, and in order to make careful decisions, 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 whereby it 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 "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 to the Brotherhood, the place of religion in the state, or religion defined and enforced by state institutions.<sup>14</sup> I show that the Brotherhood carefully acknowledges

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<sup>11</sup> [Find cite, or change text to indicate that while this was widely talked about informally, no one put it into writing.]

<sup>12</sup> As Samer Shehata and Joshua Stacher note, "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." Samer Shehata and Joshua Stacher, *The Brotherhood Goes to Parliament*, 240 MIDDLE EAST REPORT (2006). See also Mona El-Ghobashy, *Unsettling the Authorities: Constitutional Reform in Egypt*, 226 MIDDLE EAST REPORT 29 (2003), explaining that "the reductive tendency to shoehorn all of Egyptian politics into a deadlock between the regime and the Islamists, on 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."

<sup>13</sup> The range of the topics the Platform covers is vast, including the economy, education, 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. Rather than any one of these substantive areas, this Article examines structural changes that involve the place of Islam and Islamic law.

<sup>14</sup> 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 through law. Noah Feldman, *THE FALL AND RISE OF THE ISLAMIC STATE* 21 (2008). Rather than a reference to any particular rule from within the vast Islamic legal corpus, he argues, Islamist parties are offering an alternative system to the authoritarian regimes that have come into

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, constructed around and built upon the existing system. In order to examine these areas, the 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 will identify 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.

### I. The Muslim Brotherhood as 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 and illegal 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 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

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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. Objecting to this benign characterization, Abdullahi an-Na'im argues that the concept of an Islamic state is a "dangerous illusion" that threatens "constitutionalism, human rights, and citizenship in Islamic societies." Abdullahi An-Na'im, *ISLAM AND THE SECULAR STATE* 1-2 (2008). The goal in this Article is to take Egypt as a case study and examine in detail the Brotherhood as an Islamist party.

<sup>15</sup> Richard P. Mitchell, *THE SOCIETY OF THE MUSLIM BROTHERS* 7-9 (1969).

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 custom of the Prophet]; and (3) and 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.

The Brotherhood also early in its life took steps into two additional fields of activity, which began a source of conflict with the Egyptian state that continues to today. First, the Brotherhood determined that political activity was part of its agenda, and fielded candidates in the general elections of 1941 and again in 1945.<sup>17</sup> Secondly, 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. The regime arrested thousands of other Brotherhood members, and courts declared a life sentence for General Guide Hudaybi, the execution of six members, and prison sentences for hundreds more.<sup>19</sup> One

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<sup>16</sup> *Id.*, at 14.

<sup>17</sup> *Id.*, at 26-27. 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. *Id.*, at 27. 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. *Id.* at 33.

<sup>18</sup> *Id.*, at 30-32.

<sup>19</sup> *Id.*, at 151-162.

of the Brothers arrested was Sayid Qutb, whose subsequent writings are considered to have inspired the Brotherhood's violent offshoot groups such as Islamic Jihad.<sup>20</sup> When Anwar al-Sadat became President, following the death of Nasser in 1970, he initially treated the Brotherhood favorably in part to dilute his predecessor's supporters from the leftists.<sup>21</sup>

The good relations between Sadat and the Brotherhood did not last long, and it took an openly hostile stance towards Sadat's agreement with Israel at the 1979 Camp David Accords. Sadat ordered mass arrests of Brotherhood members and other Islamist groups in September 1981. The Brotherhood's splinter groups, however, proved a far greater threat to Sadat, and members of Islamic Jihad assassinated Sadat on October 6, 1981.<sup>22</sup> Hosni Mubarak succeeded Sadat and recognized religious extremism as the most immediate threat. He sought to mobilize the moderate Islamists, including the Muslim Brotherhood, against extremism, and he released many of the Brotherhood from prison.<sup>23</sup> Mubarak was trying to distinguish between violent Islamists, whom he wanted to punish, and some moderate Islamism, represented by the Brotherhood, which he needed on his side.

But the Brotherhood wanted more political involvement than Mubarak was prepared to tolerate. The Brotherhood became heavily involved in syndicates and

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<sup>20</sup>Leiken, *supra* note 2, at 110.

<sup>21</sup>Mona El-Ghobashy, *The Metamorphosis of the Muslim Brothers*, INT. J. OF MIDDLE E. STUD. 377 (2005).

<sup>22</sup>Abd al-Monein Said Aly & Manfred W. Wenner, *Modern Islamic Reform Movements: The Islamic Brotherhood in Contemporary Egypt*, MIDDLE E. J., Summer 1982, at 359.

<sup>23</sup>Hesham al-Awadi, IN PURSUIT OF LEGITIMACY: THE MUSLIM BROTHERS AND MUBARAK, 1982-2000, 49; 57 (2004).

professional organizations, taking the lead in several of these associations.<sup>24</sup> In 1984, it entered parliamentary elections in the form of an alliance with the Wafd party and effectively ran on the Wafd ticket, winning 7 seats. This early success was followed by another, when they won 38 seats in a 1987 alliance with the Liberal Party and the Socialist Labor Party.<sup>25</sup> These wins were not enough to challenge Mubarak's NDP, but by the late 1980's, Mubarak recognized that the Muslim Brotherhood posed a serious threat to his legitimacy. As members of parliament, they criticized the un-Islamic practices of the state. More significantly, in the 1990's, militant groups in Egypt targeted the regime directly and indirectly through attacks on the tourism industry, one of the Egypt's main forms of income.<sup>26</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.

The Brotherhood and other major opposition parties boycotted the parliamentary elections of 1990 because they were supervised by the Minister of Interior.<sup>27</sup> The Brotherhood also opposed Mubarak's desire to seek a third term as president. 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. In the Cairo earthquake of 1991, the Brotherhood successfully provided services to the people, in

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<sup>24</sup>*Id.*, at \_\_\_.

<sup>25</sup>Ghobashy, *supra* note \_\_, at 378-9.

<sup>26</sup>Walsh, *supra* note \_\_, at 35.

<sup>27</sup> The Tagammu` party did participate, and won six seats. Al-Awadi, *supra* note \_\_, at 144.

contrast to the perceived incompetency of the state. And the Islamist victory in Algeria in 1992 showed Mubarak what could easily happen in Egypt.<sup>28</sup>

The peak of the tension that had been building since 1990 erupted in 1995. The regime resorted to severe authoritarian methods of dealing with opposition, arresting hundred of Brotherhood members and trying them in military, not civil, courts. Most of those tried in these courts were convicted. In the 1995 elections, the Brotherhood won only one seat. The level of state coercion used to prevent success of the opposition was the highest with these elections, and 51 people were killed during two days of voting. At the same time, Islamist violence continued to rise and Mubarak was targeted when he visited Ethiopia. Even though Jihad claimed responsibility, by this point, the regime was making no distinction between radical and moderate Islamists, and Mubarak stressed the similarity between the Brotherhood and Jihad.<sup>29</sup>

Brotherhood members continued to attempt to run for the legislature, and ran as independents once the electoral law allowed independent candidates. In the 2005 lower house parliamentary elections, independent candidates from the Muslim Brotherhood running with the slogan “Islam is the Solution” gained 88 of 454 seats, many more than all other opposition groups combined.<sup>30</sup> The potential for 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 the candidates in particular before the elections.<sup>31</sup>

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<sup>28</sup> Al-Awadi, *supra* note \_\_, at 122-148. In 1992, military courts began to be used to try civilians.

<sup>29</sup> Al-Awadi, *supra* note \_\_, at 171.

<sup>30</sup> Leiken, *supra* note 2, at 114.

<sup>31</sup> Tamir Moustafa, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT* 215 (2007). Amr Hamzawy and Nathan 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 Brotherhood remains a non-party that is in effect the only real opposition to Mubarak's NDP. This party-like status does not please all Brotherhood members, some of whom want to renew focus on the original social and religious mission.<sup>32</sup> Other members sought to separate the Brotherhood political functions into a new political party that would reach across the aisle and present a religiously-inspired yet secular message. These left the Brotherhood to form the Wasat (Center) party in conjunction with other politicians, including Christians.<sup>33</sup> They applied for party recognition but it has been refused.<sup>34</sup> And finally some in the Brotherhood want the Brotherhood to function as a political party. Existing law, however, poses a significant obstacle to such recognition. The Political Parties law prohibited political parties founded on a religious basis or on the manipulation of religious feelings.<sup>35</sup> Article Five of the Constitution concerning parties, which originally drafted did not mention religion, 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 the establishment of political parties on the basis of a religious authority, a religious foundation, or discrimination on the grounds of gender or origin."<sup>36</sup> While this language does not refer to Islam specifically,

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the seats. Further, they did not run candidates against prominent NDP candidates. Amr Hamzawy and Nathan Brown, *The Egyptian Muslim Brotherhood*, 19 CARNEGIE PAPERS, March 2010, at 7.

<sup>32</sup>Abdul Monem Abu al-Futuh, *Reformist Islam: How Gray are the Gray Zones?*. ARAB REFORM BULLETIN, July 2006; Interview with Ibrahim Houdaiby, June 16, 2009.

<sup>33</sup>Carrie Rosefsky-Wickham, *The Path to Moderation: Strategy and Learning in the Formation of Egypt's Wasat Party*, 36 COMPARATIVE POLITICS 205-28 (2004).

<sup>34</sup>Mustafa Kamel Al-Sayyid, *The Muslim Brothers and Political Reform in Egypt*, ARAB REFORM BULLETIN, Feb., 2004.

<sup>35</sup>Law No. 40/1977 as amended by No. 177/2005

<sup>36</sup>AL-DUSTUR [CONSTITUTION OF EGYPT], as amended March 29, 2007.

the intent of the amendment was clear, and the Brotherhood claims that this amendment was targeted at them and will prevent them legal recognition.<sup>37</sup> In order to discuss their political agenda and its significance in Part III, the next section provides an overview of the existing Egyptian system.

## II. Current Place of Islam in the Egyptian Constitutional Structure

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

The current constitution was promulgated in 1971, early in the term of President Anwar Sadat.<sup>38</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.

The interpretation of the constitution is the responsibility sole of the Supreme Constitutional Court (SCC),<sup>39</sup> and the SCC’s relative autonomy made it an attractive

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<sup>37</sup>Nathalie Bernard-Maugiron, *The 2007 Constitutional Amendments in Egypt, and Their Implications on the Balance of Power*, 22 ARAB LAW QUARTERLY 397-417 (2008).

<sup>38</sup> See my forthcoming *The Constitutional Summer of 1971*.

<sup>39</sup>Law 48 of 1979 art. 25. 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. The powers of

place to turn to for Islamists who were displeased with various aspects of Egyptian law.<sup>40</sup> In early cases, challengers sought to declare unconstitutional legislation that they claimed was inconsistent with the vaguely expressed “principles of the Islamic Sharia.” The SCC in its decisions made clear that the constitution gives the legislature wide latitude to legislate for the general welfare (*maṣlaḥ a*) of the nation. While recognizing that religious texts should be a guiding force in determining welfare and thus in the formulation of laws, the SCC declined to require any particular kind of law making process. Instead, the SCC interpreted Article Two to mean that no legislation may violate rules of Islamic law that are definite in terms of both their authenticity and meaning. Such rules, according to the SCC, neither need nor permit interpretation (*ijtihād*) because their meanings are absolutely clear. And because they are absolutely clear, they do not change with time.<sup>41</sup>

The SCC adopted this test phrase of “definite in terms of authenticity and meaning” from classical Islamic law sources. It means that (1) the authenticity of the text must be proven beyond doubt; and (2) there must be one absolutely clear meaning of the text. As for part one, the authenticity of the Qur’an in whole is accepted, so this part

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judicial review are the most significant, and can occur through two paths. First, when in the course of deciding a case on the merits, 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. Otherwise the challenge is void. After the SCC decides, the case is returned to the original court to continue now that the constitutional issue has been clarified.

<sup>40</sup> Moustafa, *supra* note \_\_\_\_.

<sup>41</sup> Case 7 of Judicial Year 8 (May 15, 1993), *al-Jarida al-Rasmiya* [Official Gazette], No. 22 bis, June 5, 1993.

applies concerns the Sunna (normative practice of the Prophet), about which there is extensive debate. Part two provides a challenge for both the Qur'an and the sunna, since multiple opinions about the meaning of a text is a the typical result, rather than clarity and unanimity. As a result, the "principles of the Islamic Sharia" that the SCC will protect is narrow, and thus it gives 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 tests to be authenticated beyond doubt."<sup>42</sup>

For example, this first case from 1993 in which the SCC announced its test for constitutionality under Article Two involved Law 100 of 1985, which amended existing personal status legislation and added new provisions.<sup>43</sup> While challenging the Law generally, the claim focused specifically on Articles 18b and 20. Article 18b provides for an extra compensation payment to a woman whose marriage whose husband divorced her against her will and without any specific cause for which the woman was responsible.<sup>44</sup> The compensation amount is, at a minimum, equal to (and separate from) two –years' of any maintenance payment she might receive.<sup>45</sup> Article 20 extended the woman's right to custody of minor children post-divorce, providing that her right to

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<sup>42</sup>Frank 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* (Eugene Cotran and Adel Omar Sherif eds., 1999) 525: 531. Vogel brilliantly showed how the SCC test replicated the classical Islamic law standards elaborated by the scholars for determining the permissible *siyasa* power of the ruler.

<sup>43</sup>Case 7 of Judicial Year 8 (May 15, 1993), *al-Jarida al-Rasmiya* [Official Gazette], No. 22 bis, June 5, 1993.

<sup>44</sup> The marriage must have been consummated in order for the compensation to apply. Law 100 of 1985, Art. 18b.

<sup>45</sup> 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.

custody (and this maintenance from the ex-husband) terminates when the male child reaches the age of ten and the female child reaches 12, although at that point a judge may further allow a boy to remain in her custody until the age of 15 and a girl until she marries if it serves the child's interest. In rejecting this claim, the SCC essentially stated that although the claimant might find some scholar or a legal view that would reject the provisions of the Law as contrary to Islamic law, this is not sufficient. 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 scholarly opinion disagreed about the obligatory nature and amount of the compensation payment and the mother's custodial age for children, there is no Article Two violation.<sup>46</sup>

The Supreme Constitutional Court judges are appointed by the President, and when making an appointment, he chooses from among two candidates, one chosen by the General Assembly of the Court, which is the body of all the SCC's judges, and the other by the chief justice. SCC judges cannot be removed although they must retire at the age of 66. The judges can only be disciplined by the General Assembly itself. The President appoints the chief justice by Presidential decree and the person need only meet the minimum qualifications for any member of the Court. From the Court's establishment in 1979 to 2001 the president always appointed the most senior judge on the SCC for the position of chief justice.

The appointment process for Chief Judge changed dramatically in late 2001. Mubarak appointed Fathi Nagib, who at the time held the second highest position in the Ministry of Justice. The human rights community, opposition parties, as well as legal

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<sup>46</sup> Case 7 of Judicial Year 8 (May 15, 1993), al-Jarida al-Rasmiya [Official Gazette], No. 22 bis, June 5, 1993.

scholars expressed concern, for Nagib was a man tightly affiliated to the regime. The position of chief judge on a practical level controls many aspects of the court's decision making. One former justice stated that even if a majority of judges vote against the view of the chief judge, he can simply refuse to sign the ruling. Nagib immediately appointed five new justices to the Court. Since the 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. 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. Nagib made all five appointments directly to the level of justice, with the result of increasing the number of judges by 50%.<sup>47</sup>

Since then, Mubarak has appointed a chief justice from outside the SCC in the case of Mamduh Mara'i in 2003, Maher 'Abd al-Wahid in 2006, and Farouk Sultan in 2009.<sup>48</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 76 of the Constitution.<sup>49</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 in the state. The

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<sup>47</sup>Nagib had more plans for a remodeling 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 the less significant areas. The SCC judges apparently resisted this division at that time, although apparently the idea is not completely off the table. Moustafa, *supra* note \_\_, at \_\_.

<sup>48</sup>For the 2003 appointment, <http://www.barasy.com/news-view-4705.html> [Arabic]; for the 2006 & 2009 appointments, : <http://weekly.ahram.org.eg/2009/957/eg5.htm>.

<sup>49</sup>Egyptian Constitution, Art. 76; Kristen Stilt, *Constitutional Authority and Subversion: Egypt's New Presidential Election System*, 16 IND. INT'L & COMP. L. REV. 335 (2005-2006).

susceptibility to Presidential control it has faced in recent years could be used to the advantage of the Brotherhood or other political party that reached a position of power. With this sense of the SCC's current jurisprudence in mind, this Article now turns to what vision the Brotherhood has for making changes to it.

### III. 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 and before turning in Part (c) below to areas of proposed change. First, however, it examines the sources that provide the basis for these conclusions.

#### a. Sources for the Views of the Muslim Brotherhood

The analysis relies mainly on official documents, public interviews, and statements made by Brotherhood officials, along with personal interviews I conducted with members of the Brotherhood in June 2009. The official documents used include the 2004 *Undertaking of the Muslim Brotherhood on General Principles for Reform in Egypt*,<sup>50</sup> which is a broad statement of goals; the 2005 *Electoral Program of the Muslim Brotherhood*, issued in advance of the elections to the lower parliamentary house (the *Majlis al-Sha'b*); the 2007 *Electoral Program of the Muslim Brotherhood*, issued in advance of the elections to the upper parliamentary house (the *Majlis al-Shura*); and the 2007 *Platform of the Political Party* (the "Platform").<sup>51</sup> Prior to the Platform, official

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<sup>50</sup> [See if there is a standard translation for this booklet]

<sup>51</sup> 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

documents largely avoided details of the role of Islamic law in state structures and have left analysts with little in the way of details.<sup>52</sup> The much lengthier and more detailed Platform finally attempted a statement on key issues of governance, and it intended to explain the positions that the party would hold if allowed to participate as a legitimate part of Egyptian politics.<sup>53</sup>

The Platform as issued in August 2007 was marked “first draft,” and the intent apparently was to get the opinions from a limited group of intellectuals within Egypt for feedback to assist the crafting of a final platform.<sup>54</sup> Despite a desire to control the distribution, the document soon became widely available in Egypt and internationally, resulting in heavy media attention and much criticism that tended to focus on a few of the more controversial points. The “first draft” remains the only version and conflicting reports leave open the possibility that the Brotherhood will at some point issue a final

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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. For purposes of this Article, the 2004 document is the best place to begin assessing the contemporary constitutional views of the Brotherhood.

<sup>52</sup> This is still the case for other policy platforms that have been distributed by Islamist organizations in recent years. One example is the 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. Few details deal with the vision of the constitutional structure of the state. In the entire 86-page platform of the PJD, only five lines relate to the constitutional structure of the state as it relates to Islam, found in section 4, part I-A. The PJD was allowed full participation in electoral politics in exchange for recognizing the legitimacy of the monarchy. This arrangement precludes the party from challenging the King’s position as the “Commander of the Faithful” as found in Article 19 of the Moroccan constitution. In another example, the “Islamic State” document of Malaysia’s PAS provides no information about its view of the country’s constitutional structure.

<sup>53</sup> Nathan J. Brown and 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, Jan. 2008.

<sup>54</sup> Mahmoud Mohammad, *Al-Masri al-Youm*, Aug. 10, 2007.

draft.<sup>55</sup> A recent news report depending on sources with the Brotherhood stated that it was putting the draft platform “on ice” for an indefinite period of time in order to improve relations with the regime in hopes of the release of several of its leaders from prison.<sup>56</sup> Even as a first draft, or only a first draft, it has tremendous value in ascertaining how the Brotherhood is thinking about the place 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. This choice of wording deserves examination. As a matter of current Egyptian political situation, the Muslim Brotherhood is not a political party, and an application to be recognized as one would surely be rejected on the grounds that the party is based on a religion, which is prohibited by the Political Parties Law and now the Constitution itself. Yet in many ways the Brotherhood functions as a party: 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>57</sup> Brotherhood leadership also has indicated aspirations to be recognized as a party; when the Supreme Guide Mahdi ‘Akif was

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<sup>55</sup> Deputy Guide Muhammad Habib said in June that work was underway on the final draft, which would be released in a few months. Interview with Muhammad Habib, June 11, 2009.

<sup>56</sup> *Al-Masry al-Youm*, March 10, 2010.

<sup>57</sup> Shehata and Stacher, *supra* note \_\_. 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 to day’s discussions and plan for the next. The Brotherhood legislators also maintain their own website, [www.nowabikhwan.com](http://www.nowabikhwan.com)

elected in January 2004, he reiterated the group's desire to operate as a legal political party.<sup>58</sup>

Even with the Platform as a major source, attempting to present a single Brotherhood constitutional position must be accompanied by caution and caveats for four reasons. First, official documents and pronouncements can no longer be considered to represent every member within the group, although it is 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 publically. As Mona el-Ghobashy presented the change, “Over 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, multivocal political organization steered by educated, savvy professionals not unlike activists of the same age in rival Egyptian political parties.”<sup>59</sup> More recently, an even 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>60</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>61</sup>

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<sup>58</sup> As soon as he was elected in January 2004, Muhammad Mahdi 'Akif reiterated the group's desire to operate as a legal political party. El-Ghobashy, *supra* note \_\_, at 389.

<sup>59</sup> El-Ghobashy, *supra* note \_\_, at 373.

<sup>60</sup> These two sets share some overlap but not perfectly so; senior Guidance Bureau member 'Abd al-Mun'im Abu al-Futuh criticized the some of the more controversial elements of the Platform.

<sup>61</sup> Interview with Abdelmonem Mahmoud, June 10, 2009.

Thus the process by which the Platform was drafted becomes important in assessing the various opinions that might have won out over others. Very little has been reported or disclosed about the drafting process in general. According to Abdelmonem Mahmoud, a young journalist and blogger who is a member of the Brotherhood yet willing to criticize it on his blog, the process initially included individuals with a range of views, including 'Isam al-'Iryan and several young members. When al-'Iryan was arrested, Muhammad Musri, whom Mahmoud called the "old guard," took over the drafting process and several members left the process, including Mahmoud.<sup>62</sup>

Specifically, Brotherhood members expressed disagreement over two topics in the Platform in particular, the same topics that have gained the most public controversy: the Council of Scholars and the criteria for position of President or Prime Minister that excludes women and Christians. I discuss these issues below along with responses from Brotherhood dissenters, but despite receiving the most attention, these are not the only or even the most important issues for determining the Brotherhood's vision of constitutional structure. Most of the material I rely upon 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.

Secondly, some critics 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

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<sup>62</sup> Interview with Abdelmonem Mahmoud, June 10, 2009. [get arrest date of al-'Iryan in 2007]

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.

Third, and for a different set of critics, reliance on the Platform will be seen as presenting a far too friendly face of the Brotherhood; these will claim that the Platform is an effort to mislead people, 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 thus far is that the Brotherhood has been so vague on key points for fear of giving critics tangible evidence if they said exactly what they believe. Along these lines, then, the Platform is a careful effort to say what will be broadly accepted while actually retaining all of their older more conservative positions.

Finally, some of the Brotherhood members I interviewed said that from a legal perspective, the Platform may seem imprecise because no lawyers were on the drafting committee. It is 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 clearer textual presentation. I also look for trends and corroborations between the Platform and other documents from the Brotherhood. The Brotherhood officers and members seem to be saying something more than merely a comment about how 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 and the state at a level of detail, and this sense of intellectual inexperience was revealed publicly when the Platform reached widespread distribution. Although many thinkers and writers on Islamic constitutionalism, notably al-Tariq al-Bishri, Kamal Abu al-Majd, Yusef al-Qaradawi, and Salim al-‘Awwa, have been influential on the Brotherhood’s thinking, they did not deal with detailed and pragmatic questions of constitutional structure that the Platform attempt to deal with and that I discuss here.<sup>63</sup> This Article, then, is both an effort to explain the Brotherhood’s positions to American readers 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.

#### a. Acceptance of Egyptian Constitutional Structure

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<sup>63</sup> Rutherford, *supra* note \_\_, at 98-130 identifies 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. With regard to some kind of council of scholars that would check the legislation under consideration by a parliament, for example, Yusef al-Qaradawi, said that scholars of Islamic law, formed as a committee or a supreme constitutional court, should be presented draft laws and regulations to ensure that none of those are adopted that contradict Islam. Yusuf al-Qaradaqi, *MIN FIQH AL-DAWLA FI ISLAM* (1996). An exhaustive study of the Brotherhood’s constitutional vision would examine how the Brotherhood developed, expanded, modified, or rejected the ideas of influential Arab intellectuals writing on Islamic constitutionalism. This is beyond the scope of this Article.

The Platform makes it very clear 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. Article Two

The 2007 Platform recognizes the current Egyptian constitution and makes no mention of any plan to prepare a new one. Previous Brotherhood statements indicated that at least some members found the current constitution sufficiently flawed as to merit wholesale replacement.<sup>64</sup> Former First Deputy Muhammed Habib stated in the newspaper *al-Sharq al-Awsat* in 2006, 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>65</sup> He said very little about such a new constitution, except that it would define Egypt as a democratic and parliamentary republic, it would clarify the relations between the people and the government, including terms limits for president and the right of interrogation, just as it would define the rights and responsibilities of the citizens, and would separate the jurisdictions of the powers, taking guidance from the fundamentals of the Islamic Sharia and benefitting from the experience of history and the present. Asserting the composition of drafters as comprised of scholars in national law and Islamic law certainly indicates a

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<sup>64</sup> 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 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. Al-Ghobashy, *supra* note \_\_, at 33. [Constitutional Reform in Egypt]

<sup>65</sup> Muhammad Habib, *What would happen if the Muslim Brotherhood came to power?*, AL-SHARQ AL-AWSAT , Feb. 6, 2006, available at <http://www.ikhwanonline.com/Article.asp?ArtID=17810&SecID=0>.

strong concern with giving spokesmen for Islamic law an equal place at the drafting table.

Given that the Platform was intended at least in part to reassure Egyptians who might have been skeptical of the Brotherhood as wanting to bring an extremist approach to Islamic law to Egypt, 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 also does not foreclose the possibility of a future effort. One conclusion is that the 2006 statement of Habib was his own opinion. Skeptics might say that the Brotherhood realized this was a losing political strategy but the goal itself still exists within the organization. Still, the number of major problems facing Egypt today and enumerated and discussed in the Platform suggests that the Brotherhood might not expend political capital to draft a new constitution, at least not as a priority, even if their power allowed them to do so.<sup>66</sup>

Within the framework of embracing the existing constitution, the Platform highlights several articles particularly important to the Brotherhood, chief among them Article Two. In the introduction, the Platform states, "We 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 Supreme Constitutional Court has determined in interpreting the Article."<sup>67</sup> Article Two of the

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<sup>66</sup> The writing of a new constitution is distinct from amendments to the constitution, of which there have been several in recent years. The current Muslim Brotherhood bloc in parliament has engaged vigorously in these debates, as described in Amr Hamzawy and Nathan Brown, *The Egyptian Muslim Brotherhood*, 19 CARNEGIE PAPERS, March 2010, at 18-19.

<sup>67</sup> Al-Ikhwān al-Muslimūn, BARNAMĀJ AL-ḤIZB [The Muslim Brotherhood, PLATFORM OF THE POLITICAL PARTY] (first draft) (2007) [hereinafter Platform].

Constitution is then praised as “rightly considered the moderate stance and the just position in the Islamic way.”<sup>68</sup>

Article Two is the crucial link for the Brotherhood between their own agenda, which claims to be heavily grounded on Islamic law, morals, and culture, and the current Egyptian state structure. This constitutional article allows the Brotherhood to claim that *they* are the party of the constitution, not the NDP, 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. For example, the Platform states that “the text of Article Two is just an affirmation of the authority of the Islamic Sharia...”<sup>69</sup> In that sense, by basing itself on the Islamic Sharia, the Brotherhood is promoting the Egyptian constitution and nothing more radical than that. Yet, Article Two has been given a precise meaning by the Supreme Constitutional Court. As discussed below, the Platform has to deal with the fact that while Article Two on its face seems to be able to embrace all of the Brotherhood’s agenda, the SCC has already given it particular meaning, which the Brotherhood cannot reject without appearing too extreme.

## 2. Respect for SCC

The introduction from the Platform quoted above states that “We 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*

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<sup>68</sup> *Id.*, at 6.

<sup>69</sup> *Id.*, at 13.

*SCC has determined in interpreting the Article.*”<sup>70</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.” In some ways, this point is obvious: the SCC is the authorized body to interpret the constitution. But this does not end the analysis—the Platform accepts the current situation but, as will be discussed below as a matter of expansion, it does so as a floor, not 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. Noah Feldman, in *The Fall and Rise of the Islamic State*, discusses this concept and calls it Islamic judicial review. 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>71</sup> He presents the idea as something the Islamist constitutional theorists have proposed, “not merely to ensure [legislation’s] its compliance with the constitution, but to guarantee that it does not violate Islamic law or values.”<sup>72</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.

The Platform suggests that while Islamic judicial review by the SCC (as currently populated) may be acceptable to the Brotherhood, it is not sufficient. The concept of the SCC serving as a check to determine, as Feldman describes the problem, “if the laws

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<sup>70</sup> *Id.*, at 6 (emphasis added).

<sup>71</sup> Feldman, *supra* note \_\_, at 122.

<sup>72</sup> Feldman, *supra* note \_\_, at 121.

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 proposal from the Brotherhood but rather a pre-existing part of the Egyptian system that they had to live with if they were going to accept the Egyptian constitution and the SCC’s interpretation of it. In many ways, the SCC is a problem the Brotherhood has to work into their plans rather than something they sought to establish. In contrast to the multiple references to 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. 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 Civil State based on Citizenship

The documents from the Brotherhood make clear that it recognizes Egypt as a civil state and does not seek some kind of theocracy. The *2005 Electoral Program of the Muslim Brotherhood* even states that Islam as a religion rejects a religious political power and 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>73</sup> The reference to a religious political power clearly indicates the Iranian state, deeming its structure unacceptable as a fundamental matter of Islam. In part, this statement is just another example of Sunni Muslims rejecting Shi’a Islam in all of its manifestations, along with some posturing of national politics.<sup>74</sup> Since Iran serves as such a negative model for Egypt and the Arab

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<sup>73</sup> Muslim Brotherhood, 2005 ELECTORAL PLATFORM, 2. The language used is “*thawābit* of Islamic law.”

<sup>74</sup> Diplomatic relations terminated between Egypt and Iran after the Iranian revolution in 1979 when President Sadat hosted in Cairo the deposed Shah. Iran also objected to the peace treaty with Israel. After

world generally, clearly distancing itself from any suggestions that looks like Iran is essential for the Brotherhood. 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. This tension over the boundary between these two sources of law is actually very similar to that within the Iranian legal and political system.

Further drawing fine lines with terminology, the Platform links the label “civil state” and “Islamic state,” claiming that Egypt is—and should be—both. First, the Platform tries to mainstream the label “Islamic state” 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>75</sup> By taking this starting point, the Brotherhood does not need to call for something new and objectionable to some, but rather can cast itself as the ones 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,” and the Platform does not explain the reasons for its conclusions, other than perhaps the language of Article Two. The second part of this statement—the idea that Islam is the basic source of legislation—is also not constitutional language but a paraphrase of Article Two: “the principles of the Islamic Sharia are the main source of legislation.” The significance of this paraphrase is discussed below.

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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 name of the Islambouli Street to Intifada Avenue, in recognition of the Palestinian uprising, and high ranking Egyptian politicians have visited Iran.

<sup>75</sup> Platform, 82. This statement is made after describing classical Islamic criminal law.

The Platform also carefully links the notions of a civil state and an Islamic state, claiming that an Islamic state is necessarily a civil state, since in Islam rejects a religio-political power.<sup>76</sup> One of the main problems with this language is that Islamic state is not defined, and in the abstract as a label it has little explanatory meaning. The Brotherhood's strategy is to show how Egypt already is both a civil and Islamic state, and then expand from the labels to fill out the content. This rhetorical move allows the Brotherhood to say that it is not calling for any change to the structure and basic constitutional characteristics of the Egyptian state, but rather wants to see that these important characteristics are filled out, given meaning, and actually implemented. The following section turns to the ways in which this call for a filling out of existing language is also a tacit, and sometimes open, call for significant changes to the constitutional structure of Egypt.

As a complement to the point that Egypt is a civil state, the Platform says that membership in the state is based on citizenship.<sup>77</sup> The clear implication is that Egyptian citizenship determines one's place in the state and not religion. This recognizes the current situation, and any deviation from it would have caused serious concern. Coptic Christian Egyptians comprise about 10% of the population, and as a whole are very concerned about the Brotherhood making major political gains and what it would mean for them.<sup>78</sup>

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<sup>76</sup> Platform 17.

<sup>77</sup> Platform, 15.

<sup>78</sup> Steve Stanek, *Coptic Believers Say Extremists are Driving them out of Egypt*, THE GLOBE AND MAIL, July 7, 2007, at F3.

## b. Areas of Desired Expansion

The Platform implicitly and explicitly calls for the enhancement and expansion of the place 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, to whom it applies, and who has the power to enforce.

### 1. Definition of Islamic Law

The Platform provides a fairly lengthy definitional discussion of Islamic law that is well 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. Some of the key issues the definitional section raises include (1) the tension between Islamic law as a complete plan (although not spelling out the plan) and the idea that Islamic law provides only general guidelines for society to develop into concrete rules; (2) the determination of who develops those specific rules; and (3) what restrictions, if any, are those developers of the specific rules bounded by? As seen below, the Platform is not able to give clear answers to these important questions.

The Platform begins with a very general level statement about Islamic law by appealing to the concept of the aims or purposes (*maqasid*) of the Sharia. It states that the purposes of the Islamic Sharia are what determine the goals, priorities, and strategic

policies of the Brotherhood.<sup>79</sup> The “purposes” are a concept from Islamic jurisprudence and is 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. If humans implement the system correctly, then they will be able to bring about God’s intentions.

The medieval legal scholar al-Shatibi, who elaborated this concept, believed that the main purpose of God’s laws was to benefit the community of believers, in this world and in the hereafter. He further delineated three types of benefits to the community that are promoted when the Sharia is applied correctly: (1) that which is necessary for human existence to prosper (which are, according to al-Shatibi, the preservation of life, property, progeny, mind, and religion); (2) that which is needed in order to facilitate obedience to Islamic law; and (3) that which improves the benefits already enjoyed by the believers. For example, since it is necessary to human existence to preserve life, God has forbidden murder and punishes the one who commits it. To facilitate obedience to Islamic law, God does not require travelers to pray during their journey.<sup>80</sup>

The concept of aims was controversial in al-Shatibi’s environment and rejected by some, because it involves trying to understand God’s greater intentions beyond the rules of the legal source texts. Further, if the purposes are more important than the details of the rules, those rules presumably would have to bend if their strict application impedes the achievement of God’s purposes. The concept gained a new wave of support in the modern period when scholars began to seek ways to modify long-accepted views they determined to be out of date as well as create new rules that did not have a basis in source

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<sup>79</sup> Platform, 11.

<sup>80</sup> R.M. Gleave, “Makasid al-Shari’a,” *ENCYCLOPAEDIA OF ISLAM* (2<sup>nd</sup> ed., online).

texts. The identification of these five aims itself is also a product of human interpretation and malleable; the source texts do not list aims nor even state explicitly that God identified and is guided by higher aims. For example, the modern scholar Ibn 'Ashūr added equality and freedom to the list of elements necessary for human existence to prosper.<sup>81</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 parliamentary agenda. It is only a statement of general guidance and direction, one that is 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 any religious mention 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: "The aims represent the cornerstone in our civilizational values and for which the Muslim depends on for faith and civilization and for which non-Muslims depend for civilization."<sup>82</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

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<sup>81</sup> *Id.*

<sup>82</sup> Platform, 11.

oving state authority that forces prayer times, as takes place in Saudi Arabia.<sup>83</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 to give basically the mainstream Sunni view with some nuances. The authority of the Islamic Sharia according to the consensus of the Muslim legal scholars is limited to two primary sources, the Quran and the Sunna (normative practice) of the Prophet that is "*sahih*."<sup>84</sup> The Sunna refers to the speech, actions, and tacit acceptances of the Prophet, and each event is called a *hadith* (an account). A *hadith* considered to be "*sahih*" (sound) means that it has been deemed to have the highest rating of authenticity, given by two of the famous *hadith* compilers, Bukhari and Muslim. The other two main categories, "fair" and "weak," have always been considered by Muslim scholars to be acceptable for purposes of developing law, since Bukhari and Muslim's collection do not contain a significant range of legal topics.<sup>85</sup> The Platform seem to suggest a limitation on the range of *hadith* used without a recognition that most law that the scholars have derived over the centuries has been done involving *hadith* not considered sound.

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<sup>83</sup> 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 SOCIAL RESEARCH (Fall 2003).

<sup>84</sup> Platform, 11.

<sup>85</sup> J. Robson, *Hadith*, in ENCYCLOPAEDIA OF ISLAM (2d ed., online).

In addition to these two primary sources are the views of the legal scholars who produced legal doctrine using their human interpretive capabilities. The definition emphasizes that these views have changed depending on the time and 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>86</sup> This statement stresses the temporal nature of the scholar-produced rules (called *fiqh*) in almost an exaggerated sense, and seems to lay the groundwork for the Brotherhood to pick and choose rules from the vast corpus of *fiqh* that it finds suitable for a particular occasion.

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 matters of both religion and of the world. Then, it states that the Islamic Sharia is distinguished by a 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. 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. Basically these statements mean 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 when thinking how to turn Islamic law into a legislative agenda, such as: What rules can humans change, and which ones are flexible? How do humans know when they can change a rule? And who has the authority to make these decisions?

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<sup>86</sup> Platform, 11.

In order to deal with these large and significant questions, the Platform then explains that the primary source texts of the Qur'an and Sunna can be divided into three types based on the level of detail that the texts provide. The first category includes the texts that regulate subject matters that are not affected by changes in time, place, environment, or customs. A topic falls in this category if the texts concerning it provide a high level of detail; since details cannot be considered superfluous, God must have intended humans to follow them precisely and not change them simply because times change. The detailed rules given in the Qur'an and Sunna should be applied just as they appeared in the texts, the Platform states, without independent interpretation and without any changes.<sup>87</sup>

The subject matters of these kinds of detailed texts are almost entirely matters of belief and religious ceremonies, such as how one prays. 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. 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. The Platform tries here 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 or other religions.<sup>88</sup>

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<sup>87</sup> Platform, 11.

<sup>88</sup> Platform, 12.

The second type includes texts on subjects that are slightly affected by changes in time and place. These topics have textual rules that provide both general principles and some necessary details. Topical examples given in the Platform include personal status law such as marriage and divorce, and they are described as matters that form the rules that the building of Muslim society is based upon and that has no value without; if they are lost then the character of the society that distinguishes it as a Muslim society 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 type are the texts that regulate the daily, civil, worldly relations in all their types, such as economic, political, and social—among the people themselves, between them and the state, and among states. These are matters that are affected by the circumstances of the time and place and differ depending on the environment, customs, and civilizations. 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. In this area, the Sharia rarely meddles in the details and indeed provided virtually none, leaving the concrete plan to the legal interpretation conducted by human intelligence, which can adjust to the conditions and changing public needs, within the framework of general principles and complete roots. 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 are possible to adopt for society.

In addition to this division of texts into three subject-matter categories that correspond to the level of detail of the texts, the Platform then explains that substantive areas also can be divided into two groups according to the strength of their proof texts. In defining these two groups, the Platform presents a classical distinction, the same one that the SCC also adopted, between texts that are definite in terms of authenticity and meaning and those that are not. To pass this test of definiteness on both grounds, (1) the authenticity of the text must be proven beyond doubt; and (2) there must be one absolutely clear meaning of the text. As for part one, the authenticity of the Qur'an in whole is accepted, so this part applies concerns the Sunna, about which there is extensive debate. Part two provides a challenge for both the Qur'an and the sunna, since multiple opinions about the meaning of a text is a the typical result, rather than clarity and unanimity. For texts that are certain in terms of their authenticity and meaning, there is no room for human interpretation. The Platform does not say so, but there are very few of such texts. The second large category includes all primary texts that fail this text; all of these are only probable, either in authenticity or meaning. They are open to interpretation and to multiple results, and are especially numerous in rulings that organize daily worldly matters. Presumably, these areas are open to lawmaking, and correlate with categories two and three of the first division, although the Platform does not say so.

There are a few explanations for these two sets of divisions of texts. The first, separating out the detailed religious texts from their political purview, presents something of a conceptual jurisdictional expedient, an effort to divide between the Brotherhood as missionary organization and Brotherhood as political party. The Platform states that Islamic law covers all aspects of life, but as a practical matter it takes some aspects of

that law, notably the first category, out of the jurisdiction of the state. It is probably the case that the Brotherhood has no intention of dealing in legislation that regulates the details of fasting during Ramadan, for example, but the boundaries between the religious 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, for example? 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. But if a legislator wanted to control more tightly restaurants that operate through the day in Ramadan, would the legislator be overreaching into areas beyond his jurisdiction? As a practical matter, it seems impossible to keep the topics that might fall under even the first category out of the realm of lawmaking and enforcement.<sup>89</sup>

The divisions also emphasizes that the Brotherhood views some aspects of the classical Islamic law corpus to be beyond its scope as a political party. This is another approach to the same issue—trying to explain what areas of law the Brotherhood considers unchangeable and thus to be left alone, and what areas of law are open to human elaboration. 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. 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 it has no place in the political party. This statement is also no doubt to reassure Egyptians who are suspicious of the Brotherhood that it does not want to interfere in people's personal religious lives.

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<sup>89</sup> [Get source for incident in Aswan last Ramadan.]

Stating that the fixed and unchanging rules are mainly in the 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 disagreement about what falls into this area because there is disagreement about what is considered fixed, unchanging, and not subject to interpretation. For example, in the *niqāb* case discussed above, the SCC said that wearing it is not a clear, fixed rule, and suggested at the same time that the headscarf is, although that was not the factual scenario before the court. Secondly, even if a rule is considered unchanging and entirely clear, such as, perhaps, the rule to fast during Ramadan (except for people in certain conditions, such as pregnant), how will that rule be enforced? Is the Platform alleging that even the enforcement of core rules will not be a matter of political debate? Nothing in the Platform suggests that the Brotherhood is willing to relinquish jurisdiction over matters of this kind. Further, it is inconsistent to claim that these are outside the meaning of Article Two, when in fact the fixed and unchanging are exactly what the SCC said it will protect. If a national law interfered with some area of religious practice, does the Platform suggest that this is outside the Brotherhood's scope of interest because it involves a matter of religious devotion?

For all other topics, the Platform emphasizes the malleability of Islamic law, but who is supposed to decide how to mold that flexibility into tangible legislative ends, and on what basis? The Platform puts emphasis on 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 in the parliamentary power that is elected in free

elections.”<sup>90</sup> With this description, the Platform seems to suggest no more than the vision of good Muslim legislators (chosen in free election) 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 legislator or because the topics they are dealing with have no predetermined rules in Islamic law, only general guidelines. This kind of statement presents the Brotherhood as a reform party generally. 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 perhaps in competition with, several other conceptions of Islamic law. One lodges responsibility for Islamic law in a broader range of actors, while a second tries to expand the meaning and reach of current Article Two jurisprudence, as discussed next.

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” has a wider meaning than has been determined by the SCC and indeed has application in society in general beyond matters that are specifically constitutional questions. The power of the SCC as the sole body with

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<sup>90</sup> Platform, 12.

authority to interpret the constitution 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 would carry out these more expansive views.

Under policies and strategies of the Party, Point Four accepts Article Two's jurisprudence and at the same time pushes to give it more meaning. First, 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*. The statement suggests that Article Two does not create some specific enforceable legal meaning but rather merely recognizes a pre-existing legal order, such that the Egyptian people did not need the constitution for the Islamic Sharia to have legal force, but rather it already did merely by virtue of the religion of the inhabitants of the country. This may seem like a non-controversial statement from members of a religious group seeking to live according to their religion, but this is not what the SCC has determined regarding Article Two.

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. The University wanted to avoid payment on post-judgment interest owed as a result of a commercial lawsuit, and argued that interest payments conflict the principles of the Islamic Sharia and thus the Constitution. The SCC determined that Article Two, as amended, applied only to legislation issued after the date of the amendment, May 22, 1980, and does not have retroactive force. The Civil Code dated to 1949 and thus was not subject to Article Two, since the legislative committee that proposed the Article Two amendment said that 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>91</sup> For the SCC, the authority of the Islamic Sharia only exists insofar as the state accepts it as such.

Further, this statement from the Platform does not merely state “the text of article Two is just an affirmation of the authority of the Islamic Sharia” or even “the text of article Two is just an affirmation of the authority of the aspects of the Islamic Sharia that are fixed and unchanging.” It makes clear that the term Islamic Sharia is not limited to some core set of 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 only probable. Yet the SCC already decided that it would not protect a rule that was derived merely with an indication or the result of someone’s *ijtihad* because it is merely probable, stating explicitly that the rules that are definite in terms of their authenticity and meaning neither need nor permit *ijtihad* (interpretation) because their meanings are absolutely clear and do not change with time. If the SCC’s standard was to strike legislation that violated the results of any *ijtihad*, it would be protecting a wide array of rules that would greatly restrict the legislator’s work, since for the range of opinions is vast. The presentation of this concept in the Platform is subtle but does show a general understanding broader than the current SCC rulings.

In addition to the expansion in meaning of Article Two, the Platform also indicates that Article Two applies to a broader range of decisions than it currently does. The Platform states: Article Two is spoken to the parliamentary authority and to the President of the nation in the laws, decisions, and internal and foreign policies that he

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<sup>91</sup> Supreme Constitutional Court of Egypt, Case No. 20, Judicial Year 1 (May 4, 1985), al-Jarida al-Rasmiya [Official Gazette], No. 20, May 16, 1985, 992.

issues.<sup>92</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. Proposing to include the President's decisions and domestic and foreign policies under the purview of Article Two is a major expansion, and since it is presented in the Platform in such a casual way it is hard to know whether the authors knew how significant it was. Reference to the foreign policies of the President seems to be a direct reference to a foreign policy decision that still receives Brotherhood criticism: Sadat's peace treaty with Israel.

An example involving the Minister of Culture and the Brotherhood parliamentarians indicates this sense that Article Two should be used beyond its current constitutional realm of applicability. In November 2006, the Minister of Culture, Faruq Husni, said in an interview that he considered the headscarf a symbol of backwardness. Egyptians generally were angered by this statement (as well as by other things he had said and done during his tenure in office). The Brotherhood parliamentarians immediately called for the President to dismiss him, and what is significant for purposes here is the reason they gave: they claimed that he had gone against the language of Article Two of the constitution providing that "Islam is the religion of the state," because the headscarf was indeed required by Islam.<sup>93</sup> The statement of a Minister is not currently a justiciable event; the power of judicial review is in respect to laws and regulations only. Asserting that Article Two (and in particular the first part of it establishing Islam as the official religion of the state) bears on the statements of the

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<sup>92</sup> Platform, 13.

<sup>93</sup> *The Brotherhood Demands that the President Dismiss Faruq Husni*, Al-Masry al-Yaum, November 18, 2006.

Minster exemplifies either a simplistic understanding of the constitution or a creative one. Unlike the “source of legislation” language of Article Two, the SCC has not had occasion to interpret the language “Islam is the religion of the state.” Most have assumed that it has only a general meaning, indicating that Muslim holidays are national holidays, for example. In the absence of a SCC determined meaning, this clause of Article Two might be 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 in different language 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 behaving in the life of the individual and society and putting into action Article Two of the constitution as to include all levels of law-making.”<sup>94</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 and what such enforcement might mean for the SCC. Importantly, the Platform never proposes to modify the law that gives the SCC its jurisdiction to expand it, 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—is entitled to appeal to the SCC for any law, decision, or

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<sup>94</sup> Platform, 10.

policy claiming that it conflicted with the rulings of the Islamic Sharia as agreed upon by the contemporary scholars whose opinions are taken into account.<sup>95</sup> First, the language is not limited to laws and regulations, again suggesting the inclusion of policies under Article Two's purview. Second, the statement suggests that the test for Article Two is whether a law (or otherwise) conflicts with the rulings of the Islamic Sharia "as agreed upon by the contemporary scholars whose opinions are taken into account." This sounds broader than the SCC's test of definite in authenticity and meaning.

Finally, and most importantly, this statement adds the new element of an 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, 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 currently is no mechanism for individual citizens generally troubled by a law to challenge it before the SCC.

The Platform has thus set up a situation whereby it recognizes the current SCC and its decisions yet at the same time wants to give Article Two more meaning in law and society. How the Platform envisions accomplishing this is the topic of the next section.

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<sup>95</sup> Platform, 13.

c. Mechanisms of Change

1. Parliamentary

Change begins with free and fair parliamentary elections, according to the Platform. The third of the policies and strategies is to apply the authority of the Islamic Sharia in the view that the Muslim community agrees upon, through a parliamentary majority in the parliamentary authority that is elected in free elections with impartiality and true transparency without fraud, forgery, or compulsion through the direct or indirect interference of the state. The elections must take place under the supervision of foreign and domestic civil societies that are clearly independent of the executive branch.<sup>96</sup> If elections were held this way, most observers agree that far more Brotherhood candidates would be elected. Clearly, an open path to the legislature is a necessary pre-condition for many of the reforms discussed in this Platform.

In a scenario of free and fair elections, the Platform assumes that the elected officials would then carry out the wishes of their constituents, which would be more attentive to Islamic law. This goal deals with the process of getting lawmakers into office but of course does not guarantee the tangible results in terms of laws.<sup>97</sup> The Platform and Brotherhood generally puts great emphasis on bringing all Egyptian laws into compliance with some notion of Islamic law through the democratic legislative process. Muhammad Habib said that while in theory, there should be no law coming from the legislature unless

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<sup>96</sup> Platform, 12

<sup>97</sup> Feldman calls 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 sharī’a.” Feldman, *supra* note \_\_, at 120.

it is in accordance with Article Two, this does not happen in practice. One way to improve the situation would be to eliminate members of parliament who hold their positions not due to popular will but because they come from the ruling NDP.

## 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 kind of leader of the Muslim community, and thus require that this person be a male Muslim and then to subject the President's policies to Article Two. The current Egyptian constitution does not impose religious or gender requirements on the President.<sup>98</sup> The Platform, in one of the two provisions that has generated the most controversy, does add such a requirement. 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. In the case of Egypt, these officials are the President and the Prime Minister, because they must ensure that nothing the state does contradicts with Islamic practices of worship, propagation, pilgrimage, and the like.<sup>99</sup> The Islamic state also has the responsibility for protecting non-Muslims in their belief and worship. Further, decisions of war are decisions of Islamic law. Since these are religious decisions (in addition to civil decisions), they cannot be made by someone outside of the religion and indeed it is not fair to impose them on a non-Muslim. And since the leader of an Islamic community must be male, the positions of Prime Minister and President must be performed by a

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<sup>98</sup> Contrast this position with that of Syria, which requires the President to be Muslim.

<sup>99</sup> Platform, 17.

Muslim male. This notion of the Presidency as a religious position fits with the concept presented above that the President's policies must be consistent with Article Two.

In the controversy over this opinion, several lines of thought appeared in the Brotherhood. Some rejected the requirement, since these positions are created by the modern nation-state and have no religious content.<sup>100</sup> Abu al-Futuh said that the position in the Platform is only the Brotherhood's personal preference—they will not put up a woman or Coptic candidate but others are free to do so.<sup>101</sup> But what is the difference between party opinion and a rule that the country must adopt and will be adopted if they are in power? Do those members of the Brotherhood who supported this position mean that religion of the head of state is part of the flexible zone of Islamic law such that the rules can change from time and place? If so, then why did they choose this view when others could be chosen? On the other hand, if the Brotherhood claims that religion of leader is within the fixed and unchanging, then how can they explain that several prominent scholars disagree with this position? This issue is revisited in the Conclusion.

### 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 proposes to create a Council of Scholars to advise legislators in lawmaking. After explaining that the third policy is to implement the authority of the Islamic Sharia through elected members of the legislature, and describing how free and fair elections should take place for the legislators, the

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<sup>100</sup> The Brotherhood members who took this position claim to rely on an opinion of al-Qaradawi to support them.

<sup>101</sup> Interview with 'Abd al-Mun'im Abu al-Futuh, June 14, 2009.

Platform then states that “the legislature must request the opinion of a council of the senior religious scholars of the community (the Council).”<sup>102</sup> This raises several questions: who is the Council, what kind of opinion are they supposed to give, and is the opinion binding on the legislature?

The Platform says very little about the composition of the Council, merely that it also should be elected freely and directly from religious scholars who are completely independent from the executive branch. The only other information given is that the legislature should determine by law the qualifications needed in order to run for the Council. The rules on turning to the Council for an opinion also apply to the President of the Republic when issuing decisions that have the force of law when the legislature is not in session. Then, what kind of opinion should this Council give? The Platform suggests that these opinions would be formed on the basis of Islamic law and the particular needs of Egyptian society, because it states that the Council will be assisted by committees and advisers who are experts in scientific and worldly matters and trusted for their neutrality and integrity.<sup>103</sup>

Thirdly, what kind of authority does this opinion have? The Platform states that the Council’s opinion will be persuasive generally, and “in the absence of a certain legal ruling 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.” The legislature may submit revised versions of proposed laws to the Council before adopting legislation. What the Platform does not say, but which is implied, is that

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<sup>102</sup> Platform, 12.

<sup>103</sup> See, for example, Dalal al-Barzi, *The Muslim Brotherhood in their newest platform: stiffening creed and further regression*, AL-HAYAT, Jan. 1, 2008.

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. This is the same language that the SCC uses in its Article Two jurisprudence.

Most of the criticism of the Platform centered on these few sentences creating the Council. Yet, the idea seems to have been hastily added and it 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 a fundamental tension between a bottom up approach to Islamic law in society—that is, good Muslim legislators will produce good Islamic law—and the sense that at the end of the day, a scholar really should have the final (or possibly near final in this case) word because ultimately the average person who gets elected to the legislature is not an expert in the legal texts. Legislators no matter how pious and well-intentioned might get it “wrong” and need to be checked by someone with greater knowledge and experience with Islamic legal texts and methodologies. The second tension is between a democratically elected legislature that does not feel itself bound by anything other than what is best for society and the idea that some religious boundaries must be imposed for the sake of a larger goal, even if the legislators do not want it.

Through the emphasis on free and fair elections and a belief in their ability to succeed in them, the Platform seems to assume that the first scenario will exist, and not the second. The Council, then, would facilitate the will of the legislature, rather than hinder it; a raw democratic process needs to be overseen by a small elite body, a notion compatible with the Supreme Court or the Supreme Constitutional Court. Only for

certain matters is the opinion binding, and since the standard is the same as the SCC follows, it really only means that offending legislation will be prevented, rather than having to wait for years until the SCC reviews it after its adoption. In all other matters, the Council's view is not binding and can be rejected by a majority vote.

Given this, why was there so much outrage over the Council? Critics said that it imposed an Iranian-style Council of Guardians on Egypt<sup>104</sup> and that it resembled the government of the Taliban.<sup>105</sup> Intellectuals who had advocated accepting the Brotherhood for what it was functionally, a political actor, had to tone down acceptance in face of what looked like a move towards control over the democratic process by unelected Islamic legal scholars. Some within the Brotherhood criticized the idea of the Council as not representative of the membership's views. First Deputy Guide Muhammad Habib defended the Council. Others from the Guidance Bureau, namely 'Abd al-Mun'im Abu al-Futuh, criticized the Council. 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 usually boasts."<sup>106</sup> Subsequently Habib modified his position somewhat, calling the section in the platform a mistake; opposing the formation of a committee with anything more than advisory capacities;<sup>107</sup> and recognizing that the SCC is the sole arbiter of Article Two.<sup>108</sup>

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<sup>104</sup> *Id.*

<sup>105</sup> 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, Sep. 25, 2007.

<sup>106</sup> Nathan Brown & Amr Hamzawy, *The Draft Party Platform of the Egyptian Muslim Brotherhood*, CARNEGIE PAPERS MIDDLE EAST SERIES, Jan. 2008, at 7.

<sup>107</sup> Abbadi, "Habib Admits Errors in Party's Platform," *Ikhwanweb.com*, Oct. 17, 2007.

As a result of the controversy over this issue, it is widely expected that if a subsequent draft is issued, it will remove any binding role for the Council to show that it is not “interested in importing an Iranian-style theocracy to the country.”<sup>109</sup> In an interview with Egyptian daily *al-Masry al-Yaum*, the General Guide Mahdi ‘Akif stated that the Brotherhood seeks to form a Council of elected religious scholars to serve as merely an advisory body for any public figure who wishes to consult it. The Council would also choose the Shaykh of Azhar, an important religious leadership position that the Brotherhood has criticized since the President currently fills the post, and as a result the Shaykh is seen as a functionary of the state rather than an independent religious thinker.

#### 4. Judiciary

As seen above, the Platform envisions an expanded role for the meaning of Article Two, but 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 for judicial independence from the executive specifically, without naming the SCC. Brotherhood leaders have emphasized that they recognize the authority of an *independent* SCC to determine the meaning of Article Two. Muhammad Habib emphasized this point by stating that if there were to be an independent judiciary, there would be more room for Article Two implementation.<sup>110</sup> The meaning seems clear:

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<sup>108</sup> Interview with Muhammad Habib, June 11, 2009.

<sup>109</sup> Brown & Hamzawy, *supra* note \_\_, at 16.

<sup>110</sup> Interview with Muhammad Habib, June 11, 2009.

the Brotherhood does not consider the SCC as currently constituted to be an independent body, but does not propose specific remedies other than calling for a separation of powers. The hope seems to be that judges friendly with the executive will tend to interpret Article Two narrowly, on the grounds that a broad interpretation would serve the goals of the Brotherhood and not the NDP. When judges are appointed by some other process ensuring their independence from the executive, they will naturally tend towards a more expansive view of Article Two.

#### 5. Institution of *Hisba*

This institution is not mentioned in the Platform, but since it does appear in the 2004 *Reform Initiative*, its absence here suggests a retraction, an internal rethinking, or even an accidental omission. The proposal to reintroduce *hisba* to Egypt received almost no attention from observers, although in some ways it would be a change almost as dramatic as the Council of Scholars. The 2004 Undertaking proposes, under the heading of social reform, the document proposes to “revive the system of *hisba* according to the rules and conditions that the law specifies.” This proposal was not an isolated case; the four main thinkers who have served as sources for inspiration and guidance of the Brotherhood have also called for the revival of the institution.<sup>111</sup> This short statement in the 2004 document would call for a significant additional component to the constitutional structure of the state and deserves attention.

The notion of *hisba* relates to Qur’anic verses exemplified by 3:104, “Let there be one community of you, calling to good, and commanding right and forbidding wrong;

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<sup>111</sup> Specifically, al-Bishrī, Abū al-Majd, al-Qaraḍāwī, and al-‘Awwa. Rutherford, *supra* note \_\_, at 123-24.

those are the prosperers.” Early Muslim scholars interpreted this verse to mean that Muslims should act as authority figures vis-à-vis each other when noticing a wrongful act or a failing to do a required act.<sup>112</sup> The Prophet and then the caliphs after him took a particular interest in commanding right and forbidding wrong as leaders, and they did so themselves or appointed a particular individual or individuals to do so on behalf of community. Individual Muslims were still entitled, and some would even say required, to act according to this Qur’anic verse even in the presence of an appointed commander-forbidder. The Arabic term “*hisba*” began to be used for the concept of commanding right; it does not appear in the Qur’an, but become the shorthand for the Qur’anic duty to command the right and forbid the wrong.<sup>113</sup>

Another derivation of the same root, the “*muhtasib*,” became the title for any person with an interest in commanding right and forbidding wrong and specifically for the one officially appointed to carry out this task in the community.<sup>114</sup> Best described as a regulator of markets and public spaces, this legal official traversed the city and had the authority to forbid wrongful acts and require mandatory ones.<sup>115</sup> As clear as this task may initially sound, as a practical matter, the official had to make many choices, both in terms of which particular acts to address and how to address them. Work on the

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<sup>112</sup> Michael Cook thoroughly examined the Qur’anic injunction to command right and forbid wrong as it applies to individual Muslims. *Commanding Right and Forbidding Wrong in Islamic Thought*. In al-Mawardi’s terminology, the individuals who undertake it are the volunteers, distinct from the specific official of the *muhtasib* who charged with undertaking it.

<sup>113</sup> Nothing adequately explains why this term characterizes the duty or the relevance of the term’s root meaning—“calculation.” Another derivation of the same root, the “*muhtasib*,” became the title for any person with an interest in commanding right and forbidding wrong and specifically for the one officially appointed to carry out this task in the community.

<sup>114</sup> *Hisba*, ENCYCLOPAEDIA OF ISLAM (2d, edition, online),

<sup>115</sup> Kristen Stilt, *EXPERIENCING LAW IN MAMLUK EGYPT* (forthcoming, Oxford University Press, 2011).

medieval position shows that some particular individuals who held the position were more concerned about some topics over others. One *muhtasib* might spend his day forbidding women from loitering in public, while overlooking men gambling openly in the cafes. Another might turn a blind eye to intoxicating substances, while going after bread salesmen for overcharging customers. The range of forbidden and required acts as determined in classical Islamic legal texts is not only vast, but also topics of intense disagreement.

In the modern period, it is possible for a ruler or a legislature to define the specific jurisdiction of a *muhtasib*, just as is done for police, for example. That would be a necessary first step towards instituting the position in the context of a modern state, but also would require intense coordination among all institutions and parties with some claim to Islamic legal authority in Egypt. Even if that could happen, the possibility for abuse of discretion, and the impact of such abuse, is extremely high. In countries where officials carrying out the concept of *hisba* exist today, such as Saudi Arabia, a common complain is their abuse of discretion. With a large Christian population in Egypt, the dangers are even higher. How will the officials be able to carefully distinguish Muslims from Christians? Will all of the rules apply to Christians too, even though they are clearly allowed to do certain things, such as possess wine, that Muslims cannot?

At the level of constitutional structure, reviving the position of *muhtasib* in modern Egypt would give powers of Islamic law enforcement to a new set of officials and add a major new component to the state with regard to the interpretation of Islamic law. The SCC presumably would remain the only body to determine the constitutionality of a law, protecting fixed and unchanging rules as a minimum, but how could the SCC

protect citizens from overzealous enforcement of Islamic law, even when the enforcement is of those fixed and unchanging rules? And recall that the SCC suggested that wearing a head covering might be part of the fixed and unchanging Islamic rules. Would that mean that the SCC has given implicitly the *muhtasib* approval to enforce this upon women on the streets? Only other parts of the constitution could serve as ultimate limits on what a zealous official could do.

A roving religious police in Egypt would surely cause at least as much criticism as the Council of Scholars did, and the Platform may have dropped it for this reason or perhaps due to the realization that such an official is difficult to reconcile with that of a civil state. Nevertheless, the original proposal is indicative of a general theme of the Platform: accepting existing structures but filling in and bolstering areas around that framework with Islamic content. This is the challenge of any political party trying to work within a political system rather than stand outside it—specific proposals have to recognize that the democratic process cannot change institutions overnight. How much should the Brotherhood accept and how much should it propose to change, while being careful not to alienate voters who might already be suspicious of an Islamist party? These fundamental questions must be addressed by any Islamist party, and for this larger topic, I now move to the Conclusion.

#### IV Challenges of Clarity for Islamist Parties

While the Platform is the most detailed statement of political agenda issued by the Brotherhood, it still leaves many questions unanswered. One clear point made repeatedly

in the Platform is the call 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. These simple demands, essential to liberal democratic society, present the Brotherhood as making a call for the rule of law and not of humans. By accepting Article Two of the Egyptian constitution as currently formulated, the Brotherhood then is limited to trying to influence the interpretation of that Article through the proper legal channels. Presented this way, the Brotherhood looks little different from a political party in the U.S. that favors a particular interpretation of a provision of the U.S. constitution and advances it through all possible appropriate mechanisms.

Yet, the Brotherhood's agenda still troubles some in Egypt and worldwide, and in particular human rights scholars and activists, women's groups, and religious minorities. The statements in the Platform that women and Coptic Christians cannot hold the positions of President and Prime Minister are clear examples of a discriminatory position, but these statements have been rejected or at least softened by many within the Brotherhood leadership. The criticism that the Brotherhood has many discriminatory intentions that it strategically does not make public is a difficult one to address, since 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?

The Platform raises three main areas where significant ambiguity persists: the sources of reference and the content they produce; comparative authority of religious-based arguments and arguments of public welfare; and mechanisms for applying law in society. In order for Egyptians to make decisions about what political movements to support, they deserve clarity as to what they will be getting from them.

First, what specific content is intended by references to Islamic law? As the Platform itself presents Islamic law, there are source texts that were not intended to be applied literally in all times and places. The Platform explicitly recognizes two categories of source texts in which subjects are slightly or entirely affected by changes in time and place. The Platform itself recognizes the fallacy that Islamic law is some kind of code of law that can be picked up and applied in any environment. These are both important recognitions, but the question remains: what is the Islamic legal content of the Brotherhood's agenda?

One example vividly demonstrates the inability to adequately answer this question based on what the Brotherhood has said thus far. In the discussion of crime and punishment, the Platform states that there are two important components to crime reduction: Islamic education and upbringing, and preventing the ability of individuals to commit crimes.<sup>116</sup> Then, it states that if society achieves these two goals, any crime that is committed is not done from dire need but rather is a depraved threat to society, and must be punished according to Islamic law. To explain depravity, the Platform uses the example of theft. In the classical crime of theft, one criterion for the application of the penalty of amputation is that the person did not need the thing taken, which would exclude a hungry person taking food. The Platform asserts that throughout Islamic

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<sup>116</sup> Platform, 80. The classical language of "blocking the means" is used here.

history, the defined Islamic legal punishments (the *hudud*), and in particular amputation and stoning, were used very infrequently, and in those cases were the results of strict procedures. It 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.

At the end of this discussion that makes many historical assertions, it is entirely unclear whether the Platform is suggesting that the *hudud* crimes and punishments should be part of Egyptian law, or whether these 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 that they are essential to an Islamic society, the vast majority of countries with Muslim populations, including Egypt, have not made the *hudud* part of their criminal laws. The Platform's ambiguous position on *hudud* is further complicated by its statement that the *hudud* crimes and penalties "conform to the Egyptian constitution, which confirms that Egypt is an Islamic state and that Islam is the main source of legislation, just as it conforms to what modern studies reach—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>117</sup> This discussion presents no clear view on the Brotherhood's agenda with regard to *hudud* crimes and provides little comfort to Egyptians who do not want such penalties as part of national law and would not support the Brotherhood if this were part of their agenda.

In order to gain a clearer idea of the content of the Brotherhood's agenda, or that of any political party, empirical studies are needed of how lawmakers from these parties

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<sup>117</sup> Platform, 82.

actually behave when in office. Statements from the groups and parties themselves are helpful, but independent and academic studies will be even more useful to determine basic questions: What types of legislation do they propose? Oppose? What is their voting record? The Platform and other position papers are useful, 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 in this line.<sup>118</sup> Far more empirical work needs to be done in this area, in particular a comprehensive study of all Brotherhood parliamentarians in the 2005 session.

The second conceptual problem deals with the comparative authority of religious-based arguments and arguments of public welfare. The Platform places great emphasis on the results of the legislative process, provided that legislators are elected in free and fair elections. Yet it is also clear that lawmakers are subject to certain limitations that derive from Islamic law. These limitations might be merely the power of the SCC to strike down laws that contradict some core norms of Islamic law, which is already part of the constitution per Article Two. But the Platform goes further, and takes for granted but never defines some additional level of norms, with the result that the Platform suggests that some religious-based arguments should trump efforts of the legislators, even when the legislators can show that their results are clearly in the public interest. If there is an external set of norms outside the constitution that the Brotherhood believes is binding on Egypt, then what are they? Does this mean that the Brotherhood cannot possibly be

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<sup>118</sup> Shehata and Stacher, *supra* note \_\_. Bruce Rutherford summarized the main areas of concern to that same parliamentary cohort based on Egyptian newspaper reports from 2005 to 2008. Rutherford, *supra* note \_\_. Most recently, Amr Hamzawy and Nathan Brown surveyed at a general level the concerns of the Brotherhood parliamentarians from the 1995 to 2000 and 2000 to 2005 sessions. Hamzawy and Brown, *The Egyptian Muslim Brotherhood*, *supra* note \_\_, at 15-27

persuaded by fellow parliamentarians to deviate from a position they believe to be a religious one, even when it can be shown that doing so serves important public interests?

Two examples explain this comparative authority problem. As discussed above, the Platform as drafted included the controversial Council of Scholars. What is important here is not the specific formulation of the Council itself but rather the underlying anxieties that seem to have led to it. At least some of the drafters realized that leaving decisions completely up to the lawmakers, with only a post-promulgation check by the SCC to stop core rules from being violated, left too much flexibility and latitude in the process. Thus, drafters inserted the Council of Scholars into the legislative process to advise the lawmakers. The wording of the Council suggested that the binding nature of the Council would only be for a core set of rules, something like what the SCC would also protect. In one sense, this is only a change in the process not the substance. Yet there is no assurance that the Council and SCC would mirror each other, and so the Council could go further than what the SCC would have done, or vice versa.

The second example comes from the discussion of 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 right to own property, transportation, education, exercising political rights, expression of opinion (in the context of protecting the political values of society), running for representative assemblies, 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>119</sup> This presents a position—that women may not hold the office of President—based solely on an interpretation of Islamic law, presented as a consensus, without any mention of whether such a rule would be in the Egyptian interest or even whether other views exist to challenge the notion of consensus.

On one level, Brotherhood legislators are free to introduce legislation imposing gender restrictions on candidates for President, but in the end they will have to 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, without any other reasoning? Could a person holding 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 to be a consensus on the issue?

The line of questions causes several types of concerns. If the premise is accepted that a rule presented as Islamic 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 methodology. Abdullahi an-Na'im has argued forcefully against this scenario where considerations of public welfare take a back seat, rejecting 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>120</sup>

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<sup>119</sup> Platform, 23.

<sup>120</sup> An-Na'im, supra note \_\_, at 1.

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 that view about women as President is held “*because* religious scholars agreed that women may not hold this office.”<sup>121</sup> Yet this is not even an accurate statement, because one of the key thinkers who influenced the Brotherhood, Yusef al-Qaradawi, has presented an alternative view. While he did say that the President should be Muslim and the majority of Parliament should be Muslim, he also has said that women are only prohibited from serving as the head of the community of Muslims, the *umma*. But the position of President of Egypt is merely a position constructed in the modern era of nation-states, and conceptually distinct from the Islamic *umma*, and so Islamic legal rules do not have jurisdiction over this issue.<sup>122</sup>

The third conceptual problem the Platform raises is the mechanisms for implementing rules based on Islamic law. The Platform accepts the existing institutions and the functions they serve, but it does not limit itself to working through this structure. In several areas it suggests new actors and institutions and expanding existing actors to fill gaps and spaces in the existing structures. A potentially very powerful new jurisdiction, *hisba*, was not mentioned in the Platform after figuring in the 2004 *Reform Initiative*. Likewise, adding in the Council of Scholars sought not to change an existing institution but to add a new one, giving new powers to new actors without directly challenging existing powers of existing actors.

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<sup>121</sup> Id. (emphasis added).

<sup>122</sup> [Discussed vaguely in Rutherford 181-82. See original Qaradawi cite for clarification.]

The Brotherhood's idea of the proper role of the state seems to be some combination of liberal state conceptions, such as an executive that is subject to the rule of law and an independent judiciary, and an intrusive state that concerns itself with the religious behavior of the citizens. The Brotherhood suggests that it will harness the power of the state for the right cause and develop new institutions and breathe new life into the old ones to send the state's tentacles out into the city streets and the political discussions of officials. This is indeed an area of concern to many Egyptians and outside observers, who want clarity on the extent to which they can maintain personal privacy out of reach of the state.

These three conceptual difficulties will remain until the Brotherhood, or any other Islamist party, provides clear guidance as to their agenda. One way to clarify agendas is through further policy documents, and perhaps the Brotherhood will issue a final Platform or follow up clarifications. Another path is to study how these parties behave in the legislature.<sup>123</sup> But if the number of Brotherhood candidates who win seats is kept to some "acceptable" level by the NDP, then voters will only have the Brotherhood as a minority opposition movement—without the numbers to pass or block legislation on their own—to base their decisions on. In that case, the NDP's suggestion that the Brotherhood will behave differently when in the majority can continue to dangle as an unsubstantiated threat.

U.S. policymakers need to be willing to assess the agenda of the Brotherhood in an objective and nuanced way. As the examination of the Brotherhood's Platform and

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<sup>123</sup> As Samer Shehata and Joshua Stacher have found, "the 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." Shehata and Stacher, *supra* note \_\_\_\_.

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 articulation of the Brotherhood’s goals, and perhaps they have not even considered many of the questions raised in this Article. The Brotherhood needs to be pressed to formulate and provide clearer answers, and likewise the Mubarak regime should not be allowed to dismiss difficult questions of democratization with its common response that the Brotherhood are extremists. Depending in large part on the message the U.S. sends to President Mubarak, the November 2010 legislative elections have the potential to begin to advance a solution for this impasse, just as they do to further entrench the status quo.