Paradoxes of "religious freedom" in Egypt

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The place of religion in the political order is arguably the most contentious issue in post-Mubarak Egypt. With Islamist-oriented parties controlling over 70 percent of seats in the new People's Assembly and the constitution-writing process about to begin, liberals and leftists are apprehensive about the implications for Egyptian law and society, including the rights of Egypt's millions of Coptic Christians.

Mindful of these anxieties and pragmatic in its approach, the Muslim Brotherhood's Freedom and Justice Party (FJP) has backed away from earlier calls for an "Islamic state." Its 2011 election platform opts instead to promote the sharia as a "frame of reference. " Working hard to assuage anxieties both at home and abroad, the Party explicitly calls for a "civil state" and repeatedly stresses the importance of equality of citizenship among Muslims and Christians:

> Egyptians, Muslims and Christians, are integral parts of the fabric of the one homeland, with equal rights and duties, and without distinction or discrimination, and all together they must remove the injustice inflicted upon them.

Yet the FJP operationalizes this commitment to equal citizenship and religious freedom by declaring further that, "the basis of citizenship is full equality before the Constitution and the law and fully sharing all rights and duties, *with the exemption of personal status matters where 'each has his own rules'*" (emphasis added). Elsewhere in the FJP platform, the party reiterates its position that "non-Muslims have the right to refer to their own rules and laws in the fields of family and religious affairs."

As benign as this aspect of the FJP platform may sound, provisions guaranteeing "special rights" for different religious communities often carry illiberal implications when codified as state law. But the presumed alternative—banishing religious law through strict secularism—is also not an unqualified good. It imposes restrictions on "religious freedom" in another way, by disempowering citizens from entering into legal arrangements inspired by their own religious

commitments. This paradox of religious freedom—the difficulty of reconciling the individual's right *from* religion, while providing for the right *to* religious law is a paradox rooted in the modern state's capacity and proclivity to codify and monopolize law. And, ironically, it is not modern state law but the Islamic legal tradition itself that may point the way out of this impasse.

It is important to note that the codification and implementation of religious law as state law is not only troubling from a "Western" liberal rights perspective, but also from the standpoint of the Islamic legal tradition. The core epistemology of Islamic jurisprudence dictates that Islamic legal doctrine is unavoidably pluralistic. Sharia is believed to be the perfect Law of God, but Muslim jurists have always insisted that it is impossible for fallible human beings to know that Law with certainty. Thus, the legal rules they extrapolated from scripture were treated as only "probable" articulations of sharia, all equally valid because there is no way to know for sure which jurist is correct (and no Muslim "church" to designate favorites). The legal doctrine they crafted is called "*fiqh*" (literally, "understanding"), and it eventually formed into schools of law that disagreed with each other, sometimes in significant ways. For Muslims, then, there is one Law of God, but there are many schools of *fiqh* articulating that Law on earth. That simple fact is what makes discussing sharia so challenging in the West, where it is assumed by many to be exact, uniform, and uncontestable by believers.

Fiqh pluralism allows Islamic law to be tangible enough for everyday use, but still flexible enough to accommodate evolution and personal choice. This pluralism is lost with state codification. Because sharia doesn't exist as one code of law but rather as multiple *fiqh* schools, any state "legislation of sharia" is purely an exercise of state power, selecting one (humanly-created and fallible) *fiqh* rule out of several equally valid choices and enforcing it as state law, often in the guise of divine law. State codification of *fiqh* rules (and calling them "sharia") undermines the dynamism of Islamic jurisprudence and the organic relationship with society that these jurisprudential traditions have had in the past. It freezes certain rules from a past time, anachronistically applying them in today's different social, political, and technological contexts.

This is seen most clearly in the field of family law. A growing body of scholarship suggests that the codification of Islamic family law in Egypt and most other Muslim-majority countries was selective and partial. Far from advancing the status of women, the codification of Islamic family law actually narrowed the range of rights that women could claim in the diverse doctrines of multiple *fiqh* schools. Thus, the limited (and antiquated) laws of divorce that are applied today to Muslims in Egypt are dictated by contemporary politics, not by sharia. All of this means that, from the perspective of both secularists and religious Muslims, collective rights for specific religious communities will stand in tension with the individual rights of citizenship as long as religious law remains wedded to state law. Moreover, this situation begs a perennial question of religious authority—that is, who has the right to define the rules of a religious community. In their current mold, the governments of most Muslim-majority countries essentially claim to be both authors and enforcers of sharia. The theocratic dangers of this arrangement should offend not only secularists who feel that state law should be separated from religion but also Muslims because it disrespects *fiqh* pluralism and allows the state to claim control over what used to be left to the autonomy of independent *fiqh* scholars. For both sides of the "religious-secular" divide, if "religious freedom" is to have any meaning, this paradox needs to be addressed. One possible resolution is to examine the historical roots of the problem—to interrogate the codification and incorporation of Islamic family law as state law and to delink and reconfigure the relationship between religious law and the state. A first step would be to recognize that most political Islamist movements operate on an image of Islamic government that is a stark departure from the structure of nearly every pre-modern Muslim government, in which there was a separation of legal authority between *fiqh* scholars and government lawmakers. Rulers made and enforced laws ostensibly to serve public order (*siyasa* laws) but they did not make or codify *fiqh* law. *Siyasa* power was used to enforce judicial decisions of *fiqh*-based legal disputes, but *fiqh* did not need state enactment in order to be authoritative. And before "legal monism," a term adapted by Sherman Jackson to denote the presumption that all law must emanate from a centralized state, *siyasa* enforcement of *fiqh*-based judicial decisions was generally done with respect for *fiqh* pluralism.

Today's reigning assumption that a Muslim state may codify religious

laws for an entire religious community undermines the legal pluralism that religious communities (Muslim and non-Muslim) used to enjoy in pre-modern systems. Before centralized nation-states, Muslim governments operated on a "to each his own" approach to religious law that included not just the many Muslim *fiqh* legal schools, but also the religious law of Christians, Jews, and others. It is this model of religious pluralism from the Islamic legal tradition that the Muslim Brotherhood ostensibly invokes in its 2011 election platform, but there is a key difference: individuals in pre-modern Muslim systems enjoyed official recognition of their preferred religious law without the state codifying it for them.

Contrary to the impression created by many contemporary Islamists' focus on codification, "legislating sharia" is not what makes a country Islamic. Pre-modern Muslim rulers enjoyed sharia legitimacy for their lawmaking on the premise that they served the public good, not because they were selecting and enforcing a preferred interpretation of scripture. In fact, it was their early attempts to do the latter that led to the separation of *fiqh* and *siyasa* legal realms in the first place. State codification of sharia also flies in the face of the core epistemology of Islamic jurisprudence: that no human can ever know God's Law for sure. Codifying *fiqh* on the premise that "it is sharia" rejects the humility exhibited by centuries of *fiqh* scholars and implies that the state can declare what is the correct interpretation of divine law for their society. This is a radical and unprecedented move. Unfortunately, many lay Muslims and Islamist political activists seem to unquestioningly assume a centralized state model, and this presumption bolsters the idea that an "Islamic" government should use the state apparatus to legislate and enforce its preferred interpretation of sharia upon the population. Few think of law in terms of the *fiqh-siyasa* bifurcation of legal authority that was built upon the hard-fought lessons of Muslim history. In fact, the average Muslim conception of sharia itself has largely mutated over the past century. Many are so unaware of *fiqh* pluralism that government assertions of "the" sharia rule are often blindly accepted as true, even when there are actually multiple *fiqh* opinions on the topic. Many Muslims even defend "sharia legislation" as if defending their very faith, fiercely opposing anyone challenging it as a perceived enemy of Islam.

All of this manifests in the familiar and seemingly endless war between secularists and Islamists discussed and analyzed by political commentators. Unfortunately, both inside and outside Muslim-majority countries, the focus is usually on whether one or the other side will win the latest battle. A better path is to explore creative alternatives to end the war.

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