

# Islamic Law and Human Rights:

*The Muslim Brotherhood  
in Egypt*



# Islamic Law and Human Rights:

*The Muslim Brotherhood  
in Egypt*

By

Moataz El Fegiery

Cambridge  
Scholars  
Publishing



Islamic Law and Human Rights: The Muslim Brotherhood in Egypt

By Moataz El Fegiery

This book first published 2016

Cambridge Scholars Publishing

Lady Stephenson Library, Newcastle upon Tyne, NE6 2PA, UK

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

Copyright © 2016 by Moataz El Fegiery

All rights for this book reserved. No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of the copyright owner.

ISBN (10): 1-4438-9479-6

ISBN (13): 978-1-4438-9479-1

# CONTENTS

Abstract .....	vii
Note on the Transliteration .....	viii
Acknowledgments .....	ix
Abbreviations .....	x
Tables of Authorities .....	xi
Foreword .....	xix
Bassam Tibi	
Chapter One.....	1
Introduction	
1. Defining the Research Problem .....	1
2. The Muslim Brotherhood: A Historical Background.....	6
3. Methods and Sources .....	10
4. Book Structure .....	12
Chapter Two .....	15
Islamic Law and Human Rights: Conceptual and Theoretical Issues	
1. The Nature and Evolution of Islamic Law .....	15
2. Human Rights and Religion .....	24
3. Islam and Human Rights: Theoretical Perspectives.....	37
4. Conclusions.....	41
Chapter Three .....	43
Human Rights under the Rule of Shari'a	
1. The State-Religion Relationship .....	43
2. Reactions to International Human Rights .....	53
3. Shari'a and Human Rights in the 2012 Constitution.....	59
4. Conclusions.....	70

Chapter Four.....	72
Political Pluralism and Dissent	
1. The Establishment of Religious Political Parties .....	72
2. Political Pluralism and the Rule of Shari‘a .....	76
3. Sowing the Seeds of Hate and Violence .....	82
4. Freedom of Association and Human Rights NGOs .....	86
5. Conclusion .....	96
Chapter Five .....	98
Religion and Freedom of Expression	
1. Religion and Freedom of expression.....	98
2. The Literature of the Muslim Brotherhood .....	101
3. The Muslim Brotherhood in Opposition .....	106
4. The Muslim Brotherhood in Power .....	119
5. Conclusion .....	132
Chapter Six.....	134
The Rights of Religious Minorities	
1. Religious Minorities, Equality and Non-discrimination .....	135
2. Unrecognised Religious Minorities .....	165
3. Conclusion .....	171
Chapter Seven.....	172
Apostasy and its Legal Implications	
1. The Debate on the Right to Change One’s Religion .....	173
2. The Debate on Proselytism .....	181
3. Conversion in Egyptian Courts .....	185
4. Conclusion .....	193
Chapter Eight.....	194
Women’s Rights in Islam	
1. The Articulation of Gender Equality.....	195
2. The Reform of Personal Status Law .....	214
3. Female Genital Mutilation .....	232
4. Conclusion .....	236
Chapter Nine.....	238
Conclusion	
1. Explaining the Conservative Face of the MB .....	238
2. Prospects for Transformation.....	241
Bibliography.....	250
Index.....	317

## ABSTRACT

This book explores the development of the Muslim Brotherhood's (MB) thinking on Islamic law and international human rights and argues that the MB has exacerbated, rather than solved, tensions between the two in Egypt. The organisation and its scholars have drawn on hard-line juristic opinions and reinvented certain concepts from Islamic traditions in ways that limit the scope of various human rights and to advocate for Islamic alternatives to international human rights. The MB's practices in opposition and in power, have been consistent with its literature. As an opposition party, it embraced human rights language in its struggle against an authoritarian regime, but advocated for broad restrictions on certain rights. Yet, its recent and short-lived experience in power provides evidence for its inclination to reinforce restrictions on religious freedom, freedom of expression and association, and the rights of religious minorities, and to reverse previous reforms related to women's rights. I conclude that the peaceful management of political and religious diversity in society cannot be realised under the MB's model of a shari'a state. This book advocates for the drastic reformation of traditional Islamic law and state impartiality towards religion, as an alternative to the development of a shari'a state or exclusionary secularism. This transformation is, however, contingent upon significant long-term political and socio-cultural change, and it is clear that successfully expanding human rights protection in Egypt requires not the exclusion of Islamists, but their transformation. Islamists still have a large constituency and they are not the only actors who are ambivalent about human rights. Meanwhile, Islamic law also appears to continue to influence Egypt's law. I explore the prospects for certain constitutional and institutional measures to facilitate an evolutionary interpretation of Islamic law, provide a baseline of human rights and gradually integrate international human rights into Egyptian law.

## NOTE ON THE TRANSLITERATION

I have standardised the International Journal of Middle Eastern Studies (IJMES) transliteration system, with few diacritical marks. Words that are anglicised, such as shari‘a, Qur’an, jihad and ijtiḥād are not italicised. All other Arabic anglicised words are italicised. I have used the English spellings of words that are most commonly used in the English-speaking world for the names of Egyptian and Arab politicians and public figures, as well as the Muslim Brotherhood’s General Guides and leaders.

## ACKNOWLEDGMENTS

This book is an extended version of my PhD thesis from the school of Oriental and African studies (SOAS), University of London, which was written between 2011-2015. First and foremost, I would like to express my deepest gratitude to my supervisor Professor Lynn Welchman for the continuous guidance in my research and her insightful comments on early drafts of this book. I am also thankful to the rest of my supervisory committee: Professor Mashood Baderin and Professor Peter Munchlinski. I am so grateful for the scholarship I received from SOAS to pursue my PhD degree. Finally, I take this opportunity to thank my wife Shaimaa and my son Adam for supporting me emotionally throughout the writing of this book and for being patient in my absence. This book is lovingly dedicated to my father Ahmed, my sister Gina and the memory of my mother, Fatma Shalaby Safa.

## ABBREVIATIONS

AFTE	Association for Freedom of Thought and Expression
ANHRI	Arab Network for Human Rights Information
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CIHRS	Cairo Institute for Human Rights Studies
CPJ	Committee to Protect Journalists
CRC	Convention on the Rights of the Child
ECtHR	European Court of Human Rights
EIPR	Egyptian Initiative for Personal Rights
EMHRN	Euro-Mediterranean Human Rights Network
EOHR	Egyptian Organisation for Human Rights
FGM	Female Genital Mutilation
FJP	Freedom and Justice Party
GC	General Comment
HRC	Human Rights Committee
HRW	Human Rights watch
ICCPR	International Covenant on Civil and Political Rights
IHRL	International Human Rights Law
IICWC	International Islamic Committee for women and Child
MB	Muslim Brotherhood
NCW	National Council for Women
SCC	Supreme Constitutional Court

# TABLES OF AUTHORITIES

## **Table of International Treaties and Declarations**

- African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (ACHPR)
- American Convention on Human Rights (adopted on 21 November 1969 and entered into force on 18 July 1978) 1144 UNTS 123
- Convention on the Elimination of All Forms of Discrimination against Women (adopted on 18 December 1979 and entered into force on 3 September 1981) 1249 UNTS 13 (CEDAW)
- Convention on the Rights of the Child (adopted on 20 November 1989 and entered into force on 2 September 1990) 1577 UNTS 3 (CRC)
- Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (adopted on 25 November 1981) GA res. 36/55, 36 UN GAOR Supp. (No. 51) at 171
- Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (adopted 8 March 1999) GA res. 53/144, 53 U.N. GAOR
- European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950 and entered into force 3 September 1953) 213 UNTS 221 (ECHR)
- International Covenant on Civil and Political Rights (adopted 16 December 1966 and entered into force 23 March 1976) 999 UNTS 171 (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966 and entered into force on 3 January 1976) 993 UNTS 3 (ICESCR)
- Optional Protocol to the Convention on the Elimination of Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83
- Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December, entered into force 23 March 1976) 999 UNTS 302

- Protocol to the African Charter on the Establishment of the African Court on Human Rights and Peoples' Rights (adopted 10 June 1998, entered into force 1 January 2004) OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997)
- Universal Declaration of Human Rights (adopted on 10 December 1948) GA res. 2171 (III), UN Doc. A/810 at 71 (UDHR)
- Vienna Convention on the Law of Treaties (adopted on 23 May 1969 and entered into force 27 January 1980) 1155 UNTS 331

## **Table of Cases**

### **Human Rights Committee**

- M.A. v. Italy, Communication No. 117/1981, U.N. Doc. Supp. No. 40 (A/39/40) at 190, 1984
- Robert Faurisson v. France, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993, 1996

### **UN Working Group on Arbitrary Detention**

- Aleksandr Bialatski v. Belarus, Communication N.39/2012, U.N. Doc. A/HRW/WGAD/2012/39, 23 November 2012

### **African Commission on Human and Peoples' Rights**

- Arab Organisation for Human Rights v. Egypt, Communication No.244/2011
- EIPR and Interights v. Egypt Communication No.312/2005
- EIPR and Interights v. Egypt, Communication No. 323/2006
- EIPR and Interights v. Egypt, Communication No.334/2006

### **European Court of Human Rights**

- Aydin Tatlav v. Turkey, Application No.50692/99, 2 May 2006
- Dahlab v. Switzerland, Application No, 44774/98. 15 January 2011
- Garaudy v. France, Application No. 65831/01, 24 June 2003
- Hans-Jurgen Witzsch v. Germany, Application No.7485/03, 13 December 2005
- I.A v. Turkey, Application No.42571/98,13 September 2005
- Kokkinakis v. Greece, Application No.260, 25 May 1995
- Larissis and Others v. Greece, Report1998-I, 24 February 1998
- Latusi and Others v. Italy, Application No.30814/06, 18 March 2011
- Leyla Sahin v. Turkey, Application No.4474/98, 29 June 2004.
- Otto-Preminger-Institut v. Austria, Application No. 13470/87, 20 September 1994

Refah Partisi (The Welfare Party) and Others v. Turkey, Application Nos. 41340/98, 41342/98 and 41344/98, 13 February 2003

Yazar and Others v. Turkey, Application Nos. 22723/93, 22724/93 and 22725/93, 9 April 2002

### **Cases from Egyptian Courts**

‘Asran Mansur v. Adel Imam and others, Misdemeanour Court of al-‘Ajza, Case No.529/2012, 26 April 2012

‘Asran Mansur v. Adel Imam, Al-Haram Court of Appeal, Case No.24215/2012, 12 September 2012

‘Asran Mansur v. Adel Imam, Misdemeanour Court of al-Haram, Case No.24215/2012, 17 January 2012

Court of Administrative Justice, Case No. 20/29, 8 April 1980

Court of Administrative Justice, Case No. 26103/85, 26 April 2005

Court of Administrative Justice, Case no. 26657/66, 10 April 2012

Court of Administrative Justice, Case No. 35647/61, 29 January 2008

Court of Administrative Justice, Case No.1109/25, 29 January 1983

Court of Administrative Justice, Case No.1751/61, 7 April 2009

Court of Administrative Justice, Case No.183/58, 29 January 2008

Court of Administrative Justice, Case No.18354/58, 29 January 2008

Court of Administrative Justice, Case No.19/4,26 May 1952

Court of Administrative Justice, Case No.190/3, 17 September 1951

Court of Administrative Justice, Case No.24044/45, 4 April 2006

Court of Administrative Justice, Case No.31328/61,1 April 2008

Court of Administrative Justice, Case No.38/55, 17 October 2000

Court of Administrative Justice, Case No.3814/60, 4 March 2008

Court of Administrative Justice, Case No.38719/63, 29 December 2009

Court of Administrative Justice, Case No.41852/66, 16 February 2013

Court of Administrative Justice, Case No.444/61, 4 March 2008

Court of Administrative Justice, Case No35647/61, 29 January 2008

Court of Administrative Justice, Cases No.4475/58, 30 June 2009

Court of Administrative Justice. Case No.10355/63, 12 May 2009

Court of Cassation, Case No. 16/35, 8 March 1967

Court of Cassation, Case No. 61/56, 29 March 1988

Court of Cassation, Case no. 9/44, 14/12/1975

Court of Cassation, Case No. 9/44, 24 December 1975

Court of Cassation, Case No.15277/78, 15 June 2009

Court of Cassation, Case No.16/48, 17 January 1979

Court of Cassation, Case No.44/40, 29 January 1975

Court of Cassation, Cases No. 28/33, 9 January 1966

Court of Cassation, Cases Nos. 475,481 and 478/65, 5 August 1996

- Disciplinary Court of Qina, State Council, Case No.115/20, 24 December 2012
- General Prosecutor v. Dimyana Obeid al-Nour, Luxor Primary Court of Misdemeanor, Case No.1647/2013, 11 June 2013
- General Prosecutor v. Karim Amer, Eastern Alexandria Misdemeanor Court of Appeals, Case No.8240/2007, 12 March 2007
- General Prosecutor v. Mohammad Fahmi ‘Asfou, Kafr al-Zayat Primary Court of Misdemeanour, Case No.13044/2011, 24 April 2012
- General Prosecutor v. Morris Sadiq, Murqus ‘Aziz, Nabil Adib and others, South Cairo Felonies Court, Case No.636/2012, 29 January 2013
- General Prosecutor v. Romani Murad, Asyut Primary Court of Misdemeanor, Case No.2939/2013, 1 June 2013
- Misdemeanour Court of Appeals of Kafr al-Zayat, Case No. 1095/2012, 26 July 2012
- State Council, Statement on the Law No.121, 10 February 1994
- Supreme Administrative Court, Case no 17355/66, 22 September 2011
- Supreme Administrative Court, Case No. 13496/53, 9 February 2008
- Supreme Administrative Court, Case No.10831/54, 16 March 2009
- Supreme Administrative Court, Case No.12244/55, 29 May 2010
- Supreme Administrative Court, Case No.16834/52, 16 December 2006
- Supreme Administrative Court, Case No.19082/60, 12 February 2011
- Supreme Administrative Court, Case No.33472/60, 3 July 2011
- Supreme Administrative Court, Case No.44793/57, 11 October 2011
- Supreme Administrative Court, Case No.5257/43, 28 December 1997
- Supreme Constitutional Court Case No.243/21, 4 November 2000
- Supreme Constitutional Court, Case 2/35,25 May 2013, *Official Gazette* no.21bis of 26 May 2013, pp.10-11
- Supreme Constitutional Court, Case No.11/13, 8 July 2000
- Supreme Constitutional Court, Case no.131/6, 16 May 1987
- Supreme Constitutional Court, Case No.153/21, 3 June 2000.
- Supreme Constitutional Court, Case no.20/34, 14 June 2012
- Supreme Constitutional Court, Case No.22/8, 4 January 1992.
- Supreme Constitutional Court, Case No.25/16, 3 July 1995
- Supreme Constitutional Court, Case No.289/31, 3 February 2013, *Official Gazette* no.6bis of 12 February 2013
- Supreme Constitutional Court, Case No.3/19, 2 January 1993.
- Supreme Constitutional Court, Case No.35/9, 14 August 1994
- Supreme Constitutional Court, Case No.37/11, 6 February 1993
- Supreme Constitutional Court, Case no.37/9, 19 May 1990
- Supreme Constitutional Court, Case No.82/17, 5 July 1997
- Supreme Court, Case No. 7/2, 1 March 1975

## **Table of Constitutions**

### **Egypt's Constitutions**

- Addendum to the Constitutional Declaration *official Gazette* no.24bis of 17 June 2012
- Amended Constitution of the Arab Republic of Egypt, 18 January 2014, Official Gazette no.3bis of 18 January 2014
- Amendments to the Constitution of the Arab Republic of Egypt, *Official Gazette* no.13 of 31 March 2007
- Amendments to the Constitution of the Arab Republic of Egypt, *Official Gazette* no.26 of 27 June 1980
- Constitution of the Arab Republic of Egypt, 25 December 2012, *Official Gazette* no.51 bis of 25 December 2012
- Constitution of the Arab Republic of Egypt, *Official Gazette* no.36 of 12 September 1971
- Constitutional Declaration of 21 November 2012, *Official Gazette* no.46bis of 21 November 2012
- Constitutional Declaration of the Arab Republic of Egypt, *Official Gazette* no.12 of 30 March 2011
- Constitutional Declaration of the Arab Republic of Egypt, *Official Gazette* no.6bis of 13 February 2011
- Constitutional Declaration, 8 December 2012, *Official Gazette* no.49bis of 8 December 2012
- Constitutional Declaration, *Official Gazette* no.32 bis of 12 August 2012
- Royal Decree No.42/1923 Establishing Constitutional Regime Egypt, *Al-Waqa' i' al-Masriyah* no. 42 of 20 April 1923

### **Foreign Constitutions**

- Constitution of the Republic of South Africa, 1996, *National Gazette* no.17678, 18 December 1996

## **Table of Legislation and Executive Decisions**

### **Egypt**

- Consultative Council Decision No.7/2012, *Al-Waqa' I' al-Masriyya* no.190 of 16 August 2012
- Decree No. 12/2011 Amending Law No. 40/1977, *Official Gazette* no. 12bis of 28 March 2011
- Decree No. 250/1975 of Executive Regulation of law No. 103/ 196, *Official Gazette* no.13bis of 27 March 1975

- Decree No.78/1931 on the Organisation of Shari‘a Courts, *al-Waqa’i‘ al-Masriyya* no.53 of 20 May 1931
- Draft Law of Associations proposed by President Mohammed Morsi, 28 May 2013
- Law 1/2000 Concerning. Rules and Procedures of Litigation in Matters of Personal Status, *Official Gazette* no.4bis of 29 January 2000
- Law 108/2011 Amending Law 38/1972 on the People’s Assembly, *Official Gazette* no.28bis of 19 July 2011
- Law 124/2011 Amending Law 73/1956 Regulating the Practice of Political Rights, *Official Gazette* no.40bis of 8 October 2011
- Law 126/2008 Amending Certain Provisions of the Child Law 12/1996, the Penal Code 58/1937, *Official Gazette* no.24bis of 15 June 2008
- Law 131/1948 promulgating the civil code, *Official Gazette* no. 108 of 29 July 1948
- Law 149/2009 Amending Law 38/1972 on the People’s Assembly, *Official Gazette* no.24bis of 17 June 2009
- Law No. 143/1994 Concerning the Civil Affairs, *official gazette* no.23bis of 9 June 1994
- Law No. 25/1929 Concerning Certain Provisions of Personal Status, *Official Gazette* no.27 of 25 March 1929
- Law No.100 of 1985 Amending Certain Rulings of the Laws of Personal Status, *Official Gazette* no.27 of 4 July 1985
- Law No.177/2005 Amending Law No.40/1977, *Official Gazette* no.27 bis of 7 July 2005
- Law No.25/1944, *Official Gazette* no.38 of 22 March 1944
- Law No.263/1960 Dissolving the Baha’i Communities, *Official Gazette* no.161of 19 July 1960
- Law No.29/1982 Amending the Penal Code No.58/1937, *Official Gazette* no.16 of 22 April 1982
- Law No.3/1996 on the Regulation of *hisba* Cases in Family Matters, *Official Gazette* no.4bis of 29 January 1996
- Law No.430/1955 on the Censorship of Audio-Visual Materials, 3 September 1955
- Law No.44/1979 on Personal Status Laws, *Official Gazette* no.25 of 21 June 1979
- Law No.462/1955 Abolishing *Shari‘a* and *milli* Courts, *Official Gazette* no.73bis of 24 September 1955
- Law No.47/1972 on the State Council, *Official Gazette* no.40 of 5 October 1972
- Law No.48 /1979 on the Establishment of the Supreme Constitutional Court (SCC), *Official Gazette* No.36 of 6 September 1979

- Law No.48/1979 Amended by Decree No.48/2011, Official Gazettes nos.36 of 6 September 1979 and 24bis of 19 June 2011
- Law No.78/1931 Concerning the Regulations of Shari‘a Courts, *al-Waqa‘i‘ al-Masriyya* no.53 of 20 May 1931
- Law No.97/1959 Concerning Travel Documents, *Official Gazette* no.99 of 16 May 1959
- Law of Associations No.154/1999, *Official Gazette* no.21bis of 27 May 1999
- Law of Associations No.32/1964, 12 February 1964
- Law of Associations No.84/2002, *Official Gazette* no.22bis of 5 June 2002
- Law of Bequest No.71/1946, 7 January 1946
- Law of Criminal Procedure No.150/1950, *Al-Waqa‘i‘ al-Masriyya* no.90 of 15 November 1951
- Law of Political Parties No.40/1977, *Official Gazette* no.27 of 7 July 1977
- Military Order No.63/1948 Concerning the Dissolution of the MB, 8 December 1948
- Minister of Justice Decree No.1727/2000 Amending Marriage Registrars Regulations, *al-Waqa‘i‘ al-Masriyya* no.184 of 15 August 2000
- Ministry of Insurance and Social Affairs, Decision No.644/2013, 19 March 2013, *al-Waqa‘i‘ al-Masriyya* no.129 of 5 June 2013
- Minister of Interior Decision No.3937/1996, *al-Waqa‘i‘ al-Masriyya* no.133 of 17 June 1996
- Ottoman Decree of 14 May 1883 Concerning the Prerogatives of the Coptic Orthodox Council
- Penal Code No.58/1937, *al-Waqa‘i‘ al-Masriyya* no.71 of 5 August 1937
- Presidential Decree No.11/2012, *Official Gazette* no.27bis of 8 July 2012
- Presidential Decree No.13/1998, *Official Gazette* no.2bis of 11 January 1998
- Presidential Decree No.260/1990 Concerning the Ratification of the CRC, *Official Gazette* no.7 of 14 February 1991
- Presidential Decree No.291/2005, 8 December 2005
- Presidential Decree No.345/2013 Permitting the Building of a New Church for the Coptic Orthodox Sect, *Official Gazette* no.23 of 6 June 2013
- Presidential Decree No.432/2012, *Official Gazette* no.51bis of 20 December 2012
- Presidential Decree No.434/1981 Concerning the Ratification of the CEDAW, *Official Gazette* no.51 of 17 December 1981
- Presidential Decree No.453/1999, *Official Gazette* no.52bis, 30 December 1999

Presidential Decree No.536/1981 Concerning the Ratification of the ICCPR, *Official Gazette* no.51 of 17 December 1981

Presidential Decree No.54/1988 Establishing the National Council for Motherhood and Childhood, *Official Gazette* no.5 of 4 February 1988

Supreme Council of Armed Forces Decree No.348/2012 Concerning the Membership of the National Defense Council, *Official Gazette* no.24 bis of 14 June 2012

The National Penal Law, 20 February 1904

The Penal Law, 13 November 1883

### **Tunisia**

Law of Associations No.88/2011, *Official Gazette* no.74 of 30 September 2011

# FOREWORD

BASSAM TIBI

INSTITUTE FOR POLITICAL SCIENCE,  
UNIVERSITY OF GÖTTINGEN

Back in 2012, in the course of completing my book *The Shari'a State* in which I investigate the political role of Islamists in the Arab Spring and their hijack of its rhetorical commitment to democratization, I came across a significant article entitled *A Tyranny of the Majority? Islamist's Ambivalence about Human Rights* (El Fegier 2012). I was impressed by the article's quality and quoted it prominently and at length in *The Shari'a State*, which was published in 2013. *A Tyranny of the Majority*, which was written by the young, promising and talented scholar Moataz El Fegier, provides a critical examination of the discourse opposing the instrumentalisation of human rights by the Muslim Brotherhood (MB) from the time when they comprised the opposition and questions their commitment to the principles of human rights as they rise to power. Traditionally and up to this day, Islamists have utilized human rights to pave their way to power towards establishing a state wholly grounded on Islamic shari'a. Such a state imposes rigorous restrictions on the very principles they used to advocate for their pursuit of power. Human rights include principles, such as freedoms of religion and freedom of expression, which are not particularly honoured by Islamists.

El Fegier questions the Islamist discourse of human rights and their claim to follow and abide by liberal and democratic doctrines. In their view, democracy is a means to pursue a larger political project in the name of the majority. Intellectual authorities on democratic governance, ranging from Nineteenth Century scholars of the likes of Mill (*On Liberty*) to Twentieth Century scholars like Popper (*The Open Society and Its Enemies*), in fact argue, that democracy is not about the rule of the majority. Democracy is rather about putting in place the institutional guarantees securing basic rights for all without discrimination, while

guaranteeing in particular the rights of the minority (or minorities). Thus, democracy is by definition against the tyranny of the majority.

If this is the case, how can one then deal with Islamic movements that claim to speak in the name of all Muslims as the majority? About 70 Arab intellectuals (myself included), did meet officially back in November 1983 in Limassol, Cyprus to discuss the crisis of democracy in the Arab world. The proceedings of this convention were published in Arabic in 1984 in Beirut by the “Institute for Arab Unity Studies” under the same title of the assembly. At that time we were critical of the Muslim Brotherhood and based on our knowledge of their double morality and claims as well as their ‘ambivalence’, also stressed in El Fegiery’s 2012 article, we did not consider the inclusion of Islamists in our project. In fact, in addition to secularists, only Muslims with an enlightened and liberal thought and background, who believed in the separation of religion and politics, were invited to our project.

In contrast to the early 1980s, one is compelled today to deal with the question of ‘why not engage with Islamists?’ This is also a question that I have had to jointly explore with El Fegiery, which is also the subject matter of this book. Four years after *A Tyranny of the Majority?* El Fegiery presents the work done over the course of his doctoral research period, namely his doctoral dissertation, entitled *Islamic Law and Human Rights in the Thought and Practice of the Muslim Brotherhood in Egypt*. Herein he clearly makes the point ‘that successfully expanding human rights protection requires not the exclusion of Islamists, but their transformation’. Thus making the point that a conditional engagement with the Islamists is essential. This engagement presupposes, however, a basic change in the mind-set of the Islamists and in the institutional structure of their movements in order to qualify for political participation in the process of democratization.

In this context, I assessed the potential for a shift in the Islamic discourse in my article (*Islamic Humanism versus Islamism: Cross-Civilizational Bridging*) published in *Soundings* in 2015. The subtitle of the article phrases down the main argument under the title ‘from jihadism to institutional Islamism’. I find myself in agreement with El Fegiery that it would be wrong to continue excluding Islamists from the process of democratization. However, both of us ask the question of whether Islamists are really willing to change? Are they willing to adapt to the process of democratization and its requirements, or are they driven by the agenda to use democracy instrumentally to establish their own shari‘a

state? With all ‘political games’ aside, the bottom-line is that shari‘a and democracy are quite simply not compatible.

El Fegierly and I are also in agreement regarding the question of whether we can trust in the Islamists’ claimed commitment to human rights. As long as we cannot see the needed change or transformation from an Islamic underground movement towards a genuine political party, one cannot trust Islamists. These are the basic issues that lie at the heart of this valuable study of El Fegierly. I congratulate him for earning his doctoral degree on the basis of this excellent and well-thought dissertation within the Law Department of the University of London (SOAS) and believe and foresee a promising career for him as both an academic and human rights practitioner.

In my view, this is a highly exceptional and needed exploration of Islamism and human rights. As stated above, Islamists thrive to establish a shari‘a state. They claim for this endeavour to be a venture of democracy. Their basic underlying argument is that people of Muslim countries are Muslims who endorse shari‘a. It follows for them that a shari‘a state reflects a democratic rule. El Fegierly finally finds this argument to be unsatisfactory. Instead of trusting the proclaims of Islamists, he prefers to investigate the issues in point as a basic requirement for providing a solid answer to the question of the compatibility of shari‘a rule with human rights. These are the grounds on which the case study of the Muslim Brotherhood in Egypt rests.

It has been of great interest to read the first eight chapters of this book in which El Fegierly investigates all major issues that lie at the heart of the relationship between shari‘a and human rights based on which he draws solid conclusions in Chapter 9. Here he states that ‘the Muslim Brotherhood has exacerbated rather than solved tensions between Islamic law and international human rights’. Political and religious diversity are essential to any democratic governance. This aspiration ‘will be hard to realize under the MB’s model of a shari‘a state’.

While El Fegierly argues for an inclusion of the Islamists, he makes this conditional to a transformation within their movement. He is not, however, optimistic about their willingness to deliver what they promise: ‘the MB does not allow its members and leaders to engage in self-criticism or revisit the general intellectual doctrines of the group’. On these grounds, El Fegierly argues for the ‘removal of shari‘a from the constitution’ for the sake of ‘a secular state that manages religious diversity in society’. I doubt an endorsement of such an agenda by the existing Islamic movements.

Though the focus of the present book is on Egypt and on the experience of the MB, the topic is of interest to all those engaged and focusing on the relation between democracy and human rights under the conditions of the popular call for the implementation of shari‘a by Islamic movements. The study of El Fegiery matters to all who try to understand the nature of Islamic movements worldwide. I wish El Fegiery a fruitful engagement and readership within the academic community and among the wider public with this excellent work.

# CHAPTER ONE

## INTRODUCTION

### **1. Defining the Research Problem**

This book examines the way in which the thinking of the Muslim Brotherhood (hereinafter MB) has developed on the relationship between Islamic law and human rights in Egypt. The Arab world<sup>1</sup> has witnessed profound political transformation over the last five years. Since December 2010, massive popular uprisings in Tunisia and Egypt led to the ousting of two Arab authoritarian rulers and set in motion tumultuous political transitions elsewhere in the region, the outcomes of which remain uncertain.<sup>2</sup> The common feature in all countries in the Arab world since the outset of the so-called ‘Arab Spring’ is the unprecedented political influence of Islamists (Sadiki 2011; Tibi 2013b). Although political Islam did not lead the popular protests in Tunisia and Egypt, Islamists were ostensibly the first to benefit from them, by drawing on their organisational superiority and the weakness and division of liberal factions (Tibi 2013b; Mikail 2012; Bradley 2012).

The MB enjoyed unprecedented political freedom in post-Mubarak Egypt and up to the removal of President Mohammed Morsi on 3 July 2013, and it was able to establish its political party, the Freedom and Justice Party (hereinafter, FJP) (Trager 2011:114-126). The MB became the leading political bloc in the 2012 Parliament, with one of its leaders elected as the President of Egypt on 18 June 2012. It also led the 2012 Constitution-making process. However, its experience in power was short-lived: President Morsi was deposed by the military on 3 July 2013, and the Islamist-backed Constitution was suspended following massive popular

---

<sup>1</sup> In this book, the Arab world refers to the 22 member states of the League of Arab States.

<sup>2</sup> For a critical evaluation of the Arab Spring, see Sadiki (2014), Brownlee et al (2015) and Achcar (2013).

protests across Egypt against Morsi and the MB (Brown 2013).<sup>3</sup>

The rise of Islamist movements in many Muslim states<sup>4</sup> has long triggered serious concerns among academics and human rights practitioners regarding their commitment to international human rights (Benard 2003; Scientific Council for Government Policy 2006; Emerson et al. 2009).<sup>5</sup> Islamism, or political Islam,<sup>6</sup> as articulated by prominent Islamist ideologues, is centred on two key assumptions. The first assumption is that Islam mandates Muslims to establish the Islamic state, in which Islamic law regulates all aspects of the state and society. The second assumption is that determination of the normative content of shari‘a is only acceptable if it complies with the methods developed by the mainstream traditional Muslim jurists.<sup>7</sup>

The assertion of these two assumptions as the authentic expression of Islam is, however, contested by other Muslim scholars (Tibi 2013a; An-Na‘im 1990; 2008). The institutional and social settings in which shari‘a developed and was applied during pre-modern Muslim governance are paradigmatically different from the modern nation state, and therefore the idea of incorporating shari‘a into it (Hallaq 2013). This has prompted many scholars to maintain that Islamism is a modern construction that cannot be seen as an extension of the tradition (Tibi 2012; Iqtidar 2011:39-40). An-Na‘im (2008:8) has held that ‘the notion of an Islamic state is in fact a postcolonial innovation based on a European model of the state’. In this book I use the term Islamic law to mean legal rules that are extracted from the Qur’an and *Sunna*, Islamic sources. The substance of these rules varies among Muslim jurists and scholars according to their different epistemological and methodological approaches to the Islamic sources. The diversity of opinions on what constitutes Islamic law opens the relationship between Islam and human rights to significant contestation and evolution.

---

<sup>3</sup> See Statement by General Abdel Fattah el-Sisi, Commander-in-Chief of Egyptian Armed Forces and Minister of Defence and Military Production, *Official Gazette* no.26bis of 3 July 2013.

<sup>4</sup> In this book, Muslim states refer to states where the majority of populations are Muslims, members of the Organization of Islamic Cooperation (OIC), or states that recognise Islam as their official religion or consider Islamic law an official source of domestic legislation in their constitutions.

<sup>5</sup> See the *Journal of Democracy* (2008:5-8).

<sup>6</sup> Islamism and political Islam are used interchangeably in this book.

<sup>7</sup> For a general discussion of the nature of Islamism and its distinctive features, see Tibi (2012).

Some scholars express pessimistic attitudes towards Islamist movements' responses to human rights and liberal democracy (Huntington 1996: 192-198; Tibi 2008; Haqqani 2013). This pessimism has been influenced by previous experiences of governance in the name of Islam in particular Muslim states such as Iran, Pakistan, Sudan, and Afghanistan under the Taliban, which have created strong concerns over the respect of Islamist movements for international human rights norms (Mayer 2012:36-46; Marshall 2005; Haqqani 2005). The commitment of Islamist parties to human rights law has also been a matter of enquiry by the European Court of Human Rights (hereinafter ECtHR). In a famous case involving the Turkish Welfare Party in 2003, the Court upheld Turkey's decision to dissolve the party due to its adoption of a platform through which it sought to implement Islamic law. The court opined that the party's religious programme conflicted with the protection of basic rights and liberties in the European Convention on Human Rights (hereinafter ECHR).<sup>8</sup>

Nevertheless, given the popularity of Islamist parties in many Muslim states, other scholars and human rights advocates argue for the integration of 'moderate'<sup>9</sup> and peaceful Islamists into political processes as a tool of de-radicalisation and moderation (El-Ghobashy 2005, Kausch 2009; Hamid 2011; 2014; Roth 2012:4).<sup>10</sup> In this context, Baker (2003:1-14) suggested using the expression 'Islam without fear' to refer to the emergence of a 'moderate' trend among Egyptian Islamists. The term 'post-Islamism' has meanwhile been coined by political scientists (Bayat 2013) to explain the transformation of some Islamist parties, such as the Justice and Development Party in Turkey (AKP), into 'a conservative democratic party [that] defends change, reform and transformation in

---

<sup>8</sup> See *Refah Partisi and Others v. Turkey*, ECtHR, 13 February 2003. The Court, however, ignored other possible liberal interpretations of Islam and shari'a, see a commentary on this case by Abou Ramadan (2007).

<sup>9</sup> The term 'moderate Islamists' has been largely used in the literature to refer to Islamists who condemn violence and peacefully participate with other political parties in the constitutional and political institutions. However, I subscribe to other views (Tibi 2012:9-10) that find that what constitutes 'moderate' is ambiguous and misleading. Tibi (2012:10) suggests 'institutional Islamists' as a more neutral concept than moderate Islamists.

<sup>10</sup> Kenneth Roth (2012:4), the executive director of HRW stated that 'Islamic movements are hardly monolithic or implacably opposed to rights. Yet rather than engage with them to demand respect for rights, Western governments have often treated them as untouchable'.

favour of democracy, human rights and rule of law' (Sambur 2009:117).<sup>11</sup>

Since the 1980s, political repression and restricted political space in Egypt has created a common agenda of political activism for various political actors and human rights defenders in Egypt, including the MB (Shehata 2010). During the decade before the 2011 uprisings the MB embraced human rights language in its political discourse and, by harnessing other political forces, pressured Egyptian authorities to respect the right to free assembly, association and expression, to judicial independence and to a fair trial (Brown and Hamzawy 2010). After the MB won 88 seats in the 2005 Parliament, the Deputy General Guide, Khairat al-Shater (2005), wrote in *The Guardian* newspaper that the MB's main objective was to 'trigger a renaissance in Egypt, rooted in the religious values upon which Egyptian culture and society is built'. He added that 'the success of the MB should not frighten anybody: [the MB] respects the rights of all religious and political groups'.

It was not clear at the time whether the MB's shift towards human rights language was a question of political convenience, or reflected a genuine intellectual change in the organisation. However there was no consensus between the MB and other human rights activists on the content of certain rights and the acceptance of international human rights treaties as a term of reference. Ideological disparities between the MB and other political forces, as well as the restricted political space during Mubarak's governance, had not allowed such a consensus to emerge (Shehata 2010; Hicks 2002). Among other areas, this book will explore whether the political climate after Mubarak has provided an opportunity for this consensus to develop, or rather deepened divisions between Islamist and non-Islamist forces.

My interest in this research is founded on my direct engagement with the debate on Islamism, Islamic law and human rights in Egypt and other Muslim states as a human rights practitioner since 2003. The intersections between the MB and international human rights, along with increasing scholarship on the transformation of Islamist movements across the Muslim world, has motivated me to explore to what extent the MB has the potential to gradually legitimise international human rights in Islamic terms. While the experience of the MB in power after Mubarak was too short to comprehensively judge the party's actual record in human rights,

---

<sup>11</sup> See also Kuru (2013). However, other scholars argue that the AKP still embraces an Islamist agenda and engages in what they call 'creeping Islamisation' (Tibi 2012:98-102; Baran 2010).

it does enable us to compare the MB's literature and experience in opposition with its positions in power.

A great deal of research has been conducted on the MB, much of it dealing with the political history of the organisation, its institutional development and its ideology (Mitchell 1993; Lia 2006; Zollner 2007; al-Awadi 2004; Pargeter 2010; Ruben 2010). Scholars have examined the cooperation between the MB and human rights non-governmental organisations, the MB's approach to constitutionalism, and its position on the rights of religious minorities, on political pluralism, and gender equality (Hicks 2002; MacQueen 2008; Rutherford 2006; Dalacoura 2007; Slit 2010; Scott 2010; Tadros 2012a). However, this book is the first legal research to investigate the development of the MB's thinking on the relationship between Islamic law and International Human Rights Law (hereinafter IHRL) over the last three decades.

Religious actors and their involvement in the struggle over the meaning of human rights has increasingly become a subject of academic inquiry (Cismas 2014; Hopgood 2013; Chase 2015). The aim of this book is to put the debate between Islamic law and human rights in context through a systematic assessment of the thought and practice of a major Islamist movement. As proposed by Preis (1996:286-315), there is a need to study human rights as cultural practice within certain political and social contexts in order to understand the dynamics of the evolution of human rights discourses in different societies. The future of Islamic discourses is contingent on the political and social dynamics in Muslim states. As stated by An-Na'im (2004:9) 'the relationship [between Islam and human rights] is open to engagement and transformation precisely because it is contingent on an interactive web of internal and external factors and forces'.

This research focuses on the MB as one such force to be influencing the debate on Islamic law, in Egypt and the whole Muslim world. The book is structured to answer the following questions: how has Islamic law influenced the MB's conception of human rights? What have its reactions been to the development of IHRL? To what extent has there been change or continuity in the thought and practice of the MB towards human rights issues? In which areas has the MB expanded or restricted its understanding of human rights? Is there consistency between the MB's practices and the positions taken by its ideologues and scholars? And finally, how have the MB's thought and practice influenced the evolution of the debate on human rights in Egypt?

Although Islamists share common goals, one cannot generalise about

their detailed attitudes to different human rights issues, or the extent of their respect for these rights. Islamists' different responses to human rights in post-uprising Egypt and Tunisia since 2011 are illustrative in this regard (El Fegjery 2012). The major argument of this book is that the MB has exacerbated rather than solved tensions between Islamic law and international human rights. The organisation and its scholars have drawn on hard-line juristic opinions and reinvented certain concepts from Islamic traditions to limit the scope of freedom of association, freedom of expression, religious freedom, rights of religious minorities and women's rights, and to advocate for Islamic alternatives to international human rights. The MB's positions on human rights, while in opposition and in power have been consistent with its intellectual literature. In opposition, it embraced human rights language in its struggle against an authoritarian regime but advocated for broad restrictions on certain rights. The MB's short-lived experience in power provides evidence for its inclination to reinforce restrictions on the freedom of religion, expression and association, and the rights of religious minorities, while reversing previous reforms related to women's rights.

Since the literature and discourses of the MB were developed in different historical phases, in the following section I present a brief introduction to the main historical developments of the organisation since its establishment. The third section examines the research methods and sources, and in the last section I explain the structure of this book.

## **2. The Muslim Brotherhood: A Historical Background**

Founded in 1928 by Hassan al-Banna (1906-1949), the MB in Egypt represents the oldest and largest organisational manifestation of Islamism in the Muslim world, from which other groups emerged in many Muslim states (Lapidus 2002:522; Ruben 2010:1). The call for the enforcement of Islamic law is a central characteristic of its political and legal identity (Mitchell 1993 245-250; Pargeter 2013:17), however it is the MB's stance on the use of violence to achieve its goals, that is a particularly contentious issue. During the 1940s the group was involved in violent actions through a secret apparatus (al-Majid 2010:21-29). MB leaders argue that this apparatus was established by al-Banna to engage in the struggle against colonialism. They admit that the secret apparatus assassinated some civilian figures. However, they assert that al-Banna and the leadership of the organisation were not directly involved in these killings, invoking

certain statements made by al-Banna that condemned the killings and the perpetrators (al-Shamakh 2011a; al-Banna 2006:757-785). Other observers however, argue that the use of violence was justified and supported by al-Banna himself ('Ali 2007:82-90). The increasing political power of the MB and its involvement in violence led to its dissolution by a military order on 8 December 1948,<sup>12</sup> and to the assassination of al-Banna on 13 February 1949 (Mitchell 1993:58-79; Pargeter 2010:29-30).<sup>13</sup> Once the state of emergency had ended, the Court of Administrative Justice held on 17 September 1951 that the dissolution of the MB by a military order was void.<sup>14</sup>

On 23 July 1952, the Free Officers' Movement came to power after a military coup. This was well received by many Egyptians, who considered it to be a relief from the political and social crises prevailing in Egypt under the monarchy. The MB was a political ally of the Free Officers' Movement before 1952 and backed its political move. However, political tensions quickly erupted between the MB and the new leader of Egypt, Gamal Abdel Nasser, and reached a peak in 1954 when Nasser was subjected to an assassination attempt, allegedly planned and implemented by MB members. Consequently, the Leading Council of the Revolution ordered the dissolution of the MB and a considerable number of its leaders and members were sentenced to death or life imprisonment in military trials (al-Majid 2010:29-37; Pargeter 2010:33-34).

Between 1957 and 1964, the MB ideologue Sayid Qutb (1906-1965) shifted the MB to a more radical direction via his book *Milestones* (1990), in which he asserted that all societies, including Muslim societies who do not submit to the sovereignty of God in all spheres of life, are in a state of ignorance (*jahiliyya*).<sup>15</sup> Qutb (1990:43-57) asserted that pious Muslims should revolt against this *jahiliyya* to establish the Islamic state and then initiate a holy war globally to 'liberate' all other peoples. These ideas contributed to the emergence of violent Islamist movements (Shepard 2003: 521-522; Calvert 2010). In response to this wave of radicalisation, the former General Guide of the MB, Hassan al-Hudaiby (1977b), wrote a

---

<sup>12</sup> Egypt was under martial laws since 31 May 1948. See Military Order No.63/1948 Concerning the Dissolution of the MB, 8 December 1948.

<sup>13</sup> Some members of what was called at the time the Political Police were convicted for the killing of al-Banna after the 1952 Military coup but 'higher responsibility has never been proved' (Reid 1982:636).

<sup>14</sup> Court of Administrative Justice, Case No.190/3, 17 September 1951.

<sup>15</sup> The term *jahiliyya* is mentioned in the Qur'an (3:154; 5:50; 33:33; 48:26) to describe the state of affairs in the Arab Peninsula before Islam.

book titled *Preachers not Judges* to distance the MB from the hardline thought developed by Qutb and his followers (Zollner 2007). However, the book did not explicitly state that it was refuting the ideas of Qutb. It defended the application of Islamic law in the Muslim state as a fundamental component of Islam and did not abandon the possibility of declaring Muslims to be apostates and sentencing them to death, but rather subjected this to certain conditions. The MB has not yet directly denounced Qutb's ideas ('Ali 2012). Instead, they have repeatedly stated that the words used by Qutb were mistakenly interpreted by his readers, and argue that Qutb used the term *jahiliyya* as a metaphor to reject un-Islamic laws and morals that have become common in Muslim societies (Al-Bahnasawi 1985; 2000).<sup>16</sup>

During the 1970s and 1980s, the MB was able to reconstitute itself in Egyptian politics. Former president Anwar al-Sadat tolerated the activities of Islamists in an attempt to counterbalance his leftist and Nasserist critics, and so the MB leaders were released from prison and resumed their political, social, and cultural activities in Egypt (Kepel 1993:139-141; Shehata 2010:53). During the 1970s, the group was allowed to republish its magazine *al-Da'wa*, which was vocal about the Islamisation of Egypt's constitution and laws (Kepel 2005:127; Mustafa 1996:206). The MB was not the only Islamist player in Egypt at that time. Other Islamist trends emerged. Ultra-conservative Salafism<sup>17</sup> expanded in Egypt, and both Islamist trends influenced each other (Abdel Latif 2012; Tammam 2010b; Brown 2011:5). Despite its subjection to strict legal restrictions and harassment by security forces, the MB had established itself as a major political actor in Egypt and enlarged its popular constituency under former President Mubarak. Members of the group controlled the boards of major professional syndicates and university students unions during the 1980s and 1990s (Shehata 2010:53-54).

The Egyptian electoral system in this period did not allow non-partisan or independent candidates to run for elections, and the MB was not legally recognised as a political party. In 1984 the MB allied with the liberal *al-Wafd* Party and won eight seats in Parliament (Shehata 2010:85). In 1987 it established the Islamic Alliance with the Socialist Labour Party and the

---

<sup>16</sup> See an interview with the General Guide of the MB Mohammad Badie (2010).

<sup>17</sup> This term is usually used to refer to Islamists who have been influenced by the Wahabism that was developed in Saudi Arabia. The principal characteristic of those Salafists is their emphasis on the strict and literal interpretation of the Qur'an and *Sunna* (Denoeux 2011:59-60).