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The Anti-Secular Regulation of Religious Difference in Egypt

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A Thesis Submitted by

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To the Department of Law

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in partial fulfillment of the requirements for the degree of
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Supervised by Professor Jason Beckett

ABSTRACT

Egyptian religious freedom activists and researchers have for decades called for more secularism to remedy the violations facing religious minorities. Those religious minorities have been subject to attacks for practicing religious rituals and suffered from lack of recognition by the government. As those activists advocated secularism, some academics critiqued it and deemed it the instigator of the very problems it claims to uproot. Saba Mahmood famously argued that secularism is a primary producer of religious tension in Egypt. In this thesis, I argue that it is not the mere regulation of religious difference as a feature of secularism that is the problem, but the manner in which Egypt does the regulation, in which it empowers religious institutions and espouses Islam as its quintessential identity and Shari'a the basis of its public order. I also conclude that despite secularism's inherent problems, it continues to hold promise for some change for Egypt's minorities. I reach that conclusion by testing Mahmood's argument against key legal events post-2013: The 2014 Constitution, the Church Construction Law, and the yet to be issued Personal Status Law for non-Muslims.

TABLE OF CONTENTS

I. Introduction

In an ideal world, Egyptian Muslims and Christians can convert to either religion without consequence.[1] Churches are built and demolished without stirring tensions on either side.[2] And interfaith romance does not end in army tanks protecting the local church.[3] The perennial sectarian tensions are not the only venue where religion features prominently in Egypt. In Egypt, the place of religion is *the* question. Islamists helped bring down Mubarak so that their understanding of *Shari''a* reigns. Two years later, "the people," together with the army, brought Morsi down so that it does not. Where religion features in the Egyptian identity, and government, is so potent, that it was literally the driver (enabler of) behind two tumultuous and violent transfers of power, followed by painful transitions. Relying on the animations of the question of religion is the status of religious minorities, most prominent among them is the Middle East's largest religious minority, Coptic Christians.

Advocating for the inclusion and the equality of the 15-million-member community, secular - or civil - forces have called for more secularization, albeit under different names. They advocated for religious liberty, for a civil state standing at an equal distance from all religions, and for religious laws that are discriminatory to minorities or women to be repealed. Nonetheless, critical of their approach, Saba Mahmood insinuates that those activists are unaware of colonial underpinnings of the concept, and attacks it outright as an instigator of sectarianism, not a solution.[4] In this paper, I respond to Mahmood's critique by testing her thesis against key legal events in Egypt post-2013. I argue that it is not the secular regulation of religious difference that is the producer of tensions, but rather the manner in which the state empowers religious institutions and espouses Islam as its quintessential identity and *Shari'a* the basis of its public

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[1] Emir Nader, *Imprisoned journalist beaten in prison for conversion to Christianity*, Daily News Egypt (2015), https://dailynewsegypt.com/2015/05/13/imprisoned-journalist-beaten-in-prison-for-conversion-to-christianity/ (last visited Dec 7, 2020).

[2] Ishak Ibrahim, *The Reality of Church Construction in Egypt,* the Egyptian Initiative for Personal Rights (2019), https://eipr.org/en/blog/ishak-ibrahim/2019/07/reality-church-construction-egypt (last visited Dec 7, 2020).

[3] Shawki Abdel Qader et al., *The "Abeer" Strife Burns the Churches of Imbaba and Threatens to Burn the Country*, Al-Youm Al-Sabe' (2011), https://www.youm7.com/story/2011/5/12/-فتنة-«عبير»-تحرق-كنائس-إمبابة-وتهدد-بحرق-البلد/410779 (last visited Dec 7, 2020).

[4] Saba Mahmood, Religious Difference in a Secular Age: A Minority Report (2015).

order. I ultimately conclude that despite that and despite secularism's inherent problems, it still holds promise for positive change for Egypt's religious minorities.

The first section of this thesis offers a theoretical background on secularism and the classic and contemporary debates on it. It holds the author's main critique of Mahmood's take on Egyptian secularism. The second looks at the concept of the "Civil State" and its development in Egypt. The term is examined in its usage as an alternative to secularism, where it largely connotes a secular order that respects religion. The third looks into the promotion of "religious liberty," as a constitutive component of secularism. Those terms have substituted secularism discursively, and have had lives of their own. Having given an overview of what secularism is, Mahmood's critique of it in the Egyptian context, and how the pertinent aspects of secularism fared in Egypt, the thesis concludes with a section that tests Mahmood's arguments against specific key legal events post-2013. Those events are the 2014 Constitution and its drafting process, the Church Construction Law of 2016 and the Personal Status Law for non-Muslims.[5]

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[5] This thesis focuses on the tensions at play in the context of Egypt's authoritarian "secular" regime, which has been the status quo since the fifties. It does not discuss the short-lived reign of the Muslim Brotherhood, nor entertain the possibility of future elections that would bring another Islamist group to power. Similarly, this thesis is not concerned with the perennial debate over Egypt's identity being secular or religious, but rather how that identity manifests itself in the concepts animating the place of religion in Egypt.

II. Secularism

This section surveys the overarching theoretical development of secularism, the debates surrounding it and practical attempts at gauging its different implementations around the world. It also addresses part of its history, competing perceptions of it, its Christian roots, and ends with Mahmood's critique and the author's response to it. The objective of the introduction that precedes Mahmood's argument is to demonstrate the contrast between what she identifies as secularism and its accepted articulations, to capture the nuance missing in her blanket criticism of the term, and to expose her historicist approach to secularism.

A. Competing Definitions: Secularism, Secularity and Secularization

Secularism, secularity and secularization are all used in the discussion of the concept. Distinguishing between the three is important from the onset. Each has its connotation, and its most commonly used meaning, but in political rhetoric, they are often conflated. In his article, *The Secular and Secularisms*, José Casanova disambiguates the difference between the contested terms. He defines "the secular" as a modern category of a realm that is differentiated from "the religious."[6] The term is contested, however, with many debates surrounding the extent of its distinction from the religious, its legitimacy or autonomy. Casanova defines "secularization" as the historical process which saw the differentiation between the secular and the religious, primarily in Europe. Secularism, on the other hand, is basically the way secular worldviews or ideologies are implemented. Casanova defines it as "a whole range of modern secular worldviews and ideologies that may be consciously held and explicitly elaborated into philosophies of history and normative-ideological state projects."[7] He elaborates that it takes the form of a "cognitive differentiation between science, philosophy, and theology," or "practical differentiation between law, morality, and religion."[8] His definition entails that there are multiple secularisms.

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[6] Jose Casanova, *The Secular and Secularisms*, 76 Social Research 1049 (2009).
[7] *Id.*
[8] *Id.*

Casanova does not directly define secularity. However, he uses it to describe the manner in which a certain secularism is "codified, institutionalized and experienced."[9] Therefore, secularism is the practical manifestation of secular ideas, and secularity is the resultant experience from said manifestation. Secularity is defined differently by other key philosophers. Among them is Charles Taylor, whose classic, *A Secular Age,* is central to the modern debate on secularism. In his book, Taylor offers three senses for secularity. The first is the emptying of public spaces from God. To put it more concretely, Taylor explains that this means that a member of society does not need to "encounter God" in his daily dealings or in the administration of his affairs as part of said society. The second sense is the decline of religious belief among members of society, evidenced by declining association with religion and church attendance. And the third is "a move from a society where belief in God is unchallenged and indeed, unproblematic, to one in which it is understood to be *one option among others*, and frequently not the easiest to embrace." He focuses on the third sense in his book, and addresses belief and unbelief as life experiences and not as rival theories.[10]

Providing an alternative definition that focuses on the connotation of each term is Cole Durham. Durham defines secularism as "an ideological position that is committed to promoting a secular order as an end in itself." He explains that this view would at least commit itself to removing religion from the public sphere, and that "more militant versions" would be overtly anti-religion. Secularity, on the other hand, in his view, is "an approach" that avoids identification with religion, and instead offers a "neutral framework capable of accommodating or cooperating with a broad range of religions and beliefs." Clarifying his understanding of the terms, he states that French laïcité has been historically closer to secularism, while American separationism to secularity.[11]

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[9] Casanova, *supra* note 6.

[10] CHARLES TAYLOR, A SECULAR AGE 3 (2007).

[11] Cole W. Durham, *Religious Freedom in a Worldwide Setting: Comparative Reflection* (2011), https://classic.iclrs.org/content/blurb/files/Religious%20Freedom%20in%20a%20Worldwide%20Setting.pdf.

B. The Secularization Thesis

The secularization thesis is central to the study of secularism, and is perhaps the origin of its infamy in Egypt. The 1960s saw the emergence of the secularization thesis, which entailed mainly three aspects: 1. The separation (or differentiation, which is the term Casanova uses) of secular institutions from religious ones. 2. A decline in the role of religion in public life. And finally, 3. A general decline in belief.[12] The third aspect being the most contentious and at the heart of the subsequent debate on secularism. The discourse entailed "cultural-evolutionary understandings of secularism,"[13] which prophesied an inevitable demise of religion. Its Eurocentric normative discourse invoked not only academic refutation in America and the non-West, but also counter-secularist tendencies. The strongest challenge to the thesis came about in the early 2000's with 9/11 and the rise of religion worldwide. Twenty years later, with the prevalence of religion, many of the former proponents of the secularization thesis abandoned it.[14] Others, including Jose Casanova, found that parts of the thesis remained defensible. He maintained that the differentiation of public and secular spheres continued to be viable, while the inevitable decline of religious belief as an outcome of secularization is not. He argued that the normative discourse on secularism in Europe was a "self-fulfilling prophecy," and that European secularism is the exception, and not the norm as initially theorized.[15]

Therefore, the common Egyptian perception that secularism is the public death of religion is in reference to a debunked version of what the term was believed to mean. Its practical articulations offer a wide range of experiences, where the place of religion varies greatly. Those differing experiences have led to the presence of many secularisms.

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[12] *Id.*

[13] Bhatia, *Secularism and Secularisation: A Bibliographical Essay*, 48 Econ. Polit. Wkly. 103 (2013), https://www.jstor.org/stable/24479051 (last visited Mar 5, 2021).

[14] *Id.*

[15] Jose Casanova, *Secularization Revisited: A Reply to Talal Asad*, *in* POWERS OF THE SECULAR MODERN: TALAL ASAD AND HIS INTERLOCUTORS 17 (2006), https://berkleycenter.georgetown.edu/publications/secularization-revisited-a-reply-to-talal-asad.

C. Capturing the Different Secularisms

Those secularisms, and the differences between them, fundamentally boil down to how the different states regulate religion and religious difference. Speaking of the decisive role of the state, Hussein Agrama writes:

> The peculiar power of secularism cannot therefore be captured by a focus on the norms that it imposes, as it resides in the questions that it obliges and in how the ambiguities of state sovereignty and legal authority continue to animate them.[16]

In an attempt to "capture" how the different states - with the "ambiguities" of their sovereignty and legal authority - "animate" the questions within which secularism "resides," Durham designed a spectrum encapsulating a variety of secularisms/secularities and their effects on religious freedom. While the latter's work is not specifically on secularism, it is particularly relevant to this thesis, as it focuses on how secularism affects religious freedom. Addressing the poignant role played by the sovereign state in its relationship with religion, Durham analyzed state-religion configurations comparatively. His analysis focused on the degree of identification of the different states with religion, and found that the degree of identification reflected on religious freedom. He came up with a loop-shaped continuum that starts with positive identification and ends with negative identification, both of which result in infringement of religious freedom. At the tip of the loop lies what he describes as "non-identification." It is at the point of "non-identification," that religious freedom is most respected. Speaking of the different positions in his continuum, Durham highlights the fluidity of Church-State arrangements:

> The various positions along this loop need to be understood as Weberian ideal types; no state structure corresponds exactly with any of the described positions. Indeed, it is probably best to think of the various positions along the loop as contested equilibrium points reached in different societies at different times.[17]

He also argues that the diagram helps map current positions by states, and "also the range of discourse arguing for alternative positions at a given time in a particular country."[18]

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[16] Hussein Ali Agrama, *Reflections on secularism, democracy, and politics in Egypt*, 39 Am. Ethnol. 26–31 (2012), http://doi.wiley.com/10.1111/j.1548-1425.2011.01342.x (last visited Dec 7, 2020).

[17] Durham, *supra* note 11.

[18] In his view, in the West today, the key source of infringement on religious freedom lies in states prioritizing their neutrality over religious freedom, describing state neutrality and religious freedom as two competing key principles of the secular state. Interestingly, in the dynamic that concerns this thesis, it is the state's Islamic identity and religious freedom that are competing principles.

Durham's work is unique for capturing this fluidity and relating it to religious freedom using precise criteria, hence its relevance to this thesis. His work helps capture a gradation of what may be branded secular, with a focus on the embedded criteria and their influence on the state of religious freedom. This qualitative approach is especially lacking in the arguments put forward by Mahmood, as will be discussed later in the paper.

D. Perceptions of Secularism and Secularization

While secularism, as experienced, is fluid and comes in many forms, perceptions of it have been largely rigid. Those perceptions, from East and West, are so powerful that they are described to possess "a degree of constitutive force."[19] They guide international relations, trigger local conservatism, and/or performances of national identity conforming to or opposing those passionately held perceptions.[20] For instance, Wendy Brown finds that "Western secularism is so relentlessly defined through its imagined opposite in Islamic theocracy."[21] The intensity - the "constitutive force"- of that misperception is also alive and well in the Arab World, and particularly Egypt, where secularism is anathema, that its fiercest proponents dare not mention it by name. In the Egyptian collective imagination, secularism only exists in its most strict form, where it is antagonistic to religion. This view is so deeply entrenched that secularism in popular culture is synonymous with atheism. Perhaps among its more famous proponents is Farag Fouda, who was assassinated in 1992 by Islamists for advocating for secularism. In his final book, *Dialogue on Secularism*, he addressed that perception among Islamists, stating that secularism for them is "an incoming demonic bud" and "an intruder atheist concept."[22] This narrative continues to be common today.

The schism is not only between East and West. It is also deep across the Atlantic. In his classic, *Public Religions in the Modern World*, José Casanova tries to reformulate the secularization

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[19] Agrama, *supra* note 16.

[20] Agrama discusses how it guided the international community in its dealing with Egypt post-2011. The Arab initially friendly, and later antagonistic stance towards secularism is one example.

[21] Wendy Brown, *Idealism, materialism, secularism?*, SSRC The Immanent Frame, https://tif.ssrc.org/2007/10/22/idealism-materialism-secularism/ (last visited Feb 14, 2021).

[22] FARAG FOUDA, DIALOGUE ON SECULARISM (1986).

thesis to reconcile the competing European and American takes on secularism. According to him, the dominant narrative in Europe is that its secularization is "an empirically irrefutable fait accompli," and the majority of European sociologists continue to hold on to the secularization thesis "unreflexively and uncritically." The Americans, on the other side, reduce secularization to its most vulnerable tenant, that is its projection of a decline in belief, and therefore dismiss it as "myth." His reformulation entailed maintaining the main aspects of the secularization thesis, save for its prediction concerning a decline in belief among people. He finally concedes to having failed to reconcile the two sides with his efforts.[23]

E. The Christian Roots of Secularism

Secularism's Christian roots have been grounds for arguing for their incompatibility with the Islamicate world. This line of argument, as pursued by Mahmood, falls into historicism, and reduces the concept to its roots.[24] Additionally, the dynamic between Christianity and secularism has been a complex one. Christianity has both encouraged, and resisted, secularism. The degree to which secularism's origins are attributable to Christianity has been the subject of significant debate. In his 1949 book, *Meaning in History: The Theological Implications (better translated to Presuppositions) of the Philosophy of History,* Karl Löwith examined the work of key philosophers on progress and secularism. He famously argued that "the modern idea of progress is a transformation into a worldly form of Christian eschatology."[25] Critiquing his work was Hans Blumenberg who challenged the assumption that a Christian concept could be secularized.[26] The Löwith-Blumenberg debate was central to the understanding of secularism at the time.

More contemporary writers continued to animate the question. Casanova, for instance, argues that the Christian roots of secularism are undeniable. In an article in response to Talal Asad, he

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[23] Casanova, *supra* note 15.

[24] Lama Abu-Odeh, *Religious Difference in a Secular Age: The Minority Report by Saba Mahmoud* 148 *(2016) Book Review*, Georget. Univ. Law Cent. (2017), https://scholarship.law.georgetown.edu/facpub/1951 (last visited May 10, 2018).

[25] According to Robert Wallace, Löwith explains that by eschatology he means: "as simply an orientation to the future as the crucial 'horizon' for man, and hope as man's attitude in relation to that horizon."

[26] Robert M. Wallace, *Progress, Secularization and Modernity: The Löwith-Blumenberg Debate*, New Ger. Crit. 63–79 (1981), https://www.jstor.org/stable/487864 (last visited Mar 5, 2021).

cites the work of David Martin, who demonstrated that Christianity played a significant role in the genealogy of secularization, both in the Latin-Catholic and the Anglo-Protestant cultural areas. In the former, a "collision between religion and the differentiated secular spheres" catalyzed the critique of religion and stirred "ample resonance" for it in Europe. This trend has resulted in "the secularist genealogy of modernity [being] constructed as a triumphant emancipation of reason, freedom, and worldly pursuits from the constraints of religion." Moving to the second cultural area, the Anglo-Protestant, and especially as it is experienced in the United States, "there was collusion between religion and the secular differentiated spheres." He moves on to explain that while the Latin-Catholic variant saw religion inspire secularism in opposition to it, the Anglo-Protestant religion actually advocated secularism. This is due to the presence of multiple religious groups aspiring to equal treatment by the state and enjoying freedom from its interference in the American experience. The first amendment's dual clause, therefore, aimed at protecting the federal government from religious entanglement, but equally also protecting religious freedom, Casanova highlighted. He concluded that protestant Christianity especially "is intrinsically implicated in the development of secular modernity."[27]

While the Anglo-Protestant tradition was a supporter and instigator of the associated secular human rights discourse, the Latin-Catholic tradition went through a different process. In this process, the Catholic Church shifted positions from outright condemnation of secular human rights as against the Church, to accepting, then endorsing the discourse. Casanova relays how successive popes represented the steps towards the shift. The Papal position moved from one that considered human rights and freedoms as "anathema and irreconcilable with the Catholic faith" to finally accepting it in the 60's after decades of rejection. The resistance to religious freedom especially emanated from the implication that "true and false religions" are equal. After its shift in position, the Catholic Church "consistently presented the protection of human rights as the foundation of a just social and political global order."[28]

The complexity of the history of Christianity and secularism demonstrates that it is reductionist to deem the concept alien or incompatible with Muslim culture by referring to its roots as

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[27] Casanova, *supra* note 15.
[28] *Id.*

Christian. To describe its roots as Christian implies it cannot be divorced from its origins, and is indefinitely tethered to them, while the relation between the two was more layered and complex.

F. Critique of Secularism

While the previous section highlights the main areas of contestation within secularism, this one addresses Talal Asad and Saba Mahmood's critique, with a focus on the latter. Asad provides the foundation on which Mahmood builds her critique of secularism. Both Asad and Mahmood address Egyptian secularism in specific. Asad lays the ground for the critique by examining the history of modernization and secularization in colonial Egypt in his book, *Formations of the Secular*, and Mahmood expounds on present-day Egyptian secularism in her book, *Religious Difference in a Secular Age*.

1. Talal Asad on Egyptian Secularism

In his Foucauldian analysis of the secular and secularism, Asad famously critiques modernity in its secularism and promises of religious freedom. He does that by offering genealogies of religion and of the secular, that helped "deconstruct the secular self-understanding of modernity that is constitutive of the social sciences."[29] His critique of liberalism and secularism uncovers, "the coercion, silencing, and exclusion that inhere in the alleged universality of Western traditions."[30] His work emerged in the wake of the post-9/11 War on Terror, when the West's secularism was contrasted with Middle Eastern religiosity, which from a Western perspective inspired the terrorism that marked this era. In mainstream Western rhetoric, secularism was portrayed as a solution to religion-inspired violence. His work challenged the mainstream discourse of the time, and offered a fresh perspective.

Asad gives an example of how secularism is guilty of the very injustices it claims to overcome. He argues that while in Islam for instance "there are basic cultural categories that define citizens as necessarily unequal," (meaning that non-Muslims do not enjoy the same privileges under Islam,) similar inequality exists in the modern state. In the modern state, those not belonging to

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[29] *Id.*

[30] KHALED FAHMY, IN QUEST OF JUSTICE: ISLAMIC LAW AND FORENSIC MEDICINE IN MODERN EGYPT 23 (2018).

the dominant majority group, would be treated as "'minorities' unwilling or unable to assimilate to the national culture.'"[31] His work rightly pokes holes in the long-held superiority of the secular order. Nonetheless, his critique falls into historicism, idealizes pre-modern religious governance and fails to offer alternatives to secularism.[32]

In his classic, *Formations of the Secular,* he dedicates a chapter to the secularization of *Shari'a* in colonial Egypt. In the chapter, he argues that colonial modernization and secularization of the Egyptian legal system led to a situation where *Shari'a* is relegated to the private sphere leading to conceptual changes of the law in which there is an artificial separation of morality and law. These changes led to a system engineered to create a new public morality that is more Europeanized. He is not concerned with the restriction of *Shari'a* as much as he is with the conceptual changes it allowed.[33]

Laying the ground for his argument, he argues that secularism did not exist in Egypt before modernity. He relayed the story of modernizing Egyptian legal system - "narrowing of *Shari'a* jurisdiction and importation of European legal codes" - from the perspective of how these changes made secularism "thinkable as a practical proposition" in Egypt.[34] In his view the process took place in mimicry of the West, instead of building on "preexisting *sharī'a* traditions."[35] According to him, the Egyptian jurist Tariq al-Bishri contends that "the mimicry" of the West was motivated by "European coercion and Egyptian elites' infatuation with European ways." He views the shift that saw the implementation of Mixed Courts codes in National Courts as an "...Aspiration for a Westernized future rather than for a reformed continuity of the recent past." Prior to the move, Husayn Fakhri Pasha had described Mixed Courts codes as more suitable to Egyptian's than Shari'a courts and more consistent with the "arrangements to which they were accustomed."[36]

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[31] TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY 254 (2003).

[32] Atalia Omer, *Modernists Despite Themselves: The Phenomenology of the Secular and the Limits of Critique as an Instrument of Change*, 83 Journal of the American Academy of Religion 27–71 (2015), https://www.jstor.org/stable/24488130 (last visited May 12, 2021).

[33] Fahmy, *supra* note 30.

[34] Asad, *supra* note 31, at 208.

[35] *Id* at 212.

[36] *Id* at 215.

Asad argues that the hybrid system confining *Shari'a* to personal status issues is "precisely a secular formula for privatizing 'religion.'"[37] This point is key to this thesis and was expounded on by Mahmood, particularly relating to the Coptic community. Defending his argument on the secularizing effect of that system, Asad refers to Mohamad Abduh's take on *Shari'a* in a report that he compiled in 1899. In the report, Abduh makes a distinction between private and public, and places family affairs within the private, and argues that *Shari'a* courts should take charge of that private domain. Interestingly, Abduh also called for the independence of Shari'a courts from government. His reference is used as support for the restriction of *Shari'a* to personal status matters being a secularizing move in that Shari'a as religious was confined to the same private space as personal status matters, which are also private.

Asad continues to defend his argument:

> It is because the legal formation of the family gives the concept of individual morality its own "private" locus that the *shari̅'a* can now be spoken of as "the law of personal status"—*qa̅nu̅n al-ahwa̅l al-shakhsiyya*. In this way it becomes the expression of a secular formula, defining a place in which "religion" is allowed to make its public appearance through state law.[38]

Perhaps indeed the restriction of *Shari'a* to the private locus of the family has a secularizing effect, but it remains far from secular. Instead of perceiving the move as confining religion to the private, one can look at the same set of events as entrenching a place for religion in a space that is public - government and court - that invades the confines of the private family.

Perhaps Asad's argument would have been more grounded and consistent with the practical realm, if Abduh's recommendation had been followed by the government and *Shari'a* courts became independent of all government intervention. However, that is not the case. From the onset of the modernization, and today, the government administers *Shari'a*.

At the heart of his argument is the secularization project's separation of morality and law, which he primarily observes in the work of Ahmad Safwat. According to Safwat, morality pertained to

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[37] *Id* at 229.
[38] *Id* at 230.

transgressions that are punishable in the afterlife, while law pertained to transgressions that it punishes in this world. Explaining why the distinction was damaging, Asad argues: "If traditionally embodied conceptions of justice and unconsciously assimilated experience are no longer relevant to the maintenance of law's authority, then that authority will depend entirely on the force of the state expressed through its codes." He continues, "I argue that it is the power to make a strategic separation between law and morality that defines the colonial situation, because it is this separation that enables the legal work of educating subjects into a new public morality."[39]

The author agrees with Asad that reforming *Shari'a* within a secularization project that opted for restricting it to personal status matters was problematic (The colonizer/reformer had found that to also secularize personal status law would be a drastic change.). However, while Asad critiques the process for its artificial separation of morality and law, as he dissects its colonial underpinnings and motivations, the author finds it problematic in its wedding the state to religion in a perpetual bond. What if the reformers had instead *actually* relegated the implementation of *Shari'a* to the private sphere? Perhaps *Shari'a* would not have been removed from its original dynamic and fluid pre-modern legal framework, and the state would not have been entangled in the enforcement of *Shari'a* (and Christian and Jewish canon laws) on believers, nominal and real. Had an arrangement along these lines been devised, a secular order that accommodates religion may have been possible, in a fashion that promotes the religious freedom of the majority and the minority.

In his book, *In Quest of Justice*, historian Khaled Fahmy critiques Asad's argument that secularizing and modernizing Egypt has sprung from a separation of ethics from Islamic law. He contends that that separation had always existed in an Islamic discursive tradition.[40] He takes issue with the methodological approach Asad employs in that it focuses on the conceptual changes dismissing archival research as a means of gauging them.[41] He explains that it is especially that archival research that exposes not just the changes, but also how and when they

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[39] Asad, *supra* note 31, at 240.

[40] Fahmy, *supra* note 30, at 25.

[41] In chapter 7 of his book, Asad literally states that the questions he asks could not be answered through archival research.

came about. His book posited that during the reign of Mohamed Ali's descendants, and prior to the British occupation of 1882, Egypt's modernization project "continued to regard Islamic law as a foundation for justice while borrowing scientific techniques from Europe without fear of cultural contamination." Fahmy also pinpointed that Asad idealizes pre-modern Islamic law and overlooks the role of the state in legislating Islamic law.[42] In so doing, he unreflexively views *Shari'a* through a *fiqhi* discursive tradition, "in the double sense that it is a product of the discursive tradition of the *fuqaha*.' (jurists) and is based solely on ethics and aimed at the cultivation of the virtues, with no role in state politics."[43] Fahmy's book contends that it is possible that other discursive traditions existed, in which conceptions of *Shari'a* legality entailed both *fiqh* and *siyasa*.

Asad's legacy has also been criticized for adopting "an anti-realist and reactionary position." A position that affects his pupils' ability to contribute to a conversation aiming to find alternatives to the "the hegemonic discourse" they rightly critique. Atalia Omer refers to academics taking Asad's analysis of the secular and religious as the foundation of their work as Asadians. Chief among them are Saba Mahmood and Hussein Agrama. She criticizes their critique of the discourse of religious freedoms through a genealogical framework for relying "on a reactionary, overly intellectualized, reductionist account of modernity." She adds that their critique falls into the pits of:[44]

> Theorizing Christianity as only hegemonic and missionary, articulating a purist conception of an antecedent tradition prior to the advent of the modern state, locating agency disproportionately in the geopolitical and ideological unfolding of Western (Christian-centric) hegemonic discourse, and developing a crucial challenge to the liberal domestication of religion while also resisting analysis of the entanglement and co-imbrication of religion and nationalism.[45]

Omer's multi-faceted critique is supported in this paper through the examination of Mahmood's take on Egypt's Coptic minority.

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[42] Adam Sabra, *The nature of Egypt's modernity: State paradox*, Ahram Online (2019), https://english.ahram.org.eg/NewsContent/18/62/329531/Books/Review/Book-Review--The-nature-of-Egypts-modernity-State-.aspx (last visited May 9, 2021).

[43] Fahmy, *supra* note 30, at 25.

[44] Omer, *supra* note 32.

[45] *Id.*

2. Saba Mahmood's Critique of Secularism

Following in Asad's footsteps, Mahmood studies the situation of the Coptic minority in Egypt, arguing that "modern secular governance has contributed to the exacerbation of religious tensions in postcolonial Egypt, hardening interfaith boundaries and polarizing religious differences."[46] In her book, *Religious Difference in a Secular Age: A Minority Report,* she takes Egypt as a case in point to demonstrate the shortcomings of the secular project globally. She takes issue with the secular project's failure to deliver on its promises of religious liberty and equality and draws parallels between its implementation in Egypt and the West. Mahmood concedes that Egypt's political secularism is not exemplar, but insists dismissing Egypt's secular project for its flaws "blinds us to common features of the secular project shared by Middle Eastern and Euro-Atlantic societies."[47]

Permeating her book is an attempt to exonerate religion, as essentialized by the West, and to hold the regulation of religion by the state, through political secularism, responsible for the plight of minorities in the West and non-West. In that vein, she argues:

> While Islamic concepts and practices are crucial to the production of this inequality (that experienced by Copts), I argue that the modern state and its political rationality have played a *far more decisive role* in transforming preexisting religious differences, producing new forms of communal polarization, and making religion more rather than less salient to minority and majority identities alike.[48]

Indeed Islamic concepts may play a limited role, depending on how the consecutive governments chose to employ them for their political ends. However, to claim that the modern state has "a far more decisive role," seems to downplay a long Coptic history under the pre-modern state in which Copts were persecuted and lived at the whim of rulers. How comparable is the widespread persecution under Dhimmitude to current day "polarization" and sectarianism?

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[46] Mahmood, *supra* note 4, at 1.

[47] Mahmood, *supra* note 4, at 4.

[48] Mahmood, *supra* note 4, at 2. Emphasis added.

Ascribing to an understanding of secularism that focuses on its Christian origin, Mahmood argues that secular neutrality is a Euro-Atlantic norm imposed by colonialism on the non-West. To support her point she quotes the *Lautsi v. Italy* decision (2011) of the European Court of Human Rights (ECtHR) which justified allowing the display of crucifixes in classrooms by describing the crucifix as a symbol of the secular state itself, as it was Christianity that gave rise to the acceptance of diversity. The quote used by Mahmood holds truth, but the attribution it makes to Christianity could be made to Islam and other value systems:

> Looking beyond appearances it is possible to discern a thread linking the Christian revolution of two thousand years ago to the affirmation in Europe of the right to liberty of the person and to the key elements of the Enlightenment . . . namely, the liberty and freedom of every person, the declarations of the rights of man, and ultimately the modern secular state. . . . It can therefore be contended that in the present-day social reality the crucifix should be regarded not only as a symbol of a historical and cultural development, and therefore of the identity of our people, but also as a symbol of a value system: liberty, equality, human dignity and religious toleration, and accordingly also of the secular nature of the state.[49]

Granted the crucifix does symbolize the secular nature of the state, would its Christian roots be grounds for dismissing the secular project? Lama Abu Odeh addresses that specific point. In her review of Mahmood's book, she states that in countering the essentialization of Islam, Mahmood provides "an account that moves between crude historicism - secularism is its history - and formalist generalizations reminiscent of the ways "Islam" is treated in mainstream discourse. Islam is nothing but the history."[50]

As part of secularizing Egypt post-independence, a hybrid system governing the personal status affairs of Islam-recognized religious minorities was devised. The system, which was described as a "neo-millet" system, due to its semblance to its preceding Ottoman arrangement, entailed lay[51] courts applying the religious laws of the minorities to cases involving their adherents.[52] The

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[49] Mahmood, *supra* note 4, at 7. The citation of the quote: Italian Administrative Court's judgment, quoted in *Lautsi and Others v. Italy*, March 18, 2011, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040, para. 15.

[50] Abu-Odeh, *supra* note 24.

[51] I am choosing not to use secular, as despite the judges having no formal religious education, they do apply religious laws.

[52] P. S. Rowe, *Neo-millet Systems and Transnational Religious Movements: The Humayun Decrees and Church Construction in Egypt*, 49 Journal of Church and State 329–350 (2007), https://academic.oup.com/jcs/article-lookup/doi/10.1093/jcs/49.2.329 (last visited Dec 7, 2020).

botched arrangement is at the heart of Mahmood's critique of secularism. She argues that the system, in its secularism, led to "family law bear[ing] an inordinate weight in the reproduction and preservation of religious identity." The secular nature of the process, in her view, is due to "Religion, sexuality, and the family [being] relegated to the private sphere... thereby conjoining their legal and moral fates."[53] For the court to apply a religious law, to any member of society, whether that member chooses or not, is hardly a product of secularism. If anything, it is the opposite, as demonstrated by the varying definitions presented earlier. The fact that the system moved from being purely religious administered by religious institutions, to being religious, but administered by lay judges, does not in any way make it secular.

Abu Odeh addresses this misconception and refutes that this system can be attributed to secularism. "Whatever invisible line there is that separates 'secularism', with all the internal possibilities of its articulation, is crossed here to something that is 'not-secularism'," she argued, mentioning Egypt's quintessential law on the issue that demonstrates the contradiction in Mahmood's reading. She states that under this system Egyptian law stipulates that one can only marry "according to the doctrine of the religion you are born into." Abu Odeh axiomatically adds:

> If, however, the Egyptian state kept the rule above, namely, 'the duty to marry according to religious law', but also allowed for an opt-out right of marrying according to 'civil law' and made this right available to all Egyptians, then we would still be within the domain of the "religious liberty" of secularism. But then if such an option existed, many Egyptians, Muslims and otherwise, would have flocked to this opt-out, thereby "minimizing" religious difference. It would then be hard to argue, as Mahmood does, that it was "secularism" that exaggerated religious "difference" (or gender inequality); and the more common one that it was unfinished secularism that was the culprit would make much more sense.[54]

The point Abu-Odeh makes holds for a number of legal arrangements involving the state's regulation of religious difference. In those arrangements, it is clear that it is the manner in which it regulates difference that accentuates it, not the mere regulation. This holds true for the new Church Construction Law and the yet-to-be issued Personal Status Law for non-Muslims, as will be demonstrated later in this thesis.

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[53] Mahmood, *supra* note 4, at 26.
[54] Abu-Odeh, *supra* note 24.

Applying a similar rationale to Egypt's Baha'i minority, who do not enjoy the same "autonomy" or rights as Copts, Mahmood examines how Egyptian courts have dealt with the question of recognizing their "outlawed" faith. She compares the Egyptian courts' employment of secular concepts to deny basic Baha'i rights to that of the European Human Rights Court in their denial of the religious liberty of their Muslim minorities. In her comparative exercise, Mahmood attempts to highlight the failure of secular political rationality to maintain religious liberty (which she contests as a concept) while maintaining public order, yet another secular production. She pinpoints the inherent tension in the secular order, where the sovereign state is committed to civil and political equality in its regulation of religious difference, while also having the prerogative of preserving the values and traditions of the majority. Animating this tension, Mahmood argues, the state "inevitably must make normative judgments about what religion is or ought to be and its proper place in the social life of a polity."[55]

Baha'is in Egypt have struggled for the recognition of their religion in government identification documents since Nasser outlawed their religious activities in the 60's. They had lived peacefully in Egypt since the 1800's, and were only banned due to the headquarters of the Baha'i international community being in Israel, at the height of the tensions with the neighboring state.

The Baha'is' judicial struggle for recognition started after the ban, which they challenged in court. Court after court would rule to the effect that they do not enjoy the same civil rights of adherents of "heavenly religions," explicitly stipulating their inequality to them. In 1975, the Supreme Court upheld the ban "declar[ing] that the Egyptian state was only obligated to treat those individuals as equals 'who are comparable to each other with respect to their legal status— [that is,] Muslim should be treated as equal to other Muslims, and Christians to other Christians or to Jews, but Christians should not necessarily be treated as equal to Muslims, or Bahais to Christians.'"[56] In 1983, the Supreme Administrative Court ruled in favor of a Baha'i's right to

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[55] Mahmood, *supra* note 4, at 151.

[56] Mahmood, *supra* note 4, at 156. Mahmood cites the quote included in the quote I used as from Supreme Court decision on case no. 7 of the second judicial year, issued on March 1, 1975. Original quote from Johanna Pink, *A Post-Qurʾānic Religion between Apostasy and Public Order: Egyptian Muftis and Courts on the Legal Status of the Bahāʾī Faith*, 10 Islam. Law Soc. 431 (2003), https://www.jstor.org/stable/3399425 (last visited Mar 25, 2021).

have his religion registered in his identification documents, however, cautioned that their public practice of their religion continued to be prohibited in Shari'a.[57] This ruling was later overturned.

When government civil records were digitized, the computer generated religious affiliation choices did not include the Baha'i faith, only the "heavenly" religions of Islam, Christianity and Judaism. The community had to resort to courts again, which regardless of the outcome of their rulings maintained the same rationale. In 2006, a lower administrative court ruled in favor of the Baha'is right to register their chosen faith on their IDs, arguing that the explicit mention of their Baha'i faith on their IDs was essential for the government to treat them accordingly, lest it affords them rights only reserved for adherents of heavenly religions. In other words, including their religion on their ID's was necessary to maintain their inequality with their Muslim, Christian and Jewish counterparts. The court ruling argued, "Islamic jurisprudence requires a disclosure that would allow [a distinction to be made] between a Muslim and non-Muslim in their exercise of social life, so as to establish the range of rights and obligations reserved for Muslims that others cannot avail of."[58] This ruling was also overturned, and finally the Supreme Administrative Court allowed Bahais to include a dash instead of "Baha'i" in their IDs, albeit asserting that their public practice of their religion is against public order.[59] These emblematic court decisions were issued under Mubarak at the height of the endorsement, "institutionalization," and "idealization" of the concept of the Civil State.[60]

Mahmood relays the Baha'i struggle in Egyptian courts, and compares it to that of Muslims in the ECtHR. One prominent case she refers to is that of a Muslim Swiss teacher where the ECtHR confirmed the federal government's decision that "The wearing of a headscarf and loose-fitting clothes remains an outward manifestation which, as such, is not part of the inviolable core of freedom of religion."[61] In its decision, the court passed judgement on the practice itself as

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[57] Mahmood, *supra* note 4, at 157.

[58] Originally quoted in Mahmood, *supra* note 4, at 158. Administrative Court decision on case no. 24044 of the forty-fifth judicial year, issued on April 4, 2006.

[59] Mahmood, *supra* note 4, at 162.

[60] Limor Lavie, *The Idea of the Civil State in Egypt: Its Evolution and Political Impact following the 2011 Revolution*, 71 Middle East J. 23–44 (2017), http://muse.jhu.edu/article/647574 (last visited Apr 21, 2020).

[61] Mahmood, *supra* note 4, at 169. Originally quoted from: *Dahlab v. Switzerland*, February 15, 2001, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22643#.

promoting inequality between men and women, and used its judgement as grounds for denying the teacher her freedom to wear her veil:

> It appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others, and above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.

In a manner similar to that of the Egyptian court, the ECtHR invoked public order, and passed value judgement on Islamic practices, effectively circumscribing Muslim manifestation of religion.

The similarities that Mahmood brings to light serve the purpose of exposing that the West attempts to hold the Global South to standards it does not fully maintain. Nonetheless, there needs to be emphasis on the fact that the employment of the same secular rationality that attaches more weight to majoritarian public order than to religious freedom does not lead to the same outcomes in the states that are the subject of Mahmood's comparison. One has to pay attention to the degree to which those countries compromise religious freedom for the sake of public order. There is a wide range of regulated manifestation. The circumscription of any is surely grievous to the adherents of the religion. Nonetheless, from a pragmatic perspective, there are limitations that are more tortuous than others. One could try to gauge the gradation based on the level of manifestation circumscribed. For instance, the manifestation on an ID card, that is carried by the adherent of the minority religion, concealed in their wallet or pocket, and only shared with government officials for administration of their personal affairs, is hardly public. A building with religious symbols,[62] or religious attire, visible to everyone is a more public manifestation. An adherent's religious attire worn serving as a public servant is even more symbolic as they act as representatives of the state. The distinction made here does not at all aim to belittle the harm caused to the minorities in Europe, nor does it refute the double-standard secular rationale applied by the court pertaining to the manifestation of other religions. However, the distinction shows that from the perspective of the affected minority in Egypt, whose most basic religious

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[62] *See generally, Ligue de Musulmans de Suisse and Others v. Switzerland,* June 26, 2011, https://hudoc.echr.coe.int/eng#{%22dmdocnumber%22:[%22887980%22],%22itemid%22:[%22001-105618%22]}

freedom is breached, the secular formula has significant improvement to offer, even if it does not eradicate the perennial problem altogether.

Interestingly, Mahmood exonerates religious intolerance from the infringement on Baha'i religious liberty altogether. Instead of acknowledging the role of the implementation of a religiously intolerant interpretation of Shari'a, she argues that it is the "secularization of Shari'a" that led to this inequality. She explains that it is the flawed, out of place, implementation of Shari'a by Egypt that is at the heart of the issue. She contends that Shari'a is taken out of its originally fluid and flexible context, into the liberal legal meta-context, with which it conflicts. She adds that in Egypt, judges, without any religious training,[63] pass Shari'a rulings, which had been codified in a manner that is contradictory to the very nature of Shari'a. But what would a Shari'a ruling taken in the accommodating context entail? History tells us, and she refers passingly to that, that in implementation of Shari'a non-Abrahamic religious minorities were "tolerated and integrated." Toleration and integration is indeed a much lower threshold than what a secularism, that does not attempt to retain a religious component, offers, even in its most anti-religious articulations.

In her critique of Mahmood's book, Abu-Odeh refers to Mahmood's "nostalgic" reference to the Ottoman empire's Dhimmi system, insinuating that it offered minorities more religious freedom. Abu-Odeh vehemently disagrees that the Dhimmitude is comparable to modern Egypt:

> If [Ahl Al Zhimma] had to pay Jizya (tax) to buy off their corporate independence and if they had to be formally placed as second in status to the Muslim majority then the trade-off may not have been so bad. In other words, Mahmood seems to suggest that the trade-off between second class status for corporate status is superior to the one posited by the modern secular state between equal citizenship for minoritarian status combined with the grant of religious liberty.[64]

Mahmood's comparison of the two incomparable situations stems from her overarching critique of modernity, where she dismisses individual autonomy and freedom as Christian and Euro-

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[63] Every law student in Egypt studies Shari'a. Also, is she suggesting only Sheikhs with purely religious training can adjudicate based on Shari'a? Attributing a degree of sanctity to the Azharite religious education that imams receive has long been the subject of heated debate in Egypt. In the context of this debate, conservatives argue that lay Muslims are not allowed to debate, and question, Islamic theology. Reformists conversely argue that in Islam there is no priesthood, and that all Muslims are invited to *ijtihad.*

[64] Abu-Odeh, *supra* note 24.

centric. According to Omer, this is evident in her earlier work on pious Muslim women in Egypt.[65]

In conclusion, this overview of Mahmood's critique and response to some of the arguments shows her essentialization of modernity and secularism and downplaying pre-modern injustices. The next section looks at Egyptian secularism, as well as at its derivatives: the "Civil State" which is used as an alternative term, and religious liberty as a constitutive component of secularism.

G. Secularism in Egypt

Mahmood's critique of the Egyptian secularism does not preclude that Egypt - in its public opinion and generally accepted national identity - does not at all identify as secular today. Describing the place of religion in Egyptian society, buzzwords include a "Muslim state," "civil state," "a citizenship state," but certainly not secular. The demise of the term was perhaps concurrent with the neutralization of leftist powers under Sadat, which was also a time that saw a process of "Islamization," which necessarily meant the exclusion of the term. More recent debate, post-2011, saw "intellectuals" try to rid the concept of its perception as anti-religious among the public, but to no avail. The Egyptian public imagination perceived secularism as possible only in its strictest articulation, and - as the long-abandoned secularization thesis posited - inevitably meaning a decline in belief. The lengthy introduction on secularism that preceded this section aims at qualifying the Egyptian perception of secularism, while also suggesting that the concept continues to hold promise, despite its contestation and inherent tension.

If we were to place Egypt on Durham's continuum, which offers a means for gauging the place of religion in Egypt in relation to religious freedom, it would be placed as somewhere between the *Established Church* and *Religious Status* categories. As he explains, this entails the state identifying with a specific religion. In Egypt, that is Sunni Islam, represented by Al-Azhar, and Coptic Orthodoxy, represented by the Coptic Orthodox Church. The state gives monopoly to those institutions over religious life by restricting exit by adherents, who are also bound by religious law in their personal status issues without a civil recourse option. Exit from Islam and

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[65] Omer, *supra* note 32.

Christianity is not recognized, unless it is from Islam to Christianity. Some divergent beliefs are unofficially tolerated or unrecognized by the government, which does not guarantee their religious liberty to worship, and also explicitly denies their equality to adherents of the established religions. This group is subject to prosecution for blasphemy, suffers with registration of marriages, births, and includes Baha'is and Shias.[66]

This arrangement has indeed accentuated religious difference, as Mahmood argues. The role of the botched and despotic government regulation of religious difference in favor of the established religions on one side, and in favor of Islam over Christianity on the other, has in fact added fuel to fire when it comes to sectarian tensions and violence. Society's deeply held sense of religiosity is genuine, and is integral to national identity, even if it were encouraged by governments consistently invoking religion to legitimize themselves and/or rally support.

Currently, for a political movement or party to espouse itself with secularism would mean that it loses most of its popular support. That is due to the Egyptian national identity oscillating between aspiring to reviving the glorious Islamic past through an Islamist project, and rejecting an Islamist project, primarily for its corruption of religion by miring it in politics, while maintaining its deeply held moderate religiosity. Secularism has no place in either. The concept of the "Civil state," conversely, had a different journey in Egyptian public imagination and history.

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[66] *See generally* US State Department, *EGYPT 2019 INTERNATIONAL RELIGIOUS FREEDOM REPORT* (2019).

III. The Fake Consensus over "Civil State," and the Politicization of Religious Liberty

While advocating for Coptic rights under the banner of secularism had been stigmatized, and rendered useless if not counterproductive to the cause, advocacy under the banner of "the civil state" prevailed. The issue with it, however, was a state of "dissensus" over what it entails, in addition to a prolonged process of devoiding it of meaning by claiming it for the purpose of exporting a progressive image to the international community, without actually bringing it to life.[67] The same is true for other liberal democratic notions that had found their way to government and opposition discourses, but meant different things to the different factions.[68] This chapter surveys the history of the term Civil State, highlighting its inefficacy in promoting more separation between religion and state. It concludes with a section on how the concept of religious liberty, a constitutive component of secularism, was also compromised due to its colonial history and employment in the persecution discourse that typically villainizes Islam.

A. Introduction and Initial Debate

The concept of the Civil State found its way to Egypt from republican philosophers and Christian intellectuals in the 19th century. The discourse of the time was one in which the West, or those inspired by its progress, persuaded the Arab world to adopt civil rule that separates religion from government. One of the early proponents of civil society, Fatah Antun, called for equality of all citizens under civil rule where Christians enjoy the same rights as their Muslim counterparts. While initially rejected as "secularist and alien" to Islam and provoked rejection and even punishment, it found its way into public debate.[69] One early response to the concept was by Islamic scholar and jurist Mohammed 'Abduh, who argued that Islam adopted civil rule from its inception. He contended that there is no theocracy in Islam, and that because the state is not theocratic, then it is civil. He supported his argument by the fact that in Islamic *Shari'a* people choose the ruler, and the ruler is not deemed infallible. In his understanding, the religious establishment in that civil state would be "enlightened, reasonable and tolerant." Limor Lavie,

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[67] Lavie, *supra* note 60.
[68] SEBASTIAN ELSÄSSER, THE COPTIC QUESTION IN THE MUBARAK ERA 157 (2014), https://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=3056216
[69] Lavie, *supra* note 60.

who traces the genealogy of the term in Egyptian history, describes that model as one based on a "middle-way model that combines religion and modernity." She explains, however, that while the concept was legitimated to some extent, it remained "marginal" and primarily utilized in dialogue with the West to portray Islam as compatible with Western modernity.[70][71]

The 1970s saw a more robust debate surrounding the term catalyzed by the rise of Islamist groups and an Islamic revival. President Anwar Al-Sadat had allowed Islamists some degree of freedom to engage in politics to counterweight his leftist opposition. Sadat also took historical steps towards codifying into the constitution of 1971 what had already been the lived reality in Egypt. He designated Islam the state religion, and enshrined the "principles of Shari'a" as "a primary source of legislation." The "Islamization" of Egyptian society was sadly accompanied by violence against the Coptic community and rising tensions between them and their Muslim counterparts. Sadat's decade in office would witness the birth of a vicious cycle of sectarian violence surrounding houses of worship and inter-faith romantic relations that would prevail until today.[72]

This period marked the end of the term "secular," which according to Lavie, "became an insult often accompanied by accusations of heresy and atheism." She explains that the less provocative alternative term, "civil," found its way to liberal discourse to replace "secular." In her words, the term "denoted a state that separates religion from politics and legislation but at the same time honors Islam as the supreme source of values and culture." "Civil" intellectuals used a similar rhetoric to Abdu's at the time while promoting a civil state. They argued that Islam did not instate a religious but a civil state, in which people are sovereign. During that era, the term was additionally enlisted to differentiate between Sunni Muslim countries and Iran, where a revolutionary Islamic regime had triumphed to the dismay and embarrassment of its regional

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[70] Lavie, *supra* note 60.

[71] Other research, however, suggested that the term is native to the Arab world, and was pioneered by Abdu. This explains its absence in mainstream academic research and Western political theorization. *See* The Civil State (dawla madanīya) – A New Political Term? – IFAIR, https://ifair.eu/2014/02/24/the-civil-state-dawla-madaniya-a-new-political-term/ (last visited Apr 4, 2021)

[72] Lavie, *supra* note 60.

neighbors. Despite some success, the term continued to evoke angry responses, especially from the activist historically Salafist-leaning student body of Al-Azhar.[73]

After the assassination of Sadat, Mubarak initiated a crackdown on Islamists and embraced the notion of the civil state in opposition to them. The debate over the term had continued into his term, with more Brotherhood factions accepting it in an attempt to survive his regime's tightened grip and find a place in the new political order. According to Lavie, the Brotherhood "adopted a more pragmatic discourse, meant to soften its extremist image." This discourse included an acceptance of popular sovereignty in the form of a Western model of democracy. The change in discourse took place to the backdrop of increased terrorism, from which they needed to distance themselves. This time saw division within the Muslim Brotherhood over the term, with the old guard rejecting it due to its secular connotations, and the *wassatiyya* current endorsing it.[74]

Nonetheless, "the term civil state embarrassed Islamists and required convoluted explanations to render it palatable and compatible with their values."[75] For them at the time, and also today, it was easier to define the civil state through what it was not. For the Brotherhood of the 90's, the civil state they endorsed is one that is not a theocracy, and not a military state. It is civil in that it is run by civilians, and those civilians implement Shari'a. Their negative definition of the civil state would prevail until their ascent to power in 2012.[76]

B. From Debate to "Institutionalization" and "Idealization"

The open debate that was taking place between Muslim Brotherhood figures espousing this interpretation, and others advocating for a rigorous separation of state and religion, such as Farag Fouda, was intense and sadly culminated with the assassination of Fouda for his ideas. His assassination heralded a government endorsement of civil state. Lavie contends that the assassination triggered the Mubarak regime's more comprehensive endorsement of the term. The assassination, in her view, had signaled that the debate "had spun out of control." Mubarak's

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[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*

endorsement also entailed forging a forced unity over the term "through indoctrination…de-liberalization and de-Islamization of the public arena."[77]

Perhaps the assassination indeed signified the militant opposition of the term by Islamists had gone overboard, and therefore triggered the Mubarak regime's response.[78] However, it was also in the interest of the regime to export to the West that it is progressive compared to its fundamentalist alternative. Lavie mentions some of the steps taken by the regime in the context of institutionalizing secularism. These included the minimalist reading of Article 2 of the constitution by the Supreme Constitutional Court and the constitutional amendments of 2007, which included an amendment defining the state as based on citizenship in article 1. The addition was aimed at guaranteeing equality for all citizens. These changes were perceived, however, as purely cosmetic, without any consequence on the ground. They were also portrayed as "a panacea for all of Egypt's ills."[79]

Perhaps evidence to the nominal nature of the endorsement of the concept was that Egyptian courts continued to define public order through *Shari'a*. The legal struggle of Baha'is, most of which took place under Mubarak, is a case in point. When their basic religious freedom was contested in court, judges routinely invoked a public order argument referring to Islam being the official state religion in their denial of the community's demands for recognition.

Reflecting on the process in which this "institutionalization" took place, Sebastian Elsässer describes it as a part of a larger project of "more stable incorporation[80] of liberal techniques of governance into the power strategy of the regime." He agrees, however, that the process did not entail "a genuine transition toward liberal democracy, but an updating of Egyptian authoritarianism as compared to its earlier stages."[81] Interestingly, it was Gaber Usfur's theorization of the term that was adopted by Mubarak. Usfur would later have a tumultuous

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[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] Compared to under Sadat.

[81] Elsässer, *supra* note 68, at 157.

relationship with Azhar, which would end in his defeat and ultimate removal from his position as Minister of Culture under President Sisi.[82]

C. Islamist Endorsement of the "Civil State"

The Mubarak regime's efforts to "institutionalize" the concept were so effective, that for the Muslim Brotherhood to reject it on grounds of its contradiction to Islam would mean being labeled extremist. The group therefore moved towards endorsing it, by legitimating it from an Islamic perspective, which argues that the Muslim state is civil in that it is not theocratic. Lavie underscored Yusuf Al-Qaradwi's shift in ideology, in which he coined the term, "A civil state with a religious source of authority - *Dawla madaniya thaata marge'eiya deeniya.*" His endorsement of the term in a 1996 book paved the way for the group to follow in his footsteps and to eventually include it in its official platform. The group's nominal endorsement was not convincing too many, however. Lavie points to the ambiguity of their position on key aspects of the civil state. They would adopt contradictory positions on the enactment of Shari'a and on where they stood from civil equality for women and non-Muslims.[83]

The January 2011 revolution represented a moment that transcended debate over the place of religion in the state. Hussein Agrama described that moment as "asecular," in that the question was not relevant to the key players in the square. While Agrama admires the moment, and calls for better understanding of its exceptionalism, it ceases as soon as political competition for authority begins.[84] The political openness that followed the revolution thawed the facade of consensus over the civil state, with factions organizing and taking part in politics freely for the first time in decades. The range of voices ranged from outright secular to outright theocratic, which reignited the debate over the civil nature of the state, and what that entails.[85]

With the Supreme Council for Armed Forces taking over after the revolution, and becoming an "omnipotent" force in politics, the civil state debate was increasingly in reference to the state's

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[82] Ahmed El-Beheiry, *The Minister of Culture Visits Al-Azhar to De-escalate the Crisis over "Noah"*, Al-Masry Al-Youm (2014), https://www.almasryalyoum.com/news/details/471439 (last visited Mar 16, 2021).

[83] Lavie, *supra* note 61.

[84] Agrama, *supra* note 16.

[85] Lavie, *supra* note 61.

non-military nature. This had led to more "fudging" up of the meaning of the concept. That angle of the concept was not new, however, as Egypt's military has been in the forefront of politics even before its independence.[86] The civil state was again increasingly defined by what it is not. The Muslim Brotherhood's Freedom and Justice Party defined it as such:

> The Islamic state is by nature a civil(ian) state [dawla madaniyya], for it is not a military state, ruled by the army, which seizes power through military coups and governs through dictatorial decrees...Furthermore, it is not a religious state (a theocracy), ruled by an echelon of clerics — for Islam does not have a priesthood...and it is certainly not a [state] ruled by divine right.[87]

D. Egypt: Civil State in Rhetoric Only

Despite the apparent consensus around the term, "Civil State," which is primarily due to the ambiguity surrounding it, civil forces failed to include it in key documents. In August 2011, an attempt by SCAF to include the term in a "supra-constitutional principles" document that was aimed at curbing the Islamists' plans to transform Egypt into a religious state, failed especially due to the term. The document, which was drafted by legal expert Ali Al-Silmi, and was known as the Silmi document, had failed to garner enough support, as opposed to the Azhar corresponding document. The key difference between the two was the absence of the term in the second one. According to former Minister of Culture, and longstanding Azhar critic Gaber Usfur, agreement over the Azhar document was only possible after the term was omitted.[88]

"Civil State" would naturally fail to make it into the Muslim Brotherhood constitution, but also in the 2014 constitution. Even amid the anti-Islamist euphoria that followed the 2013 ouster of the Muslim Brotherhood, political forces were not able to overcome the Islamic institution's veto of the term. Azhar's significant weight guaranteed that the inclusion would be impossible. The world-renowned Sunni seat of learning had just legitimated the ouster of the first democratically elected president, and it had earned its seat on the table. There was not only lack of consensus over the term, the players were not transparent about their positions to the point that the assembly was surprised by a "typo" that had become a foundational part of the constitution.

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[86] Zeinab Abul-Magd, *Understanding SCAF*, The Cairo Review of Global Affairs (2012), https://www.thecairoreview.com/essays/understanding-scaf/ (last visited Mar 17, 2021).
[87] Lavie, *supra* note 61.
[88] *Id.*

After agreement over the inclusion of "civil rule" instead of "civil state," during voting, Amr Moussa, the Secretary General of the Assembly, read a copy that had replaced "rule" by "government," further constricting the term. It was approved by the unsuspecting committee of 50, who noticed the change too late. There was no room for later amending the term, even though it was not what the forces had agreed to include.[89] The ultimate change was attributed to the Justice ministry committee, which had supposedly amended the final version agreed upon by the members. The Church had voiced its dismay at the sudden change, but expressed its overall acceptance and welcome of the new Constitution, which had most of their demands met.[90]

In an interview after the constitution was approved by the Committee, Bishop Paula establishes the futility of the term "civil":

> After that achievement [the removal of article 219], I took the initiative and suggested we compromise on the inclusion of the word "civil" for the sake of consensus. So, the term civil [state] does not add anything. But [Salafis] perceive the word "civil" as a barrier against their existence. I am cognizant of their feelings about that. The Grand Mufti suggested changing the wording from civil state to civil rule....What matters is the essence and substance. *If the articles are civil, then we can dispose of the title, but if they were religious, what use is the title?[91]*

Bishop Paula's position on the term is emblematic of the extent to which it had been devoided of meaning.

In Egypt, "Citizenship" or *Al-Muwatana,* has been utilized in mainstream discourse to play a similar role to "civil state." It had come to exclusively refer to the "[I]rrelevance of religious affiliation in certain areas of the legal system," with other aspects of citizenship such as gender equality, political participation and class mobility have been marginalized.[92] It probably enjoys

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[89] Naeem Youssef, *Al-Zaman Newspaper: Bishop Paula Lashes out at Amr Moussa*, CoptsUnited (2013), https://www.copts-united.com/Article.php?I=4215&A=126280 (last visited Mar 17, 2021).

[90] Sameh Lasheen, *Moussa revises the meetings notes to find out source of change*, Al-Ahram Gate (2013), https://gate.ahram.org.eg/News/426567.aspx (last visited Mar 17, 2021).

[91] Mira Tawfik & Michael Nabil, *Bishop Paula to Sada El-Balad: The Difference between the assembly of 2012 and the assembly of fifty is like "Heaven and Earth"*, Sada ElBalad (2013), https://www.elbalad.news/703325 (last visited Mar 18, 2021). Emphasis added.

[92] Gianluca P. Parolin, *Why Only Religious (In)Equality? A Gramscian Reading of Traditional Intellectuals and the "Citizenship" Debate in Egypt*, 8 Electronic Journal of Islamic and Middle Eastern Law (EJIMEL) 1–17 (2020).

more consensus than the other terms discussed in this paper, but sadly remains just as inefficient in exacting real change.

This overview of the history of the term, Civil State, highlighted its inefficacy in promoting more separation of religion and state, due to the lack of consensus on its meaning. When situations arose for it to be used in the sense relating to the place of religion, as demonstrated, it was discarded for lack of consensus on its connotation in this regard.

E. Religious Liberty and the Persecution Discourse

"Civil state" and "secularism" both entail religious liberty. The term, however, has had a life of its own in Egypt. One that, sadly, lead to its marring as well. The religious liberty of Coptic Christians is the core issue for the community in Egypt. It is their religious liberty that is at stake when they cannot build a church, or when the government refuses to acknowledge the chosen faith of new Christians. Most Christians would argue that they enjoy the freedom to believe, and few would even argue that they enjoy even more freedom than Christians in the West.[93] It is, however, a fact that Copts' religious liberty, particularly pertaining to building churches, registering their Christian faith, proselytization and discussing other faiths freely, is circumscribed.[94]

Religious liberty, nonetheless, has been a tainted platform. The primary reason is that the right, as enshrined in the Universal Declaration of Human Rights, has a long-standing history of imperialism and missionary origins, and was often the pretext of intervention in the region by Western powers. In her book, *Religious Difference in a Secular Age*, Saba Mahmood gives a historical overview of the right and its problematic past. Mahmood also demonstrates how the right effectively "secures the distinction between public and private that is so foundational to secular political rule.[95] Mahmood's interest in religious liberty is primarily due to its being a

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[93] Joel Forster, *"Coptic Christians have an insatiable desire to have a Bible"*, Evangelical Focus (2019), https://evangelicalfocus.com/world/4472/ramez-atallah-coptic-christians-have-an-insatiable-desire-to-have-a-bible (last visited Apr 22, 2021).

[94] *See generally,* EIPR research and advocacy on freedom of religion and belief, https://eipr.org/en/files/freedom-religion-and-belief?page=1.

[95] Mahmood, *supra* note 4, at 32.

constitutive component of secularism, which in her view, is a primary source of sectarian tension in Egypt. Mahmood additionally highlights that while religious liberty played a role in developing state sovereignty in the West, it has been ground for its violation in the non-Christian world.

The history of European intervention on behalf of Christian minorities in the Middle East has been explored by many. It started with the seemingly benign diplomatic-like "capitulations" that the weakened Ottoman Empire granted to its European traders. Those entailed the right to "self-govern," not only in matters of criminal and civil jurisdiction, but also in relation to religion. The privileges granted under capitulations would expand to cover European missionaries and even local Ottoman Christians.[96] The capitulations, which lead the way to European states having the right to offer "protection" to specific local subjects due to their religious affiliation, did not just violate the sovereignty of the Ottoman Empire, but also made Europe an actor in its domestic affairs.

Further spoiling the term was that those powers were advocating standards of religious liberty, they did not uphold. Trying to capture their disingenuous advocacy for religious liberty in the Empire, Mahmood explains that contemporaneously Jews in Europe were forced to live in Ghettos, and their emancipation was yet to be achieved. She explains that it could be argued that Christian minorities under Ottoman rule enjoyed a larger degree of freedom or equality, but then interjects that using the terms would be "anachronous," as "inequality was the norm; just as women were unequal to men and slaves unequal to masters, non-Muslims were not equal to Muslims."[97]

While Mahmood argues against the concept as occidentally developed and enforced through International Law, historian Paul Sedra refers to modern reasons for its marginalization. He explains it is the use of "religious liberty" and "minority rights," as part of "the persecution discourse" that is the culprit. He contends that the politicization of violations faced by Copts over centuries had produced that discourse, which is sadly associated with essentialization of Islam,

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[96] *Id.*

[97] Mahmood, *supra* note 4, at 37. Emphasis is the author's.

and even Islamophobia. This politicization and the prevalence of the persecution discourse have led to a general avoidance of research into sectarianism and Coptic identity in fear of association with the discourse's Islamophobic stance, according to Sedra.

IV. Promoting Secularism and Coptic Activism

In the previous discussion of the liberal concepts of secularism and religious liberty, I do not refer to how Copts themselves employ them. This is partly due to a national unity rhetoric in Egypt, which started in the early twentieth century and lasted until today. The rhetoric has treated community demands as "sectarian aberrations from the national consensus."[98] This in turn has had a limiting effect on Coptic activism. In his book, Elsässer explains how the community selectively used the terms when defining collective Coptic rights vis-a-vis the government, but not when addressing individual Copts rights. He also offered an analysis of the differences in discourses applied by distinct Coptic entities: The Church, Coptic Human Rights lawyers, Coptic expatriates and others.

The 1919 revolution had generated a rhetoric of national unity that had made it "taboo" to raise Coptic demands. The genuine unity would sadly be short-lived, with Christians being ostracized once again with the Islamic revivalism that emerged in the 1940's. After the 1952 coup, the situation would only worsen, leading to the marginalization of Coptic demands for the remainder of the century. The official position, according to Elsässer, was that "Copts [are] not discriminated against, nor are they a minority." During the last quarter of the century, alongside Sadat's move towards the codification of the Islamic identity of the state, Coptic rights' discourse moved in the direction of demanding similar recognition. The primary protagonist of the community of the time was the Church, which had secured its position as the exclusive spokesperson for the community under Nasser. Describing how this era developed the Coptic rights discourse, Elsässer argues:

> Articulations of claims to "Coptic rights" have often taken a collective view on equality and justice—sometimes to the detriment of individual freedom...Their secularism was always motivated by a pragmatic search for the elimination of status differences with Islam and the Muslims... To the extent that the state tended towards the incorporation and "officialization" of Islam, Coptic rights discourses converged on the view that, in the name of equality, Christianity should be awarded similar official recognition.[99]

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[98] Elsässer, *supra* note 68, at 157.

[99] Elsässer, *supra* note 68, at 158.

The Church's employment of some liberal notions was not just limited, it was also confined to the collective relationship of the community with the state. It maintained its conservatism with regard to the community, in that it continued to reject civil marriage and divorce for community members.

Perhaps one avenue where the limited adoption of the human rights discourse is best articulated is Watani Newspaper. The discourse adopted by Egypt's quintessential, and oldest, Coptic newspaper, was one that addressed Coptic grievances, without embracing a human rights discourse. It would cover these events in the context of decrying them for violating "national unity." Describing the wave of increased marginalization and discrimination of Copts in the seventies, Editor-in-Chief, Youssef Sedhom used the word "humum," meaning concerns.[100] Interestingly, to-date, the header of the section addressing some of the gravest violations the community faces in Egypt continues to carry that title.[101] The paper's website rarely features stories of church attacks or other violations on its main page, which it reports thoroughly under the mentioned section.[102] The newspaper, which was founded in 1958, changed its outlook over time. When the overall political climate allowed, the paper would adopt a bolder stance. Perhaps the most significant period was the 1990's and the 2010's, when the Mubarak regime allowed for a larger degree of press freedom.[103]

While maintaining a subtle tone on Coptic "concerns," the paper adopted a discourse supportive of the civil state, secularism, and separating state from religion. The website gives ample coverage to prominent advocates of secularism, and often publishes op-eds supportive of limiting the role of religion in government.

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[100] Elsässer, *supra* note 68, at 162.

[101] Watani is one of few papers focused on reporting on these issues in detail. Unlike government-controlled media outlets, it continues to report without downplaying violations. *See* https://bit.ly/31LinyV.

[102] *Id.*

[103] Elsässer, *supra* note 68, at 163. *See for example,* Anton Sidhom, *Copts and Political Life*, Watani, June 4, 1989, https://bit.ly/3ufDo15 (last visited Mar 23, 2021).

V. The Anti-Secular Regulation of Religious Difference in Relevant Legislation post-2013

The first part of the paper addresses the place of religion in relation to religious minorities as expressed in terms of secularism, the Civil State, and briefly religious liberty. In this chapter, I look at how they feature post-2013 through an analysis of relevant legal developments during that period. I also test the arguments put forward by Mahmood against them to demonstrate the gaps in her critique of secularism at large.

A. The 2014 Constitution

The quintessential legal moment post-2013 is certainly the 2014 Constitution. The 2014 Constitution is often compared to its predecessor and hailed as a victory in terms of religious liberty and the status of minorities. Nonetheless, the constitution deeply entangles the religious institutions in the regulation of the personal lives of the citizenry, which constituted a further step away from secularity. The constitution also failed to offer any religious liberty to religious groups apart from the Christian minority, a regression from the text of the 1971 constitution.

The very manner in which it was drafted is emblematic of its direction and philosophy. In the 50-member drafting committee of the constitution, three clergymen represented Christians, with only one other Christian in the committee;[104] a stark statement on the unapologetic reduction of Copts to their collective religious identities. This also further elevated the status, and power, of the Church within the community. Azhar, Ifta and the Ministry of Awqaf had representatives, as well. Bishop Paula, the Coptic Orthodox Church's politico, led the other clergymen in the negotiations and represented a power to reckon within the committee. Religious institutions, and especially Al-Azhar, had always had representatives in Egypt's constituent assemblies, but perhaps in this particular assembly they enjoyed considerably more weight. Weight that is arguably comparable only to the army and the judiciary, in case of Al-Azhar. Indeed, no other entity was granted autonomy similar to those three institutions in the constitution.

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[104] Sir. Magdy Yacoub was the only other Christian on the committee.

The Church eventually secured an article mandating the government to issue a law regulating the construction of churches within the following parliament's first legislative term. (The law was issued in 2016.) Article 219 was also scrapped and substituted by a stipulation in the preamble that the sources of Shari'a should be defined in congruence with the rulings of the Supreme Court. The latter adopting a limited understanding of Shari'a.[105] Upon the completion of the drafting process, Pope Tawadros II appeared in a recorded video calling on Copts to vote yes on the constitution.[106]

Article 3 of the constitution remained, and did not receive much discussion. The article, which was considered as a historical gain in the 2012 constitution, stipulated, "The principles of the laws of Egyptian Christians and Jews are the main source of laws regulating their personal status, religious affairs, and selection of spiritual leaders." While the law comes in the context of recognizing, and accommodating, the Christian minority, the absence of civil recourse for Christians, necessarily means that the article restricts the rights of non-practicing Christians, or Christians who simply wish to officiate their marriages in a manner that the Church does not recognize.

The article represents recognition that the Community long advocated for, but practically only codifies the status quo. The article does not address, nor remedy, the domains where Christians are subject to Shari'a: Adoption and inheritance. Adoption is still illegal, although other similar mechanisms are in place. And courts continue to apply Shari'a law to inheritance cases where litigants are Christians. There were, however, some exceptional rulings, in which the court decided to distribute inheritance equally between male and female heirs in accordance with Christian canon laws based on Article 3.[107] Also, in March 2021, Egypt's leading human rights organization, the Egyptian Initiative for Personal Rights, just succeeded in submitting a

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[105] Tamer Nagy Mahmoud, *The Half-Full Cup of Egypt's New Constitution*, Atlantic Council, January 9, 2014, https://www.atlanticcouncil.org/blogs/menasource/the-half-full-cup-of-egypt-s-new-constitution/ (last visited May 9, 2020).

[106] Matt Bradley and Tamer El-Ghobashy, *Egypt's Coptic Church Takes Rare Foray Into Politics*, Wall Street Journal, January 16, 2014, https://www.wsj.com/articles/egypt8217s-coptic-church-takes-rare-foray-into-politics-1389915999 (last visited May 9, 2020).

[107] Ayat Al Tawy, *Egyptian woman wins case against Islamic inheritance laws*, Ahram Online, November 2019, https://english.ahram.org.eg/NewsContent/1/64/356612/Egypt/Politics-/Egyptian-woman-wins-case-against-Islamic-inheritan.aspx (last visited Mar 30, 2021).

challenge to the constitutionality of the law requiring Courts to apply Shari'a law to inheritance cases where litigants are Christian due to its violation of Article 3.[108]

Article 64 pertaining to religious freedom saw a minor change. It stipulated that religious freedom is "absolute," instead of a "guaranteed[109] right," in the 2013 constitution. Both restricted the right to worship to adherents of the "revealed" or "heavenly" religions, meaning Islam and People of the Book, Christians and Jews. Notably, both are more restrictive than the 1971 constitution, which had not explicitly restricted the right to worship to the recognized religions. Article 46 of the 1971 constitution stipulated: "The State shall guarantee the freedom of belief and the freedom of practice of religious rites."[110]

The 2014 Constitution has not introduced significant change to Article 7 that pertains to Azhar. It continued to enjoy its autonomy and freedom from oversight, and more importantly an all-encompassing vague mandate as "the main authority for religious sciences, and Islamic affairs." This is perhaps a demotion from the previous article's corresponding wording, "Al-Azhar Senior Scholars are to be consulted in matters pertaining to Islamic law."[111] Speaking of its entrenched powers, Brown states, "More than even the police, and like the Supreme Constitutional Court, al-Azhar becomes a self-perpetuating body under its senior leadership, accountable only to itself."[112]

The 2012 constitution's article 44, which prohibited blasphemy against all prophets, was removed. However, subsequent attempts to repeal the law failed.[113]

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[108] The Egyptian Initiative for Personal Rights Challenges the Constitutionality of the Implementation of Shari'a on Christian Inheritance Cases (2021), https://bit.ly/3rO9aR4 (last visited Apr 2, 2021).

[109] Another possible translation is "inviolable right."

[110] Carnegie Endowment, *Comparing Egypt's Constitution* (2013), https://carnegieendowment.org/files/Comparing-Egypt-s-Constitutions.pdf.

[111] *Id.*

[112] Nathan J. Brown, *Egypt's Constitutional Cul-De-Sac*, Carnegie Endowment for International Peace (2014), https://carnegieendowment.org/2014/03/31/egypt-s-constitutional-cul-de-sac-pub-55310 (last visited Apr 19, 2020).

[113] MPs, Justice Ministry face off over contempt of religion article, Mada Masr (2016), https://madamasr.com/en/2016/06/13/news/u/mps-justice-ministry-face-off-over-contempt-of-religion-article/ (last visited Dec 21, 2018).

It is worth noting that the constitution is not as consequential as one would expect from the supreme law of the land. It is the last in a series of constitutions that "served existing regimes rather than shaped them." One that Brown described as instating a "security state with a democratic face."[114] He made this sobering statement during the drafting of the 2014 constitution:

> Of course, in the best of worlds the most progressive and airtight clauses will work their effect only very slowly: with Egypt's legal framework and state structures thoroughly authoritarian in their basic framework and modes of operation, nothing will change overnight. As the committee members have elevated debates about freeing the media from state shackles, Islamist broadcasters remain closed. As they deliberate over political freedoms, the country's largest political party remains largely shuttered retaining only the shell of a legal existence. As they craft language to allow protests and demonstrations, supporters of the ousted government are harassed and hounded. None of this means that the wording of the constitution is irrelevant, but even if the delegates agree on general principles (which they have yet to do) and manage to codify that agreement in a skillful manner, there will be much legal and institutional meat to put on the skeletal constitutional framework.[115]

Pertaining to the key religion-related clauses, the discussion that took place in the Committee of 10 was especially enlightening. The Committee was formed by the Constitutional Declaration of July 8, 2013. The Committee of experts included in its membership judges from Egypt's judicial entities and other legal experts. It was mandated with suggesting amendments to the 2012 constitution.[116] The significance of their discussions is that while their views were guided by a certain degree of political correctness, they were not entirely politicized, unlike the Committee of 50.

In the discussions, the dynamic pertaining to the religion-related articles was one where the Committee largely opted for maintaining the status quo, with modest ambition for change. The overarching discourses animating religious freedom and equality were notably absent. The legal veterans instead referred to considerations that were marginal to the core issues. For instance,

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[114] Brown, *supra* note 112.

[115] Nathan J. Brown, *One Word Will Define Egypt's Constitution*, Carnegie Endowment for International Peace (2013), https://carnegieendowment.org/2013/11/01/one-word-will-define-egypt-s-constitution-pub-53487 (last visited Mar 28, 2021).

[116] The Constitutional Declaration of July 8, 2013, (2013), https://manshurat.org/node/3367 (last visited Apr 1, 2021).

during their discussion of the religious freedom article. The judges who called for including the adherents of the non-heavenly religions into the guarantee for freedom of worship used arguments that did not address the key issues. One judge's reasoning for the expansion of the right was: "You are calling on Europe to allow you to build mosques, and for you to practice your rituals inside them...You cannot demand something from European countries that you continue to forbid for the non-Muslim in your country."[117] In the same vein, another jurist argued that the UAE has allowed the building of houses of worship for the adherents of non-heavenly religions, hinting at the expansion of the guarantee as good for business. This expansion of freedom of worship was discussed particularly pertaining to Baha'is. The discussion did not include reference to their citizenship rights, to Egypt being a civil state, and certainly not to secularism. While those notions were not mentioned by name, their essence was part of the discussion. One judge mentioned the need for the state to stand at an equal distance from religions with regard to laws governing building houses of worship, for instance.

The Committee eventually adopted a more expansive freedom of religion article than the one eventually ratified in the 2014 Constitution. Their suggested article stated: "Freedom of belief is guaranteed. The state guarantees freedom to practice religious rituals, and facilitates the establishment of houses of worship for heavenly religions, as regulated by law. "[118] The contention, as explained above, surrounded the expansion of the guarantee to practice religious rituals to adherents of all religions. The passage of the expansion was not unanimous, even among the group of jurists representing Egypt's top legal echelon, where no Salafis, Muslim Brotherhood, or Azhar were represented. The expansion passed by six votes for and four against.[119] Interestingly, when the current 2014 constitution wording was being suggested, former Speaker of the House of Representatives Ali Abdel-Al[120] argued that excluding non-heavenly adherents from the guarantee criminalizes their practice of religious rituals.[121]

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[117] Transcript of the Fourth Meeting of the Committee of Ten, (2013), https://manshurat.org/node/12419.

[118] Draft Amendments for the 2012 Constitution Prepared by the Expert Committee, (2013), https://manshurat.org/node/1702 (last visited Apr 2, 2021).

[119] Transcript of the Fourth Meeting of the Committee of Ten, (2013), https://manshurat.org/node/12419.

[120] Then a member of the committee in his capacity as a professor of law.

[121] *Supra* note 117.

The status of Azhar and Church featured prominently, where they were represented as equals requiring similar treatment. For instance, one Committee member suggested that if the Church's article pertaining to the canon laws of Copts remains, that pertaining to Azhar should too. There was agreement among the members that the articles pertaining to the institutions have not introduced anything novel, but only codified the status quo, except for the phrase pertaining to Azhar's mandate to be consulted on religious issues. The members suggested that keeping both articles, while they do not affect change, was to offer the institutions "assurance" that their status will remain the same in the new political order. On the Azhar's mandate to be consulted on religious matters, however, the members were unapologetic in their criticism and scrapped it.[122] As mentioned earlier, the phrase was reintroduced in the eventual constitution and replaced with the slightly weaker wording: "[Al-Azhar] is the main authority for religious sciences, and Islamic affairs."

Drawing on the constitution and its drafting process, it is clear the terms - secularism, civil state, and citizenship - are almost absent. The status quo threshold of religious freedom is entrenched, and the expansion of the role of religious institutions is unabated. While the modernization and secularization projects in Egypt originally aimed at marginalizing Church and Mosque by nationalizing them and bringing them under state control, that process was reversed, with those institutions regaining their autonomy from the state, and control over people's lives gradually since the seventies, and more openly since 2013.

B. The Church Construction Law

The 2014 Constitution additionally mandated that the new parliament issue a law governing the construction of churches in its first legislative term.[123] In accordance with this article, the House of Representatives issued a new Church construction law in September 2016.[124] The law was hailed by the parliament as an unprecedented achievement, which Copts had been demanding for decades. The law was, however, problematic in a number of ways, and sadly failed to address the

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[122] Transcript of the Second Meeting of the Committee of Ten, (2013), https://manshurat.org/node/12374 (last visited Apr 2, 2021).

[123] The Egyptian 2014 Constitution, https://www.constituteproject.org/constitution/Egypt_2019?lang=en (last visited Apr 2, 2021).

[124] Law Number 80 for the Year 2016.

key issue of sectarian tensions surrounding the construction of churches. More relevantly, the law did not align with an endorsed overarching state rhetoric asserting its civil nature or the equal citizenship of its Coptic citizens.

It entrenched religious difference in its treatment of Christians differently to their Muslim counterparts, even if it eased the medieval Hamayuni law requirements, where the head of state had to approve the construction of every new church. Criticizing the law, EIPR said in a statement:

> A special law to regulate the construction of churches already sends a discriminatory message that the state distinguishes Christian citizens from Muslim citizens. While the state permits the construction of mosques based on compliance with building codes and subordination to the Ministry of Endowments, it imposes additional conditions on churches.[125]

Indeed, under the new law, the governor, and not the president, approves churches, but it remains discriminatory. It stipulated that approval for building a church is subject to security considerations, and the need for a church, as determined by the number of Christian residents in a specific area. Referring to the issuance of the law, then member of parliament Marguerite Azer described it as a "big step forward towards the Civil State, which relies on establishing citizenship."[126] Her statement stood in contrast to the reaction of activists, who decried the law for the exact opposite. Discussions for a unified law for houses of worship had been abandoned for a law regulating churches alone.

The process through which the law was formulated epitomizes the entrenchment of the role of the Coptic Church as spokesman for all Copts. The negotiations over the text took place between the Church and the government behind closed doors, with the House of Representatives, which had unprecedented Christian representation, playing a minimal role.[127]

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[125] Originally quoted in Monique El-Faizy, *Long-awaited church construction law in Egypt disappoints activists*, France 24, September 16, 2016, https://www.france24.com/en/20160916-egypt-coptic-church-construction-law-disappoints-activists (last visited Apr 2, 2021). The original release was no longer available online.

[126] Sherif Ayman, *Marguerite Azer: Church Construction Law Important Step towards Civil State*, Masrawy, September, 2016, https://bit.ly/3whiBfv (last visited Apr 2, 2021).

[127] El-Faizy, *supra,* note 125.

Over almost five years of enforcement, the law had failed to stem violence against Christian communities triggered by the construction of churches. During that time period 2016 - 2019, EIPR documented a minimum of 36 cases of sectarian tension and violence surrounding church construction. It also documented 25 cases of shuttering churches or stopping collective worship during the same time frame. The continued closure of churches as an easy end to sectarian tension is in violation of Article 8 of the Church Construction law, which stipulates that religious services are not to be stopped in an existing church under any circumstances. Church construction is a sensitive topic that touches the lives of Copts reminding them daily of their status. The Copts of Faw Bahri in Qena, for example, have struggled to have a church for more than 15 years, with attempts to build one met with unpunished violence and burning of Christian houses. The law has failed to remedy their problem in its five years of operation. Faw Bahri is one example among many, estimated to be in the hundreds.[128]

From the above, two points can be concluded. The overarching concepts of Civil State and citizenship, are not guiding the process when tackling the most salient of Coptic issues. The process better resembles bargaining for achieving whatever change is possible while remaining within the same old frameworks. The new law, therefore, allowed for a continuation of the restrictions to build churches, and contains enough loopholes to stop it altogether if the "security situation" demands it. Additionally, from the perspective of the critique of secularism as discussed in the first chapter of this thesis, the issue with the law is not the state's mandate to regulate religious difference, but rather how it does so. Had the state regulated the construction of all houses of worship indiscriminately, it would have had the opposite effect, of minimizing religious difference.

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[128] EIPR criticizes slow rate of church legalization: Three years later, the church construction law has failed to resolve sectarian tensions related to worship, The Egyptian Initiative for Personal Rights (2020), https://eipr.org/en/press/2020/01/eipr-criticizes-slow-rate-church-legalization-three-years-later-church-construction (last visited Apr 2, 2021).
Ishak Ibrahim, *The Reality of Church Construction in Egypt*, The Egyptian Initiative for Personal Rights (2019), https://eipr.org/en/blog/ishak-ibrahim/2019/07/reality-church-construction-egypt (last visited Dec 7, 2020).

C. Personal Status Laws

At the heart of the Ottoman millet system was the autonomy granted to religious groups to govern their own personal status affairs. It is also the only realm, where Shari'a continued to apply after modernization and secularization post-independence. It has also been the Church's historical stronghold over Coptic lives outside church walls. There was a brief challenge to their authority in the early twentieth century, when a progressive lay council took over the process. However, the Church regained its control shortly after under Nasser, who empowered the Church over the council.[129] The Church's supremacy was subsequently entrenched in article 3 of the constitution, as previously discussed. Nonetheless, the issue of divorce and remarriage continued to be a "headache" for the Church, as Copts continued to resort to the court system for the application of Shari'a, or for challenging Church decisions. It additionally motivated many to leave the Church altogether by conversion to escape the Church's strict rules on divorce and remarriage.

In 2010, the judicial system attempted to grant Christians the right to remarry, and approved remarriage in defiance of the Church for two men. The two had been unable to remarry due to the Church's longstanding strict rules that upon divorce, only the victim spouse is granted permission to remarry. And since all Egyptians cannot register a marriage in the absence of an officiating ceremony by a priest or Maazoon, the Christians found at fault during their divorces were forever denied the right to remarry. In light of the court decision, the Church openly said it would defy it, and would hold on to its literal interpretation of the Bible on the matter.[130] It is perhaps one of the few instances, where lay Copts almost escaped the Church's grip on personal status matters. Since then, there had been no success. Calls for allowing civil marriage for Copts have gone unheeded by government and Church alike for decades.

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[129] Saba Mahmood, *Religious Freedom, the Minority Question, and Geopolitics in the Middle East*, 54 Comparative Studies in Society and History 418–446 (2012). Mahmood was quoting Paul D. Sedra, *John Lieder and his Mission in Egypt: The Evangelical Ethos at Work Among Nineteenth-Century Copts*, 28 Journal of Religious History 219–239 (2004).

[130] Yasmine Saleh, *Egypt court says Copts can remarry, church objects*, Reuters, May 31, 2010, https://www.reuters.com/article/idINIndia-48923720100531 (last visited Apr 3, 2021).

The Church had since the 1960s attempted to reach an agreement with the government to resolve conflicting rulings between its clerical councils and courts. However, the major Egyptian denominations (Coptic Orthodox, Catholic and Protestant) have failed to reach agreement on a unified personal status law, leaving many Copts stranded between the Church and court to resolve their marriages or remarry.[131] Serious discussions of the law would only start taking place in 2014, upon the instruction of President Abdel-Fattah Al-Sisi. During that time, the Protestant Church had expressed its openness to the idea of instating civil marriage for Copts. However, the opposition of the Coptic Orthodox Church would upend any hope of allowing civil marriage in the new law. The delay in issuing the law however is not only a product of the controversy around civil marriage, but also because a unified law means the three denominations have to agree on common values to include in the law. As I write these lines, the discussions are still ongoing.[132]

According to a draft that was made public in 2020, the law would stipulate that Copts have to have gone through the Church's dispute resolution councils prior to going to court. They also would have no right to appeal church decisions before secular courts. The Church would also have an exclusive right to grant second marriage permits. On the other hand, the draft legislation expands the reasons for divorce.[133] There had been historical progress on part of the Church since 2016 in expanding the reasons for divorce and granting second marriage permissions. The process was also streamlined, with more women represented on councils, which were multiplied in number and provided with a process, where litigants can appeal decisions.[134]

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[131] Mustafa Rahouma, *Personal Status Law on its Way to the Light*, Al-Watan News, April 13, 2019, https://www.elwatannews.com/news/details/4108892 (last visited Apr 3, 2021).

[132] Mustafa Al-Khateeb, *Second Marriage Headache: When Will the Personal Status Law See the Light?*, Baladna ElYoum, March 28, 2021, https://www.baladnaelyoum.com/news/6060fc51a24321739e7263b5/-صداع/تغطيات-ومتابعات الزواج-الثان-مت-يخرج-قانون-الأحوال-الشخصية-للأقباط-للنور (last visited Apr 3, 2021).
Mustafa Rahouma, *Churches finish the draft Unified Personal Status Law and presents it to the Ministry of Justice*, Al-Watan, September 12, 2020, https://www.elwatannews.com/news/details/4977182 (last visited Apr 3, 2021).

[133] Mustafa Rahouma, *Churches finish the draft Unified Personal Status Law and presents it to the Ministry of Justice*, Al-Watan, September 12, 2020, https://www.elwatannews.com/news/details/4977182 (last visited Apr 3, 2021).

[134] Sara Allam, *Breakthrough in Personal Status for Copts*, Al-Youm Al-Sabe' (2018), https://bit.ly/2rcQw8c (last visited May 9, 2018).
Mustafa Rahouma, *Personal Status Law on its Way to the Light*, Al-Watan News, April 13, 2019, https://www.elwatannews.com/news/details/4108892 (last visited Apr 3, 2021).

The journey of the reluctant law speaks volumes to the role of the Church. The Church is granted authority over an integral part of Coptic Christians' lives that is the right to marry. Giving it this authority is the state. The state's continuous acquiescence to the Church on the matter does not emanate from its mandate to regulate religious difference, as part of a secular order, but rather from a political alliance that serves its purposes. The continued governance of the Church of the personal status of Christians epitomizes the anti-secular nature of the arrangement. It is the exact opposite of the separation of Church and state. It is fundamentally the state relinquishing its mandate to regulate personal status affairs to the Church. Coptic Christians have no choice but to abide to the Church's regulations, whether they are practicing or not, whether they agree with the Church on the matter or not, or whether they are actually non-believers with a Christian status on their IDs. The arrangement as it is has been a breeding ground for sectarian violence. It is also what Mahmood focuses on as the ultimate facet of secularism in Egypt, which as explained above, is flagrantly anti-secular.

VII - Conclusion

As this paper has shown, it is not the secular regulation of religious difference that is the producer of tensions, but rather the manner in which the state empowers religious institutions and espouses Islam as its quintessential identity and *Shari'a* the basis of its public order. Despite secularism's inherent problems, and the dismissal of its derivatives, it continues to hold promise for some change for Egypt's minorities.

While the overarching secular order may produce some emphasis on religious difference, it is not the main instigator of sectarian tension, it is rather the state that continues to foment strife by its discriminatory policies. Those policies sometimes find roots in Egypt's official interpretation of *Shari'a*. An example of that is the refusal to merely recognize Baha'is, or the conversion of Muslims to Christianity, due to that recognition's conflict with *Shari'a* as the basis of public order.[135] That level of identification with religion, and with the religious institutions of Al-Azhar and the Coptic Orthodox Church, is fundamentally anti-secular, and not a product of secularism as posited by Mahmood.

Less identification, and easing of the grip of the Church and Azhar on personal status and religious freedom issues, would bring forth much needed change. Real change, however, is unlikely except in the context of a more comprehensive political reform that is beyond the Coptic question, and one that is particularly elusive given the current complete closure of public space.

A gradual easing of the control of religious institutions over people's personal status affairs (which also happens to be at the heart of most sectarian tensions) would only happen if the political regime ceases to rely on the legitimation of the religious institution. A workable shift would take place within the same paradigm of *The Established Religions* category, as classified by Cole Durham, while allowing civil recourse for adherents. Religious dissenters and minorities would be recognized, not just unofficially tolerated, even if their right to practicing religious rituals overtly continues to be restricted.

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[135] Mona Oraby, *Law, the State, and Public Order: Regulating Religion in Contemporary Egypt: Law, the State, and Public Order*, 52 Law & Society Rev 574–602 (2018).