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Thinking About Law, Morality, and Religion in the Story of Egyptian Modernization

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We hear more insistently nowadays than we did perhaps in the past that the fusion of politics and religion in Islam makes the prospect of liberal democracy in the Muslim world rather bleak because modern democratic government requires a clear separation between the two. Crucial to this notion is the idea that where politics and religion are combined ethics is no longer what it should be in a free society—an autonomous domain in which individuals determine their own moral behavior without interference from outside forces. But what is left aside in such a view is the fact that the emergence of modern liberal society has meant not simply the removal of the authoritarian power of organized religion from the moral life of ordinary citizens, but also a redefinition of the scope and content of ethics. In what follows I want to examine this question in the context of Egypt where, about a century ago, attempts were being made to reform the *sharīʿa*, the religious law and ethics of Islam. Central to the theories being propounded was the idea that modernized law is equivalent to positive law, so I shall begin with some comments on this notion.

What I find interesting about positive law are three assumptions that underlie it: (1) that there is no *necessary* connection between law and morality; (2) that codification makes law determinate and therefore applicable to all relevant cases *publicly* and in an equal manner; and (3) that legal validity is secured by reference to certain basic *social* facts, as in John Austin's "command of the sovereign," or in Hans Kelsen's "fundamental social norm," or in Herbert Hart's "rule of recognition." These are modern assumptions, and although not all positivists understand them in the same way, I will refer to them in what follows for the purpose of exploring what seems to me significant in the process of legal and ethical reform in Egypt. I will talk mainly about the first assumption, but I will also say something about the second and third. Very briefly, I will say that the positivization of law in Egypt—as part of its process of modernization—has involved changes in ethics and religion that are not usually attended to in this context.

In his book *The Islamic Shari'a and Positive Law*,[1)] the eminent Egyptian jurist Tariq al-Bishri complains that in Egypt there now exists an unfortunate disjunction between legal rules and moral rules, in the sense that while the legitimacy of the former has come to Egypt recently from abroad in the shape of positive law, the latter has remained continuously bound

up in people's everyday lives with Islam. However, he does not address the nature of the disjunction. Nor does he discuss the fact that for secularists a separation between law and ethics is no unfortunate accident but a necessary move in the making of a freer society. The law, secularists argue, cannot properly impose virtuous behavior on individuals, both because such an attempt is practically difficult and because it negates the very essence of ethics. For the ethical act, in the liberal view, is a matter of following one's conscience, not of obeying externally-given commands. The individual, private character of ethical decisions must stand free equally of the power of the state and the demands of one's community. This separation is thus both normative and pragmatic. Through it, positive law is defined as essentially instrumental and its limits are identified: truly personal matters—so the saying goes—are "not law's business."

Al-Bishri is aware that law and morality are never completely congruent in any system. It is well known, he observes, that the distinction between them relates to the difference in the nature of the sanction, the former depending on state penalties and the latter on the reactions of people in everyday life; that legal criteria tend to focus on external behavior while most moral criteria are concerned with conscience and belief; and that unlike morality, the law may be concerned with the social consequences of a transgressive act and not merely with it as fault. To this extent al-Bishri agrees with the positive distinction between fact and value.

But, al-Bishri goes on, it is also known that law and morality are interconnected. Drawing on Dennis Lloyd's *The Idea of Law* (Penguin, 1964), al-Bishri affirms that most legal rules rest on a moral basis, and that this fact has a profound implication for the very stability of the state. For political authority gets much of its power from the moral obligation that subjects have to obey the decisions of ruler and judge, an obligation that in turn derives from the feeling that the law represents legitimate authority. Coercion is undoubtedly an essential element in the law, but law's authority—al-Bishri reminds his readers—cannot do without the belief that there is a *moral* obligation to obey it.

As an Islamist, al-Bishri is committed to the renewal of the *sharī'a*, but it is interesting that his argument about the historical displacement of Islamic law rests partly on positivist assumptions. He believes that the particular form of the split that obtains in Egypt today between codified law and everyday morality is dangerous to the state because ultimately its political legitimacy requires some measure of coherence between the two. This means that he regards legal validity (as distinct from the routine effectiveness of the law) as being rooted in society. More specifically, he sees the *lawfulness* of law as being determined by social norms that are in this case established by religious tradition.

Tariq al-Bishri's position has some affinities with that of a writer at the beginning of the twentieth century, the British-trained lawyer Ahmad Safwat, who was one of many voices calling for reform of the law of personal status based on Islamic law. Until 1907 deans of the Khediveal Law School (later to become the Law Faculty of Cairo University) were French, but

French jurisprudence remained, as it had been in the latter part of the nineteenth century, the dominant foreign influence in Egyptian law. Subsequently, a continuous stream of Egyptian students traveled to France to study comparative law under Edouard Lambert in Lyon, a prominent member of the "sociological" school of law who had functioned briefly as the last French dean of the Khedeveal School in Cairo. The law students returned home to supply the nationalist leadership of Egypt in its political struggle against British imperial rule, but they also brought with them a concern to define and construct "the social" as a space for legislation and reform.[2] Despite his British legal education, Safwat appears to have shared many of their concerns, especially the preoccupation of the sociological school with reforming private law in the interests of a national collectivity called "society."

Safwat's advocation of *sharīʿa* reform in 1917 claims our detailed attention, because it applies *ijtihād* (in the wider sense popularized by the *salafiyya* reformers) in the cause of a modernizing state and society. He is, to my knowledge, the first to argue this case rigorously, in a little book entitled *An Inquiry into the Basis of Reform of the Law of Personal Status*.[3]

The book is largely preoccupied with the problem of changing the existing laws of marriage and divorce. It is no accident, incidentally, that so much of the writing by modern reformers of the *sharīʿa* focuses on what has come to be known as "family law." The idealized family—or at any rate, a modern conception of its functions—has long been regarded in bourgeois culture as paradigmatic of "the private," and therefore of "the ethical." Reform of family law in Egypt is, I would suggest, intimately connected with the development of modern morality in form as well as content.

There is a popular feeling, Safwat claims, that the *sharīʿa* is sacred when in fact it is not. It is precisely such details as inequality in the marriage contract that make for difficulties now that social conditions have changed so much—difficulties that are a danger to all of society. The positivist assumption in this statement is that legal validity is ultimately determined by reference to certain social facts, although the facts in question here are not simply those that exist but those that ought to exist. "If we wish to discover a cure for the present situation then let us think of how we want our family life to be organized, and see how we can put that into effect in agreement with religious rules. Previously marriage was (and continues to be in the customary practice of the lower classes) an institution for sexual pleasure and procreation, but now it has become a partnership in a joint mode of life." Safwat goes on to say that among other things, this means that the marriage contract cannot be binding without the complete agreement of both partners, and with no interference from anyone else.[4] The freedom of agreement between equal parties is a basic principle of Safwat's proposals for reform, not only because the law of contract is already central to the capitalist society being constructed in Egypt[5] but also because it is considered socially progressive—i.e., integral to the definition of *individual autonomy* necessary to the freedom of choice.

So why are the *sharī'a* rules of marriage and divorce not sacred for Muslims, as Safwat claims? Because changing them would not, he insists, be contrary to the fundamental principles of *fiqh*. This claim is demonstrated by a re-examination of the basic sources of Islamic law: the Qur'an, *sunna* (the Prophetic tradition), *ijmā'* (consensus of the learned), and *qiyās* (analogy). Since the principle of analogy is not a source, he says, but a method of reasoning, it can be set aside. Furthermore, since the consensus established in the past by jurists, and even the tradition of the Prophet himself, depend for their authority on the Qur'an, Safwat suggests that it is the latter to which one must attend above all.

The Qur'an, says Safwat, basically has a threefold classification of acts: (1) *harām* (forbidden) (2) *wājib* (mandatory), and (3) *jā'iz* (permitted).[6] He does not note that actually the Qur'an uses the words *halāl* and *harām* only, two complex ideas that extend beyond the simple notions of permission and prohibition. What he does instead is to break down the concept of *halāl* into two legal categories, the obligatory act (*wājib*) that carries a sanction and the neutral act (*jā'iz*) that does not, since both are licit. But in the Qur'an, it should be noted, the term *halāl* often appears together with the qualifier *tayyib* (that which is good, beneficial), and in general its meaning stands in opposition to *ghulūw*, an idea combining notions of excessive religiosity as well as zealotry. Thus while excessive devotions and ascetic practices are licit (*jā'iz*) they are also disapproved of in the canonical traditions. *Hadīth* collections have the Prophet marking his disapproval of such practices by the expression: "Your body has a right over you" (*li-jasadika 'alayka haqqan*).[7] In other words: Do not mistreat your body. A better-known example is divorce, *talāq*, which is regarded as *jā'iz* (it is permitted) and yet is at the same time disapproved of, *makruh*. My point is that the concept *halāl* has layered ethical resonances and it cannot therefore be treated as a simple neutral legal category.

However, Safwat's translation of the term *halāl* into two legal categories enables him to make an interesting argument. Since *jā'iz* is a residual class consisting of everything that religion allows the individual to do, the members of this class cannot be exhaustively enumerated. This means that the legal status of permitted acts mentioned in the Qur'an is no different from those not mentioned. They are all equally optional. The only reason some optional acts are mentioned at all, according to Safwat, is that they define forbidden acts. For example, when the Qur'an states that Muslims may have up to four wives, it is setting a limit—it is saying in effect that having *more* than four at the same time is forbidden. But as *optional* acts are not mandatory, the state is not *obliged* to protect them—indeed they cannot be upheld as absolute rights if they conflict with the rights and freedoms of others. (Although Safwat doesn't cite John Stuart Mill he must have been familiar with his ideas—either directly, or through the writings of such contemporaries as Ahmad Lutfi al-Sayyid. At any rate, the argument that individual rights are limited is one that Mill made earlier.)

Now this is where the positive law of the state comes in, because its function is to limit—in the interests of the entire nation—the options that the *sharī'a* permits individual members

of the nation. That is why many activities that the Qur'an does not disallow may require the further permission of the government in which particular conditions are stipulated—e.g., the professional practice of medicine or law, or (and this is Safwat's example) of plural marriage.

So when Safwat writes that the obsolete family laws (the *sharī'a*) are a danger to "society," he takes a modern middle-class point of view. This not only in the sense that "the family" he idealizes is no longer an "institution for sexual pleasure and procreation, but … a partnership in a joint mode of life," but more importantly because the values that now define public interest (*maslaha*) are middle-class too, based on a view of the nation-state as a protective and facilitating power, and "society" as a bourgeois project.

In this project the almost indefinite extension of "natural" rights (i.e., those that the Qur'an allows) may be curtailed by the state through legislation without infringing religious or moral rules. The argument by which Safwat delimits the sphere of religious rules and opens up the space for secular state law is unlikely to have been appreciated by the lower classes, but it is one of the earliest and most rigorous that I know of in modern Islamic reform. Thus, although he repeatedly adverts to the importance of recent historical changes and to the need for responding to them, he does not make that the basic justification for reform. He does not, in other words, resort directly to the classical notions of *maslaha* (public interest) or *darūra* (social necessity) in order to adjust given *sharī'a* rules to rapidly changing modern conditions.[8] He first clears a theoretical space in which *the state* can judge and act freely in limiting the "natural" liberties of its individual citizens in the interest of securing civilized life. "Public interest" and "social necessity" are firmly rooted in the authority of the state and its sanctions. What is particularly interesting about this move is not only that the entire tradition of *usūl al-fiqh* (Islamic legal theory) is set aside, but that the legislative power of the modern state is derived from re-interpreted Qur'anic categories.

The distinction between law and ethics is itself made by Safwat in jurisprudential terms traceable in European thought at least as far back as Grotius,[9] a distinction based on the idea that law is the domain of obedience to a civil sovereign and ethics the domain of individual sovereignty in accordance with inner freedom (conscience). This distinction is theorized most famously by Kant, a more consistent foundationalist than Grotius. The idea of an inner, conscience-driven moral law is taken for granted by Safwat. Where the state punishes individuals for disregarding or breaking a rule, he says, there is positive law. Where transgression is sanctioned only by belief in otherworldly punishment, there is sacred law underpinning religious morality, and where punishment is also imposed in this world for contravening religious morality, we have a society in which law and ethics (governmental and religious authority) are fused. This stands in sharp contrast to a modern liberal society in which ethics is entirely a matter of individual conscience. The interesting point here is not that Safwat distinguishes between law and morality (medieval Islamic jurists made that distinction too) but that the difference between *the concept* of morality and *the concept* of

law is defined in terms of kinds of *social rules*, rules whose obligatory character is constituted in both cases by the sanctions attached to them—one of which is based on *public power* and the other on *private belief*. "Morality" is therefore seen as the totality of obligatory rules that lack state sanctions. We saw that even Islamists sophisticated in matters of the law, such as al-Bishri, have now taken this view.

Safwat's reading cuts right across the famous *shariʿa* classification of *ʿibādāt* (proper behavior between God and the faithful), *muʿāmalāt* (proper behavior between the faithful), and *hudūd* (limits to the behavior of the faithful defined by penalties). Modern positive law excludes the first as being beyond its purview because it relates to the ways a believer ought to act towards his/her God, a matter that is entirely private. It also renders the five-fold *sharīʿa* ranking of acts—*wājib* (obligatory), *mustahabb* (recommended), *mubāh* (indifferent), *makrūh* (disliked), and *harām* (forbidden)—into something that is relevant only to an internal, private domain, and therefore to ethics. Morality, in other words, is privatized.

The grid separating "law" from "morality" that Safwat imposes on the *sharīʿa* schema thus alters it—because the concept of Islamic virtue (*fadīla*) in the latter is defined not merely in terms of the type of sanction (this-worldly versus other-worldly) or of the type of governance (freedom of conscience versus obedience to external authority). It constitutes a dimension of all accountable behavior (including justiciable acts), in the sense that while all such behavior is the responsibility of a free agent, it is also subject to assessments that have practical consequences for the way one lives in this world *and* the next. It is true, as Baber Johansen recently demonstrated in his brilliant study of Hanafi law, that *fiqh* has always distinguished between justiciable and non-justiciable matters, but my argument is different. It is that in Safwat's conception of morality different kinds of relationship emerge between the two. And that is precisely what needs to be examined carefully. For in the newer conception, ethics no longer relates to the *continuous disciplining* of virtues but to the *free exercise* of an always-present function of the individual conscience by which moral judgments about acts and intentions are made.

Now, practical programs for the cultivation of moral virtues presuppose authoritative models. In the case of the *sharīʿa* the ultimate model is embodied in the figure of the Prophet Muhammad as conveyed in *ahādīth*. That is to say: The Prophet stands as the origin of the *sunna*, at once the paragon of all moral virtues *and* an indispensable source of legal rules.

If the *sharīʿa* is to be thought of as including an ethical dimension, then it seems to me important to recognize that traditionally it has been anchored in a particular conception of ethics. I want to stress that in saying this I refer not simply to the *content* of ethical rules, but to the articulation of social practices. To the extent that Egyptian reformers like Safwat have tried to distinguish between moral and legal rules in terms of sanction and scope, they have also, I suggest, transformed the very sense of morality from one that has been called Aristotelian (focused on developable virtues) into one attributed to Kant (with its emphasis

on conscience as sole judge and on universalizable rules).[10] The former tries to identify what is involved in learning to be a moral subject and the latter with identifying the definitive characteristics of moral rules, especially their dependence on "obligation." According to this conception, it is the seriousness with which *obligation* is recognized that serves to distinguish between moral rules and rules of mere etiquette or grammar. (The separation between morality and etiquette is crucial for modern ethics but not for the Aristotelian notion of virtue.) I propose, therefore, that the positivization of law—including the *sharīʿa*—be seen as part of a wider movement that includes the positivization of ethics and of social knowledge.

In other words, there is more at stake here than the question of where Egyptian legal reform has acquired its rules from, whether the reform is "authentic" or "hybrid."

The figure of the Prophet as the paradigm of Islamic virtues has a long and interesting popular history in Egypt—as elsewhere in the Muslim world. It is thus that he appears not only in scholarly collections of *hadīth* (sayings and enactments of the Prophet) but also in popular songs, stories and poems. The scholarly and the popular often merge in public recitations. For example, in Mamluk times, the entire *Sahīh al-Bukhārī* (a canonical collection of *hadīth*) was recited in Cairo during Ramadan, and its completion celebrated as *khatm al-Bukhārī*.[11] *Hadīth* were therefore more than simply Islamic source-texts for legal and moral rules. They were solemnly recounted and heard. The rules themselves were neither mere texts nor merely thoughts about texts—they were *practices* that one tried to master by a process of embodiment. Put differently: the rules are to be seen not as *orders* that are obeyed or disobeyed but as *standards* towards which ethical capabilities are directed, a teleological process that may never be definitively completed.

Mawlid an-nabi (celebration of Muhammad's birthday), at which the Prophet's virtues were publicly cited in songs of praise, were much more widely attended by various classes than they are today. What all this indicates is not simply that there was a formal set of Prophetic standards by which people judged the ethical status of one another's social actions, but that it was the focus of a complex cultivation of their moral and aesthetic sensibilities that even underlay the judicial process *as one part of quotidian life*. The experience and memory of particular sights and sounds, and even particular smells and tastes—the Prophet approved of perfume, he liked honey, etc.—contributed to the recognition and embodiment of virtues. (Incidentally, a growing volume of anthropological studies on embodiment and on the senses has given us a deeper understanding of such matters.) An intriguing question then is: How did these sensibilities enter into *practical* rulings in actual legal cases? In other words: If ethics is a matter of the cultivation of capabilities, of learning to speak, feel, and reason in relation to particular conceptions of the world, if it relates to recognizable behavior in one's own community, how does it connect with the ways the law is actually articulated and applied?

In this context, the formation of judges (*qādis*) and their quotidian relations with the population among whom they served prior to the late nineteenth century is a matter of

considerable interest. "Lower-level *qadis* and their deputies serving in the courts throughout Egypt," writes Amira Sonbol,

> were usually graduates of the Azhar and similar schools, like the Salihiyya al-Najmiyya, who received an *ijaza* in *fatawi* (certification in rendering legal decisions) from the teachers from whom they studied. At that level, it was not uncommon for an individual to be assigned as *qadi* back in his own village or city quarter. Most Shafi'i and Maliki judges were graduates of local schools and can be considered to have been organically linked with the communities in which they served. But after the reforms [beginning in 1897], judges would have to be educated, certified, employed by the Egyptian central government, and assigned to their respective courts.[12)]

My question, therefore, is not about how the earlier arrangement gave rise to particularist bias in legal judgments, but about the *qādi*'s ways of reasoning, of speaking legally. For his reasoning depended in part on the knowledge of local customary practices (*'urf*),[13)] a knowledge that resided with the local community.

There was also a specific institution for assessing the virtuous standing of witnesses, *tazkiya*, and a designated individual (the *muzakki*) whose job it was to make the necessary enquiries. What I want to stress, however, is that the judicial process was dependent on the relevant knowledge of the community and the moral credibility of witnesses. In a system where oral evidence was the only basis of legal proof, knowledge about the moral character of witnesses helped to constitute authoritative legal judgment. This contrasts with the system of positive law in which documentary and other indirect evidence are not only accepted but given priority.

The shift to positivism had various aspects. One that is relevant to our story is the fact that the figure of the Prophet ceases to be the object of ethical imitation. Thus it is known that Muhammad Abduh, the great Egyptian religious reformer of the late nineteenth century, possessed a copy of David Strauss's *Life of Jesus* among the European books in his library.[14)] The influence of this book on modernist Muslim biographies of the Prophet was probably considerable and needs to be explored. The twentieth-century positivization of *sīra* literature (literature on the Prophet's biography) contributed to the familiarization of a new conception of morality that was linked less to practices of virtue formation and more to a modern notion of free personal choice. (I am thinking of the work of Ahmad Amin, Muhammad Husain Haykal, Abbas Mahmud al-Aqqad, Abdul Rahman al-Sharqawi, etc.) For this reason I think the modernist dismissal of stories about the Prophet on the ground that they were "superstitious" should be regarded as a positivist move, and not confused with the well-known condemnation of public storytellers (*qussās*) by medieval *hadīth* teachers and theologians on the grounds that the extraordinary tales and songs they recited about the

Prophet veered towards *shirk* (attributing partners to God).[15] The notion of "superstition"[16] is by no means equivalent to the theological concept of *shirk*. What concerned the modernist was that the Prophet Muhammad should not be represented as a miracle-monger pretending to flout the laws of nature. They represented him as a genius capable of astonishing social and political achievements. Now a genius cannot be imitated, he can only be admired. Thus in the discourse of modernists the Prophet Muhammad was neither a paragon of virtue to be emulated nor an eternal basis of legal rules. He could therefore be invoked by secular Muslims and Christians alike as a remarkable historical personality in the emerging story of Arab nationalism. This shift produces a different range of sensibilities—and thus new forms of embodiment—for which the figure of the Prophet was important but no longer central.

Perhaps I should add the caveat here that I am not making claims about religion being more pervasive in earlier times or more rational in ours. Did Muslims believe more strongly and practice more assiduously in the past? I do not know and am not interested in this question here. My concern is to analyze what it means to say that someone is "being a moral subject," or that she is acting as a legal agent and not an ethical one. More specifically, I am suggesting that we should explore the new ways that law came to be separated from ethics in the process known as legal modernization in Egypt. My general premise is that a change in the very *concept* of morality and not merely in its *content* was involved. If I have even begun to persuade you that there is something in what I say, then you will agree that historians need to pay more attention to breaks as well as continuities in the story of religious modernization in Egypt.

Modern changes in law, religion, and morality do not simply indicate the continuing removal of restrictions on social choice (as though the choosing subject pre-existed all cultural and social conditions). They also imply new ways of constituting and experiencing social relations, and therefore of becoming moral subjects. The changes may also increase moral dilemmas. Thus the tendency to "privatize morality" that accompanies the positivization of law and social knowledge has increased some choices while producing further contradictions. For on the one hand there is a push for deregulation on the grounds that in modern society personal beliefs are highly diverse; at the same time, whenever there is moral panic there are calls for the law to be imposed *equally* on everybody regardless of their personal beliefs. The generality and predictability of law is after all a claimed feature of positive law. Such tensions are a feature not only of Egypt, a country often described as being not yet fully secularized, but of Western liberal societies too. The recent affair of the Islamic veil in France is an example of just such a call.

Codification was regarded by Westernizers as crucial for Egyptian modernization because, unlike case law, it provided a thorough and systematic reproduction of modern law. As a feature of positivism, codification is intended to be a guarantee of the law's publicity and universality. Whether legal realists are right or not in maintaining that the law never was

universal and predictable, it remains true that the emergence of the liberal welfare state has created new tensions between the abstract ideal of law and the particular ways in which the law is applied.[17] The idea that morality is properly a private matter and that what is private should not be law's business has contributed to the passing of legislation intended to deal with private trouble cases that force themselves into the legal arena. The legislation has given judges and welfare administrators greater discretion in matters relating to the family (custody, childcare, divorce, maintenance, matrimonial property, and inheritance). The feeling is that this is a more humane way of dealing with conflicts in which different personal beliefs, sentiments, and circumstances can be taken into account. But discretion reinforced by private hearings results in justice being individualized. Where the powers of discretion are conferred on administrative officials, the possibilities of appeal are restricted. Thus the authorized intervention by social workers into family life in cases of suspected incest or child neglect or spousal abuse is a function not directly of law but—for good or for ill—of bureaucratic action on the morality of "private" relations that is aided by law. *In other words: although religion is no longer allowed to impose moral standards on society, these legal developments are re-drawing the boundaries of ethics as a space of moral self-regulation.*

Let me try to summarize what I have been saying and then bring my comments to some sort of conclusion.

I said that the positivization of law in Egypt has accompanied important changes. It should be clear that I am interested less in how these changes are to be labeled—"Western" or "Egyptian" or "French," or even "a hybrid product of the interaction between foreign and indigenous actors"—and more in the changes themselves, less in what caused the changes and more in some of their ideological implications. Prominent among these changes was the attempt by reformers to separate personal morality from state law, and although the reformers admit that connections between them remain at various levels, they maintain that such connections are indirect and contingent. Most important, they increasingly maintain that the regulation of individual behavior that is to be called *moral* is not a legitimate function of communal power. My argument has been that the separation of law and morality into autonomous (albeit interconnected) realms has meant a transformation in the form as well as the content of the latter, and the claim that modern state law does not regulate moral behavior is more questionable than it appears at first sight.

In my presentation I also tried to question the notion that codification secures the generality and publicity of the law. In modern states there is an intimate connection between legal authority and administrative powers. One outcome of this is that the domain of personal morality (pre-eminently the domain of "family" relations) is at once defined, protected, and regulated. Justice relating to private trouble cases comes to be individualized. Although Egypt does not have the state-administered social services that are found in modern Western states, I pointed out that if they are taken as the model of liberal democracy, some paradoxes will be

generated if and when Egypt follows them. These have to do with increasing secrecy in the administration of personal law and the increasing control of personal moral behavior by the state. But what I did not discuss in any detail—although I have done so elsewhere—is how in Egypt the state attempts to define and control "religion," as it does in most modern countries.

Finally, I touched on the third assumption of positive law that I mentioned at the very beginning: the social foundation of its authority. I have not, to be more precise, interrogated the concept of "society," a domain of reality that has its own *modern* conditions of existence and in which positive law finds its ultimate validity. For if "society" (as opposed to mere sociality) is itself a *national project*, as I suggested, the claim that law is *socially* founded becomes more problematic (because of their circularity) than theories of liberal democracy recognize. I did, however, stress that the positivization of law in Egypt meant a radical change in the ethical structure of the *shari'a* schema. How this played itself out in Egyptian history during the nineteenth and twentieth centuries is of course a crucial question for further research.

But I want to conclude with a general comment: In the history of modern Egypt the connections between morality and law, between religion and politics, should not be seen as a matter of either fusion or separation. The connections and alterations between them are complicated. Furthermore, the changes that have taken place should not be taken—in the way that many Islamists and orientalists have taken them—to imply that the Islamic tradition has therefore been broken. That tradition, like all living traditions, is full of tensions that emerge sharply in particular contexts. It is capable of change and has indeed changed again and again in its history. The idea that "tradition" always requires unthinking imitation from one generation to the next and that the existence of serious argument about the existence of new questions and answers means that tradition has given way to modernity, is a serious misconception. But how, in a changing democratic tradition, ethics, law, and religion are related to one another, and to what degrees they can be negotiated, is never a simple question.

NOTES

1) Tariq al-Bishri, *al-Wad' al-qanuni al-mu'asir bayn al-shari'a al-islamiyya wa-l-qanun al-wad'i*, Cairo: Dar al-Shuruq, 1996.
2) See A. Shalakany, "Sanhuri and the historical origins of comparative law in the Arab world." in Annelise Riles, ed., *Rethinking the Masters of Comparative Law*, 2001.
3) *Bahth fī qā'idat islāh qanūn al-ahwāl al-shakhsiyya*, Alexandria, Jurji Gharzuri Press, 1917.
4) Safwat, *Bahth*, pp. 3-5.
5) See Hossam M. Issa, *Capitalisme at societés anonymes en Egypt: Essai sur le rapport entre structure sociale et droit*, Paris: R.Pichon et R.Durand-Auzias, 1970, especially Part One.
6) Safwat, *Bahth*, p. 24. According to van Ess, a threefold classification *halāl*, *harām*, and *mubāh* first emerged in the early ninth century (cited in Baber Johansen, *Contingency in a Sacred Law*, Leiden: Brill, 1999, p. 69). The familiar fivefold classification came later, says Schacht, and was influenced by Stoic ethics. See J. Schacht, *An Introduction to Islamic Law*, Oxford: O.U.P., 1964, p. 20.

7) See, for example, *Sahīh al-Bukhārī*, 78:84.
8) Although in classical *fiqh* these two principles were supplementary to others (and therefore of relatively limited significance), in the hands of many modernists they have become major instruments of Islamic reform with indefinite powers. As a secular statist this is clearly not the route that Safwat takes.
9) See J. B. Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy*, Cambridge: Cambridge University Press, 1998, Chapter 4, especially pp. 75-8; and Richard Tuck, *The Rights of War and Peace*, Cambridge: Cambridge University Press, 1999, Chapter 3.
10) My reference to Aristotle and Kant is not intended to embrace two total moral philosophies. I want to identify a difference between virtue ethics and rule-governed ethics that has been discussed in philosophical debates since the sixties (see, for example, Alasdair MacIntyre, *A Short History of Ethics*, 1966; Amelie Rorty, ed., *Essays on Aristotle's Ethics*, 1980) and to use the two names to point to a historical shift in the legal reforms in Egypt.
11) A. Schimmel, *And Muhammad is His Messenger*, Chappel Hill, NC: University of North Carolina Press, 1985, p. 27. She cites Ibn Taghribirdi.
12) Amira Sonbol, "Adults and Minors in Ottoman *Shari'a* Courts and Modern Law" in Amira El Azhary Sonbol (ed.), *Women, the Family, and Divorce Laws in Islamic History*, Syracuse University Press, 1996, pp. 238-9.
13) Contrasting the flexibility of legal options available in Ottoman times with those of the post-1897 era, Sonbol writes that "Practically speaking, there was a preference for the application of *'urf* in Egypt during the Ottoman period, whereby the public could choose the *madhhab* [legal tradition] to be applied to their cases, and *qadis* and *muftis* (deliverers of formal legal opinion) from those *madhahib* administered *fatawi* (juridical opinions)." Ibid., p. 237.
14) A. Hourani, *Arabic Thought in the Liberal Age*, OUP, p. 135.
15) See Ignaz Goldziher, "The Hadith as a Means of Edification and Entertainment," in *Muslim Studies*, volume II, London: Allen and Unwin, 1971.
16) According to the etymology supplied by Emile Benveniste, *superstitio* comes from a root which means "surviving" (*Indo-European Languages and Society*). Hence initially it had nothing pejorative about it. But medieval Christian theologians used the term "superstitio" to apply to vestiges of pagan religion in a way that was at once temporal and value-laden. English anthropologists like Tylor cleared the notion of its theological overtones and gave it a more positivist character by proposing the term "survivals" ("fragments of a dead lower culture embedded in a living higher one", *Primitive Culture*) instead.
17) See, for instance, Katherine O'Donovan, "Family Law and Legal Theory," in W. Twining (ed.), *Legal Theory and Common Law*, Oxford: Blackwell, 1986.