Is The Middle East Moving Toward Islamism After The Arab Spring? The Case Study of the Egyptian Commercial and Financial Laws

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IS THE MIDDLE EAST MOVING TOWARD ISLAMISM AFTER THE ARAB SPRING? THE CASE STUDY OF THE EGYPTIAN COMMERCIAL AND FINANCIAL LAWS

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Abstract

The first parliamentary elections that followed the Egyptian Revolution witnessed an unprecedented success for Islamists as they secured an overwhelming majority of seats in parliament, suggesting that they may intend to amend many laws to bring parliament into compliance with Islamic Shari’a. This article addresses legal challenges that will face the new majority if they decide to Islamize laws and regulations related to business and finance. Particularly, the article discusses Islamic money theory, trade, banking systems, consumer protection, insurance, competition, and tax systems. The article analyzes Egyptian business and finance laws to examine whether they comply with Islamic law. It then proceeds to explain the alternative Islamic principles that may replace several current rules. The article concludes that while some changes are foreseeable, there can be no expectation of radical change in the near future. Although the authors come to this conclusion, they analyze the legal issues without judging, supporting, or opposing the imposition of Islamic law.

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INTRODUCTION

Although secularism stands as a solid wall against the imposition of religious principles in national laws and regulations, the situation is different when it comes to Islamic societies. This is because Islam as a religion regulates all aspects of life including spiritual, economic, political, social, and commercial activities. These divergent approaches may soon be displayed in Egypt; while its population is the largest in the region, with more than eighty million people, it also boasts the largest non-Muslim minority with about eight to twelve million Christians. Since Islamic law affects many aspects of its followers’ lives, a question arises with respect to the Shari’a rules’ impact on financial and commercial issues that affect all. This is especially important when it comes to huge financial and commercial practices such as

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3 Islam is the religion of Muslims with principles provided by their holy book, the Qur’an. God, Allah, dictated The Qur’an word for word to his Prophet Muhammad, the prophet of Islam. Glossary of Islamic Legal Terms, 1 J. ISLAMIC L. 89, 90, 99 (1996); MASHOOD A. BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW 34 (2003). The word Sharie’a refers to the Islamic laws. Id. at 246. The sources of Islamic law include the Qur’an as the main source, which is not only considered as a spiritual book, but also a legal code. See generally Cherif Bassiouni & Gamal M. Badr, The Shari’ah: Sources, Interpretation, and Rule-Making, 1 UCLA J. ISLAMIC & NEAR E. L. 135, 135, 138, 148-49 (2002) (defining the sources of the Sharie’a and its methods of interpretation). The Sunna is the second source of the Sharie’a, which refers to the Prophet Muhammad’s oral statements, actions, or consensus in action by others. BADERIN, supra at 246. The Sunna, as a source of Islamic law, has to be in conformity with the Qur’an otherwise it cannot be considered as a source of the law. In cases where the Qur’an and the Sunna are silent regarding certain issues, the supplementary sources of the Sharie’a apply. These sources include Ijma’ and Qiyas. Ijma’ means the agreement on a particular issue that is not provided by the Qur’an or the Sunna or that requires further interpretation. Qiyas means analogue reasoning that aims to govern a new situation with an old rule as long as this new situation is similar to that governed by the old rule. See generally Irshad Abdal-Haq, Islamic Law: An Overview of Its Origin and Elements, 7 J. ISLAMIC L. & CULTURE 27 (2002) (defining Shari’a and discussing the methodologies of the Islamic jurisprudence); Bernard K. Freamon, Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence, 11 HARV. HUM. RTS. J. 1 (1998) (introducing the definition of Islam and the various sources of its rules).


6 See Taylor, supra note 4, at 387.
as banking systems, trade transactions, consumer protection, prohibition of monopoly, taxation mechanisms, governmental interference in private sector activities, and insurance, particularly for a country like Egypt, which is deemed the center of the Arab Middle East.

The January Revolution makes imposition of Shari’a as a source of legislation seem more likely than in the past, as Muslim groups advocate for a more integral role for Islamic law in Egypt’s legal system. This possibility seems even more likely after the Islamists\textsuperscript{7} won an overwhelming majority of seats in a parliamentary election runoff, bringing them closer to dominating the first elected body after the Revolution.\textsuperscript{8}

This Article addresses the legal challenges that may face the new Islamic government if they seek to impose Shari’a. The Article does not provide recommendations, but instead raises some unanswered questions that may arise if Muslim groups, wielding their new

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\textsuperscript{7} The most common Muslim groups in Egypt are the Muslim Brotherhood (known as the “Al-Ikhwan Al-Muslimeen”) and the Salafi’s group. Currently, the Muslim Brotherhood is the most powerful political force in Egypt. It was established in 1928. The Brotherhood, a group that virtually invented the Islamist movement eight decades ago, is a middle-class missionary institution at its core, led not by religious scholars but by doctors, lawyers, and professionals. It has long sought to move Egypt toward a more orthodox Islamic society from the bottom up, one person and family at a time. Its vast following and disciplined organization, built during its decades in opposition, have given it preeminence among civilian groups since the Revolution that toppled former President Hosni Mubarak’s regime in February 2011, even though the uprising was set off primarily by young people and liberal activists. The Muslim Brotherhood’s Freedom and Justice Party was the clear winner in the first round of parliamentary voting held in late November, and appeared poised to create a dominant coalition with a more conservative Islamist party. \textit{Topics: Muslim Brotherhood (Egypt), N.Y. Times, Sept. 14, 2012, available at http://topics.nytimes.com/top/reference/timestopics/organizations/m/muslim_brotherhood_egypt/index.html?inline=nyt-org. In contrast, the Salafis are political newcomers, directed by religious leaders. Ten months after the uprising that overthrew President Mubarak, the Salafis’ new brand of religious populism propelled Al Nour and its allies to claim more than a quarter of the vote in the first round of parliamentary elections, surprising even the most seasoned Egyptian analysts and Western diplomats. David D. Kirkpatrick, \textit{In Egypt, a Conservative Appeal Transcends Religion}, N.Y. Times, Dec. 10, 2011, \textit{available at http://www.nytimes.com/2011/12/11/world/middleeast/salafis-in-egypt-have-more-than-just-religious-appeal.html?pagewanted=all. Recently, the Brotherhood’s party denied that there was any “alleged alliance” to form “an Islamist government” with Al Nour, a party formed by ultraconservative Islamists known as Salafis. David D. Kirkpatrick, \textit{Muslim Brotherhood Denies Islamist Alliance}, N.Y. Times, Dec. 2, 2011, at A10.}

\textsuperscript{8} See Kirkpatrick, \textit{In Egypt, a Conservative Appeal Transcends Religion, supra} note 7.
authority, push for such a move. In particular, the Article explains legal difficulties that may arise in terms of financial and business laws.

Accordingly, Part I of this Article explains the effect of Shari‘a on legislation in Muslim countries. Part II offers an overview of the Egyptian Revolution, particularly the political, economic, and social circumstances leading to the uprising. Part III provides a genealogy of debated issues that may arise when thinking about the imposition of rules based on Shari‘a in commercial and financial laws and regulations. Finally, Part IV concludes that radical or fundamental changes in laws are unforeseeable, at least in the short run.

**Shari‘a as a Source of Legislation**

The degree of adopting Shari‘a as a source of legislation is not the same in all Muslim countries. Arguably, Muslim countries, according to their reaction toward adopting Shari‘a as a source of their legislation, are divided into three main categories.⁹ One category includes countries, such as Lebanon and Turkey, that do not provide for Shari‘a as the main source of their national laws.¹⁰ Thus, the Turkish Constitution provides that “[t]he Republic of Turkey is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Ataturk, and based on the fundamental tenets set forth in the Preamble.”¹¹

Some other countries, such as Algeria, Yemen, and Jordan, consider Shari‘a to be a vital, but not exclusive, source of their national laws.¹² For instance, the Yemeni Constitution provides that Yemen is an Arab Muslim and independent country; that Islam is the religion of the country and Arabic is its official language; that Shari‘a is the main source of legislation; and that inheritances must be granted in accordance with Shari‘a.¹³

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⁹ NISRINE ABIAD, SHARIA, MUSLIM STATES AND INTERNATIONAL HUMAN RIGHTS TREATY OBLIGATIONS: A COMPARATIVE STUDY 34-35 (2008) (Islamic Law Countries are countries where the majority of the population is Muslim, and where the state is one of fifty-seven member states in The Islamic Conference, an inter-governmental organization that represents the collective voice of the Muslim world.).

¹⁰ Id. at 35-36.


¹² See ABIAD, supra note 9, at 37.

Finally, some countries, such as Iran, Bahrain, and Saudi Arabia recognize Shari’a as the main and exclusive source of their national laws. For example, the Bahraini Constitution provides that “[t]he Kingdom of Bahrain is a fully sovereign, independent Islamic Arab State whose population is part of the Arab nation and whose territory is part of the great Arab homeland.” In addition, the Basic Law of 1992 of Saudi Arabia states: “[t]he Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God’s Book and the Sunnah of His Prophet, God’s prayers and peace be upon him, are its constitution, Arabic is its language and Riyadh is its capital.” Similarly, the Qatari Constitution provides that “Qatar is an independent sovereign Arab State. Its religion is Islam and Shari’a law shall be a main source of its legislations. Its political system is democratic. The Arabic Language shall be its official language. The people of Qatar are a part of the Arab nation.”

It is claimed that Egypt falls under the second category explained above. Thus, the Egyptian Supreme Constitutional Court held:

The principles of Islamic Shari’a are the major source of legislation. This imposes a limitation curtailing both the legislative and executive power, through which they are obliged that whatever laws or decrees they enact, no provision contained in them may contradict the provisions of Islamic law which are definite in terms of their immutability and their meaning. . . whatever legislative enactment contravenes them must be declared null and void.

Also, the Egyptian Constitution declares Islam as the religion of the State and the main source of the law. Written legislation, court deci-
sions, and jurisprudential explanations all reflect that Shari’a is the main source of legislation in Egypt; however, in reality Shari’a does not serve this function except in a few areas such as family law. The Egyptian legal system is more accurately described as a “combination of Islamic (Shari’a) law and the Napoleonic Code.” In fact, Egypt was the first Arab Middle Eastern country that voluntarily adopted Western style codes in the late nineteenth century.

BACKGROUND ON THE JANUARY REVOLUTION

The Egyptian Revolution, beginning on January 25, 2011, called for democracy, justice, the protection of human dignity, the equal application of the rule of law to all citizens, and a change of the governing regime. Many reasons have been cited to explain the eruption of this Revolution. Although Egypt has witnessed remarkable economic growth in the last decade, most Egyptians did not feel the effect of this growth. The corruption of public officials and businessmen, who were frequently motivated by politics, led to the concentration of most investment tools in the hands of the elite. This elite monopoly led to an unfair distribution of wealth, contributing to the anger that caused the January Revolution.

Additionally, the denial of human rights and restrictions on public freedoms, such as freedom of speech and participation in public life, played a role in starting the January Revolution. For instance, abuse by police went unchecked for more than two and a half decades while the incumbent regime remained in power. Police suppressed

2012) (repealed 2011 and replaced by the Temporary Constitutional Declaration of the Arab Republic of Egypt, Al-Jarida Al-Rasmiyya, Mar. 30, 2011 (Egypt)).
25 Elsaman & Alshorbagy, supra note 18, at 43.
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social freedoms, practiced torture, constructed detention camps, committed security abuse, and destroyed institutions in a clear violation of the basic human rights of Egyptian nationals.27

The fact that President Mubarak had been in power for thirty years also fueled the sentiments that led to the revolution. The Egyptian Constitution was amended in a way that gave him the power to monopolize the country and his son, Gamal Mubarak, was groomed to follow him.28 It may be further noted that the scandalous rigging of all the elected councils during the past decade also encouraged the Revolution, particularly the rigging of the parliamentary elections, which was done in the most blatant and unsophisticated way, reflecting the arrogance of the ruling clique and its contempt of the people.29

In the first parliamentary elections after the Revolution, Islamist candidates were overwhelmingly successful and dominated the new parliament.30 This raises the question of whether or not the Egypt-

27 See Egypt: Pledge Serious Human Rights Reform, HUM. RTS. WATCH, Feb. 16, 2010, http://www.hrw.org/news/2010/02/16/egypt-pledge-serious-human-rights-reform; Egypt: Government Renews State of Emergency, HUM. RTS. WATCH, May 11, 2010, http://www.hrw.org/news/2010/05/11/egypt-government-renews-state-emergency. These harms also emphasize the state of emergency Egypt had been in for 30 years. In fact, both Egyptian and international human rights organizations have reported that such abuses occurred in Egypt, not to mention similar reports by foreign governments and the United Nations. In fact, one of the occasions that led to the Revolution was the “accidental” murder of a young man, Khalid Sa'id, by the police on June 7, 2010. He was beaten to death by police forces in an internet café in Alexandria. This led some Egyptian youth to establish a Facebook group named “We are all Khalid Sa'id,” which soon gathered 100,000 members. They formed discussion groups and moved from demanding justice for their friend to protesting emergency law, repression, corruption, and unemployment. In short, they decided to take their destiny in their own hands and to go for real change. See Anver M. Emon et al., We Are All Khaled Said, 3 MIDDLE E. L. & GOVERNANCE, no. 1-2, 2011, reprinted in Bos. Rev., http://www.bostonreview.net/BR36.6/khaled_said_facebook_egypt_revolution.php.


29 See Sharp, supra note 28, at 2, 16.

tian Revolution was an Islamic revolution or at least called for an Islamic government. Regardless of the answer, one cannot deny that Islamic ideas were clear during the Revolution. Abou El Fadl cites examples that illustrate the effect of religion on the Revolution, such as the fact that protestors used to gather every Friday to perform prayers together before starting their political activity. They also used to label every Friday with a different inspiring name such as “the Friday of wrath,” “the Friday of departure,” and “the Friday of victory.”

Additionally, Friday sermons played a vital role in inspiring and motivating protestors to survive the Revolution. Martyrs killed during the Revolution are called Shohada, from the word Shihada, an Islamic principle that refers to martyrs who are killed because of engaging in a battle against despotism, injustice, and corruption. One can also see the effect of religion on slogans sung by protestors such as “Allahu Akbar” (God is greater), “silmiyya, silmiyya” (peacefully, peacefully), and “alshahid habib Allah” (martyrs are the closest or the most beloved to God).

The Egyptian Revolution, however, was not led or engineered by Islamists to bring about an Islamic state modeled after Iran or Saudi Arabia. The reason behind the mixed nature of the Revolution that ties it strongly to Islam is the fact that Islam has a great influence on its followers’ everyday behavior. Thus, “separation of church and state in many western societies has led to the view that religion is essentially a private matter, whereas the Islamic ethical system allows no such separation. As a result, Islam influences the decision making of its followers in every situation, including those that arise in business relationships.”

**FINANCIAL AND COMMERCIAL LAW CHALLENGES**

One of the greatest factors that contributed to the January Revolution was the country’s economic decline. Forty-four percent of all Egyptians used to be categorized as “extremely poor to near poor,”

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32 Id.
33 Id.
34 Id. at 313.
35 Id.
36 Id. at 312.
more than 10 percent were unemployed — almost 90 percent of whom were between the ages of 15 and 24 — and inflation was almost 12 percent.\(^{39}\) Since the Revolution took place, however, political instability further harmed the economy.\(^{40}\) Foreign capital disappeared and more than 300 Egyptian businessmen remained on a government watch list, many of whom have fled the country.\(^{41}\) The GDP decreased four times and the reserves declined from $36 billion at the beginning of 2011 to $22 billion by October of the same year.\(^{42}\) Tourism revenue declined 35 percent, and the stock market declined more than 40 percent.\(^{43}\) This suggests that the Egyptian transitional government failed to support the Egyptian economy during the transition period,\(^{44}\) and that the new government will be facing a worst-case scenario of economic decline. This means the Egyptian economy’s coming era requires careful attention, yet many challenges may arise depending on the direction Islamists adopt when imposing Shari’a rules. These potential roadblocks will be further explored below.

\(\text{(A) Monetary Theory}\)

The Islamic financial theory of moderation is somewhat of a midpoint between “Liberalism,” which adopts the concept of absolute possession and disposal of money, and “Totalitarianism,” which eliminates human beings’ natural ability to possess and invest.\(^{45}\) The core of the moderation theory is the idea of \textit{Khilafa}.\(^{46}\) This idea provides that a human being is a successor of Allah, and accordingly, his life is


\(^{40}\) The continuing unrest is due to contradictions among different demands: majority interests vs. minority rights; secular vs. religious; military vs. civilian; Christians vs. Muslims; Muslim Brotherhood vs. Salafists; poor and unemployed vs. elites; old vs. young. See id.


\(^{42}\) Heineman, \textit{supra} note 39.

\(^{43}\) Id.


\(^{46}\) \textit{Glossary of Islamic Legal Terms}, \textit{supra} note 3, at 96 (\textit{Khilafa} is an Arabic word meaning “succession”).
“a test of the worth of men in the eyes of Allah.” In other words, the ownership of money reverts first to Allah and people are appointed as successors/trustees to use this money through nominal ownership. God attributed money to himself to underline its importance and assigned owners of money as successors/trustees who are responsible for maintaining, increasing, and spending money according to directions and instructions set by Allah.

So, where money is owned by Allah, all people are worshipers of Allah, and the life they live is dictated by Allah, money shall be generated to be used for and maintained by all people, and its benefits should be in the favor of all people. Therefore, money is from and to the entire Islamic nation as one body. Thus, the welfare of society could be achieved if governments had a more enabling role, through the re-distribution of wealth, to create a more suitable climate for serving both private and social goals.

The legal challenge that may arise here is related to the degree of governmental interference, used as a tool of the people’s collective will, because the government’s role in the operation of monetary and investment activities must reflect the fair and just management of money owned by Allah.

(B) Prohibited trades

Shari’a has a unique concept of property and trade, called mal, which affects trade in general. Mal refers to objects that can be owned and traded among people. An object has economic value only if it is useful for people, and the perspective of Islamic law informs

48 See generally Emarah, supra note 45.
49 The Qur’an provides “Believe in Allah and His Messenger, and spend (in charity) out of the (substance) whereof He has made you heirs. For, those of you who believe and spend (in charity), for them is a great reward.” Qur’an: The Holy Qur’an English Translation of the Meanings and Commentary 1688-89 (Presidency of Islamic Researchers et al. eds., 1994) (quoting the meaning of the Qur’an 57:7). It also provides: “[G]ive them something yourselves out of the means which Allah has given to you.” Id. at 24:33.
50 See generally Emarah, supra note 45; “He who hath created for you all things that are on earth.” The Qur’an, supra note 49, at 2:29.
51 See generally Emarah, supra note 45.
53 Glossary of Islamic Legal Terms, supra note 3, at 97.
55 Id.
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this finding. Accordingly, some objects that otherwise can be subject to property rights and traded in comparative societies will be forbidden under Islamic law. This means that trade in Islamic law societies is not about achieving profits; rather, Islamic law societies aim to promote the social welfare of the whole society.56

Accordingly, trade in certain types of items, such as tobacco and alcohol, is prohibited under Shari’a law.57 This is because from the Islamic viewpoint alcoholic drinks are not useful to people, due to their intoxicating effect.58 As a result, Shari’a law forbids drinking and trading in alcoholic drinks as they do not qualify as mal. However, it is imperative to note that the prohibition does not affect all such products; where items are traded for other purposes, such as alcohol used for scientific research, Shari’a is not so restrictive.59 In short, the purpose and use of an item is just as important as its ingredients.

Moreover, although narcotic drugs are not explicitly mentioned in the Qur’an, trade in narcotic drugs is forbidden by virtue of analogy, which is another source of rules derived from Islamic law.60 Like alcohol, narcotic drugs are not useful and do not qualify as mal except for scientific research or where used for medical purposes.61 One should therefore expect a fierce war against the illegal drug trade in Egypt, where the trade is absolutely outlawed but exists on a large scale due to the substantial failure of police to enforce the law, particularly in the period following the revolution.62

Tobacco trading is another complicated issue. It does not qualify as mal in Islam because it negatively affects a person’s health, and as a general rule, anything that negatively affects a person’s health is forbidden.63 Therefore, the tobacco industry and trade is prohibited under Islamic law. Yet, this conflicts with the situation in Egypt,

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56 See Williams & Zinkin, supra note 47, at 523; see also Taylor, supra note 4, at 388.
57 Williams & Zinkin, supra note 47, at 523.
58 Bassiouni & Badr, supra note 3, at 156.
60 Bassiouni & Badr, supra note 3, at 155.
61 Letter from Gezairy, supra note 59.
63 The Islamic Jurisprudence derives evidence from the Qur’an and the Sunnah to that effect. The Qur’an provides: “Those who follow the Messenger, the unlettered prophet, whom they find written in what they have of the Torah and the Gospel, who enjoins upon them what is right and forbids them what is wrong and makes lawful for them the good things and prohibits for them the evil and relieves them of their burden and the shackles which were upon them. So they who have believed in him, honored him, supported him and followed the light which was sent
which is home to millions of smokers, and where the tobacco industry
is quite successful. As a result, it is not expected that tobacco will be
banned since most smokers are addicted to the substance, but it is rea-
sonable to expect restrictions on smoking, particularly in public places.
This presents a question as to the effect of the prohibition of trade in
these various goods and services on the Egyptian economy. It also
raises a challenge to investment and trade ties between Egypt and the
rest of the world, particularly those countries that do not prohibit
these items. For instance, the application of Islamic law in Egypt may
result in the prohibition of the alcohol industry – and businesses offer-
such products may be forced to look for an alternative. Neverthe-
less, according to some Islamic scholars, the prohibition of these
businesses aims to protect life and health by avoiding its harmful ef-
fects on society.

(C) Banking System

Another challenge arises with respect to Egypt’s banking sys-
tem. In Islam, usury, called riba, is strictly prohibited. Riba literally
means “increase” and refers to the principal and the premium the bor-
rower pays the lender as a condition for the loan or for an extension in
its maturity. Shari’a law prohibits this because it creates profit with-
out work and the lender and borrower do not equally share in the risk
of the loan, which is not for the moral, social, and economic well-being
of society. In this context, the Qur’an provides:

That they took usury, though they were forbidden; and
that they devoured men’s wealth wrongfully; We have
prepared for those among them who reject faith a griev-
ous chastisement.

But Allah hath permitted trade and forbidden usury.
Those who after receiving admonition from their Lord,
desist, shall be pardoned for the past; their case is for Allah (to judge); but those who repeat (the offense) are Companions of the fire: they will abide therein (forever).  

The prohibition of the riba led Islamic banking institutions to use supervisory boards that provide religious guidance for the banks’ activities. This allowed Islamic banks to develop new tools that are claimed to be in conformity with Shari’a rules: Murabaha, Bai Bithaman Ajil, Ijara, Musharaka, Mudaraba, and Qarde Hasan.

The Murabaha is an installment sale agreement by which the bank works as an intermediary, buying goods and then selling them to the customer at the acquisition cost (in addition to some profits paid in installments). Hence, the bank owns the goods before the ownership is transferred to the customer. In Bai Bithaman Ajil ("deferred payment financing"), the bank, at the request of its customer, buys certain assets and then resells them to the customer on a deferred payment schedule.

Istisna is similar to the Bai Bithaman Ajil, except the bank pays a contractor to complete certain work for the customer’s benefit. Moreover, the Ijara, a tool that is often used for property, is a rent-to-own agreement encompassing a leasing arrangement whereby the bank buys the goods and then leases them to customers. The Musharaka is a kind of partnership agreement that allows the bank to provide its customers with required capital on the condition that the bank shares the customers’ profits and losses. Customers also usually contribute small shares of capital, effort, and know-how. Although similar to the Musharaka, in Mudaraba, the bank provides the entire amount of capital while customers only provide know-how. Finally, the Qarde Hasan allows banks to provide interest-free loans in return for an unconditional commitment to pay the bank back after providing collateral.

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69 Id. at 2:275.
70 Taylor, supra note 4, at 394.
72 Taylor, supra note 4, at 395.
73 Id. at 396.
74 See id.
75 Mann, supra note 71, at 1149.
76 See id. at 1150.
77 Taylor, supra note 4, at 398.
78 Id. at 399.
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The question that arises here is related to the status of the treatment of the non-Islamic banks established in Egypt and the possibility of turning or establishing new Islamic banks that would deal under the banking rules imposed by Shari'a law. Another question addresses the effect of the establishment of this kind of bank on the cycle of economics and investment, and particularly foreign investment, in Egypt.

(D) Consumer Protection

Many principles of Islamic law discussed above, such as the prohibition against riba, aim at protecting consumers.\textsuperscript{79} Similarly, Islamic insurance policies can be seen as protecting policyholders from wasting their money, which is transferred to the insurance companies that in turn achieve large profits.\textsuperscript{80} Hence, protecting consumers is an ultimate goal of Islamic law.

In addition to the above-mentioned principles, in the Islamic contract of sale, the seller is required to reveal any defects he is aware of in the product; otherwise, the contract is void.\textsuperscript{81} Therefore, even if the seller put an exemption clause in the contract to avoid liability for any defect in the product sold, such clause is not applicable if the buyer proves that the seller was aware of the defect and did not disclose it at the time of contracting.\textsuperscript{82} Moreover, the buyer has the right to inspect the good to ensure its quality, a concept called khiyar al-ayb.\textsuperscript{83} Additionally, the concept of gharar prohibits, as a general rule, those transactions whose subject matter is not available at the time of contracting in order to further protect consumers.\textsuperscript{84}

Similarly, a transaction that involves significant uncertainty and risk is not permitted.\textsuperscript{85} For instance, gambling and other games of chance are prohibited.\textsuperscript{86} This is because in Islam, one must acquire

\textsuperscript{79} See supra pt. III(c).
\textsuperscript{80} See supra pt. III(e).
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{86} The Qur'an provides: “They ask you about wine and gambling. Say, ‘In them is great sin and [yet, some] benefit for people. But their sin is greater than their benefit.’ And they ask you what they should spend. Say, ‘The excess [beyond needs].’ Thus Allah makes clear to you the verses [of revelation] that you might give thought.” THE QURAN, supra note 49, at 2:219. Another verse of the Qur'an provides: “O you who have believed, indeed, intoxicants, gambling, [sacrificing on]
wealth by working and benefiting society.\textsuperscript{87} Gambling does not qualify as work because it is a game of chance – a lucky person may acquire massive wealth, while an unlucky person may lose all his wealth. Accordingly, gambling redistributes wealth on the basis of pure chance, not work.

Gambling also involves social dangers since it can be addictive. A gambler who achieves a big profit on one occasion may be tempted to play repeatedly to earn money without expending much effort. Similarly, a gambler who loses money may feel compelled to do so again to recoup his losses. Regardless of the reason for doing so, the more gamblers play, the more they lose. The real winners are those lucky people in whose hands the wealth concentrates. Furthermore, for many people, incentives to gamble may exceed incentives to work and through work, benefit society.

With these concerns in mind, Egypt has long allowed gambling in casinos that limit access to foreigners.\textsuperscript{88} Given the profits from these venues, the liberal regimes that formerly ruled Egypt thought that prohibiting gambling could negatively affect tourism. The rise of Islamists, however, casts doubts on the future of such foreigner-only casinos in Egypt.

In the same context, in the last few years Egypt has witnessed an increasing number of game shows that will likely be an issue under Islamic law. The game shows usually induce television spectators to send a text message or call a phone number to answer a question. The questions are usually very easy so that more people can know the answer and participate. Organizers of such shows will randomly choose one person who made the right answer to get a monetary reward. The source of this reward is the revenue from text messages and phone calls from other spectators. The remaining revenue becomes the profit of the show organizers. Therefore, such shows may be regarded under Islamic law as a prohibited game of chance.\textsuperscript{89}


\textsuperscript{88} Law No. 1 of 1973 (Hotels and Touristic Establishments), Al-Jarida Al-Rasmiyya, 1 Mar. 1973, art. 1 (Egypt).

\textsuperscript{89} FRANZ ROSENTHAL, GAMBLING IN ISLAM 32 (1975) (illustrating that a lottery depends on two things: (1) haphazard drawing which designates the winner, and (2) participants who contribute to a share of the prize).
Insurance

Islamic law prohibits conventional insurance because it is conceptually similar to gambling and thus contradicts the concept of gharar. This is because the insured pays a cash premium, while the insurer undertakes to pay a certain amount of money upon the occurrence of a given future contingency. If the future contingency does not occur, the insured gets nothing in exchange for the cash premiums paid as these are owned by the insurer. Thus, conventional insurance violates the gharar rule because it involves significant uncertainty as to whether or not the insured will get a return for the cash premium payments.

The Islamic version of insurance is “Takaful insurance.” Unlike conventional insurance, in this system an individual acts as an insurer and an insured at the same time. To put it in another way, the policyholders are partners in the insurance company. The company’s administration operates the insurance process but is not the exclusive owner of the company. In return, the administration gets compensation for operating the company depending on the business model employed.

The administration operates the company through a traditional agency contract, know as a wakalah. Additionally, a profit-sharing arrangement can be organized through a mudarabah contract. In such situations, one party, called rab al-mal, the owners of the insurance company, provides the capital while the other experienced party, the mudarib, the company’s administrative team, oper-

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94 Saleh bin-Abdullah bin-Humaid, al-Ta’min al-t’awni al-islami [The Islamic Takaful Insurance] 15, available at www.kantakji.com/fiqh/Files/Insurance/15202.doc; see also Masud, supra note 90, at 1143 (“the insurance company does not act like an insurer in the conventional sense”).
95 Bin-Humaid, supra note 92, at 17; see also Masud, supra note 90, at 1143 (noting that the insurance company manages the business aspect of insurance institutions).
96 Bin-Humaid, supra note 92, at 17.
97 Masud, supra note 90, at 1144.
98 See id.
99 Id.
ates the capital.\textsuperscript{100} The parties share the profit according to a pre-
determined formula.\textsuperscript{101} However, they do not share liability as the 
mudarib’s liability is limited to losses resulting from negligence.\textsuperscript{102} 
Obviously, the administration shall invest the funds of the company in 
non-usurious projects.\textsuperscript{103}

The philosophy of Islamic insurance is based on brotherhood 
and solidarity among people.\textsuperscript{104} Hence, one of its critical features is 
that a company should not aim to obtain profits for the operators of the 
insurance process.\textsuperscript{105} Yet such profit may nevertheless occur as a sec-
secondary result when the cash premiums are invested through the 
agency or the profit sharing arrangements stated above.\textsuperscript{106} Another 
important feature is that the ownership of the funds remains with the 
policyholders.\textsuperscript{107} This feature in particular negates the suspicion of 
gambling. Accordingly, if the company is disassembled, each insured 
party gets a proportionate percentage to his or her original 
investment.\textsuperscript{108}

Additionally, life insurance is troublesome because it may be 
regarded as contradicting Islamic \textit{Shari’a}. First, one cannot insure 
against death because “life and death are in the hands of God.”\textsuperscript{109} Sec-
ond, life insurance violates the Islamic inheritance rules because the 
policyholder can nominate a beneficiary who might not otherwise in-
herit at all.\textsuperscript{110}

The Egyptian insurance industry adopts the conventional ver-
sion, rather than the Islamic version, of insurance.\textsuperscript{111} The rise of 
Islamists after the Revolution suggests that this trend may change and

\begin{thebibliography}{111}
\bibitem{100} Oliver Agha, \textit{Islamic Finance: Principle Before Profit}, 2 Berkeley J. Mid. E. & 
Islamic L. 125, 131 (2009) [hereinafter \textit{Principle Before Profit}].
\bibitem{101} \textit{Id.} at 132; see also Nabil A. Saleh, \textit{Unlawful Gain and Legitimate Profit in 
Islamic Law: Riba, Gharar and Islamic Banking} 103 (1986) (“The division of 
profits between the two parties must necessarily be on a proportional basis and 
cannot be a lump sum or a guaranteed return.”).
\bibitem{102} \textit{Principle Before Profit}, supra note 100.
\bibitem{103} See Ibrahim, supra note 93, at 716.
\bibitem{104} Vogel & Hayes, supra note 92, at 151 (noting that Islamic insurance should 
be regarded “as a charitable collective enterprise by which Muslims pool resources 
to aid each other in the event of casualty or loss”); see also Masud, supra note 90 
(“Islamic insurance is a cooperative model of insurance.”).
\bibitem{105} Masud, supra note 90, at 1143 (“the insurance pool is more akin to a charitable 
institution as opposed to a profit-earning institution”).
\bibitem{106} Bin-Humaid, supra note 94, at 16.
\bibitem{107} \textit{Id.} at 10.
\bibitem{108} \textit{Id.}
\bibitem{109} Masud, supra note 90, at 1144; see Saleh, supra note 101, at 106.
\bibitem{110} See Masud, supra note 90, at 1144.
\bibitem{111} Law No. 47 of 1972 (Civil Code), \textit{Al-Jarida Al-Rasmiyya}, 29 July 1948, §§ 747-
771 (Egypt).\end{thebibliography}
Egypt may follow the experiments of countries that adopt Takaful insurance, like Malaysia.\(^{112}\) It is unclear how the transformation process will happen, and what will be the fate of the current insurance companies.

\((F)\) Competition Laws

Islamic jurisprudence emphasizes that “the basic purpose of legislation in Islam is to secure the welfare of the people by promoting their benefit or by protecting them against harm.”\(^{113}\) Accordingly, the laws of Islam encourage fair trade.\(^{114}\) The harms of monopoly are obvious. Monopolies misallocate resources and redistribute income in favor of a few individuals.\(^{115}\) This causes a reduction in the society’s aggregate welfare, which contradicts the goals of Islam.\(^{116}\) Therefore, Islam forbids monopolies.\(^{117}\)

Fighting monopolies, Islam forbids a merchant from hoarding products when supply does not satisfy demand.\(^{118}\) Hoarding means “withholding supplies of essential goods and services with a view to raising prices.”\(^{119}\) Under Islamic law, the state may force a merchant hoarding such a product to sell the hoarded product at the market

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\(^{112}\) Masud, supra note 90, at 1147 (noting that Takaful insurance was introduced in Malaysia after conventional insurance was declared to be contrary to Islamic Shari‘a; at present, Malaysia has the largest Islamic insurance market.).


\(^{114}\) Amir H. Khoury, Ancient and Islamic Sources of Intellectual Property Protection in the Middle East: A Focus on Trademarks, 43 IDEA 151, 175 (2003).


\(^{117}\) Prophet Muhammad was reported to say “[t]hose who bring grain to a city to sell at a cheap rate are blessed, and they who keep it back in order to sell at a high rate are cursed” and “[w]hoever monopoliseth is a sinner.” THOMAS PATRICK HUGHES, DICTIONARY OF ISLAM: BEING A CYCLOPEDIA OF THE DOCTRINES, RITES, CEREMONIES, AND CUSTOMS, TOGETHER WITH THE TECHNICAL AND THEOLOGICAL TERMS OF THE MUHAMMADAN RELIGION 197 (1885).

\(^{118}\) Brewer, supra note 116; see also SAM‘IRAH SAYYID SULAYMÂN BAYYÚMĪ, AL-IHÔTIKÄR WA-‘ĀÞARÛH FĪ AL-SHARI‘AH AL-ISLĀMIYAH [MONOPOLY AND ITS EFFECTS IN THE ISLAMIC SHARI‘A] 106 (1989) (noting that hoarding products is permissible as long as it does not harm the public; in other words, if the product is available in the market and the public has sufficient access to it, a merchant may hoard the amount he has with a view to selling it when prices go up because this will not harm the public).

\(^{119}\) Brewer, supra note 116.
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price. Additionally, should such a merchant fail to comply, the state may expropriate and sell the product itself.

Moreover, Islamic ethics constitute the foundation for unfair competition rules. Islam forbids any unjust or unscrupulous business practices. Dumping, for instance, is illegal under Islamic law. A dumper uses predatory pricing in order to knock competitors out of competition. By eliminating competition, dumping can constitute a first step toward establishing a monopoly.

Furthermore, free-riding through misappropriating trademarks is considered deceptive conduct and is not allowed under Shari’ a law. Besides the fact that misappropriation constitutes a fraudulent means to induce consumers to buy the product, it also hurts the competitor who owns the trademark. Additionally, because trademarks constitute nontangible property, misappropriation shall be regarded as an attack on the private property of the trademark owner.

Egypt enacted the Law on the Protection of Competition and the Prevention of Monopolistic Practices in 2005. The former regime did not seem serious about protecting competition, however, which was evident from suspicious monopolistic practices in the steel industry — led by a senior official of the then-ruling National Democratic

120 BAYYUMI, supra note 118, at 70-72.
121 Id. at 73-74. Under Islamic law, expropriation is permitted for two purposes: (1) executing a court decision against a debtor, or (2) for public interest. Richard E. Vaughan, Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing past Each Other When We Say “Property”? A Lockean, Confucian, and Islamic Comparison, 2 ILSA J. INT’L & COMP. L. 307, 356 (1996).
123 See Ida Medieha Azmi et al., supra note 122.
124 Id. at 2-3.
125 Id.
126 See id.
127 The Qur’an provides: “Devour not the properties of one another unlawfully, but let there be lawful trade by mutual consent.” The QURAN, supra note 49, at 4:29. Another verse states: “And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people’s property.” Id. at 2:188.
Party. Nonetheless, as one scholar notes, the main purpose of enacting that law was compliance with Egypt’s obligations toward its trade agreement with European countries.

While Islamic principles regulating competition are very basic and general, Egyptian competition laws provide additional details on these issues in light of these general principles. Accordingly, no apparent conflict between Islamic competition law and Egyptian law exists. Hence, the challenge to the new parliament should be to promote competition laws and to provide efficient enforcement mechanisms. Unlike the former regime, the Islamists appear to have a sincere desire to fight monopolies to comply with Islamic teachings. The former regime denied the legal enforcement of many rules that were not applied on the ground. For example, misappropriation of trademarks is illegal but its enforcement is very relaxed. The rise of Islamists may have a direct impact on eliminating misappropriation of trademarks. Therefore, the promotion of antitrust and unfair competition laws is expected, and enforcing intellectual property rights should be promoted.

(G) Tax

Islam has a very special obligatory charity system called zakah which, to a certain extent, is similar to the modern tax system. Zakah is a wealth tax focused on compulsory charitable giving for specially designated groups in society. The idea of zakah illustrates how Islam distributes income and wealth in society to guarantee security for members and to maintain business activity along just and ethical lines. Williams and Zinkin argue that the system of zakah applies to both Muslims and non-Muslims who are in need, as Islam allows the latter to share in the wealth of Muslims. In their argu-

131 See DABBH, supra note 130.
133 See DABBH, supra note 130, at 255.
134 See Khoury, supra note 114, at 195-96.
135 Glossary of Islamic Legal Terms, supra note 3, at 103 (Zakah is an Arabic word that refers to the obligatory charity based upon a percentage of annual surplus wealth); see also Williams & Zinkin, supra note 47, at 526.
136 See generally Emarah, supra note 45.
137 Williams & Zinkin, supra note 47, at 526.
138 Id.
ment Williams and Zinkin refer to the Prophet saying: “The Head of State is the Guardian of him who has nobody to support him.” 139

A question arises as to whether the newly elected parliament intends to replace the current Egyptian tax law with the system of zakah. If they do not, there is the further issue of whether they are going to impose a zakah system in addition to the tax imposed by law so that Egyptians pay double the standard tax, or whether the payment of zakah will be optional. Another challenge is related to the administration of the zakah funds, which may sometimes be unfairly distributed because of the corrupt authorities responsible for the distribution and management of the money collected under zakah.140

CONCLUSION

The rise of Islamists in the Egyptian parliament suggests that Egypt may incorporate more rules based on the Islamic Shari’a in its legal system. This article followed a purely analytical methodology to spot potential issues and transformations in the Egyptian business and finance laws and regulations, which may affect the ways of doing business in Egypt after the Revolution. The article does not aim to judge, support, or oppose the application of Islamic law in Egypt after the Revolution. It is imperative to note that Islamic law is man-made law, based on divine rules in the Qur’an and the Sunnah, which forms Shari’ah law.

Generally, radical or fundamental changes in laws are unforeseeable, at least in the short run. Thus, one cannot expect the closure of usury banks and conventional insurance companies because this would contradict the public interest, a source of rules for Islamic law.141 However, non-Islamic businesses should expect fierce competition from newly emerging businesses that follow Islamic teachings. In the field of insurance, for instance, consumers are likely to prefer Islamic insurance companies’ model because it better serves consumer interests because consumers own the cash premium they pay under that model. This may not be the case for the Islamic banks because the usury banks may be more profitable.

Some industries, like alcohol and tobacco, may be banned or restricted in light of the application of Shari’a rules, but this restriction would be challenging to apply in the short run since it would affect

139 Id.
140 Some scholars argue that sometimes the collected Zakah is not properly distributed to the poor, giving examples from Malaysia and Sudan where no more than between 11 and 15 percent of the collected money for Zakah is distributed to people in need. Hans Visser, Islamic Finance Principles and Practice 30 (Edware Elgar Publishing Ltd., 2009).
141 Bassiouni & Badr, supra note 3, at 147.
the cycle of trade. In the short run, the focus is thus expected to be on fighting monopolies in different areas of trade to promote competition and the welfare of society. This is in line with the overwhelming trend of protecting consumers, which is among the most important issues that the parliament is expected to address in order to satisfy a public that displaced the former regime largely for economic reasons. Finally, Islam recognizes the taxation system but it is unclear whether a change is likely in the tax law.