



POLITICS OVER DOCTRINE: THE EVOLUTION OF SHARIA-BASED STATE INSTITUTIONS IN EGYPT AND SAUDI ARABIA

Nathan Brown, Ph.D.

George Washington University; Carnegie Endowment for International Peace

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Introduction

The tumultuous changes underway in the Arab world since 2011 have affected deeply entrenched political patterns, even in the region's most stable states. Religion-state relations have been central to many struggles, even in places where the state remains quite intact, such as Egypt and Saudi Arabia. The promise of the uprisings of 2011—of a more inclusive and participatory order—has hardly materialized, however. In Egypt, adherents of a religiously inspired movement who won the post-2011 elections were tossed out of the parliament by the courts in 2012 and then out of the presidency in 2013 by a coalition led by the military. The regime now in power has sought to solidify its domination of the religious sphere and tighten control over religious officials. In Saudi Arabia, islands of religious autonomy within the state—institutions tied to religious constituencies—are being brought to heel using mechanisms that are more familiar to Egyptians than to Saudis.

To understand the issues at stake, and the institutions that seem to be evolving in an authoritarian direction, a focus on day-to-day developments is not enough; it obscures the deep historical roots of the institutions as they have evolved and misses the long divergent, but now converging, patterns evinced between the Egyptian and Saudi experience.

Indeed, the structures have been so distinctive until quite recently that comparative work is difficult and sometimes confusing. If an Egyptian official in any of the country's vast range of religious institutions were to encounter Saudi counterparts (or if a Saudi visitor were to pay a friendly call to Egyptian colleagues), she or he would have a sensation similar to a native English speaker seeing or reading Dutch. There would be a strange mixture of the familiar and unfamiliar in every respect. An English speaker encountering the Dutch language finds words that are spelled like English but do not sound like them when spoken and other words that sound familiar but are spelled unrecognizably.

The religiously minded visitor to Egypt and Saudi Arabia would be puzzled by the presence of some institutions that are actually quite similar even though they sound quite different, like Egypt's *Majlis al-Dawla* system for administrative law and Saudi Arabia's *Diwan al-Mazalim*, titled in such a way as to resonate with pre-modern statecraft but deliberately modeled after its Egyptian counterpart. And he or she would find similar structures—Supreme Judicial Councils in both countries, for instance—that have had some very different origins and functions over the years.

The odd pattern of differences is a product of a different history of state building, leading not only to distinctive institutional patterns but also to very different ways in which religious structures and social constituencies have been folded into the modern state. It is the evolution of state structures and the sharply different patterns of inclusion and control—much more than the different doctrinal bases on which they are built—that have produced the distinctive outcomes.

Many of the differences between the two countries are now eroding, however, as the triumph of the bureaucratic state and attempts to subordinate the religious constituencies

incorporated into the state are rapidly causing the Saudi and Egyptian structures to more closely resemble each other.

In this report, I will trace the historical circumstances in which both states developed their religious establishments, showing how they evolved under different influences and constraints. After an initial consideration of the general history, I will move on to consider a series of state functions that have involved religious institutions in both countries—adjudication, public morality, and governing non-Muslims—and examine in greater detail how the institutions have evolved over time. I will show that even apparent doctrinal particularities—such as the Saudi resistance to codification—have political as well as doctrinal roots that are generally related to the patterns of inclusion and exclusion of religious constituencies.

But I will also show how differences in the political context in which religious institutions operate in the two societies are narrowing—that the exclusionary and hierarchical Egyptian path is increasingly being followed in Saudi Arabia.

The Saudi system, by folding religious groups and orientations into the state apparatus more thoroughly, evolved quite differently from the Egyptian system which, by contrast, allowed for far more containment of religious influence and direct regime control. In Saudi Arabia, as a result, when religious figures criticized policies, it was often unclear whether they were oppositional or state actors and they had many different institutional perches (mosques, schools, and courts) from which to pursue their vision. In Egypt, organized religious movements (like the Muslim Brotherhood) were more clearly oppositional and outside of the state. The contrast was not absolute at any point. But what is striking about the current moment is how the contrast is diminishing, largely because Saudi Arabia is moving in an Egyptian direction of containment and exclusion. Because of the narrowing in regime strategies, Saudi and Egyptian institutions themselves are showing some limited but definite signs of convergence.

Exploring and Explaining the Difference: History Over Doctrine

There are, to be sure, differences in doctrine between the Islam favored by each state. The dominant Egyptian approach, institutionalized in al-Azhar, is distinct from the Wahhabi approach knit into Saudi state structures. But if such differences are real, we will see in this section that the historical evolution of their institutional basis matters more.

The Egyptian state encompasses al-Azhar, a vast educational and research institution (or set of institutions) that is now constitutionally enshrined; the current Egyptian constitution proclaims:

“Al-Azhar is an independent scientific Islamic institution, with exclusive competence over its own affairs. It is the main authority for religious sciences, and Islamic affairs. It is responsible for preaching Islam and disseminating the religious

sciences and the Arabic language in Egypt and the world. The state shall provide enough financial allocations to achieve its purposes.”¹

For its part, Saudi Arabia was built, since the foundation of the state, on doctrinal approaches based on the teachings of Muhammad ibn `Abd al-Wahhab, the 18th century scholar whose name has been lent, despite the wishes of many followers, to the Wahhabi approach.² There are other doctrines extant in both societies, but the state itself—sometimes explicitly and sometimes implicitly by favoring graduates from national Azhari or Wahhabi institutions—clearly favors the dominant approach.

Yet the specific forms that Islam and sharia-based institutions have taken in Egypt and Saudi Arabia owe far more to historical evolution than to any specific idea. The most distinctive element of the Saudi state, the body often termed the “Religious Police,” for example, is a bureaucratized form of the *muhtasib*—an office that very much existed in Egypt in earlier centuries—and is very much consistent with the Azhari approach. The post disappeared in the Ottoman period for reasons that had nothing to do with doctrine, but the doctrine of *hisba* on which the office of *muhtasib* was based lives on in other areas of Egyptian law.³

The Saudi resistance to the codification of law is sometimes presented in doctrinal terms but seems to stem much more from the judiciary’s suspicion that being forced to rely on written codes rather than direct resort to Islamic jurisprudence will transfer authority from the judiciary to the ruler; in Egypt, by contrast, very different circumstances meant that codification served to cement the position of the courts in a country that was coming under imperial rule.⁴

The power of the Saudi judiciary is, as we will see, in part a function of its connection with a critical social constituency of the Saudi state (religious populations centered in the central region of Najd) and the way that the Saudi process of state formation allowed semi-autonomous parts of the state to emerge that were linked to such constituencies.

Neither Azhari nor Wahhabi doctrine has that much to say about the bureaucratic structure of a modern state; while they currently operate very much within such bureaucratic structures, they have actually shown some malleability in that regard. Scholars trained in both traditions have accommodated themselves to the bureaucratic and institutional

¹ Translation of Egypt’s 2014 constitution, article 7, by the Constitute Project. See https://www.constituteproject.org/constitution/Egypt_2014.pdf.

² Wahhabi scholars tend to prefer to refer to themselves as Hanbali scholars who draw particularly from the teachers of ibn `Abd al-Wahhab.

³ On the position in general, see Kristin Stilt, *Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt* (Oxford: Oxford University Press, 2012). On current forms of *hisba*, see Hussein Agrama, *Questioning Secularism: Islam Sovereignty, and the Rule of Law in Modern Egypt* (Chicago: University of Chicago Press, 2012).

⁴ I have explored this question more thoroughly in “Law and Imperialism: Egypt in Comparative Perspective,” *Law and Society Review* 29 no. 1 (1995): 103-126.

structures that have arisen, though they often seek to maximize their own autonomy within the states that encompass their authority and activity.

In both cases, three historical forces operated in very different ways to produce the current set of structures. The same forces were at work, but often in different ways (with their influence in Saudi Arabia sometimes attenuated).

First, Egypt was nominally part of the Ottoman Empire and was deeply influenced by the Ottoman bureaucratization of Islam as well as Ottoman institutional changes (especially the commitment to comprehensive law codes and judicial reform), even when it pursued them separately. Ottoman changes were not automatically applied in Egypt, but the sorts of changes made offered Egypt's rulers attractive ideas for building a stronger, more centralized and hierarchical, and (at least in the content of the law) less autonomous legal order. The construction of key institutions and practices—such as *Dar al-Ifta'* (an official fatwa-giving institution), a ministry of religious endowments and religious affairs, and state regulation of mosques and religious education—often followed Ottoman patterns in the manner in which they built religious institutions as parts of a hierarchical state apparatus.

The Saudi state, by contrast, was largely built on a bureaucratic foundation very distinct from the Ottoman path. Originally born in part in rebellion against Ottoman rule and emerging first in areas where Ottoman control was weak or nonexistent, the Saudi state incorporated Ottoman structures only to a very limited extent when it took control of territory (most notably the Hijaz) where Ottoman rule had been stronger and Ottoman institutions had taken some root. This generally allowed the structures to operate in a limited way on a local level for some time while it slowly built national institutions that subsumed, absorbed, or removed them.⁵ Those national institutions, when built beginning in the fourth decade of the 20th century, were constructed in part by creating a religious state within the broader state, staffed by those with training in Wahhabi Islam and dominated by those from a specific sector of Saudi society. In a sense, by favoring a specific, Najd-based religious constituency, the Saudi approach was very inclusive toward one group but exclusionary toward others.

Second, imperialism had very different effects in the two locations. In Egypt, imperialism had a series of effects that led to a set of religious institutions that, while part of the state, were separated from other structures of governance. Egyptian governments attempted to fend off imperialism as well as capitulations that effectively granted extraterritorial status to foreigners residing in Egypt. When the British occupied Egypt in 1882, they sought to avoid the religious sector but still contain its influence. Overall, the efforts of Egypt's own leaders (before but especially after the British occupation) led to a state religious apparatus that allowed religious structures to operate in specific fields (personal status law, part of the educational apparatus, mosque administration) in ways that kept them separate and (to a lesser extent) autonomous from other parts of the state apparatus. From the late 19th

⁵ For a good overview of the Wahhabi movement and of Saudi religious history see David Commins, *Islam in Saudi Arabia* (Ithaca: Cornell University Press, 2015).

century forward, there was a distinct set of schools, law courts, and other structures that could be identifiably labeled as “religious.”

Saudi Arabia, by contrast, developed institutions in the same areas—law and education most especially—that were not based on such a strong separation between the religious and non-religious parts of the state. When separation eventually occurred, it tended to do so quietly in a manner that obscured its origins and followed patterns designed to anticipate domestic opposition and co-opt it more than to escape foreign rulers. To be sure, European powers played a role in shaping some of the country’s borders and in inducing the country’s leadership to ignore and even silence some of those individuals and structures (such as the *Ikhwan* within its own ranks) that cause international complications, but imperialism played a far less prominent role in shaping the contours and purview of religious institutions.⁶

Finally, Egypt and Saudi Arabia built their modern states in distinct and different ways. The specific patterns followed tended to accentuate the differences wrought by Ottoman and imperial influence. The Egyptian state was gradually built in a manner that tended to maintain religious institutions and fold them unambiguously into the state, placing them under direct oversight by senior regime officials. Schools, personal status courts, al-Azhar, and religious endowments were all brought under clearer state oversight, governed by specific laws and regulations, and overseen by senior executive-branch officials. From the mid-20th century onward, presidential authoritarianism significantly reshaped the state, bringing all state bodies under stronger central control and allowing senior officials to deploy their power to secure ideological, policy, or other ends. Religious institutions were not exempt from these trends. It is no accident that when religious members of Egyptian society mobilized, they found they had to do so outside the state. Oppositional movements—sometimes well organized—at times pressured these institutions as competitors, though in periods in which regime control loosened (as in parts of the Mubarak presidency), they sometimes influenced and even infiltrated them.⁷

Saudi Arabia might similarly be viewed as authoritarian in its development, but the state evolved into a far less coherent entity, shaped by oil revenues from the mid-1940s on and especially since the mid-1970s. With a fiscal basis that made hard choices unnecessary, a far-flung ruling family, and a privileged and somewhat autonomous religious sphere, Saudi state formation allowed for fiefdoms within the state and enabled an inclusionary approach

⁶ For Saudi political history generally, see Bernard Haykel, Thomas Hegghammer, and Stephan LaCroix, eds., *Saudi Arabia in Transition: Insights on Social, Political, Economic and Religious Change* (Cambridge: Cambridge University Press, 2015).

⁷ I have tried to explore the politics of al-Azhar specifically and religious institutions in the Arab world more generally in “Post-Revolutionary al-Azhar,” Carnegie Endowment, 2011, http://carnegieendowment.org/files/al_azhar.pdf; “Islam and Politics in the New Egypt,” Carnegie Endowment, 2013, http://carnegieendowment.org/files/islam_politics.pdf; and “Official Islam in the Arab World: The Struggle for Religious Authority,” Carnegie Endowment, 2017, http://carnegieendowment.org/files/CP306_Brown_Religious_Institutions_Final_Web1.pdf.

toward some groups while marginalizing others.⁸ Criticism and opposition could certainly be heard in Saudi Arabia, but it found space within state structures. In addition, it took a less formal shape; only toward the end of the 20th century did distinct movements arise (such as the *sahwa* movement of the 1990s), but the extent to which they represent not just trends but actual organized movements continues to be a topic of controversy.⁹

By the 21st century, the result in Egypt was a bifurcation between hierarchical official structures and unofficial movements. In Saudi Arabia, by contrast, the religious establishment had a far less clear chain of command, and divisions of responsibility were informal and in constant flux. Religious institutions were not segregated from others but instead courts, schools, and policing tended to avoid carving out a distinct religious sphere. But in the past few years, Saudi Arabia has begun to follow the Egyptian path. We can see this in three areas: the judiciary, public morality, and areas of law that depart from sharia strictures.

Law and Adjudication

The formation of the modern Egyptian legal and judicial frameworks was accomplished by an emerging bureaucratic state that worked through laws, commissions, and procedures. In the 19th century, a variety of other bodies that applied the law and adjudicated disputes supplemented Egypt's court system. By the last third of the 19th century, those bodies became formally titled as "courts;" codes of law were written for them based on the French civil code; and the jurisdiction of various courts was fixed by law and sometimes by international agreement.¹⁰ What had been Egypt's courts of general jurisdiction became "Sharia Courts" restricted to adjudicating matters of personal status among Muslims (joined by "Milli Courts" for other recognized religions). Civil law "National Courts" became the courts of general jurisdiction for cases involving Egyptians. "Mixed Courts" adjudicated cases involving a foreign interest, and "consular courts" handled cases involving foreign nationals in matters not within the jurisdiction of the Mixed Courts. Subsequently, this system was consolidated: Sharia, Milli, consular, and Mixed Courts were all abolished and their work folded into the National Courts.

Most of the political jockeying regarding the courts involved issues of their jurisdiction and their independence from the executive. Very few issues involved religion. The abolition of the Sharia and Milli Courts occasioned only ephemeral opposition. Some Islamist movements criticized the codes that guided the courts, claiming the legal process should be based more fully on Islamic jurisprudence—though the idea of written codes, even in

⁸ Steffen Hertog, *Princes, Brokers, and Bureaucrats: Oil and the State in Saudi Arabia* (Ithaca: Cornell University Press, 2010).

⁹ See Stephan LaCroix, *Awakening Islam: The Politics of Religious Dissent in Contemporary Saudi Arabia* (Cambridge: Cambridge University Press, 2011); Thomas Hegghammer, *Jihad in Saudi Arabia: Violence and Pan-Islamism since 1979* (Cambridge: Cambridge University Press, 2010); and Madawi Al-Rasheed, *Muted Modernists: The Struggle over Divine Politics in Saudi Arabia* (Oxford: Oxford University Press, 2015).

¹⁰ I have explored this more fully in *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge: Cambridge University Press 1997).

matters of personal status, was adopted on the rationale that they were derived from (and not merely consistent with) sharia rulings.

Saudi judicial evolution took a very different path. Saudi courts were built by the Saudi state in various parts of the kingdom as the state expanded its control over its current territory. Courts were consolidated into a single judicial system and the territory was unified into a single state in 1932, though regional systems in some areas such as the Hijaz were only slowly folded in.¹¹ Those courts operated on the basis of their interpretation of the Islamic sharia; those with training in Wahhabi doctrine led the judiciary. Over time they became more hierarchical and bureaucratized, but they retained considerable autonomy, as discussed above.

Thus, in Saudi Arabia, a separate system known as the “Sharia Courts,” which came to operate in Egypt, never emerged. Saudi courts of general jurisdiction were in a sense all sharia courts, staffed with judges trained in sharia. State structures and procedures were only slowly formalized or encoded in written form. That looseness allowed new, quasi-judicial structures to emerge and slowly gain influence. As early as the 1930s, “committees” arose for specific areas; they came to rule on the basis of *nizams* (“regulations” or “edicts”) or other enactments from state bodies that were formally called anything but “laws” (*qanuns*). In 1955, a “Diwan al-Mazalim” (Board of Grievances) was created to hear disputes in which the state was a party. Saudi rulers had no trouble introducing quasi-judicial bodies that heard disputes and issuing decrees with legal force. But they studiously avoided calling them “courts” and “laws” since the terms would seem violations of the idea that the sharia-trained judges had general jurisdiction.

Sharia-trained Saudi judges did not resist ruler-issued legal rules or quasi-judicial structures. Rather, they did object to attempts to restrict their own jurisdiction or control their authority to engage in sharia-based jurisprudence. New bodies could arise that accepted cases, though they provoked complaints if they operated in a way that implied they were edging in on the territory of the courts. The Diwan al-Mazalim proved an exception and actually came to be seen as a branch of the regular court system, not simply because of its antiquarian title but also because its judges were trained in the Islamic sharia. Other minor encroachments—such as the expectation that Saudi courts would use some ruler-issued edicts as legal in nature—could be accepted as long as the regime eschewed any attempt to subordinate the courts to non-sharia based bodies or to codify the sharia in a form that robbed individual judges of their jurisprudential role. This is why the words “court” and “*taqin*” (codification) could not be used but other departures from a more traditional system—the formation of multi-judge panels or courts of appeal—could pass without opposition.

¹¹ For legal and institutional histories of Saudi Arabia, see Frank E. Vogel, *Islamic Law and the Legal System: Studies of Saudi Arabia* (Leiden: Brill, 2000), and Mouline, *Clerics of Islam*.

The informality and unspoken deference of these arrangements is now threatened with serious erosion in three areas. First, the stream of regulations issued by the king is rapidly picking up pace and is beginning to dominate most areas of law.

Second, a limited kind of codification is taking place.¹² Full codification (*taqin*) might no longer be spoken of, but *tadwin*, a process by which leading decisions are written for guidance so that judges tend to operate a bit more within known and predictable interpretations, is well underway. For a state that wishes uniformity and predictability from its courts, this may be a distinction without a difference: rulers and legal experts expect the decisions that are published and circulated to be given respect and deference by judges who do not wish to be overruled. The Saudi system will have retained its distinctiveness but still have taken a step closer to its Egyptian counterpart in its structure and operation.

Third, the judiciary is expanding beyond its traditional Najdi base, with universities built all over the country, talk of admitting graduates from law faculties into the judiciary (provided they receive additional training in sharia), and a clear trend toward appointing loyalist judges to leading positions and shutting down dissident voices.¹³

The overall result is a series of steps in an Egyptian direction, suggesting that the traditional procedural and social mechanisms that gave the Saudi judiciary autonomy and linked it to parts of Saudi society are being undermined.

Policing Public Order and Morality

The word “police” in English has evolved in meaning along with the development of modern states. Originally referring to providing public order (an order that entailed not merely personal security and property rights but also righteous social conduct), policing only came to mean a professional law enforcement in the 19th century. The shift was subtle and initially slow but has become ubiquitous.

Much of the Arab world followed a similar process. Policing shifted from an emphasis on public morality to one that stresses security, but the importance of the former lives on. The difference between Saudi Arabia and Egypt in that regard does not have to do with doctrine, but with institutional history.

In Egypt, as described above, the *muhtasib* as an institution or position in Egypt disappeared centuries ago, replaced by a variety of institutions that separated sharia-based practices from those anchored solely in the authority of the state. However, both sets plunge into issues of public morality.

¹² I explored this issue in “Why Won’t Saudi Arabia Write Down its Laws,” *Foreign Policy* 23 (January 2012), <http://foreignpolicy.com/2012/01/23/why-wont-saudi-arabia-write-down-its-laws/>.

¹³ See Abdullah Alaoudh and Nathan Brown, “Full Court Press,” *Diwan*, January 8, 2018, <http://carnegie-mec.org/diwan/75155>; and Nathan Brown, “The Remaking of the Saudi State,” Carnegie Endowment for International Peace, November 9, 2018, <http://carnegieendowment.org/2017/11/09/remaking-of-saudi-state-pub-74681>.

First, a collection of professional police and security forces operate—generally under the Ministry of Interior—with jurisdiction defined by law and clear divisions of responsibility for categories of legally defined criminal offenses. There are also the civil law courts, as described above. These structures regard themselves as security bodies as well as moral authorities. Egyptian courts often refer to “public order” in a way that incorporates religious sensibilities; the issue arises most frequently in matters of apostasy and religious conversion.¹⁴

Second, religiously based institutions address matters of preaching and religious guidance, certainly treading into issues of public life, sometimes with enforcement authority. Al-Azhar asserted an authority to censor cultural productions and found support from the Council of State, a judicial body with adjudicative, drafting, and advisory functions but no religious ones.¹⁵

But if the morality of Egyptian citizens is policed, they are edged out of participating in the shaping of such authority; moral policing operates in a politically and legally exclusionary manner. An inclusionary loophole was closed in the 1990s by regulating the practice of individual Muslims filing suits based on public morality—an element of *hisba* that had survived largely unregulated until then. In 1996, after a court ordered the divorce of a prominent intellectual from his wife on the grounds of his alleged apostasy (because of the content of his academic writings), Egypt’s leaders amended the law to require citizens acting on the doctrine to file their complaints with the public prosecutor who would then decide whether or not to pursue it.

In Saudi Arabia, by contrast, the public-private distinction has been less clear, at least until recently. There is a public body, one straddling the division between state and society, that seems to embody both the older and newer meanings of the English term of “policing.” Often referred to in English by the strange phrase “religious police,” the *Hay’at al-amr bi-l-ma’ruf wa-l-nahi`an al-munkir* (most accurately translated as the Body for Enjoining Virtue and Prohibiting Vice, or sometimes as the CPVPV, Committee for Promoting Virtue and Prohibiting Vice) is staffed by pious enthusiasts (*mutawwi`in*) who are actually part of a professional force that has policed conduct in public places, disciplining those who engage in unfair retail transactions, violate the prohibition on alcohol, and associate with those of the opposite gender in ways that violate the Hay’a’s interpretation of Islamic norms. While some measure of formal legal authority has come to guide their structure and functioning,¹⁶ the Hay’a presents itself as deputized by the ruler to carry out his duties to enforce some sharia-based norms and behavior; within the bounds of the official directives, the Hay’a operates in accordance with its personnel’s understanding of what those norms are.

¹⁴ Maurits S. Berger, “Apostasy and Public Policy in Contemporary Egypt: An Evaluation of Recent Cases from Egypt’s Highest Courts,” *Human Rights Quarterly* 25 (2003): 720–740.

¹⁵ Tamir Moustafa, “Conflict and Cooperation Between the State and Religious Institutions in Contemporary Egypt,” *International Journal of Middle East Studies* 32 (2000): 3–22.

¹⁶ The relevant structures and regulatory framework are posted on the Hay’a’s website at <https://www.pv.gov.sa/Pages/PVHome.aspx>.

In that sense, the Hay'a would seem to be a modern bureaucratization of a medieval institution, one that does not carve out a distinct sphere for religion and blends morality, ethics, law, and religion with considerable discretion. It sees itself as deputized by the ruler but acting for the community. As an institution, the Hay'a dates back to the current Saudi state's early decades; it tends to be staffed by those from those areas of the country more connected to Wahhabi teachings. Its activities—those issues it focuses on—have varied considerably over time and place, not so much in response to written public directives (though that tool has been used more frequently in recent years) as to unofficial guidance from senior officials.

Thus, the divergent paths followed by Egypt and Saudi Arabia in terms of policing public morality are characteristic not of different understandings of religious doctrine—neither repudiates the idea that religious values are relevant to public and political life and should be enforced by the state on behalf of the community—but on different patterns of state formation: the Egyptian legal system is more centralized, hierarchical, and more insistent of specialization and demarcation of jurisdiction and authority and the Saudi more diffuse with important structures penetrated by influential constituencies.

Yet the divergence, while marked, appears to be diminishing. In Egypt and Saudi Arabia, regimes are striving hard to ensure that states are more responsive to ruler needs and direction. The trend is over half a century old in Egypt but has taken on special force since the uprising of 2011; it is newer in Saudi Arabia but is quite marked in recent years.

In Egypt, the interim military regime that took power in 2011 wished to enhance the credibility of the state religious apparatus and insulate it against the rise of the Muslim Brotherhood. As a result, it granted the sheikh of al-Azhar far more autonomy and allowed the recreation in 2012 of a leadership body for that institution—the Body of Senior Scholars—that the regime had abolished in the 1960s in an effort to exert more control over al-Azhar. But having walled off the religious establishment from the society, the regime is now grappling with its autonomy. Since 2012, Egypt's presidents (first from the Brotherhood, then the military) have tussled with al-Azhar over matters less of religion than of authority.

Saudi Arabia created a Body of Senior Scholars just as Egypt was abolishing its own. The intent seems to have been to bring more centralization to its religious structure. But even as it did so, it allowed the religious institutions some autonomy. And it treaded very carefully with the most publicly active body, the Hay'a. But now Saudi Arabia has taken efforts to place the leadership of religious bodies under less independent scholars; even the Hay'a has been carefully brought to heel. Deprived of its power to arrest in 2016, the “religious police” was transformed into an institution that had the same authority as private citizens in Egypt to impose sanctions. It is now required to submit complaints to the police and the public prosecutor, who then decide whether and how to proceed. Of course, the Hay'a is still an institution with a far-flung presence in Saudi Arabia and its monitoring capabilities seem unimpeded, but with its authorization to act restricted by law and forced

to operate only by securing the cooperation of existing law enforcement institutions, it is simply a far less forbidding body.

Non-Muslims and Sharia Noncompliance

Both the Egyptian and Saudi states confront the problem of law that is either based on another religion (especially in matters of personal status for non-Muslims) or that seems to contravene key tenets of Islamic law (such as commercial or financial agreements that provide for fixed interest rates). The two have evolved very different approaches to the problem, however. Egypt has formally designated areas where various kinds of law can operate in a manner that affirms state authority. Saudi Arabia prefers to look the other way, allowing such laws to operate while not always acknowledging them directly. But that attitude is coming under pressure as Saudi Arabia increasingly moves in the direction of Egypt's preferred strategy of encapsulation and control.

In Egypt, the Ottoman legacy, imperialism, and the capitulations (themselves a product of the first two forces) produced a system by the late 19th century in which an area of personal status law had been carved out and cases were adjudicated largely by religiously trained personnel in accordance with the faith of the family. By 1955, that system had been replaced, and all personal status cases were adjudicated in regular state courts, but the law applied varied according to the faith of the parties involved. The system, which survives to the present, can lead to occasional complicated conflicts—if husband and wife are members of different communities, for instance, or if one member of a non-Muslim family converts to Islam—that have sometimes led to intense political controversies that state officials, and sometimes courts, sought a way at times to avoid.¹⁷

With its civil codes, by contrast, no such complication exists. Egypt allows commercial interest and even mandates unpaid fines or debts to be repaid at a fixed interest rate. Thus, religious law prevails in specific areas, but only in matters defined and adjudicated by clear state directives.

Saudi Arabia followed a different path. This might have some doctrinal origins—Wahhabi approaches evince a particular reluctance to accommodate differences even from their own understanding of Islamic law, much less non-Islamic law. But even in the face of such reluctance, politics is very much at work. Saudi rulers have refused to follow their religious scholars' preferences. The developmental, diplomatic, and security demands they feel could not be accommodated by excluding non-Muslims from the kingdom and international commerce have even led to an accommodation of commercial interest. But these devices, while very much in use, can often be obscured. The determination to do what is deemed necessary while obscuring such concessions is now fraying, and there are strong signs of a determination to follow a more Egyptian path.

¹⁷ This topic is explored thoroughly in Mona Orabi's work. See, for instance, "Authorizing Religious Conversion in Administrative Courts: Law, Rights, and Secular Indeterminacy," *New Diversities* 19, no. 1, http://newdiversities.mmg.mpg.de/wp-content/uploads/2015/10/2015_17-01_05_Oraby.pdf.

In personal status law, the Saudi state equates citizenship with religious status. All Saudis are automatically considered Muslims. With Saudi courts—operating on the basis of their understanding of sharia law—possessing general jurisdiction, they simply rule on those cases that would fall to distinct personal status courts in other countries in the region. Saudi Shi'a are accommodated in regional Ja'fari courts (a right they do not have in Egypt) but in a way that is barely publicly acknowledged. What about non-Muslims? Since all Saudis are considered Muslims, non-Muslims are foreigners by definition. So those residents in the state have their marriages or other family transactions notarized by their consulates and then registered with the Ministry of Interior, freeing Saudi courts of adjudicating complex disputes based on non-Islamic law by merely enforcing decisions reached by other bodies.

What of the enforcement of judgments that appear to violate the Islamic sharia as understood by Saudi courts? The problem actually arises regularly and again, the generally preferred strategy seems to be to avoid the question directly. International investment and commerce often bring in arbitral procedures that require interest payments for those who are liable to pay debts. Private contracts might also run afoul of sharia-based financial strictures. The establishment of “committees”—the court system that dares not speak its name—is partly a response to the desire of various actors to make the arrangements they want and have them enforced. Arbitration clauses have the same intent.

Will Saudi courts enforce judgments and awards that violate their understanding of the Islamic sharia? Not if they are told about it, so specialized committees write decisions that seem to presume a “don't ask, don't tell” approach. An award of a monetary amount from a quasi-judicial committee that simply omits details on how the amount was calculated, or a commercial contract that uses a variety of devices to avoid formal declaration of interest will be recognized and enforced by Saudi courts.

Is such an approach sustainable? Can “committees” and those who draft arbitral awards be trusted to avoid triggering Saudi judicial concerns about sharia-compliant business practices? And does such tiptoeing alienate potential business partners and investors? A Saudi state that promises comprehensive economic transformation, one that proclaims in its “Vision 2030” that it is “open for business”¹⁸ seems to be feeling some need to move in an Egyptian direction of clarity and explicit empowerment of state officials to determine what the law is, how it will be enforced, and who has authority to interpret and enforce it. In a visit to Saudi Arabia in 2017, I met several legal figures involved in drafting legislation that would acknowledge openly what the courts had been allowed to ignore—and there was even talk of unifying the Saudi court system in a manner that would make all judicial bodies complicit in such steps.

¹⁸ Saudi Vision 2030, <http://vision2030.gov.sa/en>.

Conclusion

As they have evolved, Egyptian and Saudi institutions that involve the sharia are far more often analogous than homologous in the meaning of the terms as used by evolutionary biologists. Homologous institutions share origins but have evolved to serve different functions; analogous ones have divergent origins but have evolved to serve similar functions. The institutions described here betray a history that is closely linked with the ways that the countries experienced Ottoman rule, imperialism, and state building; they are also linked to the very different nature of the regimes that have ruled them.

But those historical forces that operated in past generations may be losing some of their force as both countries are led by regimes that are centralized, security conscious, and striving to control all parts of the state apparatus. Even the difference between the two regimes has diminished: Egypt is a republic and Saudi Arabia is a monarchy, but both show similar determination to manage autonomous state structures, scatter potential opposition movements or prevent them from organizing, and prevent parts of the state apparatus from protecting opposition voices.

Most significantly, the segmented Saudi state, with its ability to use an enormous fiscal base to be many things to many people, is being reshaped to become more hierarchical, responsive to regime commands, and able to work more harmoniously with policy directions sketched from the center.

Egyptian state institutions based on the sharia have been contained within the state apparatus. Their scope has not only been defined, it has also diminished as part of the process of state formation. The process has also been politically and socially exclusionary: when religious publics organize, they often do so outside of the state apparatus (though not outside of its gaze) in nongovernmental organizations, piety groups, and even oppositional movements. In Saudi Arabia, sharia-based institutions have not only been more thoroughly woven into the state apparatus, they have also been connected to powerful constituencies. The result is inclusionary for some (Najdis, Wahhabis, graduates of specific universities) but exclusionary of others. The Saudi approach was not based so much on formal rules (though it used them) as an informal way of doing things.

That way of doing things may be coming to an end. In both Egypt and Saudi Arabia, current rulers seem to view autonomous religious institutions and religious publics as bodies to manage and control. The lesson of the Arab upheavals for both regimes seems to have been not one of the necessity of inclusion but instead, the need for more regimentation, hierarchy, and exclusion.