

## ***Ijmā'* Jurisprudence Undergoing a 'Chemical Reaction' in Egypt?**

Dawood Adesola Hamzah\*

dawoodhamzah9@gmail.com

dawosla@live.com

### **Abstract**

As sovereignty underscores governance in human society, *Hakimiyyah* serves as a platform to argue that Islam is both state and religion. Theoretically, *ijmā'* has been the most potent factor in defining the meaning of the other *uṣūl* and thus in formulating the doctrine and practice of the Muslim community. It is a part of traditional authority but, over the ages, its validity had been a subject of theoretical and empirical discussion, suggesting perhaps, a possible 'chemical reaction' of Islamic jurisprudence. Islamic law was "jurists' and people's law" in that its content was determined by the jurist-scholars, accepted and observed by the people. It was also State law in that it had a mechanism of being enforced by the state. The neglect of application of the law by the state with tacit approval of scholars with consensus of the people and stiff resistance against the dissenting voices are giving rise to emergence of radical groups. Egypt has a track-record in the development of Islamic law. Its people also have played significant role in the struggle for its application. What followed the Arab Spring in Egypt has served as a re-enactment of the aged-long struggle against colonialism, and certainly, a serious challenge

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\* Lecturer in Law of Banking and Insurance, University of Ilorin, Ilorin, Nigeria

not only to the concept of *ijmāʿ*, but also to the modern concept of democracy. This paper intends to explore the relevance of the principles of *ijmāʿ* and democracy in the political and religious metamorphosis of Egypt by applying an interpretive methodology to examine various stakeholders' roles and responsibilities within relevant theoretical framework.

**Keywords**

*Hākimiyyah*, *ijmāʿ*, democracy, political crisis in Egypt, *dramatis personae*.

## Introduction

The era of orthodox caliphs was governed by legislative procedures that were guided by the Qurʾān and Sunnah, the two primary sources of law in Islam. The legal development of this period had prepared ground for legislative culture that later led to the emergence of secondary sources of law.<sup>1</sup> This was particularly the case with the development of *ijmāʿ*. Rules provided for in the primary sources do not explicitly deal with every conceivable eventuality; jurisprudence must refer to resources and authentic documents to find the correct course of action.<sup>2</sup> Within this theoretical framework, and historical reality on the ground, Islam was arguably accepted to be both state and religion. *Ijmāʿ* is a part of traditional authority but, over the ages, its validity has been a subject of theoretical and empirical debate. Its relevance in the contemporary law and politics has been called to question. The long neglect of its application by the state with tacit approval of scholars with consensus of the people and stiff resistance against the dissenting voices give rise to the emergence of radicals and violent groups. The arrival of Islam in Egypt dates back to 7th century after which it emerged as a centre of politics and culture in the Muslim world. Under Anwar Sadat, Islam became the official state religion and the *Sharīʿah* the main source of law. Egypt has a track-record in the development

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1. Izzi Dien, M., *Islamic Law from Historical Foundations to Contemporary Practice* (Edinburgh: Edinburgh University Press, 2004), p. 40.
  2. Motahari, A.M., *Jurisprudence and Its Principles*, trans. Tawhidi, S., edit. Bakhtiar, L. (New York: Elmhurst, 1980), pp. 5-6.

*Ijmā' Jurisprudence Undergoing a 'Chemical Reaction' in Egypt?*

of Islamic law. The uprising of the Arab Spring particularly in Egypt not too long ago had re-enacted the aged-long struggle against colonialism, and of course, a serious challenge not only to the relevance of *ijmā'*, but also to the modern concept of democracy. It is argued that the combined effect of both *ijmā'* and Western democratic process offers positive, peaceful and progressive alternative. Although Egypt exhibits commitment to both the Islamic value as well as Western democratic system, unfortunately however, none of the two systems appears to have practical application in the Egyptian political system. The question arises as to the relevance of Egyptian scholars' many years of theoretical exercises in Islamic jurisprudence generally and *ijmā'* in particular. Similarly, the relevance of the Egyptian secularists endless defence of secular democratic values is called to serious question. In reality, stakeholders should endeavour to maximise the benefits of the two concepts rather than allow the region to slide into unimaginable legal and political upheaval.

**Part One:**

**Sovereignty in Islam**

Generally, sovereignty goes to the root of governance in human society. The society needs some form of authority/government which has the necessary powers to maintain law and order so as to regulate the entire spectrum of the state's affairs.<sup>3</sup> Constitutionalism has a variety of meanings. Most generally, it is "a complex of ideas, attitudes, and patterns of behavior elaborating the principle that the authority of government derives from and is limited by a body of fundamental law".<sup>4</sup> A

3. An-Na'im, A.A., *Toward an Islamic Reformation, Civil Liberties, Human Rights, and International Law*, (New York: Syracuse University Press, 1990), p. 70; Nwabueze, B.O., *Constitutionalism in the Emergent State* (Rutherford, N.J.: Fairleigh Dickinson University Press, 1973), pp. 2-3; Hebert, J.S., "The True Constitution", in C.P. Magrath, ed., *Constitutionalism and Politics: Conflict and Consensus* (Glencoe, Ill.: Scott, Foresman, 1968), pp. 4-12. See Hency, C.B., *Black's Law Dictionary*, 5th ed. (St. Paul: West Publishing, 1979), p. 282.
4. Don E. Fehrenbacher, *Constitutions and Constitutionalism in the Slaveholding South* (Athens, Ga University of Georgia Press, 1989), p.1.

sovereign state is constitutional to the extent that it “evolve[s] institutionalised mechanisms of power control for the protection of the interests and liberties of its citizens, including those in minority group within that state.”<sup>5</sup>

The Madinah Constitution serves as basic and authoritative source of constitutional theory under the *Shari’ah*. It was legislation fashioned out by the Prophet himself in 622 A.D. and further implemented by his four successors (*al-khulafā’ al-rāshidūn*).<sup>6</sup> Notwithstanding the likely characterisation of this constitutional model in modern terminology as a *theocracy* or a *nomocracy*,<sup>7</sup> Madinah, the first Islamic State had a specific *de facto* organisation (in accordance with the constitution) that was supposed to be copied after the Prophet’s death, subject to modifications necessitated by the termination of divine revelation.<sup>8</sup> The Qur’an specifically states that Muḥammad is the final Prophet and the Qur’an is the conclusion of Divine Revelation.<sup>9</sup>

It has been argued that Muslims have historical ambivalence to the modern concept of nation-state.<sup>10</sup> However, it has also been acknowledged that the concept has presently become an irreversible institution firmly grounded across the Muslim world.<sup>11</sup> The inferences are constitutionalism, representative governance and government. As regards constitutionalism, it has been argued that in spite of persistent calls for law-reform and reformulation, neither serious nor momentous change has been so far introduced in the area of constitutional aspect of *Shari’ah*.<sup>12</sup> It is therefore suggested that it is reasonable to appraise and evaluate the Madinah constitutional model in

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5. Gordon, S., *Controlling the State: Constitutionalism from Ancient Athens to Today* (Cambridge, MA: Harvard University Press, 1999), p.4.
  6. Faruki, K.A., *Evolution of Islamic Constitutional Theory and Practice from 610 to 1926* (India: 1999), pp. 16-36; Mohammad, S.E., *On the Political System of the Islamic State* (Indianapolis: American Trust Publications, 1980), pp. 26-62; An-Na’im, A.A., *ibid.*, p. 75.
  7. Khadduri, M., “The Nature of the Islamic State,” *Islamic Culture* 21 (1947), pp. 327-31; An-Na’im, A.A., *supra* note no. 3.
  8. An-Na’im, A.A., *supra*.
  9. See *Al-Aḥzāb* (33):40.
  10. Piscatori, *Islam in a World of Nation-States*, particularly in Chapters 2 and 3.
  11. An-Na’im, A.A., *supra* at p. 72.
  12. *Ibid.*, at p. 76.

*Ijmā' Jurisprudence Undergoing a 'Chemical Reaction' in Egypt?*

terms of modern constitutionalism.<sup>13</sup> The suggestion was based on the fact that the majority of advocates of Islamic state and Islamic *Shari'ah*, envisage the model to serve as a basis for their vision.<sup>14</sup> Representative governance and governments are said to be cohesive and coefficient values of modern constitutionalism, but also are seen by some as insufficient.<sup>15</sup> They argue that it is a fact of history that universal suffrage is capable of creating and supporting tyranny of the majority or of a minority or of even one man.<sup>16</sup>

It is thus suggested that the processes of government must be controlled by higher and more fundamental principles, which ensure the protection of the rights of individuals and minorities against the will of the majority by declaring any legislative or executive action that is inconsistent with those principles null and void to the extent of their inconsistency.<sup>17</sup> It is observed that the numerical majority may not necessarily be the political majority and thus, what is important is a principle that protects the rights of whoever is subjected to or threatened with oppression or discrimination, be it the majority, minority, or a single individual.<sup>18</sup>

### Sovereignty of God

*'The hākim is the one who exercises judicial authority; a ruler or governor... and there is none but Allāh (God) as the Highest Governor, the Ruler and the Supreme legal authority.'*<sup>19</sup> From the concept of *Hākimiyyah* propounded by Sayyid Quṭb, the word *'hukm'* is a derivative of the word *'hakim'* (itself a noun created from

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13. Ibid.

14. Ibid.

15. Ibid., p. 72.

16. Wheare, K.C., *Modern Constitutions* (London: Oxford University Press, 1966), p. 139.

17. McIlwain, C.H., *Constitutionalism Ancient and Modern* (Ithaca, NY: Cornell University Press, 1958), pp. 37-38.

18. *An-Na'im*, A.A., supra at p. 72.

19. Ibn Durayd, A.B.M., *Kitāb Jamharat al-Lughah*, Vol. 1 (Beirut: Dar al-'Ilm Li al-Malayin, 1978), p. 456; Ibn Manzur, *Lisan al-'Arab*, Vol. 12 (Beirut: Dar Sadir), pp. 141-5; Ahmad Rida, *Mu'jam Matn al-Lughah*, Vol. 2, (1958), pp. 139-40; Al-Bustani, A., *Al-Bustani*, Vol. 1 (Beirut: Matba'ah Amrikiyyah, 1927), pp. 559-60; Khatab, S., "'Hakimiyyah' and 'Jahiliyyah' in the Thought of Sayyid Quṭb", *Middle Eastern Studies*, Vol. 38, No. 3 (July 2002) p. 145 and footnote no. 2.

the verb *‘hakama’*), always expresses the concept that authority and command rest with God alone.<sup>20</sup> Qutb’s definition conforms with the unanimous agreement (*Ijmā’*) of the Muslim community, to the effect that the term refers to the highest political and legal authority which belongs to none but God.<sup>21</sup> A number of Qur’ānic verses are quoted in support of the point.<sup>22</sup>

The significance of Sayyid Qutb’s idea of *Hākimiyyah* rests in the suggestion that Islam is both religion and state. However, two views had been advanced to oppose this proposition. In the first instance, it has been argued that the term *hākimiyyah* is not a Qur’ānic term; and secondly, the word *hukm*, mentioned in the Qur’ān, has no political connotation.<sup>23</sup> In other words, Islam is simply not a state.<sup>24</sup> It has been noted that even if the argument that the term *hākimiyyah* is not a Qur’ānic term, it is derived from the Arabic verb *‘hakama’* which means ‘to govern’ and ‘to judge’.<sup>25</sup> The fact is that ‘to govern’ has political connotations and ‘to judge’ also denotes the highest legal authority.<sup>26</sup> This opposing points of view were based on reference to either ‘Alī ‘Abd al-

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20. Qutb, S., *Fi Zīlāl al-Qur’an* Vol. 3 (Cairo: Dar al-Shuruq, 1992), p. 1194; Khatab, S., *ibid.*
21. Al-Maraghi, A.A., *‘Al-Tashri’ al-Islami fi ‘Asr al-Khulafā’ al-Rashidin’*, *Al-Azhar Magazine*, vol. 18 No. 7, (1947), pp. 27-31; Al-Zalabani, R., *‘Al-Siyasah al-Dusturiyyah al-Shar’iyyah*, *Al-Azhar Magazine*, vol. 18, No. 7 (1947), pp. 13036, 251-5; Khadduri, M., *The Islamic Concept of Justice* (London: Johns Hopkins University Press, 1984), pp. 18-19; Qutb, S., *ibid.*, at vol. 1, p 210; Khatab, S., *ibid.*
22. See *al-Sajdah* (32):5; Qutb, S., *ibid.*, at vol. 5., p. 2807; Khatab, S., *supra* note no. 19 at p. 146.  
*Al-Furqān* (25):2; Qutb, S., *supra* note no. 20 vol. 5 p. 2548.  
*Al-An‘ām* (6):57; Qutb, S., *ibid.*, vol. 2, p. 1110.  
*Al-Kahfi* (18):110; Qutb, S., *ibid.*, vol. 4, pp. 2297; *Al-Kahfi* (18):57; Qutb, S., vol. 2 p. 1111.  
*Al-Nisā’* (4):64; Qutb, S., vol. 2, pp. 695-6 and also pp. 688 and 690.
23. Khatab, S., *supra* note no. 19 at p. 147.
24. *Ibid.*
25. Haddad, Y., ‘*Sayyid Qutb: Ideologue of Islamic Revival*’, in John Eposito (ed.), *Voices of Resurgent Islam* (Oxford: Oxford University Press, 1983), pp., 67-98; Kepel, G., *Muslim Extremism in Egypt* (Berkeley: University of California Press, 1986), p. 47; Khatab, S., *ibid.*
26. Umarah, M., *Al-Islam wa Usul al-Hukm li Ali Abd al-Raziq* 2nd ed. (Beirut: al-Mu’assasah al-‘Arabiyyah, 1988), pp. 75-6; Khatab, S., *supra*.

*Ijmā' Jurisprudence Undergoing a 'Chemical Reaction' in Egypt?*

Rāziq's *al-Islām wa Uṣūl al-Ḥukm*<sup>27</sup> or al-Huḍaybī's, *Du'āh wa lā Qudāh*,<sup>28</sup> or both which are one of the major points of reference in the debate until the present time.<sup>29</sup>

It has been noted that 'Alī 'Abd al-Rāziq's book was published in 1925 following the collapse of the Islamic Caliphate in Turkey in 1924.<sup>30</sup> It was written in opposition to King Fuad who assumed the position of Caliphate in Egypt.<sup>31</sup> However, a close examination of the two works reveals that 'Alī 'Abd al-Rāziq was not against Sayyid Quṭb's position. In other words, he too maintained that Islam is a religion and a state based on the political connotations of the term '*ḥukm*', mentioned in the Qur'ān.<sup>32</sup> Al-Huḍaybī on the other hand, appeared to share this view as he also maintained that Islam is both religion and state.<sup>33</sup>

In a nutshell, Quṭb's concept of *ḥākimiyyah* highlights a number of points, namely that, (a) the Islamic system of government is different and distinct from other systems; (b) the Islamic government is constitutional; (c) the Islamic government is not theocratic and; (d) Islamic *Sharī'ah* is constant or unchangeable despite changes in leadership.<sup>34</sup>

Analysing the first point in a comparative sense, shows that in other systems and particularly in the modern democracy, *ḥākimiyyah* (absolute sovereignty) belongs to man and that he legislates for himself.<sup>35</sup> This implies that Islamic system is

27. Abdel Raziq, A. *al-Islam wa Usul al-Hukm: Bahth fi-l Khilafa wa-Hukuma Fi-Islam* (Islam and the Foundations of Governance: Research on the Caliphate and Governance in Islam), *Critique and commentary by Mamdooh Haqqi* (Beirut: Dar Maktabat al-Hayat, 1978).

28. Kepel, G., *Muslim Extremism in Egypt* (Berkeley: University of California Press, 2003), p. 62.

29. Sheppard, W.E., 'Muhaddad Sa'id al-Ashmawi and the Application of the Shari'ah in Egypt', *International Journal of Middle Eastern Studies*, vol. 28, p. 39; Ayubi, N, *Political Islam: Religion and Politics in the Arab World* (London: Routledge, 1991), pp. 54, 65, 130; Khatab, S., *ibid.*

30. Khatab, S., *supra* at p. 148.

31. Umarah, M., *Al-Islam wa Usul Al-Hukm li-Ali Abd al-Raziq* (Beirut: al-Mu'assasah al-Arabiyyah, 1988), pp. 8-16.; Khatab, S., *ibid.*

32. Khatab, S., *supra* at p. 149.

33. *Ibid.*

34. *Ibid.*, at p. 158.

35. *Ibid.*

unique and cannot be called anything but “Islam”.<sup>36</sup> Also, the Islamic political system can be explained as rule through *shūra* (consultation), which according to him is a fundamental principle of *Sharī‘ah*, and essential to the various organs and to the identity of the Islamic state.<sup>37</sup> He even argues that consultation in governance is mandatory by virtue of its being the subject of a Qur’ānic command<sup>38</sup> just like ‘obligatory prayers and *zakāh*’ (legal tax).<sup>39</sup>

As to the constitutionalism in Islam, Qutb argues that governmental activity is restricted within the limits of *Sharī‘ah* as ordained by the *ḥākimiyyah*.<sup>40</sup> It follows that the government can act only within the framework of the limitations as mentioned which are expressed in clear words and in positive term of law such as ‘do this and do not do that.’<sup>41</sup> He further shows that the Prophet Muhammad himself was not empowered to exceed or overstep the limitations.<sup>42</sup> The totality of Sayyid Qutb’s analysis of the *ḥākimiyyah* concept is to the effect that the government in Islam is legally bound by a constitution that is divinely inspired and unanimously affirmed and ratified by the Muslim community.<sup>43</sup> In other words, this community is a ‘state under God’s Sovereignty’.

An-Naim accedes to the notion of God’s absolute sovereignty in Islamic community:<sup>44</sup> God, accordingly, was the Titular head of the State and its source of authority; Muḥammad was its head of Government.”<sup>45</sup> He however raises question

36. Qutb, S., *Al-Adala al-Ḥitima’iyyah fi al-Islam* (Cairo: Dar al-Shuruq, 1993), pp. 76, 80; Qutb, S., *Fi Zīlāl*, vol. 1, *ibid.*, at p. 406; and vol. 2, at pp. 1004-15; vol. 3, at pp. 1194, 1211, 1216-17, 1259, 1266; see Khatab, S., *ibid.*, particularly, footnote no. 110.

37. Qutb, S., *Fi Zīlāl*, vol. 1, *ibid.*, at p. 501; and vol. 2, at p. 3165; Khatab, S., *supra*.

38. *Al-Shūra* (42):38 and *Āl Imrān* (3):159.

39. Khatab, S., *supra*.

40. *Ibid.*, at p. 160.

41. *Ibid.*

42. Qutb, S., *Fi Zilal*, vol. 1, *ibid.*, pp. 248-9; vol. 2, pp. 685-7; and *Adalah*, pp. 80-81; Khatab, S., *ibid.*, see also *Al-Baqarah* (2):229.

43. Khatab, S., *supra* at p. 160.

44. *An-Na’im*, A.A., *supra*. Gibb, H.A.R., *Mohammadanism* (New York: Mentor Books, 1955), p. 39; and Mehdi, “*Constitutionalism Western and Middle Eastern*,” pp. 113-14; *An-Na’im*, A.A., *supra* at p. 83.

45. Khaddur, M., *War and Peace in the Law of Islam*, p. 10.



*Ijmā' Jurisprudence Undergoing a 'Chemical Reaction' in Egypt?*

about the validity of such sovereignty on the Caliphs who came after the Prophet.<sup>46</sup> An-Naim also argues that *Sharī'ah* did not provide for the implementation of this concept of responsible representative government.<sup>47</sup> However, he is generous to suggest that 'that is not to say that these mechanisms and procedures cannot be developed today.'<sup>48</sup>

It is here suggested that An-Naim is stretching the argument too far. It is unlikely that the Qur'ān or Sunnah would go to the extent of giving details of mechanisms and procedures for appointing representatives of the people in government especially if he agrees that the *Sharī'ah* is eternal and meant for the Muslims of all ages, and diverse cultural backgrounds and also across geographical locations around the world. Secondly, An-Naim appears to be using the modern Western democratic fundamentals to appraise the Islamic value system. With due respect, this approach might be myopic, assuming and academically hypothetical.

From the above analysis, God is the Creator, real Ruler of the universe and the Law-giver. In other words, He is the 'Sovereign *De Facto*' and 'Sovereign *De jure*'. It had thus, been an established norm of the Islamic Jurisprudence that *De jure* sovereignty belongs to God whose *De facto* sovereignty is inherent and manifest in the working of the entire universe and Who enjoys exclusively the sovereign prerogative over all creation. The legal framework upon which the Islamic State and polity are fashioned and structured dictates that the totality of its principles of justice, prudence, temperance, fortitude, spiritual and secular are to be guided by the Divine law which precede it and to whose dictates it has ideally to conform.<sup>49</sup>

### **Sovereignty and Prophethood**

As *de jure* sovereignty exclusively and solely belongs to God, the Prophet is the physical manifestation and expression of God's de

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46. *An-Na'im*, A.A., *supra*.

47. Khadduri, M., *Political Trends in the Arab World*, pp. 28, and 47.

48. *An-Na'im*, A.A., *supra*.

49. Muslehuddin, M., *Philosophy of Islamic Law and the Orientalists* (A Comparative Study of Islamic Legal System) (New Delhi: Taj Company, 1986), p. 57.

jure sovereignty on earth and His mouthpiece for this purpose.<sup>50</sup> Sayyid Quṭb emphasises that this status of God's *de jure* sovereignty on earth did not empower the Prophet to exceed or overstep the limits set in the Qur'ān by God, the Law-giver.<sup>51</sup> This is because, Islamic government is not, a kind of absolute government, nor it is an autocracy or an authoritarian form of government; it is a government limited to a constitution.<sup>52</sup> Al-Zalabani supports this view.<sup>53</sup> It follows that the Qur'ān and the Sunnah are the constitution, and the method which facilitates the application of the constitution is constitutional polity.<sup>54</sup>

As God in the Qur'ān has declared him as His last prophet on earth, it implies that prophethood has been brought to finality by his mission. This goes further to indicate that God intended to delegate the exercise of sovereignty to men other than his prophets.<sup>55</sup> Therefore, the role of exercising God's sovereignty after the Prophet has now shifted to the generality of the people under leadership that might emerge among them.<sup>56</sup>

### Sovereignty and Concept of 'Khilāfah' (Vicegerency)

The Islamic notion of 'vicegerency of God' is general. It is not the exclusive preserve or birthright of any individual or clan or class of people. It is rather the collective right of all those who accept and admit God's absolute sovereignty over themselves and accept the Divine Laws, revealed to mankind through the Prophet, as the law above all laws and regulations.<sup>57</sup> The totality of this concept of polity makes the Islamic *Khilāfah* (vicegerency)

50. Maududi, S.A.A., supra at p. 218.

51. Khatab, S., supra at p. 160.

52. Ibid.

53. Al-Zalabani, R., 'Siyasah Dusturiyyah Shar'iyah', *Al-Azhar Magazine*, vol. 18, No. 7 (1947), pp. 130-36.

54. Khatab, S., supra at p. 161.

55. Khadduri, M., supra at p. 69.

56. See Arnold, W. (Sir Thomas), *The Caliphate* (Oxford: The Clarendon Press, 1924), pp. 19-22; and Faruki, A.K., *Evolution of Islamic Constitutional Theory and Practice* (Delhi: Adam Publishers, 1999), pp. 16-19, for detailed account of the selection and appointment of the first four Caliphs. Arnold, W. (Sir Thomas); see also *An-Na'im*, A.A., supra at p. 76 particularly footnote no. 22.

57. Ibid., see Al-Nūr (24) :55.

*Ijmā' Jurisprudence Undergoing a 'Chemical Reaction' in Egypt?*

a democracy.<sup>58</sup> As authority of governance has been conferred on the Islamic State through the Prophet, the State is at liberty to operate and implement state policy within the limits prescribed in the Qur'ān and Sunnah. This means that the State operates through the *Shūra* or Parliament which serves as an instrument in exercising this liberty for the benefit of the *Ummah* (community) and humanity at large.<sup>59</sup>

In conclusion, what appears to be the Islamic formula of 'democracy' is that the people enjoy only the right of *Khilāfah* or vicegerency of God Who alone is the Sovereign.<sup>60</sup> Therefore, the two systems have similar characteristics in that the government is elected into power and can be removed by the exercise of the will of the common voters.<sup>61</sup> However, the two differ in that, under the Western system, a democratic state enjoys the right of absolute authority, while under the Islamic 'democratic system', the State under the *Khalīf* is bound by the limits prescribed in the Divine Code.<sup>62</sup>

How does this translate to the modern representative government within the conceptual framework of *ijmā'*, a legal theory of Islamic jurisprudence? This requires an in-depth analysis of the concept and juxtaposition of same against the background of the Arab Spring and particularly political event in Egypt.

### **Definition of *Ijmā'***

Definition of *ijmā'* presents posers. It raises questions of competence and validity. The question of a formal definition was not raised until the time of Al-Shāfi'ī, who recognised the *ijmā'* of the community and almost rejected the *ijmā'* of the scholar.<sup>63</sup> From the advent of Islam to the end of the era of Abū

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58. Maududi, S.A.A., supra at p. 219.

59. Ghazi, M. A., *Fundamental Principles of an Islamic State, Da'wah Highlights* (Islamabad: Da'wah Academy, International Islamic University, 1989), p. 19.

60. Maududi, S.A.A., supra.

61. Ibid.

62. Ibid.

63. Ibid.

Bakr, ‘Umar, ‘Uthmān and ‘Alī, the only two sources of Islamic law were the Qur’ān and the Sunnah. But the nascent Islamic empire rapidly expanded to incorporate races, cultures and environments or various kinds. Consequently, issues calling for jurisprudential consideration began to arise. Many of such issues have no references in the first and second primary sources of the law, namely, Qur’ān and Sunnah. This development led to emergence of *ijmā’* and of course, *Ijtihād*.<sup>64</sup> The purpose of the latter was to meet the demand of those novel jurisprudential problems,<sup>65</sup> while that of the former was to stand as a substitute authority to that of the Prophet who was no longer physically present.<sup>66</sup> *Ijmā’* was not formerly instituted until the second century of Islam even though it occurred informally at that period.<sup>67</sup> In resolving jurisprudential issues for instance, the first two successors of Prophet Muḥammad, Abū Bakr and ‘Umar used to summon a general meeting of the well-informed figures about Islam among the Companions, most of who were then still living in Medina. Having attained their unanimity, the matters were accordingly resolved.<sup>68</sup> It must be noted that the idea of defining *ijmā’* doctrine came after it had become fully developed. It was formally defined in the last decades of the fourth century of the Hijrah.<sup>69</sup> It was defined as: “the consensus of the *Mujtahidūn* of the Muslim community of any period following the demise of the Prophet Muḥammad on any matter.”<sup>70</sup> This definition started with the question of competence for participation in *ijmā’*.

64. Madkur, M.S., *Manahij Al-Ijtihad Fi Al-Islam* (Kuwait: Jamiat Al-Kuwayt, 1973), p. 44 and Shalabi, A., *Tarikh Al-Tashri’ Al-Islami Wa Tarikh Al-Nuzum Al-Qada’iyah Fi Al-Islam* (Cairo: Maktabat Al-Nahdah, 1976), pp. 24-25.

65. Mahmassani, S. R., *Falsafat Al-Tashri’ Fi Al-Islam* Trans. Farht J. Ziadeh (Leiden: E.J. Brill, 1961), p. 16, and Musa, M.Y., *Tarikh Al-Fiqh Al-Islami, Da’wah Qawiyah Li Tajdid-hi Bi Al-Ruju’ Ila Masadir-hi Al-Ula*, (Cairo: Dar al-Kitab Al-Arabi, 1958), p. 21.

66. Hasan, A., *The Early Development of Islamic Jurisprudence* (Islamabad: Islamic Research Institute, 1970), pp.156-7 and Gibb, H.A.R., *Mohammedanism* (New York: Oxford University Press, 1976), pp. 65-6.

67. Musa, M.Y. *Tarikh Al-Al-Fiqh al-Islam, Da’wah Qawiyah Li Tajdid-hi Bi al-Ruju’ Ila Masadir-ji al-Ula* (Cairo: Dar al-Kitab al-‘Arabi, 1958), p. 21

68. Ibn Al-Qayyim Al-Jawziyah, M. A., *Filam Al-Muwagqin An Rabb Al-‘Alamin* (Cairo: Shrikah al-Tiba’ah Al-Fanniyah Al-Muttahidah, 1968), Vol. 1, Pt. 1, p. 63 and Al-Shahwi, p. 47.

69. Ibid.

70. Hasaba-Allah, A. *Usul Al-Tashrihi Islam* (Cairo: Dar Al-Maarif, 1985), p. 109.

*Ijmā' Jurisprudence Undergoing a 'Chemical Reaction' in Egypt?*

The reference to the *Mujtahidūn* precludes the agreement of laymen from the purview of *ijmā'*.<sup>71</sup> The phrase 'the *Mujtahidūn* of any period' is in reference to an epoch of time in which there exists a number of *Mujtahidūn* at the time an incident occurs.<sup>72</sup> Similarly, the reference to 'any matter' implies that *ijmā'* applies to all juridical (*shar'ī*), intellectual (*ʿaqlī*), customary (*ʿurfī*) and linguistic (*lughawī*) matters.<sup>73</sup> Matters of a practical type which do not partake of the nature of *tashrī'* (legislative enactment) do not constitute the proper subject of *ijmā'*. For example, the agreement of the Companions to send out troops to Syria or to Persia, or their agreement on setting up certain government departments, etc., did not constitute *ijmā'*, for these were practical decisions that were valid in connection with particular circumstances and did not bind the generations of Muslims that came after them. These are purely policy and administrative matters whereas *ijmā'* whose function is to regulate on legislative matters has a quality of permanence and its validity is not confined by a time limit.<sup>74</sup>

Natural growth of ideas underscores the essence of *ijmā'*.<sup>75</sup> It begins with the personal *ijtihad* of individual jurists and culminates in the universal acceptance of a particular opinion over a period of time. Differences of opinion are tolerated until consensus emerges, and in the process there is no room for compulsion or the imposition of ideas upon the community.<sup>76</sup>

Classical jurists proffered some definitions. For instance, Abūl Ḥusayn Al-Baṣrī defines *ijmā'* "as agreement of an assembly of scholars on a certain matter by action or by abandonment."<sup>77</sup> This was later qualified by the condition of *ijtihad* (independent legal interpretation) and time.<sup>78</sup> Al-ʿAmidī in his *al-Iḥkām fī ʿUṣūl al-ʿAḥkām* summed up all the definitions given by the jurists in different ages as follows:<sup>79</sup>

71. See generally, Kamali, H.M. *Principles of Islamic Jurisprudence* (Cambridge: The Islamic Texts Society, 2003).

72. *Ibid.*, p. 230.

73. Shawkani, (n.d.), *Irshad*, p. 70 as quoted by Kamali, M.H., *Ibid.*

74. Abu Zahrah, (n.d.) *Usul*, p. 165.

75. *Ibid.*

76. Kamali, M. H., *supra* at p. 231.

77. Abul-Husayn, A.B. *Kiṭāb al-Mu'tammad* (Damascus: Institute of Francis de Dames, 1964), p. 457.

78. Schacht, J. art. *Shari'a*, *Shorter Enc. of Islam* (Leiden: E.J. Brill), pp. 524-25.

79. Ahmad, H. "The Doctrine of Ijma' in Islam", *IRII* (1984), p. 73.

- a. Agreement of *Ahl Hil Wal Aqd'* (i.e. to say people invested with power to have final say in the affairs of the community) in a certain period of time, on a rule about a certain incidence.
- b. Agreement of all those who are legally responsible and belong to the community of Muḥammad in a certain age, on a rule about a certain incidence.

The former definition is applicable in situation where the masses are excluded but where they are included, the latter definition is applicable.<sup>80</sup>

Al-<sup>2</sup>Amidī breaks the various definitions into five component parts namely, agreement; people invested with the power to make a final say on matters that affect the community; membership of the Prophet's community; period of time; and moot questions.

The word agreement includes consensus by silence. The term, *Ahl Hil Wal Aqd'*, (people invested with power to have final say in the affairs of the community), is an expression which indicates unanimous agreement of the Jurists including the agreement of the masses. The condition of the 'membership of the Muslim Community' implies exclusion of those who belong to other communities. The phrase 'in a certain period' means the existing community. Finally, the phrase 'on a rule about a certain incidence' included positive and negative aspects of consensus, and rules about rational and legal question.<sup>81</sup>

As stated earlier in this work, definition is first problem of doctrine of *ijmā'*. The definitions of both classical and contemporary periods have some common implications. Chief among these implications is the fact that membership of those who are competent to exercise *ijmā'* and agreement coming out of the exercise preclude and perhaps the awareness of laymen of the community. Secondly, by reference to the *Mujtahidūn* of any period, it is meant a specific number of *Mujtahidūn* at the time when an incident occurs. There seems to be a paradox between the underlined philosophy and the formal definition of *ijmā'*. Be

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80. Ibid.

81. Al-Amidi, *Al-Ihkam fi Usul al-Ahkam* (Cairo: Matba' Al-Ma'arif I, 1914), pp. 280-282.

*Ijmā' Jurisprudence Undergoing a 'Chemical Reaction' in Egypt?*

that as it may, the validity of *ijmā'* is not in doubt as a source of Islamic Law. Jurists are unanimous that *ijmā'* is a legal proof and compliance with it is binding with exception of Jurists of Shī'ites, Khārijites and some rules of Mu'tazilites.<sup>82</sup>

As earlier stated, *ijmā'* does not directly partake of divine revelation and can only occur after the demise of the Prophet. Therefore, rules of *ijmā'* are considered products that emerge within the framework of *ijtihād* reached by consensus. Whether those who reached the consensus are scholars or laymen or mixture of both is another question entirely. By this comparison, *ijmā'* could be said to have similarity with other human-made law enacted by consensus of the people such as the Acts of National Assembly (in case of municipal legal order) or Resolutions passed by the Security Council and General Assembly of the United Nations Organization (in case of international legal order). However, *ijmā'* is distinguished from others for the fact that it derives its validity from sources which are entirely divine and which are incapable of review or amendment by human.

*Ijmā'* legislation, like any other law in every society is formulated with the consent of the people. *Ijmā'* actually derives its name from words like 'consent', 'consensus' and 'agreement' etc. Like *ijmā'*, Roman law was also founded on popular consent. It was basically customary law because most of the institutions like the authority of a head of a family, monogamy, and certain other formal ceremonies exist before there is any law in the strict sense of the term. The sources of Roman law include, custom, *lex*, *plebiscitum*, *magistratum edicta*, *senatusconsulta*, *principum placita* and *responsa prudentium*. *Lex* was a statute formulated on the proposal of the king or magistrate ratified by the vote of the people in a meeting called comitia.<sup>83</sup> The king or the magistrate had no authority to legislate on important matters except with the approval of the senate.<sup>84</sup>

Since church, on the other hand, comes into existence as a binding force in a religious community, its principal function is

82. Hasaba-Allah, A. *Usul Al-Tashri Al-Islami* (Cairo: Dar Al-Ma'arif, 1985), p. 112.

83. Prichard, A.M., *Leage's Roman Private Law* (London: Macmillan & Co, 1964), pp. 13-17.

84. *Ibid.*

to create unity by its direction in different ages in doctrine and practice. A remark by Joachim Wach becomes relevant here. He says:

There follows with continued reflection and discussion, systematization, and elaboration of doctrine, the careful and comprehensive formation of a rule of faith or creed, the standardization of forms of collective worship, and eventually the establishment of a constitution to sustain the new stable organization. The oral tradition is written down, the written tradition is collected and standardized, the doctrine is redefined, and hereafter all deviations and opinions at variance with the officially accepted teachings are classed as heresy.<sup>85</sup>

With the rise of this unifying body and directing authority, there emerged the idea of consensus of opinion through which church functions. Sociologists attach supreme importance to opinion, public or private, in a society. Opinion is sometimes called ‘authority,’ sometimes ‘source of authority’ and even authority is suspected to be the ‘daughter of opinion.’ Authority is rather derived from opinion.<sup>86</sup> Public opinion carries more weight than the individual one and it is considered a social force. An individual or a group which has the public opinion in its favour receives the whole force of society, hence, the significance of public opinion or the agreement of people in general on a certain matter.<sup>87</sup>

In the ancient time, important matters were decided in a twofold way, (i) by consulting an individual, say king, priestly divines or oracles; and (ii) by agreement of the body of elders in the community. These methods were applied in the case of the points not answered in the scriptures or by the founder of religion. Greek civilisation presents several instances in this regard. Cicero remarks:

The Athenians, for instance, in every public assembly always had present certain priestly diviners, whom they

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85. Wach, Joachim, *Sociology of Religion* (Chicago: The University of Chicago Press, 1964), p. 142-3.

86. Durkheim, Emile, *The Elementary Forms of the Religious Life* (New York: Callier Books, 1961), pp. 238-39.

87. Ibid.



*Ijmā' Jurisprudence Undergoing a 'Chemical Reaction' in Egypt?*

called mantis. The Spartans assigned an augur to their kings as a judicial adviser, and they also enacted that an augur should be present in their Council of Elders which is the name of their senate. In matters of grave concern they always consulted the oracle at Delphi, or that of Jupiter Hammon or that of Dodona.<sup>88</sup>

## **Popular Participation in Government – Islamic Legal Framework**

The question of people's sovereignty is directly linked to modern principle of popular participation in government. Participation, engagement and involvement are all terms that are popular today. While there are differences in the meaning of these terms there is also a lot of overlap. Increasingly, many Muslims have accepted the notion of democracy, although they have different opinions about its precise meaning. Muslim interpretations of democracy generally build on the well-established Qur'ānic concept of consultation, but these interpretations vary in the degree to which "the people" are able to exercise this duty.<sup>89</sup> Some argue that Islam is inherently democratic, not only because of the principle of consultation but also because of the concepts of independent reasoning (*ijtihad*) and consensus (*Ijmā'*).<sup>90</sup>

There are those who hold that compatibility exists between Islam and popular participation of people in government. According to them, Islam as a set of norms and ideals emphasises the equality of people, the accountability of leaders to community, and the respect of diversity and other faiths, is fully compatible with democracy. He does not see how it could be compatible with a government that would take away those values.<sup>91</sup>

Yet, throughout the Islamic world there are those who paint compatibility of Islam with democracy as odd. Columbia

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88. Cicero, *De Divinatione*, trans. William Armistead Falconer (London: the Loeb Classical Lib., 1953), p. 327.

89. Esposito, J.L., *Contemporary Islam: Reformation or Revolution?* Oxford History of Islam (Oxford: Oxford University Press, 2000).

90. Asad, M., *The Principles of State and Government in Islam* (Berkeley: University of California Press, 1961).

91. Louay Safi, a member of the board of directors of the Washington, D.C.-based Center for the Study of Islam and Democracy (CSID) is one of those who holds this view. See Handwerk, B., "Can Islam and Democracy Co-exist?" *National Geographic News* (2003), <http://news.nationalgeographic.com/news/2003> (accessed 21 April 2012).

University Professor Richard Bulliet,<sup>92</sup> holds that most of those presumptions are grounded in anti-U.S. and anti-West sentiment.<sup>93</sup> Safi argues that self-government does have some roots in the Islamic world, saying that historic Muslim societies were more representative than their modern counterparts because the central state was not as powerful.<sup>94</sup> He feels that a historic mistrust of central authority, bolstered by post-colonial experiences with oppressive central governments, could spark Muslim societies to seek more participatory governments with weaker national authority.<sup>95</sup>

Wherever the argument goes, it is a fact that historically, people participate in the formation of government under the Islamic system even though it may not be in the pattern of modern participatory system.

The concept of Legislative Assembly is as old as the Islamic Jurisprudence. In the classical period, the term used to describe the word ‘Legislative Assembly’ was: “*Ahl al-Hal wa al-Aqd*”, meaning: the “Body which resolves and prescribes”.<sup>96</sup> In other words, it was an organ of the Islamic State that was responsible for resolution of issues and prescription of rules and policies. The focal point of the government arm was to determine the law which shall govern the society within the framework of the state.<sup>97</sup>

As legislative power in an Islamic State is based on God’s *de jure* sovereignty, it follows that any law enacted and promulgated therein which contradicts or found to be inconsistent with the two primary sources (the Qur’an and Sunnah) will be null and void to the extent of its inconsistency. The position is the same even if the popular opinion of the citizens demands such legislation.<sup>98</sup>

92. He specialises in the history of the Middle East and other Islamic nations. Some of his works include the following: *The Case for Islamo-Christian Civilization* (2004, in press), *The Columbia History of the Twentieth Century* (ed., 1998), *The Encyclopedia of the Modern Middle East* (co-ed., 1996), *Islam: The View from the Edge* (1994), *Conversion to Islam in the Medieval Period* (1979), *The Camel and the Wheel* (1975), and *The Patricians of Nishapur* (1972).

93. Handwerk, B., supra note no. 91.

94. Ibid.

95. Ibid.

96. Maududi, S.A.A., supra at p. 220.

97. Al-Tamawi, S., *Al-Sultan al-Thalath fi Al-Dasatir al-Arabiyyah Al-Mua’asirah wa fi al-Fikr al-Siyasi al-Islam* (Cairo: Matba’ah al-Sa’idah, 1967), p. 42.

98. Ibid.

*Ijmā' Jurisprudence Undergoing a 'Chemical Reaction' in Egypt?*

It follows that the power of the Legislature in an Islamic State is limited. In spite of this obvious limitation, the Legislature has a number of functions to perform.

*Ijmā'* is a synonym of 'Legislature'. It is an Arabic homonym with two literal meanings namely, resolution<sup>99</sup> and unanimity.<sup>100</sup> The former is only used in the Qur'ānic expression: "*Fa ajmi'ū amrakum wa shurakā'akum*" which translates approximately as: "So resolve on your course of action, you and your partners."<sup>101</sup> In the legal terminology, *ijmā'* means consensus of scholars. The definition may not be exhaustive as any definition depends on a particular scholar or school of thought.

*Ijmā'* is recognised by the Sunnī and Ithna 'Ashari Shī'ah except Al-Nazzām<sup>102</sup> in one form or another as a source of Islamic jurisprudence. *Ijmā'* belongs to the group of sources of law that do not share directly with Qur'ān and Sunnah the features of direct divine revelation. Yet, it is the third in the order of priority after the Qur'ān and Sunnah.

*Ijmā'* plays a significant role in preserving the Islamic heritage, serving as a unifying force, like some parallel institutions in other systems.<sup>103</sup> The doctrine of *ijmā'* plays a fundamental and significant role in conserving the past heritage and formation of institutions in Islam.<sup>104</sup> It engenders unity and solidarity in the whole system of law, dogma and rituals.<sup>105</sup> *Ijmā'* is a rational and binding proof that is accorded high status. This has made it mandatory that only an absolute and universal consensus would qualify, although absolute consensus on the rational content of *ijmā'* has often been difficult to obtain.<sup>106</sup>

99. Ibn Manzur, M.M., *Lisan Al-Arab* (Beirut: Dar Bayrut, 1956), Vol. 8. pp. 57-58.

100. Al-Sadr, M.S., *Al-Ijma' Fi Al-Tashri' Al-Islami* (Beirut: Manshurat 'Uwaydat, 1969), pp.19-21.

101. *Yānūs* (10): 71.

102. Bernandi (-Baladi), M., "*Idjma'*", E.I. Vol. 3. (n.d.) p. 1023. Al-Nazzam was a Mu'tazili theologian of the Basra School. He was born around the second half of the 2nd/7th century and died between the year 835 and 845 (220-230 Hijrah). For details, see Gibb, H.A.R. and Kramers, J.H., *Shorter Encyclopedia of Islam* (Leiden: E. J. Brill, 1974), pp. 445-446.

103. Hasan, A. *The Doctrine of Ijma' in Islam* (Islamabad: Islamic Research Institute, 1984), p. 260.

104. *Ibid.*

105. *Ibid.*

106. Kamali, M.H., *supra* at p. 228.

## Comparative Appraisal of *Ijmāʿ* and Modern Legislative Assembly

A comparison between the doctrine of *ijmāʿ* and the modern legislative assembly reveals similarity and difference between the two. For instance, while expressing concern on how to utilise the potential of *ijmāʿ* in the process of modern statutory legislation, Muḥammad Iqbāl suggests ‘the transfer of the power of *ijtihād* from individual representatives of schools to a Muslim legislative assembly’. He argues with vehemence that it is the only possible form *ijmāʿ* can take in modern times.<sup>107</sup> Rejecting this suggestion however, Dr. S.M. Yusuf, observes that Iqbāl is mistaken in trying to convert *ijmāʿ* into a modern legislative institution. He argues that *ijtihād* and *ijmāʿ* have never been the prerogatives of a political organisation, and any attempt to institutionalise *ijmāʿ* is bound to alter its nature and defeat its basic purpose, for *ijtihād* is a non-transferable right of every competent scholar, and a *Mujtahid* is accepted by the community by virtue of his recognised qualities, rather than through electioneering campaigns or the award of official certificates. The process of arriving at *ijmāʿ*, according to him, is entirely different from that of legislation in a modern state assembly. *Ijmāʿ*, he argues, passes through a natural process which resembles that of the ‘survival of the fittest’. No attempt is made in the process to silence the opposition or to defeat minority opinion. Opposition is tolerated until the truth emerges and prevails. *Ijmāʿ* is a manifestation of the conscience of the community, and it is due mainly to the natural strength of *ijmāʿ* and the absence of rigid organisation ‘that no one is able to lay his hands on Islam; when anyone tries to hammer Islam, he ultimately finds to his chagrin that he has only been beating in the air.’<sup>108</sup>

Ahmad Hasan finds Iqbāl’s view that *ijtihād* should be exercised collectively instead of being a preserve of the individual *Mujtahid* to be basically sound. He argues that modern conditions demand that it should be exercised collectively. A *Mujtahid* may be an expert in Islamic learning, but he cannot claim to be perfectly acquainted with the social conditions of a country and

107. Iqbal, M. *Reconstruction of Religious Thought in Islam* (Lahore: Ashraf Press, 1965), pp. 173-4.

108. Yusuf, S.M., *Studies in Islamic Culture and History* (Lahore: Institute of Islamic Culture, 1970), pp. 212-8.

*Ijmā' Jurisprudence Undergoing a 'Chemical Reaction' in Egypt?*

the diverse nature of its problems.<sup>109</sup> He therefore recommends that the legislative assembly is 'the right place' for the purpose of collective *ijtihād*, which would in turn provide an effective method of finding solutions to urgent problems.<sup>110</sup>

The debate between the antagonists and protagonists of the developmental trend in *ijmā'* especially its classical formation shows that the similarity and difference between doctrine of *ijmā'* and legislative assembly under modern legal system are both conceptual and factual.

**Part Two:**

***Ijmā'* and Democracy – a Chemical Reaction in Egypt**

*Ijmā'* is a classical concept of consensus or agreement of the Muslim community basically on religious issues and by extension, as propounded by the modern Muslim jurists, a platform for people representation in governance. Democracy, on the other hand, is a government by the people; a form of government in which the supreme power is vested in the people and exercised directly by them or by their elected agents under a free electoral system.<sup>111</sup> If the concept of people representation under the two systems is theoretically and empirically assessed, it is convenient to argue that they are presently undergoing a chemical reaction in Egypt.

Egypt is a Muslim majority state. The arrival of Islam in the country dates back to the 7th century after which it emerged as a centre of politics and culture in the Muslim world. Under Anwar Sadat, Islam became the official state religion and *Shari'ah* the main source of law.<sup>112</sup> Egypt politics is based on the republican system with a semi-presidential system of government. As the aftermath of the 2011 revolution and the resignation of President Hosni Mubarak, executive power has been assumed by the Supreme

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109. Ahmad, H., supra at p. 244.

110. Kamali, M.H., supra at p. 257 quoting Ahmad, H. at 244.

111. <http://dictionary.reference.com/browse/democracy> (accessed 27 March 2014).

112. Berkley Center for Religion, Peace and World Affairs, Georgetown University, <http://berkeleycenter.georgetown.edu> (accessed 28 March 2014).

Council of the Armed Forces, which dissolved the parliament and suspended the constitution. Like any modern-nation State that claims to be democratic, Egypt has the Executive, Legislative and Judicial arms of the government. A brief appraisal of *modus operandi* of the three arms of government at the wake of the 2011 Egypt revolution becomes pertinent.

### **Executive**

The March 2011 referendum produced a new regulation which stipulates that the president is limited to two four-year terms, with the Judiciary supervising the elections. The president is required to appoint a deputy, and a commission will draft a new constitution following the parliamentary election. Candidates must provide 30,000 signatures from at least 15 provinces, or 30 members of a chamber of the legislature, or nomination by a party holding at least one seat in the legislature.<sup>113</sup> Consequent to the meeting of the newly elected People's Assembly and *Maglis al-Shūra* in March 2012, a committee was charged with drafting a new constitution to replace the pre-revolutionary one to be followed by presidential elections. Contrary to that arrangement, the 2012 Egyptian presidential election was held without a new constitution. The military council, which took power in early 2011, promised a fair and civilian vote. The first round of the election took place on 23 May and 24 May 2012.<sup>114</sup> It was followed by a run-off on 16 June and 17 June. The election was won by Mohamed Morsi who assumed office on 30 June 2012.<sup>115</sup>

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113. El-Hennawy, N., Commission Announces Proposed Changes to Egyptian Constitution, *Egypt Independent*, (Saturday, 26 February 2011), <http://www.egyptindependent.com/news/commission-announces-proposed-changes-egyptian-constitution> (accessed 27 March 2014).

114. Doucet, L., Egyptians Vote in Landmark Presidential Election, BBC News Middle East (23 March 2012), <http://www.bbc.co.uk/news/world-middle-east-18167224> (accessed 27 March 2014); Sabry, B., "Quick Guide: The Lowdown on Egypt's Presidential Frontrunners", *ahramonline* <http://english.ahram.org.eg/NewsContent/36/122/42031/Presidential-elections-/Presidential-elections-news/-Quick-Guide-The-lowdown-on-Egypt-presidential-fr.aspx> (accessed 27 March 2014).

115. Fleishman, J., and Abdellatif, R., "Egypt Runoff Presidential Election Kicks off Sullenly", *Los Angeles Times* (17 June 2012), <http://articles.latimes.com/2012/jun/17/world/la-fg-egypt-election-20120617> (accessed 27 March 2014).

*Ijmā' Jurisprudence Undergoing a 'Chemical Reaction' in Egypt?*

In what observers described as a carefully motivated and planned uprising against the first democratic elected government, the constitution of Egypt was suspended and Morsi was ousted from the presidency on 3 July 2013. A transition government to be headed by Egypt's chief justice was put in place. This arrangement has remained until a date for early presidential elections be determined.<sup>116</sup>

**Legislative, *Maglis el-Sha'ab* (People's Assembly) and, *Maglis el-Shūra* (Consultative Council)**

The Egypt Parliament meets for one eight-month session each year. However, the President is empowered to call an additional session under special circumstances. It is argued that though, by virtue of the 1980 constitutional amendment the powers of the Egypt Parliament had increased, it continues to lack the powers to balance the extensive powers of the President.

The People's Assembly on the other hand, is the principal legislative body. Under Article 87 of the Constitution, out of the assembly's 454 deputies, 444 are directly elected while no more than 10 may be appointed by the President.<sup>117</sup> The assembly sits for a five-year term but can be dissolved earlier by the President. All seats are voted on in each election. Four hundred seats are voted on using proportional representation while the remaining 44 are elected in local majority votes. The Constitution reserves 50 per cent of the assembly seats for 'workers and peasants', (although in practice, the "workers and peasants" have come to be retired military officers and internal security personnel).<sup>118</sup>

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116. Chappell, B., Memmott, M., "Egypt's President Morsi is Ousted from Power by Military", npr *the two-way*, (03 July 2013), <http://www.npr.org/blogs/thetwo-way/2013/07/03/198282481/showdown-in-egypt-wednesdays-developments> (accessed 27 March 2014).

117. Egypt Constitution of 1980 Article 87 provides that: The law shall determine the constituencies into which the national territory shall be divided; the number of elected members of the People's Assembly must be at least 350, at least one-half of which has to be workers and farmers elected by direct and secret public ballot. The definition of the worker and the farmer shall be determined by law. The President of the Republic may appoint a number of members not exceeding ten.

118. Martini, J., and Taylor, J., "Commanding Democracy in Egypt", *Foreign Affairs Magazine*, (Sept./Oct. 2011), pp. 127-137.

The People's Assembly may force the resignation of the executive cabinet by voting a motion of censure. For this reason, the Prime Minister and his cabinet are necessarily from the dominant party or coalition in the assembly. In the case of a president and assembly from opposing parties, this leads to the situation known as cohabitation. While motions of censure are periodically proposed by the opposition following government actions that it deems highly inappropriate, they are purely rhetorical; party discipline ensures that, throughout a parliamentary term, the government is never overthrown by the assembly.

The 1980 Egypt Constitution created the *Shūra* Council. It was the 264-member upper house of Parliament. Members totalling 176 of this Council were directly elected while 88 members were appointed by the President of the Republic for six-year terms. One half of the *Shūra* Council was renewed every three years. Legislative powers of this Council were limited, while the People's Assembly had the last word in the event of a disagreement between the two houses.

In the aftermath of the 2011 revolution and abrogation of the Egypt Constitution, the *Shūra* Council was dissolved. Three round elections for the new 270 seat *Shūra* Council were held between 29 January and 11 March 2012.<sup>119</sup> In what appeared to be a beginning of elimination of *Ijmā' / Shūra* concept from the Egypt polity, the *Shūra* Council was removed from the draft copy of the 2014 constitution.<sup>120</sup> The abolition of the council became conclusive in view of the passage of the constitution.<sup>121</sup>

119. Al-Atrush, S., "Egypt Election to Start on November 28", *AFP*, (27 September 2011), <http://www.google.com/hostednews/afp/article/ALeqM5g5BSkdO3TcP9CsIRc--wEe9AVB7g?docId=CNG.4e9dd22c6965a9c01668d330c7cc2b7e.881> (accessed 27 March 2014); and Xinhuanet, "Egypt to Hold Parliamentary Elections on November 28", [http://news.xinhuanet.com/english2010/world/2011-09/27/c\\_131163534.htm](http://news.xinhuanet.com/english2010/world/2011-09/27/c_131163534.htm) (accessed 27 March 2014).

120. "50 Member Constitution Committee Eliminates Shura Council", *Ahram Online*, (Sunday, 1 December 2013), <http://english.ahram.org.eg/NewsContent/1/64/87991/Egypt/Politics/-member-constitution-committee-eliminates-Shura-Co.aspx> (accessed 27 March 2014).

121. Al-Jazeera, "Egypt Constitution Approved by 98.1 percent", (24 January 2014), <http://www.aljazeera.com/news/middleeast/2014/01/egypt-constitution-approved-981-percent-201411816326470532.html> (accessed 27 March 2014).



## Judiciary

Egypt judicial system is an independent branch of the government which includes both secular and religious courts. The system is based on European and primarily French legal concepts and methods. The legal code is derived largely from the Napoleonic Code. The judicial arm of the Egypt government system plays an important role, as it is given the responsibility to monitor and run the country's parliamentary and presidential elections.

Historically, Egypt was among the leading modern nation-state after France to establish a judicial institution which began in 1875 with the enactment of the modern codification under which the Mixed Courts were established. The Egyptian judicial institution that existed in the mid-19th century was characterised by "Consular Courts" designed to adjudicate in matters involving foreigners; an Exclusive Judicial system that enabled members of the executive authority to decide on certain cases and of course, discontinuation of the unified judicial system that was in vogue since the era of the Ottoman Empire rule in Egypt. It is noted that during the Ottoman period, the judiciary power was undertaken by one person known as the Chief Justice, who was assisted by four deputies representing the four schools of Islamic jurisprudence; Ḥanafī, Shāfi'ī, Mālekī and Ḥanbalī. During Moḥamed 'Alī's reign of Egypt and his efforts to build a modern Egyptian state, two significant developments took place leading to the existence of various bodies of civil judiciary in the country.

Independence of judiciary in Egypt is seriously challenged in the current political imbroglio. Five hundred and twenty-nine members of the outlawed Muslim Brotherhood were sentenced to death not long ago. The case has attracted attentions of international organisations, media and justice human rights bodies. AFP reports of the case show graphic description of the court verdict in the case and raise serious doubt about independence of judiciary in Egypt especially in face of the political logjam that has characterised the country.

The death sentence passed on the accused in the case has been described as 'draconian' and 'unprecedented' following court hearings that lasted barely two days.<sup>122</sup> Aside from a series

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122. Spencer, C., "Egypt: The Politics of 'Normalization'", *Chatham House, Independent Thinking on International Affairs*, (28 March 2014), <http://www>.

of charges for public order offences and damage to public property, the defendants' main alleged crime was the killing of a single policeman, whose widow subsequently claimed that the 2-3 people responsible for her husband's death were not even in court.<sup>123</sup> Observers say that it was the highest tally of death sentences ever served at once in Egypt, after proceedings that could not conceivably have conformed to international standards of justice.<sup>124</sup>

Egyptian judiciary has been described as being rife with judges who are sharp opponents of Islamists who are operating amid a media frenzy demanding swift and harsh verdicts against the Muslim Brotherhood. The result, according to judicial experts, is the week's stunning verdict sentencing hundreds of suspected Islamists to death after a cursory mass trial, a decision likely to be overturned but clearly intended to send a deterrent message.<sup>125</sup> The report states further that the rulings of a criminal court in the provincial capital of Minya brought heavy international criticism from the U.N., the United States and the European Union. Amnesty International called the verdicts "grotesque," while Egyptian rights groups were stunned. The court delivered the sweeping sentences against more than 520 defendants after only one session hearing testimony—without hearing the defence's case.<sup>126</sup> The following week, the same Minya judge opened a second mass trial of 683 suspected Islamists on similar charges—murder and attempted murder in connection to an August attack on a police station. After one day of hearing witnesses—with defence lawyers boycotting the proceedings—the judge declared he would rule in the next hearing in a few weeks.

A serving Egyptian judge on a high-level court speaking on condition of anonymity referred to the verdict as "an individual case" of a judge aiming to show "his political allegiance" and

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chathamhouse.org/media/comment/view/198621 (accessed 31 March 2014).

123. Ibid.

124. Ibid.

125. Deeb, S., and Keath, L., "Egypt's Mass Verdicts Show Pressure on Judiciary", *Associated Press*, (26 March 2014), <http://abcnews.go.com/International/wireStory/egypts-mass-verdicts-show-pressure-judiciary-23057778> (accessed 27 March 2014).

126. Ibid.

*Ijmā' Jurisprudence Undergoing a 'Chemical Reaction' in Egypt?*

“send a particular message”. He noted further that “...the manner and the way the session was managed have seriously harmed the reputation of the judiciary...”<sup>127</sup>

Sensing the far-reaching implications of the verdict, Egypt Justice Ministry issued a statement reiterating that the judiciary was independent and that the ruling was not a final verdict, rather it could be overturned by the court after the country's top Islamic official, the *Mufti*, issued his opinion on the death sentences. Furthermore, the sentences could be appealed before the Court of Cassation, which could order a retrial.<sup>128</sup> So far, there has not been a clear trend in the few verdicts reached in the multiple trials of members of the Muslim Brotherhood. One court sentenced 12 students to 17 years in jail for rioting on university campus, according to the report.<sup>129</sup>

### **Political Parties and Military Intrusion**

Prior to the revolution in Egypt, power was concentrated in the hands of the President of the Republic and the National Democratic Party which retained a super-majority in the People's Assembly. Basically, there were 18 recognised political parties from across the political spectrum. The formation of political parties based on religion is fundamentally prohibited in the Constitution. The official opposition and political pressure groups including the Muslim Brotherhood, were active in Egypt and made their views public. They are represented at various levels in the political system. As of 2012, there were more than 40 registered political parties in Egypt. The largest were Freedom and Justice Party, al-Nour Party, New Wafd Party, Free Egyptians Party, Justice Party, Wasat Party, Egyptian Social Democratic Party.

Following the abrogation of the Constitution in February 2011, the Egyptian parliament was dissolved.<sup>130</sup> The development paved way for new political parties to emerge in anticipation

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127. Ibid.

128. Ibid.

129. Ibid.

130. Anthony, S., “Egyptian Military Dissolves Parliament”, *The New York Times* (13 February 2011), [http://www.nytimes.com/2011/02/14/world/middleeast/14egypt.html?pagewanted=all&\\_r=0#h](http://www.nytimes.com/2011/02/14/world/middleeast/14egypt.html?pagewanted=all&_r=0#h) [accessed 29 March 2014].

of parliamentary elections. As Hosni Mubarak resigned his position as President, the Supreme Council of the Armed Forces headed by Field Marshall Mohamed Hussein Tantawi assumed the authority of the State. The council was initially intended to be transitional with a view to surrendering state powers to the president following the election in May. However, the Council, exhibiting its power, unilaterally issued a constitutional declaration giving itself legislative and judicial powers to “basically decide what the law is.”<sup>131</sup>

This development opened a new chapter in the traditional intrusion of Egypt Armed Forces in political life of the people of the country. On the one hand, it amounted to throwing spanner into the wheel of political and legislative progress. *Ijmāʿ* as a concept has been a subject of theoretical analysis over a long period of time. Egypt, a Muslim majority state had been in the forefront in the struggle to empirically put the aged-long theoretical polemics of Islamic jurisprudence to practical application. This desire was quashed by military fiat. The opportunity was wantonly denied. The ‘Western democracy’ on the other hand, was stripped naked in the daylight in the very eyes of its Western custodians as well as local and international observers by the same military junta.

### **Egyptian Scholars and Citizens**

The political logjam has sharply divided the Egyptian citizens generally and scholars in particular. While some scholars are in support of the ousted President Morsi and the Muslim Brotherhood, others line behind the establishment led by Al-Sisi, Egyptian military brass and secular groups. For example, Sheikh Aḥmed Al-Ṭayīb, the Grand Imām of Al-Azhar played a major role in the incidents that led to the ouster of Egypt’s first-elected president Moḥamed Morsi. Sheikh Al-Ṭayīb and Pope Tawadros II, the Coptic pope, were key attendees at the last-minute meeting held by Defence Minister Abdel-Fattah Al-Sisi that agreed on the ouster of Morsi and the roadmap for a post-Morsi Egypt.<sup>132</sup>

131. Steavenson, W., “Who Owns the Revolution?” *The New Yorker* (1 August 2011), [http://www.newyorker.com/reporting/2011/08/01/110801fa\\_fact\\_steavenson](http://www.newyorker.com/reporting/2011/08/01/110801fa_fact_steavenson) (accessed 29 March 2014).

132. Shahine, G., “Risks to Al-Azhar?” *Al-Ahram* (Tuesday, 1 April 2014), <http://weekly.ahram.org.eg/News/3403/32/Risks-to-Al-Azhar.aspx> (accessed 1 April 2014).

*Ijmā' Jurisprudence Undergoing a 'Chemical Reaction' in Egypt?*

Following the announcement of Morsi's removal, on Egyptian state television and having openly declared his support for early presidential elections and the roadmap, Al-Ṭayīb was quoted as saying that: "It was clear that we had to choose between two bitter choices," he said, adding that he had chosen the less harmful solution to the political impasse the country had come to in opting to end Islamist rule. Al-Ṭayīb had earlier called upon the ousted president to step down to end the bloodshed.<sup>133</sup>

Similarly, Dr. 'Alī Gomaa the 18th Grand Mufti of Egypt who succeeded Mufti Aḥmad El-Ṭayīb<sup>134</sup> argued that the arrest of Morsi was legitimate from an Islamic legal point of view. Since the "people of the state" and those who were responsible for the emergence of leadership in the community (*ahl al-hall wal 'aqd*),<sup>135</sup> manifested in the Defence Minister, the Republican Guard, Sheikh al-Azhar, Dr. Aḥmad al-Ṭayīb, and the Coptic Pope Tawadros II, were the ones who moved against Morsi to prevent further national chaos, such action was legal. Dr. Gomaa also vociferously supported not only the breakup of the protests and military intervention in Sinai, but also argued for the legitimate use of lethal force against the Morsi supporters, largely led by the Muslim Brotherhood who staged sit-ins in various squares around Cairo, most notably the Raba'a Square in Nasr City.<sup>136</sup> Dr. Gomaa had likened the Brotherhood to the early khawārīj who sought to rise against the Caliph 'Alī bin Abī Ṭālib in the 7th century.<sup>137</sup>

Commenting on Dr. Gomaa's position and comments, Amr Osman notes that:

The collaboration of Muslim scholars with tyrants is well known in Egypt and everywhere in the Muslim

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133. Ibid.

134. Tolson, J., "Finding the Voices of Moderate Islam", *USNews* (2 April 2008), <http://www.usnews.com/news/blogs/faith-matters/2008/04/02/finding-the-voices-of-moderate-islam> (accessed 31 March 2014).

135. "*Ahl al-Hall wal-'Aqd*" is a technical term that is not mentioned in either the Qur'ān or the Sunnah. Historically, it is a reference to those six people whom 'Umar ibn al-Khaṭṭāb chose when he was about to die, so that they could agree among themselves as to who could be a Khalīfah from among themselves. Thus, they are those who are qualified to elect or depose a caliph on behalf of the Muslim community.

136. <http://www.akhbarak.net/articles/13072729> (accessed 31 March 2014).

137. Ibid.

world; indeed, political conservatism (in the sense of supporting powerful leadership irrespective of its religious and moral commitments and forbidding any challenge to it) has been a hallmark of mainstream Sunni Islam since early Islamic history. However, Gomaa's speech is still remarkably striking, not only in its explicitness in encouraging and legitimating mass murder by the state (and not just justifying these *ex post facto*), but also because of its uncompromisingly aggressive tone and, one could say, remarkably over-the-top language. Obviously, Gomaa was bestowing religious legitimacy on plans for violent crackdown on protesters to "clear the conscience" of the security troops before they embarked on their assault. And to do that, Gomaa used several strategies...<sup>138</sup>

Against this position however, Sheikh Yūsuf al-Qaradāwī declared in a religious edict, or fatwa, shortly after the ouster of Morsi that Egyptians should reject the coup and support the ousted President, saying that the military should withdraw from the political scene.<sup>139</sup> According to him, the military's intervention in Egypt this time around was against democratic principle and the constitution. He reiterated the necessity to support the elected Egyptian president and to retain the constitution... and calling on al-Sisi and those with him to withdraw to preserve legitimacy and democracy."<sup>140</sup> Sheikh al-Qaradāwī who is also Chairman of the International Federation of Muslim Scholars, has been a vociferous supporter of the revolutions that roiled Arab countries in 2011.<sup>141</sup>

The continuing political unrest in Egypt has further widened divisions in Egypt. Egyptians are suspicious of each other on the

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138. Osman, A., "Religion and politics in post-coup Egypt", *OpenDemocracy* (28 November 2013); <http://www.opendemocracy.net/arab-awakening/amr-osman/religion-and-politics-in-post-coup-egypt> (accessed 31 March 2014).

139. "Yusuf al-Qaradawi says in Fatwa Egyptians Should Back Morsi", *Reuters* (6 July 2013) as reported by the Egypt Independent (1 April 2014); <http://www.egyptindependent.com/news/yusuf-al-qaradawi-says-fatwa-egyptians-should-back-morsi> (accessed 1 April 2014).

140. *Ibid.*

141. *Ibid.*

*Ijmā' Jurisprudence Undergoing a 'Chemical Reaction' in Egypt?*

basis of individual political and ideological leaning. Tensions had continued to mount as citizens are killed on account of deadly clashes between riot police and members and supporters of Morsi and Muslim Brotherhood. Political parties and institutions— Islamists and non-Islamists, are further polarised against each other: each viewing their opponents' moves as illegitimate. This polarisation has extensively extended to the Pan-Arab solidarity league—The Arab League. This is quite understandable. The League is divided into pro and anti Morsi-Muslim Brotherhood and Sisi, secularists and coup d'état strategists.

### ***Hākimiyyah* and *Ijmā'*: Active Participants in Egypt**

As earlier noted, legal framework upon which the Islamic State and polity are fashioned and structured dictates that the totality of its principles of justice, prudence, temperance, fortitude, spiritual and secular are to be guided by the Divine law which precede it and to whose dictates it has ideally to conform.<sup>142</sup> Egypt finds itself in this conceptual political reality. Presence and participation of Islamic groups in Egypt political spheres confirms this reality. Similarly, it is argued that the classical *ijmā'* of scholars and modern *ijmā'* of legislative assembly are relevant and have roles to play in resolving the on-going political logjam in Egypt. Four institutions are identified in this regard, namely, the citizenry, political and military institutions, the scholars and of course, the regional and international stakeholders. It is pertinent therefore to examine briefly the theoretical framework of the sovereignty in Islam and the concept of *Ijmā'* against the background of these three institutions.

### **International Stakeholders**

Wherever argument goes, history has proved that the *Hākimiyyah* theory suggesting that Islam is both religion and state could not be wished away. It is a reality that has to be accepted. Therefore, the right-wing, xenophobic political ideologues in the West that usually link all versions of political Islam with *al-Qaeda* as

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142. Supra.

a dire warning to those who dare let such political parties gain influence and popularity<sup>143</sup> may at long run prove to be fantasy. It is argued that if the West truly embraces the democratic ideals they promote, they must eventually respect the wishes of a voting Muslim population, even one that freely elects ‘hard-line’ Islamist parties, such as *Hamas*. The US that leads in the promotion of democratic value is expected to engage winners of free and fair elections at least diplomatically. Failure to do this will amount to committing an affront towards the fundamental principles of free democratic elections or to the Muslim citizens that engage and participate in the electoral processes.<sup>144</sup> It is therefore argued that the apprehension of the West about political Islam is considered exaggerated and extensively stretched beyond bond.

Hisham H. Ahmed observes in this regard that ‘while it is true that Islam as a religion and a culture is intrinsic to Arab life, the politicisation of Islam is a product of internal and external developments. The supports by the West of corrupt regimes and its concerted attack on nationalist and pan-nationalist secular forces have made the rise of political Islam almost inevitable.’<sup>145</sup> He notes that by no means are all those who vote for Islamist parties in Arab elections necessarily members and/or supporters. Many cast votes of protest against Western policies and attitudes, a contention he based on extensive observation of legislative elections in Palestine in 2006. According to him, many Palestinians, including Christians, voted for *Hamas*, not because they were members or supporters, but rather to send a message to the West that no pressure tactics such as cutting off foreign aid can dictate their decision at the ballot box.<sup>146</sup>

He further notes that following many attempts to curtail the rise of political Islam, whether in Sudan, Palestine and/or Algeria, the West seems to have reconciled some of its policies with the assumption that the phenomenon will remain. The West

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143. Ali, W., “Is Political Islam a Threat to the West?” *The Guardian* <http://www.theguardian.com/commentisfree/belief/2009/jan/23/religion-islam-doha-debates> (3 April 2014).

144. *Ibid.*

145. Ahmed, H.H., “The Arab Spring, the West and Political Islam”, <http://www.solidarity-us.org/node/3492> (accessed 3 March 2014).

146. Ahmed, H.H., *ibid.*



*Ijmā' Jurisprudence Undergoing a 'Chemical Reaction' in Egypt?*

seems to have concluded that these forces can serve to counteract “radical” Islam, as represented by *Al-Qaeda*. Indeed, the campaign in the West to mischaracterise and actually tarnish Islam at every available opportunity is far from over.<sup>147</sup> He concludes by saying that it is widely believed in the Arab world that the West will use the rise of political Islam to further advance Samuel Huntington’s idea of “Clash of Civilizations.” After the collapse of the Soviet Union, in particular, the West has been in dire need of an “enemy” to help mobilise its forces and resources in service of its policies. Nothing could play this role more effectively than Islam and its perceived threats and dangers.<sup>148</sup>

### **The Arab League**

The political turmoil in Egypt has further polarised the Arab League. An Al-Jazeera’s report of the League’s concluded summit in Kuwait some time ago shows how the organisation has been deeply divided on account of the political situation in Egypt. This is apparent in a statement made by the Kuwaiti Emir when he was quoted to have said *inter alia*, that: “The dangers around us are enormous and we will not move towards joint Arab action without our unity and without casting aside our difference.”<sup>149</sup>

### **Saudi Arabia**

Saudi Arabia is a leading regional political player. Martin Harrison however notes that one of the cornerstones of Saudi foreign policy throughout the 20th century that was laid by Ibn Saud was opposition to the establishment of pan-Arab or pan-Islamic political formations.<sup>150</sup> He argues that Ibn Saud resisted the endorsement of the plans aimed at transforming independent

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147. Ahmed, H.H., *ibid*.

148. Ahmed, H.H., *ibid*.

149. “Arab League summit under way amid divisions”, *Al-Jazeera* (25 March 2014), <http://www.aljazeera.com/news/middleeast/2014/03/arab-league-summit-201432552716861683.html> (accessed 2 May 2014).

150. Harrison, M., *Saudi Arabia’s foreign policy: Relations with the Superpowers*, University of Durham, Centre for Middle Eastern and Islamic Studies, CMEIS Occasional Paper No. 46 (February 1995), p. 7.

Arab countries into a larger unity. He had little enthusiasm of the pro-unity propaganda of both Arab nationalists in Syria and the Muslim Brothers in Egypt in the 1930s. He opposed plans for a stronger Arab League in 1945 and refused to be drawn into any integration scheme, insisting that the separate existence of each Arab state be recognised.<sup>151</sup> This explains Saudi Arabia's stand in the on-going political imbroglio in Egypt. Shaikh Al-Qaradāwī some time ago called on Saudi Arabia to stop subsidising the military coup in Egypt. He said that the government in Riyadh “committed a mistake” when it decided to support the coup, “which has been crushing Egyptians” since July the previous year.<sup>152</sup> He argues that it is a strange position for Saudi Arabia to pay billions to support the coup which is the farthest from Islamic principles. According to him, “the coup leaders do not believe in the *Shari'ah* as a system to rule people as they are secularists; this means that they are basically against the Saudi way of life.” He alleges that the coup leader Abdul Fattah Al-Sisi is using the Saudi money “to kill innocents” and he called on the people and the government of Saudi Arabia to stand by the people of Egypt against their killers: “To stand beside virtue against vice; beside the oppressed against their oppressor.”<sup>153</sup>

### Egypt People and Scholars

Egyptian people and scholars are politically challenged against the theoretical framework of *ijmā'*. The popular Sunnah authority as proof of validity of *ijmā'* is to the effect that “My *ummah* will never agree upon an error.”<sup>154</sup> While there are differing views over who is considered a part of this consensus, the majority view is split between two possibilities: that religiously binding consensus is the consensus of the entire Muslim community, or

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151. Ibid., at p. 8.

152. “Senior Muslim scholar calls on Saudi to stop supporting coup in Egypt”, (Thursday, 30 January 2014) <https://www.middleeastmonitor.com/news/middle-east/9498-senior-muslim-scholar-calls-on-saudi-to-stop-supporting-coup-in-egypt> (accessed 31 March 2014).

153. Ibid.

154. Narrated by al-Tirmidhi (4:2167), ibn Majah (2:1303), Abu Dawood, and others with slightly different wordings.

*Ijmā' Jurisprudence Undergoing a 'Chemical Reaction' in Egypt?*

that religiously binding consensus is just the consensus of the religiously learned<sup>155</sup>—namely therefore, *ijmā' al-ummah*—a whole community consensus and of course, *ijmā' al-aimmah*—a consensus by religious authorities.<sup>156</sup>

Wherever the argument goes, the Egyptian people and scholars have become diametrically divided. Such an outcome is hardly unexpected nor unusual. Under the Western democracy too, people are always politically divided. But the situation where an influential scholar of Egypt changed the tempo and attempted to tilt the political pendulum towards a dangerous trend is unfortunate. In the words of Egypt's former Mufti, Sheikh 'Alī Gomaa, speaking to an audience of the Egyptian military and police leadership, declared in reaction to the conflict between Egypt's military and the Muslim Brotherhood, that:

Shoot them in the heart (i.e. leaders, followers and sympathisers of Muslim Brotherhood). . .Blessed are those who kill them, and those who are killed by them . . .We must cleanse our Egypt from these riffraff. . . They shame us . . .They stink. This is how God has created them. They are hypocrites and seceders. . . Stand your ground. God is with you, and the Prophet Muḥammad is with you, and the believers are with you . . . Numerous visions have attested that the Prophet is with you. May God destroy them, may God destroy them, may God destroy them. Amen!<sup>157</sup>

Indeed, such a rally is against the spirit of *ijmā'*. *Ijmā'* is intrinsically and fundamentally vouchsafed to forestall and obviate anarchy and bloodshed and to bring people together to peace rather than war.

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155. Hasan, A., *The Doctrine of Ijma': A Study of the Juridical Principle of Consensus* (New Delhi, India: Kitab Bhaban, 2003), p. 81.

156. Standke, C., *Sharia - The Islamic Law* (Munich: GRIN Verlag, 2008), pp. 4–5.

157. Osman, A., "Religion and politics in post-coup Egypt" <http://www.opendemocracy.net/arab-awakening/amr-osman/religion-and-politics-in-post-coup-egypt> (accessed 31 March 2014).

## Egypt Military Generals

The Egyptian Military set-up consisting of the Army, Navy, Air Force and Air Defence Command has been ranked the 13th most powerful in the world.<sup>158</sup> It enjoys considerable power, influence and independence within the hierarchy of the Egyptian state.<sup>159</sup> Records show that during almost the entire political history of Egypt, active or retired military generals and officers have been heads of the Egyptian state and top government officials. Starting from the Egyptian Revolution of 1952, which created the Republic of Egypt, and was organised by the Free Officers Movement, presidents of Egypt (Gamal Abdel Nasser, Anwar Sadat, Hosni Mubarak) were ex-military officers for almost 60 years. This was interrupted with the 2011 revolution, when Mubarak stepped down, and the Supreme Council of the Armed Forces ruled until an elected president—Muḥammad Morsi—took office. On 3 July 2013, General Al-Sisi announced Morsi's removal in the 2013 Egyptian coup d'état, although the interim president he named was a civilian—the Chief Justice of Supreme Constitutional Court, Adly Mansour. This explains why the new constitution drafted and passed under democratically elected Morsi confers immunity on the military from legal and parliamentary oversight.<sup>160</sup>

The Military grip on the entire life of Egypt and Egyptians is exemplified by its economic and social possessions and domination including its own Hospitals, factories, clubs and gas stations which provide for its officers, soldiers, and public as well as influential elites in business, engaging in road and housing constructions, consumer goods, resort management,<sup>161</sup> and the

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158. “Global Fire Power “GFP”” [http://www.globalfirepower.com/country-military-strength-detail.asp?country\\_id=Egypt](http://www.globalfirepower.com/country-military-strength-detail.asp?country_id=Egypt) (accessed 2 May 2014).

159. Cambanis, T., “Succession Gives Army a Stiff Test in Egypt”, *The New York Times* (11 September 2010), [http://www.nytimes.com/2010/09/12/world/middleeast/12egypt.html?\\_r=1&ref=global-home&pagewanted=all](http://www.nytimes.com/2010/09/12/world/middleeast/12egypt.html?_r=1&ref=global-home&pagewanted=all) (accessed 2 May 2014).

160. Kirkpatrick, D.D., and El-Sheikh, M., “Egypt Opposition Gears Up After Constitution Passes”, *New York Times* (23 December 2012), [http://www.nytimes.com/2012/12/24/world/middleeast/as-egypt-constitution-passes-new-fights-lie-ahead.html?\\_r=0](http://www.nytimes.com/2012/12/24/world/middleeast/as-egypt-constitution-passes-new-fights-lie-ahead.html?_r=0) (accessed 2 May 2014).

161. Cambanis, T., *supra*.

*Ijmā' Jurisprudence Undergoing a 'Chemical Reaction' in Egypt?*

rapid expanse of real estate. Among much military information that is not accessible to the public, include budget information, names of general officers and the size of the military (which is considered exclusively a state secret).<sup>162</sup> It has been reported that “as much as 40% of the Egyptian economy” is controlled by the Egyptian military,<sup>163</sup> a figure which has been described as a “myth” by some experts, and contributions considered by some as “necessary” for the Egyptian Economy and the needs of the Armed Forces to maintain its strength.<sup>164</sup>

This clear scenario explains why it had been easy for the military to frustrate any government that emerged even through democratic process as long as such governments are not in the good books of the military and they are willing to dance to the tune of the traditionally established military brass and generals.

### **Muslim Brotherhood**

The Muslim Brotherhood on the other hand, must have made mistakes within the short period that they assumed power in Egypt. In an interview with the Brotherhood Deputy Supreme Guide, Khairat al-Shater, shortly before the election that brought them to power, he was quoted to have said in reference to the Islamic jurisprudential tool of “consultation” that: “Democracy is *shūra*,” which implied that the Brotherhood accepted a political system that encouraged open debate. Contrary to this claim, it has been alleged that since the Muslim Brotherhood’s candidate, Mohamed Morsi, was elected president, the exact opposite has been the case. According to this allegation, the Brotherhood’s only real “consultation” had been with the Egyptian military, which the Brotherhood persuaded to leave power by ceding substantial autonomy to it under the new constitution. Among other undemocratic provisions, the backroom deal yielded

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162. Ibid.

163. Hammer, J., and Ismail, A., “Egypt: Who Calls the Shots?” *The York Review of Books* (18 August 2011), <http://www.nybooks.com/articles/archives/2011/aug/18/egypt-who-calls-shots/> (accessed 2 May 2014).

164. Najjar, A.S., “Army Economy between dramatize and the dismantling of the state”, *Al-Ahram* (12 April 2012), <http://digital.ahram.org.eg/articles.aspx?Serial=865724&cid=46> (accessed 2 May 2014).

constitutional protection for the military's separate court system, under which civilians can be prosecuted for the vague crime of "damaging the armed forces."<sup>165</sup> The Brotherhood has also been alleged to have embraced many of the Mubarak regime's autocratic excesses. For example, editors who are critical of the Brotherhood have lost their jobs, and more journalists have been prosecuted for insulting the president during Morsi's six months in office than during Mubarak's 30-year reign.<sup>166</sup>

The most blatantly undemocratic act raised against the Muslim Brotherhood regime, was Morsi's 22 November "constitutional declaration," through which he placed his presidential edicts above judicial scrutiny and asserted the far-reaching power to "take the necessary actions and measures to protect the country and the goals of the revolution."<sup>167</sup> When the power grab catalysed mass protests, according to allegations, Morsi responded by ramming a new constitution through the Islamist-dominated Constituent Assembly, and the Brotherhood later mobilised its cadres to attack anti-Morsi protesters, and subsequently extracted confessions from their captured fellow citizens.<sup>168</sup> So much for promises of "consultation," it is argued.

Be that as it may, military coup d'état, anarchy and violent bloodletting could not be the right approach to check the perceived dictatorial tendency of the Muslim Brotherhood-led government. As a Muslim majority country willing to accept both the Islamic and democratic values, the combination of *ijmā'* legislative framework as well as the modern democratic values is significant potentials to resolving political crisis and to move Egypt forward.

## **Conclusion and Suggestions**

*Hākimiyyah* is a conceptual framework that attempts to affirm Islam as both state and religion. Both the Arab secularists and their Western allies are challenged by such a framework. The

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165. Trager, E., "Think Again: The Muslim Brotherhood, How did so many Western analysts get Egypt's Islamist movement so wrong?" (28 January 2013) [http://www.foreignpolicy.com/articles/2013/01/28/think\\_again\\_the\\_muslim\\_brotherhood\\_egypt](http://www.foreignpolicy.com/articles/2013/01/28/think_again_the_muslim_brotherhood_egypt) (accessed 1 May 2014).

166. Trager, E., *ibid.*

167. Trager, E., *ibid.*

168. Trager, E., *ibid.*

*Ijmā' Jurisprudence Undergoing a 'Chemical Reaction' in Egypt?*

Arab secularists fail to appreciate the fact that it was Islam that put the Arabs on the world map having successfully characterised their culture and ways of life. The earlier they realise this fact the better. The West, on the other hand, is sentimentally apprehended of Islam and its value systems. However, the apprehension of the West about political Islam is exaggerated and stretches beyond bond. Considering the past colonial adventure in many Muslim territories, it may not be feasible for the West, to wish to deal a dead-blow on political Islam as it did successfully with socialism. Though the West's campaign to mischaracterise and tarnish Islam at every available opportunity is far from over, can that stop Islamic political resurgence? It is argued that the better approach is to accept political Islam as a reality and work out modality of cooperation between the two blocks. Any attempt to further checkmate Islamic political resurgence by whatever method, will continue to snowball into breeding potential military insurgency and guerrilla warfare.

*Ijmā'* as propounded and analysed by the Egyptian Muslim scholars and Western democratic value promoted and defended by the Egyptian secularists are not allowed to work in Egypt. Unfortunately, innocent Egyptians are the ones paying the price for this failure. Thus, inadvertently, *ijmā'* and democracy are being subjected to an unconventional process whose end result one cannot predict.

***Ijmā'*, Democracy and Political Reform in Egypt**

For centuries, *ijmā'* has remained perpetually banished into the realm of thre utopia. The traditional theory of *ijmā'* can be subjected to a reform that is capable of solving contemporary political challenges in Egypt. The Arab Spring has offered an opportunity to put into practical test its aged long theoretical framework. Thus, the Egyptian scholars are challenged. They should be proactive and courageous enough to bury their pride and come together with a view to work out blue prints of *Fatwa* on political issues that had continued to plague Egypt and the Egyptian people. Similarly, the inherent defects in the Western democracy can be modified to suit the political system of a Muslim majority state like Egypt to bail out itself from political

logjam. Military intervention and military incursion into politics are no longer popular in the contemporary world politics. It is naive of a country like Egypt known for its historical feat in civilisation to think that its political salvation in the present time lies in the hands of military generals and their arms and jackboots. The scholars should rise to the occasion and prove that Islamic jurisprudence is not only relevant for classroom discussions and academic exercises, but also to the practical life of the people.

### **Arab League Should Eschew Clash of Civilisation**

The Arab League is an alliance of mutual suspicion, a coalition of mistrust and consortium of disunity and enmity. It lacks direction and focus. Ordinary observers assume that the Arab League is a coalition of Islamic value. Unfortunately, the Islamic value is an anathema to its policy and strategy. The League glorifies the Western value to its detriment. Inadvertently, it becomes an embodied victim of Samuel Huntington's "Clash of Civilizations". Even if the League has nothing to do with Islam, it should borrow a leaf from other regional organisations like the European Union. Unlike the Arab League, the European Union is capable of managing its crisis and maintains cohesion and consistency. Frankly, the Arab League is a laughing stock in the face of regional and global events and challenges. Before Islam, the Arabs knew little or nothing about culture of unity and cooperation. It was Islam that imparted such a glorious culture into it. Unfortunately, it prefers to abandon this culture. Indeed, such a betrayal. The Arabs need to go back to the drawing board.

Egyptians should not allow themselves to be used as guinea pigs by the politicians and military generals. Political division among them is natural. But anarchy and bloodletting is totally inhuman and unacceptable. *Ijmā'* framework and democratic processes could be blended together to form a better and positive political alternative. The two can go a long way to resolving their political crisis. They should maximise their benefits. Enough is enough of violence and ferocious blood-letting.