

The Extent to Which the Egyptian and Algerian Constitutions Observe the Islamic Law as the Source of Legislation; a Comparative Study

by

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Abstract

The study aimed at evaluating the extent to which the Egyptian and the Algerian Legislations comply with the Islamic Law (Shari'a) as the source of legislation . The study used the comparative methodology to reach the targets in question. To gather the required data, a review of literature was administered. The study came to the conclusions that: first, according to Islam teachings, the Islamic Law (Shari'a) must be the source of legislation for a Muslim State's constitution; second, neither the Egyptian Constitution nor the Algerian Constitution pays due attention to the Islamic Law (Shari'a) as the source of legislation. The study recommended that the Egyptian and the Algerian Constitutions ought to prescribe that the Islamic Law (Shari'a) is the only source of legislation.

Keywords: Source of legislation, Islamic Law, Egyptian and Algerian Constitutions.

ملخص

استهدفت الدراسة الحالية بيان مدى اعتناء الدستورين المصري والجزائري بالشريعة الإسلامية كمصدر للتشريع وتقييم ذلك في ضوء ما قرره الإسلام في هذا الخصوص. واستندت الدراسة إلى المنهج الوصفي. واعتمدت في إطار ذلك على الأسلوب المقارن بجانب الأسلوب التقويمي. وتمثلت أداة الدراسة في مسح الأدبيات المتعلقة بموضوع الدراسة. وأسفرت الدراسة عن العديد من النتائج أبرزها: وجوب الاستناد إلى الشريعة الإسلامية – وحدها – كمصدر للتشريع - أن الدستورين المصري والجزائري لم يعتنيا الاعتناء الكاف بالشريعة الإسلامية كمصدر للتشريع. وأوصت الدراسة المُشرعين المصري والجزائري بضرورة النص صراحة على أن الشريعة الإسلامية وحدها مصدر التشريع. الكلمات المفتاحية: مصدر التشريع، الشريعة الإسلامية، الدستور المصري، الدستور الجزائري.

Introduction

Praise be to Allah and Peace and Blessings of Allah upon our Prophet Muhammad, his family, his companions and all who follow his guidance to the Day of Judgment .

(O, believers, be pious to Allah and care nothing but to die on Islam) ⁽¹⁾.

(O, people, be pious to Allah Who created all of you from a male and a female and who created the female from the male and created all humans from both of them. O, people, be pious to Allah Who you will stand before for Judgment and He will question you about what you have done with your relatives. Remember that Allah observes you all) ⁽²⁾.

(O, believers, fear Allah and say what is right in order that Allah mend your deeds and forgive your sins. Whosoever obeys Allah and His Messenger shall win a great victory) ⁽³⁾.

To proceed⁽⁴⁾:

Both the Egyptian and Algerian Constitutions state that the established religion of the country is Islam. This means that the statute of these two countries considers the Islamic Law (Shari'a) as the source of legislation. Nevertheless, one is surprised that some laws made in Egypt as well as Algeria break the Islamic Law. Thus, the question has been raised concerning the extent to which both the Egyptian and Algerian Constitutions regard the Islamic Law (Shari'a) as the source of legislation. This is what is going to be tackled in the coming lines.

The Problem of the Study

The study problem is put in the following main question;

To what extent do the Egyptian and Algerian Constitutions observe the Islamic Law as the source of legislation?

This main question can be divided into the following subcategories;

- 1- What is the ruling of observing the Islamic Law as the source of legislation?
- 2- To what extent does the Egyptian Constitution observe the Islamic Law as the source of legislation?
- 3- To what extent does the Algerian Constitution observe the Islamic Law as the source of legislation?

The Objectives of the Study

Based on the pre-raised questions, the study objectives are as follows;

- 1- Investigating the ruling of observing the Islamic Law as the source of legislation.
- 2- Investigating the extent to which the Egyptian Constitution observes the Islamic Law as the source of legislation.
- 3-Investigating the extent to which the Algerian Constitution observes the Islamic Law as the source of legislation.

The importance of the Study

The study importance is shown in two aspects;

First: Theoretically;

The study seeks to bridge the gap in the area of Islamic Law as the source of legislation to develop what previous studies have come to.

Second: Practically;

The study draws the attention of the Muslims; specialized or not, to be aware of the ruling of observing the Islamic Law as the source of legislation. It also calls the constitution drafters' attention to refer to the Islamic Law as it is the only legal source of legislation that has to be followed in Muslim countries.

The Methodology of the Study

The study has used a descriptive comparative methodology to reach the targets in question. To gather the required data, a review of literature has been administered.

The Study's Main Term:

Legislation:

Legislation is defined as: "the written legal rules that are provisioned by the legislative authority" ⁽⁵⁾. According to this definition, it is obvious that legislation is a part of law. Law is defined as: "A set of rules that regularize living in a society and the government coerces people to abide by" ⁽⁶⁾. In the light of this definition, law includes written as well as oral rules ⁽⁷⁾, whereas legislation is limited only to written rules that are made by the legislative power ⁽⁸⁾.

The Scheme of the Study

The study has been planned as follows;

- Introduction.
- Chapter I.
- Chapter II.
- Chapter III.
- Conclusion.
- Bibliography.

The coming lines will tackle these points in further detail.

Chapter I

The Ruling of Observing the Islamic Law as the Source of Legislation

Undoubtedly observing the Islamic Law only as the source of legislation is an obligation according to Islam. In other words, it is no permissible for Muslims; individuals as well as groups, to adopt any other source for legislation other than the Islamic Law (Shari'a). There is abundant evidence of this obligation shown as follows;

I. Evidence from the Holy Book:

-First Evidence;

Allah, exalted be He, says, "Have you not seen those who claim that they believe in what has been sent down to you and what was sent down before you? They desire to be judged by the idol, although they have been commanded to disbelieve it. But satan desires to lead them astray into far error" ⁽⁹⁾. Ibn Al-Arabi, may Allah be merciful to him, said, "Maik said, 'The idol means any thing worshipped but Allah such as the sun, the moon, the trees, the magicians or the soothsayers'" ⁽¹⁰⁾. IbnKatheer, may Allah have mercy on him, mentioned that " Allah, may He be exalted and glorified, rebukes those who allege that they believe in what Allah has revealed to His Messenger and the Messengers before him and they desire to be judged by not what Allah sent down ... This verse censures those who desire to be judged by the secular laws not by the Islamic laws" ⁽¹¹⁾. Al-Fakhr A-Razi, may Allah

be merciful to him, said," QadiIad said, 'Being judged by the idol is disbelief and not being comforted by the judgment of the Prophet Muhammad, peace and blessings of Allah upon him, is disbelief too. No doubt that the belief in the idol implies the disbelief in Allah and vice versa" ⁽¹²⁾. Ibn Al-Qaiem, may Allah be merciful to him, asserted that: " Allah, exalted be He, tells us that those who accept to be judged by not what Allah sent down are the same as those who accept to be judged by the idol ... and this is the way of disbelievers and the heretics not the way of the Companions, may Allah please them, and those who follow in their steps to the Day of Judgment" ⁽¹³⁾.

SheihSulimanIbnAbd Al-Wahaab, may Allah be merciful to him, declared that " Since monotheism which is the meaning of the profession that there is no god but Allah includes and requires the belief in the Messenger, peace and blessings of Allah upon him, ... Allah, exalted be He, draws attention that monotheism implies and entails the believers to make the Messenger the judge regarding the disagreement between them. This is the implication of the profession that there is no god but Allah and what is required from every believer. Who knows the meaning of the profession that there is no god but Allah has to be fully submitting and surrendering to the judgment of Allah that has been revealed to his Messenger Muhammad peace and blessings of Allah upon him. Who professes that there is no god but Allah and accept to be judged by not what Allah sent down, his profession is false since they are conjoined and indivisible ...

Hence, this verse shows that Allah, blessed and exalted be He, rebukes those who claim that they believe in what Allah sent down and desire to be judged by not what Allah sent down. This Holy verse declares that being judged by the idol breaches one's faith. One's faith won't be

accepted unless one disbelieves in being judged by the idol. Those who do not disbelieve in the idol do not believe in Allah ...

His speech, exalted be He, " Butsatan desires to lead them astray into far error" means that those who desire to be judged by not what Allah sent down are slaves to the Devil who and whose party would like people to enter Hellfire. This verse evidences that those who accept to be judged by any thing other than the Holy Qur'an and the Hadith (Sunna) is unbeliever" ⁽¹⁴⁾.

-Second Evidence;

Allah, exalted be He, says, "When it is said to them, 'Come to what Allah sent down and to the Messenger, 'you see the hypocrites completely barring the way to you" ⁽¹⁵⁾. "This means that if the hypocrites are called to be judged by what Allah revealed upon His Messenger, they arrogantly swerve away as Allah, exalted be He, says, (And when they are called to Allah and His Messenger so that he judges between them, a party of them swerve away) ⁽¹⁶⁾" ⁽¹⁷⁾. Sheikh SulimanIbnAbd Al-Wahaab, may Allah have mercy upon him, said, "Ibn Al-Qaiem, may Allah be merciful to him, said, 'This Holy Verse is evidence that those who are called to be judged by the Holy Qur'an and the Hadith (Sunna) and turn away, are hypocrites. If this is the case of those who recant the judgment of Allah, what about those who bar the way for people to be judged by the Holy Qur'an and the Hadith (Sunna) through his words, his action as well as his books?! and at the same time makes allegation that he is acting in good will and he seeks after reconciling his idol with the Holy Qur'an and the Hadith (Sunna). I commented that this is the case of many people in our time who allege that they are informed believers. If it is said to them, 'Come to be

judged by what Allah sent down, they arrogantly swerve away and give a plausible explanation that they neither know nor realize anything about this. But the truth is that Allah cursed them because of their disbelief" ⁽¹⁸⁾.

-Third Evidence;

Allah, exalted be He, says, "But no, by your Lord, they will not believe you until they make you the judge regarding the disagreement between them, then, they will not find in themselves any discomfort concerning your verdict, and will surrender to you in full submission" ⁽¹⁹⁾. Al-Qurtobi, may Allah have mercy on him, said, "Mujagid and others said, 'The addressed in this verse ... are those who desire to be judged by the idol and for them it was revealed'" ⁽²⁰⁾. Al-Fakhr A-Razi, may Allah be merciful to him, said, "This Holy Verse makes it evident that those who are not comforted by the judgment of the Messenger, peace and blessings of Allah upon him, are unbelievers" ⁽²¹⁾. Ibn Al-Qaiem, may Allah have mercy on him, said, "Allah, exalted be He, swears that people will not believe until they make His Messenger the judge regarding the disagreement between them, and they will not find any discomfort concerning his verdict, and will surrender to him in full submission" ⁽²²⁾.

-Fourth Evidence;

Allah, exalted be He, says, "Whosoever does not judge according to What Allah has sent down are the unbelievers" ⁽²³⁾. Al-Qurtobi, may Allah be merciful to him, said, " Ibn Abbas and Mujad said that this Holy Verse means that people who do not judge in conformity with what Allah sent down are not believers" ⁽²⁴⁾. "Thus whosoever does not

rule by what Allah sent down is an unbeliever since he neglects objects to complying with the Laws of Allah" ⁽²⁵⁾.

-Fifth Evidence:

Allah, exalted be He, says, "Whosoever does not judge according to What Allah has sent down are the harm doers" ⁽²⁶⁾. Abu-Al-Ezz Al-Hanafi, may Allah have mercy on him, points out that "Judging by not what Allah sent down may be either major or minor disbelief. If the person thinks that judging by not what Allah sent down is not obligatory or belittle it though he is fully certain that this is truly the judgment of Allah, he becomes unbeliever. This major disbelief. Minor disbelief occurs when a person thinks that judging in accordance with what Allah sent down is obligatory but he does not abide to it and feels remorseful and sinful for what he does" ⁽²⁷⁾.

-Six Evidence;

Allah, exalted be He, says, "Whosoever does not judge according to What Allah has sent down are the evildoers" ⁽²⁸⁾. A-Tabary, may Allah be merciful to him, said, " Ibn Abbas said that this Holy Verse means that people who profess that they are believers and do not judge in accordance with what Allah sent down are evil doers" ⁽²⁹⁾.

-Seventh Evidence;

Allah, exalted be He, says, "They say, 'We believe in Allah and the Messenger and obey, but a party of them turn away after this. Those are not believers. * And when they are called to Allah and His Messenger so that he judges between them, a party of them swerve away" ⁽³⁰⁾. IbnKatheer, may Allah be merciful to him, explains that "Allah, exalted

be He, tells us about the characteristics of the hypocrites who say that which they do not do. They say that they believe in Allah and the Messenger and obey, but a party of them turn away after this. In other words, they say what they do not do. That's why Allah, exalted be He, says that they are unbelievers. His speech, exalted be He, ' And when they are called to Allah and His Messenger so that he judges between them ...' means that if they are asked to follow the path of Allah and be judged by the Holy Qur'an and the Hadith (Sunna), they arrogantly turn away" ⁽³¹⁾.

Eighth Evidence;

Allah exalted be He, says, "But when the believers are called to Allah and His Messenger, in order that he judges between them, their reply is: 'We hear and obey'. Such are the prosperous" ⁽³²⁾. Al-Qurtobi, may Allah be merciful to him, said, "Ibn Abbas said that when the Companions are called to be judged by Allah, they obey straight away whatever it costs them. And if those who follow them are truly believers, they will follow in their steps" ⁽³³⁾.

Ninth Evidence;

Allah exalted be He, says, "Is it pagan laws that they wish to be judged by? Who is a better judge than Allah for a nation whose belief is firm?" ⁽³⁴⁾. IbnKatheer, may Allah be merciful to him, asserted that "Allah, exalted be He, rebukes those who do not abide by His judgment and adhere to the secular laws ... following suit of non-Muslims. Those who do this become unbeliever and have to be fought until they turn in penitence to Allah and keep to the judgment of Allah, exalted be He, in every way" ⁽³⁵⁾. Al-Hassan Al-Basri, may Allah be merciful to him,

declares that "Those who are judged by not what Allah sent down are followers of pagans" ⁽³⁶⁾. Al-Hafez IbnHajjar, may Allah have mercy on him, draws attention that "neglecting ordinances of Islam and committing forbidden things are typical of pagans" ⁽³⁷⁾.

Tenth Evidence;

Allah, exalted be He, says, " Those who, if We established them in the land, will establish the prayers and pay the obligatory charity, order with honor and forbid dishonor, and to Allah is the end of all affairs" ⁽³⁸⁾. Al-Qurtobi, may Allah be merciful to him, said, "IbnAbiNojaih said, 'His speech, exalted be He, (Those who ...) refers to the rulers'. A-Dahaak said, 'Allah, exalted be He, prescribes that rulers have to keep to His judgments in every affair" ⁽³⁹⁾.

II. Evidence from the Consensus of the Scholars:

The Scholars unanimously agree that observing the Islamic Law as the source of legislation is an obligation. Ibn Al-Qaiem, , may Allah be merciful to him, said, "Those who rule or accept to be ruled by not what Allah revealed are the same as those who rule and accept to be ruled by the idol and they do not abide by the path of the Prophet, peace and blessings of Allah upon him, the Companions, may Allah please them, and those who follow in their footsteps" ⁽⁴⁰⁾.

Sheikh SulimanIbnAbd Al-Wahhab, may Allah be merciful to him, said, "Because monotheism, which means the profession that there is no God but Allah, and implies and entails the belief that Muhammad, peace and blessings of Allah upon him, is the Messenger of Allah, the Holy Qur'an reminds us that monotheism implies that a Muslim ought to willingly accept

adjudication and arbitration to what Allah sent down as well as it is an application of the profession that there is no God but Allah. Therefore, those who claim that they are Muslims and rule and accept to be ruled by not what Allah sent down, they are not truthful" ⁽⁴¹⁾.

Sheikh Mohamed IbnIbramiem, may Allah be merciful to him, "There is no doubt that Allah demands Muslims to implement the Islamic Law and warns them of adopting secular laws. Allah, exalted be He, tells us that those who do not carry out the Islamic Law are hypocrites. He also tells us that all secular laws are pagan. Allah, exalted be He, shows that no Law is better than His. Allah, Glorified and Sublime be He, swears that His servants will not believe the Messenger until they make him the judge regarding the disagreement between them, then, they will not find in themselves any discomfort concerning his verdict. In the Chapter of the Table (Surat Al-Ma'ida), Allah, Glory be to Him, tells us that judging by not what Allah has sent down is disbelief, harm and evil doing" ⁽⁴²⁾. Hence, the Imam who rules the Muslim country by not what Allah sent down is considered to be either committing a major grave sin or renouncing his faith. Sheikh Mohamed Ibn Ibrahim-may Allah havemercy on him, said, "The thought that the secular law equals the Divine Law means rejection of faith. It is not reasonable that Allah, exalted be He, calls the person who does not rule by what he sent down a disbeliever and he is not so. Undoubtedly, this person must be a disbeliever ...

Disbelief is divided into two categories as follows;

I. Major Disbelief:

Major disbelief means apostasy. If a Muslim commits one or more of the below mentioned sins, he becomes an apostate. This category is divided into subcategories as follows;

First, Thinking that what Allah sent down is not right. This is what is reported by Ibn Abbas and what is supported by IbnJarir as well as being unanimously agreed by all Scholars ...

Second, Thinking that the Divine Law is right but the secular laws are better and more suitable for regulating people lives ...

Third, Thinking that the secular laws are as equal as the Divine Law ...

Fourth, Thinking that it is permissible to breach the Divine Law.

Fifth, Establishing courts judging under the secular laws. This is the gravest disbelief.

Sixth, Judging under the nomads' inherited tribal laws as it is the case of the pagan societies.

II. Minor Disbelief:

A minor disbelief occurs when a Muslim judges by not what Allah sent down for self-interest although he believes that the Islamic laws are unparalleled. This sin is as grave as committing adultery, alcohol-drinking, theft, perjury ⁽⁴²⁾. Like them, it is not considered to be apostasy" ⁽⁴³⁾.

Sheikh Abd Al-Aziz IbnBaz, may Allah have mercy on him, said, "No doubt that Allah, exalted be He, ordains that Muslims have to judge and be judged by Islamic Law (Shari'a) and He warned them of judging or being judged by not what Allah sent down, describing those who do this as hypocrites and pagans. Allah, exalted be He, also swears that those who judge or accept to be judged by not what Allah revealed to His Messenger, peace and blessings of Allah upon him, are not believers. Furthermore, Allah, exalted be He, in the Chapter of the Table, describes judging and accepting to be judged by not what Allah send down as unbelief, wrongdoing and evildoing" ⁽⁴⁴⁾. He, may Allah be merciful to him, added that " All the Scholars of Islam unanimously agree that the leaders of Muslim countries have to rule the Muslim nation according to the Islamic Law (Shari'a) and ban any law breaks it ... All the Scholars unanimously agree that those who claim that the secular laws are better than the Islamic Law are unbelievers. The Scholars also unanimously agree that those who claim that it is permissible to rule the Muslim nation not to what Allah sent down are unbelievers, harm doers and evil doers " ⁽⁴⁵⁾.

Sheikh Ahmed Shaker, may Allah be merciful to him, said, " In some Muslim countries, we find secular laws copied from pagan Europe. Not only do these laws infringe many of Islam teachings, but some of them undo Islam as well. This is an intuitive and obvious fact ... It must be borne in mind that judging under these secular laws is not permissible even if they conform with Islam principles since the European laws not Islam principles that have been taken into consideration when making these secular laws. And those who follow in the footsteps of European laws are renegades whether the laid laws are compatible with Islam teachings or not" ⁽⁴⁶⁾.

Those who commit this major disbelief ⁽⁴⁷⁾ can be divided into three categories;

"First, the legislator who makes the secular laws and believe that they are right and what he does is right as well. This person becomes an apostate even if he establishes the prayers, observes fasting and claims that he is a Muslim.

Second, the advocate who supports the secular laws and argues for them right or false. If he argues for them believing they are right, he becomes a renegade. If he argues for them for self interest and he believes that they are false, he becomes a hypocrite.

Third, the judge ... who puts the secular laws to work. If he judges under these laws believing they are right, he becomes a renegade. If he judges under these laws for self interest and he believes that they are false, he becomes a hypocrite" ⁽⁴⁸⁾.

No doubt that those who judge by not what Allah sent are not fair even if they think they are so since justice is established only under the Islamic Law. Ibn Al-Mawseli, may Allah have mercy on him, pointed out that " Justice is established only by what Allah sent down. This is evidenced by the Holy Verse that says, "Whosoever does not judge according to What Allah has sent down are the harm doers" ⁽⁴⁹⁾, and the Holy Verse that says, "Whosoever does not judge according to What Allah has sent down are the unbelievers" ⁽⁵⁰⁾, and the Holy Verse that says, "Whosoever does not judge according to What Allah has sent down are the evildoers" ⁽⁵¹⁾. Thus, those who do not judge by what Allah sent down are not only harm and evil doers but they are unbelievers as well" ⁽⁵²⁾.

Sheikh Mustafa Sabry, may Allah be merciful to him, describes judging by not what Allah sent as: " a governmental revolution against the people's religion. It is customary that it is the people not the government that make revolutions and rebellions. The government rebels against the religion of the nation. It recants from it. The government announces its apostasy. The government embraces unbelief. The individuals who obey this government become apostates too since they listen to this apostatized government that claim that it is independent after it was following Islam. What is the difference if a renegade government or a non- Muslim one runs a Muslim country? To your surprise, the renegade government may be worse and more threatening with regard to the religion of the nation ... since the people are likely to be tricked by this religiously seeming government. By being forced to obey such a government, the individuals are being badly influenced by it and gradually turning away from Islam" ⁽⁵³⁾.

As shown above, It is evident that observing the Islamic Law as the only source of legislation is mandatory. It is not permissible for any Muslim refer to any other source for legislation other than what Allah sent. If a Muslim refers to any source for legislation believing in what he does, he becomes a renegade even if he claims that he is a Muslim, establishes the prayers or fasts the Holy Month of Ramadan.

Chapter II

The Extent to Which the Egyptian Constitution Observes the Islamic Law as the Source of Legislation

The Egyptian Constitutions made during the republican era which began with the 1952 black coup de tat to date, have claimed paying attention to the Islamic Law as a source of legislation. This claimed

attention has been expressed implicitly at times and explicitly at other times.

This claimed attention was implicitly shown in the 1956 and 1964 Egyptian Constitutions. The Third Article of the 1956 Egyptian Constitution and the Fifth Article of the 1964 Egyptian Constitution prescribe that: "Islam is the established religion of the State". According to this Article, it is understood that Islam is the source of legislation. It is incompatible that legislation is derived from sources other than Islam. Nevertheless, this is not the understanding of Islam which the drafters intend to. They intend us to understand Islam only as a belief in one's heart and an observance in the mosque and has nothing to do with social, economic and political life. This is evidenced with the Second Article of these Constitutions that say: "Sovereignty is for the nation ...". According to this Article, the nation is the source of legislation regardless of abides by the Islamic Law or not. Furthermore, this Article came fifth in the 1964 Constitution. This indicates that even this distorted copy of Islam is not a priority for the Constitution drafters whether they are jurists or politicians.

Hence, it can be said that according to the constitutions of this time the nation - or those who represent it – is the source of legislation not the Islamic Law.

The claimed attention to the Islamic Law as the source of legislation was explicitly expressed in the republican constitutions that followed. The Second Article of the 1971, 2012 and 2014 Egyptian Constitutions prescribes that: "Islam is the established religion of the State ... and the principles of the Islamic Law (Sharia) are the main source of legislation". Too, the Second Article of the 2019 Egyptian Constitution states that: "Islam is the established religion of the State ... and the principles of the Islamic Law (Sharia) are a main source of legislation"

(54).

It is significant that the Egyptian Constitutions drafted since 1971 not only state that Islam is the established religion of the State as it was the case before, but they also overtly dictate that the principles of the Islamic Law as the main source – a main source – of legislation. In addition, this article has come in an antecedent place in comparison with that of the former constitutions. This demonstrates that it has become a priority for the constitution drafters.

Despite this actuality, the Islamic Law (Sharia) has never been a priority as a source of legislation for the political leadership at this time as it has never been for its precedent regardless of what they say. This is attested by the texts of the First and Third Article of this constitution. The First Article prescribes that: "The political system the Arab Republic of Egypt adopts is socialist and democratic ...". The Third Article states that: "Sovereignty is for the nation only ... and the nation is the source of all authorities ...". This is conclusive evidence that the nation or who represents it is the source of legislation not the Islamic Law (Sharia) as the Second Article goes. In the light of this article, the nation or its political system is entitled the authority to make and revise laws in agreement with what it thinks right regardless of being religiously acceptable or not.

In addition, "the principles of the Islamic Law (Sharia)" 's wording is so loose and open to wide interpretation that it juggled with to pass the laws the political system is in favor for irrespective of being consistent with Islam teachings or not.

Too, if we could even take for granted that what is meant by the term "the principles of the Islamic Law (Sharia)" is the general norms such as justice, equality, reciprocity and public interest, this means that the prescribed rulings such as those related to inheritance and estimated

penalties, which cover most of Islam teachings, will be excluded as being a source of legislation as a result.

Besides, the wording of the phrase that says: "the principles of the Islamic Law are the main source of legislation" implies that the Islamic Law is not the only source for legislation. That is, in the light to this Article, it is understood that there are subordinate sources as well as the Islamic Law ⁽⁵⁵⁾. This contradicts with the teachings of Islam as it is prohibited to adopt any other source for legislation but the Islamic Law. Allah, exalted be He, is the Only Legislator as it is decided by the Holy Verse that says: (Surely, His is the Creation and Commandment) ⁽⁵⁶⁾; that is, Allah, exalted be He, has the exclusive authority of legislation.

Moreover, the implication that there are other subordinate sources for legislation means that the Islamic Law (Sharia) is not adequate to cover all legislative needs. This is not true because the Islamic Law neglects nothing. Allah, exalted be He, says, (We have neglected nothing in the Book) ⁽⁵⁷⁾. This evidences that Islam encompasses the ruling of everything in this life. But this covering comes as a whole at times and in detail at other times. It comes as a whole for the issues that differ from place to place and from time to time such as the form of the punitive, financial, political and consultation systems. If this is the case, Islam designates the general principles such as justice and equality and skips the details for the specialists to design the appropriate system in the light of the socio-economic context. But this coverage comes in detail for the constancies which cannot be changed from place to place or from time to time such as the issues of inheritance, marriage, divorce, women unmarriageable for certain men and prescribed penalties.

Additionally, the Second Article of the 2019 Egyptian Constitution states that the principles of the Islamic Law (Sharia) is a main source of legislation. This means that the principles of the Islamic Law are no longer the main source of legislation as it was the case of the 1971 and 2014 Constitutions. There are other main sources as well as the Islamic Law. This implies that those human sources are equal to the principles of the Islamic Law which are divine. Undoubtedly, this is considered an apostasy from Islam because it makes the imperfect human being and what he legislates parallel to his Creator and parallel to what He legislates. And this is religiously and logically unacceptable.

Even if we accept the idea that there are other main sources together with the principles of the Islamic Law (Sharia), the basis on these sources are singled out is indefinite. In other words, it is not known when and what to take from the Islamic Law or when and what to take from the other sources of legislation.

Some can demur that the previous Article has been brought forward to take the second place after being in the third and the fifth places in the former Constitutions and this bespeaks that it has been given much attention in comparison with what was before. However, this objection is not admitted because prioritizing this Article in the post 1971 Constitutions has not been authentic. That is, the aim of this prioritizing this Article has not been to observe the Islamic Law, but to deceive the public by pretending that the political leadership is interested in the nation's established religion. This evidences by the many texts of the Constitution and the ordinary laws that break the Islamic Law. As an example, the first Article of the 1971 Egyptian Constitution that says, "The Egyptian people are part of the Arab nation and they seek to fulfill its unity". This Article reinforces tribalism which is religiously

forbidden. Allah, exalted be He, says, (And hold fast to the Bond of Allah, together, and do not scatter" ⁽⁵⁸⁾. Allah, exalted be He, also says, (Believers are indeed brothers) ⁽⁵⁹⁾. Allah, exalted be He, also says, (The noblest of you before Allah is the most righteous of you) ⁽⁶⁰⁾. The Prophet, peace and blessings of Allah upon him, says, "Who calls for tribalism is not a Muslim" ⁽⁶¹⁾. The Prophet, peace and blessings of Allah upon him, also says, "An Arab is not better than a non-Arab if he is not righteous" ⁽⁶²⁾. This religious texts draw our attention that is cares only for Islamic brotherhood not for tribalism as the Constitution goes.

Another example for not adhering to the Islamic Law is what Article (40) of the 2019 Egyptian Constitution states. This Article prescribes that "All citizens are equal in duties and public rights. Discrimination because of gender, race, language, religion or creed is not permissible". No doubt that this Article disagrees with what the Islamic Law goes to since according to Islam the non-Muslim is not equal to the Muslim. Allah, exalted be He, says, (The inhabitants of the Fire and the inhabitants of the Paradise are not equal) ⁽⁶³⁾. "This is evidence that the non-Muslim is not equal to the Muslim" ⁽⁶⁴⁾. Allah, exalted be He, also says, (What, shall We make those who are submissive like the wrongdoers * What is the matter with you, then? How do you judge?) ⁽⁶⁵⁾. IbnHazm, may Allah be merciful to him, says, " No doubt this verse means that the non-Muslim is no equal to the Muslim" ⁽⁶⁶⁾.

One more example for not keeping to the Islamic Law is what Article (46) of the 2019 Egyptian Constitution states. This Article says, "The State guarantees freedom of faith and freedom of practicing religious observances". This conflicts with Islam teachings in this concern. According to Islam, it is not permissible for a Muslim to covert to any

other religion but Islam whatever the claim is. Allah, exalted be He says, (But whosoever of recants from his religion and dies an unbeliever, their works shall be annulled in this world and in the Everlasting Life and those shall be the companions of Hell and there they shall live forever) ⁽⁶⁷⁾. Al-Qurtobi, may Allah have mercy on him, says, "This verse warns Muslims of recanting from their religion. If a Muslim recants from his religion, he becomes an unbeliever and if he dies unbelieving, he will enter Hell and shall live there forever" ⁽⁶⁸⁾. Al-Bukhari narrated in his book, the Sahih, that the Prophet, peace and blessings of Allah upon him, says, "Whosoever recants from Islam, He shall be sentenced to death" ⁽⁶⁹⁾. Ibn Abd Al-Barr, may Allah be merciful to him, says, "This Hadith points out that any Muslims recants from his religion shall have the penalty of capital punishment" ⁽⁷⁰⁾. These texts are conclusive evidence that a Muslim is not allowed to change his religion.

So far, it has been obvious the Egyptian Constitutions' drafters restricts the Islamic Law in some general principles which they pervert to pretend that they observe the Islamic Law in a sense and, in the other sense, to pass the laws they desire irrespective of being in conformity with Islam or not. In brief, it could be said the Egyptian Constitution does not observe seriously the Islamic Law as a source of legislation.

Chapter III

The Extent to Which the Algerian Constitution Observes the Islamic Law as the Source of Legislation

The Algerian Constitution does not declare that the principles of the Islamic Law (Sharia) are the main – or a main – source of legislation as it the case with its Egyptian counterpart.

Nevertheless, there have been indirect hints that are supposed to understand from which that the Islamic Law is the source of legislation. Of these hints is what Article Four of the 1963 Algerian Constitution and Article Two of the 1976, 1989 and 1996 Algerian Constitutions refer to. These two Articles prescribe that "Islam is the established religion of the State". According to this text, the Islamic Law (Sharia) has to be the source of legislation.

In addition, Article (110) of the 1976 Algerian Constitution, Article (73) of the 1989 Algerian Constitution and Article (76) of the 1996 Algerian Constitution and its 2016 amendments state that "The president of the republic takes the oath as follows; 'I swear by Allah the Supreme and Mighty to respect and glorify Islam'. Respecting and glorifying mean nothing but putting Islam teachings into practice.

Furthermore, the Preamble of 1989 Algerian Constitution and the 1996 Algerian Constitution and its 2016 amendments decide that "Algeria is the homeland of Islam". This indicates that the Islamic Law is the spring of all authorities including the legislature.

Moreover, Article Ten of the 1996 Algerian Constitution and its 2016 amendments states that "It is not permissible for the authorities to break Islam teachings". This Article imposes that all the authorities in Algeria have to abide by the Islamic Law.

In spite of the above-mentioned hints in emphasizing that the Islamic source has to be the source of legislation, they are intended to be interpreted differently. They are meant to understand that Islam is no more than faith and a code of ethics only. That is, they are intended to mean that Islam has nothing to do with legislation. This is

demonstrated by the many articles breaking the Islamic Law. For instance, Article Seven of the 1996 Algerian Constitution and its 2016 amendments prescribes that "The nation is the source of all authorities". According to this article, the nation or who represents it is the source of every authority including that of legislation not the Islamic Law. No doubt that what this article implies contradicts not only with Islam teachings but only with the previous articles that state that "Islam is the established religion of the State", "Algeria is the homeland of Islam" and "It is not permissible for the authorities to break Islam teachings". This contradiction could be cleared up only if Islam is understood the same way the enemies of Islam wants us to understand. In other words, we are wanted to understand Islam as a creed and a set of ethics only. And if we argue for the Islamic Law, the enemies of Islam's answer is that the Islamic Law is something of the past and it is not suitable for our age. It is not hidden what they really seek to. Not only do they hanker after effacing the Islamic Law, but they are also eager to eradicate Islam as a whole.

Another example for breaking the Islamic Law is what the Algerian Criminal and Penal Law decides as a penalty for alcohol drinking. Article One of the presidential order no. 75-26 issued on 29th April 1975 states that "Whosoever proved guilty of intoxication in a public place such as streets, cafes or shops shall be punished by a fine from 40 Algerian dinars to 80 Algerian dinars". Article Two of this presidential order prescribes that "if this crime recurs, the guilty shall be punished by imprisonment from five days to ten days". These two texts conflict with Islam teachings. According to Islam, alcohol drinking is completely forbidden whether it leads to intoxication or not, or whether the crime is committed in a public place or not. Too, the imprisonment

and fine penalties decided for this crime infringes Islam teachings. Islam decides the lashing penalty for those who are proved guilty of this crime.

Further example for not abiding to the Islamic Law is what the Algerian Penal Law prescribes for the penalty of theft. It prescribes the penalties of imprisonment, fine, interim and life imprisonment. Article (350) of the Algerian Penal Law states that: " those who are guilty of embezzlement are considered thieves and shall be punished by imprisonment ... and fine from 100,000 Algerian dinars to 500,000 Algerian dinars". Article (351) amended states that "those who are convicted of theft shall be punished by life imprisonment if they - or one of them - carry a weapon". Article (353) amended prescribes that "Whosoever proved guilty of theft shall be punished by interim imprisonment if the theft is committed with violence or with threatening with it". These penalties decided for theft by law encroaches on what Islam decides as a penalty for theft. According to the Islamic Law, those who are proved guilty of more than a quarter gold dinar theft, they shall be punished by hand-cut off.

One more example for not adhering to the Islamic Law is the penalty of adultery and fornication. Article (339) prescribes that "Any wife proved guilty of adultery shall have the penalty of imprisonment from a year to two years. The same penalty is applicable to her partner if he knows that she is married. Too, the husband who is proved guilty of adultery shall have the penalty of imprisonment from a year to two years. The same penalty is applicable to his partner. And no legal action is taken unless the dishonored husband makes a complaint. If the dishonored husband condones ⁽⁷⁰⁾, no legal action is to be continued". The penalty of adultery also breaks what Islam decides as a penalty for adultery and

fornication. According to Islam, the married adulterer shall be thrown with stones to death and the fornicator shall have a hundred lashes and shall be banished whether there is a complaint or not, or whether the dishonored husband or wife condones or not.

From what is previously discussed, it is evident that although the Algerian Constitution decides that "Islam is the established religion of the State", "Algeria is the homeland of Islam", and "It is not permissible for the authorities to break the teachings of Islam", it does not observe the Islamic Law in reality as it is the case with its Egyptian equivalent. Neither of them explicitly states that the Islamic Law is the only source of legislation.

Conclusion

The study aimed at investigating the extent to which the Egyptian and Algerian Constitutions observe the Islamic Law as the source of legislation. The study came to two the following findings:

First: Observing the Islamic Law as the source of legislation is mandatory according to the teachings of Islam.

Second: Compared to the Algerian Constitution, the Egyptian equivalent pays more attention to the Islamic Law by stating that the Islamic Law is a source of legislation. However, both of them do not consider seriously the Islamic Law as the source of legislation.

In the light of these findings. The study recommends that the Egyptian and the Algerian drafters to explicitly state that the Islamic Law (Sharia) is the only source of legislation in agreement with what Islam ordains. Consequently, the study suggests redrafting the Second Article of the 2019 Egyptian Constitution and the Fourth Article of the 1996 Algerian Constitution and its 2016 amendments to be as follows;

-Islam is the established religion of the State and the Islamic Law (Sharia) is the only source of legislation.

The study also recommends that this Article has to come first since it is the reference of all that follow.

Notes

- 1) Surat Al-Imran (The Family of Imran) III, verse: 102.
- 2) Surat An-Nisaa (The Women) IV, verse: 1.
- 3) Surat Al-Ahzab (The Confederates) XXXIII, verse: 70.
- 4) Al-Albany, **Sahih Al-TargheebwaTarheeb**, edit. 1, p.3.
- 5) Hasan Kerra, **Al-MadkhalEl Elm Al-Qanoun**, no edition, p. 74.
- 6) Abd-Al-Hameid Metwally, **Al-Shariea' Al-Islamia Kamasdar Asy Lidostour**, edit. 3, pp. 18-23, Ahmad Hashish, **Moshklat A-Dostour Al-Mesryfe Daw Smow Al-Kanon Al-Elahy**, no edition, pp. 236-238 and Ashraf Al-Lemsawy, **Al-Mabade' Al-Genaia' A-Dostouria and A-Dawliafe Al-Tashrea't Al-Arabia waDawlia**, edit. 1, p. 11.
- 7) Abd-Al-Hameid Metwally, **Al-Shariea' Al-Islamia Kamasdar Asy Lidostour**, edit. 3, pp. 18-23, Ahmad Hashish, **Moshklat A-Dostour Al-Mesryfe Daw Smow Al-Kanon Al-Elahy**, no edition, pp. 236-238 and Ashraf Al-Lemsawy, **Al-Mabade' Al-Genaia' A-Dostouria and A-Dawliafe Al-Tashrea't Al-Arabia waDawlia**, edit. 1, p. 11.

8) It is noteworthy that legislation is divided into three categories:

A- **The Constitution**; that is considered as the main legislation;

B-**The Laws**; that are made by the legislative authority and considered as ordinary legislations

C- **The Regulations**; that are made by the executive authority and considered as subordinate legislations.

However, it is customary that the term legislation is used to refer to the laws provisioned by the legislative authority.

Refer to: Abd-Al-HameidMetwally, **Al-Shariea' Al-IslamiaKamasdarAsasyLidostour**, edit. 3, pp. 18-23, Ahmad Hashish, **Moshklat A-Dostour Al-MesryfeDawSmow Al-Kanon Al-Elahy**, no edition, pp. 236-238 and Ashraf Al-Lemsawy, **Al-Mabade' Al-Genaaia' A-Dostouria and A-Dawliafe Al-Tashree't Al-Arabia waDawlia**, edit. 1, p. 11.

9) Surat A-Nisaa (The Women) IV, verse 60.

10) Ibn Al-Arabi, **Ahkam Al-Qur'an**, edit. 3, vol. 1, p. 578.

11) IbnKatheer, **Tafseer Al-Qur'an Al-Azeem**, edit. 1, vol. 2, pp. 302-305.

12) Al-Fakhr A-Razi, **Mafateeh Al-Ghaib**, edit. 3, vol. 10, p. 121.

13) Ibn Al-Qaiem, **I'lam Al-Mawaq'een Ann Rabb Al-Alamin**, edit. 1, vol. 1, p. 40.

14) SuliamanIbnAbd Al-Wahab, **Taiseer Al-Aziz Al-Hameed**, edit. 1, vol. 1, pp. 479-481.

15) Surat A-Nisaa (The Women) IV, verse 61.

16) Surat A-Noor (The Light), verse 48.

- 17).SuliamanIbnAbd Al-Wahab, **Taiseer Al-Aziz Al-Hameed**, edit. 1, vol. 1, p.482.
- 18) SuliamanIbnAbd Al-Wahab, **Taiseer Al-Aziz Al-Hameed**, edit. 1, vol. 1, p. 482.
- 19) Surat A-Nisaa (The Women) IV, verse 65.
- 20) Al-Qurtobi, **Al-Gamie L-Ahkam Al-Qur'an**, edit. 2, vol. 5, p. 266.
- 21) Al-Fakhr A-Razi, **Mafateeh Al-Ghaib**, edit. 3, vol. 10, p. 121.
- 22) Ibn Al-Qaiem, **I'lam Al-Mowaq'een Ann Rabb Al-Alamin**, edit. 1, vol. 1, p. 40.
- 23) Surat Al-Ma'idah (The Table Spread with Food) V, verse 44.
- 24) A-Tabari, **Jamie Al-Bayian An TaweelAy Al-Qur'an**, edit. 8, p. 467.
- 25) A-Sidlan, **WojoupTatbeq A-Shari'a Al-Islamiafe Kull Asr**, edit. 1, p. 178.
- 26) Surat Al-Ma'idah (The Table Spread with Food) V, verse 45.
- 27) Abu-Al-Ezz Al-Hanafi, **Sharh Al-Aqeeda A-Tahawia**, edit. 1, vol. 1, p. 324.
- 28) Surat Al-Ma'idah (The Table Spread with Food) V, verse 45.
- 29) Al-Qurtobi, **Al-Gamie L-Ahkam Al-Qur'an**, edit. 2, vol. 6, p. 190.
- 30)Surat A-Noor (The Light), verses 47- 48.
- 31) IbnKatheer, **Tafseer Al-Qur'an Al-Azeem**, edit. 1, vol. 6, p. 68.
- 32) Surat A-Noor (The Light), verse 51.

- 33) Al-Qurtobi, **Al-Gamie L-Ahkam Al-Qur'an**, edit. 2, vol. 12, p. 295.
- 34) Surat Al-Ma'idah (The Table Spread with Food) V, verse 50.
- 35) IbnKatheer, **Tafseer Al-Qur'an Al-Azeem**, edit. 1, vol. 3, p. 119.
- 36) IbnKatheer, **Tafseer Al-Qur'an Al-Azeem**, edit. 1, vol. 3, p. 120.
- 37) IbnHajjar, **Fath Al-Bari**, no edition, vol. 1, p. 85.
- 38) Surat Al-Hajj (The Pilgrimage), verse 41.
- 39) Al-Qurtobi, **Al-Gamie L-Ahkam Al-Qur'an**, edit. 2, vol. 12, p. 73.
- 40) Ibn Al-Qaiem, **I'lam Al-Mowaq'een Ann Rabb Al-Alamin**, edit. 1, vol. 1, p. 40.
- 41) SuliamanIbnAbd Al-Wahab, **Taiseer Al-Aziz Al-Hameed**, edit. 1, vol. 1, pp. 479-481.
- 42) Perjury is the offence of willfully telling an untruth or making a misrepresentation under oath. Perjury is a grave sin. It is evidenced by the Hadith reported by Al-Bukhari that Abdullah IbnAmr narrated that the Prophet, peace and blessings of Allah be upon him, said, " The grave sins are: polytheism, ingratitude to parents, homicide and perjury". Refer to; Al-Buhari, **Sahih Al-Bukhari**, edit. 1, vol. 8, Book of Oaths and Vows, Chapter of Perjury, Hadith no. (6675), p. 137 and IbnAbedeen, **Radd Al- Mohtar**, edit. 2, vol. 3, p. 705.
- 43) Mohamed IbnIbrhimAal-Sheikh, **ResalatTaheem Al-Qawaneen**, no edition, p. 2-10.
- 44) IbnBaz, **Majmo' Al-Fatawa**, no edition, vol. 2, p. 325.
- 45) IbnBaz, **Majmo' Al-Fatawa**, edit. 1, vol. 1, pp. 268-271.

- 46) A commentary of Sheikh Ahmed Shaker, may Allah be merciful to him, on the book of "**Musnad of Imam Ahmed IbnHanbal**". Refer to: Ahmed IbnHanbal, **Musnad of Imam Ahmed IbnHanba**, edit. 1, vol. 4, p. 351.
- 47) Major disbelief means recanting from Islam. Refer to: A-Razi, **Mokhtar A-Sahah**, edit. 5, vol. 1, p. 56.
- 48) Ahmed IbnHanbal, **Musnad of Imam Ahmed IbnHanba**, edit. 1, vol. 4, p. 354.
- 49) Surat Al-Ma'idah (The Table Spread with Food) V, verse 45.
- 50) Surat Al-Ma'idah (The Table Spread with Food) V, verse 44.
- 51) Surat Al-Ma'idah (The Table Spread with Food) V, verse 47.
- 52)Ibn Al-Moseli, **Hosn A-Suluk Al-Hafez Dawalat Al-Muluk**, no edition, vol. 1, p. 56.
- 53) Mustafa Sabri, **Mawqef Al-Aqlwa Al-Elm wa Al-Alam men Rabb Al-AlaminwaIbadaho Al-Mursaleen**, edit. 2, vol. 4, pp. 281-285.
- 54) It is worthy of note that the Islamic Law (Sharia) was the official source of legislation in Egypt since the Islamic conquest till the time of Mohamed Ali who was the ruler of Egypt in 1805. Under the reign of Mohamed Ali, the Islamic Law starts to diminish and it was gradually replaced with the French Law till the latter became the main source for legislation except for the personal status affairs that are, in a sense, still based on the Islamic Law. Since then, the Islamic Law has not been an official source of legislation. But, in 1971, the Egyptian Constitution made a turning point. It prescribes in the Second

Article that: "the principles of Islam are the main source of legislation". Refer to: Mohamed Hasan Qassem, **Al-Madkhal I-Drasat Al-Qanoun; Al-Qaeda Al-Qanonia**, no edition, pp. 174-176.

54) It should be noted that according to the legal literature, there are three sources of legislation. They are as follows:

A- **The Content Sources**; these are the sources from which the legal rules are derived.

B- **The Form Sources**; these are the sources that are meant to draft the legal rule and make it binding.

C- **The Interpretation Sources**; these are the sources that are meant to interpret the legal texts.

Refer to: Abd-Al-Hameid Metwally, **Al-Sharica' Al-Islamia Kamasdar Asy Lidostour**, edit. 3, pp. 18-23, Ahmad Hashish, **Moshklat A-Dostour Al-Mesryfe Daw Smow Al-Kanon Al-Elahy**, no edition, pp. 236-238 and Ashraf Al-Lemrawy, **Al-Mabade' Al-Genaaia' A-Dostouria and A-Dawliafe Al-Tashree'at Al-Arabia wa Dawlia**, edit. 1, p. 11.

55) Surat Al-A'raf (The Heights/Or The Wall with Elevations) VII, verse 54.

56) Surat Al-An'am (The Cattle) VI, verse 38.

57) Surat Al-Imran (The Family of Imran), verse 103.

58) Surat Al-Hujurat (The Dwellings) XLIX, verse 10.

59) Surat Al-Hujurat (The Dwellings) XLIX, verse 13.

60) This is a part of Hadith narrated by Jubeir Ibn Mot'em. The chain of narrators is weak, but the meaning is correct. Refer to: Abu-Dawoud, **Sunan Abi Dawoud**, edit. 5, vol. 7, Book of Sleep, Chapter of tribalism, Hadith no. (5121), p. 441.

61) This is part of a long Hadith narrated by Abi-Nadrah. The chain of narrators is authentic. Refer to: Ahmed IbnHanbal, **Musnad of Imam Ahmed IbnHanba**, edit. 1, vol.38, Book of Al-Ansar, Chapter of a Companion of the Prophet, peace and blessings of Allah upon him, Hadith no. (23489), p. 474.

62) Surat Al-Hashr (The Gathering), verse 20.

63) Al-Mawardi, **Al-Hawi Al-Kabeer**, edit. 1, vol. 12, p. 11.

64) Surat Al- Qalam or Nun (The Pen) LXVIII, verses 35-36.

65) IbnHazm, **Al-Mohalla**, no. edition, vol. 10, p. 227.

66) Surat Al-Baqarah (The Cow) II, verse 217.

67) Al-Kortoby, **Al-Gamie' Le-Ahkam Al-Qura'n**, edit. 2, vol.3, p.46.

68) Narrated by Ibn Abbas, may Allah please him and his father. Refer to: Al-Bukhari, **Sahih Al-Bukhari**, edit. 1, vol. 9, Book of Calling the Renegades for Repentance and Fighting them, Chapter of the Ruling of the Male and Female Renegades and Asking them to Repent, Hadith no. (6922), p. 15.

69) -IbnAbd Al-Barr, **Al-Istezkar**, edit. 1, vol. 7, p. 151.

70) Condoning means that "The government give the victim of certain crimes the right to get the perpetrator punished or waive his right implicitly or explicitly". This right remains in force as long as there is no final judgment of the law case. This means that if the victim waives after a final judgment is adjudicated, it is ineffective except for the crime of adultery and the crime of theft from one's family. Refer to: Abd Al-Fattah Al-Seifi, **Ta'seel Al-Ijra'at Al-Jinaiah**, no edition, p. 116.

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