Between Sharia'h (Islamic Law) & Fiqh (Islamic Jurisprudence)

In the aftermath of World War II, several currents, from the extreme right to the extreme left, surfaced in Egypt, for a variety of deep-rooted and interrelated reasons. One of these currents raised the slogan of religion and targeted the revival of Islamic Caliphate and the application of Sharia'h.

But the revival of Islamic Caliphate clashes with the political regimes and government status – not just in Egypt, but all through the Muslim world. So, that current concealed the call for reviving the Caliphate and pushed through with the call for applying the Sharia'h, hoping such application is their way of reviving the Islamic Caliphate.

Maybe as a result of that current – and other different reasons – the expression "principles of Islamic Sharia'h" made its way into the contemporary Egyptian legislations. The second paragraph of the first article of the civil law – effective from October 15, 1949 – states that "In the case of absence of a legislative text to be applied, a judge is to rule by custom, if not, then by the principles of Islamic Sharia'h, if not, then under the principles of natural law and the rules of justice." The second article of the Egyptian Constitution – adopted in 1971 – states that "The principles of Islamic Sharia'h are a major source of legislation". In the Constitutional amendment of May 22, 1980, that article was changed to be "The principles of Islamic Sharia'h are the major source of legislation", adding the definition article to make it "the major source", instead of "a major source".

What the legislator did – in subjection to the above mentioned current, whether agreeing with it or trying to control it – made the call for legalizing the Islamic Sharia'h a hot issue, untouched by pros or cons without having its burning effect on them.

The changes Egypt witnessed during the past half a century helped increase that burning effect and spread the blinding smoke coming out of it. The political system changed completely in persons, institutions and the philosophy of ruling. The traditional social system, based on the hierarchy – where respect for the superior and pity on the inferior spread – fell apart. School learning increased, but without being accompanied by a general cultural atmosphere or wiping out of illiteracy. Fortune was redistributed randomly, without always emphasizing the respect of work values or resorting to honest means or following economic regulations or respecting state laws or caring for the interest of the citizens. The infrastructure of society was altered without control or guidance. Measures of evaluation were destabilized, losing objectivity and clear definitions. The balances of effort were turned upside down, giving more value to manual labor than mental work or any other work. The very standards of work lost their meaning, with the higher value shifting from work itself to public relations or easy gains or deceitful appearances. The overwhelming majority no more demands what they deserve, but rather the utmost they can get, changing the general principle from "each (gains) according to their work" or "each (gains) according to their needs" to "each (gains) as much as they can take", even without effort or work.

Adding to this the outer factors of war defeats, change of treaties between east and west, increase of oil-producing Arab countries' fortunes, labor forces going abroad for work and the effects of money transfer to and from the country and security and economic international unrest… All these factors – apparent or concealed – led to the voices calling for the application of Islamic Sharia'h judging such application would immediately lead to instant reform of the society and make it purified and idealistic.

Through repetition and persistence, the call gained supporters, especially upon seeing the official approach of the state – considering "The principles of Islamic Sharia'h are the major source of legislation" – which convinced them with the seriousness and soundness of the call.

In any society, all through history, when the powers of work shrink, the power of slogans become huge and when the ability of labor retreats, that of speeches takes prominence. When the capabilities of scientific research are weakened, the effect of empty talk gets louder. This being the case of our modern society, the call for legalizing Sharia'h sufficed with just repeating the call, considering it a first and last demand for any reform, without caring to conduct serious, accurate and scientific studies on what is meant by it and whether its mere application leads automatically to all reforms or there is some more important and better means; namely, education, good example and forming conscience of the people.

The civil and constitutional legislator – both or one of them – never put a definition for the expression "principles of Islamic Sharia'h". The committees formed to legalize what they thought to be Islamic Sharia'h, went straight to business without never trying to determine what is meant by that expression, their method in adopting that legalization and the relevance to the current Egyptian law or to make a comparison between both.

The word "Sharia'h" does not mean – not in the Noble Qura'n or dictionaries of Arabic – legal rulings, but it means the way, method, road and the likes of these broad meanings.

In the Noble Qura'n, Sura 45-18, says: "And now have We set thee (O Muhammad) on a clear road of (Our) commandment; so follow it.", meaning We set you, Prophet, on a road or a way. And in Sura 5-48, it says: "For each We have appointed a divine law and a traced-out way." That means there is one religion for all messengers and prophets and one road or way for that religion. And in Sura 42-13, it says: "He hath ordained for you that religion which He commended unto Noah, and that which We inspire in thee (Muhammad), and that which We commended unto Abraham and Moses and Jesus." That is to say a road from that religion to follow, and so on.

That Qura'nic meaning about the word Sharia'h – as a noun and a verb – is the same linguistic meaning in the language dictionaries. The verb "shara'" means – in language – watering place and the noun "Shira'h or Sharia'h" means "water source"; that is water opening; that is way or road "Dictionary Lisan El-Arab – Tongue of the Arabs).

The word Sharia'h underwent amendments and changes several times in the Islamic thinking. It was first used under its original meaning (way – road and so on). Then the meaning was broadened to include legal regulations (legislations) mentioned in the

Noble Qura'n. Then it was extended to include similar regulations and rules mentioned in prophetic sayings. The meaning then changed to include explanations, interpretations, Fatwas and judgments issued to explain these rulings or to measure against them or deduce wherefrom to apply; that is to say jurisprudence. Currently, the word Sharia'h means exactly – in the common usage – Fiqh (Islamic jurisprudence) or the historical system of Islam.

The call to legalize Sharia'h actually means legalizing Fiqh or reviving the historical system of Islam, without awareness of the confusion between Sharia'h and jurisprudence and without realizing that the rules of Fiqh and Islamic systems were formed across history and during certain events. These conditions change according to emerging and new situations, and without realizing Fiqh and systems are man-made resulting from human applications and thinking, thus enjoying no sanctity, thus they should not be an obstacle before new thinking or blocking creativity and renovation. The Egyptian legislator also fell victim for that confusion between Sharia'h and Fiqh, leading to the worst consequences on the legal thinking on one hand, and on the political thinking and work, on the other, not only in Egypt, but all through the Islamic world. The preparatory works for the civil law, in comment on the text of the second paragraph of the first article, referred to before, stated: "First of all, an Egyptian judge is demanded, in the absence of a clear law article, to seek a solution for the dispute before him guided by the principles included in the general law for all Egyptians with all their different religions… It is clear through researches … that many modern theories were known to Muslim jurists". These preparatory works stated: "Highlighting the principles of Islamic Sharia'h is a renovation aiming at meeting the rights of that Sharia'h not only in its capacity as an historic source for a part of the project's rules (later known as the civil law), but as a unique model of fine technical linguistic formations. The Islamic Sharia'h has enjoyed a distinguished place in the jurisprudence of comparative law and headed the finest modern techniques on the theory of arbitrary use of right and other human theories. Therefore, it is entitled to be a source of inspiration for Egyptian judiciary, especially that most of the project's rulings (later known civil law) can be produced under the Sharia'h rulings on its various schools without burdens". The preparatory works also stated: "The article speaks about the principles of (Islamic) Sharia'h, that is its general concepts, which are not a subject of contention among jurists." (Preparatory Works for the Civil Law – Part 1 – Pages 184, 189, 191).

It is clear, from what is above mentioned, that the legislator did not put a definition for the word "principles" or "the Islamic Sharia'h", even though that was a must, especially the expression and word were used in an important law, like the civil law and were later used in the constitution.

But it is clear form the preparatory works of the civil law that the legislator, by using the expression "principles of Islamic Sharia'h", meant the general rulings jointly agreed upon by the Islamic schools of Fiqh. This is obvious when it was stated that "many modern theories were known to Muslim jurists", and "The article speaks about the principles of (Islamic) Sharia'h, that is its general concepts, which are not a subject of contention among jurists." The context of the legislator's words in the preparatory works – in addition to his phrases referred to above about the Fiqh theories known to jurists and the different schools of Fiqh – all that determines the fact that the legislator fell victim to the confusion between Sharia'h and Fiqh. In fact,

he meant the general rulings of Islamic Fiqh or the joint principles among the schools of Fiqh when he used the expression "principles of Islamic Sharia'h".

The Constitution of 1971 has no explanatory memorandum or preparatory works that could be consulted to clarify the legislator's goal or intention behind the usage of the expression "principles of Islamic Sharia'h". But it is clear the legislator of 1971 Constitution had taken the expression from the civil law, with all the confusion of understanding and chaos of usage.
The Constitutional amendment of May 22, 1980, was preceded by two reports of the special committee formed to introduce that amendment. They said "It is known that the major sources of Islamic Sharia'h are the Book (Noble Qura'n", Sunnah (prophetic tradition), unanimous rulings and Fiqh. In addition, there are several sources opinions differ on them from one school (of Fiqh) to another, such as open-ended interests, custom…etc". "It is also known that Sharia'h rulings are divided into two sections: The first is clear-cut rulings with no room for human interpretation (Ijtihad). The second is Ijtihadi rulings… It is a given fact for the second section that these rulings change according to place and time, a matter that led to the existence of various schools of Fiqh and even different opinions within the same school. That gave Islamic Fiqh vitality and flexibility, making it safe to rule Islamic Sharia'h is applicable at all times and places." "Excluding Islamic Sharia'h to the rulings of previous jurists is a matter rejected by the texts and spirit of the Sharia'h." "It is a given fact for Islamic Sharia'h – being a comprehensive organization for religious and worldly affairs – that it includes two essential principles in dealing with non-Muslims: First is no compulsion in (getting people to adopt) religion, and second is they share the same rights and duties as Muslims."
It is clear from what is above mentioned that the legislator of the latest Constitutional amendment severely confused religion, Sharia'h and Fiqh… This is a really unfortunate matter.

First: He mentioned the Noble Qura'n, Sunnah, unanimous rulings and Fiqh to be the major sources of Islamic Sharia'h, while these sources are Noble Qura'n, Sunnah, unanimous rulings and Al-Qiyas (Comparison of incidents), which are all sources of Fiqh or for producing rulings and not sources of Sharia'h. This is confusion between Fiqh and Sharia'h.

Second: He divided Islamic rulings into clear-cut proved rulings and Ijtihadi ones that change with time and place, whereas clear-cut rulings are those related to worship and Ijtihadi ones what jurists thought.

Third: In referring to how the existence of various schools of Fiqh gave Sharia'h vitality and flexibility, making it applicable at all times and places, he – as usual – confuses Sharia'h with Fiqh.

Fourth: Again in deciding that limiting Islamic Sharia'h to rulings of previous jurists is a matter rejected by the texts of the Sharia'h, he is confusing what Sharia'h is with what is Fiqh.

Fifth: In referring to two principles as being Sharia'h principles; first is no compulsion in religion which is at the core of religion itself and the second is non-Muslims share the same rights and duties as Muslims is a Fiqh principle.

There is a big difference between a Sharia'h principle or ruling and a Fiqh principle or ruling. The Sharia'h principle is taken directly from the Noble Qura'n or Sunnah; such as: "No laden soul can bear another's loud", Sura 17-15, and "And every man's augury have We fastened to his own neck", Sura 17-13, and "Divorce must be pronounced twice and then (a woman) must be retained in honor or released in kindness", Sura 2-229. Fiqh principle or ruling, on the other hand, is put forward by jurists, even though inspired by the spirit of religion and Sharia'h.

The Sharia'h principle or ruling is established by the Great Legislator in the Noble Qura'n or what the Prophet (PBUH) spoke of in well-proved Sunnah. Whereas Fiqh principle or ruling is any Ijtihad or a rationale by a Muslim or a jurist.

That means a Fiqh principle or ruling is not fortified (against mistakes) or sacred or constant, because it is the point of view of a human that he said or did in certain circumstances that change accordingly. It is known that Imam Shafie' made changes to his Fiqh when he moved from Iraq to Egypt; that is to say he changed Fiqh by merely changing place, despite time being the same and circumstances generally similar.

All that means the call for legalizing Fiqh (mistakenly called Sharia'h) could be political, party, national or sectarian calls, but definitely they are not religious. Any other saying leads to odd and pervert results. An opponent of that call might be considered kafir (atheist), even though he is merely rejecting or refuting a human judgment, no matter how highly esteemed is that human. How could the non-legalization of Fiqh be deemed Kufr (atheism) or the government that does not apply it be deemed kafir? What is so atheist about being not subjected to (following) a human opinion? How could be following an opinion by Shafie' and not by Malik be deemed Kufr? Or even following a Shiite school, not a Sunni one? What is atheist in following the rulings of an Egyptian, not French or Italian jurist, as long as it is for the best interest of society? A Fiqh ruling says: Wherever interest lies, it is the Shara' (Ruling) of Allah). What is so atheist in applying the legacy and rulings of Egyptian courts that continued for over a century to be a model of comprehensiveness and accuracy, by the whole world's testimony?

If non-legalization of Fiqh (mistakenly called Sharia'h) is deemed Kufr, its legalization could also be deemed Kufr. A legislator should adopt the opinions of some jurists and neglect those by others. Therefore, followers of the neglected Fiqh opinions are entitled to deem the legislator Kafir, as he opposed Sharia'h as he himself (legislator) claimed. The clearest example here what happened during the amendment of personal affairs' law through Law Decree number 44 for 1971. The draft was put by then deputy of Waqf Ministry (Islamic Endowments), deputy head of Al-Azhar and the Mufti of Egypt. They said the amendment conformed with Sharia'h (they meant Fiqh), whereas opponents of the law – many actually – say it opposes Sharia'h (they mean Fiqh), with some of them being as radical as deeming those who put or apply it as Kafir.

So, legalizing Sharia'h (meaning Fiqh) may lead to a deep whirlwind of Kufr accusations, sending the whole society to the edge of a bottomless cliffhanger, bound to end up with violence and terrorism, under the belief such works are carried out to

achieve Allah's orders. In fact, this is confusion between Sharia'h and Fiqh and ignorance of the reality of Sharia'h and Fiqh rulings.

It is clear, from the above mentioned, that the Egyptian legislator – in using the expression "principles of Islamic Sharia'h" – always meant rulings of Fiqh or the joint rulings among the different schools of Fiqh.

The civil law authorizes the judge – in case of absence of a legal text matching the dispute before him – to resort to custom, then to rulings of Islamic Fiqh. The legislator then authorizes the judge – in case of Fiqh rulings missing a judgment on the dispute – to resort to the principles of natural law and foundations of justice; that is to say human conscience. Had the legislator been confident the rulings of Fiqh contain solutions for any problem or trouble, even in the future, he would have stopped there and not refer to natural law or justice (conscience).. The Divine source inherent in individuals and societies cared for by all heavenly religions.

As regards the constitution, it is obvious the legislator – by using the expression "principles of Islamic Sharia'h are the major source of legislation" – meant the general rulings of Islamic Fiqh, as demonstrated in the two paragraphs explaining the reasons for amendment. These rulings are like the rulings "There should be neither harm nor reciprocating harm", "Hardship brings about easiness" and "Necessities know no law", all are applied in the Egyptian Code, with its various branches. "There should be neither harm nor reciprocating harm" is applied in article 163 of civil law, which states "Every mistake causing harm to others invokes compensation upon who caused it". "Hardship brings about easiness" is applied in the theory of emergencies, stated upon in article 147 civil law, "In cases of general exceptional incidents that could not be anticipated and that led making the meeting of a contract commitment – even though not impossible – very hard on the debtors part threatening him with severe losses, the judge is authorized to reduce that debt (commitment) to a reasonable limit". "Necessities know no law" is applied in the case of necessity stated in article 61 penal law, "No penalty for someone, who committed a crime under the circumstances of necessity of protecting himself or others from an imminent grave danger threatening the self or others, and he had no power or will in stopping it by any other way."

Henceforth, following the principles of Fiqh or the general rulings of schools of Fiqh in the Egyptian legal system – and in other Arab and Islamic systems – leads to proving them all in one ruling or another, in a clear manner or applicable one necessitated by tailoring rulings, diversity of texts and multiplicity of targets.

So, a constitutional text is considered a statement of an already existing affair in the legal system and it is not considered – upon examination and verification – a call for any change or a base for any demand for a new legalization.