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**The American University in Cairo**

**School of Global Affairs and Public Policy**

**JUDICIAL ACTIVISM IN THE EGYPTIAN STATE COUNCIL  
A CASE LAW STUDY**

**A Thesis Submitted to the**

**Department of Law**

**in partial fulfillment of the requirements for  
the LL.M. Degree in international and Comparative Law**

**By**

**Ibrahim Ahmed Hassan Soliman**

**May 2016**

The American University in Cairo  
School of Global Affairs and Public Policy

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in partial fulfillment of the requirements for the  
LL.M. Degree in International and Comparative Law  
has been approved by the committee composed of:

Professor Amr Shalakany

Thesis Supervisor \_\_\_\_\_  
American University in Cairo  
Date \_\_\_\_\_

Professor Nesrine Badawy  
Thesis First Reader \_\_\_\_\_  
American University in Cairo  
Date \_\_\_\_\_

Professor Hani Sayed

Thesis Second Reader \_\_\_\_\_  
American University in Cairo  
Date \_\_\_\_\_

Professor Hani Sayed

Law Department Chair \_\_\_\_\_  
Date \_\_\_\_\_

Ambassador Nabil Fahmy

Dean of GAPP \_\_\_\_\_  
Date \_\_\_\_\_

The American University in Cairo

School of Global Affairs and Public Policy  
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JUDICIAL ACTIVISM IN THE EGYPTIAN STATE COUNCIL:  
A CASE LAW STUDY

Ibrahim Ahmed Hassan Soliman

Supervised by Professor Amr Shalakany

ABSTRACT

According to the democratic principles of the separation of powers and judicial independence, the judiciary has to apply the law and only the law to the facts before it. However, this principle is not actually applied in many countries where we witness intervention in judicial judgments. While judges adjudicate cases before them and try to find legal solutions under the application of law, they may also rely, in some cases, on both the letter of the law and the overarching activism directives behind it at the same time. Accordingly, a judge legislates according to his own particular interpretation of a certain legal provision in a manner that may broaden or narrow its scope of application in order to achieve justice from his personal point of view. This process of making law is "the judicial activism of judges." Such intervention may take place in human rights cases where judges interpret the notions, conceptions, definitions, and limitations of freedoms and liberties according to their ideological basis; consequently, judicial activism differs from one judge to another. This study highlights the existence of judicial activism through reviewing several actual cases from the Egyptian State Council. The massive conflicts in State Council jurisprudence can be understood in light of judges' distinct education, culture, persuasions, experience, environment, and way of thinking. This is the rational explanation that may clarify the significant mental differentiations among judges to comprehend certain subjects, despite the fact that such subjects are governed by specific and fixed legal provisions.

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## Introduction

The Charter of the United Nations and the Universal Declaration of Human Rights recognize the values of the rule of law, such as the equality of all individuals before the law, and judicial independence. Such fundamental principles guarantee the protection of human rights in both the developing and the developed countries.

In Egypt, successive constitutions have provided for the independence of the judiciary, namely the Supreme Constitutional Court, the Ordinary Judiciary, and the Administrative Judiciary (The State Council).<sup>1</sup> According to the democratic principles of the separation of powers and judicial independence, the judiciary applies the written rules on the facts before them; they have to apply the law and only the law.

While most countries state the independence of the judiciary in their constitutions, the principle is not actually applied in many countries where we witness intervention in judicial judgments. In 1985, the Commissioner of the United Nations for Human Rights stated the measurement criteria for the independence of the judiciary, such as their selection, qualification, training, suspension, and removal.<sup>2</sup>

However, many scholars argue that judges often go beyond the mere "application" into the actual "making" of law. Accordingly, this study focuses on the crucial question of legislation in Egypt, and how judges legislate in their judgments under the rubric of what I call "judicial activism".

Such an issue is extremely serious as it leads, in many cases, to contradictions among legal judgments. The multiplicity of the contradicting judgments in Egyptian society because of judicial activism may create what is called a status of uncertainty of the legal judgments. Because of the fact that Egyptians are used to respecting the

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<sup>1</sup> The Egyptian constitutions starting from the 1923 (article 94), till the 2014 constitution (article 184) used to provide the independency of the judiciary.

<sup>2</sup>Basic Principles on the Independence of the Judiciary, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985). <https://www1.umn.edu/humanrts/instree/i5bpjij.htm>.

Egyptian judiciary and trust its judgments, the existence of judicial activism may actually lead to serious consequences.<sup>3</sup>

From my judicial experience as a judge in the Egyptian State Council, I want to emphasize that the uncertainty of the legal judgments involves many negative consequences in terms of both judges and litigants. Lawyers exploit legal uncertainty to win in some controversial cases, for example by manipulating the legal system through pursuing their lawsuits only before certain judicial circuits that adopt the legal viewpoints which comply with their allegations.

Consequently, such a fact negatively affects the credibility of judges in the society, and it absolutely leads to contradicting legal decisions. Furthermore, such a status of uncertainty regarding legal judgments may lead to a negative feeling of injustice and inequality among citizens in Egyptian society. Moreover, litigants are unable to predict the outcome of their cases, which may lead to the loss of confidence in the judicial authority. Ultimately, such a conclusion will negatively affect the political stability of the state.

In this study, I argue that while judges adjudicate cases before them and try to find legal solutions through the application of law, they may also rely, in some cases, on both the letter of the law and the overarching activism directives behind it at the same time. Accordingly, I call this process of making law "the judicial activism of judges." I contend that such judicial activism relates mainly to the judges' thoughts, beliefs, conceptions, ideologies, education, environment, and experience;<sup>4</sup> consequently, this activism differs from one judge to another according to these factors.

This thesis aims to prove the existence of judicial activism by presenting, and reviewing several judgments that have been issued by Egyptian State Council judges which is the judicial entity that decides mainly thuman rights cases in Egypt in the context of Administrative Law. Furthermore, all of the studied judgments are separate

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<sup>3</sup> Unfortunately, some people strongly thought that legal decisions are like gambling; they cannot guess in advance judges' legal conclusions.

<sup>4</sup> I want to emphasize that one or more of these factors absolutely will affect his viewpoints and his judgments, such as whether he was born in a rural area or in the city, whether his education involves democratic notions or not, or whether he has been exposed to other cultures or not, along with the extent of his experience, fields of practice ... etc.



from religious beliefs. Moreover, I shall not determine a time limit for such study as judicial activism exists in both the ancient and the modern judgments. In addition, the cases that the study addresses involve both facts and legal rules that, to a very great extent, resemble each other; nevertheless we find a massive difference in the legal conclusions.

Chapter I of this study details the precise meaning of judicial activism and differentiates it from other notions that may resemble it, most notably politics and the discretionary power of judges. I provide an overview of the literatures written on the issue; some scholars adopt the viewpoint of applying the rules of law, others believe in the process of making law by judges. Moreover, the study presents a pragmatic study by offering some realistic cases from the Egyptian courts in order to prove the existence of judicial activism in these courts.

The ensuing chapters provide detailed applications of different notions of judicial activism in various contexts of litigation, namely: the right of women to wear face veils in Chapter II, the right of Egyptian citizens to change their religion as indicated on the National Identification Cards in Chapter III; the right of citizens with disabilities to be appointed to public office as diplomats in Chapter IV; and finally the right of female citizens to be appointed to public posts generally and to the judicial authority in particular as discussed in Chapter V.

## **I. Defining Judicial Activism**

According to the Separation of Powers principle, state authorities work independently; every authority has to undertake what is stipulated in the constitution. Consequently, the legislative authority has to “make laws,” the executive authority has to “implement” these laws, and finally the judiciary has to “settle” disputes only in accordance with the laws. In that scheme, the ordinary work of judges is to apply the state enacted laws of the country, yet in many cases we find judges making laws that are then applied to the existing disputes.

### **A. The Notion of the Judicial Activism:**

In two or more cases we may find similar facts which necessitate the application of the same legal provisions, but entirely different conclusions may be reached in each dispute. If we legally fix three elements, namely the facts of two cases, the close time period in which such facts took place, and the applied laws which govern such facts, we may find that, in some cases, the first judge deduces a certain legal conclusion that is totally distinct from the second judge's one. This is what is called judicial activism that forms the core of this study.

No doubt that the process of making law differs from the process of applying it; consequently, the crucial and critical question that arises in this context is about the legal meaning of judicial activism in terms of this study. A judge may legislate due to a particular interpretation that he gives to a certain law provision from his point of view, background, and ideology. This situation can take place in cases of broad or vague law provisions, such as human rights ones where fundamental rights are provided by the legislator without providing boundaries for such rights, and the judge's role is to determine the limitation of the rule's application. Thus, the judge may interpret a law provision in a manner that broadens or narrows its scope of application in order to achieve justice from his personal viewpoint. Moreover, the judge may legislate in order to overcome the problem of “hard cases” where the applied law runs out in order to fill such

gap. This study addresses the former case where the process of judges' interpretations is the main reason for their judgments differentiations.

There are two main viewpoints regarding intervention in the judiciary's work, namely adjudication and legislation. Some literature adopts the notion of adjudication; accordingly, they think that the sole role of judges is to apply law to the facts and cases before them.<sup>5</sup> The other school of thought believes that it may be absurd to think of the judge's sole role as merely applying the written rules; he may play a bigger role in many other cases which necessitates other tools rather than applying the law.<sup>6</sup>

Liberal law thinkers adopt the Separation of Powers principle; consequently, they think that judges are not permitted to make law; "judges should merely act as deputy to legislature not as deputy legislators; they should only apply legal principles."<sup>7</sup> According to such a normative view legislatures should legislate and only legislate, whereas courts should adjudicate and only adjudicate:

There is a massive difference between what can be called questions of law and questions of fact. The former falls within the judge's province because they involve objective questions of meaning rather than the subjective judgments that are required when we make the political choice to apply one rule or another to a given fact situation. Because of the fact that the process of making law is political, it should only be done by elected officials who operate under the norm of accountability to their constituents.<sup>8</sup>

This point of view asserts that such distinction between legislation and adjudication remains sharp even in light of the fact that law application will often require a reformulation of the rule before it can be applied to the facts or even in hard cases:

We are unsure at first brush how to apply the rules to the facts; we resolve the question through appealing to the definition of the words. As long as

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<sup>5</sup>Dworkin is a scholar who belongs to such normative school of thought.

<sup>6</sup> Such as Duncan Kennedy and Hale who belong to this modern school of thought.

<sup>7</sup> Ronald Dworkin, *The Model of Rules I*, at 28- 32 (Jan 1967), available at [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4614&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4614&context=fss_papers).

<sup>8</sup> Duncan Kennedy, *A Critique of Adjudication*, Harvard University Press, (1997) at 27

the process of reformulation is understood to the 'semantic' or 'deductive' in the sense of looking for the 'meaning' of the words that compose the rule to be applied, it is not, in this understanding, rulemaking even if the case is hard one.<sup>9</sup>

Regarding judges' ideological interventions in hard cases, this opinion concludes that "in fact legal principles are most conspicuously at play in hard cases, where they guide and constraint judicial decision making in the absence of legal rules."<sup>10</sup>

Ultimately, such viewpoint emphasizes the concept of professional judges who are responsible for the application of laws:

Since the determination of questions of right can be done objectively, rather than ideologically, it seems obvious that it should be. Therefore it should be entrusted to trained professionals operating under a norm of 'independent' fidelity to law.<sup>11</sup>

On the other hand, another group contends that if judges do apply law at all times, it seems equally obvious that judges constantly have to do something more than just applying law. Such view alleges that at a minimum, judges often have the job of resolving gaps, conflicts, or ambiguities in the system of legal norms. This group argues that "when it is said that there is a gap, conflict, or ambiguity in this sense, then it is also agreed that the judge who resolves it "makes" a new rule and then he applies it to the facts, rather than merely applying the preexisting rule."<sup>12</sup>

In addition, such a group thinks that judges, especially American ones, deny that they make law even in hard cases. Moreover, other writers note that if the function of a court, especially in a civil law system, is merely to apply the written law, such statement may be curtailed, and it would mean a very narrow judicial function:

When a court applies a law, it has to interpret that law; in the process of interpretation the court may well extend the scope of the law considerably

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<sup>9</sup>*Id.*, at 28.

<sup>10</sup> Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide For The Perplexed*, Public Law and Legal Theory Working Paper Series, Working Paper No.77, March 2007 at 11.

<sup>11</sup>Kennedy, *Supra* note 10 at 28.

<sup>12</sup> Kennedy, *Supra* note 10 at 28.

beyond that originally contemplated. By this method of interpretation and by filling in gaps where the written law is silent or insufficient, the civil law court can be considered as 'making' law interstitially.<sup>13</sup>

In addition, they assert that a judge makes law when he adheres to and respects precedents that were decided by other courts or even by him previously; accordingly, they become "*jurisprudence constante*."<sup>14</sup>

Moreover, positivist thinkers, such as Hale who constitutes a distinct school of law, believes that the law in a certain society is the sum of special rules used and agreed upon by the community<sup>15</sup> directly or indirectly for the purpose of determining which behavior will be punished or coerced by the public power.<sup>16</sup> Such rules have to be adopted by political institutions, such as the legislature or the judiciary. Because of this, positivists entitle judges with discretionary power in hard cases which may take place under two conditions. The first is where law is unclear or two rules contradict with each other. The second is where the law is clear but leads to absurdity:

If someone's case is not clearly covered by such a rule because there is none that seem appropriate, or those that seem appropriate are vague, or for some other reasons then that case cannot be decided by 'applying the law.' It must be decided by some official, like a judge, "exercising his discretion."<sup>17</sup>

## **B. Judicial Activism and Politics:**

This study distinguishes between working and engaging in political matters by judges which is called in the context of this study "politics" on the one side and "judicial activism" which means the personal interpretation of the legal provisions by judges on the other one. Accordingly, judges do not and should not engage in ordinary politics which

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<sup>13</sup> Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 426.

<sup>14</sup> *Id.*, at 427.

<sup>15</sup> Neil MacCormick, *The Concept of Law and 'The Concept of Law'*, 14, No. 1. Oxford Journal of Legal Studies, 17 (1994).

<sup>16</sup> Dworkin, *supra* note 9 at 17.

<sup>17</sup> Dworkin, *supra* note 9 at 17.

relates, in the context of this study, to the competence of both the legislative and executive authorities.

Despite the fact that judges enjoy the same political rights as ordinary citizens as stated by the law, and they are affected by the political events that take place around them, they are prohibited from reflecting their political opinions and viewpoints in their legal judgments.<sup>18</sup> Moreover, they cannot join any political party to engage in politics.<sup>19</sup> Consequently, judges' engagements in politics may take the form of supporting certain political ideas, or joining a certain political party and adopting its political viewpoints that may be in favor or against the state's political strategy.<sup>20</sup> Thus, political notions included in judges' legal verdicts lead to politicized verdicts which are prohibited by law. Accordingly, a judge's political idea that is not encompassed in his judgment may not form an engagement in politics, such as his personal political viewpoints regarding a certain political party.<sup>21</sup> Accordingly, we can say that judges' engagements in politics are seen in the *intentional* ideas or acts that they incorporate into their judgments. Politicized judges want to reflect their own political ideas in their judgments in order to support or defeat a certain group or notion.<sup>22</sup>

On the other hand, the idea of "judicial activism" is totally different from the notion of "politics". This is because the process of adjudicating a certain case takes several steps, namely the judge's comprehension of the disputed facts, the interpretation of the

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<sup>18</sup> See the law of organizing the practice of political rights no. 73 for the year of 1956 and its amendments; Judges have the right to vote in elections and referendums as ordinary people as stipulated in.

<sup>19</sup> See article 73 of the judicial authority law and article 95 of the State Council law. Both of them clearly states that "Judges are prohibited to practice and engage in politics."

<sup>20</sup> See the Egyptian Court of Cassation judgment no.34 issued in 14/3/1955; it decided that "if the judge expressed his opinion regarding a certain case before issuing his written decision in this case, such a decision in such case shall be void."

<sup>21</sup> It is worth mention that judges are not prohibited from disclosing their political viewpoints as long as such viewpoints are apart from the cases they are deciding. Judges are ordinary people who live in the society; consequently, they are influenced by political events that take place around them. In other words, judges are **only** prohibited from engaging into politics, such as joining political parties.

<sup>22</sup> After the Egyptian revolution, a judicial stream named "Kodah men AglMasr" appeared in the Media advocating a certain political group in public. Such judges were violating laws and they were dismissed from the Egyptian judiciary by the final legal decision of the Supreme Disciplinary Council. For more details see:

Mohamed Sameh, *Egypt's Supreme Disciplinary Council removes 32 judges from their posts*, Albawaba EG, March 28, 2016. available at: <http://www.albawabaeg.com/83412>

concerned and competent rule of law, and finally the application of these rules to these facts. Judicial activism relates mainly to the second element, namely the interpretation of law. Such a process is a purely mental activity which depends fundamentally on the way a judge comprehends such a rule of law. Such comprehension differs from one judge to another according to individual education, personal thoughts, and ideologies; this is what is called judicial activism. Consequently, judicial activism is the intangible personal ideas and principles which judges may include in their decisions unintentionally.

### **C. Judicial Activism and Judges Discretionary Power:**

The notion of judicial activism is entirely different from the conception of judges' discretionary power. Such power is granted to judges by the legislature in order to achieve justice. Consequently, this power is conferred mainly to the criminal law judge in order to augment or lessen the criminal's punishment according to some factual and legal factors that he assesses in the cases before him. As a result, such power is recognized by both the legislature and the judges and it is used by judges intentionally.<sup>23</sup> Moreover, such power is granted to the criminal law judge in almost all of the criminal cases that s/he adjudicates, whereas judicial activism takes place in some cases that relate mainly to the fundamental human rights of citizens in the society.

I think that the Egyptian legislator recognizes the existence of the judicial activism in the Administrative judiciary. Consequently, the legislator has created a certain circuit in the Supreme Administrative Court "The Unifying Principles Circuit"<sup>24</sup> in order to unify the contradicting administrative judgments in Egypt. In fact, some judges prefer to decide controversial cases, in spite of knowing that these cases have to be reviewed first by the Unifying Circuit; thus, they do not present such cases to this circuit. Accordingly, some conflicting judgments, unfortunately, are not legally revised by such circuit in order to resolve the conflict between them. Moreover, other judges do not comply with the

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<sup>23</sup> It is worth mentioning that many judges don't know anything about the judicial activism; they use such activism in their judgments without knowing that they are intervening in some way by their personal viewpoints in their judgments. On the other hand we may find other judges who deny such truth entirely.

<sup>24</sup> The original reads: دائرة توحيد المبادئ بالمحكمة الادارية العليا بمجلس الدولة

decisions that are issued from this legal circuit. This study addresses mainly the Egyptian judges in order to argue and prove that, in some cases, judges actually intervene with their personal opinions in their judgments.<sup>25</sup> Consequently, judges have to present every controversial and contradicting issue to the Unifying Circuit in order to unify the diverse viewpoints. In addition, they have to respect, apply, adhere to, and comply with such circuit legal decisions in order to avoid or even reduce the notion of contradicting judgments in Egypt.

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<sup>25</sup> Unfortunately, many judges do not recognize what may be called judicial activism, namely the unintentional subjective intervention in cases. They think that such variation in the judicial decisions may occur because of mere legal viewpoints.



## II. Wearing face-veils

As previously discussed State Council judges, while adjudicating cases before them, may depend on many other factors besides the pure application of law. Judges' ideologies, culture, beliefs, and social backgrounds may strongly affect their verdicts. This is what is called "judicial activism." Such intervention may take place in some human rights cases where courts interpret the notions, conceptions, definitions, limitations, and parameters of freedoms and liberties according to their ideological basis.

One of these freedoms that has been socially debated both by ordinary people and in courts is the issue of wearing women's face veil especially in public places, such as public institutions, universities, schools, judicial and military clubs. Despite the fact that such an issue may seem to reflect a religious debate, it is a social one and based on social convention.<sup>26</sup> This is because it is religiously recognized that wearing a veil is optional; consequently, it is neither mandatory nor forbidden.<sup>27</sup> In addition, such an issue relates to the basic human rights of people; consequently, it is governed by provisions that relate to personal freedom, freedom of belief, freedom of practicing religious rites, and equality.<sup>28</sup>

The Egyptian administrative judiciary has adopted two main approaches regarding the wearing of face veils. The first permits the wearing of veils, whereas the second does not

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<sup>26</sup> It has been stated in many verdicts of the Supreme administrative court that wearing veil is a mere social habit, as I will show later in this chapter.

<sup>27</sup> Such fact shall be illustrated in the chapter.

<sup>28</sup> Article 54 of the Egyptian constitution amended 2014 provides that "Personal freedom is a natural right, shall be protected and may not be infringed upon." The original reads: الحرية الشخصية حق طبيعي وهي مصونة لا تمس.

In addition, article 57 of the constitution states that "The right to privacy may not be violated, shall be protected and may not be infringed upon." The original reads: للحياة الخاصة حرمة وهي مصونة لا تمس. Furthermore, article 64 provides that "Freedom of belief is absolute. The freedom of practicing religious rituals and establishing worship places for the followers of Abrahamic religions is a right regulated by Law."

The original reads: حرية الاعتقاد مطلقة. وحرية ممارسة الشعائر الدينية وإقامة دور العبادة لأصحاب الأديان السماوية، حق ينظمه القانون.

Moreover, article 65 states that "Freedom of thought and opinion is guaranteed. Every person shall have the right to express his/her opinion verbally, in writing, through imagery, or by any other means of expression and publication." The original reads: حرية الفكر والرأى مكفولة. ولكل إنسان حق التعبير عن رأيه بالقول، أو بالكتابة، أو بالتصوير، أو غير ذلك من وسائل التعبير والنشر.

recognize such a perspective. Despite the fact that both parties relied on the same legal provisions that govern such a dispute, each one depends on separate arguments to reach the final conclusions. We can even find that inside the same body that has reached the same conclusion, each court has adopted specific reasons for rationalizing its final outcome; such justifications may dramatically differ from one court to another according to judges' beliefs and ideologies.

I shall demonstrate these two different judicial perspectives through examining four Egyptian veil cases that have been reviewed by the State Council and the Supreme Constitutional Court. I will begin with the branch that adopted the freedom of women to wear veils, then with the opposite one which restricted such freedom. Furthermore, I will not follow a chronological order; rather I will compare different judgments with each other to highlight the notion of policy in each one.<sup>29</sup>

#### **A. Proponents for women freedom to wear face-veils:**

There are many verdicts that emphasize the personal freedom of women to wear face veils in any place with some conditions, such as revealing their faces to other women for identity caution and security purposes. Courts have adopted different and distinct approaches in order to justify their conclusions. I shall discuss four court judgments that underline such freedom; however, they handled it from different perspectives according to the ideologies and beliefs of each court.

##### **1. NohaAmr v. AUC and the Ministry of High Education<sup>30</sup>:**

The first case *NohaAmr v. AUC* reflects the judicial viewpoint that supports the freedom of women to wear face veils.<sup>31</sup>

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<sup>29</sup> There is no need to follow a certain chronological order because I will not talk about political eras, rather I shall focus on different trends of the judiciary that may take place in even one year in order to prove that the different ideologies of judges are the reason for the differentiation in their legal verdicts not the time factor.

<sup>30</sup> *NohaAmr v. AUC*, 241 (2001).

<sup>31</sup> The plaintiff in this case (Noha) filed the law suit number 10566 for the judicial year 55 before the Administrative Judicial Court.

The plaintiff was an assistant professor in the faculty of translation and languages at AlAzhar University who was preparing for her Ph.D. degree. She used to benefit from the resources of the AUC library from 1988 during her Masters and her Ph.D. studies.

In 2001 the board of the faculties' deans at AUC decided that "for security reasons, it has been decided to ban wearing face-veil inside classes, laboratories, and libraries of the AUC."<sup>32</sup> Following this action, the plaintiff filed a lawsuit against AUC to void such a decision. She argued that the decision infringes on the freedoms and liberties that are guaranteed by the Egyptian constitution and laws. The court decided to overrule the AUC decision that banned the face-veil on its campus on the basis that wearing veils is permitted in Islam on an optional basis.<sup>33</sup> In addition, the court emphasized that such wearing is not criminalized in Egyptian law, and cannot be considered as immoderation in trend because it is socially recognized in Egyptian society. The court added that the sole entity that can prohibit the face-veil is the parliament; consequently, the administrative authority (the university) cannot issue such decisions as they are outside their legitimate authorities:

Wearing face-veil is not prohibited in the Islamic faith. For the veil remains one of the personal freedoms that reflect freedom of belief, and thus it cannot be totally restricted or banned on women even if such ban is in a specific area or place where she has the right to be in. Such a total ban, if it exists, represents an infringement upon personal freedom on wearing any garment and hence it is a restriction on freedom of belief. Wearing face-veil does not violate religion or customs as it reflects respectable garments for women that protect them. The legislative authority is the sole power that has the authority to completely ban face-veils in universities not the university or faculty boards.<sup>34</sup>

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<sup>32</sup>NohaAmr v. AUC, *supra* note30, at 243.

<sup>33</sup> This legal verdict was issued on 2/12/2001 by the Administrative Judicial Court in case no 10566 for the judicial year 55.

<sup>34</sup>NohaAmr v. AUC, *supra* note30, at 243. The original reads: واجبا وان لم يكن وجهها ان لا يكره العرف ويظل النقاب طليقا في غمار الحرية الشخصية شرعيا في رأى فانه في رأى آخر ليس بمحظور شرعا ولا يجرمه القانون كما لا يكره العرف ويظل النقاب طليقا في غمار الحرية الشخصية ومحررا في كنف الحرية العقيدية ومن ثم لا يجوز حظره بصفة مطلقة أو منعه بصورة كلية على المرأة ولو في جهة معينة أو مكان محدد مما يحق لها ارتياده لما يمثله هذا الحظر المطلق أو المنع الكلى من مساس بالحرية الشخصية في ارتداء الملابس ومن تقييد للحرية العقيدية ولو إقبالا على مذهب ذى عزيمة أو إعراضا عن آخر ذى رخصة دون تناقض مع قانون أو اصطدام بعرف بل تعريفا وافيا لصاحبه ومظهرا مغريا بالحشمة ورمزا داعيا للخلق القويم عامة فلا جناح على امرأة أخذت نفسها بمذهب شدد بالنقاب ولم ترتكن إلى آخر خفف بالحجاب أيا كان الرأى في حق المشرع الوضعى للدستور في الانتصار لمذهب شرعى على آخر فى مسألة أدخل فى العبادات أسوة بحقه هذا فى نطاق المعاملات رفعا للخلاف فيها وتوحيدا للتطبيق بشأنها فهذا الحق لا يثبت لغير السلطة التشريعية ولو كان من القائمين على المسؤولية فى غيرها مثل مجلس الجامعة أو رئيسها أو عمداء الكليات فلا يجوز لأيهام فرض ذلك الحظر المطلق والمنع التام للنقاب فى الجامعة أو الكلية .

## 2. The Unifying Principle Circuit Opinion:<sup>35</sup>

AUC appealed the verdict before the Supreme Administrative Court under appeal number 3219 for the judicial year 48. The appellant alleged that such a verdict infringed previous verdicts which were issued by the same court in other cases. Because of the fact that the Supreme Administrative Court found itself before more than one conflicted judicial approach regarding the wearing of veils, it decided to forward the dispute to the Unifying Principles Circuit.<sup>36</sup> The Unifying Principles Circuit supported the first degree court's judgment; however, it handled it from a different perspective. The court decided that the complete ban of the face-veil even in a specific place for a specific period of time violates the personal freedom of women. Furthermore, such a prohibition infringes the equality principle which is stated in the constitution:

If women have the full right to wear whatever garments they wish without any restrictions from anyone because of the personal freedom constitutional principle, Muslim women should also have the same right to wear whatever garments they believe in to save their modesty and respectability. Accordingly, there should not be any unconstitutional, illegitimate, and unjustified distinction between these two kinds of women.<sup>37</sup>

Moreover, the court argued that AUC did not prove its allegations regarding the existence of security considerations because of the wear of face veils. Accordingly, the court concluded that the sole reason for preventing the student from entering the AUC was the wearing of face veil.<sup>38</sup>

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<sup>35</sup> AUC v. NohaAmr 250 (2007).

<sup>36</sup> The Unifying Principle Circuit is one of the Supreme Administrative court's circuits. Its role is to unify the conflicted approaches and judgments that are issued by this court's circuits.

<sup>37</sup> AUC v. NohaAmr, *supra* note35, at 251. The original reads:

ومن حيث إنه يبين من ذلك أن المشرع الدستوري أضفى سباجاً من الحماية على الحرية الشخصية وعلى الحقوق و الحريات العامة ، ولما كان ارتداء النقاب بالنسبة للمرأة المسلمة هو أحد مظاهر هذه الحرية فإنه لا يجوز لجهة الإدارة أو أى جهة أخرى حظر ارتدائه حظراً مطلقاً . فكما يترك للمرأة عموماً الحرية فى أن ترتدى ما تشاء من الثياب غير مقيدة فى ذلك بضوابط الاحتشام نزولاً على الحرية الشخصية ، فإنه يحق كذلك للمرأة المسلمة أن ترتدى الزى الذى ترى فيه المحافظة على احتشامها ووقارها ، وألا تكون ثمة تفرقة غير مبررة بين الطائفتين لا سند لها من القانون أو الدستور .

<sup>38</sup> AUC v. NohaAmr, *supra* note35, at 251. The original reads: واذا لم تقدم الجامعة الطاعنة أى دليل على وجود سبب أمني يدعو إلى منع المطعمون ضدها من ارتداء النقاب ، كما أجدبت أوراق الطعن المائل تماماً من وجود أى مظهر من مظاهر الإخلال بالأمن

### 3. Mahmoud Samy v. The Ministry of Education and Isis Secondary School:<sup>39</sup>

Whereas the first degree court regarding this case supported the notion of women freedom to wear face-veils as in the previous case of *NohaAmr v. AUC*, the second degree one, beside the Supreme Constitutional Court rejected such a conception. The plaintiff in this case *Mahmoud Samy v. The Ministry of Education* filed a lawsuit before the Administrative Judicial Court against Isis Secondary School in Alexandria and the Ministry of Education.<sup>40</sup> He alleged that his two daughters were prevented from being admitted to the school because they wore face-veils. In addition, he argued that such exclusion from their school violates Islamic *Shari'a* and the personal freedoms of people embodied in the Egyptian constitution and laws. The Court decided to negate the school's decision on the basis of infringing on the constitution and the freedom of belief.

#### **B. Restricting women freedom to wear face-veils in some places with some conditions:**

Three judgments concluded the same legal outcome which restricts the freedom of women to wear face veils in public places; however, each one justified its result through different arguments.

#### **1. The Court of Appeal and the Supreme Constitutional Court Verdicts:**

After voiding the school's decision of banning the plaintiff's daughters from entering their school in the first instance court, the second degree court decided to send the dispute to the Supreme Constitutional Court in order to establish the school decision's constitutionality.<sup>41, 42</sup>

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داخل الجامعة من المطعمون ضدها ، وهو ما يعني أن منع ارتداء النقاب داخل الجامعة لم يكن لأسباب أمنية ، كما زعم قرار مجلس عمداء الكليات بالجامعة ، وإنما السبب الحقيقي هو منع ارتداء النقاب في حد ذاته .

<sup>39</sup> Mahmoud Samy v. The ministry of Education, 1026 (1996).

<sup>40</sup> The plaintiff filed the lawsuit number 21 for the judicial year 49.

<sup>41</sup> According to the Egyptian laws, the judge has the right to send and forward any dispute that is reviewed by him to the Supreme Constitutional Court in order to review the constitutionality of a certain law provision (s) that must be applied by him on the facts of such dispute.

The Supreme Constitutional Court annulled the Administrative Judicial Court's decision for a number of reasons. Firstly, the Constitutional Court argued that the guardian and superior of a certain place have the full power to determine the garments of women in such a place. Such garments have to be compatible with their society's existing traditions and customs.<sup>43</sup> Moreover, the court decided that taking off face-veil may lead to more modesty, shyness, and respectability for Muslim women as people shall know them; consequently, people may supervise and censor their diverse conducts and behaviors in the society.<sup>44</sup>

Furthermore, the court argued that women's garments have to be modest, moderate, and compatible with their society's standards and not their personal ones.<sup>45</sup> Accordingly, it argued that the face-veiled woman is immoderate in Egyptian society, thus the wearing of such veils may form an unacceptable behavior in the society.

The Court decided that the decision to take off the face-veils is optional in Islam; it neither infringes on the freedom of belief nor the freedom of practicing religious rites:

The issue of wearing veils is neither forbidden nor obligatory in Islam; accordingly, the decision of taking off face-veils does not relate to Islamic Shariaa, rather it relates to the regulation of a permissible issue.<sup>46</sup>

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<sup>42</sup> The dispute (21 for the year 49 Mahmoud Samy v. the Ministry of Education) was sent to the Supreme Constitutional Court to be registered under number 8 for the judicial year 17. The verdict was issued on 18/5/1996

<sup>43</sup> Mahmoud Samy v. The ministry of Education, *supra* note 39, at 1035. The original reads: واضافت المحكمة "انه يكون لولي الامر السلطة الكاملة التي يشرع بها الاحكام العملية في نطاقها تحديدا لهيئة رداؤها او ثيابها علي ضوء ما يكون سائدا في مجتمعها بين الناس مما يكون صحيحا من عاداتهم واعرافهم التي لا يصادم مفهومها نصا قطعيا بل يكون مضمونها متغيرا بتغير الزمان والمكان وان كان ضابطها ان تحقق الستر بمفهومه الشرعي ليكون تعبير المرأة تعبيراً عن عقيدتها.

<sup>44</sup> Mahmoud Samy v. The ministry of Education, *supra* note 39, at 1037. The original reads: وارادت المحكمة "بل ان كشفها لوجهها أعون علي اتصالها بأخلاق من الناس يعرفونها ويفرضون نوعاً من الرقابة علي سلوكها ، وهو كذلك اكفل لحياتها وعضها من بصرها وأصون لنفسيتها وأدعي لرفع الحرج عنها.

<sup>45</sup> Mahmoud Samy v. The ministry of Education *supra* note 39, at 1038. The original reads: واضافت المحكمة "ان زي المرأة ينبغي ان يكون مناسباً مذهباً وطرازاً - لا بمقاييسها الشخصية - ولكن بما يراعي احتشامها ويكون موافقاً لتقاليد واخلق مجتمعها".

<sup>46</sup> Mahmoud Samy v. The ministry of Education, *supra* note 39, at 1038. The original reads: واضافت المحكمة ان القرار المطعون فيه يدخل في دائرة تنظيم المباح ومن ثم لا يعد افتئاتاً علي حرية العقيدة

The Court determined the freedom of belief notion as forcing someone to join another religion or to leave his current religion unwillingly. Accordingly, the notion of taking off the face veil is separate from this freedom. In addition, the Court did not consider the decision to take off face-veils as violating personal freedoms of women:

Despite assuming that a person's garments reflect his/her free will and freedom in choosing his/her clothes, such freedom has to be limited to rights and matters that are closely related to his/her own personality and personal life, for instance the right to choose his/her spouse/husband and to have a family and a baby. Consequently, such freedom shall not extend to issues that relate to public interest, such as determining specific garments that have to be respected in a specific place.<sup>47</sup>

Finally, the court asserted that taking off the veil does not violate a woman's personal freedom as long as she belongs to a place that stipulates some conditions regarding people who belong to it:

A face-veiled woman has to respect the unified garments that are put and determined by specific entities if she wants to join one of them, such as the armed forces, the police, and hospitals. Such distinct garments shall distinguish women who belong to specific entities from others who are outside their circles. Accordingly, it shall not be any violation to personal freedom if a woman is hampered from wearing face-veil in a certain place as long as she belongs to such place.<sup>48</sup>

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<sup>47</sup>Mahmoud Samy v. The ministry of Education, *supra* note 39, at 1036. The original reads

وحيث انه وان جاز القول بأن مظهر الشخص من خلال الأزياء التي يرتديها يبلور ارادة الاختيار التي تمثل نطاقاً للحرية الفردية يرعي مقوماتها وجوهر خصائصها ، الا ان ارادة الاختيار هذه ينبغي قصر مجال عملها علي ما يكون لصيقاً بالشخصية ، مرتبطاً بذاتية الانسان في دائرة تبرز معها ملامح حياته الشخصية في أدق توجهاتها وأنبل مقاصدها كالحق في اختيار الزوج وتكوين الأسرة وأن يتخذ الشخص ولداً ، ولا يجوز بالتالي بسطها الي تنظيم محدد ينحصر في دائرة بذاتها يكون الصالح العام ماثلاً فيها ضيقاً لشئون هؤلاء الذين يقعون في محيطها... .

<sup>48</sup> Mahmoud Samy v. The ministry of Education, *supra* note 39, at 1037. The original reads:

إذا كان ارتداء النقاب بالنسبة للمرأة المسلمة هو إحدى مظاهر الحرية الشخصية فإن هذه الحرية لا ينافيها أن تلتزم المرأة المسلمة وفي دائرة بذاتها بالقيود التي تضعها الجهة الإدارية أو المرفق على الأزياء التي يرتديها بعض الأشخاص في موقعهم من هذه الدائرة لتكون لها ذاتيتها فلا تختلط أديتهم بغيرها ، بل ينسلخون في مظهرهم عن سواهم ليكون زيهم موحداً متجانساً ولائقاً بهم دالاً عليهم ومعرفاً بهم وميسراً صور التعامل معهم ، فلا تكون دائرتهم هذه نهياً لآخرين يقتحمونها غيلة وعدواناً ، ليلتبس الأمر في شأن من ينتمون إليها حقاً وصدقاً ، كما هو الشأن بالنسبة للقوات المسلحة والشرطة والمستشفيات وغيرها ، وترتيباً على ذلك فإن المرأة المسلمة التي ارتضت النقاب لباساً لها أخذاً بحريتها الشخصية أن تلتزم بما تقرضه تلك الجهات من أزياء على المنتمين لها في نطاق الدائرة التي تحددها إن هي رغبت في الاندراج ضمن أفراد تلك الدائرة .

Accordingly, the Supreme Constitutional Court concluded that the complete prohibition of face-veils for women in a specific place for a specific period of time is legal, licit, and constitutional as such regulation does not violate personal freedom, freedom of belief, and freedom of practicing religious rites.

## **2. RehamMostafa v. Ain Shams University:<sup>49</sup>**

The courts in RehamMostafa v. Ain Shams University supported the notion of restricting women to wear veils in public places.

### **The First Degree Judgment:**

The plaintiff, RehamMostafa, filed a lawsuit against the head of Ain Shams University as its legal representative to annul its decision that encompassed the absolute ban of wearing face-veils in exam halls.<sup>50</sup> Because of her refusal to take off her face-veil while taking her exams, the plaintiff was banned from continuing them. She alleged that such a ban contradicted the constitution, laws, human rights, personal freedoms, and the freedoms of belief and practicing religious rites.

The Court rejected the plaintiff's allegations on the basis of the necessity doctrine. It alleged that despite the fact that wearing face-veils is a personal freedom which may not be touched, it should be controlled if the conditions necessitate doing so. The court argued that due to the complicated process of administering exams, besides the huge number of examined students and the security required in exams, it is necessary to restrict such freedom during the exam time parameters:

Wearing a veil is a personal freedom that may be controlled and restricted in case of necessity. It is apparent from the case papers that there are some reasons which have obligated the university to issue its appealed decision, such as the hardship of examination works that needs complete capacity of all its employees, and rendering its administrative powers so as to accommodate hundreds of thousands of students attending examinations within a short period of time and limited space. Thus, there is no harm regarding a veiled student to

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<sup>49</sup>RehamMostafa v. Ain Shams University (2010).

<sup>50</sup> The first degree court decision was issued by the Administrative Judicial Court in 17/1/2010 in case number 10050 for the judicial year 64.



uncover her face during examination time as long as this is a temporary decision necessary for the smoothness of the examination and supervision processes which necessitate watching students' behavior and faces throughout the examination period.<sup>51</sup>

### **The Second Degree Judgment:<sup>52</sup>**

The appellant (RehamMostafa) pursued the appeal number 13628 for the judicial year 56 before the Supreme Administrative court. The appellant alleged that the first degree court violated the Egyptian constitution which safeguards personal freedom, equality, and the freedom of practicing religious rites from any infringements. The appellant added that it is irrational to oblige veiled women to uncover their face with the claim of achieving public welfare. She asserted her readiness to unveil her face so as to be identified whenever she was asked to do so, and to be searched for security reasons.

Despite the fact that the Supreme Administrative Court deduced the same conclusion as the First Degree Court, it relied on different arguments to justify its legal outcome.<sup>53</sup> The Supreme Administrative Court depended mainly on the opinion of The Egyptian High Commission for Religious Advisory Opinions (Dar Al-Ifta Al-Missriyyah) to prohibit the wearing of face-veils in specific places. Dar Al-Ifta advised in its opinion no. 14 dating 13/2/2011 that the guardian and superior shall have the full power to control the examination process:

It is permitted for the concerned authority (administration) as the authorized guardian and superior to control the examination process. Such an authority shall have the power to issue compulsory decisions that have to be religiously implemented by the examiners in the examination halls during the examinations time. Such opinion is based on the fact that wearing face-veils for women has been considered a tradition among most learned-Islamic scholars. In

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<sup>51</sup>RehamMostafa v. Ain Shams University, *supra* note 49 at 3. The original reads:

وشيدت المحكمة قضاؤها على أساس أن ارتداء النقاب من الحريات الشخصية التي يجوز في حالة الضرورة تنظيمها وفرض بعض القيود عليها طالما كانت حالة الضرورة قائمة، وأن البادي مما وسعته الأوراق أن ثمة أسباباً حدثت بالجامعة إلى إصدار قرارها المطعون فيه تحت وطأة أعمال الامتحانات التي تستوجب استنفاراً كاملاً لكافة أطراف العاملين بها ووضع كافة مكناتها الإدارية اللازمة لاستيعاب مئات الآلاف من الطلبة والطالبات لأداء الامتحانات في فترة زمنية محددة وفي أماكن محصورة، ومن ثم فإنه لا ضير أن تكشف الطالبة المنقبة عن وجهها أثناء أداء تلك الامتحانات طالما كان ذلك بصفة مؤقتة لحسن سير عملية الامتحانات وسداً للزرائع وانتقاء للشبهات خاصة وأن أعمال المراقبة ورصد حالات الغش تكمن في مراقبة سلوك الطلبة والطالبات وبصفة خاصة وجوهم طوال فترة أداء الامتحانات، ويكون القرار المطعون فيه قد قام على اعتبارات صحيحة لتحقيق المصلحة العامة مما ينتفي معه ركن الجدية اللازم لوقف تنفيذه والغائه.

<sup>52</sup>RehamMostafa v. Ain Shams University, 3 (2011).

<sup>53</sup> The court's verdict was issued on 23/4/2011.

addition, it has been decided by Muslim scholars that a ruler is allowed to restrict permitted rights and freedoms, and the ruler here is the authorized administration.<sup>54</sup>

Furthermore, Dar Al-Ifta argued that the appealed decision did not contradict article (2) of the 1971 Egyptian Constitution. Moreover, Dar Al-Ifta advised the administrative authority of the concerned university as its guardian that it should balance between garments of female students that guarantee their respect in their society on the one side and garments that reflect the society's religious values and social traditions on the other:

The guardian, regarding the debatable matters, has the right to put specific rules in order to facilitate people's lives and to reflect what is acceptable of their habits and traditions as long as such rules are compatible with the Islamic Sharia. Accordingly, one of these rules is organizing the wear and garment of women (within a specific area) so as to cover their bodies and private parts... In addition, their ways of wearing garments must be in accordance with their religious values which in fact reflect the morals and traditions of their society. Furthermore, it shall be considered an unpleasant behavior if a woman insisted to wear face-veil in such circumstances as Maleky doctrine believed that covering women's face is regarded as a disagreeable behavior if it is not a tradition in the concerned society and they mentioned that it is considered "immoderation in trend."<sup>55</sup>

Accordingly, the Supreme Administrative Court supported the legal decision of the first degree court; however, it handled the legal matter from a distinct perspective.

### C. Comparison and Analysis:

<sup>54</sup>RehamMostafa v. Ain Shams University, *supra* note 52, at 4. The original reads:

يجوز لجهة الادارة - باعتبارها وليا للأمر منوطا به تنظيم جريان الامتحانات ، بما لها من شروط مرعية لتحقيق اهدافها - ان تصدر أمرا واجب التنفيذ شرعا علي كافة من هو في موضوعه بحظر ارتداء النقاب داخل قاعات الامتحانات اثناء فترة ادائها تأسيسا علي أن ارتداء النقاب للمرأة المسلمة هو من قبيل العادات عند جمهور الفقهاء ، وانه تقرر لدي علماء المسلمين في قواعد فقهم ان للحاكم تقييد المباح ، وجهة الادارة في هذا المقام هي ولي الأمر.

<sup>55</sup> ولا يناقض القرار المطعون فيه - في كل ما تقدم - نص المادة (2) من دستور جمهورية مصر العربية الصادر عام 1971 والتي تقضي بأن "الإسلام دين الدولة واللغة العربية لغتها الرسمية ومبادئ الشريعة الإسلامية المصدر الرئيسي للتشريع" ذلك أن لولي الأمر - في المسائل الخلافية - حق الاجتهاد بما ييسر على الناس شئونهم ويعكس ما يكون صحيحا من عاداتهم وأعرافهم وبما لا يعطل المقاصد الكلية لشريعتهم التي لا ينافيها أن ينظم ولي الأمر - في دائرة بذاتها - لباس الفتاة فلا يكون كاشفاً عن عورتها أو ساقها ولا واثياً ببدنها أو منبها عما لا يجوز إظهاره من ملامحها أو نافياً لحيائها وهو ما توخاه هذا القرار حين ألزم كل تلميذة بإحدى المراحل التعليمية التي نص عليها بأن يكون زيتها مناسباً حائلاً دون تبذلها ناهياً عن عريها أو إظهار مفاتنها، بل إن أسلوبها في ارتداء زيتها يتعين فوق هذا أن يكون ملائماً لقيمها الدينية التي تندمج بالضرورة في أخلاق مجتمعتها وتقاليدها. ومن حيث إنه في ضوء ذلك يسلك القول بشرعية حظر النقاب داخل قاعات الامتحانات اثناء فترة ادائها بل أن التمسك بارتدائه - مع هذا الأمر - هو أقنيت على ولي الأمر لا يليق بمكارم الشريعة وهذا ما دعا مذهب المالكية برمته إلى النص على أن انتقاب المرأة مكروه إذا لم تجر عادة أهل بلدها بذلك وذكروا إنه من "الغلو في الدين". وانتهت دار الإفتاء المصرية في كتابها سالف الذكر إلى شرعية حظر النقاب داخل قاعات الامتحانات اثناء فترة ادائها".

All of the previous judgments agreed on the fact that the face veil is separate from religious matters, namely the wearing of the face-veil is permitted in Islam; it is optional.<sup>56</sup> Accordingly, it is neither mandatory nor prohibited in Islamic *Shariaa*.. The only court that did not rely on such a fact was the Court of Appeal in *RehamMostafa v. Ain Shams University*.<sup>57</sup> Despite the fact that wearing veils has been considered separate from religious debates, the court demanded the opinion of Dar Al-Ifta the highest committee in Egypt which is competent in giving religious opinions and advice. The Court required the opinion of Dar Al-Ifta on whether the guardian or the superior has the right in Islam to prohibit face-veils in universities and schools. Such a judicial decision reflects the court's policies and beliefs regarding the issue of wearing face-veils. The court believed it is a religious matter; consequently, it could not decide the case before inquiring about religious opinion. The court's judgment was issued in 2011; accordingly, the court absolutely knew the previous legal decisions that adjudicate the matter on a mere civil basis.<sup>58</sup> Unfortunately, the court depended mainly on Dar Al-Ifta opinion without stating any other reason, argument, or justification for its mysterious approach. Such an approach should be understood in light of the court's policies. By and large, such differentiation in the judges' approaches can be comprehended in light of their different policies, ideologies, and beliefs.

Despite the fact that both the first degree and the second degree courts regarding the case of *Reham Mostafa v. Ain Shams University* deduced the same conclusion, namely restricting the wearing of face-veil, each one of them provided distinct reasons and justifications according to respective beliefs and ideologies.<sup>59</sup> Accordingly, if the second degree judge relied on the right of the guardian to regulate the issue of wearing face-veils in specific places, such as universities, the first degree one depended on the right of the administrative authority to regulate face-veil due to the range of practical considerations and necessary matters within the examination process, for instance, avoiding cheating.

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<sup>56</sup> As I have previously asserted that wearing face veil is optional according to almost all the religious scholars; it is neither mandatory nor prohibited in Islam.

<sup>57</sup> *RehamMostafa v. Ain Shams University*, (2011).

<sup>58</sup> It is worth mentioning that Dar Al-Ifta's opinion admitted that wearing veils does not relate to a religious debate.

<sup>59</sup> *RehamMostafa v. Ain Shams University*, (2011).

Thus, if the first degree court depended on the examination process itself, the Court of Appeal relied on the authority of the guardian to regulate such examinations.

Despite the fact that the Supreme Constitutional and the Supreme Administrative Courts' judgments argued that the face-veiled woman is immoderate in trend in the Egyptian society, the wearing of such veils may form unacceptable behavior in this society; other verdicts considered it as acceptable behavior. They considered the same matter as an ordinary habit, and not criminalized by Egyptian laws; consequently, it is agreed upon conduct in Egyptian society. In spite of all being Egyptian judges who live in the same society, each one has his own policy, education, viewpoint, ideology, and beliefs as seen in these decisions.

In addition, some judgments that handled the matter of prohibiting face-veils from the viewpoint of the guardian's authority in a certain society to restrict such freedom alleges that such guardian is the administrative authority, for instance the university. On the other hand others argued that it is the authority of the judge, while the third category emphasized the power of the legislature to completely ban face-veils in specific places. Such differentiation in comprehension reflects judges' differentiation in their policies.<sup>60</sup>

Regarding the nexus between prohibiting the wearing of face-veils and personal freedom, we find two main judicial approaches that reflect different judges' policies. The first one which is adopted by all of the judgments except the Constitutional Court's one in *Mahmoud Samy v. the Ministry of Education* alleged that the complete restriction of face-veils in specific places for specific periods of time infringes women's personal freedom. Even the Administrative Judicial court's judgment in *Reham Mostafa v. Ain Shams University* that restricted such freedom admitted that such a restriction violates personal freedom; however, there is a necessity in doing so. On the contrary, the Supreme Constitutional Court's verdict in *Mahmoud Samy v. the Ministry of Education*, argued that the prohibition of face-veils in the previous circumstances does not violate women's

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<sup>60</sup> Egyptian law provisions are absent from determining the authority that has the power to completely ban the freedom of wearing face-veils in specific places. Accordingly, the judiciary's discretionary power may play a great role in such an issue.

personal freedom as the relation between them is absent. The judgment argued that the personal freedom of individuals has to be limited to rights and matters that are closely related to their own personality and personal life; consequently, personal freedom is strongly connected to the private interests of people. At the same time, the court emphasized that personal freedom does not extend to issues that relate to public interest, for instance restricting the wearing of face-veils.

Finally, the Constitutional Court's judges in *Mahmoud Samy v. the Ministry of Education* gave a distinct justification for banning face-veils that reflects the policy when they stated that "taking off face-veil may lead to more modesty, shyness, and respectability for Muslim women. Consequently, people may supervise and censor their diverse conducts and behaviors in the society."<sup>61</sup> Despite rejecting such a point of view, it is still a respectable viewpoint that reflects the judges' ideologies and beliefs.

To conclude this discussion, I would like to share my own experience as a judge. I wrote a judgment regarding the constitutional rights of face-veiled women in the Egyptian universities in 2010.<sup>62</sup> I justified my decision on reasons that also reflect my own policies and viewpoints on the subject. I think the administrative authorities in the universities have to find constitutional, legal, and appropriate means to balance between both the public interest of the state and the private one of students. Accordingly, it is irrational to hamper the right of women to wear face-veils on the basis that such garments may lead to the breach of law in universities, for instance, permitting cheating in exams. This is because the administrative authorities of universities have many other tools that may assure and guarantee the successful application of rules rather than the complete banning of face-veils for female students. Accordingly, such authorities may require all veiled students to unveil their face in order to verify their identities, and to be searched in order to be found free from possessing any means that could infringe the examination process.<sup>63</sup> In addition, it is illogical to educate and teach students the notions of personal freedoms,

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<sup>61</sup> Mahmoud Samy v. The ministry of Education, *supra* note 39, at 1037.

<sup>62</sup> Maha Adel v. Cairo University (2010).

<sup>63</sup> Moreover, the administrative authority may decide to take all the mobile phones from students within the frame time of examinations.

freedom of belief and practicing religious rites, and to then ban them from practicing such freedoms practically.

### **III. Proof of Religious Conversion in National Identification Cards**

Changing one's religion, especially from Islam to any other religion has been a controversial issue for the Egyptian State Council for a long time. It relates to the freedom of belief and the practicing of religious rites in Egyptian society. In this chapter, I am not aiming to discuss the purely religious matter of alteration of religious affiliation in Egypt; rather, I am focusing on a purely procedural and in that sense secular matter, namely the rules of evidence in supporting proof of such an alteration in the National Identification Card (ID).

In that sense, we may distinguish between two main judicial points of view that adjudicate such matters. On the one hand, the first judicial stream finds that the conversion of a religion, for instance from Islam to Christianity, must be reflected and proved on the National Identification Card, regardless of the issue of apostasy. This does not mean that the court recognizes such apostasy; it mainly relies on notions of “public order” to sustain this argument. However, the other view finds that the change of a religion on the Identification Card infringes on the public order as such conduct admits apostasy which is prohibited by Islam as a religion. The two conflicting decisions are detailed below and followed by a brief comparison and analysis.

#### **A. Proponents of Proof of Religious Conversion in National Identification Cards:**

The first opinion judges – because of their own ideologies and thinking – believe that any change in a citizen's information must be legally reflected and proved on his National Identification Card. The Identification Card should reflect the factual status of citizens in society.

## 1. GhadaBadawy v. Minister of Interior:<sup>64</sup>

The case of *GhadaBadawy v. Minister of Interior* reflects a distinct meaning of public order; in addition, the court relied on the conception of a civic state to rationalize its legal judgment.

The plaintiff in this case pursued a lawsuit before the Administrative Judicial Court against the Minister of Interior and the Head of the Civil Status Department<sup>65</sup> in order to force them to modify her name and religion from Islam to Christianity on her National Identification Card.<sup>66</sup> She alleged that she belonged to a Christian family and that her name was Ghada Tadros before changing her religion to Islam and her name to Ghada Badawy. She added that after adopting the Islamic religion for some years, she decided to re-adopt her original religion Christianity and had obtained the admission of the church to revert back to Christianity on 12/3/2001. However, the defendant refused to re-change her religion from Christianity to Islam in the ID on the grounds that such modification violated the Egyptian public order. Accordingly, the plaintiff sued the administrative authority on the grounds that its refusal infringed upon her freedom of belief and her right to practice the religion of her choice.

The Administrative Judicial Court decided on 26/4/2005 to strike down the administrative authority's decision on the grounds that the conversion of religion did not violate the freedom of belief. The administrative authority, in return, appealed the case before the Supreme Administrative Court on 10/5/2005 on the grounds that the first instance court's judgment infringed on Egyptian public order. The Supreme Administrative Court issued its verdict on 9/2/2008, supporting the first instance judgment. The second degree court argued that the legislature gives special attention to the personal status data, such as the Identification Card because it encompasses all the essential civil information for citizens, for instance their sex, religion, employment, marital status, and nationality. Such information is required for the citizens' formal and informal relations with their society.

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<sup>64</sup>GhadaBadawy v. Minister of Interior, 599 (2008).

<sup>65</sup> The Arabic translation for the Civil Status Department is مصلحة الأحوال المدنية

<sup>66</sup> The plaintiff in this case pursued the law suit number 24673 for the judicial year 58 before the first degree court (The Administrative Judicial Court).



Accordingly, the conversion of religion should be reflected and verified in the official papers because it may lead to serious consequences:

Because of the importance of such information, it has to be accurate, precise, and to reflect the actual statuses of citizens. Accordingly, the Civil Status Authority has to register any new data for any and every citizen in his/her Identification Card provided that he/she presented what is required to prove such new information. In addition, the personal status law obliged every person who reached sixteen years old to apply for an Identification Card and to continuously update his information in order to truly reflect all the essential data which is required in his relation with the community.<sup>67</sup>

Moreover, the court argued that the Civil Status Authority is bound by law to register any changes in the personal statuses of citizens even if such amendments involve religious beliefs. The Court states that all citizens have the right to change their religion provided that the new one is one of the three recognized religions in Egypt, namely Islam, Christianity, and Judaism. Furthermore, the court alleged that despite the fact that converting one's religion from Islam to Christianity is religiously prohibited in Islam, it is still legally permitted. This is because

Changing a religion from Islam to Christianity in a person's Identification Card does not mean at all that the court recognized his apostasy because apostasy is not religiously or even legally recognized. However, such modification in religion has to be registered and proved because of the considerations of the modern state. Such considerations necessitate that every citizen in the state has to carry an Identification Card. Since every change in a person's information may entirely change his legal position and status in his/her relation with people, official entities, or even the

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<sup>67</sup>GhadaBadawy v. Interior Affairs Minister, *supra* note 64, at605. The original reads: أولى المشرع رعاية خاصة لتنظيم قيد بيانات الأحوال المدنية للمواطنين ، ومنها بطاقة تحقيق الشخصية ؛ بحسبان أن هذه البطاقة هي الوعاء الذى ينطوى على البيانات المدنية الأساسية للمواطن والتي على أساسها يتم التعامل مع المجتمعسواء تمثل في الجهات الرسمية أو الافراد ، فهي الوثيقة الأساسية التي يرتكن اليها في تحديد نوع الشخص وديانته ووظيفته وحالته الاجتماعية وأهليته القانونية. ولذلك فإنه يجب أن تكون البيانات المدونة بها معبرة حقاً وصدقا عن واقع الحال للمواطن ، لذلك اوجب الشارع علي المواطن ان يسارع الي استخراج بطاقة تحقيق الشخصية متى بلغ ستة عشر عاما ، وان يبادر ايضا الي تحديث بياناتها اذا طرأ عليها اي تعديلات. ترتيبا على ذلك : يجب على مصلحة الأحوال المدنية متى تكاملت الوثائق التي تثبت صحة البيان الصادر عن الجهات المختصة أن تقيد البيان فى بطاقة تحقيق الشخصية دون أن يعد ذلك تسليمًا منها أو إقرارا بسلامة البيان.

whole community, the person's Identification Card must accurately reflect his/her civic and religious statuses.<sup>68</sup>

Consequently, the court's main concern while adjudicating this case was the conception of a modern state where the citizen's rights and obligations in his community are derived from his/her civil status.

In addition, the court provided a distinct definition of the public order in the context of changing religion. It stated that the conversion of a person's religion on his National Identification Card does not infringe at all on the Egyptian public order:

The registration for the new religion does not change the plaintiff's religion in itself; rather it merely proves the new legal position and status for the plaintiff. Accordingly, the plaintiff's new legal status has been founded by the admission of the Christian authorities to change his religion to the Christianity. In other words, the modification of religion in the National Identification Card is a reflection for a certain reality which is the intent of the plaintiff to change his religion and the admission of the Church to do so.<sup>69</sup>

The court concluded that the modification of religion in the Identification Card does not contradict public order. Accordingly it gave the example of marriage to prove its viewpoint. The court argued that the registration of a different religion resembles the registration of a marriage contract. This is because of the fact that marriage takes place factually before its registration; consequently, such registration is merely a way to prove this contract *ex post facto*.

<sup>68</sup>GhadaBadawy v. Interior Affairs Minister, *supra* note 64, at606-607. The original reads: قيد بيان تعديل الديانة من الإسلام إلى المسيحية في بيانات بطاقة تحقيق الشخصية لا يعد إقراراً لهذا الشخص على ما قام به ، لأن المرد لا يقر على رده طبقاً لمبادئ الشريعة الإسلامية وما استقرت عليه أحكام هذه المحكمة وأحكام محكمة النقض، وإنما يتم ذلك نزولاً على متطلبات الدولة الحديثة ، التي تقضى بأن يكون بيد كل مواطن وثيقة تثبت حالته المدنية ، بما فيها بيان الديانة - أساس ذلك : أن كل بيان منها يرتب مركزاً قانونياً للشخص لا يشاركه فيه غيره - مؤدى ذلك : على جهة الإدارة أن تثبت للمواطن بياناته على نحو واقعي في تاريخ إثباتها ، ومنها بيان الديانة وما يطرأ عليه من تعديل - شرط ذلك : أن تكون الديانة من الديانات السماوية الثلاث المعترف بها ؛ حتى تتحدد في ضوئها حقوقه وواجباته المدنية والشخصية ، ومركزه القانوني المترتب عليه الديانة التي يعتنقها ، على أن يثبت ذلك في بطاقة تحقيق الشخصية مع الإشارة في هذه البطاقة إلى سبق اعتناق الشخص للإسلام - أساس ذلك : يجب أن تعبر البطاقة بصدق عن معتقدات الشخص الحقيقي وواقع حاله الذي يتحدد في ضوئه مركزه القانوني - تطبيق.

<sup>69</sup>GhadaBadawy v. Interior Affairs Minister, *supra* note 64, at606. The original reads: وازدادت المحكمة أنه "ما كان يجوز لجهة الادارة الامتناع عن قيد المدعي بمقولة مخالفة ذلك للنظام العام. فالقيد في حد ذاته لا ينشئ مركزاً قانونياً لأن هذا المركز أنشئ بالفعل بمجرد قبول المطعون ضدها ابنة من بنات الديانة المسيحية ، والقيد ما هو الا تقرير لواقع غير منكور ومركز قانوني تكامل قبل القيد ليعبر عن حقيقة الواقع ، اعلنا للغير بحقيقة الديانة التي يعتنقها صاحب الشأن حتي يتم التعامل معه علي هذا الاساس وذلك مثل قيد بيانات الزواج فالقيد ليس هو الذي ينشئ المركز القانوني الناتج عن الزواج بل انه لا يصح قيد واقعة الزواج حتي اذا كان ثمة زواج تم بالفعل وتكاملت أركانه."

On the other hand, the court decided that the refusal to convert the religion by the administrative authority actually contradicts public order:

The Identification Card should reflect the factual statuses of citizens, especially their religions because they may lead to serious consequences. Consequently, if a person's true religion is not proved in his Identification Card, this may lead to many social complications that are prohibited by many religions, such as the marriage that may take place between an apostate and a Muslim woman.<sup>70</sup>

In short, the Supreme Administrative Court, as a court of appeal,<sup>71</sup> supported the first instance court in its previous verdict for the same legal reasons that were embodied in such legal judgment.

## **B. Opponents of Proof of Religious Conversion in National Identification Cards:**

The Second opinion judges argued that the conversion of a religion on the National Identification Card contradicts Islamic values and the Egyptian Constitution.

### **1. Reda Mohamed Ali v. Minister of Interior:<sup>72</sup>**

Unlike the previous case, the court in the case Reda Mohamed Ali v. Minister of Interior understood and handled the conception of public order and the civic state from a different perspective.

The plaintiff in this case filed a lawsuit on 22/12/2005 before the Administrative Judicial Court against the Minister of Interior and the head of the Civil Status Department in order to force them to modify his name and religion from Islam to Christianity on his National

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<sup>70</sup>GhadaBadawy v. Interior Affairs Minister, *supra* note 64, at 606. The original reads: *واستطردت المحكمة قائلة "ان الامتناع عن قيد البيان الذي يعبر عن الحالة الواقعية للمواطن هو الذي يتصادم مع النظام العام ، خاصة اذا كان يتعلق ببيان الديانة ، اذ يترتب علي ذلك ان الشخص يتعامل في المجتمع علي خلاف الدين الذي يعتنقه ويحرص علي اداء شعائره ، مما قد يؤدي الي تعقيدات اجتماعية ومحظورات شرعية مقطوع بها ، كحالة زواج مثل هذا الشخص المرتد من مسلمة وهو امر تحرمه الشريعة الاسلامية تحريما قاطعا ويعد اصلا من اصولها الكلية".*

<sup>71</sup> The Interior Affairs Minister v. GhadaBadawy in the appeal no. 64 for the judicial year 50.

<sup>72</sup>Reda Mohamed Ali v. Interior Affairs Minister, (2007).

Identification Card.<sup>73</sup> He alleged that he belonged to a Christian family and his original name was Basel RedaHalim before changing his religion to Islam and his name to Reda Mohamed Ali on 14/10/2000. He added that after adopting Islam for some years, he decided on 22/6/2005 to re-adopt his original religion, Christianity, and he obtained the permission of the church to return back to its fold. However, the defendant refused to re-change his religion from Christianity to Islam on the grounds that such modification violated the Egyptian public order. Accordingly, the plaintiff sued the administrative authority on the grounds that its refusal infringed upon his freedom of belief and right to practice his religious rites.

The court in its judgment on 29/5/2007 comprehended the matter of modifying the Islamic religion on the National Identification Card from a distinct point of view.<sup>74</sup> It emphasized the freedom of belief and the right to practice religion in Islam; however, it decided that changing a religion does not relate to such freedoms:

The court underlined the great difference between these two kinds of freedoms from one side and the notion of manipulating religious affiliation for other purposes. The idea of changing religion relates mainly to the notion of manipulation; consequently, it is apart from the freedom of belief and practicing religious rites. This is due to the fact that some manipulators seek to achieve some private goals from changing their religious affiliation.<sup>75</sup>

Moreover, the court argued that those manipulating religious affiliation want to ridicule and mock the two religions, namely the one which they adopted earlier and the later one. The court stated that the conversion of a religion passes through two phases:

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<sup>73</sup> The plaintiff in this case pursued the law suit number 8515 for the judicial year 60 before the Administrative Judicial Court (the first degree court).

<sup>74</sup> It is worth mentioning that the Supreme Administrative Court adopted the same legal opinion of this court as a first instance court in the Appeal no. 121 for the judicial year 49.

<sup>75</sup>Reda Mohamed Ali v. Interior Affairs Minister, *supra*note72, at7. The original reads: ومن حيث إنه ولئن كان قضاء هذه المحكمة قد استقر في العديد من أحكامها على إعلاء مبدأ حرية العقيدة وممارسة الشعائر الدينية كأحد المبادئ الأساسية للصيقة بشخص الإنسان، فإنها في نطاق الدعوى المطروحة تؤكد على أنه يوجد ثمة فارق كبير بين حرية الاعتقاد و ممارسة الشعائر الدينية ، وبين ما يطلبه البعض من حرية التلاعب في الاعتقاد بالتغيير من ديانة إلى أخرى لتحقيق مآرب دنيوية

The manipulation process commences by manipulating the original religion that the manipulator affiliates which is proved in all his/ her official documents, beside his relations with people in his community. Moreover, after changing his religion for a while the manipulator aims to mock the new adopted religion through deciding to abandon affiliating it suddenly after dealing with people by the name of this new religion.<sup>76</sup>

The Court emphasized that Islam respects all of the monotheistic religions, and it recognizes that each religion of these has its own distinct rules that should be honored. Moreover, it argued that there is a massive difference between the freedom to convert to a religion and the freedom of belief. The court articulated a distinct definition for freedom of belief:

The freedom of belief means that Islam does not coerce anybody to adopt its own rules and beliefs. However, if a person intended willingly to embrace this religion, he shall be bound by its strict rules, such as the complete prohibition of apostasy. This person knows in advance, before changing his religion to Islam, that he is religiously banned from re-changing his beliefs to any other religion. In addition, despite being advised by Christian scholars before changing his religion from Christianity to Islam (at the first time), such person insisted to change to Islam.<sup>77</sup>

As a result, the court concluded that it is irrational to give the claimant the chance to return to his first religion as his behavior is a form of pure mockery and manipulation of religious affiliation.

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<sup>76</sup>Reda Mohamed Ali v. Interior Affairs Minister, *supra* note 72, at 7. The original reads: واضافت المحكمة ان ذلك التلاعب يمر في حقيقته بمرحلتين أولهما تبدأ بالتلاعب بالدين الذي كان يعتنقه ، وصدرت على أساسه مستندات رسمية من جهة الإدارة ، وتمت تعاملاته مع المواطنين وغيرهم على ضوء ذلك الدين ، وثانيهما بالتلاعب بالديانة التي انصرف إليها فترة من حياته وتعامل خلالها مع الآخرين على ضوءها ، وذلك بزعم العودة إلى ديانته الأولى والحصول على موافقة الجهة الدينية الأخرى بذلك

ولما كان لكل دين من الأديان السماوية أحكامه الخاصة به وكان الدين الإسلامي في أساسه يقوم على حرية الاعتقاد، وحرية الدخول فيه دون ثمة إكراه مع احترامه الكامل للديانات السماوية الأخرى، إلا أن أصول أحكامه التي ارتضاها كل من دخل فيه تمنع من ولد عليه فطرة أو اعتقده بعد ذلك بإرادته الحرة من الخروج عليه بدعوى الارتداد إلى أي دين آخر، خاصة وأن تغيير الديانة من المسيحية إلى الإسلام لا يتم عرفاً وواقعاً إلا بعد جلسات للنصح والإرشاد يقوم بها رجال الدين المسيحي على ما هو متعارف عليه ، وهو ما يقطع بأن تارك دينه المسيحي عازف عنه عزوفاً لا رجعة فيه ليدخل في الدين الإسلامي بملء إرادته دون إكراه، راضياً بالالتزام بأحكامه وقواعده ومنها عدم الاعتداد بالردة أو الخروج من الدين الإسلامي بعد ذلك سواء بالعودة إلى دين سماوي آخر أو الخروج إلى غير دين سماوي كلية لأن القول بغير ذلك يؤدي إلى التلاعب بالأديان والعقائد والشرائع بما يتعارض مع القواعد الأمرة التي يفرضها النظام العام واستقرار المجتمع، الأمر الذي يضحى معه قبول رجوع الخارج عن الدين الإسلامي من هيئة دينية أخرى اعتداء على الديانة الإسلامية التي دخل فيها، وزج بالمعتقدات الدينية في أتون خلافات عقائدية.

Furthermore, the court rejected the notion of changing a religion from Islam to another religion on the basis of violating public order considerations. The court argued that the apostate has private interests for converting his religion; consequently, the court should not permit him to do so. Specifically, the court states that:

Islam is the official religion of Egypt as most of its citizens are Muslim. Accordingly, Islamic values form one of the essential bases of Egyptian public order. One of these values is the complete ban from disowning Islam. The freedom of belief is not free of any regulations; consequently, it has to respect and to be in accordance with Egyptian public order and public morals. Therefore, if the administrative authority admitted the change of religion from Islam to any other religion, such conduct shall absolutely violate the public order of Egyptian society.<sup>78</sup>

The court maintained that despite the fact that it has no authority over the internal beliefs of the apostate, it would not officially recognize apostasy, namely in the apostate's official papers, including the National Identification Card. In addition, the court argued that many apostates manipulate the legal system through religious conversion to satisfy their private and illicit interests, such as the Christian who changes his religion to Islam in order to divorce his Christian wife, then attempts to return to his original faith after achieving his goal.

### C. Comments and Analysis:

Though contradictory in their final judicial holding, State Council judges in the above two cases relied on the same legal provisions, namely international treaties, such as the International Covenant on Civil and Political Rights, and the Egyptian constitution, in order to resolve the matter of religious conversion. Both recognize that there is no explicit

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<sup>78</sup>Reda Mohamed Ali v. Interior Affairs Minister, *supra* note 72, at10. The original reads: واضافت المحكمة انه "قد استقر الوجدان القضائي علي رفض الدعاوى المرفوعة في هذا الخصوص منعا من التحايل على الأديان السماوية ومراعاة للنظام العام والآداب المرعية في دولة يدين اغلب مواطنيها بالدين الإسلامي بغض النظر كلية عن النص في الدستور على أن دين الدولة هو الدين الإسلامي من عدمه مما لا يجوز معه التحايل على تلك الأديان السماوية واتخاذها مطية لأهواء بعض الخارجين علي ديانتهم الأصلية المتلاعبين بأدائها وأحكامها أو الخارجين على القانون والأحكام القضائية بالتخفي وراء أسماء وديانات أخرى لحين تحقيق مآربهم غير السوية شرعاً وقانوناً.

provision that prohibits religious conversion from Islam to another, but rather that the Egyptian constitution states that the freedom of belief and the practicing of religious rites are guaranteed. Accordingly, each of the two judges interpreted the freedom of belief and the notion of the civil state from a distinct point of view that allows for judicial activism from the bench.

The first judge mainly relied on the civil state notion to comprehend and recognize the concept of converting from Islam to a different religion. Consequently, he exhibited a preference for Islamic values and beliefs on the one side and the civil state concept and practical considerations on the other. In spite of respecting Islamic values through recognizing the religious prohibition of apostasy, this judge preferred the conception of a civil modern state because of his own ideological basis. Accordingly, he adopted the view that revolved around the notion of freedom: every citizen is free to do whatever he wants provided that he does not harm anyone and his behavior is not banned by law.

Moreover, the judge emphasized the civic status of citizens which must accurately reflect his legal status in the society; as it determines his rights and duties in the community. Thus, he alleged that recognizing the change of the Islamic religion on the National Identification Card to any other religion does not recognize apostasy, namely the new religion that the apostate believes in. Rather, the judge argued that religious conversion does not violate Islamic values at all but merely reflects the apostate's internal beliefs that should also be shown in official papers.

On the other hand, the second judgment *Reda Mohamed Ali v. Minister of Interior* handled the whole matter from a religious viewpoint as opposed to relying mainly on the notion of a civic state. Accordingly, the second judicial stream considered the conversion of Islamic religion to another religion on the National Identification Card as pure apostasy and manipulation of religions. It contended that such permission infringed on religions' sacredness and respectability. In addition, the judgment distinguished between the freedom of belief and the freedom to change religions. It determined that the freedom of belief in Islam means that a religion does not coerce a person into adopting its own rules and beliefs; every person is free in his religious affiliation. Whereas the freedom to change a

religion means that a person wants to manipulate two religions in order to escape from the strict rules in one of them to more flexible ones in the other for a fixed period of time before returning back to his original religion after finishing his illicit goal – typically in matters of divorce and inheritance.

Regarding the issue of converting religions, each of the two judges posits a distinct definition and determination of public order based on his own beliefs and ideologies. The first judge in *Ghada Badawy v. Minister of Interior* believed that public order necessitates accurate civil status data for every citizen in society. This is because such civic information determines many crucial consequences for a citizen. Thus, the court concluded that dealing with a citizen through a manner that contradicts his genuine, civil and personal status, especially religious ones may lead to results that violate public order, such as the marriage between a Christian man and a Muslim woman which is religiously prohibited in Islam.

Unlike the previous judgment, the court in *Reda Mohamed Ali v. Minister of Interior* argued that because Islam is the formal religion of Egypt, any conduct that violates Islamic values must always and by definition infringe upon Egyptian public order. Thus, conversion from Islam to any other religion violates public order as apostasy is religiously prohibited in Islam.

Ultimately, if the first legal opinion in *Ghada Badawy v. Minister of Interior* because of the judge's own beliefs and persuasions depended fundamentally on the civil state conception, the second judicial stream in *Reda Mohamed Ali v. Minister of Interior* relied mainly on the Islamic state notion. In addition, if the second judgment found that conversion from Islam to any other religion violates public order, the first judgment contradicts this viewpoint through arguing that the non-alteration of one's religion might infringe upon Egyptian public order. Accordingly, each judge viewed Egyptian public order from a different viewpoint because of the differences in their ideological biases.

The next chapter discusses another case which reflects the differentiation between judges in their persuasions and thoughts. It relates to the right to reject disabled persons from official posts because of their disabilities. Some judicial judgments support such a conception, whereas others reject it.



## IV. Appointment of Visually Impaired Citizens to Diplomatic Service

Modern societies try hard to protect the human rights of their members whether abled or disabled. The guarantee and protection of persons' rights is one of the vital challenges that face many societies. Moreover, the appointment of people with disabilities in either the sphere of public or in private businesses is considered essential to human rights in modern societies. Accordingly, many international and national conventions, constitutions, and domestic laws seriously attempt to preserve such a right through notions of equality between the abled and disabled.

The Convention on the Rights of Persons with Disabilities issued by the United Nations General Assembly on December 1975, in addition to the Egyptian Constitution confirm the principles of equality and equal opportunities among citizens without discrimination.<sup>79</sup> Accordingly, all people have equal rights and duties, for instance the state guarantees the right to work for every citizen on the basis of equality and justice principles.

Domestic Egyptian laws and regulations try hard to safeguard the disabled work rights; they grant the disabled a specific quota in public profession appointments.<sup>80</sup> Accordingly,

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<sup>79</sup>The Convention on the Rights of Persons with Disabilities, 1975. It is very important to provide such a convention in this chapter because both judicial viewpoints illustrated in this study depend on it to rationalize their opinion. Available at: <http://www.un.org/disabilities/convention/conventionfull.shtml>

<sup>80</sup>Article 9 of the Egyptian Constitution 2014 states that: The State shall ensure equal opportunities for all citizens without discrimination. The original reads: *دون تمييز*. In addition, the constitution provides in article 12 that "work is a right, duty, and honor guaranteed by the state." The original reads: *العمل حق، وواجب، وشرف تكفله الدولة*.

Article 14 provides that: Public offices are a competence-based right for all citizens without bias or favoritism, and are deemed a mandate to serve the people. The Arabic translation reads: *الوظائف العامة حق للمواطنين على أساس الكفاءة، ودون محاباة أو وساطة، وتكليف للقائمين بها لخدمة الشعب*.

Article 53 of the Constitution states that "All citizens are equal before the Law. They are equal in rights, freedoms and general duties, without discrimination based on religion, belief, sex, origin, race, color, language, disability, social class, political or geographic affiliation or any other reason. Discrimination and incitement of hatred is a crime punished by Law. The State shall take necessary measures for eliminating all forms of discrimination." The original reads: *المواطنون لدى القانون سواء، وهم متساوون في الحقوق والحريات والواجبات العامة، لا تمييز بينهم بسبب الدين، أو العقيدة، أو الجنس، أو الأصل، أو العرق، أو اللون، أو اللغة، أو الإعاقة، أو المستوى الاجتماعي، أو الانتماء السياسي أو الجغرافي أو لأي سبب آخر. التمييز والحض على الكراهية جريمة يعاقب عليها القانون. تلتزم الدولة باتخاذ التدابير اللازمة للقضاء على كافة أشكال التمييز*.

Moreover, article 81 of the constitution states that "The State shall guarantee the health, economic, social, cultural, entertainment, sporting and educational rights of persons with disabilities and dwarves, strive to provide them with job opportunities, allocate a percentage of job opportunities to them, and adapt public

Egyptian laws attempt strongly to achieve equality between the abled and disabled. Nevertheless, many private and public employers reject the appointing of disabled persons on the basis that they are not qualified enough to fulfill posts' requirements.

The question arises in State Council case law concerning the right of the Egyptian Foreign Ministry to reject visually impaired applicants from appointment in its diplomatic and consular services. There are two main judicial viewpoints regarding this matter; the first believes in the inadmissibility of these applications as the required physical fitness stipulations are absent; consequently, the Ministry is under no obligation to form special committees to examine them.

The other point of view finds that the Ministry of Foreign Affairs is legally obligated to accept such applications, and that it should take the necessary measures and precautions to enable the visually impaired citizens to compete with other applicants. Moreover, this judicial opinion contends that the deprivation of the visually impaired citizens from applying to this type of jobs is considered discrimination against them; such discrimination clearly contradicts the Egyptian Constitution and the International Convention on the Rights of Persons with Disabilities.

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facilities and their surrounding environment to their special needs. The State shall also ensure their exercise of all political rights and integration with other citizens in compliance with the principles of equality, justice and equal opportunities. The original reads: *تلتزم الدولة بضمان حقوق الأشخاص ذوي الإعاقة والأقزام، صحياً واقتصادياً واجتماعياً وثقافياً وترفيهياً ورياضياً وتعليمياً، وتوفير فرص العمل لهم، مع تخصيص نسبة منها لهم، وتهيئة المرافق العامة والبيئة المحيطة بهم وممارستهم لجميع الحقوق السياسية ودمجهم مع غيرهم من المواطنين اعمالاً لمبادئ العدالة والمساواة وتكافؤ الفرص.*

Article (2) of the Egyptian Law of Rehabilitation of Disables no. 39 for the year 1975 states "the disabled is meant for every person became incapable to depend on himself to practice work with stability or deficiency, as a result of, physical or mental or sensational shortage or congenital deficit since birth. Rehabilitation of Disables is meant to provide social, psychological, medical, educational and vocational services for the handicapped or his family to help him overcome effects resulted in his disability." The Arabic translation reads:

يقصد في تطبيق احكام هذا القانون بكلمة المعوق، كل شخص أصبح غير قادر على الاعتماد على نفسه في مزاوله عمل أو القيام بعمل آخر والاستقرار فيه ونقصت قدرته على ذلك نتيجة لقصور عضوي أو عقلي أو حسي أو نتيجة عجز خلقي منذ الولادة.

ويقصد بتأهيل المعوقين تقديم الخدمات الاجتماعية والنفسية والطبية والتعليمية والمهنية التي يلزم توفيرها للمعوق وأسرته لتمكينه من التغلب على الآثار التي خلفت عن عجزه.

Article (3) of the same law states that "each handicapped has the right of rehabilitation, and the state provides these services free of charge within the limits of financials listed for this purpose in the State Budget..." The original reads: *للكل معوق حق التأهيل، وتؤدي الدولة خدمات التأهيل دون مقابل في حدود المبالغ المدرجة لهذا الغرض في الموازنة العامة للدولة*

## 1. Mahmoud Hassan Ghanem vs. the Ministry of Foreign Affairs:<sup>81</sup>

The plaintiff in this case was visually impaired; he held a Bachelor's degree in Political Science from the American University in Cairo (AUC) in 2011.<sup>82</sup> He then applied to the Diplomatic and Consular Service competition in 2012, and asked for a special committee to examine him taking into consideration his disability. Because this issue is controversial, the Ministry of Foreign Affairs asked the State Council's Advisory Department for its legal opinion.<sup>83</sup> The advisory department judges were divided into two groups; the first one rejected the notion of appointing the plaintiff as a visually impaired person to diplomatic and consular posts, whereas the second group supported it.

### A. Opponents of Appointing Visually impaired citizens to Diplomatic Posts:

The first opinion judges – because of their own ideological biases – believed that the rejection of the visually impaired in such professions does not discriminate against him; thus it is compatible with the law. In addition, the judges asserted that the inadmissible discrimination takes place between similar citizens, and there is no doubt that lack of sight makes the visually impaired different from his sighted counterpart, especially for this kind of job which depends mainly on sight. This viewpoint added that it is not accepted to state that the Convention on the Rights of Persons with Disabilities grants rights to disabled persons to hold all positions, whatever their types or tasks or requirements are not matching with their disabilities. For instance, to have a handicap in the legs of a person with disability prohibits him from being a policeman.<sup>84</sup>

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<sup>81</sup>Mahmoud Hassan Ghanem vs. the Foreign Affairs Ministry, 1 (2013).

<sup>82</sup> The case file no is 6/32/2/45 and the opinion has been issued from the Opinion Department of Justice, Foreign and Interior Affairs Ministers that follow the Egyptian State Council in 5/8/2013.

<sup>83</sup> The Opinion Department is a judicial one which follows the State Council and it consists of judges whose main tasks are to give legal opinions to the administration regarding the debatable issues. It is called in Arabic: قسم الفتوى بمجلس الدولة

<sup>84</sup>Mahmoud Hassan Ghanem vs. the Foreign Affairs Ministry, *supra* note 81, at 4. The Arabic original reads: إنه لا يوجد ثمة تمييز مخالف للقانون ضد الأشخاص فاقد البصر بسبب عدم قبول طلباتهم للتعيين في وظائف السلك الدبلوماسي والقنصلي. فالتمييز المنهي عنه يكون بين ذوي الظروف المتشابهة، ولا غشاضة في القول بأن فقدان تلك الطائفة لحاسة الإبصار يجعلهم في وضع مختلف عن نظرائهم المبصرين، خاصة بالنسبة إلى وظيفة تعد سلامة البصر فيها أحد مقومات شغلها. ومن غير المقبول القول بأن مؤدى هذه اتفاقية حقوق الأشخاص ذوي الإعاقة أحقية الشخص المعاق في شغل كافة الوظائف على اختلاف أنواعها وأشكالها حتى وإن كانت مقتضياتها ومهامها لا تتناسب مع إعاقته. فلا يُتصور على سبيل المثال، أن يقوم بمهام ضابط الشرطة شخصاً مصاباً بإعاقة في قدميه تعجزه عن الحركة.

Accordingly, this legal opinion held that the visually impaired lacks a critical capability that is required for the diplomatic and consular service, namely meeting the medical and health fitness requirement.<sup>85</sup> They underlined the fact that the right to work for persons with disabilities is ensured; however, such work should meet certain conditions in order for it to be approved. This opinion asserted that:

The right to work for the handicapped is guaranteed according to the convention on the Rights of Persons with Disabilities and the constitution; however, it stops at a rational limit. Such limit is the rational measures and procedures that can be provided by the administration for the handicapped. Consequently, if these procedures are absurd or irrational the administration commitment is over and so the handicapped right to practice work terminates.<sup>86</sup>

Judges who adopted the opinion of barring the visually impaired citizens from the diplomatic and consular careers tried to strengthen their point of view by focusing on some practical considerations, for instance financial ones. They asserted that the reasonableness of the visually impaired citizens' appointment should not lead to unnecessary burdens upon the Ministry:

Regarding the exams the Foreign Ministry will afford financial expenses in the formation of special committees to examine them; this notion may be unsuitable to the Ministry's budget. Moreover, in the case of passing exams and appointing them as diplomats, the Ministry will be committed to provide them with special arrangements along their serving period. These measures represent overload and extra financial burdens which are disproportionate to the Ministry's budget at least for the time being and the unfavorable economic conditions of the country.<sup>87</sup>

<sup>85</sup>Article (6) of Consular and diplomatic law no. 45 for the year 1982 states that "It is required to be appointed the follow:

- 1- To prove medical and health fitness for the job supervised by specialized medical council.
- 2- To pass successfully the competition exam the Ministry conducts for this purpose."

In Arabic it reads: يُشترط فيمن يُعين في وظيفة ملحق ما يلي :

1. أن تثبت لياقته الصحية للوظيفة بمعرفة المجلس الطبي المختص.
- 2 أن يجتاز بنجاح إمتحان المسابقة الذي تجريه الوزارة لهذا الغرض

<sup>86</sup>Mahmoud Hassan Ghanem vs. the Foreign Affairs Ministry, *supra* note 81, at 4. The original reads: الحق في العمل على قدم المساواة مع الآخرين مكفول بلا شك للأشخاص المعاقين بمقتضى أحكام تلك الاتفاقية، ولكنه يقف عند حد "المعقولة" فإذا كانت هذه الترتيبات غير معقولة، انقضى التزام الإدارة بتوفيرها وسقط من ثم حق الشخص المعاق في ممارسة العمل المعني بالمساواة بالآخرين.

<sup>87</sup>The original reads: ومناطق المعقولة في هذا الخصوص، كما جاء بأحكام الاتفاقية، هو ألا يترتب على ممارسة الشخص المعاق لحقه في العمل، بعد اتخاذ التدابير التيسيرية اللازمة، تحميل الإدارة "عبئاً غير متناسب أو غير ضروري". وعليه، وبالنظر إلى أن قبول الطلبات المقدمة من الأشخاص فاقد البصر للالتحاق بالاختبارات الخاصة بمسابقة التعيين في وظائف السلك الدبلوماسي والقنصلي يقتضي تحمل

Ultimately, this opinion concludes that if some foreign countries try to protect human rights through appointing disabled persons such as the visually impaired citizens in some sensitive jobs, it is not a must for this country to appoint them in such places in order to reach the same targets.<sup>88</sup> Accordingly, opponents of appointing the visually impaired citizens in the diplomatic posts believe that such viewpoint does not discriminate against disabled persons because they lack the requirements of the concerned posts. The issue of lacking the stipulations of a certain post, such as the medical one depends on judges' own experiences, beliefs, and thoughts.

### **B. Proponents of Appointing Visually impaired citizens to Diplomatic Posts:**

The second group of judges – because of their different beliefs, opinions, and culture, in short their ideological biases – totally contradict the first group which rejected the visually impaired citizens' appointment. They believed that people with disabilities should enjoy the same rights side by side with fully-able citizens. Moreover, they added that the deprivation of handicapped citizens from holding specific positions because of their disabilities represents direct discrimination against them:

The international agreements and the constitution ban all kinds of discrimination against citizens with disabilities. Consequently the deprivation from holding specific positions represents extreme discrimination against them. All feelings of injustice, oppression and lack of affiliation will be entrenched to them.<sup>89</sup>

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وزارة الخارجية لنفقات مادية تتمثل في تكاليف تشكيل لجنة خاصة لاختبارهم وهو ما قد يكون غير متناسب مع الميزانية المخصصة لهذه المسابقة، هذا فضلا عن أنه حال اجتيازهم لتلك الاختبارات وتعيينهم كدبلوماسيين، فإن الوزارة ستظل ملتزمة بالنفقات المرتبطة بتوفير الترتيبات التي تساعد على أداء مهامهم الوظيفية، وذلك طيلة مدة خدمتهم، فهي تمثل التزام مادي جد مرهق، وغير متناسب، كما أنه غير ضروري ولا طائل من وراءه، فلن يعود على وزارة الخارجية ثمة نفع من استخدام دبلوماسيين مكفوفين لا يستطيعون القيام بمهامهم الوظيفية بمفردهم.

عدم ملائمة التوقيت بالنسبة لقبول المواطنين فاقد البصر للعمل بوظائف السلك الدبلوماسي والقنصلي، ومن ثم فإن مصر غير ملتزمة بقبول الأشخاص المكفوفين للعمل بالسلك الدبلوماسي والقنصلي على الأقل في الوقت الحالي، وذلك في ضوء ما يرتبط بذلك من نفقات وما تمر به البلاد من ظروف اقتصادية غير مواتية.

إذا كانت بعض الدول الأجنبية تجيز تعيين المكفوفين في الوظائف الهامة والحساسة كوظائف السلك الدبلوماسي،<sup>88</sup> The original reads: فليس بالإزام على الدول الأخرى أن تسير في نفس الدرب للوصول لذات الأهداف.

- <sup>89</sup>Mahmoud Hassan Ghanem vs. the Foreign Affairs Ministry, *supra* note 81, at 5. The original reads: ولما كانت اتفاقية حقوق الأشخاص ذوي الإعاقة حظرت كافة أنواع التمييز ضد الأشخاص ذوي الإعاقة، فإن هذا النوع يمثل أقصى درجات التمييز وأشدّها تعسفاً وإجحافاً، إذ أن من شأنه غلق الباب المؤدي للتعيين بوظائف معينة أمام فئة بعينها، وهو ما يرسخ لديهم مشاعر الظلم والاضطهاد وعدم الانتماء.

Accordingly, this judicial opinion clearly contradicts the previous one; they interpreted the notion of discrimination from a distinct perspective. Such interpretation relies mainly on their personal thoughts, experiences, and ideologies.

In addition, this opinion refuted the first opinion's argument regarding the absence of disabled citizens' medical fitness. It finds that citizens with disabilities still enjoy adequate fitness, and they can fulfill specific jobs in the diplomatic arena. Consequently, they emphasized that medical fitness has to be assessed within the context of reasonable arrangements provided by the Foreign Ministry:

The facilitating arrangements provide persons with disabilities with the required fitness to commit certain diplomatic tasks and jobs. Thus, the visually impaired – using a facilitating measure – may hold a position in an airline company as one of its staff; nevertheless, it is not necessary to work as a pilot whose task is to drive planes. Accordingly, the visually impaired can undertake certain technical missions that comply with his disabilities and are apart from a task that does not comply with his disability.<sup>90</sup>

Consequently, this point of view believes that the entire prohibition of persons with disabilities from diplomatic posts is considered discrimination against them, and it contradicts the constitutional principles of equality and equal opportunity among Egyptian citizens.

Unlike the first group, judges holding this point of view interpreted the international conventions and the Egyptian constitution in a way that serves people with disabilities. They believed that the duties and responsibilities of diplomats are likely to encompass some managerial positions. Accordingly, they thought that there was no problem to be done by the visually impaired with the appropriate measures provided by the Foreign

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<sup>90</sup>Mahmoud Hassan Ghanem vs. the Foreign Affairs Ministry, *supra* note 81, at 5. The original reads: عندما يبدأ الشخص ذو الإعاقة حياته الوظيفية بجهة ما على كادر وظيفي معين، فإن ذلك لا يعني أنه يعد أهلاً لشغل كل الوظائف بهذه الجهة وذلك الكادر حتى وإن كانت لا تتناسب البنية مع إعاقته بالرغم من اتخاذ كافة التدابير التي يكون الغرض منها مساعدته على أداء مهامه الوظيفية. فعلى سبيل المثال، قد يلتحق شخص ضرير للعمل بشركة طيران بالكادر الوظيفي المهني، إلا أنه ليس من الضروري أن يعمل طياراً وتكون مهمته الإقلاع بالطائرات وقيادتها في الجو والهبوط بها في مكان الوصول المنشود، فملكاته لا تساعد على القيام بهذه المهام، ولا يتصور لحالته ثمة ترتيبات تيسيرية معونة. ومع ذلك فلا مشكلة أن يشغل وظيفة بذات الشركة، تنطوي واجباتها على جوانب فنية أيضاً، ويتمتع من خلالها بذات المزايا الوظيفية، ولكنها لا تتعلق بالطيران، ويستطيع القيام بها بالاستعانة بالتدابير التيسيرية التي توفرها له جهة عمله.

Ministry, such as providing the visually impaired with assistants to help them in reading and writing. In addition, they asserted that if a certain task has to be done by the visually impaired diplomat by himself/herself for security reasons, it is possible to use modern, adaptive, and technological means to enable him/her to do such a task without assistance, such as using a specific scanner to listen to what is included in a certain document.<sup>91</sup>

This viewpoint rebuts the opposing viewpoint through alleging that the facilitating measures that should be provided by the Foreign Ministry must not bear its budget unreasonable costs; accordingly, such costs can be easily afforded. Judges holding this viewpoint believed that the whole matter in every job promotion initiative will include only a few visually impaired citizens; consequently, it is not conceivable for the Ministry to pay extra expenses in order to examine them via special committees, or to provide them with facilitating means:

The ministry will not be obliged to provide citizens with disabilities with the facilitating arrangements along their serving period. Furthermore, it is inaccurate to allege that such arrangements are impractical, expensive, or out of the reasonable limits. This is because these arrangements are estimated according to every case and responsibilities of each diplomatic function separately.<sup>92</sup>

Those judges strengthened their viewpoint by demonstrating the privileges of the visually impaired citizens; they argued that:

Losing sight does not mean losing insight, creativity and excellence; furthermore, the visually impaired may be a stimulant for a person to prove himself and his skills. The visually impaired citizens can enjoy

= <sup>91</sup>Mahmoud Hassan Ghanem vs. the Foreign Affairs Ministry, *supra* note 81, at 6. The original reads: وبملاحظة واجبات ومسؤوليات أعضاء السلك الدبلوماسي والقنصلي يبين أنها يغلب عليها الطابع الإداري وليست هناك مشكلة في أن يقوم بها أحد الأشخاص فاقد البصر بالاستعانة بالتدابير التي تلتزم وزارة الخارجية بتوفيرها له وفقا لأحكام الاتفاقية المذكورة، ومنها على سبيل المثال توفير موظف مساعد يستعين به الدبلوماسي في القراءة والكتابة والقيام بمختلف الأعمال الأخرى. وإن تعلق الأمر بمهمة يتعين على الدبلوماسي القيام به بمفرده لا اعتبارات السرية والخصوصية، فمن الممكن عندئذ أن يستعين بالوسائل التكنولوجية الحديثة التي تمكنه وبها يستطيع (adaptive technology) من القيام بهذه المهمة دون أن يشاركه فيها أحد، ومن ضمن ذلك ما يعرف بتكنولوجيا المحاكاة الدبلوماسي الكفيف، على سبيل المثال، الاستماع لكل ما تحويه المستندات التي يتم تحميلها على جهاز الحاسب الآلي بواسطة الماسح . ولذلك، فإن فقدان الشخص لبصره لا يفقده شرط اللياقة الطبية المطلوب للتعيين في هذه الوظيفة، والقول بغير ذلك (scanner) الضوئي يعد تمييزاً ضده بسبب اعاقته وفقاً لأحكام الاتفاقية المذكورة.

<sup>92</sup>Mahmoud Hassan Ghanem vs. the Foreign Affairs Ministry, *supra* note 81, at 6. The original reads: كما أنه لا سند للإدعاء بأنه حال تعيين الأشخاص فاقد البصر بوظائف السلك الدبلوماسي والقنصلي، فإن الوزارة سوف تضحي ملتزمة بتوفير التدابير التي تمكنهم من أداء مهامهم الوظيفية طيلة مدة خدمتهم، وهي تدابير غير عملية وتنطوي على تكاليف مرهقة ومن ثم تخرج عن حدود المعقولية، لأن تلك التدابير تُقدر بحسب كل حالة ووفقاً لمسؤوليات كل وظيفة دبلوماسية على حدة.

some characteristics which their sighted counterparts don't have, for instance the Arabic Literature Dean Taha Hussein who enriched the Arabic Library with original literature all over the world. He also held several academic and governmental positions, for example as Minister of Education.<sup>93</sup>

Ultimately, those judges concluded their opinion through stating the most essential point in their arguments, namely the achievement of democracy and equal opportunity principles. They confirmed that the nomination of the visually impaired in diplomatic and consular posts reflects how civilized Egyptian authorities. Nations are judged on how much they respect their nationals and their major freedoms. Appointing the visually impaired to a diplomatic position is a source of pride for Egypt among foreign nations. Moreover, it reflects how much Egyptian authorities respect citizens' right to work despite disability.<sup>94</sup>

To sum up, proponents of visually impaired citizens' appointment to diplomatic and consular posts believe that they have the right to equal opportunities with their fully-abled counterparts. Hence, they should not be deprived entirely from holding these positions in a comprehensive manner. In addition, they asserted that it should be taken into account that the occupation of certain posts is subject to the discretion of the Foreign Ministry in light of the visually impaired 's ability to do what the concerned position might require them to do. In other words, the Ministry is obligated to appoint the visually impaired citizens to diplomatic posts commensurate with their abilities after providing the necessary facilitating arrangements.

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<sup>93</sup>Mahmoud Hassan Ghanem vs. the Foreign Affairs Ministry, *supra* note 81, at 7. The original reads: فقدان البصر لا يمنع من التمتع بالبصيرة والابداع والتفوق، بل أنه قد يكون حافزا لإثبات الذات والإبداع والتفوق، فقد يتمتع الأشخاص المكفوفين بمزايا لا يمتلكها أقرانهم المبصرين. وخير مثال على ذلك عميد الأدب العربي طه حسين، الذي أثرى المكتبة العربية بالعديد من الأعمال التي لا تضاهي وكان فخرا لنا بين سائر الأمم، كما أنه تولى العديد من المناصب الأكاديمية والحكومية وكان منها وزير المعارف.

<sup>94</sup>Mahmoud Hassan Ghanem vs. the Foreign Affairs Ministry, *supra* note 81, at 8. The original reads: تعيين المواطنين فاقد البصر في وظائف السلك الدبلوماسي والقنصلي من شأنه أن يعكس مدى تحضر السلطات المصرية ومواكبتها للعصر وخصوصا في زمان علت فيه مبادئ حقوق الإنسان في مدارج النظام القانوني الدولي وأضحت الدول تُقيم فيه وتُصنف بالنظر إلى مدى احترامها لحقوق مواطنيها وحياتهم الأساسية، فإن من شأن تعيين الشخص الكفيف بوظيفة دبلوماسي أن يصبح مصدرا للفخر والاعتزاز لمصر بين سائر البلدان الأخرى التي يقوم بتمثيلها لديهم، بحسبانه يعكس مدى احترام سلطات الدولة لحقه في العمل والسماح له بتقلد هذا المنصب الهام والحساس بالرغم من فقدانه للبصر.



### C. The Advisory Opinion of the General Assembly for the advisory and Legislation Departments Regarding Visually impaired citizens:<sup>95</sup>

Because of such controversial judicial opinions regarding the visually impaired appointment to diplomatic and consulate posts, the issue was presented to the General Assembly's Advisory and Legislation Departments in the Egyptian State Council for its legal opinion.<sup>96</sup> The General Assembly supported the viewpoint of the first group on the grounds that the medical and health fitness levels needed to comply with the requirements of the job that are set by law. Consequently, the General Assembly concluded that the visually impaired do not meet the required fitness levels for diplomatic posts. The General Assembly highlighted the reasons:

Missions of diplomatic posts, include mainly the corresponding means usage in various types especially encrypted messaging, beside the ability of an effective contact with foreign countries representatives. This communication imposes the diplomat to detect the impressions and excitements of other countries representatives and their behavior to be conveyed to his own country officials. These affairs are appreciated in nation's relations, as these tasks are supposed to have several individual meetings with counterparts some of them are secret. Furthermore, missions of documentation, attending conferences and accompanying the participating delegations need sense of sight, as the person in charge should do it solitary without assistantship.<sup>97</sup>

#### Comparison and Analysis:

Despite the fact that each judicial stream relies mainly on the same legal provisions, namely the International Convention on the Rights of Persons with Disabilities and the

<sup>95</sup>The General Assembly for the advisory and Legislation departments at the State Council (2013).

The General Assembly is considered the competent entity that adjudicates the debatable matters between diverse advisory departments. The Original reads: الجمعية العمومية لقسمي الفتوي والتشريع بمجلس الدولة المصري

<sup>96</sup>File no.1139/3/86 – session 9/10/2013

<sup>97</sup>The General Assembly, *supra* note 95. The original reads: ولما كانت المهام المنوطة بأعضاء السلك الدبلوماسي تتضمن بشكل أساسي استخدام وسائل المراسلة بمختلف أنواعها خاصة المشفرة منها بالإضافة إلى القدرة على التواصل الفعال مع ممثلي الدول الأجنبية، بما يفرضه هذا التواصل من تبين الدبلوماسي بذاته لتعبيرات وانفعالات من يلتقي بهم من ممثلي الدول الأخرى وطريقة وموضع جلوسهم لنقل ذلك إلى المسؤولين بالدولة التي ينتمي إليها وهي كلها أمور محل تقدير في علاقات الدول فضلاً عما يفترضه هذا العمل من تعدد اللقاءات الفردية مع نظرائه والتي لا يمكن بحال إلا أن يكون الدبلوماسي فيها منفرداً مع نظيره دون مساعد لما يغلفها من اعتبارات السرية فضلاً عن اضطلاع الدبلوماسي بمهام مساعدة وحماية المواطنين المصريين الموجودين في دائرة اختصاص البعثات التمثيلية ومباشرة الأعمال القنصلية المكلف بها البعثات التمثيلية والتي من بينها التوثيق وحضور المؤتمرات ومرافقة الوفود المشاركة وهي أمور كلها تفترض تمتع من يقوم بها بنعمة البصر وقيامه بها بمفرده دون مساعدة. وترتيباً على ما تقدم فإن فقد البصر يحول ابتداء دون توفر شرط اللياقة الصحية المطلوب قانوناً لشغل هذه الوظيفة، ومن ثم لا يجوز قبول أوراق المعروضة حالته في امتحان المسابقة الذي تعقده وزارة الخارجية للتعيين في وظيفة ملحق دبلوماسي.

Egyptian constitution and laws, they reached distinctly different conclusions. I think that each group believes in certain ideas, and wants to reach a conclusion that complies with such ideas. These ideas may be derived mainly from the judge's ideologies, personal thoughts, experiences, and education.

I think that the opponents of the visually impaired citizens appointment to diplomatic and consular posts adopt certain ideas that are not as democratic, civilized, and open minded as the second group. Despite the fact that such a stream pretends to manifest their rejection to appoint visually impaired as diplomat on a practical and pragmatic basis, for example the expensiveness and cost of the facilitating measures provided by the Ministry and the absence of the required fitness level, I believe that such arguments are not the principle ones. The major reason for their refusal is their personal attitude towards disabled people. I do not question their belief in the right to work of people with disabilities, such as the visually impaired; however, this right is limited to certain professions. Such an opinion finds that the right to work for these people cannot be extended to certain posts, namely the "sovereign" ones, even if such disabled people are qualified to fulfill the professional requirements. According to such a view the exclusion of visually impaired citizens from the diplomatic and consulate fields does not entail discrimination against them.

I think such a point of view is widely adopted in Egyptian society; it is a common notion in Egyptian culture because of our education, exposure, vision and attitude regarding the disabled as a whole and visually impaired in particular. Accordingly, we cannot find a visually impaired judge, a military officer or even a police officer who is visually impaired even if his qualifications and capabilities are enough to qualify him to work for these sovereign entities. I am not arguing that he may be appointed as an officer whose task is to pursue criminal in the street; rather the administration is bound to find a suitable and appropriate post that complies with his competences.

On the other hand proponents of visually impaired appointment to diplomatic positions understand the same legal provisions from a different viewpoint; they handled

this matter from a distinct legal viewpoint. They believe that visually impaired citizens have the right to be appointed to every place and profession that complies with their abilities and capacities. Moreover, they think that the exemption of visually impaired from special posts contradicts international conventions and the Egyptian provisions of equality, equal opportunities, and nondiscrimination. Accordingly, judges in this judicial stream differ mainly from the first one; they interpret international conventions and the constitution in a way that serves people with disabilities. Furthermore, they try hard to balance disabled people's human rights which involve their rights to work and to be equal to able-bodied people on the one side and their capabilities on the other.

I believe that such massive conflict in State Council jurisprudence regarding these two positions can be comprehended in light of their distinct education, culture, and personal formation and thoughts. This is the rational interpretation that may clarify the significant mental differentiation between judges to comprehend certain subjects, despite the fact that such a subject is governed by certain, specific, and fixed legal provisions.

## V. Appointment of Women to Public Service

According to successive Egyptian constitutions women are equal to men in their rights and responsibilities.<sup>98</sup> Nevertheless, the issue of appointing women to public servant positions including as judges in Egypt has been a controversial issue for many years. Despite the fact that the Egyptian Constitution and laws guarantee equality between men and women in almost all fields of life, such an issue is contested in State Council case law. Some cases support women serving as public servants and judges, whereas others strongly reject this notion. I shall demonstrate firstly the appointment of women to public posts then in the judicial ones.

### A. Appointing Women to Public Posts:*Fawzia Michael Hanna v. Minister of Health*<sup>99</sup> and *Mona Taher v. Minister of Health*:<sup>100</sup>

There are two cases that reflect the two main judicial viewpoints regarding public service appointment.

#### 1. Proponents of Women Appointment to Public Posts:

The facts of the above two cases *Fawzia Michael Hanna v. Minister of Health* and *Mona Taher v. Minister of Health* are almost the same. Both plaintiffs held Bachelor degrees of science from Cairo University and then applied to the Health Ministry for appointment as chemists in its laboratories. Both of them succeeded in the Ministry exams, and signed all of the required official papers in order to be hired; however, the Ministry rejected their appointment in spite of their successful applications. Consequently, each plaintiff filed a lawsuit against the Ministry of Health before the Judicial Administrative Court.<sup>101</sup> The plaintiffs alleged that in spite of fulfilling all of the required conditions for the concerned posts, the Ministry still rejected their appointment. The court decided on 29/6/1960 in *Fawzia Michael Hanna v. Minister of Health* and on 28/12/1960 in *Mona Taher v. Minister of Health* that they deserve compensation for being dismissed as chemists in the Ministry laboratories:

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<sup>98</sup> Several Constitutions have equalized between women and men, such as Egyptian 1923, 1930, 1956, 1971, 2014 constitutions.

<sup>99</sup> *Fawzia Michael Hanna v. the Minister of Health*.1 (1960).

<sup>100</sup> *Mona Taher v. the Minister of Health*.1 (1960).

<sup>101</sup> *Fawzia Michael* pursued the suit no. 1137 for the judicial year 13, whereas *Mona Taher* pursued the lawsuit no. 395 for the judicial law 14.

The Ministry of health has to compensate the plaintiff because of two main reasons; firstly, the competition announcement does not involve any legal condition that stipulates the appointment has to be for men only. Secondly, the plaintiff fulfilled all the legal conditions and the medical examinations that are required for the post; consequently, she has to be appointed without any restrictions and obstacles.<sup>102</sup>

## 2. Opponents of Women Appointment to Public Posts:

The Ministry of Health appealed the above two verdicts before the Supreme Administrative Court as a second degree court.<sup>103</sup> The Supreme Court abolished the first degree judgments and reached a different conclusion based on a distinct interpretation of the constitutional provisions of equality and equal opportunity among Egyptian citizens. The court decided on 21/3/1963 for *Fawzia Michael Hanna v. Minister of Health* and on 28/2/1965 for *Mona Taher v. Minister of Health* to reject their appointment as public servants on the basis that they were not discriminated against rather it was a question of ministry discretion:

It is not a breach of legitimacy or equality concepts, if the plaintiff is not appointed as a chemist in the Ministry laboratories. Not only do the excellence and efficiency criteria qualify the applicant for the concerned post, but also there is another criterion which is the administration's discretionary power in the light of the applicant's marital status, gender, environmental conditions, tradition and custom.<sup>104</sup>

Accordingly, the Court recognized the notions of custom and tradition as essential criteria in the public post appointment. It considered that such legal viewpoint complies with the Constitution and the existing laws as its main goal is public interest and the common good:

The administration has the right to assess the validity of an applicant woman to fulfill the conditions of a certain public profession in light of some environmental factors, traditions, social customs, and the nature and responsibilities of the post itself in order to achieve the public interest and

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<sup>102</sup>Fawzia Michael Hanna v. the Minister of Health, *supra* note 99 at 2. The original reads: قضت المحكمة بتعويض المدعية طالبة الالتحاق بالعمل بوظيفة كيميائي بمصلحة المعامل بسبب اولا شروط المسابقة خلت من شرط عدم صلاحية الاناث لتولي الوظيفة المعلن عنها. بالاضافة الي ان المدعية نجحت وقدمت مسوغات تعيينها ونجحت في القومسيون الطبي ومن ثم اصبحت جاهزة للتعيين بغير عائق ، وذلك فان عدم تعيينها خطأ من الادارة يستوجب التعويض.

<sup>103</sup>The suit no. 1137 for the judicial year 13 was appealed by the appeal no. 2536 for the judicial year 6, whereas the suit no. 395 for the judicial year 14 was appealed by the appeal no. 898 for the judicial year 7.

<sup>104</sup>The Minister of Health v. Mona Taher.2 (1963). The original reads " مجرد عدم تعيين المدعية وتعيين من يليها في ترتيب " النجاح في مسابقة العمل ككيميائي بمصلحة المعامل لا ينطوي على اخلال بالمشروعية ومبدأ المساواة ، لان التفوق والكفاءة ليس هو المعيار الوحيد المؤهل للوظيفة العامة وانما هناك معايير اخري تقدرها الادارة مثل الحالة الاجتماعية والجنس وظروف البيئة واحكام العرف.

the common good. The court asserted that such conception does not contradict with the constitutional principles of equality and equal opportunity among citizens in Egyptian society.<sup>105</sup>

Moreover, the Court tried to rationalize its legal viewpoint by focusing on the conception of women's comfort and relief. Accordingly, the Court contended that the nature of the post that the plaintiff sought may exhaust her as such posts necessitate the continuous and considerable travel from one place to another. This may force the plaintiff for example to ride livestock on bumpy roads, or towalk on foot for long distances, or even to accompany taxi drivers alone. Consequently, the Court concluded that such risks and hardship, if imposed on a woman violates the appropriate conditions that should be provided for women in public posts. Accordingly, if the administration limited such kinds of jobs to men, this is due to their capability to bear the hardship and burden.<sup>106</sup>

Ultimately, the Court tried hardly to convince its legal audience of its judicial viewpoint, and it depended on more than one argument for such mission. I strongly believe that the massive differentiation in the previous viewpoints is related to judges' different ideologies and experiences.

## **B. Appointing Women to Judicial Posts:**

Not only have some courts rejected the appointment of women to public posts, but also there are other courts that have dismissed women appointed as judges in judicial entities in Egypt.

### **1. Proponents for Traditions and Customs notions as Criteria for Women Appointment to Judicial Posts: FawziaAbdElSattar v. Minister of Justice and AmenaMostafa v. Minister of Justice:**

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<sup>105</sup>The Minister of Health v. Fawzia Michael Hanna. 3 (1960). The original reads: وإذا كان الدستور ينص علي المساواة في الحقوق العامة ، فان ذلك يختلف كثيرا عن حق الادارة في تقدير صلاحية المرأة للقيام بمهام بعض الوظائف العامة وفقا لعوامل البيئة واحكام التقاليد والعرف وطبيعة الوظيفة ومسؤولياتها تحقيقا للصالح العام. والامر لا يتعلق باحتقار شأنها او الانتقاص منها.

<sup>106</sup>The Minister of Health v. Mona Taher, *supra note* 104 at 4. The original reads: الوظيفة التي تسعى اليها المدعية بمصلحة المعامل تقع مراكزها في الغالب بالقرى النائية خارج القاهرة وفي الصعيد ، وان طبيعة هذه الوظيفة تتطلب كثرة الانتقال من موقع لآخر لاجراء التحاليل اللازمة ، بما يستوجب استقلال الموظف للدواب في مسالك وعرة ، او السير علي الاقدام لمسافات طويلة ، او مرافقة سائق الاجرة بمفرده. ولذلك فان هذه المشقة والمخاطر اذا فرضت علي المرأة تعارضت مع الظروف الملائمة التي يجب توفيرها للمرأة في الوظيفة العامة. ولذلك فان جهة الادارة تقصر هذه الوظائف للرجال الاقدر علي تحمل اعبائها ومشقاتها.

The above two cases *Fawzia Abd El Sattar v. Minister of Justice* and *Amena Mostafa v. Minister of Justice* relate to the appointment of women to judicial posts. The plaintiffs in both cases held Bachelor degrees in law, and applied for appointment in the judicial posts. The first one applied to be a judge in the Egyptian State Council, whereas the second plaintiff aimed to be a lawyer in the Governmental Cases Department.<sup>107</sup> In spite of fulfilling the requirements set for these professions, the Minister of Justice rejected their appointment to the judicial posts; consequently, each one filed a lawsuit against the Ministry of Justice in protest.<sup>108</sup>

Both first and second degree courts refused to appoint them on the same basis as shown before, namely customs and traditions in the Egyptian society which restrict their appointment:

Women may not be entirely prohibited from being appointed as judges or members in the judicial bodies, otherwise viewpoint shall actually violate the constitutional conceptions of equality and equal opportunities between people in the Egyptian society.<sup>109</sup>

Despite the fact that the court prohibited an entire ban of women appointment as judges, it introduced a serious exception. The Court asserted that the Ministry has the discretionary power to determine the appropriateness and convenience of its decision; it has the power to set the *appropriatetime* for women to hold public posts, such as judicial ones. Such power is granted to the Ministry without any judicial supervision as long as its main goal is to achieve public interest and the common good. Accordingly, the Court contended that if the Ministry decided to exclude the plaintiff from judicial posts because of the *inappropriate time* for the appointment, the Ministry did not violate the Egyptian Constitution as long as such a ban is temporary. The Ministry has to undertake such power in light of the environmental conditions, customs and traditions, social considerations, and the nature of every post.

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<sup>107</sup>The Arabic translation shall be "هيئة قضايا الدولة او قلم قضايا الحكومة سابقاً"

<sup>108</sup>The first plaintiff pursued the suit no. 30 for the judicial year 4 before the Administrative Judicial Court which issued its judgment on 2/2/1952, and it was appealed before the Supreme Administrative Court by the appeal no. 243 for the judicial year 6 and the judicial verdict was issued on 22/12/1953.

The second plaintiff filed the lawsuit no. 33 for the judicial year 4 before the Supreme Administrative court which issued its judgment on 20/2/1952.

<sup>109</sup>*FawziaAbdElSattar v. the Minister of Justice*. 2 (1952). The original reads: مقتضى مساواة المرأة بالرجل في الحقوق والواجبات بالنسبة للوظائف هو عدم جواز حرمانها علي وجه مطلق من تولي هذه الوظائف والاعمال والا كان ذلك مخالفا لمبدأ المساواة. كما لا يجوز حرمان المرأة بصفة مطلقة وفي كل زمان لتولي منصب القضاء او الهيئات القضائية.

Moreover, the Court added that such conception is totally apart from women contempt or detraction in her society.<sup>110</sup>

Accordingly, the Court considered some criteria, such as customs and traditions to determine the appropriate time for appointment. Not only did the Court set the notion of "the appropriate time" as an exception, but also it determined a new exception for women's appointment as judges. The Court decided that the woman applicant has to be "developed and valid enough" in order to hold a specific profession:

The Ministry shall have the discretionary power to determine whether or not a woman has been improved and developed enough in order to be appropriate for a certain post. Accordingly, the Ministry is obliged to equalize between a man and a woman if such woman fulfills all the validity reasons to be appointed in the concerned post.<sup>111</sup>

Thus, it is obvious that the court relied mainly on subjective criteria for women's appointment in judicial bodies. Such criteria varies from one judge to another according to each judge's experience, personal knowledge, environment, and ideologies.

## **2. Opponents for Traditions and Customs notions as Criteria for Women Appointment to Judicial Posts: Hanem Mohamed Hasan v. Minister of Justice:**

The court in *Hanem Mohamed Hasan v. Minister of Justice* adopted a distinct legal viewpoint; it did not consider custom and tradition as criteria for women's appointment to judicial posts.

The plaintiff in this case held a Bachelor's degree in law, and applied for appointment as a judge at the State Council. In spite of fulfilling the requirements set for such a position as in

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<sup>110</sup>AmenaMostafa v. the Minister of Justice. 2 (1952). The original reads: تتمتع الادارة بسلطة ملائمة اصدار قراراتها. للادارة ان تقدر من غير تعسف مدي ملائمة الوقت الذي تتولي فيه المرأة بعض المناصب والوظائف العامة كالعامل بالقضاء، فهي رخصة للادارة بمقتضى سلطتها التقديرية مستهدية في ذلك بطروف البيئة والتقاليد والعرف والاعتبارات الاجتماعية واحوال كل وظيفة وملابساتها ، ولا معقب عليها من القضاء طالما ابتغت الصالح العام. عدم تعيين المدعية في وظيفة قضائية بحجة ان الوقت لم يحن بعد لتوليها هذه الوظيفة لا يخالف الدستور. عدم تعيين المرأة لا يعد ذلك انتقاصا من مكانة المرأة او كرامتها او مستواها الادبي او الثقافي او العلمي.

<sup>111</sup>FawziaAbdElSattar v. the Minister of Justice, *supra* note109 at 5. The original reads: يجب ان يترك للادارة السلطة التقديرية لتحديد ما اذا كانت المرأة بالنسبة لوظيفة او منصب محدد قد تطورت الي حد الصلاحية لشغل هذا المنصب او الوظيفة ، فان رأت الادارة ان المرأة استوفت اسباب الصلاحية كان عليها ان تساويها بالرجل بالنسبة لتلك الوظيفة او المنصب.



the other cases, the Minister rejected the appointment; consequently, she filed a lawsuit against the Ministry of Justice in protest.<sup>112</sup> Despite the fact that the Court reached the same conclusion as the previous judgments, its legal verdict contradicted entirely the previous ones. The court confirmed that the Ministry regularly excluded women from judicial posts because of two main reasons. The first one relates to the Egyptian social customs and traditions which involve the conception of inferiority; women are lower than men due to their physical formation or because they may be underdeveloped if they are compared to men. Secondly, the mistaken comprehension of the Islamic *Shari'a* that women are forbidden from being judges.<sup>113</sup>

The court decided to discard the notion of custom and traditions as the main criteria for appointment to judicial posts. The court emphasized that women can hold public office:

The role of custom and traditions in Egyptian society has been developed in a way that admits women to hold public office. Accordingly, it shall not be admissible anymore to exclude women from public posts and judicial professions because of custom and traditions, tough environmental conditions, or even some posts special stipulations.<sup>114</sup>

Despite the fact that the court reached the same conclusion as the previous judgments, it did not rely on traditions to exclude the plaintiff. The court used the argument of Islamic *Shari'a* to dismiss the plaintiff from being appointed as a judge:

Because of the fact that the appointment of women as judges is a controversial issue in Islamic *Shari'a*, the Ministry is totally free to adopt one of the two contradicting opinions as long as it is aiming at achieving the

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<sup>112</sup>The suit no. 316 for the judicial year 20 before the Supreme Administrative Court, and the judgment was issued in 2/6/1979.

<sup>113</sup>Hanem Mohamed Hasan v. the Minister of Justice. 2 (1979). The original reads: العناصر التي بنت عليها الجهة الإدارية تقديرها بعدم ملائمة تعيين المدعية في منصب القضاء اذا ما ردت الي اصولها الموجودة في البيئة المصرية فانها تتجسد في اصلين اساسيين اولهما: العرف المتمثل في نظرة المجتمع منذ القدم الي المرأة علي انها ادني مستوي واقل شأنًا من الرجل سواء بسبب طبيعة تكوينها الخلقي ، او بسبب تخلفها عن الرجل في مدارج العلم والثقافة ، وثانيهما الفهم الشائع لاحكام الشريعة الاسلامية علي انها لا تجيز تقليد المرأة الولايات العامة علي اطلاق منها ومنها ولاية القضاء".

<sup>114</sup>*Id.*, at 4. The original reads: تؤكد المحكمة ان قواعد العرف في المجتمع المصري قد تطورت في مجال الاعتراف بحق المرأة في تقلد المناصب والوظائف العامة بما لا يسوغ معه بعد ذلك الاستناد الي العرف والتقاليد وظروف البيئة وأحوال الوظائف لحرمان المرأة من تقلد منصب القضاء.

public good.<sup>115</sup> Accordingly, the Ministry is right to rely on the religious opinion that bans women from holding judicial posts.<sup>116</sup>

### 3. The Egyptian State Council General Assembly opinion:<sup>117</sup>

The notion of prohibiting women from being appointed as judges has been continued from the 1960s until now. Accordingly, the General Assembly of the State Council<sup>118</sup> decided in 2010 with almost total consensus to defer the appointment of women as judges in the Council. The judges argued that the dismissal of women is due to several reasons, such as the seriousness and importance of the issue which necessitates more time to be studied well. Moreover, the judges argued that such a deferral may take place due to the lack of safe and secure places for women to stay when presiding over a trial and the lack of nurseries for their children. I totally believe that the actual reason for such a rejection is judges' own beliefs and ideologies regarding women's appointment as judges. These conceptions are strongly related to customs and traditions in the Egyptian society.

### C. Comparison and Analysis:

Despite the fact that each judicial opinion relied on the same legal provisions, for instance the International Declaration of Human Rights and the successive Egyptian constitutions<sup>119</sup> which provided for the equality of citizens before the law in their rights and duties, they reached different conclusions.

The legal viewpoint which granted the Ministry wide discretionary power concerning the appointment of women to public and judicial posts depended on subjective criteria, for instance customs, traditions, social circumstances, the appropriate time for appointment, and

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<sup>115</sup>It is worth mentioning that Islamic *Shari'a* involves two contradicting religious viewpoints; the first one admits women to hold judicial posts, whereas the second one bans such concept.

<sup>116</sup>Hanem Mohamed Hasan v. the Minister of Justice, *supra* note 113 at 5. The original reads: انتهت المحكمة الي رفض الدعوي بزعم ان موضوع تعيين المرأة بوظيفة القضاء هو من الامور الخلافية في الشريعة الاسلامية بين مؤيد ومعارض وان جهة الادارة لها الحق في تبني وجهة النظر المعارضة دون الاخرى.

<sup>117</sup>The Egyptian Center for Women's Rights, *Broken Justice in Egypt* (Dec.2010), available at <http://ecwronline.org/?p=1187>

<sup>118</sup>The General Assembly of the State Council is composed of all chancellors and judges of the State Council who have the right to vote in its decisions.

<sup>119</sup> The Egyptian constitutions starting from 1923, then 1930, 1952, 1971, 2011, 2014 and their amendments provided for the equality of citizens before the law in their rights and duties.

the improvement and development of women. These criteria depend mainly on the judge's social thoughts, education, and environment; accordingly, it may differ from one judge to another and from one time to another.

Despite the fact that some of these verdicts were issued over sixty years ago, this study compares these legal judgments in relatively close proximity in time in order to demonstrate the subjective intervention of judges in their decisions. Thus, both cases which relate to women's appointment to public posts took place in the 1960s. In addition, the other two judgments that excluded women from being appointed to judicial posts because of traditions and customs criteria took place in the 1950s, whereas the verdict that contradicted with such viewpoint was issued in the 1970s. It is irrational to argue that the main reason for the change in the court's viewpoint is the time factor, namely the ten years between the two judgments.<sup>120</sup> This is because in 2010 the State Council General Assembly readopted the former legal opinion which relied on custom and tradition as main criteria for women's appointment. Accordingly, the main reason for the change in the legal position between judges is the distinction between them in their personal experience, thoughts, beliefs, conceptions, ideologies, education, and environment.

Regarding women who applied for appointment as chemists in the Health Ministry laboratories, the first degree court applied the exact rules that were stipulated in the constitution and laws, namely the efficiency criterion; consequently, the court adjudicated to assign them to such posts. The court excluded customs and traditions by stating that the plaintiff had to be appointed as long as she fulfilled the required legal and medical stipulations. Whereas the second degree judges, because of their own beliefs regarding women, placed heavier weight on the existing customs and traditions. Moreover, they tried hard to promote the idea that the verdict was in favor of the plaintiff particularly, and women

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<sup>120</sup> Accordingly, some may allege that the main reason for the massive change in the legal viewpoints regarding custom and tradition is the time criterion. They may argue that judges who issued the judgment in 1979 were mentally developed enough if they were compared with their counterpart in the sixties; consequently, they ignore the criteria of custom and traditions as main reasons for appointment. I strongly believe that such viewpoint is inaccurate because the notions of traditions and custom are still adopted till nowadays; accordingly, it is not a matter of time development. I think the General Assembly of judges that took place in 2010 and readopted the conception of traditions is a strong evident for the correctness of my viewpoint; it is a matter of judges' differentiation in their ideologies and personal experience.

in general, by protecting them from the surrounding environment. Consequently, the court alleged that customs and traditions aimed at protecting the working women from hardship and fatigue. They tried hard to demonstrate that their judgment was derived through the pure application of law and logical deduction of the facts before them.

Furthermore, the appointment of women to judicial posts in these cases encompassed some subjective criteria too. Some judges relied on the same notion of customs and traditions as criteria for holding judicial posts. The court, in these cases, added some additional conditions, such as the appropriate time for women to be hired and the validity and their credentials to hold certain positions.

The negative impact of such criteria is that the conception and comprehension of customs and traditions differ substantially from one judge to another. For instance a judge who was born and brought up in the city might have a distinct point of view regarding customs and traditions if compared to his counterpart from rural areas. In addition, such standards vary from one period to another; consequently, the verdicts that were issued in the 1950s relied on customs and traditions as criteria to hold judicial posts; such thinking involved the idea that women were lesser developed than men.<sup>121</sup> On the contrary, in the 1970s the court explicitly dismissed the notion of traditions; however, in 2010 Egyptian State Council judges implicitly readopted customs and traditions as the main criteria for holding judicial posts.<sup>122</sup> These traditions involve the conception that it is not the appropriate time for women to serve as judges in the State Council.<sup>123</sup>

Ultimately, I do not question the accuracy of the verdicts; rather I want to highlight the differentiation in judgments due to some judges' subjective viewpoints.<sup>124</sup> In addition, I want

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<sup>121</sup> I am arguing that the Egyptian mentality as a whole adopted and still adopts the notion of masculine. Such social ideas may reach the judicial verdicts and opinions in many places.

<sup>122</sup> It is worth mentioning that the State Council judges did not explicitly reject women from being appointed as judges because of custom and traditions; rather they preferred to say that such issue needs some time in order to be studied well.

<sup>123</sup> Of course, I am not aiming in this study at contradicting the State Council judges' viewpoints regarding the appointment of women in their courts because I am one of them; rather I am trying to a certain matter which is the judges' psychological effects on the cases that they are adjudicating.

<sup>124</sup> I want to assert that such viewpoints of judges are not intentional at all; rather they may be part of judges' personalities.

to emphasize the point that if some courts explicitly recognize the criteria of custom and traditions for the appointment of women in public posts generally and judicial professions particularly, such customs, traditions, and environmental conditions are absolutely assessed in the light of the judges' education, environment, ideologies, beliefs, perceptions, and thoughts.

## **Conclusion**

Judges are human beings who are impacted by their environment; accordingly, they are affected by their education and experiences, and by the prevailing norms of their society. Such factors and effects are reflected in their legal judgments. Consequently, judges' work cannot be described as the mere application of law because such a description is not accurate.

A judge legislates according to his own particular interpretation of a certain legal provision in a manner that may broaden or narrow its scope of application in order to achieve justice from his personal point of view. This process is a mental activity which depends substantially on the way a judge comprehends a rule of law. Such comprehension differs from one judge to another according to education, personal thoughts, experiences, environment, and ideologies; this is what is called "judicial activism." Judicial activism is these personal ideas and principles which judges may include in their legal decisions unintentionally because of their ideological biases.

This study highlights judicial policies that are seen in several human rights cases in Egyptian State Council jurisprudence. Judges differ in their comprehension and interpretation of many notions and conceptions, for instance of what constitutes public order, personal freedom, discrimination, and customs and traditions in Egyptian society. The study does not question the accuracy of the presented case study verdicts; rather it highlights differences among judgments due to judges' subjective viewpoints.

Because of the fact that judges legislate in many cases, their legal decisions in these cases might not be legally anticipated; consequently, this may lead to contradictory judgments. The multiplicity of the contradictory judgments in Egyptian society because of this judicial activism may introduce uncertainty in the legal judgments among Egyptians which may lead to negative consequences. Accordingly, judges have to present every controversial and contradictory issue to the Unifying Circuit in the Supreme Administrative Court in order to unify the diverse viewpoints. In addition, they have to respect, apply, adhere to, and comply with such Circuit's legal decisions in order to avoid or reduce the notion of contradictory judgments in Egypt.