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

**CONSTITUTIONAL THEORY AND POLITICAL HISTORY AS
JUSTIFICATION FOR THE GENDER QUOTA IN EGYPT'S
LEGISLATURE**

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

Abir Ahmed El-Menshawy

June 2013

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

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ACKNOWLEDGMENTS

My deepest gratitude to my parents, my mother Dr. Manal Abou Taleb who taught me persistence and hard work, my father Ahmed El-Menshawy who taught me to pursue my dreams, my sister Eman who supported me all the way and to my sister Heba who managed to keep me on her duty schedule, and my grandmother Hoda El-Herawy whom I miss dearly.

To my friend and partner Amr Shata for his unconditional love and support. To my daughter Laila for being the joy of my life.

My genuine gratefulness to Dr. Mina Khalil who taught me that the word is a world and for his continuous support while writing this thesis.

I thank you all for without your persistent support I would not have completed this thesis.

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Abir Ahmed El-Menshawy

Supervised by Professor Mina Khalil

ABSTRACT

The purpose of this thesis is to examine the conformity of gender quotas with the constitutional concept of equality. The importance of this examination is to answer the question whether gender quotas are constitutional. My argument is that gender quotas are constitutional because they address de facto inequality by making women's representation equal to men's representation. I argue that Egypt has a history of adopting quotas to guarantee the representation of disadvantaged groups. I also tie the constitutionality of the gender quota to the current political landscape where the Muslim Brotherhood controls the state. I argue that gender quotas will not, most probably, be adopted under the leadership of the Muslim Brotherhood, as they do not believe in equal representation for women.

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I. Introduction

Debates on quotas to address women's political representation are quite fierce. Not all women support such quotas, nor do all feminists. In Egypt, over the past decade, quotas that aim to tackle women's political representation in the legislature (hereinafter, "the People Assembly") have been the subject of hesitant adoption and quick annulment or abolition.

This thesis focuses on the debates behind quotas that aim to tackle women's political representation (hereinafter, "gender quota(s)"). Two main issues are believed to hinder the quota. First, there is the question of the constitutionality of the quota. It is widely believed that the quota is unconstitutional as it violates the principle of equality or equal opportunity between men and women. In fact, the quota debates lie at the intersection of several legal, moral, and social concepts, namely equality, agency and gender. By defining and addressing these key concepts upon which the quota may or may not ground its legitimacy, this thesis aims to shed light on the constitutionality of quotas in well-established constitutional democracies.

Second, beyond this theoretical and legal approach to understanding the quota, this thesis aims to explain that equally important in the quota debate is the specific historic and legal contexts in which the quota is recommended. By examining how the historical and legal ascension of political Islam has generally affected women's political participation in Egypt, the largest nation in the heart of the Muslim Arab world, this thesis argues that the quota is an important, if not necessary, tool to tackle gender discrimination in societies. In doing so, this thesis will discuss how Islamists' views on women's political participation, and more specifically on quotas, has been quite detrimental to women's political participation as a whole as well as the survival of the gender quota in Egypt. The thesis then shifts to critiquing contemporary Islamists' stance with the actual religious texts they rely upon to justify restricting women's political participation.¹

Most basically, quotas, or 'political quotas', are considered an immediate remedy to the fact of under-representation of women in politics, especially in Egypt where women have historically remained almost non-existent in political public

¹ By "Islamist" I refer to the political Islamic Party.

affairs.² This thesis discusses the quota in the context of the Egyptian People's Assembly (hereinafter, "the People's Assembly"), the main lawmaking body in Egyptian politics.

In other words, the quota remedy to the problem of women's political participation (or lack thereof) is an affirmative action that aims for the equality of result. Electoral gender quotas are a form of affirmative action that aim for the equality of result in the lawmaking body of a society rather than equality of opportunity to become a representative in that lawmaking body. Nevertheless, these actions consist of measures intended to guarantee an increased representation of women. With regards to equality, the idea of guaranteeing the selection of women's representatives in elections has engendered controversy. It is the case as they are viewed as bypassing competitiveness and hence as ignoring the merit principle which ensures that the best person will be selected.³ In parallel to this merit question, there is also the persistent question of why women are necessary vehicles to represent other women in the People Assembly. These questions will be addressed in turn in Chapter Two, yet the main question this thesis aims to answer is whether women's presence in the People's Assembly is vital for Egyptian democracy. A distinction is made between an understanding of representation as "acting on behalf of" and an understanding of representation as "standing for."⁴ For "acting on behalf of" the elected representative is a trustee, authorized to use her judgment when acting on behalf of electors; whereas "standing for" means she is a delegate strictly attached to those who elect her.

² In the three main organs of the State: the Judiciary, the Legislative and the Executive, women's number reflects a potential formal resistance to their political participation. In the Egyptian judiciary, women have been able to become judges in normal courts only very recently. In 2007, forty-two women judges were appointed to join the judicial system. In the legislative body - the People's Assembly of 2005 - there were nine women members of Parliament of which four were elected and five were appointed by the former President Mubarak, with an overall percentage of less than 2%. Finally, in the Executive body women held three ministries of the State's thirty-two ministries, i.e. the Ministry of Manpower and Immigration (held by Aisha Abdel Hady), the Ministry of International Cooperation (held by Fayza Abul Naga) and the Ministry of State for Family and Population (held by Mosheera Mahmoud Khattab). See Egypt State Information Service, *Women in the Executive Authority*, available at: <http://www.sis.gov.eg/En/Story.aspx?sid=2259> (entered May 16, 2010)

³ Mala N. Htun & Mark P. Jones, *Engendering the Right to Participate in Decision-Making: Electoral Quotas and Women's Leadership in Latin America* 50 (Nikki Craske and Maxine Molyneux ed., Houndmills Palgrave 2002)

⁴ Hannah Fenichel Pitkin, *The Concept of Representation*, 60-92 (Berkeley: University of California Press 1972).

In Egypt, quotas addressing women's representation in the People's Assembly have been legally adopted twice. Egypt has adopted gender quotas in the form of statutory or legislative reserved seats. Gender quotas were first adopted in 1984, yet they were soon after abolished in 1987 by a decision of the Supreme Constitutional Court (hereinafter, "SCC").⁵ In 2008, the quota was nevertheless reinstated under Mubarak's regime, yet it was suspended with the January 2011 Revolution. Thus, a hesitant adoption and a quick abolition has been the fate of quotas addressing women's representation in the People's Assembly.

This thesis ultimately aims to address the legitimacy and legality of quotas and the future of Egyptian women's political representation in light of political the rise of political Islam in the Egyptian state.⁶ In Chapter One, the origins, the definition and types of quotas used in different constitutional regimes will be presented and compared to the quota adopted in Egypt's political landscape. In Chapter Two, legal feminists theories and their relationship to women's quotas will be discussed. In Chapter three the constitutional history of women's rights will be presented. It will be followed by an analysis of the SCC's decision regarding the legality of the quota to argue for the constitutionality of gender quotas. In Chapter Four, the historical-legal relationship of women's political participation in light of the ascension of political Islam in Egypt will be discussed to argue for the consideration of specific historical and legal conditions in the evaluation of the legal quota.

⁵ No 131/6Q.

⁶ By "Islamisation" I mean that an Islamic Political Party heads the state with a main political agenda of applying Islam—from its' perspective--as a public policy.

II. Origins and Types of Gender Quota

In the first section, of this chapter the origins of gender quotas will be presented. In the second section, the definition and different types of gender quotas will be presented.

A. Origins of Gender Quota

Recent years have witnessed the emergence of new patterns of political representation. On one hand, political transformations around the world have incited reflection on the question of institutional and constitutional design.⁷ For example, in Latin America, Eastern Europe and Africa, reformers have devised new political measures in light of democratic transitions. On the other hand, new scholarship has challenged the prevailing conventions of liberal democracy by rethinking the means and ends of the representative process.⁸ Instead of viewing politics as a neutral arena in which all citizens play an equal role, this scholarship argues that liberal political arrangements create systematic distortions in public policies and in equal political engagement.⁹

The developments have led to different variations in political participation. The most common reforms have been provisions to increase women's representation. Most of these provisions take the form of quota policies aimed at increasing women's selection and election to political office.¹⁰ The origins of many of these policies can be traced back to the United Nations Fourth World Conference on Women, held in Beijing in September 1995. The resulting Beijing Declaration and Platform of Action, called on governments to take measures to ensure women's equal access and full participation in politics.¹¹ While quotas appeared before this date,¹² the

⁷ Mona Lena Krook, *Quotas for Women in Politics: Gender and Candidate Selection Reform Worldwide 3* (Oxford University Press 2009).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ http://www.unesco.org/education/nfsunesco/pdf/BEIJIN_E.PDF

¹² In the early 1990s, some countries established 30 percent quotas for women in their local governments. However, it is not know where the 30 percent figure originates. But one theory links it with the concept of a 'critical mass,' a term used in some research to suggest that women need to form a large minority of all legislators before they can make a difference in public policy. Sarah Childs & Mona Lena Krook, *Should Feminists Give up on Critical Mass A Contingent Yes*, 2 *Politics & Gender* 522, 522-530 (2006).

importance of this event is seen in the patterns of quota adoption around the world.¹³ Between 1930 and 1980, only ten countries established quota provisions, followed by twelve countries in 1980s. However, in 1990s quotas were adopted in more than fifty countries, and after 2000 nearly forty more adopted the quota.¹⁴

The use of quotas as a tool for attaining equal political participation is often referred to as the Beijing Platform. The Beijing Platform signifies a shift regarding women's empowerment in politics. First, it discusses "discriminatory attitudes and practices" and "unequal power relations" that lay as the main reasons for the under-representation of women in politics, a discussion that is labeled "discourse of exclusion."¹⁵ Previously, the focus was on women's lack of interest or lack of resources to participate in politics. Now, the focus has shifted to the institutional and cultural mechanisms of exclusion that have prevented women from accessing the decision-making level in politics. The responsibility for promoting women's positions in politics has also shifted from the individual woman to the institutions that are expected to rectify the causes of women's under-representation.¹⁶ Second, the demands for a "minimum level of representation" were abandoned and replaced by a new discourse of "equal representation." Thus, the aim is no longer to have "more women in politics" rather to have "equal participation" and "equitable distribution of power and decision making at all levels."¹⁷

Finally, the Beijing Platform suggests affirmative actions as a means to reach the goal of equal representation. However, the word "quota" was not used. For governmental and public administration positions, it recommends that the world's governments use "specific targets and implementing measures [...] if necessary through positive actions."¹⁸ Also, for elected positions, it recommends that governments "take measures, including, where appropriate, in electoral systems that encourage political parties to integrate women in elective and non-elective public positions in the same proportion and at the same levels as men."¹⁹ Furthermore, it recommends that political parties should "consider examining party structures and

¹³ Krook, *supra* note 7, at 6.

¹⁴ *Id.*

¹⁵ Drude Dahlerup, *Women Quotas and Politics* 5 (Drude Dahlerup ed., Routledge 2007) (2006).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Fourth United Nations World Conference in Women in Beijing in 1995, article 190 a.

¹⁹ *Id.*

procedures to remove all barriers that directly or indirectly discriminate against the participation of women.”²⁰ The Beijing Platform signifies a new discourse that focuses on the mechanism of exclusion through institutional practices, setting gender balance as the goal and demanding that governments and political parties commit themselves to take affirmative actions.

Gender quotas take a wide range of forms in different countries. In fact, interesting theories have emerged to explain quota adoption.²¹ These theories explain it by identifying the principal actors in quota campaigns and the actors’ reasons for pursuing political reforms.²² Literature on gender quotas proposes four different perspectives on quota adoption: (1) women mobilize for quotas to increase women’s representation, (2) political elites recognize political advantage in pursuing quotas, (3) the connection between quotas and established political norms or the consistency of quotas with existing or emerging notions of equality and representation, (4) and the support of international organizations. These theories, taken together, present conflicting views as they draw attention to distinct actors and motivations for quota reform.²³ They also suggest that none of these accounts, on their own, explain all cases of quota reform.²⁴ Some accounts characterize only some cases, and at the same time, some cases may tell only part of the story that engages several of these narratives.²⁵ Also, each theory may constitute only one element within a sequence of events e.g. women’s mobilization may influence and, thus, precede political parties decision-making.²⁶

²⁰ *Id.*

²¹ These explanations are made based on individual case study of countries. However, they are grouped together to determine the general answer for the question of “who and why?” in relation to the adoption of gender quota. For example in Germany quota proposals originate with women’s groups inside the political parties. However, it was only when political elites perceived gender quotas adoption as an effective way to compete favorably with other parties that the gender quotas were adopted. Another example is Morocco where the provision of equality in the constitution prevented the adoption of quota. However, women’s movement pushed political parties to make a gentlemen’s agreement to adopt quota despite the constitutional blockage. Thus, each case is different with regards to the actors and the reasons for adopting quotas.

²² Krook, *supra* note 7.

²³ *Id.* at 26.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

The majority of research on gender quota adoption considers women as the source of quota proposals. According to this first theory, the call to nominate more women in politics never occurs without the prior mobilization of women, even when male politicians or activists are responsible for the decision to adopt quotas.²⁷ Women's movements form varies across cases and may include grassroots women's movements that work nationally and internationally to promote women's political participation.²⁸ It also includes women's organizations inside political parties that propose specific quota policies,²⁹ individual women inside parties who encourage male leaders to adopt a quota,³⁰ and women involved with the national women's organizations that support gender quotas as a means for creating a women-friendly policy change.³¹

Other theories suggest the significant role of political elites and political parties, usually consisting of males, and the strategic advantages they perceive for adopting gender quotas. For some, the reason is party competition, noting that elites tend to adopt gender quotas only when their electoral rivals adopt them.³² Others note that political parties adopt gender quotas to overcome a long period in opposition or a dramatic decrease in popularity by closing the gap in support among female voters.³³

Scholars have linked the adoption of gender quotas to emerging notions of equality and representation. They justify this link depending on how they relate gender quotas to the reigning political regime. Some see gender quotas as an extension of the ideas of equality and fair access by noting that quotas in left-wing

²⁷ See Lisa Baldez, *Elected Bodies: The Gender Quota Law for Legislative Candidates in Mexico*, 29 *Legislative Studies Quarterly* 231-240 (2004). Available at: <http://www.jstor.org/stable/3598632>

²⁸ See Gihan Abou Zeid, *The Arab Region: Women's Access to the Decision-Making process across the Arab Nation*, in *WOMEN, QUOTAS, AND POLITICS* 168, (Drude Dahlerup ed., Routledge 2007).

²⁹ See Dan Connell, *Strategies for Change: Women & Politics in Eritrea & South Africa*, 25 *Review of African Political Economy* 189, 189-206 (1998).

³⁰ See Miki Caul Kittilson, *Challenging Parties, Changing Parliaments: Women and Elected Office in Contemporary Western* 16 (Parliaments and Legislatures ed., Columbus: Ohio State University Press 2006).

³¹ See Mark Jones, *Increasing Women's Representation Via Gender Quotas*, 16 *Women and Politics* 75-98 (1996).

³² See Miki Caul, *Political Parties and The Adoption of Candidate Gender Quotas: A Cross-National Analysis*, 63 *The Journal of Politics* 1214, 216-1229 (2001). However, there are other scholars who suggest that competition among parties may in fact work against the selection of female candidates, as parties that are uncertain about electoral outcome favors the traditional male politician support.

³³ Eva Kolinsky, *Political Participation and Parliamentary Careers: Women's Quotas in West Germany*, 14 *West European Politics* 56, 56-72 (1991).

parties match their more general goals of social equality.³⁴ Others associate quota adoption with democratic transformation by noting that the demands for gender quotas emerge during periods of democratic transition as a means for guaranteeing the representation of traditionally underprivileged groups or establishing the national or international legitimacy of the new regime.³⁵ However, these accounts neglect the fierce opposition gender quotas receive based on equality norms. Opponents to the gender quotas argue that proposed quotas for women discriminate against men and therefore should be considered unconstitutional or illegal.³⁶

Finally, the fourth theory refers to the role of international norms and transnational information sharing in shaping national quota debates.³⁷ This research proposes that quota policies originate in international meetings and conferences that generate recommendations for member states to improve women's access to political decision-making. It also determines the most two influential documents in this regard to be the Convention on the Elimination of All Forms of Discrimination Against Women, passed in 1979, and the Beijing Platform for Action, approved in 1995, and elaborated within the United Nations. Other international organizations have issued similar resolutions in recent years adopting quotas for women including the Inter-Parliamentary Union, the Socialist International, the Council of Europe, the European Union, the Organization for Security and Cooperation in Europe, the Commonwealth, the African Union, the Southern African Development Community and the Organization of American States.³⁸ In the majority of cases, gender quotas are noticed to be adopted in the wake of recommendations issued by international organizations, especially in the years following the United Nations' Fourth World Conference in Beijing in 1995.³⁹ However, this theory does not trace the explicit causal relation between international norms and national quota adoption policy. Instead, they limit their observations to specific cases of quota adoption that follow an international event.

³⁴ *Id.*

³⁵ See Gretchen Bauer and Hannah E. Britton, *Women in African Parliaments*, (Gretchen Bauer and Hannah Britton ed., Boulder: Lynee Rienner 2006).

³⁶ Marila Guadagnini, *Gendering the Debate on Political Representation in Italy: A difficult Challenge*, in *STATE FEMINISM AND POLITICAL PRESENTATION* 140 (Joni Lovenduski ed., New York: Cambridge University Press 2005).

³⁷ Krook, *supra* note 7, at 24.

³⁸ *Id.*

³⁹ *Id.*

B. Types of Gender Quotas

Quotas in politics involve setting up a percentage or number for the representation of a specific group.⁴⁰ Quotas are used as a measure to increase the representation of historically under-represented groups. Gender quotas are defined as “fixed number or percentage of minority group or women needed to meet the requirements of affirmative action.”⁴¹ By enforcement, it requires that women constitute a certain number or percentage of the members of an institution or a body.⁴²

Gender quotas may be adopted to require a minimum representation for both sexes, for example of no more than sixty percent and of no less than forty percent for each sex. According to such gender-neutral quotas, it sets a maximum for both sexes, which quotas for women do not.⁴³

Gender quotas are considered to be part of a new equality policy representing a new shift from “equal opportunity” to “equality of results.” Affirmative action implies measures that target structural discrimination or that makes it possible to leap over the barriers. Thus, it is considered as a fast track equality policy. Given the limitations of equal opportunity policies, in recent decades many countries have turned to affirmative action policies. Positive action policies for legislative office include three main strategies: the use of reserved legislative seats, where only women can be appointed or elected, established by electoral law or by the national constitution; the use of legislative or statutory gender quotas controlling the composition of candidate lists for all parties in each country, established by electoral law or by the national constitution; and also the use of voluntary gender quotas in the process employed within particular parties and political groups to nominate candidates, established by internal party rules, recruitment procedures, or party constitutions.⁴⁴

Successful examples where these strategies have substantially increased women’s representation in diverse societies and cultures worldwide range from India

⁴⁰ Dahlerup, *supra* note 15.

⁴¹ <http://www.merriam-webster.com/dictionary/quota>

⁴² Drude Dahlerup, *Increasing Women’s Political Representation: New Trends in Gender Quotas*, in *WOMEN IN PARLIAMENT: BEYOND NUMBERS* 141 (Julie Ballington and Azza Karam ed., International Institute for Democracy and Electoral Assistance 2005).

⁴³ Krook, *supra* note 15, at 19.

⁴⁴ *Id.*

to Morocco, South Africa, Pakistan, Jordan, Britain, Belgium, and Argentina. Proponents argue that positive action policies are the most effective strategy for achieving gender balance. Evidence confirms that in many cases women have made rapid gains. Yet successful implementation depends upon many detailed matters, such as the legal penalties for non-compliance.⁴⁵

There are three main types of gender quotas. The first type takes the form of reserved seats in parliament. The second type takes the form of legislative or statutory gender quotas and the third type takes the form of voluntary party gender quotas.

Reserved seats are often created by reforms to the constitution or occasionally by electoral law creating separate rolls for women, designating separate districts for female candidates, or distributing seats for women based on each party's proportion of the popular vote.⁴⁶ This strategy has been the most widespread type of quota in Africa and the Arab region.⁴⁷ This type is currently used for the lower house of the national parliaments in Morocco, Jordan, Sudan, Djibouti, Bangladesh, Pakistan, Botswana, Taiwan, Lesotho, and Tanzania.⁴⁸

Egypt employed this type of gender quotas. The first time, in 1983, the electoral law established a proportional list system by which all the candidates must be party-listed.⁴⁹ The law also divided the country into 48 electoral constituencies of which 31 constituencies reserved one seat for women. In these thirty-one constituencies, a woman had to be on the list.

In 2008, when the gender quota was adopted for the second time, the electoral law stated reserved 64 seats for women by creating women constituencies. In these constituencies, only women competed with each other. Morocco established this type of quota in 2002, which allowed 9.2 percent of women representation or 30 of 325.⁵⁰ And in Egypt the quota allowed 8.3 percent of women's representation or 30 of 360 in 1979 and 14.3 percent or 64 of 445 in 2010.⁵¹ This policy guarantees a minimum number of women in elected office. Reserved seats differ from party and legislative quotas as they mandate a minimum number of female legislators instead of simply

⁴⁵ *Id.*

⁴⁶ Krook, *supra* note 7, at 6.

⁴⁷ Abou Zeid, *supra* note 28, at 176.

⁴⁸ Dahlerup, *supra* note 15.

⁴⁹ Law 114 for 1983.

⁵⁰ Abou Zeid, *supra* note 28, at 175.

⁵¹ *Id.*

setting a percentage of women among political candidates.⁵²

In spite of its strengths, critics suggest this strategy may not enable women to exercise genuine power. Those appointed by the president, prime minister, or party leader lack the democratic legitimacy that arises from an independent electoral or organizational base. Their appointment by party leaders can be used to reinforce control of parliament by the majority party, especially in countries with limited democratic rights and civil liberties where power is concentrated in the hands of the executive.

Legislative gender quotas are mainly found in developing countries especially in Latin America, and in post-conflict countries in the Middle East.⁵³ Legislative gender quotas specify that women must constitute a minimal proportion of parliamentary candidates or of elected representatives within each party or group. These quotas may be enacted by law or by the national constitution. Quotas have been used for legislative candidates and for public bodies such as government commissions. Statutory gender quotas imposed by the law or the constitution applies to all parties and groups within a country. They are similar to party quotas in that they address party selection processes but differ in that they are adopted by national parliaments to require that all parties nominate a certain proportion of female candidates. As such, they are mandatory provisions that apply to all political groups rather than only those who choose to adopt a quota. Similar to party quotas, legislative quotas call for women to form between 25 to 50 percent of all candidates. Nevertheless, they consist of a broader processes of reform focused on changing the language in constitutions and electoral laws rather than the content of individual party regulations. Furthermore, like party quotas, legislative quotas are implemented in varied ways depending on the electoral system, applying alternatively to party lists or to a broader group of single-member districts.⁵⁴

Given their status as laws, legislative quotas are distinctive in that they impose sanctions for noncompliance and are subject to some degree of oversight from external bodies. The effective implementation of legislative quotas depends upon multiple factors, including how statutory mechanisms are implemented, the level of the gender quota specified by law, whether the rules for party lists regulate the rank

⁵² Krook, *supra* note 7, at 6.

⁵³ *Id.* at 21

⁵⁴ *Id.* at 8.

order of women and men candidates, whether party lists are open or closed, and also the penalties associated with any failure to comply with the law. These policies prove least effective when the laws are designed as symbolic window-dressing more than as de facto regulations; the regulations specify that a certain proportion of women have to be selected for party lists, but they fail to specify their rank order so that female candidates are listed at the bottom.⁵⁵

Finally, party quotas are the most common type of gender quota. They were first adopted in the 1970s by a limited number of socialist and social democratic parties in Western Europe. Currently, they are the most common type of formal quotas in the “West” as they are adopted in fourteen countries of the region.⁵⁶ In some of these countries they exist alongside other types of quotas to promote women’s representation.⁵⁷ International IDEA’s Global Database of Quotas for Women estimates that 181 parties in 58 countries use gender quotas for electoral candidates for national parliaments. This practice is common throughout Scandinavia, Western Europe, and Latin America. These policies are also effective; for example in Europe on average about one third or 33 percent of the elected representatives in national parliaments are female in parties using voluntary gender quotas, compared with only 18 percent in parties that do not follow this policy. Party quotas are measures that are adopted voluntarily by individual party practices, internal regulations, aiming to attain a certain proportion of women among its candidates to political office.⁵⁸ This strategy typically mandates that women constitute between 25 and 50 percent of parties’ electoral lists.⁵⁹

⁵⁵ *Id.*

⁵⁶ Mona Lena Krook, Joni Lovenduski & Judith Squires, *Western Europe, North America, Australia and New Zealand: Gender Quotas in the context of citizenship models*, in *WOMEN, QUOTAS, AND POLITICS* 194, (Drude Dahlerup ed., Routledge 2007).

⁵⁷ See Petra Meier, *The Mutual Contagion Effect of Legal and Party Quotas: A Belgian Perspective*, 10 *Party Politics* 583-600 (2004).

⁵⁸ Krook, *supra* note 7, at 7.

⁵⁹ *Id.*

III. Theoretical Justifications of the Quota

In this chapter, the theoretical arguments concerning gender quota will be discussed to argue in favor of the adoption of gender quotas. In Section one, the debate over the legality of gender quota will be discussed. In Section two, a discussion of the Egyptian experience with regards to the adoption of gender quotas will be presented. To further strengthen the argument for gender quotas, other Egyptian parliamentary quotas surviving for sixty years without facing the same fate that gender quotas face in Egypt, will also be discussed.

The arguments for and against quotas stem from three theoretical strains: gender theory, representation theory, and equality theory.

A. Gender Theory

One of the debates in contemporary feminist theory is whether women can be described as an interest-based group whose similar interests would require political representation in well-established democracies.⁶⁰ The key issue for women's political participation is no longer women's rights to be represented as individuals possessing the right to vote and the right to stand in elections, but rather becomes their representation as an interest group.⁶¹ From this point of departure, the "gender debate" on whether women as a group have different interests than men or other groups, becomes relevant. For this reason, gender is first defined and discussed here.

Gender refers to "socially learned behavior and expectations that distinguish between masculinity and femininity,"⁶² whereas sex is understood as the biological distinction between males and females.⁶³ In other words, biological 'sex' refers to

⁶⁰ Anne Phillips, *Engendering Democracy*, Polity Press, 1991, 1997 p.70. (The author shows the link between democracy and feminism. She points out that democracy and feminism have much in common as they both deal with the notions of equality and they both oppose arbitrary power. However, they did not develop in tandem. She points out that the ancient Greeks and early liberals have adopted democracy without the inclusion of women for example. She contends that gender challenges the existing political theory as political theorists consider that gender is irrelevant to the political thought.)

⁶¹ See Virginia Sapiro, *When are interests interesting: The Problem of Political Representation of Women*, 75 *The American Political Science Review* 701, 701-16 (1981).

⁶² V. Spike Peterson and Anne Sisson Runyan, *Global Gender Issues 5* (George A. Lopez ed., Westview Press. 1999). (The authors argue that Gender is the lens through which politics should be viewed. Because it will examine how the world is shaped by gendered concepts and practices.)

⁶³ *Id.*

genetic and anatomical characteristics, whereas socially-learned gender is an acquired identity gained through performing prescribed gender roles.⁶⁴ Gender inequality originates from the social constructions of how individuals are taught culturally appropriate attitudes and behaviors depending on their gender.⁶⁵

The under-representation of women in politics is one of the consequences of the unequal structure of power that underlies the relationship between women and men.⁶⁶ Some scholars contend that gender is the basis for relations of inequality between males and females because societies place different values on masculine and feminine behaviors.⁶⁷ As such, the link between gender and inequality is obvious when women's representation is very weak and unequal to men. Women, therefore, constitute a historically disadvantaged group.

Building on this determination of gender, some feminists have argued that women constitute a particular group grounding their argument on the "shared interests theory."⁶⁸ They argue that women have common interests resulting from a history of disadvantageous status resulting from the "characteristics of gender relations."⁶⁹ Moreover, they argue that women share common interests and concerns due to the kind of social role they play with an emphasis on their domestic and child-rearing responsibilities.⁷⁰ They point out that, in fact, it is women who become pregnant and it is women who give birth.

Here, I argue that women do constitute a unique group—not based on their shared interests—but rather by simply being women who have been historically excluded politically because they are women. I argue that shared interests theory excludes from the group women who may hold varied interests and goals.

Even if it is assumed that some women may share a determined set of interests

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Anne Philips, *the politics of Presence*, 100 (Oxford University Press 1995).

⁶⁹ See Anne Marie Goetz, *Women's Political Effectiveness: A Conceptual Framework*, in *NO SHORTCUTS TO POWER: AFRICAN WOMEN IN POLITICS AND POLICY MAKING* 29, (Anne Marie Goetz and Shireen Hassim eds, London: Zed Books 2003).

⁷⁰ See Mala N. Htun and Mark P. Jones, *Engendering the Right to Participate in Decision-making: Electoral Quotas and Women's Leadership in Latin America* in *GENDER AND THE POLITICS OF RIGHTS AND DEMOCRACY IN LATIN AMERICA* 32, (Nikki Craske and Maxine Molyneux eds., Houndmills: Palgrave, 2002).

such as marriage and pregnancy, such interests are not determinative in making all women a distinct social group. Single or career-driven women may not have the same objectives as married or housewives, yet they are nevertheless still women. Therefore, while shared-interest theory may correctly identify some shared goals between women of a particular social or economic class, it excludes women who may not choose to be part of such a class.⁷¹

Hence the shared interests' theory opens the door to considerable critics, which in the end undermines the contention that women constitute a group. The argument that gender is a sufficient criterion to demonstrate that women constitute a group set solid grounds to the contention that women constitute a group. I argue that women constitute a distinctive group based on their historical and systematic political exclusion in many societies in spite of their varied goals and interests.

B. Representation Theory (Deliberation Theory)⁷²

Women's under-representation is seen in the disproportionate gender representation between constituents and elected.⁷³ Also, the striking homogeneity of existed representatives suggests that historically disadvantaged groups are not represented.⁷⁴ If there were no differences between black people and white people, between Copts and Muslims or between women and men, then those elected would be a more random sample than those who are elected.⁷⁵ The consistent under-representation of any social category establishes that there is a problem. Some feminists contend that sexual differentiation in conditions and experience has produced a woman's point of

⁷¹ Women are not a homogeneous group; attempts to increase the descriptive representation of women must take account of variations among women. Failure to do so causes what Dovi calls an inclusion problem and amounts to an essentialist account of what it is to be a woman suggesting a binary and 'natural' division between the sexes. Feminists are well aware that '[w]omen differ when they have children or do not, are divorced or not, have been raped or not, are straight or gay, obese or thin, Muslim or Christian, menopausal or prepubescent' available at: http://faculty.washington.edu/mbarreto/courses/Dovi_2002.pdf

⁷² Pitkin, *supra* note 4, at 65. Hanna Pitkin provides, one of the most straightforward definitions: to represent is simply to "make present again." On this definition, political representation is the activity of making citizens' voices, opinions, and perspectives "present" in the public policy making processes.

⁷³ Phillips, *supra* note 56, at 53.

⁷⁴ *Id.* at 65.

⁷⁵ *Id.*

view that needs to be represented.⁷⁶

It has been argued that democratic political institutions that lack representatives from historically disadvantaged groups-- such as women--are unjust.⁷⁷ Furthermore, these arguments often assume that an increase in the number of representatives from historically disadvantaged groups can contribute to their substantive representation.⁷⁸ Hence it is argued that descriptive representation leads to substantive representation to under-represented groups.⁷⁹

To evaluate the claim that there is a need for more women representing women, it is necessary to discuss different arguments about representation itself. For some feminists, a distinction is made between an understanding of representation as “acting on behalf of” and an understanding of representation as “standing for.”⁸⁰ For “acting on behalf of” the elected representative is a trustee, authorized to use her judgment when acting on behalf of electors; whereas for “standing for” she is a delegate strictly attached to those who elect her.

Another way to present this is to distinguish between descriptive representation and a substantive representation.⁸¹ Descriptive representation occurs when representatives mirror the background of the represented.⁸² Whereas, substantive representation is considered as “acting in the interests of the represented in a manner responsive to them.”⁸³ Women are thought to be represented when deliberations about public policy consider the potential impact on different groups of women.

Feminists have contended that a necessary condition for the representation of

⁷⁶ Pitkin, *supra* note 4, at 20.

⁷⁷ See Sue Thomas, *The Impact of Women on State Legislative Policies*, 53 *Journal of Politics* 958, 958–76 (1991). (Examining the relationship between the percentage of women in state legislatures and their policy priorities. Findings reveal that women in states with the highest percentages of female representatives introduce and pass more priority bills dealing with issues of women, children, and families than men in their states and more than their female counterparts in low representation legislatures.)

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Pitkin, *supra* note 4.

⁸¹ *Id.*

⁸² Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent Yes*, 61 *The Journal of Politics* 628, 628-57 (1999).

⁸³ Irene Diamond and Nancy Hartsock, *Beyond Interests in Politics: A Comment on Virginia Sapiro's 'When are Interests interesting? The Problem of Political Representation of Women,'* 75 *American Political Science Review* 717, 717-21 (1981).

women's interests is the presence of women in decision-making bodies.⁸⁴ They argue that interests are realized in the course of deliberation and decision-making, as various implementation strategies and competing concerns are discussed. Only when present may women benefit from such realization and promote their interests.⁸⁵

For other feminists, the argument is as follows: if there are binding mandates, as assumed in the "delegate" model, it will not matter who representatives are as they represent the views of those who elected them.⁸⁶ They argue that in contemporary electoral politics there are no binding mandates and as a consequence, representatives exercise judgment.

The question then becomes on what grounds elected representatives are expected to reflect women's views and interests and address their demands. In well-established democracies, it is often argued that elected representatives should express the full range of opinions of their constituents, and hence women's views should be included. This form is called a "politics of ideas,"⁸⁷ whereby elected representatives are expected to show impartiality because of the absence of commitment to any specific group.⁸⁸ However, members of underrepresented groups have challenged this argument. They argue that the majority of elected representatives represent the portion of the population they come from.⁸⁹

Contrary to this "politics of ideas" is the "politics of presence." For the politics of presence, elected representatives display the characteristics of members of underrepresented groups in order to counter the partiality of those who dominate the elected bodies. Quotas are aligned with the politics of presence. Gender quotas permit the representation of women by women as the best means to reflect and represent women's views and varied interests in elected bodies without depending on the actual elected representatives of middle-class men.⁹⁰ A necessary condition for the representation of women's views and interests is the presence of women in decision-making bodies.⁹¹ Views and interests are realized in the course of

⁸⁴ Pitkin, *supra* note 4.

⁸⁵ *Id.*

⁸⁶ Carol Bacchi, Arguing For and Against Quotas: Theoretical Issues, in *WOMEN, QUOTAS, AND POLITICS* 32, (Drude Dahlerup ed., Routledge 2007).

⁸⁷ Phillips, *supra* note 64.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

deliberation and decision-making, as various options, implementation strategies and competing concerns are discussed. Only when present may women benefit from such realization and promote their interests.⁹²

Feminists also debated for the deliberative democracy. However, opponents to deliberative democracy contend that public choice, or public opinion, should be the basis for a democratic society.⁹³

Some, feminists argue against the determination of interests and term the failure for identifying precisely women's interests as "uncrystallized" interests.⁹⁴ If women at both the mass elite level have a shared political interest that is not fully "crystallized" into a coherent set of policy demands then representatives from other groups i.e. men cannot unproblematically undertake the representation of women.⁹⁵

In line with the argument for the presence of women and for the descriptive representation of women, it is argued that gender differences signal convictions' differences as to gender roles.⁹⁶ As such women and men hold different views with regards to gender roles. For this reason, women representatives are best to reflect the point of view of female constituents. As such, a challenge is made to the conception of representation that argues that the gender of the representative does not matter and that representation depends upon ideas but not the gender of the representative.

⁹² Women do have a point of view that is different from men's point of view. A very interesting study found that: "in terms of attitudes to traditional gender roles, on average men and women differ, and women representatives are more like women voters and male representatives are more like male voters. Such differences diminish but continue when we control for age and party. On average, male representatives, and would-be representatives, do not report the same level of hostility to traditional gender roles as women voters; hence, they may, on average, be less likely than women representatives to act for, or otherwise represent, women voters on the many issues affected by such roles." Therefore, the argument of politics of presence finds its' reasoning. Women and men on average have different ideas about the roles of each sex therefore women's interests from women's points of view would only be represented by women. Rosie Campbell, Sarah Childs and Joni Lovenduski, *Do Women Need Women Representatives?*, 40 *British Journal of Political Science* 171, 171-94 (2010).

⁹³ It is argued that public opinion theory is overstated. The public opinion in a given matter does not assume that the right opinion was made. Especially in the existence of the persuasion industry that made it possible for elites to shape opinion and then invoke those opinions in the name of democracy. Public opinion is vulnerable to manipulation. A disengaged and uninformed public is more easily manipulated than one that has firm opinions based on extended thought and discussion. *Id.*

⁹⁴ Phillips, *supra* note 64.

⁹⁵ Diamond and Hartsock, *supra* note 64, at 720.

⁹⁶ Campbell and Childs, *supra* note 88.

C. Equality Theory:

The third vein of theories in relation to the importance of gender quota is the theory of equality. The question of defining equality and thus inequality has long been the preoccupation of feminist jurisprudence.

Feminist jurisprudence has links to several categories of legal scholarship.⁹⁷ It shares with “law and social sciences” scholarship an emphasis on the connections between law and society and the ways in which law is non-autonomous.⁹⁸ Feminist jurisprudence use empirical data to reveal how women are affected by law and by law’s absence.⁹⁹ As discussed, women’s representation in the parliaments around the world is between two and ten percent. An empirical finding that is analyzed to reveal how women’s representation is affected by the law’s absence to guarantee equal representation between women and men.

Feminist jurisprudence in relation to legal equality is then used to argue for the adoption of gender quotas. This thesis contends that the absence of laws that guarantees numeric equal representation of women is the reason for the under-representation of women. This absence of law also possibly amounts to discrimination against women. But here the question to ask is how women get to be equal before identifying the means and measures by which women get to be equal to men. The question feminism posts is what kind of equality actually women want.

Feminists formulate the equality question as follows: should women emphasize their similarity to men or their differences from men?¹⁰⁰ It is the sameness-differences debate that forms feminist legal theories of equality. In feminist jurisprudence the sameness-difference debate has taken the form of a debate between

⁹⁷ This thesis is using Catharine Mackinnon’s suggested definition of feminist jurisprudence: “feminist jurisprudence is an examination of the relationship between law and society from the point of view of all women.”

⁹⁸ Heather Ruth Wishik, *To Questions Everything: The Inquiries of Feminist Jurisprudence*, in FEMINIST LEGAL THEORY: FOUNDATIONS 22, 22-247 (D. Kelly Weisberg ed., Temple University Press 1993).

⁹⁹ “Describing and identifying the harms of patriarchal law and legal systems is also part of feminist inquiry. The act of seeing patriarchal gender bias as harm contains the implication that a harm-free alternative might be possible. Thus feminist jurisprudence inquires not only into the harms of patriarchal law, but also into the possibility and characteristics of a world without patriarchal law and of non-patriarchal legal system.” *Id.* at 23.

¹⁰⁰ Frances Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869-1895*, in FEMINIST LEGAL THEORY II: POSITIONING FEMINIST THEORY WITHIN THE LAW 415, 415-38 (Frances E. Olsen ed., New York University Press 1986).

formal equality for women and substantive equality for women. In other words the debate between equal treatment and special treatment.¹⁰¹

There are four schools of feminist thought that have produced different understandings of equality: liberal theory, radical theory, cultural theory, and post-modern theory.¹⁰²

Liberal feminists believe that women and men are rights bearing, autonomous human beings.¹⁰³ Equal rights and equal opportunity are central for liberal legal thought.¹⁰⁴ Liberal feminists build on these concepts and argue that women are just as rational as men and that women should have equal opportunity with men to exercise their right to make rational choices.¹⁰⁵ For liberal feminists, women are equal to men and therefore the law is gendered and unjust by treating women differently.¹⁰⁶

However, this thesis challenges liberal feminism's stance on equality. To argue that women are similar to men is merely to assimilate women into an unchanged male sphere, which will result in making women into men.¹⁰⁷ Liberal feminism makes men the norm to which women should adhere without paying attention to the different needs and interests of women.

For liberal feminism women are the same as men. The law would be gendered and unjust by treating women as different, even if it served their interests.¹⁰⁸ According to liberal feminism, gender quotas do not do right to women as they imply that women and men are not equal. They contend that women should not be treated differently than men, and therefore women should not benefit from special measures that are not conferred similarly to men. Liberal feminists approve the adoption of different actions for the support of women in politics that have as a goal equal opportunity. For example, these actions consist of various measures to increase leadership and representation opportunities such as skills training for women and

¹⁰¹ This debate was originated with the question of maternity and state policy on this issue. The question was: are women different from men as they get pregnant and thus they need special treatment in the workplace or not? See *Id.*

¹⁰² Nancy E. Dowd and Michelle S. Jacobs, *Feminist Legal Theory: An Anti-Essentialist Reader* 10 (Nancy E. Dowd and Michelle S. Jacobs ed., New York University Press 2003).

¹⁰³ Patricia A. Cain, *Feminism and the Limits of Equality*, in *FEMINIST LEGAL THEORY: FOUNDATIONS* 237, 237-247 (D. Kelly Weisberg ed., Temple University Press 1993).

¹⁰⁴ *Id.*

¹⁰⁵ Dowd and Jacobs, *supra* note 97.

¹⁰⁶ *Id.*

¹⁰⁷ Cain, *supra* note 98.

¹⁰⁸ Dowd and Jacobs, *supra* note 97.

financial support.¹⁰⁹ However, they do not approve of affirmative actions that aim at guaranteeing seats for women and see them as emphasizing that women are not equal to men.

Contrary to liberal feminism, cultural feminism focuses on women's differences; it argues that noticing and valuing differences associated with women or typical of women's lives are critical to real equality.¹¹⁰ Using equality rhetoric, cultural feminists argue for material changes in present conditions that support women-valued relationships.¹¹¹ Liberal feminism is different from cultural feminism in that it focuses on the similarity between women and men and not the difference between them.

For cultural feminism the focus is on women's differences. It argues for material changes in present conditions that would support women. According to cultural feminism, gender quotas are considered as a means to value women's differences.

The third feminist theory is radical feminism or dominance theory. For radical feminism both liberal and cultural feminism have their focus in the wrong place. It contends that "it is not about difference, it's about dominance."¹¹² They contend that the key to women's inequality is women's lack of power. It further argues that we should pay attention should be paid to power relations and devising means of empowerment or redress for the abuse of power.¹¹³

Therefore, radical feminists argue for the means of redress for the abuse of power.¹¹⁴ For them, gender quotas are necessary to redress the abuse of power and dominance of men.¹¹⁵

The fourth feminist theory is post-modern feminism. Postmodernism challenges the existence of grand theory or a unitary truth.¹¹⁶ It does not focus on the

¹⁰⁹ <http://www.hks.harvard.edu/fs/pnorris/Acrobat/Afghanistan.pdf>

¹¹⁰ Cain, *supra* note 98.

¹¹¹ *Id.*

¹¹² See Dowd and Jacobs, *supra* note 97, at 11.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Cultural and radical feminism are both focusing on women's difference. However, cultural feminism looked as the women's difference as something positive, something to be embraced. Whereas radical feminism looks at women's differences in a negative way. As it considers it the reason men dominate women.

¹¹⁶ Cain, *supra* note 98.

category “woman,” rather it focuses on the situated realities of women in the plural.¹¹⁷ It challenges any attempt to define women and contends that any definition is limiting the definition of women. It challenges the existence of a “woman” category and a woman’s point of view. For these reasons, postmodernists generally will not accept gender quotas that actually address a woman category and women’s needs, interests and point of views.

Legal feminist theories have differently viewed equality. Thus the implications for gender quotas differ as well. Gender quotas as affirmative actions are not agreed upon unanimously as realizing equality for women by the four theories.

The idea of guaranteeing the selection of women representatives in elections is controversial. The four feminists schools have different analyses of equality. Thus when applied to gender quotas, they produce different hypotheses about the legality of gender quotas.

Another trait in the debate of gender quotas and equality among feminists is based on the merit concept. On the one hand, opponents of electoral gender quotas argue that positions should be held based on merit that are easily measured.¹¹⁸ On the other hand, proponents of electoral gender quotas argue that existing systems are unfair in the way they assess women as they set too narrow an understanding of merit by ignoring how women’s and men’s merit differ.¹¹⁹ Sometimes it is also claimed that gender, in itself, constitutes merit since political systems ought to reflect the views of the entire population.¹²⁰

The debates about merit relate to the understanding of discrimination. Opposing gender quotas, liberal feminists argue that what is needed is an equal society which treats all people equally. Equal treatment means a gender-blind policy that does not discriminate based on gender. Discrimination is understood as the different treatment of equals; affirmative action is presented as treating women differently than men, which constitutes a form of discrimination.¹²¹ Consequently, affirmative action is considered as an exemption to anti-discrimination statutes in a given country.

¹¹⁷ *Id.*

¹¹⁸ Bacchi, *supra* note 8,2 at 34.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

Cultural feminists see that it is important to reframe affirmative action discourse so that it moves beyond the discrimination/anti-discrimination debate towards doing justice for women.¹²² Cultural and radical feminists have made several recommendations: firstly, to shift the focus from non-discrimination to a “right to be treated as an equal”; secondly, to stress the special contributions of women in male-dominated arenas while shifting the focus from discriminating against women to the benefits of including women; and finally, to transfer the burden of proof from those advocating equality to those defending the *status quo*. The aim is to broaden the perspective by shifting the focus from women “needing help” to unfair social rules.¹²³

This thesis argues that presenting affirmative action, as an exemption to anti-discrimination principles is, in itself, a problem.¹²⁴ That social rules are generally fair but some people face incidental blockages and barriers that hold them back - barriers that might be described as “social differences that pervade law.”¹²⁵

It further argues that affirmative action can also be viewed from a different perspective. It can be viewed not as a form of “special help” for needed groups but rather as a form of redress to well-established social privileges.¹²⁶ In this way, affirmative action is not a form of “preferential treatment” and thus discrimination - positive or otherwise; its aim is to achieve justice.

¹²²Mari Teigen, *The Affirmative Action Controversy*, 8 NORA 63, 63-77 (2000).

¹²³ *Id.*

¹²⁴ Bacchi, *supra* note 82, at 34.

¹²⁵ Donald J. Black, *Sociological Justice* (New York: Oxford University Press 1989). (Challenges the conventional notion that law is primarily an affair of rules and that discrimination is an aberration. Law, he contends, is a social process in which bias is inherent.)

¹²⁶ Bacchi, *supra* note 82, at 34.

IV. Constitutionality of the Gender Quota in Egypt

This chapter examines the constitutional texts that deal with citizenship and women's rights to trace how successive constitutions formulated women's equality particularly with regards to women's political participation. The challenge to the constitutionality of gender quotas from an Egyptian feminist perspective is also examined. I argue that gender quotas are constitutional for two reasons: Egyptian women have had a disproportionate, subjugated political status to Egyptian men. And, the Egyptian legal system has absorbed this gender-power differential. Therefore, I contend that gender quotas are necessary to redress a situation of power inequality

A. Egyptian Women's Constitutional History

When and how women have been presented in Egypt's constitutional texts reveals the history of women political rights. At the present time, the basic right to legal-political equality, to vote and to run for political positions, is taken for granted. However, this basic right to political equality between men and women has not always been the case. Egyptian women have faced differential legal treatment when it comes to citizenship.¹²⁷

The first time Egyptian women were granted the right to vote and stand for political positions was in 1956. These rights were granted by virtue of the 1956 Constitution. Before the 1956 Constitution women were not treated in the same way as men. Women did not have the same citizenship rights as men and were not permitted to vote or run for political positions. It was via the 1956 Constitution that women were granted political right and became eligible to participate in politics.

¹²⁷ The list is long. For example women do not have the same legal rights as men in relation to: divorce, marriage, travel and conferring the Egyptian nationality to their children. For example regarding divorce, an Egyptian man can divorce his wife without her presence and without the need to stand before a judge. However, an Egyptian woman cannot divorce her husband unless she files a legal case and it takes not less than three months for the judge to grant her the divorce.

Before the formulation of the 1956 Constitution, Egypt had another constitution, the Constitution of 1923.¹²⁸ Women's rights were completely ignored in the latter.¹²⁹ The 1923 Constitution stated in Article 3 that Egyptians are all equal before the law regarding their civil and political rights without discrimination based on race, language or religion. The rest of the 1923 Constitution never mentioned women or their rights. Although, Articles 74 and 82 did grant universal suffrage to all elected members of the Senate, a subsequent electoral law issued on April 30, 1923 restricted suffrage to males only.¹³⁰ The absence of constitutional reference to gender equality permitted the adoption of such a law. By not including "gender" or "sex" as one of the prohibited basis of discrimination the Constitution of 1923 left space for discriminating against women. Which occurred when electoral laws allowed only males to participate in the public suffrage. Hence, in the 1923 Egyptian Constitution, women were excluded from participating in the democratic process on the basis of sex alone.

The 1956 Constitution was the first to mention women's equal political rights. Article 3 stated "Egyptians are equal with no differences made based on gender." In compliance to the 1956 Constitution, article one of the electoral law no. 73 for the year 1956 stated that every Egyptian male or female has the right to practice his or her political rights.¹³¹

The reason for including women's constitutional and legal equality was political. The regime at that time had adopted a socialist system that promoted equality between citizens. The regime believed in social equality that included both men and women.¹³² The feminist movement that started in 1923 that had as its main

¹²⁸ Egypt witnessed four Constitutions: 1923, 1956, 1971 and 2012. In between there were constitutional declarations. However, these constitutional declarations will not be part of the constitutional review searching for citizenship and women's rights.

¹²⁹ Article 3 of the Constitution states: " All Egyptians are equal before the law. They enjoy equal civil and political rights and are equally subject to public duties and responsibilities, without distinction on the basis of race, language or religion."

¹³⁰ Which ignited the Egyptian feminist movement as a response to this exclusion. Especially after women were welcomed in resisting the british occupation and taking part in the national resistance women were then excluded from participating in the public life. In consequence, the first Women's Union was formed by Hoda Sharawi. *See Egyptian women, Al ahram study.*

¹³¹ Law no 73 for 1956.

¹³² Soha Abdel Kader, "Egyptian Women in a Changing Society, 1899-1987" Lynne Rienner Publishers, Inc. 1987. P.50

objective obtaining equal legal rights may also have played a part.¹³³ Nonetheless, it was the state's policy at that time to confer women the same rights to vote and stand for political positions as men.

The 1971 Constitution also laid down the principle of equality and citizenship as a core value of the State.¹³⁴ It maintained the gender equality enshrined in the 1956 Constitution. According to the 1971 Constitution, all Egyptians are equal before the law without discrimination based on sex, ethnic origin, language, religion or creed. By including gender as a basis for equality, the 1956 constitution and the 1971 constitution laid down the principle of equality between women and men.

A new stipulation specifically geared towards women's representation was added. Article 62 left the door open for the adoption of gender quotas in specific cases. It stated that "The law may adopt a system that combines between the individual and the party-list systems at such ratio as may be specified by the law. Such a system may also include a minimum limit for women's participation in both councils." A new development in the constitutional text, was a minimum number of women is allowed in the People's Assembly. Thereby, the constitution of 1971 permitted the adoption of the gender quota.

The 1971 constitution was in force until the uprising of 25 January 2011. After the uprising a new constitution was formed, the constitution of 2012. Article 33 of the 2012 constitution stated that "all citizens are equal before the law, they have equal rights and duties without discrimination." The 2012 constitution does not articulate, specifically, the basis of discrimination prohibited. Shocking absence that leaves space for interpretation. It risks repeating the 1923 constitutional scenario whereby the absence of specific articulation in relation to gender discrimination, and thus gender equality, leaves the door open to legal discrimination based on sex.

Out of the four constitutions that Egypt has had, only two specifically protect women from any discrimination based on their sex; only one established gender quotas. The policy is not new: quotas for peasants and workers in the People's

¹³³ Soha Abdel Kader, "Egyptian Women in a Changing Society, 1899-1987" Lynne Rienner Publishers, Inc. 1987. P.50

See Badran M.F., 1977. "Huda Sharawi and the Liberation of the Egyptian Woman." PhD dissertation, Oxford University.

¹³⁴ Article 40 of 1971 Constitution stated that: "All citizens are equal before the law. They have equal rights and duties without discrimination between them due to race, ethnic, origin, language, religion or creed." *Available at:* <http://www.constitutionnet.org/files/Egypt%20Constitution.pdf>

Assembly was established in the 1956 constitution and continues until the present time. However, the 1971 constitution left the decision of adopting the gender quota to the public authority, whereas it obliged the public authority to adopt the peasants and workers' quota.¹³⁵

B. The Constitutionality of Gender Quotas

In Egypt gender quotas are believed to be unconstitutional for violating the principle of equality.¹³⁶ This belief was originated in the SCC's ruling over several articles in law no. 114 of 1983.

The women's quota has always been the subject of controversy. It has been criticized for violating the principles of democracy as it prejudices the equality between candidates to run for elections equally without privileges.¹³⁷ In Egypt, the women's quota in the People's Assembly was adopted two times: in 1984 and in 2008. The quota of 1984 was abolished in 1987 by a decision of the Constitutional Court.¹³⁸ The quota of 2008 was abolished with the dissolution of the People's Assembly following the 2011 Revolution, and has been not re-adopted in subsequent electoral laws.

While the 1987 women's quota was abolished by a Constitutional Court ruling, the Court did not rule over the constitutionality of the quota itself. It is true that it found unconstitutional a number of articles in law no. 114 of 1983 that created the women's quota. But it did not render the entire law unconstitutional, nor did it rule over the quota. In fact the Court decided upon another matter, i.e. the discrimination between independent candidates and party-listed candidates as the law allowed only party-listed candidates to run for elections. In making its decision - No.

¹³⁵ The peasants and workers' quota is stipulated by article 87 of the 1971 Constitution: "the law shall determine the constituencies into which the State shall be divided and the number of elected members of the People's Assembly must be at least 350 persons, of whom at least one half shall be workers and peasants elected by direct secret public balloting. The definition of worker and peasant shall be provided by law. The President of the Republic may appoint a number of members not exceeding ten."

¹³⁶ For example Salwa Sharawi argued against the SCC ruling that gender quotas are unconstitutional. However, the SCC never ruled on gender quotas, as it will be shown. See Salwa Sharawi, *Tamtheel al mar'a fee al majalis al montakhaba*, 207 (Salwa Sharawi ed., Public Administration Research and Consultation Center 2000).

¹³⁷ *Supra* note 100.

¹³⁸ No 131/6Q.

131/6Q of May 1987 - the Court relied on the principle of equality of opportunity as guaranteed by articles 8, 40 and 62 of the Constitution.¹³⁹

The ruling was made with regard to discrimination between independent candidates and party-listed candidates and not with regard to the quota for women. In fact, the court decided not to rule on women's quota for the "absence of legal interest."¹⁴⁰ For this reason, the unconstitutionality of the women's quota in Egypt should not be assumed. The court did not rule on women's quota; the government annulled the entire law, including the allocation of seats to women. But it was not because the law was deemed entirely unconstitutional. It can be seen that the government chose not to risk the challenging of unconstitutionality of gender quotas in the future.

A quota for women to participate in the political realm did not stay ignored. In 2008, for the second time, legislative women's quota was adopted. Sixty-four women entered the People's Assembly following 2010 elections. However, their presence was short-lived. The 2010 People's Assembly was dissolved by the 2011 Egyptian uprising the following year. A new People's Assembly was elected and a new constitution was drafted. The elections were organized by the constitutional declaration of March 2011.¹⁴¹ Yet again, however, the constitutional declaration maintained the fifty percent peasants and workers' quota and abolished the women's quota. The 2012 Constitution did the same: it maintained the peasants and workers' quota and abolished the women's quota.

The legality of the peasants and workers' quota, which remains until the present day, has not been contested for sixty years since they were introduced in the 1956 constitution. However, the quota for women, which was also created to guarantee the representation of half of the Egyptian population, has not received the same level of acceptance and longevity.

Though the Supreme Constitutional Court did not rule over the constitutionality of the gender quota, the question of the constitutionality of the gender quota should be discussed. If the court had had to rule over the quota, what

¹³⁹ Shawki El Sayed, *Lobbying for Increased Participation of Women in Egypt*, in THE ARAB QUOTA REPORT: SELECTED CASE STUDIES QUOTA REPORT SERIES 73 (International Institute for Democracy and Electoral Assistance 2007).

¹⁴⁰ No 131/6Q.

¹⁴¹ <http://www.egypt.gov.eg/english/laws/constitution/>

would have been its ruling? Do gender quotas conform to the constitutional concept of equality?

The plaintiff's argued that the gender quota violated the principle of equality. He also argued that the electoral law violated the principle of equality as it allowed only for party-listed candidates to run for elections. Which legally prevented independent candidates from running for elections. The defendant-- the government-- claimed that it is within its jurisdiction to regulate the electoral system. And therefore, restricting the right to run for elections to party-list candidates is within its jurisdiction.

The court did not rule on the gender quota. However, it decided that the article stipulating that only party-listed candidates were allowed to run for elections is unconstitutional as it violates the principle of equality between citizens.

I, therefore, will discuss the reasoning of the court with regard to equality and then apply it to the gender quota to examine its constitutionality.

The SCC reasoned as follows: the right to run for elections is a constitutional political right. Restricting this right to some citizens and excluding others is a violation of the principles of equal opportunity and equality. The SCC based its decision on Articles 62, 40 and 8.¹⁴²

The SCC ruled that the right to candidacy is a constitutional right conferred to all citizens as stated in Article 62 of the constitution. The SCC added that the state's jurisdiction for regulating candidacy must not violate the principle of equality and equal opportunity guaranteed by Articles 40 and 8 of the constitution.

If the SCC was to respond to the plaintiff and rule over gender quotas it would have ruled that the gender quota was constitutional. It would also base its decision on Articles 62 and 40. Article 62 states clearly that the electoral system may adopt the

¹⁴² Article 62 stated that: "Citizens shall have the right to vote and express their opinions in referendums according to the provisions of the law. Their participation in public life is a national duty. The law shall regulate the right of candidacy to the People's Assembly and the Shura Council according to the electoral system it specifies. The law may adopt a system that combines between the individual and the party- list systems at such ratio as may be specified by the law. Such system may also include a minimum limit for the women's participation in both councils." Article 40 stated that: "All citizens are equal before the law. They have equal public rights and duties without discrimination on grounds of race, ethnic origin, language, religion or creed." Article 8 stated that: "The State shall guarantee equality of opportunity to all citizens." Available at: http://www.sis.gov.eg/en/LastPage.aspx?Category_ID=208

gender quota. Furthermore, it would have added that the adoption of the gender quota is within the state's jurisdiction.

But if I go further and presume that the constitutional text that allows for the adoption of the gender quota did not exist this would allow an actual discussion of the gender quota's conformity with the concept of equality. I argue that gender quota lies at the heart of the concept of equality. As discussed in chapter two, the gender quota does justice by redressing a situation of unequal representation. What is granted to men or other citizens by law should, in turn, be granted to women by law. For example, if there is a law granting Egyptian nationality to children of Egyptian men, another law should also grant Egyptian nationality to the children of Egyptian women.

If there is a legal text that guarantees a quota for men or a group of citizens, then a legal text should exist in turn for a quota for women. This is the constitutional principle of equality and citizenship. If a legal quota exists for peasants and workers, then a legal quota for other categories should be established.

V. Gender Quotas and Political Islam

In this chapter, I argue that the political historical context in which women are viewed and treated in society matters as much as the theoretical and constitutional arguments for the adoption of the gender quota in Egypt. To do so, the stance of Egypt's dominant political party, the Muslim Brotherhood,¹⁴³ on women's political

¹⁴³ Present election results of the Freedom and Justice Party in first parliamentary elections The Egyptian Muslim Brotherhood currently dominates the political scene in Egypt. Today, the president of Egypt was the president of the political party of the Muslim Brotherhood (The Freedom and Justice Party). They also formed the majority of the People's Assembly before its dissolution. <http://english.ahram.org.eg/NewsContent/33/100/32287/Elections-/News/Islamists-win--of-Egypt-Peoples-Assembly-party-lis.aspx> In a majority Muslim nation where 94.6 percent of the population is Muslim, the Muslim Brotherhood positions itself as a moderate Islamist group which advocates for greater Islamic religiosity in society and government. Pew Research Center, *Mapping the Global Muslim Population* (Washington, DC: Pew Research Center 2009).

The Muslim Brotherhood was founded in 1928 by Hassan Al-Banna, a schoolteacher, who initially organized a social organization to provide its members with teachings on the "correct path of Islam." Ana Belén Soage and Jorge Fuentelsaz Franganillo, *The Muslim Brotherhood in Egypt*, in THE MUSLIM BROTHERHOOD: THE ORGANIZATION AND POLICIES OF A GLOBAL ISLAMIST MOVEMENT 39 (Barry Rubin ed., New York: Palgrave Macmillan 2010). Al-Banna founded the Brotherhood in reaction to the corruption he saw as a student in Cairo and to counteract the increasing influence of Western culture in Egyptian society. Nachman Tal, *Radical Islam in Egypt and Jordan* 16 (Sussex Academic Press 2005). Due to Hassan Al-Banna's strong leadership and ability to motivate Egyptians with his speeches and writings the movement grew and expanded. The new movement fought against competing ideologies of liberalism and communism, as much as it was anti-colonial. Natalie Darlene, *Advocating for greater political participation: Feminisms in Egypt and the Muslim Brotherhood* (2011) (Unpublished MA thesis, Georgetown University). Al-Banna's strong anti-British stance, as well as an attempted plot by the Muslim Brotherhood against British control over Egypt eventually led to Al-Banna's brief arrest during which time he was convinced of the need to form a secret paramilitary group called the "Special Apparatus." Ana Belén Soage and Jorge Fuentelsaz Franganillo, *The Muslim Brotherhood in Egypt*, in THE MUSLIM BROTHERHOOD: THE ORGANIZATION AND POLICIES OF A GLOBAL ISLAMIST MOVEMENT 39 (Barry Rubin ed., New York: Palgrave Macmillan 2010).

In order to gain greater political power, the Special Apparatus organized attacks against those they considered blocking the goal of creating an Islamic State leading the government to fear that the Brotherhood would organize a coup. In reaction, Prime Minister Mahmud al-Nuqrashi at this time banned the Brotherhood in order to counter-act the militant arm of the organization. The subsequent assassination of the Prime Minister was blamed on the Muslim Brotherhood and shortly after this incidence of violence Hassan al-Banna was assassinated on February 12, 1949 by the secret police. Ana Belén Soage and Jorge Fuentelsaz Franganillo, *The Muslim Brotherhood in Egypt*, in THE MUSLIM BROTHERHOOD: THE ORGANIZATION AND POLICIES OF A GLOBAL ISLAMIST MOVEMENT 39 (Barry Rubin ed., New York: Palgrave Macmillan 2010).

participation and representation will be presented through a textual analysis of political Islam. First, I analyze the writings of Hassan Al-Banna, the founding father of the Muslim Brotherhood Society in 1928, with respect to women's political representation. Second, I assess the Freedom and Justice Party's (hereinafter, "FJP") political program, and its official statement with regards to women to ascertain a dominant position with regards to women's political representation and gender quotas. On the basis of this political-historical analysis, I argue that the gender quota should be readopted in Egypt.

A. Hassan Al-Banna's Views on Women's Equality

During his life, Al-Banna thought that the solution for Egyptian society was its return to Islamic morals in every aspect of life as a way to correct the confusion that engulfed Egypt in the 1930s and 1940s.¹⁴⁴ To his Muslim Brotherhood followers in the past and present, Hassan Al-Banna "charismatic and appealing to the masses of believers" is a perfect model "of the combination of religious conviction with moral courage and public engagement, . . . his ideology as exemplifying Islamic ideals."¹⁴⁵

As a charismatic leader who founded the Muslim Brotherhood movement and shaped its ideology, Al-Banna was greatly missed after his death. The organization worked to find a new leader who had the same vision and ability to motivate Egyptians to take action in pushing for an Islamic State.¹⁴⁶

In the twenty years that Hassan Al-Banna led the Muslim Brotherhood, the organization experienced tremendous growth. It is estimated that by 1948 the organization had 1,700 to 2,000 branches with approximately a million followers in Egypt.¹⁴⁷

As the founding father of the Muslim Brotherhood, the writings of Hassan Al-Banna with regards to women's rights are illuminating. In fact, Al-Banna's writings

¹⁴⁴ Ana Belén Soage and Jorge Fuentelsaz Franganillo, *The Muslim Brotherhood in Egypt, in THE MUSLIM BROTHERHOOD: THE ORGANIZATION AND POLICIES OF A GLOBAL ISLAMIST MOVEMENT* 40 (Barry Rubin ed., New York: Palgrave Macmillan 2010).

¹⁴⁵ Barbara H. E. Zollner, *The Muslim Brotherhood: Hasan al-Hudaybi and Ideology* 9 (New York: Routledge 2009).

¹⁴⁶ Natalie Darlene, *Advocating for greater political participation: Feminisms in Egypt and the Muslim Brotherhood* (2011) (Unpublished MA thesis, Georgetown University).

¹⁴⁷ Zollner, *supra* note 3.

are foundational to trace the Muslim Brotherhood's stance on women's equality. The Muslim Brotherhood express their official stance in relation to any given matter in two ways, either in the form of Messages from the Supreme Guide or in the form of official statements from the organization itself.¹⁴⁸ Any official endorsement by the Supreme Guide of the Muslim Brotherhood is to be considered as an authoritative, undisputed source of reference on the Muslim Brotherhood's viewpoint on any matter.¹⁴⁹ The official endorsement of the Supreme Guide takes the form/title of "Messages from the Guide" or *rissalah min al murshid*. In addition, there are the documents or the official statements that have "Message from the Brotherhood," *rissalah min al ikhwan* inscribed on them.¹⁵⁰

Since its inception, the Muslim Brotherhood has had eight Supreme Guides.¹⁵¹ The most influential is considered to be Hassan Al-Banna, as the first Supreme Guide and the founder of the Muslim Brotherhood. In relation to women's issues, Al-Banna was the only Supreme guide who wrote about women in his Messages, establishing a policy of action towards women. He wrote four messages to announce his position vis-à-vis the debate about women's rights on several occasions.¹⁵² These Messages are: "The Muslim Women at a Crossroad" or *al mar'a al muslima 'ala moftarak tarekayn*, "Message to Feminists" or *resalat lel nesa'eyat*, and "Da'wa purposes: The Muslim Family" or *men ahdaf al da'wa: al 'osra al muslima* which is a series of two messages.¹⁵³

In his first Message, "The Muslim Woman at a Crossroad," he declared that there are two paths for the Muslim woman. The first is to follow Islam with its traditions and its rules protecting women, and the second is to follow the example of the Western woman whom he viewed as epitomizing all misconduct. He advocated

¹⁴⁸ Mariz Tadros, *The Muslim Brotherhood Gender Agenda: Reformed or Reframed*, 42 IDS Bulletin 88, 88-99 (2011).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 90.

¹⁵¹ The Supreme Guides of the Muslim Brotherhood are: Hassan El-Banna, Hassan El-Hudaybi, Omar El-Telmesani, Mohamed Abou El-Nasr, Mostafa Mash'hour, Mohamed Ma'moun El-Hudaybi, Mahdy Akef and Mohamed Badee' as the current Supreme Guide. Available at: <http://www.ikhwanwiki.com/index.php?title=نيدش رمل لئاسر: في نصت>

¹⁵² See the messages of Hassan El-Banna available at: <http://www.ikhwanwiki.com/index.php?title=نيدش رمل لئاسر: في نصت>. He also wrote a book entitled "The Muslim Women" where he also announced his opinions, however in this thesis I refer to official references only, on account of the Muslim Brotherhood's view on women's issues.

¹⁵³ The titles of the messages and the content are translated by the author of the thesis.

the path of Islam as a safeguard to women, for their own protection and benefit. He emphasized that women in Islam have a noble task of taking care of the family, a role undermined in the West and privileged by Islam.¹⁵⁴

Hassan Al-Banna in this message contended that women in Islam are protected by its rules. Hassan Al-Banna contended that women are treated differently than man for their own protection. I argue that this protective approach is used to justify different or unequal treatment between men and women in the name of religion. Hassan Al-Banna's personal views of women's rights are presented as if they are the rules of Islam. Which confer them a special importance and divinity. His views in regards to women's rights are very restricting. He believes that women's place is at home denying her any public exposure or participation. He also emphasizes his stance in the following message.

His second Message, "Message to Feminists" was dedicated to opposing the status of free mixing between men and women. He argued for a strict segregation between sexes for the good of women and for their own protection. He emphasized that women's role, according to Islam, is not in the public sphere and that they should hold on to their role at home. Women's role, for him, was a noble role; women were the caregivers, the wives and mothers of future Muslim generations.¹⁵⁵

Yet again, he uses the protective approach by which women should not participate in the public sphere for their own benefit and for their own protection. It should be questioned why would not Hassan Al-Banna thought of changing the discourse as follows: men should not participate in the public sphere for their own protection. If he spoke out of religion, he should have spoken out of the concepts of justice and equality. Therefore, he should have asked men not to participate in the public sphere, or at least not to participate in the public sphere where there are women, for men's protection. In addition, I argue that Hassan Al-Banna did not discuss the elements of protection i.e. from what exactly are women protected? If the answer is women should be protected from men, then Hassan Al-Banna was supposed to direct his messages to men and not to women. Therefore, I argue that his focus and objective might be to restrict women's rights. This belief emancipates from the absence of a serious discussion regarding the issues faced by the Muslim society, as he sees it, if women were to enter the public sphere and the means to overcome these

¹⁵⁴ http://www.ikhwanwiki.com/index.php?title=نِيقِيْرِط_قِرْفَم_يَلَع_قَمَلَسْمَلَا_أَرْمَلَا

¹⁵⁵ http://www.ikhwanwiki.com/index.php?title=تَايِيْئِاسْنَلَا_قَلْأَسْر

issues. This contention is especially significant in his third message.

The third Message was a very important one. Hassan Al Banna wrote it on the occasion of two major women's rights debates in the People's Assembly. The first debate was over whether the People's Assembly should allow women to practice the profession of law and work as lawyers.¹⁵⁶ The second was over whether the People's Assembly would allow women the right to vote in elections. The People's Assembly allowed women to practice the law.¹⁵⁷ It refused, however, to confer the right to vote to women.

Commenting on the People's Assembly's first decision, Hassan Al-Banna rejected the People's Assembly's approval of women's right to practice the law basing his argument on the principle of segregation.¹⁵⁸ In response to the debate on women's right to vote he re-emphasized women's role as being to take care of the house and raise her "boys" to be the future "male" citizens and "male" leaders. He argued that male citizens do not exercise their right to vote correctly and he added that the majority of men do not vote in elections. Hence, he contended that, the priority should not be to grant women the right to vote, rather it should be to teach men the "right" way to vote and its importance. Moreover, he argued that caring about "women's rights" was a waste of time and effort. He summed up by stating that what should be granted to women is the knowledge of how to run her household and care for her family. This message is considered as an emphasis to the contention that Hassan Al-Banna's aim was to restrict women's rights-- without any true religious reference. He believes that women should take care of their sons, omitting any reference to women's taking care of their daughters. I argue that by this message he clarified that the society he sees is a society of men where there is no place for women and girls but to take care of men and boys.

Finally, the fourth Message was a response to those who called for women's equality denying that she inherited half of what the man inherited and that the testimony taken from one man was to be taken by two women. He argued that Islam treated women and men equally but differently. And that, the difference in treatment

¹⁵⁶ Tadros, supra note 6, at 90.

¹⁵⁷ http://www.ikhwanwiki.com/index.php?title=م_قلمس_م_ا_ق_ر_س_أ_ا_.._ق_و_ع_د_ل_ا_ف_ا_د_ه_أ_ن_م

¹⁵⁸ He argued that allowing women to work as lawyers will undermine women. He added that male lawyers gather in front of courts to get legal assignment to lawsuits and he denied the possibility that women would gather with men in such a way. See Hassan El Banna's Introduction *available at:* http://www.ikhwanwiki.com/index.php?title=م_قلمس_م_ا_ق_ر_س_أ_ا_.._ق_و_ع_د_ل_ا_ف_ا_د_ه_أ_ن_م

only does justice to women. He contended “the difference between men and women in rights is attributable to their different natures and in accordance with the different roles assigned to each.”¹⁵⁹

Hassan Al-Banna wrote, stating his opinions, that he believed that women in Islam are equal to men, but they are differently treated. However, this difference made in treatment between men and women is in favor of equality and justice. He argues that women should not be treated the same as men for their biological differences and for their different duties and roles. Hence, it is concluded that he opted for equality based on the difference approach and not the sameness approach. He also contended against western women and depicted them as the worst example of women’s equality.

In regard to women’s right to representation, Hassan Al-Banna rejected women’s right to vote. In consequence, Hassan Al-Banna was mostly against women’s representation in the People’s Assembly. This approach is the approach of most Muslim scholars in discussing women’s equality.¹⁶⁰ I argue that the Islamic discourse of equality is based on two approaches. First that Islam laid the principle of equality between men and women, in treatment them differently. Second, that the western theory of equality as the sameness equality did harm to women. Muslim scholars assert that women and men are considered equal by Islam, however they deny the approach of “identicalness” of equality.¹⁶¹ They consider that men and women are different biologically and have different duties and rights however Islam treats them equally but in different ways. Due to the differences between men and women equality in treatment differs as well. Islam has equated between the two sexes but in a way that suits the nature of each sex. Hence, they oppose the formal equality and strict formality called upon by the west. They oppose the sameness or identicalness approach of equality between men and women. An approach they consider as undermining women’s protection and right.¹⁶²

¹⁵⁹ Tadros, *supra* note 6, at 90.

¹⁶⁰ See for example, Murtaza Mutahhari, *The Human Status of Woman in The Quran*, in Princeton Readings in Islamist Thought: Texts and Contexts from al-Banna to Bin Laden 249 (Roxanne L. Euben & Muhammad Qasim Zaman ed., Princeton University Press 2009).

¹⁶¹ *Id.* at 255.

¹⁶² See *Id.*

B. Contemporary Muslim Brotherhood's Stance on Gender Quota in Egypt

In this section, I examine if the current policy of the Muslim Brotherhood diverges or complies with Hassan Al-Banna's views.

The present policy of the Muslim Brotherhood in regard to women can be found in the Muslim Brotherhood's party program and in a public statement they announced entitled "*The Status of Women in Islam as Seen by The Muslim Brotherhood.*"¹⁶³

The Muslim Brotherhood contends that the party program serves as the Muslim Brotherhood's electoral program in which it announces the principles that they will use in their state policy. In regards to women's representation a keen reading of the section of equality reveals that the Muslim Brotherhood today sees women's representation in a different way.

Under the section entitled "*The Principles of Freedom and Equality*" the Muslim Brotherhood announces that freedom for the Egyptian is a main principal and a right, therefore the party seeks not to discriminate between citizens based on religion, sex or race. Furthermore, the party guarantees women's acquisition of all her rights without prejudice in conformity to decrees of Islam and in a way that balances her duties and her rights.¹⁶⁴

A first reading of this section suggests that the present policy of the Muslim Brotherhood follows Al-Banna's stance in regard to women's representation. However, a closer reading shows this is not the case. In fact, the Muslim Brotherhood today sees women's representation in a different way. They believe that she should have the right to vote and the right to be represented and participate in the public sphere. However these rights are conditional upon respecting the decrees of Islam i.e. their husbands' approval.¹⁶⁵ This development in regards to women's representation was reached during the discussion of two main Islamic theories i.e. the theory of *Qiwama* and the theory of *Wilaya*.

Qiwama is a term used to refer to the leadership of men over women. It was originated in the Quran. Verse number 34 of *surat Al-Nisa'* provides that men are the

¹⁶³http://www.hurryh.com/Party_Program.aspx

¹⁶⁴http://www.hurryh.com/Party_Program.aspx

¹⁶⁵ See the place of women as seen by the MB statement available at: http://www.ikhwanwiki.com/index.php?title=قنالكَم_أرمل_اهاري_امك_أرمل_قنالكَم

protectors and maintainers of women because Allah has given one more than the other and because they support them with their own means. Muslim scholars have used this verse to explain gender roles in public and in private spheres.

Some Muslim scholars hold the view that men have a leadership position over women in the private sphere i.e. in their households and in the public sphere i.e. women's public participation.¹⁶⁶ Others consider *qiwama* as being restricted to the private sphere i.e. the household.¹⁶⁷

At present the Muslim Brotherhood adopts a position in between, they narrow the sphere of men's *qiwama* to marital relations i.e. the private sphere.¹⁶⁸ However, they also limit women's public participation to their husbands' approval thus widening the scope of private *qiwama*. It can be considered that the Muslim Brotherhood adopted both the private and public scope of *qiwama* but they have reframed it by allowing that men control women's public participation as part of men's private scope of *qiwama*. The end result is a control of women by in both the private and public spheres.

This position can also be seen as an attenuation of men's *qiwama* to best serve the interests of the Muslim Brotherhood. Women members of the Muslim Brotherhood play a very important role in the welfare organizations and the access to women in mosques—an important advantage to women that the Muslim Brotherhood would not leave unexploited. Women Muslim Brotherhood members would mobilize other women for to support Muslim Brotherhood candidates in elections.

For this reason, the Muslim Brotherhood limits the scope of *qiwama* to the private sphere. However they do so to gain the votes of female voters who are mobilized by women members of the Muslim Brotherhood.

The second theory is the theory of *Wilaya* or leadership in public positions. The Muslim Brotherhood considers that women can hold public leadership positions with the exception of the president position.¹⁶⁹ They believe that the representative position in elected bodies is a public position that a woman can hold. In the Muslim

¹⁶⁶ The public sphere includes public and political participation. The Mufti of the MB Sheikh Abdallah El Khatib's decision was that *qiwama* takes force in both the private and the public spheres. Tadros, *supra* note 6, at 92.

¹⁶⁷ For example Abdel Moneim Abou El Fotouh. Tadros, *supra* note 6, at 92.

¹⁶⁸ See the place of women as seen by the Muslim Brotherhood's statement *available at*: http://www.ikhwanwiki.com/index.php?title=قنالكم_أرمل_اهاري_امك_أرمل_قنالكم

¹⁶⁹ *Id.*

Brotherhood's official statement regarding women entitled *The Status of Women in Islam as Seen by The Muslim Brotherhood*, the question of whether women have the right to be representatives in elected bodies is explored. They state that women are equal to men and therefore they can be representatives. This position is easily critiqued. If they contend that women are equal to men and therefore women can hold a public position as a representative. This equality is not maintained for women to hold the position of president. At the same time, no justification for this is offered.

In a four point section arguing for the representation of women, the Muslim Brotherhood promote their views that women are equal to men in response to criticism of women's political representation.

Opponents to women's representation contend that women are unfit to be representatives as they do not have experience in public affairs. The Muslim Brotherhood states in response to this point that if there is a woman who does not have experience in public affairs the same case can be for men. Not all men have experience in public affairs, which does not prevent any of them from being representatives. The second point is based on biological differences: Women become pregnant and have their menstrual periods which influences their work as representatives. The Muslim Brotherhood respond that men also get sick which also influences their work. Getting sick does not prevent men from their right to be representatives in elected bodies and nor should it be for women.

The third point offered by opponent is that the principle of segregation between men and women prevents women from running for elections. The Muslim Brotherhood responds that segregation can be respected and implemented by reserving a special order and placement of seats in the people's Assembly, which does not prevent women from running for elections as well. Contrarily, they also make two remarks regarding women's role. They point out that a woman's ultimate goal is to be a caregiver to the Muslim family. In a final remark that they reject the model of Western women in both treatment and social status.

Today's Muslim Brotherhood has broadened the application of equality in comparison to Hassan El Banna's position. They recognize that women have the right to vote and stand for elections. However, they still maintain the same core principles that women are equal to men in spite of their being treated differently. Women's noble and main role in Muslim society is domestic as a caregiver to her family and that the Western model of women's equality is a degrading one, that does

not protect women and is totally rejected.

The representation of ideas on gender roles of the Muslim Brotherhood today is different from Hassan Al Banna's views on gender roles. However, the essence of the message bears similarities especially in regards to women's role as a caregiver of the family.

After such a difference in women's representation one would expect broad support for equal numbers of women Muslim Brotherhood members running as candidates in elections and ultimately more women from the Muslim Brotherhood represented in the People's Assembly. One would also expect greater support for women's representation in leadership positions within the Muslim Brotherhood. This has not been the case. The first time the Muslim Brotherhood supported a woman to run for election only was in 2005. And they supported only one woman, Makarem El Deiry.¹⁷⁰ Moreover, in the elections of 2012, women represented only 13.6 percent of the Muslim Brotherhoods' candidate lists.¹⁷¹

Another way to learn how the Muslim Brotherhood sees women's political representation is to examine how women are represented in upper positions in Muslim Brotherhood. In fact, there has never been a female member in the Guidance Bureau.¹⁷² Women members have been excluded from holding important posts of power within the movement including representation in the Guidance Bureau from inception of the Muslim Brotherhood to the present day.

Moreover, "the status of women as seen by the Muslim Brotherhood" statement contains a very important point. It states that the husband has a right to permit his wife to work. This right is to be regulated by an agreement between the husband and the wife. Such rights should not be regulated by law and the authorities should not interfere with them except in some rare cases."¹⁷³ In other words, the Muslim Brotherhood considers the state policy to be not interfering in married life. And that there must not be any constitutional or legal guarantee of women's right to work.

In regard to gender quotas specifically, the Muslim Brotherhood opposes them. This thesis argues that the Muslim Brotherhood opposes the adoption of gender

¹⁷⁰ Tadros, *supra* note 6, at 92.

¹⁷¹ http://www.onislam.net/content/arabic/in_depth/commuinty/topic_06/22.shtml

¹⁷² The Guidance Bureau is the highest hierarchy in the Muslim Brotherhood.

¹⁷³ *Supra* note 25.

quotas adoption because they have been against women's political representation and women's public participation from the start. Though the Muslim Brotherhood has fielded female candidates in several elections, this can be viewed as a token gesture to show that the Muslim Brotherhood does support women's political representation but only superficially. They paint a picture of women's support to win the sympathy of a wider audience.

From my point of view, I contend that the Muslim Brotherhood specifically opposes gender quotas based on two indicators: first, they contend that the role of women is in the home; they deny her the right to freely participate in the public sphere and when she does, it is conditional to her husband's approval. And secondly, they oppose the concept of quotas, in general, as it was shown during the deliberations of the 2012 constitution.¹⁷⁴

The Muslim Brotherhood did not want to maintain the peasants and workers quota in the People's Assembly because they consider it against equality. They consider it to be a violation of the principle of equality. This stance is similar to the stance of liberal democracy that sees all rights' holders as being equal. However, it is not clear what the theoretical foundation is for their refusal to maintain the fifty percent peasants and laborers' quota that was enforced for sixty years. It may be because they were against the Nasserite social regime that established the quota. This period is when the Muslim Brotherhood witnessed their harshest treatment. Or it may be because they are genuinely any state social policy that contradicts against Islamic state policy.

The two indicators show the contradiction in the Muslim Brotherhood's stance vis-à-vis equality. If they contend that all citizens are equal and therefore no quotas should be established. They should also apply this liberal equality to women i.e. by giving women the freedom to participate in the public sphere and thus be represented politically on an equal basis without limitations.

The application of the Muslim Brotherhood's concept of equality also differs according to gender. They may see only men as equal; therefore they may see in quotas favoring male peasants and workers over non-peasants and non-laborers males a violation of the principle of equality "between men." The quota that favors one

¹⁷⁴ The Muslim Brotherhood wanted to abolish the 50 percent peasants and workers quota. See <http://rassd.com/1-33273.htm> and <http://digital.ahram.org.eg/articles.aspx?Serial=1102802&eid=462>

category of men over another category of men is not legitimate. However, this male-male equality is not the same as a male-female equality. Hence, the issue of women's equality to men in participating in the public sphere is denied. As such, the Muslim Brotherhood do not agree to women's equality with men regardless of their liberal views on equality between men.

VI. Conclusion

Gender quotas in parliament are considered as an immediate remedy to under-representation of women in politics, especially in Egypt where women have historically remained almost non-existent in political public affairs. In other words, the quota remedy to the problem of women's under-representation in the parliament is an affirmative action that aims towards equality in political representation between men and women. Electoral gender quotas are measures intended to guarantee an immediate increased representation of women. With regards to the equality principle, the idea of guaranteeing the selection of women's representatives in elections has engendered controversy. They are viewed as bypassing competition and hence as ignoring the merit principle which ensures that the best person is selected.

In Egypt, the gender quota has engendered controversy over its constitutionality, as it is perceived as violating the principle of equality. This thesis argues that the gender quota adopted in Egypt is constitutional because it complies with the constitutional principle of equality.

Gender quotas are viewed as a mean to establish equality. There are different theories and concepts of equality most of which consider gender quotas as being a means to attain justice. With the exception of liberal feminism, feminism theorists have argued in favor of gender quotas' adoption.

Liberal feminism considers that women are equal to men thus the law is gendered and unjust when it treats women differently. Liberal feminists see gender quotas as a different treatment that goes against their call for equal treatment. Equal treatment theory is critiqued from two perspectives. On the one hand, the equal treatment theory omits women's differences associated especially with childbearing. On the other hand, the concept of equal treatment is itself gendered by setting men as the objective model of equality.

Other theories, however, focus on women's differences i.e. cultural feminism and radical feminism. Cultural feminists argue that the valuation of women's differences is critical to real equality. Radical feminists argue that the issue is neither sameness nor differences; the issue is that men dominate over women. The critical point for understanding inequality is women's lack of power. Cultural feminism and radical feminism are believed to argue for treating women differently to achieve equality; therefore, adopting gender quotas for them is accepted.

The debate persists between the theories of equality, but also in practice. There is no better example than the Egyptian experience. The gender quota has

engendered fierce debate on the basis of constitutional equality. Gender quotas are considered, wrongly, as unconstitutional for violating the principle of equality.

This belief is incorrect because the SCC never ruled over the constitutionality of the gender quota. In fact, this thesis contends that the SCC validated the concept of quotas, in general, when it commented on the People's Assembly's election law. The SCC made ten comments as part of its oversight as stated in the Constitution of 2012. In the first comment the SCC discussed the peasants and workers quotas.¹⁷⁵ The SCC's remark focused on the legal definition of a peasant and of a worker. By discussing the question of who falls into the legal determination of peasants and workers, the SCC validated the peasant and workers' quota. The SCC reviewed the conformity of the electoral law with the constitution and did not comment over the unconstitutionality of the peasants and workers quota. Hence, the SCC considers the latter constitutional. By extension, gender quotas as another form of quotas are also constitutional.

In Egypt, gender quotas have been adopted two times. The first time in 1979 out of forty-eight electoral districts/constituencies thirty-one constituencies reserved one seat to women. In 2008, when the gender quota was adopted for the second time, the electoral law reserved sixty-four seats to women by creating women constituencies. In these constituencies only women competed with each other. In both instances, the gender quota did not subsist for a long period of time.

In 1984 the SCC ruled on the constitutionality of several articles of the electoral law that established the gender quota. However, it did not rule on the gender quota itself. Nonetheless, there is a general misconception that the gender quota was deemed unconstitutional. In addition, Egyptians considered the peasants' and workers' quota a way to establish equality between social categories. It is a means that Egyptian society views as not privileging one category over another. Rather, it is viewed as doing justice to an undermined category.

In Egypt today where an Islamic movement dominates the political landscape it is acknowledged that the gender quota will not be re-adopted as long as the so-called Islamic movements and groups control the political arena. It is argued that the Muslim Brotherhood, the Islamic group that leads the political scenery, will not adopt

¹⁷⁵ <http://www.almasryalyoum.com/node/1481401>

gender quotas. This is due to two main reasons. The first is because their equality interpretation, of equality itself, is based on the justification that women are unequal with men. And the second is because they oppose the quota concept itself.

The Muslim Brotherhood has a set of rules regarding the role of each sex--men and women--in a Muslim society. Gender roles that they perceive as being founded by Islam are the one that should be respected. The strict adherence to such foundational beliefs is necessary for the establishment of a Muslim society.

A first reading of the statement of how the Muslim Brotherhood sees women suggests that the present policy of the Muslim Brotherhood follows Al-Banna's stance in regards to women's representation. Hassan Al-Banna had very restricted and conservative views in regards to women. He believed that women should not participate at all in the public sphere and that woman's most noble and only goal in life is to take care of her household. He denied her the right to vote when the question of women's right to vote was discussed in the People's Assembly at the time. It is presumed that if the question of women's representation and gender quotas had also been discussed at the time, he would have rejected them as well.

However, the present policy of the Muslim Brotherhood is different from Hassan Al-Banna's policy towards women. In fact the Muslim Brotherhood's stance today is different in regards to women's representation than in the past. They believe that she should have the right to vote and the right to be represented and participate in the public sphere. However these rights are conditional upon respecting the decrees of Islam i.e. gaining their husbands' approval first.

The Muslim Brotherhood discussed women's right to be represented under the rubric of the Islamic theory of *qiwama*. At present the Muslim Brotherhood adopts a quasi-conservative position as they limit the sphere of men's *qiwama* to marital relations only i.e. the private sphere. However, they also limit women's public participation with their husbands' approval and thus widening the scope of private *qiwama*. The Muslim Brotherhood adopted both the private and public scope of *qiwama* but they have reframed it by affording that men control over women's public participation as part of men's private scope of *qiwama*. The end result is control of women by men in both the private and the public spheres.

This position can also be seen as an attenuation to men's *qiwama* to best serve the interests of the Muslim Brotherhood. Women members of the Muslim Brotherhood play a very important role in the welfare organizations and in preaching

to women in mosques. An important advantage that the Muslim Brotherhood does not leave unexploited. In fact, women members of the Muslim Brotherhood commonly mobilize other women to support Muslim Brotherhood candidates in elections.

In other words, the contemporary Muslim Brotherhood has broadened the application of equality in comparison to Hassan Al Banna's. As such they consider women to have the right to vote and to stand for elections. However, they still maintain the same core of principles that women are equal to men in spite of requiring different treatment. Women's noble and main role in the Muslim society is domestic as a caregiver to her family and the Western model of women's equality is a degrading one for women that does not protect women and thus is totally rejected.

I contend that the Muslim Brotherhood oppose, specifically, gender quotas because of two reasons: first, they contend that the role of women is at home and they deny her the right to freely participate in the public sphere and if she does, it is conditional on her husband's approval). And secondly, they oppose the concept of quota in general as it was shown during the deliberations of the 2012 constitution.¹⁷⁶

The Muslim Brotherhood does not want to maintain the peasants' and workers' quota in the People's Assembly because they consider it against equality and they consider it as a violation to the principle of equality. However, it is not clear what is the theoretical foundation is for their refusal to maintain the fifty percent peasants and workers quota that has been enforced for sixty years.

The two indicators show the paradox in the Muslim Brotherhood's stance vis-à-vis equality. If they contend that all citizens are equal and therefore no quotas should be established, they should also apply this formal equality to women by leaving women the freedom to participate in the public sphere and be represented equally politically and without any limitations.

The contradiction in positions can be justified if the application of the Muslim Brotherhood's equality differs according to gender. It is possible that they see only men as being equal therefore they do see in quotas favoring males peasants and workers over non-peasants and non-laborers males a violation of the principle of equality "between men." They consider the quota that favors a category of men over

¹⁷⁶ The Muslim Brotherhood wanted to abolish the 50 percent peasants and workers quota. See <http://rassd.com/1-33273.htm> and <http://digital.ahram.org.eg/articles.aspx?Serial=1102802&eid=462>

other categories of men as not legitimate. However, this male-male equality does not reach a male-female equality. Hence, the issue of women's equality with men in participating in the public sphere is denied. As such they do not agree on women's equality with men regardless of their liberal views on equality between men. It is therefore argued that the overall stance of the Muslim Brotherhood on women's equality delineated according to biological differences and gender roles complies with Hassan Al-Banna's views on women's equality.