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**The American University in Cairo**

**School of Global Affairs and Public Policy**

**ADJUDICATING PATRIARCHY IN THE NATIONALITY LAW**

**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**

**Muhammed Samy Ahmed Nofal**

**Spring 2021**

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

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*Muhammed Samy Ahmed*  
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## ADJUDICATING PATRIARCHY IN THE NATIONALITY LAW

Muhammed Samy Ahmed

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### ABSTRACT

The Egyptian legal structure has long discriminated against women. Taking nationality law as an example, it is obvious that all consecutive nationality laws have ignored women's right concerning passing on and acquiring nationality. Even after its amendment in 2004, major gender discrimination still exists. This is caused by the fact that the nationality law is only a part of the legal system. Consequently, its essence will not deviate from the patriarchal composition of the overall nature of the legal system. This paper argues that the existing forms of discrimination in the nationality law correlate with the broader legal environment. Hence, using law as a tool for social reform in the nationality law only masks the deeper problem. This is what happened when the legislators intervened in 2004 to achieve gender equality in the nationality law. Even the use of strategic litigation has failed on its own to alter the gender discrimination existing in the nationality law. Though in some cases the court has been successful in bringing back some rights for women, patriarchy cannot be altered through judgments.

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## **I. Introduction:**

Egyptian society has long been characterized by its patriarchal nature. This term is commonly used to refer to any form of male domination in the society. Patriarchy can also be referred to as the power given to men within boundaries of the family, over wife, children and other dependents.<sup>1</sup> However, the former meaning is the most broadly accepted definition. Patriarchy does not refer to individuals, but rather to the whole society in which men and women are participating. A society can be deemed patriarchal when it promotes male powers through being male dominated, male identified, and male centered.<sup>2</sup>

The current patriarchal principles are correlated to the historical role of women in pre-state societies. In earlier times, social classification was based on the concept of women being the property of men. The exchange of women took place as a universal part of culture, even though it was not equal in all places.<sup>3</sup> At that time, even matrimonial exchange was a way in which women were considered a form of property; marriage was not established between a man and a woman but between two groups of men whose women were the object of that exchange.<sup>4</sup> Even early philosophers like Aristotle did not consider women as a part of the political life.<sup>5</sup> He adopted a male-dominant model. These early patriarchal concepts later became part of every culture and social order where it also became codified through laws and regulations.

In the Middle East, patriarchy is seen in both law and custom.<sup>6</sup> Custom is manifested through distinguishing between the role of boys and girls from an early age and teaching each of them to know their role in the society.<sup>7</sup> Similarly, gender inequality in Egypt is not a recent phenomenon. This ideology has deep roots in the Egyptian community, and the interrelationship between men and women in Egypt has been the subject of many

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<sup>1</sup> Judith M. Bennett, *History Matters , Patriarchy and the Challenge of Feminism* , University of Pennsylvania Press (2007) , at 55.

<sup>2</sup> *Id.*

<sup>3</sup> Levi-Strauss, Claude, *The Elementary Structures OF Kinship* (1969) at 10, 62.

<sup>4</sup> *Id.*

<sup>5</sup> See Aristotle, *Politics* 1127-30, 1194-97, i.2, 13,1252a-1253a, 1259b-1260b (R. McKeon ed. 1941) as cited by Janet Rifkin, *Toward a Theory of Law and Patriarchy* , 3 HARV. WOMEN'S L.J. 83(1980) at 91.

<sup>6</sup> Selma Botman, *Engendering Citizenship In Egypt* New York: Columbia University Press (1999), at 107.

<sup>7</sup> Arat Yesim, *The patriarchal paradox: women politicians in Turkey* (1989), at 18.

studies.<sup>8</sup> Though Egyptian women are classified by their social standard, they commonly share the same status of being subordinated to men.<sup>9</sup> Thus, they are not granted equal rights in a way parallel to men. Being influenced by the social culture, Egyptian men and women are raised to believe that men are competent to protect and defend women. They are also raised to believe that family honor is in the women's hand. Thus, men's honor is derived from controlling women's bodies, movements and behavior; harsh control is enforced through inequality in gender, submissive supervision, premature marriage and circumcision.<sup>10</sup> For example, the loss of one's hymen is much more important than losing any other part of a women's body;<sup>11</sup> the sacredness of the hymen is behind most honor cases in Egypt. Thus, women are always under the control of a man. Before marriage, they are under the supervision of their father, and after marriage, this supervision is passed on to the husband.<sup>12</sup>

These patriarchal patterns have been historically transformed into municipal laws. Many civilizations, if not all, have used legal institutions in order to oppress women.<sup>13</sup> In Egypt, most of the constitutional committees of consecutive constitutions, parliament members and those who are competent to apply the law are in male hands. Thus, the state fundamentally functions through male dominant ideas,<sup>14</sup> and the resulting laws, though appearing reasonable on the surface, promote patriarchy. Every powerful organ of the state structure is operated by men. From this perspective, women are born and raised to accept their subordinate position.<sup>15</sup> Women are portrayed as being a property of men.<sup>16</sup> That being said, most of these paradigm conceptions are set by men. These ideologies

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<sup>8</sup> The first attempt for spreading awareness published book was published in 1879 by Maryam al Nahas. She presented some models for women. She was followed by Aisha El-Taymuriyah in 1887 and Qasim Amin "The Liberation of the Woman" in 1894. See Badran, Margot. *Feminists, Islam, and Nation: Gender and the Making of Modern Egypt*. E-book, Princeton, N.J.: Princeton University Press (1995), at 14.

<sup>9</sup> Willy & Jansen, *Women Without Men* (1987) at 2.

<sup>10</sup> Fatema Mernissi, *virginity and Patriarchy* (1982), at 183.

<sup>11</sup> Zenie-Ziegler, *In search of shadows: Conversations with Egyptian women* (1988), at 104.

<sup>12</sup> Willy, *supra* note 9, at 1.

<sup>13</sup> Lynne Henderson, *Law's Patriarchy*, 25 *LAW & Soc'y REV.* 411 (1991) at 411.

<sup>14</sup> Currie, Dawn H., *Feminist Encounters With Postmodernism: Exploring the Impasse of Debates on Patriarchy and Law*, *Canadian Journal of Women & the Law.* , Vol. 5 Issue 1 (1992), at 66.

<sup>15</sup> See Suzanne Silk Klein, "Individualism, Liberalism and the New Family Law", *University of Toronto Faculty Law Review* 43 (1985), at 116.

<sup>16</sup> Dawn H. Currie, *Feminist Encounters with Postmodernism: Exploring the Impasse of Debates on Patriarchy and Law*, 5 *CAN. J. WOMEN & L.* 63 (1992), at 5.

have long been adopted through laws and regulations which continue to be codified in national laws.

This patriarchal composition of the society has led to a complex gender discriminatory legal structure. Hence, a closer look at the existing laws demonstrate an explicit preferential treatment of men at the expense of women. In this paper, I use nationality law as an example of the discriminatory nature of the Egyptian legal system more generally. Through examining nationality law, I highlight the discrimination existing in the nationality law specifically and the legal structure in general.

Nationality has acquired its importance from the fact that it formulates the core of the state. It defines the formation of population. It is considered as one of the most important human rights in modern history. Nationality as a legal form has a very significant impact over women's rights; it is called the right to have rights<sup>17</sup> due to its power to grant citizenship which afterwards empowers citizens with social, political, cultural and economic rights which include a reciprocal relation between the state and its subjects.<sup>18</sup> Consequently, assessment of the position of women in the nationality law is useful for examining patriarchy in the Egyptian legal system. The importance of assessing the nationality law lies in the fact that nationality laws have long been promulgated in accordance with the same factors affecting other laws in Egypt. Hence, the same grounds that affect Egyptian laws are mirrored in the nationality law.

In this thesis, I will show how nationality law, as an example in the Egyptian legal system, has long discriminated against women. I also argue that even though the law was used as a tool for social change through amending the nationality law in 2004, it has failed to achieve equality. Even, the use of strategic litigation, though helping nationality law overcome certain occasions of gender inequality, is not enough on its own to overcome the discrimination existing in the nationality law. Though adjudication has been very successful to some extent to achieve equality, it has failed to impose complete equality. The reason is that the nationality law is only a small part of a patriarchal society

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<sup>17</sup> Lisa C. Stratton, *The Right to Have Rights: Gender Discrimination in Nationality Laws*, 77 MINN. L. REV. 195 (1992).

<sup>18</sup> Lina Abou-Habib, *The 'right to have rights': active citizenship and gendered social entitlements in Egypt, Lebanon and Palestine*, *Gender and Development*, Vol. 19, No. 3, Citizenship (2011) at 442.

with a legal structure that does, in all cases, oppose the achievement of satisfactory equality.

This argument is built in three chapters. The first chapter highlights discrimination against women in Egyptian laws. I choose some of the most well-known laws for their gender discrimination to demonstrate how the nationality law is only one example of the current patriarchal composition. In the second chapter, I compare the opposing points of view regarding the enactment of the amendment of nationality law no 154 of 2004 and how this law has been promoted as a tool for social reform. I show how the amendment of the nationality law of 2004 is not sufficient, as a tool of social reform, to eliminate discrimination existing in the nationality law. In the last chapter, I define strategic litigation and describe how it functions. After this, I examine the role of strategic litigation in Egypt in general and regarding nationality law specifically. This is followed by an assessment of the role of strategic litigation in achieving gender equality and how it is not enough on its own to achieve equality.

## II. Gender Discrimination in Egyptian laws

This chapter focuses on the gender discrimination that exists in the Egyptian legal structure. Only major discriminatory laws are discussed in this chapter as a way of identifying how women's rights are treated in the Egyptian legal system. The first part focuses on the definition of discrimination and its manifestations. The second part discusses women's protection under consecutive Egyptian constitutions as well as their representation in the legislative body. The final part shows the existing gender discrimination in the penal law, personal status law and finally nationality law.

### A. Defining Discrimination

Many national and international instruments have tried to define discrimination. It can be defined as the actions undertaken by a majority group which impose differential and negative impact over a minority group.<sup>19</sup> The International Convention on the Elimination of All Forms of Racial Discrimination define discrimination as:

any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>20</sup>

In addition, the European Court of Justice in its attempt to define discrimination states that "discrimination can arise only through the application of different rules to relevantly similar situations or the application of the same rules to different situations."<sup>21</sup> If we look closer at the forms of discrimination, we find that it might take a direct form where an act or law is imposes unequal treatment on a group of people as compared to others.<sup>22</sup> It can also be indirect where equal treatment is applied, but this results in a worse position for a certain group.<sup>23</sup> A clear example for indirect discrimination is where rules treat equally

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<sup>19</sup> Feagin & Eckberg. Discrimination: Motivation, action, effects and context. *Annual Review of Sociology*, (1980) 1–20.

<sup>20</sup> The United Nations. "International Convention on the Elimination of All Forms of Racial Discrimination." *Treaty Series*, vol. 660, Mar. 1966, art. 1 para. 1.

<sup>21</sup> Case C-279/93. *Finanzamt Köln-Altstadt v Schumacker* (1995) para 30.

<sup>22</sup> Ildikó Laki, *The concept of discrimination nowadays* (2014) at 189.

<sup>23</sup> *Id.*

men and women while ignoring the fact that only women are affected by pregnancy.<sup>24</sup> Fighting discrimination must not only be concerned with direct and indirect discriminatory rules, but also to adopt the required measures to reach the aimed result on the ground.

However, fighting discrimination is not an easy matter. Even though the rules that aim at eliminating discrimination might be decisive as to its wording, such as that adopted by the current Egyptian constitution, many constraints and limitations might be imposed over its effectiveness. If we take the anti-discrimination law of the UK as an example, we find that the law itself provides comprehensive protection against discrimination that goes far beyond the requirement of the European Union anti-discrimination law.<sup>25</sup> However, two major restrictions are imposed over its capacity. The first one are the “exceptions” whereby some cases are excluded from its application.<sup>26</sup> The second are the “justifications” whereby the discriminatory behavior is justified.<sup>27</sup> This is similar to most of the Egyptian laws where certain equalities are disregarded in the laws. Even those laws are keen on applying equality, they face many obstacles as to their application. This is due to various factors such as the interpretation of the court and the application undertaken by the executive authority. These discriminatory flaws, whether in law or application, are usually the result of a tension between the tendency towards a restrictive application of anti-discriminatory measures, and the pragmatic approach where other competing variables are weighed against the equality principle.<sup>28</sup>

In this regard, gender discrimination<sup>29</sup> is one of the major types of discrimination that international instruments and municipal laws tend to fight. Many of these forms of discrimination are justified based on the stereotyping of both women and the role they

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<sup>24</sup> Larry Willmore, *Discrimination*, Extract from the Report on the World Social Situation, Chapter VIII, (1997) at 4.

<sup>25</sup> See N. Bamforth, M. Malik and C. O’Cinneide, *Discrimination Law: Theory and Context*, London: Sweet & Maxwell (2008), at 299-309. In addition, we can see that certain types of discrimination are permitted in the Equality Act of 2010 like marital status outside of employment. See sections 28 and 32 of the British Equality Act 2010.

<sup>26</sup> Colm O’Cinneide & Kimberly Liu, *Defining the Limits of Discrimination Law in the United Kingdom: Principle and Pragmatism in Tension*, 15 INT’L J. Discrimination & L. 80 (2015), at 8.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> By gender discrimination, I refer to the biological or anatomical differences between men and women.

play in society.<sup>30</sup> The CEDAW adopted a broad definition of the discrimination against women. It defines it as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>31</sup>

The definition adopted by the convention does not only address explicit discrimination, but also indirect discrimination where identical treatment is applied if such treatment constitutes impairing a women's right.<sup>32</sup> This can take place when a law appears neutral, but imposes a discriminatory effect with its application. The CEDAW in its pursuit of eliminating all forms of discrimination against women is keen on achieving gender equality. It imposes on the states a formal legal obligation for achieving equality.<sup>33</sup> This concept is concerned primarily with laws and their application. The convention also requires states to undertake substantive measures to ensure gender equality.<sup>34</sup> Moreover, the convention aims at ensuring the establishment of transformative equality through addressing prevailing gender-based stereotypes.<sup>35</sup>

Governments in their efforts to address the discriminatory rules and behavior might not only adopt the strict form of eliminating discrimination through strict interpretation of equality before the law. Many governments, rather, prefer to adopt some preferential policies, stipulated in the CEDAW, which promote equal opportunity rather than strict equality for law.<sup>36</sup> This is adopted by the Egyptian constitution which grants women preferential treatment as to the number of seats preserved for women in the parliament.

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<sup>30</sup> Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. Pa. L. Rev. 1, 1-2 (1995) at 2.

<sup>31</sup> Article 1 of Convention on the Elimination of All Forms of Discrimination against Women, A/RES/34/180 (1979).

<sup>32</sup> General Recommendation 28, UN Doc CEDAW/C/GC/28, [16].

<sup>33</sup> General Recommendation 25, UN Doc A/59/38, annex I [10].

<sup>34</sup> The committee stipulated that it is not enough for states to guarantee equal treatment. States must take into account biological, cultural and social differences in order to guarantee best results. CUSACK S, PUSEY L. CEDAW and the Rights to Non-Discrimination and Equality. *Melbourne Journal of International Law* (2013) at 64.

<sup>35</sup> *Id.*

<sup>36</sup> Larry Willmore, *Discrimination*, Extract from the Report on the World Social Situation 1997, Chapter VIII (2001).

The preferential policy, however, criticized for its aiming to solve the manifestation of the<sup>37</sup> discrimination, but not the inequality itself. Hence its existence must be only temporary until equal opportunity is reached. Accordingly, discrimination has different forms and eliminating its existence does require adopting multiple procedures and forms of reparations.

## **B. The Constitution and Parliament Representation**

In order to analyze the gender inequality in the Egyptian legal structure, we must first analyze the articles of the consecutive constitutions. Since a constitution is considered to be a social contract,<sup>38</sup> assessment of its articles sheds light on the patriarchy in the legal system in modern Egypt. There is a significant correlation between women's rights prescribed in the constitution, and how they are represented in the parliament which suggest the existence of gender equality. For this reason, an assessment of women's rights must be made in order to identify the discrimination existing in the current system. This can be achieved through assessing three pillars. The first one is the formation of the constituent assembly of the constitution and the number of women represented in it. The second assesses the wording of the constitution itself and, lastly, the level of discrimination in social, political and cultural rights based on gender. Accordingly, we must evaluate how these pillars have developed in Egyptian constitutions.

After the 1919 revolution, the formation of the constituent assembly which formed the 1923 constitution had a significant influence on the articles of the constitution. Prime Minister Adli Pasha issued a decree to form the thirty-member legislative committee which did not include any women. This constitution ignored the right of representation of women in the parliament. While it recognized that Egyptians are equal before the law in enjoying civil and political rights, the electoral law gave voting rights exclusively to men. Though this constitution stated that discrimination based on origin, language, and religion was forbidden, it ignored discrimination based on gender.<sup>39</sup> In addition, under this

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<sup>37</sup> *Id.*

<sup>38</sup> Starting from the 1952 the constitution was considered as a social contract unlike the 1923 constitution which was considered as a grant from the King to the people; Hala Kamal Inserting women's rights in the Egyptian constitution: personal reflections, *Journal for Cultural Research*, 19:2, (2015), at 155.

<sup>39</sup> See Constitution of the Arab Republic of Egypt, 1923, art. 3.

constitution, women were not given the right to vote.<sup>40</sup> As a consequence, the protection of women in this constitution was at its minimal which reflects the position of women before the drafting of this constitution.<sup>41</sup> The only right they acquired was the right of primary school education.<sup>42</sup> Hence, the constitution solidified the patriarchy in a legal form that would enhance discrimination based on gender. Despite the important role that women played in the strikes in 1919, the rights of women were disregarded.<sup>43</sup> Here, since patriarchal conservatism was no longer in need of women's participation, they could go back to their normal place in the home.<sup>44</sup> This shows how patriarchal norms were embodied in the behavior of the governing male elite.

After the 1952 revolution, a new constitution was issued in 1956 which slightly expanded women's rights. Unfortunately, in the same manner as its predecessor constitution, the committee formed for drafting it was composed of fifty members none of whom were women. Despite this, the constitution was more progressive than its predecessor. It stated that all Egyptian are equal before the law without any discrimination based on sex.<sup>45</sup> It gave the right to all Egyptians to vote in accordance with the law.<sup>46</sup> Consequently, women acquired the right to vote in the elections. It was the first constitution also to mention the word "women" in the constitution.<sup>47</sup> The constitution imposed over the State the duty of reconciling their work in the community and duties in the family. This article, which exists in all of the subsequent constitutions - 1971, 2012, and 2014 - explicitly discriminating against women through depicting the main role of women as being within the household, and their right to labor secondary to their family role. In addition,

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<sup>40</sup> Serena Tolino, Gender Equality in the Egyptian Constitution: From 1923 to 2014, *Oriente Moderno* 98 (2018) at 147.

<sup>41</sup> Mohamed Al Agati, Women and Equal Citizenship: Analysis of the New Constitution of Egypt, (2012) at 11.

<sup>42</sup> *Id.*

<sup>43</sup> Selma, *supra* note 6 at 111.

<sup>44</sup> see Margot Badran, *Feminists, Islam, and nation: gender and the making of modern Egypt*, Princeton University Press (1995) at 74-88.

<sup>45</sup> Constitution of the Arab Republic of Egypt, 1956, Art. 31.

<sup>46</sup> *Id.*, art. 61.

<sup>47</sup> *Id.*, art.19.

criticism has been directed towards this article for separating women's private rights as a part of the family from her public rights as a citizen.<sup>48</sup>

The 1971 constitution, similarly, did not include any women within its formation. The eighty members of the special committee who formed four sub-committees excluded women from their composition. Apart from that, the 1971 constitution took further steps towards equality. In addition to maintaining the stipulation of prevalence of equality, this constitution for the first time stipulated a positive discrimination for women.<sup>49</sup> It guaranteed the protection of motherhood and childhood, as well as guaranteed equality with men in the political social, cultural and economic life but only as long as it did not violate Islamic rules.<sup>50</sup> The correlation made between equality and the non-contradiction with Islamic rules opened the door for a wide set of discriminatory laws that adopted patriarchal ideologies. In addition, the constitution identifies citizenship by prescribing that gender equality take place only in cases that it does not contradict *Shari'a*. This was a major degradation towards the effort of gender equality and elimination of patriarchy. This encouraged Islamists to advocate that women should fall back into their rightful place in the home.<sup>51</sup> In addition, in 1976, the constitution was amended to make the Islam the principle source of legislation in Egypt. This was considered as a drawback for women's rights and opened the door for Islamists to set their restrictions.<sup>52</sup>

Afterwards, during Mubarak's rule, the constitution was amended twice - 2005 and 2007. The amendments were not directed towards addressing women's rights.<sup>53</sup> However, an important amendment was introduced in 2007 that permits law to provide a minimum representation of women in the parliament.<sup>54</sup> This opened the door for the adoption of a quota system to appoint women in the Egyptian parliament. Hence, the people assembly law was amended which gave women 64 seats out of 500 seats with a

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<sup>48</sup> Moussa, Jasmine. *Competing Fundamentalisms and Egyptian Women's Family Rights : International Law and the Reform of Shari'a-Derived Legislation*, BRILL (2011) at 147.

<sup>49</sup> Constitution of the Arab Republic of Egypt, September 11, 1971, Art. 8, 40.

<sup>50</sup> *Id.*, art. 40.

<sup>51</sup> Selma, *supra* note 10 at 80.

<sup>52</sup> *Supra* note 49, Art. 2.

<sup>53</sup> Serena Tolino, *Gender Equality in the Egyptian Constitution: From 1923 to 2014*, *Oriente Moderno* 98 (2018) at 154.

<sup>54</sup> *Supra* note 49 Art. 62.

percentage of about 12% of the total seats.<sup>55</sup> Though this is considered a great step for empowerment of women's political rights, this limited number of seats, of only 12% of the total, strengthened the patriarchy in the legal system and marginalized the role of women in the society and political life since it does not reflect the real representation of women in the society.

After the ouster of Mubarak during the events of 25<sup>th</sup> of January revolution, the fundamental legal structure of the state was rebuilt. The 1971 constitution was suspended, and since Islamists rose into power after Morsi became the president, the status of women's rights became vague. The constituent assembly was formed with 100 members.<sup>56</sup> Among all these members only seven were women. Though women tried to align with some non-Islamist political parties, the overall characteristic of women rights prescribed for in the draft constitution was limited by their not contradicting the rules of *Shariah*.<sup>57</sup> Article 68 of the draft constitution prescribed the equality between women and men in all fields as long as it did not contradict with *Shariah*. This article was removed eventually from the final draft as *Salafis* would not have allowed this article without compliance with *Shariah*.<sup>58</sup> Moreover, the Islamists managed to add article 219 which specified the scope of *Shariah* rules specifically. Of course, this implies a more progressive interpretation of *Shariah* that was opposed by feminist activists. The constitution also failed to guarantee protection against gender violence and human trafficking. It also failed to stipulate the commitment of the country to international treaties which includes the CEDAW.<sup>59</sup> Moreover, this constitution did not treat women as full citizens enjoying equal rights and responsibilities, but rather they were considered either as "men fellows" or "mothers" in a way that they remained dependent on men.<sup>60</sup> In the People's Assembly, only around 2% of women were represented as compared to the

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<sup>55</sup> Law no 149 of June 20, 2009 on Amending Some Rules of the Law no. 39 of 1972, art. 1.

<sup>56</sup> *Id.*

<sup>57</sup> Amany Abou El Fadl, . *Min kawaleis al distour ser`al siyada al wataniyya wal irada al dawliyya dakhel distour misr*. Cairo: Nahdet Misr (2013).

<sup>58</sup> Maya Morsy. Egyptian Women and the 25th January Revolution: Presence and Absence, Journal of North African Studies (2014).

<sup>59</sup> Amany, *supra* note 57.

<sup>60</sup> Constitution of the Arab Republic of Egypt, December 25, 2012, Preamble & art. 10.

quota system adopted by Mubarak in 2010 of around 12% women representation.<sup>61</sup> Even then, those women were only involved in the discussion with a participation percentage of 3% of the total.<sup>62</sup> These women, in addition, did not promote women's rights but sometimes advocated for stabilizing the patriarchy.<sup>63</sup>

The 2014 constitution, on the other hand, was formed by a constitutional body of fifty members;<sup>64</sup> five of whom were women - a slightly higher percentage than that of the 2012 constitution.<sup>65</sup> Despite this, the difference is dramatic. Most of them have a strong record of defending women's rights.<sup>66</sup> A concrete reading of the current constitution will deduce that many weaknesses in the former constitution were readdressed in this new one, and even new points of gains were stipulated in it. The state guaranteed the elimination of all sorts of violence and increased the empowerment of women to be appointed in the top-leading positions without discrimination. A reflection of the implementation of these articles is seen in women members of the 2016 parliament of 14.9% which is the highest female representation in the parliament's history.<sup>67</sup>

In 2019 the constitution was amended. One of the amendments adopted the quota system again which stipulated that women's seats must not be less than a quarter of the total number of seats.<sup>68</sup> Whereas the percentage of women representation in the Egyptian parliament was the highest in 2015 with almost 15% of seats,<sup>69</sup> this percentage even increased significantly in 2020 to a quarter of all of the seats.<sup>70</sup> Despite this, the quota system, as the one adopted before, does not grant women the equal amount of seats that is

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<sup>61</sup> Blanka Rogowska, *Did Egyptian Women Win or Lose by Overthrowing the Regime of Hosni Mubarak?* (2018) at 116.

<sup>62</sup> El Baradei, L. and Wafa, D., *Women in the Second Egyptian Parliament Post the Arab Spring: Do They Think They Stand a Chance?*, "Journal of International Women's Studies," no. 14.3 (2013), at 42–63.

<sup>63</sup> One of the women elected members called for cancelling Khulu law, and banning travel of women alone. See *Id.*

<sup>64</sup> Khalil Ashraf. "Egypt's Committee of 50 Rewrites the Constitution – Again". Al-Jazeera America, (2013, In: <https://goo.gl/48KfZ3>)

<sup>65</sup> Prior to the formation of the 50 members committee, there was a 10 members committee that was competent of revising the 2012 constitution. This 10 members committee did not include in its formation any women representative.

<sup>66</sup> Mariz Tadros, *Negotiating Women in Egypt's Post-Mubarak Constitutions 2012–2014*, (2020).

<sup>67</sup> Hend El-Behary, "Women's Representation in New Parliament Highest in Egypt's History." *Egypt's Independent* (2014).

<sup>68</sup> Constitution of the Arab Republic of Egypt, January 18, 2014, art. 102.

<sup>69</sup> Hala Abdelgawad and Mazen Hassan, *Women in the Egyptian parliament: a different agenda*, *Review of Economics and Political Science* (2019), at 1.

<sup>70</sup> Reem Leila, *Egypt's parliament: A significant female representation*, *Ahramonline* (2020).

equivalent to their representation in the society. It has only increased the percentage which does not yet represent the required number of seats that should be occupied by women. Thus, even though consecutive constitutions increased the percentage of women's representations in the Egyptian parliament, it has implicitly empowered the patriarchy.

In addition, if we look at the constituting committee, we see that despite women's long struggle for acquiring their rights and protesting, neither of the constituting committees of the 1923 constitution, nor the 2012 one included any women in its formation. Though things changed in the current constitution, only five women were part of the fifty member committee responsible for drafting the 2014 constitution.

### **C. The Penal Law**

The spread of violence against women is one of the major indications of patriarchy in society. Women have long been subjected to violence worldwide.<sup>71</sup> This behavior has been widespread in Egypt also for a long time. In a survey held by the National Center for Women, it is estimated that around 63% of married women have been subject to violence through their life.<sup>72</sup> Despite the effort exerted in the legal structure level to put an end to this violence, the Egyptian Penal code has long opened the door for legitimating violence against women. Article 60 of the Penal Code states that the law will not be applied in a case where the act is undertaken with good intention in accordance with a right stipulated in *Shari'a* law.<sup>73</sup> This article has been frequently used by the criminal courts and confirmed by the Court of Cassation in order to justify limited strikes by family members against women in order to discipline them.<sup>74</sup> The Court of Cassation, in one of the cases where a daughter was killed due to being brutally beaten by her father, declared that the right of discipline is permitted under article 60 of the penal code as long

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<sup>71</sup> According to the WHO between 15% to 71% of women were subject to one sort of violence in their lives. See World Health Organization. WHO Multi-country Study on Women's Health and Domestic Violence Against Women Geneva (2005).

<sup>72</sup> A study of violence against women at Egypt, The Egyptian Center for Women (2009), at 31.

<sup>73</sup> Law no. 58 of July 31, 1937 on Penal Law, art. 60.

<sup>74</sup> Egypt: Facts on Violence Against Women, EuroMed Rights, <https://euromedrights.org/wp-content/uploads/2017/03/Factsheet-2017-VAW-Egypt-AR.pdf>

as the father hit them with leniency and in body parts other than face, head, and limbs.<sup>75</sup> When the male family member uses extensive power to discipline his wife or daughter, the court uses this article to ease the penalty imposed upon him.<sup>76</sup>

One of the major forms of gender discrimination that also exists in the Penal code is its treatment of honor crimes. Despite the penal code not referring explicitly to honor crimes in its wording, both articles 17 and 237 facilitate discriminatory behavior from the law in honor cases.<sup>77</sup> Article 17 gives courts the power to impose lenient sanctions on the accused person in accordance with the circumstances of the crime.<sup>78</sup> This article is commonly applied by the court in order to promote lenience in crimes of honor in cases where the conditions required in article 237 do not exist. The problem is that the court of cassation stipulates that judges can apply leniency measures upon the existence of certain circumstances without the need for a discussion of his reasoning in the ruling.<sup>79</sup> This will even extend the justification to apply this discriminatory article. The non-justified discriminatory behavior can be established in a case where two brothers killed their third brother's wife for her bad reputation.<sup>80</sup> They killed her and then burnt her body. The court decreased the sentence from execution to life imprisonment by applying article 17. This application shows how this article is discriminating against women's rights. On the other hand, article 237 stipulated explicitly that if a husband caught his wife in an adulterous situation, and killed her and her partner at once, he would be convicted of a misdemeanor only.<sup>81</sup> This is an implicit permission from the law for husbands to execute women if they commit adultery as they will be able to escape sanctions under the rule of article 237, or have lenience if committing a crime of honor under article 237.

Another ground of gender discrimination relates to the crime of adultery for married spouses. The penal law discriminates between married men and women in cases of

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<sup>75</sup> Case no. 2840, Judicial Year no. 80, of December 12, 2011, Court of Cassation; see also a case where a husband killed his wife and claimed that he was using his right to discipline her. Case no. 18555, Judicial Year no. 73, of November 17, 2008 Court of Cassation.

<sup>76</sup> *Id.*

<sup>77</sup> LYNN WELCHMAN & SARA HOSSAIN, 'HONOUR ': CRIMES, PARADIGMS & VIOLENCE AGAINST WOMEN Chapter 6 (2008), at 143-144.

<sup>78</sup> Penal Law, *supra* note 73, art. 17.

<sup>79</sup> Case no. 1186, Judicial Year no. 36, October 4, 1966, Court of Cassation.

<sup>80</sup> Case no. 16231, Judicial Year no. 65, October 21, 1997, Court of Cassation.

<sup>81</sup> Penal Law, *supra* note 73, art. 237.

adultery. The law sanctions married women who commit adultery with a period of two years imprisonment.<sup>82</sup> On the contrary, the law requires more restrictions in case of a man who commits adultery; it requires that the adulterous action must be in the same house as the marriage home, and in this case he will only be sanctioned with six months imprisonment.<sup>83</sup> In addition, the law gives the right of the husband of the adulterous wife to stop the execution of this judgment and does not give a similar right to the women in the same situation as men. The legislator in article 276 also stipulates certain restricted grounds of evidence<sup>84</sup> in order to acknowledge the existence of adultery from the married men's side, leaving women's adulterous action to be proven by all means without any restrictions.<sup>85</sup> This facilitates the proof of the crime committed by women while complicates the proof of the commission of the crime from the men's side. Accordingly, in a new precedent, the appeal court of Banha referred these articles to the Supreme Constitutional Court to review their constitutionality.<sup>86</sup> The court in its reasoning stipulated that there is not any justification for the unequal sanctions imposed on married men and women in case of adultery since the crime is not acceptable from both on the same level. It stated also that the law permitted married men to commit adultery in any location as long as it is not in the house of marriage which is a discriminatory clause that has not any justification.<sup>87</sup> The court also raised the point of discrimination on the grounds of evidence between the two genders who commit the same crime.

#### **D. Personal Status Law**

One of the major controversial laws that is often raised when discussing the gender equality topic is personal status law. Despite the fact that family law is supposed to be included in the civil code and be regulated as a secular law,<sup>88</sup> it now is comprised of a significant number of gender discriminatory articles. Since personal status law is based

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<sup>82</sup> Penal Law, *supra* note 73, art. 274.

<sup>83</sup> Penal Law, *supra* note 73, art. 277.

<sup>84</sup> Those are arresting him while in the action of adultery, his confession, the presence of letters or other written papers from him, or his presence in the place designated for the women.

<sup>85</sup> Penal Law, *supra* note 73, art. 267.

<sup>86</sup> Case no. 7604 of Judicial Year 2020, December 16, 2020 Appeal court of South Banha.

<sup>87</sup> *Id.*

<sup>88</sup> Sanhoury aimed while writing the civil code to include also personal status matters. See FARHAT J. ZIADEH, *LAWYERS, THE RULE OF LAW AND LIBERALISM IN MODERN EGYPT* (1968) at 117, 138.

on *Shari'a* law,<sup>89</sup> it is considered to be one of the most important legal confrontations between feminism and Islamism. Most of the gender inequality existing in the personal status law revolves around rights during marriage and after divorce.

The personal status law distinguishes between the role of both men and women as to maintenance. It puts the burden of maintaining the family and wife as part of the husband's duties.<sup>90</sup> This financial privilege given to women is not a favor. It results in a hierarchy in the marital relationship where women are supposed to obey their husbands' orders.<sup>91</sup> The law stipulates that a woman will not receive her maintenance if she disobeys her husband, and she will be considered disobedient if she refuses to come back after he invites her back home known as *bayt al-ta'ah*.<sup>92</sup> This article highlights the patriarchal constitution of family under personal status law.<sup>93</sup> In addition, she will lose her maintenance if she commits apostasy, or leaves the matrimonial house without her husband's permission.<sup>94</sup> Another significant inequality is that the law also stipulates that a woman loses maintenance if she works in a manner that affects the interest of the family after her husband explicitly asks her to stop.<sup>95</sup> This amplifies the ideology of the law which considers women as subordinate to men in marital relations whereby men have symbolic control over many fundamental rights that constitute women's identity as an equal citizen.

Under personal status law, polygamy is permissible in a way that promotes male supremacy.<sup>96</sup> The only limitation existing on the absolute right given to men is to inform the wife that he is going to marry a new one. Thus, Egyptian men can marry more than one woman at the same time and women might not be able to plead divorce for harm. In

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<sup>89</sup> Moussa, *supra* note 48, at 131.

<sup>90</sup> Law no. 25 of 1929, on Egyptian Personal Status, art. 11 para. 2, as added by law no. 100 of 1985, art. 1.

<sup>91</sup> Moussa, *supra* note 48, at 172.

<sup>92</sup> *Id.*

<sup>93</sup> It was possible under the *bayt al-ta'ah* provision to force women back home by the use of police. This had ended after large campaign against this practice. Moussa, *supra* note 48, at 175.

<sup>94</sup> There is an exception in cases where going out is in accordance with *shari'a* or in cases of emergency. Law no. 25 of 1929, on Rule of Maintenance and Some Personal Status Matters, art. 1, as amended by law no. 100 of 1985.

<sup>95</sup> *Id.*

<sup>96</sup> It was not regulated or restricted under the law no. 25 of 1929.

the annulled law that was issued in 1979,<sup>97</sup> women were given the right to get a divorce directly when their husbands married another woman.<sup>98</sup> Even though this was still discriminating against women, as polygamy was only permitted for men, this restriction was not included in the latter amendment of the law which constitutes a severe form of patriarchal discrimination. Permitting polygamy explicitly contradicts with Egypt's responsibilities derived from the CEDAW Convention.<sup>99</sup>

The personal status law also is not equating between men and women as to maintenance, custody and guardianship on children. Though law is favoring women in the maintenance and custody parts, it gives the guardianship rights to men.<sup>100</sup> Putting the burden of maintenance on men might seem to be privileging women, however, in reality it strengthens the stereotype of women being a householder while men are the laborers; women should do their work as a caregiver for their children 'hold custody' while men should pay the expenses 'maintenance'.<sup>101</sup> This same ideology gave men the right of guardianship over children even if the women have their custody until age twenty one.<sup>102</sup> This discrimination was slightly limited when the child law was amended to give the one who has the custody the power to exercise guardianship over education.<sup>103</sup> This amendment aimed at decreasing the effects of the patriarchal composition of the guardianship. The law is not even considering a mother capable of being a guardian in case the father was incapable of exercising his rights, rather, it gives the guardianship to the grandfather.<sup>104</sup>

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<sup>97</sup> This law was declared unconstitutional in 1985. Case no. 28, of Judicial Year 2, May 4, 1985, Supreme Constitutional Court (SCC).

<sup>98</sup> Law no. 44 of 1979 as an amendment of the personal status law.

<sup>99</sup> The CEDAW committee made a recommendation stating that polygamy contradicts with women's right to equality with men, *General Recommendation 21, Equality in Marriage and Family Relations*, UN CEDAWOR, 13th Sess., UN Doc. A/47/38, (1994), at para. 14.

<sup>100</sup> The law stated that if the child does not have money, then his maintenance is on his father according to the conditions stated in the law. Personal Status Law *supra* note 90, art. 18, para. 2, as amended by law no. 100 of 1985.

<sup>101</sup> If a man divorced his wife he should pay her *Nafka* and *mot'a*. The man should pay for his child's expenses like food, clothing and education, and in case of divorce, he should provide a proper house for his children. Personal Status Law *supra* note 90, art. 18 para.1,2,3.

<sup>102</sup> Law no 119 of 1952, on Egyptian guardianship over money law, art. 1.

<sup>103</sup> *Id*, art 2.

<sup>104</sup> *Id*, art. 29 - 31.

Apart from that, dissolution of marriage in the personal status law also discriminates against women. Even though the legislator intervened to insert a solution for women,<sup>105</sup> it was not enough to overcome the existence of inequality. The law primarily granted men the power of divorce without the need to state any reason or file a lawsuit. On the contrary, women who seek divorce must prove the existence of one of the conditions stipulated by the law. Grounds for seeking divorce by the wife can be due to extended absence of the husband,<sup>106</sup> polygamy,<sup>107</sup> and the existence of harm. This shows how women's rights were violated concerning the dissolution of the marriage contract.

As stipulated before, one of the major grounds for divorce is to prove that there is harm inflicted upon the wife.<sup>108</sup> However, it is the responsibility of the wife to prove the existence of such harm. If we look closer at the harm requirement for divorce, we will find many difficulties revolving around it. Harm interpretation falls in the hands of judges where they have full discretionary power. In addition, the burden of proof falls on the wife. Judges are also restricted by other judicial precedents that have been proven to be conservative.<sup>109</sup> One of these precedents is that when a wife return back home after being subject to harm, the court should not implicate divorce since life could be resumed between spouses.<sup>110</sup> Another problem is that standards of harm are not stable. A court can make exceptions to harm based on the social standard of the wife.<sup>111</sup> In one of the cases, the Court of Cassation defined harm that could be relied on for divorce as being the one that can be done through either words or physical acts that are considered harmful by custom in a way that the wife cannot bear it anymore.<sup>112</sup> This shows how much the judge enjoys discretionary powers in deciding whether to grant divorce based on harm. In addition, the wife still needs the testimony of two witnesses that have seen the act

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<sup>105</sup> The legislator introduced the Khul' for the women's interest. Law no. 1 of 2000, on some rules and procedures of litigation in matters of personal status.

<sup>106</sup> If the husband disappears without a valid reason for a year or more, the wife could acquire a court decision with divorce. Personal Status Law *supra* note 90, art. 12.

<sup>107</sup> She has the burden of proof that her husband's marriage caused moral or material damage in a way that like could not be continued.

<sup>108</sup> Personal Status Law *supra* note 90, art. 6.

<sup>109</sup> Moussa, *supra* note 48, at 178.

<sup>110</sup> Hajjar, Lisa, 'Domestic Violence and Shari " a: A Comparative Study of Muslim Societies in the Middle East, Africa and Asia', Islamic Family Law Project at 25.

<sup>111</sup> The court of cassation defined harm as the verbal or physical abuse that is contradicting with her social standard. See case no. 28, of 29 Judicial Year, April 18, 1962, Court of Cassation.

<sup>112</sup> Case no. 337, of 67 Judicial Year, October 13, 2001, Court of Cassation.

undertaken by the husband.<sup>113</sup> Harm is even harder to prove in cases of polygamy though polygamy resembles a clear example of discrimination. In addition, it is considered a lengthy and costly procedure for women to get a divorce through a court judgment.<sup>114</sup>

The law no 1 of year 2000 aimed at easing the discrimination existing in the divorce regulation. It gave women the right to break off the marriage bond unilaterally or *khul'* in return for abdicating their financial rights.<sup>115</sup> This way of separation still required that women go to court in order to separate. Whereas, it is not required to justify her request through stating the reasons of *khul'* as the judge does not have a discretionary power over it.<sup>116</sup> This solution is criticized as women still have to appoint lawyers and go to court which can be exhausting. In addition, the duration though considered shorter than divorce, can still take quite a few months before the judge renders his decision.<sup>117</sup> Moreover, a women is forced to return the dowry that was given to her at marriage in addition to abdicating her financial rights which can be financially exhausting especially for those who are unemployed.<sup>118</sup> Hence, it is discriminatory to impose all of these obstacles on women, while giving men the power of unilateral repudiation through going to a civil state office and without the need for justifications.

### **E. Nationality Law**

The nationality law is not separate from the discriminatory legal nature of Egyptian laws. The nationality law, unlike other laws like the personal status law and penal code, has many consecutive versions during the past century. This active legal reformation that characterizes the history of the Egyptian nationality law all discriminate against women. Although each of them was issued during a different political moment, all of them have

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<sup>113</sup> Nathalie Bernard-Maugiron, Breaking Up the Family: Divorce in Egyptian Law and Practice, *Journal of Women of the Middle East and the Islamic World* 6 (2008), at 56.

<sup>114</sup> *Id.*, at 57.

<sup>115</sup> The financial rights are her alimony, financial compensation *mut'a*, and return the *mu'akkhar al-sadaq*.

<sup>116</sup> Law concerning some rules and procedures of litigation in matters of personal status, *Supra* note 105, art. 20.

<sup>117</sup> Husbands tend to extend the procedures through not attending the conciliation sessions. In some cases one of the experts is absent. See Nathalie Bernard-Maugiron, Breaking Up the Family: Divorce in Egyptian Law and Practice, *Journal of Women of the Middle East and the Islamic World* 6 (2008), at 64.

<sup>118</sup> *Id.*, at 59.

agreed to ignore women's rights. Accordingly, in this part the development of the nationality law until the adoption of the current law is discussed.

After Egypt became independent from the Ottoman Empire, it was important to establish a new nationality law that would empower the state to give nationality to its citizens. Accordingly, the nationality law no. 26 of the year 1926 was issued.<sup>119</sup> This law did not last long and a new law replaced it, no. 19 of the year 1929. This law recognized Egyptians as people who are born from an Egyptian father whether inside or outside the state. It is clear, accordingly, that this law did not equate men's status with women's in passing the nationality to their children. The legislator only granted the children of an Egyptian woman her nationality in cases where the father was not known.<sup>120</sup> In other words, the law granted Egyptian nationality to children of an Egyptian woman as long as the lineage to the father could not be legally proven.<sup>121</sup> This is considered good coverage for these children by the nationality law in order not to have stateless children.

In addition, the law granted the foreign wife that was married to an Egyptian the right to acquire the nationality, based on certain requirements specified in the law, though it did not grant this right to the foreign husband who was married to an Egyptian wife.<sup>122</sup> In the same context, if a male foreigner acquired the Egyptian nationality, for one of the reasons of naturalization prescribed in the law, his wife would be granted the Egyptian nationality based on the fulfillment of certain requirements.<sup>123</sup> However, the legislators again kept silent on the opposite case when the foreigner is a woman. Thus, in this case the husband of this foreign woman, who had acquired the Egyptian nationality, would not be able to acquire the Egyptian nationality. The legislator continued his discriminatory path as he granted the children of the male foreigner Egyptian nationality once their father acquired the Egyptian nationality.<sup>124</sup> There is no similar article for foreign women.

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<sup>119</sup> Law no. 19 of May 31, 1926, on Nationality law..

<sup>120</sup> Law no. 19, of March 23, 1929, on Nationality Law, art. 6.

<sup>121</sup> *Id* paragraph 2.

<sup>122</sup> *Id*, art. 14.

<sup>123</sup> *Id*, art. 15.

<sup>124</sup> *Id*, art. 16. The legislator set some restrictions on this rule. However, in general he did not equate between men and women in this article.

Later on, prior to the 1952 revolution, a new nationality law was issued. The nationality law no 160 of the year 1950 expanded the conferring the Egyptian nationality to children of Egyptian women. Article 3 of this law stated that to be considered Egyptian, it includes whomever is born outside of the Egyptian territory by an Egyptian woman whose lineage to his father was not proven. It is clear that the wording used by the Egyptian legislator was very decisive as to grant them the Egyptian nationality without any discretionary power by the administrative authorities. Thus, he considered this nationality was granted through blood bond not by naturalization. This is considered a positive step forward towards granting Egyptian nationality to children brought from an outside marriage relationship where their fathers refused to acknowledge their paternity, and their Egyptian mother failed to prove this through the courts.

The 1950 nationality law did not last long. In conjunction with the principles of the 1952 revolution, a new law for nationality was issued, no. 391 of the year 1956,<sup>125</sup> in order to coincide with other social and economic developments.<sup>126</sup> This new law maintained the previous expansion,<sup>127</sup> however, the wording of the article as well as its subjective content changed dramatically. In the new law, article 3 gave the administrative authority discretionary power for granting nationality to the children of an Egyptian woman where the lineage to the father was not proven and when born outside Egyptian territory. It also added a new condition that should be fulfilled. It required that this child should have spent at least five continuous years in Egypt before reaching the age of majority. This of course is considered a major restriction that did not exist in the previous nationality laws. Thus, the legislator considered that grounds for granting nationality is naturalization not the blood bond. Besides promoting ongoing inequality against women, he also withdrew some of the rights that had already been given her from previous laws. In the same context, other inequalities that existed in its previous nationality laws were prescribed again without changes. This law did not last long due to the unity between Egypt and Syria during Nasser's rule. A new law was issued, no. 82 of the year 1958,<sup>128</sup> to regulate

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<sup>125</sup>Law no. 391, of November 20, 1956, on Nationality Law.

<sup>126</sup> It is to be noted that law no 160 of the year 1950 was issued before the mentioned law and last only 6 years.

<sup>127</sup> Law no. 160 of 1950, art. 3, on Nationality Law.

<sup>128</sup> Law no. 82 of July 3, 1958, on Nationality Law.

the new legal status of nationality of Egyptian and Syrian citizens. However, this law did not state anything new regarding women's nationality rights.

Egypt continued to rely on the law issued during the United Arab Republic between Egypt and Syria even after the dissolution of this unity in 1961. Thus, there was an existing need to change this law which actually happened in 1975 with law no. 26.<sup>129</sup> This law did not address the inequalities that existed in the previously mentioned laws. However, it put the position of children of women that were born outside of the territory where lineage to the father could not be proven in a better position. The legislator acknowledged again that he would grant nationality to these children based on the blood bond not naturalization. Thus, it stated that these children are considered Egyptians without giving any discretionary power to the administrative authority. However, the legislator did not remove the requirement of making his normal accommodation in Egypt prior to reaching the majority age. This was a constructive step taken by the Egyptian legislator. However, the predominant characteristic of the nationality law which depended on the Egyptian male as the ultimate source of Egyptian nationality continued to exist.

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<sup>129</sup> Law no. 26 of May 29, 1975, on Nationality Law.

### **III. A Closer Look at the Egyptian Nationality Law**

Since a correlation has long existed between a patriarchal legal structure and gender inequality in nationality laws, the latter has continued to reflect the patriarchy through all of its subsequent promulgations. Many progressive changes have been undertaken both to the legal system in general and to nationality laws more specifically. However, the rights given to women are still too far from the point of equality. Abiding by the patriarchal ideology of women being subordinate to men, the legal identity of woman as an Egyptian citizen has long been attributed to another male. This has been translated in successive Egyptian nationality laws that reflect the social conceptualization of women in the Egyptian community. Accordingly, Egyptian nationality law extended the nationality to women only through a male figure: either passed through Egyptian fathers or through Egyptian husbands. This irrational discrimination was the result of a long precipitation of gender discrimination characterizing the legal system. Hence, the nationality law was amended in 2004 in order to address this problem.

In this chapter, I will talk about the debate that surrounding the adoption of the amendment of the law of nationality. I will discuss Egypt's reservations to the CEDAW Convention, and how this reflected the patriarchal ideology of the legislature while enacting the nationality law no 26 of 1975. Also I will highlight the grounds that were raised for and against the enactment of the amendment no 154 of 2004. Following, I will discuss the legal nature of acquiring nationality according to the Egyptian nationality law which infused a huge degree of discrimination in the new amendment. Finally, I will assess the amendment law as a tool used for social reform in the nationality law in Egypt.

#### **A. The Debate Over the 2004 Amendment**

Before the promulgation of the law no. 154 of 2004, the Egyptian nationality law no. 26 of 1975 discriminated against women in many aspects. The most dominant inequality appears in the deprivation of the children of Egyptian women whom married to a foreign person from acquiring the nationality of their mother. It is estimated that by 2004 around 298,000 children have been deprived of the Egyptian nationality because they were born

to Egyptian mother whom has been married to a foreign person.<sup>130</sup> Some of these children were raised in Egypt for many years, even spent their whole life there, while facing economic, social and psychological difficulties in the community.

The aim of the legislator from this situation could be understood when we have a look over the reservations made by Egypt on the Convention of Elimination of All Forms of Discrimination against Women. Egypt has been one of the first Arab countries to sign the Convention which is considered as one of the major tools for protection of women's right.<sup>131</sup> However, since principles of Islamic *Shari'h* is prescribed in the constitution as the source of legislation in the Egyptian constitution,<sup>132</sup> Egypt made subjective restrictions on the convention. In this essence, Egypt made four subjective reservations on the convention related to article 2,9,16 and 29 paragraph 1.<sup>133</sup> However, what is relevant to our study in this paper are the reservations made by Egypt for article 2 and 9.

Article 2 of the convention is a general clause that prescribes that states which are parties to the treaty should amend their laws in order to be consistent with the convention. Egypt made a reservation on this article in which it will comply with its content "provided that such compliance does not run counter to the Islamic *Shari'a*".<sup>134</sup> Thus, Egypt agreed to comply with the convention as long as it will not contradict with *Shari'a* principles; otherwise it will not apply the convention. This is a significant restriction on the effectiveness of the convention. Putting a reservation on this article means excluding the main tools that could be used to achieve the goals of the convention.<sup>135</sup> Therefore, it violates the integrity of the convention and does not serve in favor of its universal

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<sup>130</sup> Reforming Citizenship Law: Reports from Tunisia, Algeria, and Egypt, al-raida Issue 129 – 130, (2010) at 78 , 79.

<sup>131</sup> Anna Jenefsky, Permissibility of Egypt's Reservations to the Convention on the Elimination of all Forms of Discrimination against Women, 15 Md. J. Int'l L. & Trade 199 (1991); Egyptian Parliament ratified the Convention on September 18, 1981. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, (1990), at 165.

<sup>132</sup> See Constitution of Arab Republic of Egypt, of 1971, art. 2 , as amended in 1980; Constitution of Arab Republic of Egypt, of 2014, art. 2.

<sup>133</sup> Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180 (Dec. 18, 1979), 1249 U.N.T.S.

<sup>134</sup> *Supra* note 131, at 167.

<sup>135</sup> See Rebecca J. Cook, Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women, 30 VA. J. INT'L L. 643, 689 (1990).

application.<sup>136</sup> Accordingly, though Egypt did not make a reservation on all of the articles of the convention, this reservation exempt Egypt from abiding with any obligation in the whole convention that contradicts with Islamic law.

Relying on Islamic *Shari'a* as a sanctuary in order to justify the actions of the state cannot be justified. *Islam* cannot be considered as a ground for gender discrimination. Those who adopt the patriarchal ideology utilize its rules and interpret it in a way that would serve their interests. In addition, if we look deeper into *Shari'a* law we will find that *Quran* and *Sunnah* have been its formal sources.<sup>137</sup> Relying on these sources, and with the use of *hadith*<sup>138</sup>, *ijtihad*<sup>139</sup>, and *ijma*<sup>140</sup>, a workable law could be formed. By the end of the ninth century, *Shariah* law was completely formed and the door of *ijtihad* was closed.<sup>141</sup> This slowly turned *Shari'a* into a rigid set of rules which is completely opposite to the concept of gradualism adopted in early days of Islam.<sup>142</sup> Even the reform achieved over years was based on selective employment and biased interpretation of Quran versus.<sup>143</sup> Accordingly, closing the door of *ijtihad* and relying on the process of “picking and choosing in order to choose the rules of *Shari'a* lead to the deviation of the use of *Shari'a* as a reference in law. Hence, *Shari'a* must not be framed as divine as it is made by jurists even if they were interpreting *Quran* and *Sunna*. A clear example for this dilemma is the disregard made by the patriarchal interpreters of *Quran* in which they highlighted the *Quran* versus which stated that male and female were created from the same *nafs*.<sup>144</sup> They intentionally ignore this versus on the expense of the misinterpreted principle that men are ‘*qawamun*’ over women. This term has long been interpreted that men are superior over women which paved the road for legitimizing a patriarchal model.

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<sup>136</sup> Anna, *supra*note 131, at 211.

<sup>137</sup> Baderin Mashood A, *International Human Rights and Islamic Law*. Oxford; New York: Oxford University Press (2003) at 34.

<sup>138</sup> It refers to what Prophet Muhammed had said.

<sup>139</sup> It refers to the thinking and understanding of Islamic jurists.

<sup>140</sup> It refers to the consensus of jurists.

<sup>141</sup> Ali Shaheen Sardar, *Gender and Human Rights in Islam and International Law: Equal before Allah, Unequal Before Man?* The Hague; Boston, MA: Kluwer Law International (2000), at 2-81.

<sup>142</sup> Baderin, *supra* note 137, at 41.

<sup>143</sup> Dina Mansour, *Women's Rights in Islamic Shari'a: Between Interpretation, Culture and Politics*, 11 *Muslim WORLD J. HUM. Rts.* 1 (2014).

<sup>144</sup> Al-Hibri, Azizah Yahia, *Muslim Women's Rights in the Global Village: Challenges and Opportunities*, *Journal of Law and Religion* (2001), at 46.

In fact, this term mean protection and support from men to women,<sup>145</sup> but patriarchal interpreters preferred the other meaning.

On the same context, Egypt also made a reservation on article 9 which states that women shall be granted equal right as men with respect to their children's nationality.<sup>146</sup> The problem is that Egypt reservation on article 9 of the convention hinders its application. Egypt justified its reservation based on:

To prevent a child's acquisition of two nationalities where his parents are of different nationalities, since this may be prejudicial to his future. It is clear that the child's acquisition of his father's nationality is the procedure most suitable for the child and that this does not infringe upon the principle of equality between men and women, since it is the custom for a woman to agree, on marrying an alien, that her children shall be of the father's nationality.<sup>147</sup>

This reservation is clearly discriminating against women without any convincing justification. Egypt stated that 'it is clear' that having the father's nationality is more suitable for the child with an arbitrary decision against women. Accordingly, this reservation failed to introduce any acceptable justification for stripping women of this fundamental right stated in this article.

The concept adopted by the government and the legislator was justified based on some grounds that were also criticized by others. The first ground is that parents are the one competent of raising patriotism and nationalism awareness in their children. This is strengthened by the fact that father is the controller of the household.<sup>148</sup> Hence, he has the capabilities to articulate children's way of thinking. On the other hand, those who support the right of Egyptian mother consider this ground as point of strength for women not the opposite. Women are the one who educate and raise her children to be loyal for the country which might overweight the role of men in this essence.<sup>149</sup>

In addition, the Egyptian nationality law is considered repellent to nationality not an attracting one. This is due to the massive annual increase in the population. Therefore,

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<sup>145</sup> *Id*, at 51.

<sup>146</sup> *Supra* note 133.

<sup>147</sup> *Id*.

<sup>148</sup> Yassmin Abo El-Ela, limit of equality between men and women in the area of nationality (2018) , at 218.

<sup>149</sup> *Id*, at 224.

giving the mother the power to pass her nationality will be inconsistent with the methodology of the Egyptian legislator.<sup>150</sup> This ground was criticized since controlling the over-population problem must not be enforced through depriving children of the Egyptian mother from their right to acquire the nationality, but through other known methods adopted to fight this problem.<sup>151</sup>

Lastly, they relied on the elimination of the dual nationality problem as a solid ground for this discrimination, and even this was stated in the reservation made by Egypt on the CEDAW. They justified it on the basis that giving the nationality to children of the Egyptian mother will lead to a dual-nationality situation if the nationality law of the father gives him the right to pass his nationality in all cases.<sup>152</sup> This ground was turned over by the fact that the consecutive nationality laws have many cases where dual-nationality cases could arise. For example, the law gives the right of acquiring nationality to children who have an Egyptian origin though they have acquired a foreign nationality.<sup>153</sup> In addition, the Egyptian nationality law permitted explicitly in article 10 paragraph 3 the right of the foreigner who acquired the Egyptian nationality to maintain his foreign nationality.

Thus, many governmental and non-governmental organizations highlighted this problem and initiated a campaign to withdraw Egypt reservations made on the CEDAW<sup>154</sup> and to correct this situation in law no. 26 of 1975.<sup>155</sup> This drove the Former President Mubarak to announce in the annual conference of the governing party in 2003 that the nationality law will be amended.<sup>156</sup> Shortly afterwards, the law no. 154 of 2004 has been enacted and published on July, 2004. This has been considered as one of the most progressive achievements for women as to her nationality rights.

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<sup>150</sup> *Id.*, at 219.

<sup>151</sup> *Id.*, at 225.

<sup>152</sup> Amany Ahmed, *The power of Mother to pass her nationality to her children in the Egyptian and comparative laws* (2013), at 321.

<sup>153</sup> *Id.*

<sup>154</sup> Egypt withdraw its reservation on article 9 ( 2) in January 2008. see MARSHA A. FREEMAN, *RESERVATIONS TO CEDAW: AN ANALYSIS FOR UNICEF, POLICY AND PRACTICE UNICEF*, DECEMBER 2009, at 15.

<sup>155</sup> *Id.*

<sup>156</sup> Middle East Online Journal, <https://middle-east-online.com/>.

## B. Nature of Nationality Acquisition

In order to assess the gender equality achieved under the law no. 154 of 2004 amendment of the Egyptian nationality law, we must first understand the legal and social significance of nationality. Generally speaking, nationality is a legal bond that attaches people to their state. Nationality has acquired its importance from the fact that it formulates the core of the state. In other words, it defines the formation of population. It is considered as one of the most important Human Rights in modern history. The Universal Declaration for Human Rights <sup>157</sup> declared that nationality is a right to everyone, and no one shall be arbitrarily deprived of it nor denied the right to change it

We can deduce that nationality stands on 3 main pillars. The first pillar is the existence of the state that has the power to create and grant the nationality. In addition, individuals are the second pillar that would be granted the nationality and, hence, form the society. The last and most important condition is the legal bond between the state and the individual. Obviously, the clearest disclosure of this relation is the nationality municipal laws.<sup>158</sup> Thus, the significance of nationality rules is manifested through its effects. These laws grant individuals the capacity of being citizen in the state. It, subsequently, empowers him directly to exercise many rights like political and social rights, right of education and health care.<sup>159</sup>

From the international law perspective, nationality, as one of the human rights, was considered primitive and not developed.<sup>160</sup> Though nationality is very important on the International level, the most crucial consequence for its existence remains internal.<sup>161</sup> It is settled that states have the full discretionary power in regulating nationality laws according to their own interest.<sup>162</sup> the Permanent Court of International Justice, followed

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<sup>157</sup> The United Nations. *Universal Declaration of Human Rights*. 1948, art. 15.

<sup>158</sup> Abd El-Menaem Zamzam, Rule of nationality in the international law and the Egyptian comparative law (2011).

<sup>159</sup> Id.

<sup>160</sup> Manby, Bronwyn. *Citizenship Law in Africa: 3rd Edition*, African Minds (2015), at 11.

<sup>161</sup> Nottebohm Case (Second Phase) (Lichtenstein v Guatemala), judgment of 6 April 1955, ICJ Reports 1955, at 20.

<sup>162</sup> SERENA FORLATI ET AL., *THE CHANGING ROLE OF NATIONALITY IN INTERNATIONAL LAW* (Taylor & Francis Group) (2013), at 35.

by the International Court of Justice,<sup>163</sup> held that, in the present state of international law, questions of nationality are [. . .] in principle within [each State's] reserved domain' in the absence of any 'obligations which it may have undertaken towards other States'.<sup>164</sup> Thus, only this internal correlation can constitute the rights and duties of persons.

It is important in this regard to differentiate between nationality and citizenship. It could be defined as the status of a natural person who is attached to a State by the tie of allegiance. Nationality could be referred to as one of the synonym for citizen or subject, but usually used in a broader aspect. It only refers to the tie between the individual and the state without any reference to the rights and duties constituted from this tie. For Kunz, nationality is a matter of international law, while citizenship is related to municipal law.<sup>165</sup> Accordingly, nationality refers to the population of the state which should be defended in relation with other states, while citizenship refers to the civil and political rights and duties granted and protected by the state<sup>166</sup>, whereas, most scholars use a divergent meaning to refer to nationality and citizenship. Dumbrava, for example, defined citizenship as political membership and nationality as legal membership.<sup>167</sup> This was strengthened by the definition made by the European Convention on Nationality which stated that nationality is 'the legal bond between a person and a state and [...] not [...] the person's ethnic origin'.<sup>168</sup> Looking closer into the historic formation of citizenship, we will find that ethnicity and nationalism have always been attributed to the basis of citizenship. It was common in the past to include or exclude citizens based on their ethnicity and nationalism. However, these grounds for forming citizenship policies have decreased significantly especially in the west.<sup>169</sup> Though these many crucial rules of modern citizenship laws were connected to ethnic concepts, gradually, these grounds

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<sup>163</sup> *Supra* note 161.

<sup>164</sup> Nationality Decrees in Tunisia and Morocco, advisory opinion of 7 February 1923, PCIJ Series B, No. 4, at 24.

<sup>165</sup> Kunz Josef L., Nottebohm Case, *supra* note 160, at 546.

<sup>166</sup> Rosas Allan, 'Nationality and Citizenship in a Changing European and World Order' in Suksi Marku (ed.), *Law under Exogenous Influences* (1994), at 31.

<sup>167</sup> Costica Dumbrava, *Nationality, citizenship, and ethno-cultural belonging. Preferential membership policies in Europe* (2015).

<sup>168</sup> European Convention on Nationality. Reference, ETS No.166, 1997.

<sup>169</sup> Joppke, C., *Citizenship between de- and re-ethnicization*. *European Journal of Sociology* (2003), at 429–458.

were replaced by new principles of acquiring nationality that are considered extensions of these fundamental grounds of citizenship.

Globally, nowadays, the most dominant way of acquiring citizenship is either by blood “*ius sanguinis*” as child takes the nationality of his father. It could be also acquired by birth “*ius soli*” which take place when a person is born in a specific territory, and thus gains its nationality. Lastly, an individual could acquire the nationality of a state through naturalization in which he could apply for it after a while from his birth on meeting certain criteria set by the given state.<sup>170</sup> The Egyptian nationality law, same as most of other countries, adopted the 3 doctrines as grounds for acquiring the Egyptian nationality. Egypt relies primarily on *ius sanguinis* and naturalization as main grounds for acquiring citizenship.<sup>171</sup> Only in limited cases *ius soli* could be applied for granting nationality.

Precisely, the most dominant way of acquiring citizenship, globally, is *ius sanguinis* which refers to birthright citizenship which could take place descending from a citizen and *jus soli* which refers to being born in the country. The former ground for acquisition of citizenship worldwide is very complex. This ground of acquisition, though being defended on some grounds,<sup>172</sup> has been criticized for being arbitrary in regard to the details of birth and unequally assigning legal status.<sup>173</sup> In addition, there is general consensus that citizenship should be formed based on the judgment on the *Nottebohm case* in which it is considered a link between the individual and the state.<sup>174</sup> There is also an agreement that long-term residence in a state empower the right to obtain the nationality.<sup>175</sup> However, combining those two concepts will not be compatible with the external *ius sanguinis* where children are born abroad for non-resident citizens. There

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<sup>170</sup> AFRICA CITIZENSHIP AND DISCRIMINATION AUDIT , THE CASE STUDY OF EGYPT, The Center for Migration and Refugee Studies, The American University in Cairo

<sup>171</sup> Manby, *supra* note 160, at 43.

<sup>172</sup> It is important as it ensures the continuity of populations and countries; Baubo`ck, R, Temporary migrants, partial citizenship and hypermigration. *Critical Review of International Social and Political Philosophy*, 14(5), (2011), a 665–693.

<sup>173</sup> Carens, J. H., Aliens and citizens: The case for open borders. *The Review of Politics*, 49(2), (1987), at 251–273.

Christopoulos, D. Greek State Council strikes down *ius soli* and local voting rights for third (2011).; Shachar, A, *The birthright lottery: Citizenship and global inequality*, Cambridge, MA: Harvard University Press, (2009).

<sup>174</sup> *Nottebohm Case*, *supra* note 161.

<sup>175</sup> Costica Dumbrava Super-foreigners and Sub-citizens: Mapping Ethnonational Hierarchies of Foreignness and Citizenship in Europe, *Ethnopolitics*, 14:3, (2015) , at 296-310.

children do not have a direct link with the state itself. This external *ius sanguinis* is quite popular all over the world.<sup>176</sup>

However, though, *ius sanguinis* is considered the dominant method of obtaining nationality, *ius soli* is considered the broadened and liberal way. Despite this, its effectiveness might be massively limited due to the restrictions imposed upon it.<sup>177</sup> For example, the German law stipulated that those who acquired nationality based on *ius soli* must choose between the German nationality and any other nationality at the age of majority.<sup>178</sup> Thus, this discriminate between citizens as only those who acquire nationality based on *ius soli* are forced to choose one nationality.<sup>179</sup> Thus, it is clear that both grounds of granting nationality based on birthright are criticized.

This inconsistency has led to non-uniform set of rules governing nationality. The problem arises from the fact that in many countries there is a distinction between rights and privileges of citizens who acquired the nationality based on how they acquired it. This violation of citizenship equality finds its place through the distinction between citizens by birth, naturalization, or other ways.<sup>180</sup> We can see that in countries like Portugal, Spain and Bulgaria the naturalized citizens are deprived from the right of holding some high ranked positions.<sup>181</sup> Hence, we can deduce how much the current rules of nationality are making inequalities and deformed citizenship.

Similarly, the Egyptian nationality law has adopted these unequal ways of acquiring nationality which resulted in different rights and duties for Egyptian citizens. *Ius soli* was only adopted in one situation where a child is born in Egypt while not knowing his parents.<sup>182</sup> On the other hand, the dominant way of acquiring nationality is the *ius*

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<sup>176</sup> *Id.*

<sup>177</sup> Honohan, I, The theory and politics of *ius soli*. EUDO Citizenship Observatory RSCAS/EUDO-CIT., San Domenico di Fiesole: European University Institute, (2010).

<sup>178</sup> Hailbronner, K. Country report: Germany. EUDO Citizenship Observatory RSCAS/EUDO-CIT-CR, San Domenico di Fiesole: European University Institute, (2012).

<sup>179</sup> Honohan, *supra* note 177.

<sup>180</sup> Costica, *supra* note 175 at 303.

<sup>181</sup> Smilov, DCountry report: Bulgaria. EUDO Citizenship Observatory RSCAS/EUDO-CIT-CR 2013/22. San Domenico di Fiesole: European University Institute; Rubio Mari ´n, R., Sobrino, I., Pe ´rez, A. M., & Moreno Fuentes, F. J. Country report: Spain. EUDO Citizenship, Observatory RSCAS/EUDO-CIT-CR 2012/11. San Domenico di Fiesole: European UniversityInstitute.

<sup>182</sup> Nationality law, *supra* note 129, art 2.

*sanguinis*.<sup>183</sup> The law also opened the door for many grounds for naturalization and set its conditions with a wide discretion power to the administrative authority. Precisely, the law did not only rely on the blood bond as a dominant method of Egyptian nationality acquisition. Rather, it adopted the historical patriarchal perspective in which citizenship is acquired through a male family member.<sup>184</sup> Thus, in addition to the aforementioned inequality between citizens based on the method of acquisition of citizenship, the Egyptian legislator made a new inequality based on the gender aspect. As we have seen before, the nationality law before the last amendment has not given the Egyptian women the right to pass nationality whether based on *ius sanguinis* or through naturalization. After the amendment, the women are divided; some of them can pass nationality based on *ius sanguinis* and others based on naturalization in an explicit unjustified patriarchal differentiation. Hence, nature of acquisition of nationality does not only discriminate between equal Egyptian citizens, but also used by the Egyptian legislator to differentiate between the genders.

### **C. Amendment of Nationality Law no 154 of 2004 As a Way of Social Reform**

Nationality law amendment no. 154 of 2004 was a result of an imminent social change in which law was used as a tool for its achievement. This Social change could be defined as a variation in the stable behavior in the society.<sup>185</sup> It is a change in the way people communicate and behaves not in the standards of the community.<sup>186</sup> When there is a social problem in the society, social change could take place through consciously defining the problem and solving it through using rationale tools.<sup>187</sup> One of the most important tools for undertaking this social change is the use of law. Accordingly, due to the apparent mobilization made by feminist civil movements, the gender inequality in nationality law was identified and law was used by the Egyptian government as a tool to alter this deficiency.

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<sup>183</sup> *Id.*

<sup>184</sup> Diane Sainsbury, Gender differentiation and citizenship acquisition: Nationality reforms in comparative and historical perspective, *Women's Studies International Forum* 68 (2018), at 28–35.

<sup>185</sup> FREEDMAN, A. HAWLEY, W. LANDECKER & H. MINER, *PRINCIPLES OF SOCIOLOGY* 312 (1952).

<sup>186</sup> Lawrence M. Friedman and Jack Ladinsky, *Social Change and the Law of Industrial Accidents* (1967), at 50.

<sup>187</sup> *Id.*

However, there are different opinions on whether law is considered as an efficient tool for social change or not. Some literature believes that the development of law is slower than the dynamic changes of societies. So it is usually running after these social changes aiming to cope with it gradually.<sup>188</sup> On the other hand, Law might be seen as not only a reflection of the current social order but as an imminent player in cases of changing the current situation. The law is both a mirror of the society's progress and a cause of its change.<sup>189</sup> Law is always utilized as a tool of legitimizing the development of social changes, whereas law in modern societies has been used as an important tool for social change.<sup>190</sup> Some other people highlighted the unanticipated results of the reform role of law which might cause a negative effect on social reform.<sup>191</sup> However, Carolyn Heilburn once said that conservatives always anticipate a disaster when they think about social changes, whereas revolutionaries expect utopia; both of them are wrong.<sup>192</sup>

However, law as a tool of social change in gender equality in Egypt has proved its failure to achieve its ultimate goal. Relying on law as a source of social reform, though might seem to be beneficial in undertaking a tangible change, is ignoring the ideological power of law as a mechanism of altering the real character of social identity and blocking the core of social change.<sup>193</sup> Adopting new laws as a mean of social reform is only covering up the deep anger and dissatisfaction existing among society members. It is only putting a mask over the real social problem without solving its roots.<sup>194</sup> These laws will typically lead to a flow of law cases that are trying to alter these deficient laws. Many civil society organization and activist, consequently adopt the strategic litigation as a method that might minimize the effects of this failure.

Despite the fact that law is responsive for social change and legal reform, there is an apparent gap between the ideal goals of equality and the substantive applied rules. Law as

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<sup>188</sup> See LENORE WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985).

<sup>189</sup> M. Vecera & M. Urbanova, *Law and Recent Social Change*, 98 *PRAVNY OBZOR* 455 (2015).

<sup>190</sup> *Id.*

<sup>191</sup> Martha Minow, *Law and Social Change*, 62 *UMKC L. REV.* 171 (1993), at 171.

<sup>192</sup> *THE BEACON BOOK OF QUOTATIONS BY WOMEN* (1992), quoting CAROLYN HEILBURN, *TOWARD A RECOGNITION OF ANDROGYNY* (1973).

<sup>193</sup> Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 *HARV. WOMEN'S L.J.* 83 (1980) at 86.

<sup>194</sup> Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 *HARV. WOMEN'S L.J.* 83, 1980 at 87.

a regulatory tool could be used as a suppressive factor used by male authority. This lies down in the ideology of law that forms social cohesion and stability. The power of law appears in its ideology to shape social order in the name of traditions.<sup>195</sup> This ideology is powerful to the extent that law and custom are integrated in a way that is hard to differentiate them. For example, in the 1908, the United States Supreme Court set working hours limits for women due to their physical structure and justified this to protect her from greed of men.<sup>196</sup> Hence, in the name of protection women, the patriarchal conception of hierarchical classification was strengthened. This is exactly what the amendment of the nationality law did through strengthening patriarchy in nationality law. While it might appear solving the problem, it has legalized the gender inequality.

Those who advocated for depending on law as the only ground for gender reform in nationality law have faced the nature of law itself. Law as discourse is lying in between reality and ideality. It is considered a reflection of social and political changes.<sup>197</sup> In this essence, law targeted achieving the idea of gender equality in nationality law, while on the ground it was not able to achieve this goal since social order and legal structure in Egypt as we have stipulated is patriarchal.

According to some scholars,<sup>198</sup> law is considered a symbol and a tool for enforcing male dominance. Men have created law and controlled its formation and enforcement in modern societies. <sup>199</sup> Consequently, law, as a tool, adopts, exercise, and re-enact patriarchy. All the law features of hierarchy, combating and rationality among others constitute the core of a patriarchal institution.<sup>200</sup> In which law became hard to change. Rather, patriarchy is the one that should be changed.

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<sup>195</sup> Kellner, *Ideology, Marxism, and Advanced Capitalism*, (1978) at 45.

<sup>196</sup> *Muller v. Oregon*, 208 U.S. 412, 422 (1908).

<sup>197</sup> Eisenstein, Zillah R. *The Female Body and the Law*. E-book, Berkeley: University of California Press, (1988), at 46.

<sup>198</sup> Janet Rifkin, “ Toward a Theory of Law and Patriarchy”; *id* at 52.

<sup>199</sup> *Id.* ; Carol Smart, *Feminism and the Power of Law*. London: Routledge (1989); Catharine A. MacKinnon, *Toward a Feminist Theory of the State*. Cambridge, MA: Harvard University Press (1989).

<sup>200</sup> Diane Polan, “Toward a Theory of Law and Patriarchy”, *The Politics of Law*, at 301.

#### **IV. Strategic Litigation as a Tool of Social Reform In Nationality Law**

Legal activists and civil society organizations sometimes rely on legal mobilization as a means of advocating for their causes and for wanted legalizations. The most prominent form of this means is the use of strategic litigation as a way of promoting social change and endeavoring to change the law.<sup>201</sup> The same path has been adopted by women activists who are trying to promote gender equality. In this chapter, I will define the meaning and grounds of strategic litigation. I will, then, give examples of how strategic litigation has been used as a useful tool of reform in Egypt. Finally, I will show how strategic litigation was able to tackle many gender inequalities in the Egyptian nationality law.

##### **A. Defining Strategic Litigation:**

One of the paths used by social advocates to forward their plans for social change is by using strategic litigation. Generally speaking, strategic litigation refers to as the cases of general interest that will not only affect a party's interests, but also the whole society.<sup>202</sup> It is used in order to raise awareness of people regarding certain issues, and to urge the government to comply with the social reform needs. It gives both activists and courts the proper channel for democratic discussion.<sup>203</sup> This mean of social change achieve its goals when it wins the legal battles in courts. And even if they lose it, this gives the movement time to develop other paths along with increasing the awareness of the public.<sup>204</sup> Strategic litigation, therefore, is considered as one of the critical tools of social reform.

Adopting this strategy requires the existence of four different conditions. First, it requires the existence of a legal framework that preserves human rights such as a constitution that adopts its principle, a legal structure, or the possibility of applying international human

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<sup>201</sup> Fuchs, Gesine. "Strategic Litigation for Gender Equality in the Workplace and Legal Opportunity Structures in Four European Countries." *Canadian Journal of Law and Society*, vol. 28 no. 2 (2013), at 189-208.

<sup>202</sup> Rekosh E, et al, editors. Pursuing the Public Interest A Handbook for Legal Professionals and Activists, at 81-82. [http://www.pilnetorg/component/docman/doc\\_download/35-pursuing-the-public-interest-a-handbook-for-legal.html](http://www.pilnetorg/component/docman/doc_download/35-pursuing-the-public-interest-a-handbook-for-legal.html)).

<sup>203</sup> Tushnet M. The Hartman Holz Lecture: Dialogical Judicial Review. *Arkansas Law Review* (2008).

<sup>204</sup> Westley F, Zimmerman B, Quinn Patton M. Getting to Maybe: How the world is changed. Toronto: Vintage Canada (2007).

rights treaties.<sup>205</sup> In addition, the judicial system must enjoy independence without being influenced by other state authorities.<sup>206</sup> Thirdly, there must be a strong ground for civil society organizations. Advocates must have a good knowledge of litigation and the role of courts in social reform. They must also be able to cooperate with other groups to form stronger grounds for a better outcome. Finally, litigation must be supported by other channels that pushes forward towards social change such as social movements that increase public awareness. This cannot be achieved without the existence of loyal funders of the core of the case.

To evaluate whether social change can be initiated and presumed before courts we must have an intensive look over those who bring the case into adjudication. Those who participate in the legal change through litigation are usually considered a repeat player (RP) which is often represented by a large entity rather than being one-shotters (OS).<sup>207</sup> Having the advantage of frequently filing cases will enhance the intelligence and expertise of litigation. Unlike OS, RPs aim not only at shortcomings but also at affecting the decisionmakers in the next round whereas OS are only concerned with their personal outcomes disregarding the future ones.<sup>208</sup> Hence, RPs tend to minimize possible gains at the expense of being able to expand law-gains. In addition, RPs are the ones who have the power to invest their resources in challenging a given law, and bear the consequences of some symbolic losses at the expense of future gains.<sup>209</sup>

The problem with the nationality law cases is that the Government as a defendant is the one who is playing the role of RP, while all of the nationality cases claimants are OS. The reason is that nationality is generally considered a personal right. However, OS claimants in nationality cases are privileged by having lawyers representing them that are considered on their own as RPs.<sup>210</sup> It is certain that specialized lawyer will supply the claimant with better information and expertise related to their personal gains.

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<sup>205</sup> Mónica Roa and Barbara Klugman, *Considering strategic litigation as an advocacy tool: a case study of the defence of reproductive rights in Colombia* (2014).

<sup>206</sup> Burbank SB, Friedman B, editors. *Judicial Independence at the Crossroads: An Interdisciplinary Approach*. London: Sage Publications (2002).

<sup>207</sup> Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, *Law & Society Review*, Vol. 9, No. 1, (1974), at 98.

<sup>208</sup> *Id.*, at 100

<sup>209</sup> *Id.*, at 103.

<sup>210</sup> *Id.* at 114.

Unfortunately, lawyers specialized in OS cases are mostly from a lower level of prestige within profession and tend to work individually.<sup>211</sup> Thus, they fail to encourage and mobilize claimants due to ethical rules of advocacy.<sup>212</sup>

It is notable that movements of social advocates in the United States in the last decades have brought cases of racism and other social reform needs into courts.<sup>213</sup> The reason is that courts are progressively more active than the legislator who is considered rigid and opposing change. Consequently, it is believed that courts play a crucial role in law and social change, especially the United States Supreme Court.<sup>214</sup> However, we can see that the effect of the court is only part of many legal reform tools in the country. Even in cases like *Brown v. Board of Education*, the role of the Court in social reform were extensively supported by huge protests and legislative regulations.<sup>215</sup> The importance of Courts role in reform comes from the power of emphasizing the need for change. Issues of social reform are highlighted through filing cases in courts which are directed towards affecting the legislator agendas and social public awareness regardless of whether they win or lose the case in court.<sup>216</sup> However, alternative paths can be adopted in order to undertake this change. An example of this is obvious when activists turned away from the Supreme Court and started placing pressure on the congress, domestic legislatures, state and federal governments and even in federal courts.<sup>217</sup>

However, this can also be criticized on many grounds. Social reform, for some, is considered beyond the courts scope of jurisdiction. The courts do not have the required information and expertise related to the social reform cases in order to evaluate its cost-

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<sup>211</sup> Jack LADINSKY "Careers of Lawyers, Law Practice and Legal Institutions," 28 American Sociological Review 47, (1963).

<sup>212</sup> Kenneth J. REICHSTEIN, *Ambulance Chasing: A Case Study of Deviation Within the Legal Profession*, (1965).

<sup>213</sup> Handler, J., *Social Reform Groups and Law Reformers*, University of Wisconsin- Madison, Institute for Research on Poverty Discussion Paper (1976), at 375-376.

<sup>214</sup> See generally David M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* (1993).

<sup>215</sup> Martha Minow, *Law and Social Change*, 62 UMKC L. REV. 171 (1993) at 173.

<sup>216</sup> See NAN ARON, *LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980's AND BEYOND* (1989).

<sup>217</sup> Ross Cranston, *Courts and Social Reform*, 5 N.Z. RECENT L. 290 (1979) at 293

benefit equation.<sup>218</sup> Settling long-term social deficiencies is not one of the functions of courts; rather they are only competent of settling individual cases. Hence, courts might undertake a social change without being aware of the consequence of their intervention since they are only involved in a small part of the bigger image.<sup>219</sup> The reason is that they are governed by some procedures and boundaries that might not limit their ability to evaluate the whole context.

## **B. Strategic Litigation in Egypt**

As we have previously noticed, the first requirement for strategic litigation to be effective is the existence of legal framework that would respect human rights principles and aims at its enforcement. If we have a look over the current constitution we will find that it has been keen on protecting many women's citizenship rights like full representation in the legislative bodies, appointment in the high ranked position and appointment in judicial bodies, but most importantly it states that the state must guarantee achieving equality between women and men in all civil, political, economic, social and cultural rights in accordance with the provisions of the constitution.<sup>220</sup> Moreover, the constitution considers any treaty related to human rights signed by the state have the power of law.<sup>221</sup> Thus, the CEDAW convention, that requires signatory states to implement equal rights between men and women in passing their nationality to children, impose a legal liability over the government to amend its current laws to be consistent with its articles.

Meanwhile, the Egyptian government is pushing forward towards achieving gender equality and women empowerment.<sup>222</sup> Egypt adopted an agenda in order to cope with the United Nation goals for Sustainable Development 2030. The fifth goal of this agenda is to guarantee equal rights and opportunities between men and women.<sup>223</sup> Egypt also stated that it aims to end all forms of discrimination against all women and girls everywhere.

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<sup>218</sup> Fuller. 1. "Collective Action and the Arbitrator" *Wisconsin Law Review* 30 (1963); Galanter, M "Why the 'haves' come out ahead: Speculations on the Limits of Legal Change" *Law and Society Review* 95 (1974).

<sup>219</sup> Ross Cranston, *Courts and Social Reform*, 5 *N.Z. RECENT L.* 290 (1979) at 293.

<sup>220</sup> Egyptian Constitution *supra* note 68, art 11.

<sup>221</sup> *Id.*, art. 93.

<sup>222</sup> Today staff, E, 'Sisi: Egypt has taken steps to achieve gender equality, empower women', *Egypt Today*, online NewsBank (2020).

<sup>223</sup> Samir, Aya.. *Women empowerment in Egypt: long history, gov'tal strategy*, *Egypt Today* (2019).

Latter, the Egyptian president endorsed the first-ever national strategy for the Empowerment of Egyptian Women 2030.<sup>224</sup> It is consistent with Egypt vision 2030 on Sustainable Development Strategy. This strategy stands on four pillars which are women's political empowerment and leadership; women's economic empowerment; women's social empowerment; and women's protection.<sup>225</sup> This will be achieved through reviewing current legislations and ensuring its conformity with equality and challenging the cultural stereotype related to women in different sectors.<sup>226</sup>

If we look at the judicial structure in Egypt, we will see that since the establishment of the Supreme Constitutional Court and Administrative courts, the courts was not in affirmative line with the government's interests.<sup>227</sup> Litigation become a fundamental tool for social movements and activists for challenging government's policies and laws which is way easier method than challenging them in the People's assembly. Hence, the common interest of both courts and activists on defending human and civil rights, led to the expansion of the use of courts as a mean of strategic litigation to undertake social reform in Egypt for the last decades.<sup>228</sup>

In addition, we can see that many civil society organizations are active in Egypt. Apparently, all of these variables have contributed for the existence of a convenient environment for strategic litigation. Strategic litigation has long been demonstrated in Egyptian courts whether directly through civil society organizations and activists or indirectly through supporting individuals with same legal status to file cases. The cases that are filled directly are usually related to public interest matters. The question arouse around this cases is whether civil society organizations have the required legal competence of filling this cases.

If we looked at public interest litigation "third party litigation" we will find that courts are mostly behind its existence. In the U.S., the Supreme Court interpreted the meaning

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<sup>224</sup> UN Women Praises the Decision of the Government of Egypt to Develop the Country's First National Action Plan on UNSCR 1325 on Women Peace and Security, UN Women (2019).

<sup>225</sup> National Strategy for the Empowerment of Egyptian Women 2030 (2017).

<sup>226</sup> *Id.*

<sup>227</sup> Tamer Moustafa, *The Struggle For Constitutional Power: Law, Politic and Economic Development in Egypt*, Cambridge University press(2007), at 6.

<sup>228</sup> *Id.*

of the constitution regarding injury in which it stated that it should be concrete and particularized.<sup>229</sup> Hence, injury is the one that affects the claimant in an individual manner. The U.S. Supreme Court, however, introduced the over-breadth challenges as an exception for this which allows citizens to sue on behalf of part of the population. The expansion adopted for permitting public interest litigation was based on the doctrine adopted by court to widen its authority to protect rights.<sup>230</sup>

Similar to the US constitution, the Egyptian litigation law stipulates that claimants must acquire personal and direct interest in his claim. Otherwise, the claims should be dismissed.<sup>231</sup> The Supreme Administrative Court, however, was able to widen the scope of personal interest to be able to adjudicated public interest cases. The court in many occasions refers to the fundamental principles of public rights and liberties stipulated in the constitution in order to justify public interest litigation.<sup>232</sup> It stated that restricting acceptance of cases on the condition of existence direct and personal interest of the claimant in matters that are trespassing the fundamental rights is conflicting with the nature of the administrative cases. Some of the public rights that were relied on by the Supreme Administrative Court to widen the scope of Strategic litigation are cases related to protection of public property,<sup>233</sup> right of development and exploitation of natural resources.<sup>234</sup> This opened the door for a wide scope of strategic litigation cases.

Primarily, civil society organization in many occasions took the lead to change a rule or a decree affecting or related to public interest which will affect huge part of the society.

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<sup>229</sup> Gwendolyn McKee, *Standing on a Spectrum: Third Party Standing in the United States, Canada and Australia*, 16 BARRY L. REV. (2011) at 118, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, (1992), at 560-61

<sup>230</sup> Gwendolyn McKee, *Standing on a Spectrum: Third Party Standing in the United States, Canada and Australia*, 16 BARRY L. REV. (2011) at 120.

<sup>231</sup> Law no 13 of 1968, on Egyptian Litigation, art. 3 as amended by law no. 81 of 1996.

<sup>232</sup> See for example, The cases of annulment of privatization discussions case no. 40510 of 65 Judicial Year, September 21, 2011, Administrative Judiciary as confirmed by case no. 1976, 2677 2688, 2699, Judicial Year no. 58, December 17, 2012, Supreme Administrative Judiciary.

<sup>233</sup> This what the court relied on in cases of privatization, see for example Case No. 34517, Judicial Year no. 65, Cairo Administrative Court (Al Fakharany et al v. Head of Council of Ministers, et al.); This was used also in the case of annulment of Madinty contract., case no. 30952, Judicial Year no. 56, September 14, 2010, Supreme Administrative court.

<sup>234</sup> The court relied on this right to justify its jurisdiction to rule over the case of gas exportation to Israel, case no. 7975, 6013, 5546, Judicial Year no. 55, February 27, 2010, Supreme Administrative Court. Same was used in the case of El-Sokary mine exploitation, case no 57570, Judicial Year no. 65, October 30, 2012 Administrative Judiciary.

One of the recent cases is the case filled by The Egyptian Initiative for Personal rights in front of the State Council to cancel the decree of the minister of health related to pricing of the medicines.<sup>235</sup> This decree aimed to recalculate the prices of medicines based on their prices internationally. The importance of this case is that it affected wide part of the population and was considered a violation of their constitutional right for Health. The decree was then canceled by the court.

Animal activists who are bothered with the method of killing street cats and dogs have also undertaken the same path in order to spread awareness of their problem and filled three cases of a total of forty one claimants in front of the Administrative Judiciary in 2017.<sup>236</sup> They aimed to stop killing street cats and dogs and alter to modern ways of controlling their numbers through sterilizing them.<sup>237</sup> However, the court dismissed the case based on that administrative decrees permitted killing street dogs and cats in a merciful way. A year later, by the end of 2018, and upon news on social media that the government aimed to export street dogs and cats to countries to be consumed as food,<sup>238</sup> fourteen activists filled a new case, with an urgent request, asking for the cancellation of this decision and, in addition, stopping the killing of cats and dogs.<sup>239</sup> Both of their claims were denied in the urgent request by the Administrative Judiciary based on the same grounds adopted in the judgment of its predecessor case.<sup>240</sup> Months after this judgment, a new case was filled again that were trying to change their methodology in front of the court. The new case was not filled by an urgent request so as it will escape the administrative Judiciary and go directly to the State Commissioners Authority. Their claims were also modified as they request in this case only to stop using the Striknine poison as a cruel way of killing street dogs and cats. Hence, it is clear how animal activists are still insisting on using the strategic litigation as a path for defending their cause. Even though they failed not only once, but twice to convince the court of their point, they kept on filling new cases. Primarily, in order to affect the media that are

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<sup>235</sup> Case no. 2457, Judicial Year no. 64, Administrative Judiciary.

<sup>236</sup> Case no. 37349, 37356, 37363, Judicial Year no. 69, Administrative judiciary.

<sup>237</sup> Id.

<sup>238</sup> Sally Nabil, Controversy in Egypt regarding the export of cats and dogs (2018), <https://www.bbc.com/arabic/middleeast-46378513>

<sup>239</sup> Case no.17788, Judicial Year no. 73.

<sup>240</sup> Ahmed Hady, The Administrative Judiciary declined the case of stopping the kill of street dogs and cats, (2020), <http://www.youm7.com/4803481>.

covering news related to the case; thus increasing awareness of general population. Also, they are changing their strategy of litigation so as to reach better result for this litigation.

Despite this, Egypt in some other aspects restricted public interest litigation through direct intervention by the legislator.<sup>241</sup> In other sectors, like most of gendered based cases, the court has not adopted a widened aspect for the required personal and direct interest of the claimant. Consequently, only those who are injured directly could fill the case. In this regard, the role of civil movement societies and activities in the strategic litigation is limited to motivating and supporting the claimants. They could not file the case personally since they do not have the required legal capacity. A clear example for this, the Egyptian center was able to convince one of the public employees to file a case to ask for putting a minimum wages for labors.<sup>242</sup> The court in the urgent request rules in favor of the claimant<sup>243</sup> which was a deal breaker afterwards for putting the current minimum wages. For sure this judgment has an effect over millions of Egyptian workers. Though this judgment was not by itself applied directly, it made a wide debate among labor syndicate, parties, media and parliament. Due to this awareness, most of the presidential candidates after the 2011 revolution dedicated their absolute effort to guarantee setting minimum wages standards which was set and reassessed many times since then.<sup>244</sup>

Women's rights adjudication is not apart from the whole scene of preferring strategic litigation to deal with public cases. Many cases related to women's right were brought to all types of courts whether Constitutional, Ordinary or Administrative Court. Though most of these cases are not public interest cases, meaning they must be filled by the directly injured claimants, their effects in most cases extend to other women forming a

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<sup>241</sup> Egypt issued law no 32 of 2014 to prohibit third-party litigation of administrative contracts after a series of judgments rendered to cancel privatization decisions which forced Egypt to pay billions of dollars as compensations from international arbitration for Egypt bilateral investment treaties that have been violated. See for example Case A1 Fakharany et al v. Head of Council of Ministers, *supra* note 232; Heba Hazzaa & Silke Noa Kumpf, Egypt's Ban on Public Interest Litigation in Government Contracts: A Case Study of "Judicial Chill", 2015, at 149

<sup>242</sup> *Id* at 134.

<sup>243</sup> Case no. 21606, Judicial year no. 63, Administrative Judiciary.

<sup>244</sup> Minimum wages was set by 700 E.P. and increased in 2020 to be 2000 E.P. see Government of Egypt, the minimum wage ... between 2000 and 7000 pounds per month <https://arabic.cnn.com/business/article/2019/07/10/egypt-minimum-wage>.

sort of social reform. In this regard, a very important analysis was made by Judge Tahany El-Gebaly the former president of the Supreme Constitutional Court among others to evaluate the adjudication of women's cases in Egyptian courts.<sup>245</sup> The rendered judgments focus mainly on the personal, social and labor rights of women. Many judgments were issued from the Family court in matters related to the marriage and maternal rights that upheld women's rights. One of the most important cases ruled by the family court is the case related to the right of the child to be named after their parents depending on the result of the analysis medical DNA for the parties to the matrimonial relationship.<sup>246</sup> In another famous case the court decided that Moral harm principle could took place by the act of the husband to stay away from the wife for a year or more, and this was considered a reason for her divorce for backbiting.<sup>247</sup> The Supreme Administrative Court also in a famous case promoted the women's right to wear *Nikab* as a matter of personal freedom.<sup>248</sup>

In the matter of labor, women's rights have been promoted in many cases like the principle adopted by the Supreme Constitutional Court considering that going out for work will not be considered as disobedience for her husband since this is related to her right of working. The rule considered that her right of working is not against the Islamic Sharia which is considered a powerful limitation for the retrograde concepts adopted by parts of the society.<sup>249</sup> A very important judgment also were rendered from the same court which insisted that marriage contracts must be authenticated as a social necessity to secure marriage and save rights and not consider it contrary to the principle of personal freedom of Islamic Sharia.<sup>250</sup>

These examples for selecting litigation strategy for defending women's right over other tools show how Egyptian courts are a convenient environment for its application. According to one statistics, number of cases related to women's rights in the period between 1990 and 2000 increased by more than the double as compared to the period

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<sup>245</sup>Tahany El-Gebaly, Women's human rights "Bright signs in the judgments of the Arab judiciary"

<sup>246</sup> Case no.1886, Judicial year no. 2004, Family Court of Helwan.

<sup>247</sup> Case no. 341, Judicial year 2007, Family Court of Port Said.

<sup>248</sup> Case no. 3219, Judicial year no. 48, Supreme Administrative Court.

<sup>249</sup> Case no. 18, Judicial year no. 14, Supreme Constitutional Court.

<sup>250</sup> Case no 45, Judicial year no. 28, Supreme Constitutional Court.

between 2000 till 2010.<sup>251</sup> The data also shows that there was insistency from the side of women's defenders not only to gain the propaganda required for their problems, but also to get actual gains on the ground from the court itself. From all the judgments gathered, there were forty percent of them issued from the courts of first instance and same percentage from the appealing courts. A percentage of 20 percent was also in favor of judgments rendered from supreme courts.<sup>252</sup> This shows how they are persistent to challenge judgments that are not suitable to their demands. Another very essential assessment for the judgments in favor of women's rights shows that around quarter of these judgments was the motive for the Egyptian legislator to intervene by solving the given problem; this is through promulgating a new law, amendment an existing one, or cancelling it. Moreover, around ten percent of the judgments stipulate for a new legal or juristic rule in favor of women. This shows how courts are not only used for its ordinary way of strictly applying existing laws; they are extensively capable of assessing the gaps between laws and facts of the case in accordance with the Egyptian society.

More than ever now courts are powerful in reviewing matters related to women's rights based on the constitution of 2014 which praises equality based on gender and state for the rights of women explicitly in its provisions. This has given activist the courage to challenge articles that have long been discriminating against women. It gave the courts also the legal ground to be able to challenge such articles. In a new precedent the Appeal Court of Banha referred articles 274 and 276 of the Penal Code to the Supreme Constitutional Court to review their constitutionality.<sup>253</sup> These two articles are related to the penalty imposed on women in case of adultery while being married. The court referred them based on inequality between the penalties imposed on women as compared to men. What is to be noticed in this judgment is that this article was enacted in 1937 and has been applied since then; only now in 2020 the court was able to review its constitutionality.

All of these examples of strategic adjudication have proven its importance in affecting cases which have public importance. Whether the court ended up accepting or rejecting

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<sup>251</sup> Tahany *supra* note 245, at 62.

<sup>252</sup> *Id.*

<sup>253</sup> Case no. 7604, Judicial Year no. 2020, December 16, 2020 Appeal court of South Banha.

the case, most of these cases laid a positive impact on the cause they are defending. For cases which the court accepted directly, the decision of the court in itself constitutes the revenue of the battle they are undertaking. Even, sometimes, the government exceeds the narrow scope of the judgment through opening a wide discussion with competent parties in order to reach a better solution.<sup>254</sup> In other cases, where the court rejected the case like in the case of exporting the gas to Israel, the government where forced to reconsider its pricing for selling gas to internal factories and price of exporting which in other terms lead to the same result that the court case was trying to reach. It is to be mentioned that these judgments did not influence only its litigants but many interests of other people. The court reassured the existence of a negative administrative decree in which the government must have undertaken in a certain case. Court has also expanded the concept of capacity and interests of claimants which opened the door for more cases of strategic litigation.<sup>255</sup>

It is very important to understand that adjudicating any public cases must be well approached in order not to result in reverse consequences. In addition to the pre-mentioned conditions that must be existent in order that strategic litigation takes effect, perspective cases must be well prepared and its consequences evaluated.<sup>256</sup> Choosing the subject that could be litigated depends on actual facts that are surrounding it and who are going to be interested from this judgment. In addition, selecting the right timing for the initiation of the procedures and being able to mobilize different players to support the case, as well as studying the legal precedents of similar case will lead to the best outcome from adjudication.<sup>257</sup>

The reason is that if the strategic litigation failed in courts and did not empathize the public opinion towards its goals, this might lead to immunizing the given rule or decree and empower it with the interface of reasonableness and legality it requires. Failing to study all the variables before initiating the case and after failing in the courts might give a

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<sup>254</sup> The case of minimum wages is a good example for this.

<sup>255</sup> Alaa Shalaby and Moataz Bellah Othman, Experiments of Strategic Litigation in Light of social and Economic Rights (2012).

<sup>256</sup> Alaa Shalaby, Litigation and Strategic Litigation by Referring to social and Economic Rights (2013).

<sup>257</sup> Alaa Shalaby and Moataz Bellah Othman, Experiments of Strategic Litigation in Light of social and Economic Rights (2012), at 69.

general view that this given case is not legal and that those who defend its position are not supporting the right side.

### **C. Adjudicating Nationality law no 154 of 2004**

As previously mentioned, the legislator adopted both the acquisition of nationality based on blood bond and naturalization as grounds for passing the nationality from the Egyptian mother to her children. This interaction from the legislator side, though on one side might seem significant, lead to a new cycle of patriarchal classification. In this regard, courts were used as a suitable mean of highlighting the major deficiencies in the nationality law. In this part I will show how the strategic litigation was used to tackle the gender inequality in nationality law. Afterwards, I will assess how much strategic litigation contributed towards the goal of gender equality in nationality.

#### **1. First generation:**

The law<sup>258</sup> was promulgated to eliminate the discrimination between men and women in passing their nationality to their children. The new law has been introduced to correct two situations relating to the Egyptian mother marrying a foreigner. First, the legislator interfered to regulate the position of the children of the Egyptian women in the future. Thus, article 2 of the law no 26 of 1975<sup>259</sup> was substituted by article 2 of the new amendment in which its final phrasing is “anyone who is born to an Egyptian father or mother would be deemed as Egyptian”.<sup>260</sup> Article 4 of this amendment stipulates that this law would be enforceable starting from the next day of its publishing. Accordingly, all children that would be born for an Egyptian mother after 15<sup>th</sup> of July 2004 will be considered Egyptians automatically by the force of law same as what was applied for Egyptian fathers. By this interference from the legislator side, the situation of the Egyptian mother who gave birth to a child after 2004 is apparently equal to that of Egyptian men.

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<sup>258</sup> Law no 154, of July 14, 2004, on Amendment of Nationality Law.

<sup>259</sup> This article stated that anyone who is born to an Egyptian father would be considered Egyptian without referring to Egyptian mother.

<sup>260</sup> *Supra* note 258, art. 2.

However, the ministry of interior issued a decree as an executive regulation for the amendment law no. 154 which required those who were born for an Egyptian mother after the amendment to submit a request for the Immigration National Authority, the Egyptian embassies or the Civil Status Authority in order to issue a decree from the ministry of interior.<sup>261</sup> This decree, thus, contradicts with the essence of the legislator's intent. It imposes a new restriction over those who were born after the law without relying on any ground from the law itself.<sup>262</sup> Those people have the right to obtain the nationality originally through blood bond without the need of taking any extra procedure. Unfortunately, this decree has not been cancelled until now.

Nevertheless, the case of children born for Egyptian women before this date is not resolved by this article. Also, there might be many other generations' subsidiary to these children that were deprived from the Egyptian nationality, which is formed from this distortion in which all of these generations did not get the nationality. Consequently, the legislator regulated in article 3 the situation of children born before the pre-mentioned date of enforcement of the law. The first paragraph of this article states that those who were born before the date of enforcement of the law must manifest their interest to acquire the Egyptian nationality to the ministry of interior. Accordingly, he would be considered Egyptian by either a decision made by the ministry of interior, or by the lapse of a period of one year from the date of manifestation unless a reasoned decision is issued with the refusal of granting the nationality.<sup>263</sup>

From the first glance, it could seem that this part filled the missing blanks. However, this article encompasses many difficulties as a result of its phrasing and how it has been applied by the administrative authorities. Unlike children who were born to Egyptian mother after the new amendment, it is clear that those who were born before it must go through certain procedures and file a request in order to obtain the Egyptian nationality. This is a distinct situation since children of Egyptian mothers who were born after the amendment and children of Egyptian fathers in all cases do not need to initiate or

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<sup>261</sup> Decree no. 12025 of 2004, Ministry of interior, art. 1.

<sup>262</sup> Fatouh ElChazli, *Women's Rights in the Nationality Laws* (2012) at 16.

<sup>263</sup> *Supra* note 258, art. 3 para. 1

undertake any procedure. They can take a birth certificate immediately stating that they are Egyptians.

The reason behind this procedural inequality finds its roots in the core differentiation made by the legislator for the legal ground of obtaining the Egyptian nationality between the Egyptian father and the Egyptian mother after the amendment on one side, and the Egyptian mother before the amendment on the other side. The legislator considered the nationality of children of the latter as naturalization “acquired nationality” whereas the nationality of the former is considered acquired by blood.<sup>264</sup> The nationality driven from blood bond is also referred to as the original nationality in an implied indicative that it is acquired by force of law without any need of taking any procedures.<sup>265</sup> This discrimination was not the result of wrong interpretation of the legislator or the abuse of power by the administrative authority. It is clear from the explanatory note of the amendment law no 154 that the idea of discrimination between the Egyptian mother before the law and after it was on the table during the deliberation on the law.<sup>266</sup> Subsequently, this situation was the mere intention of the legislator.

This inequality resulted that those who were born before the amendment will acquire the nationality only from the day of the decision of the minister of interior not from the date of their birth.<sup>267</sup> Thus, they will not be deemed as born Egyptian same as how children of Egyptian father are treated. The problem could be noticed if a person born for an Egyptian mother, before the amendment, did not take his nationality except through a judicial award in a date later than the amendment. His children that were born before this date even if it was after the issuance of the new law in 2004 will not be considered Egyptians. They will have to acquire a decision rendered from the ministry of interior with the same procedure taken by his mother and his nationality will be considered an acquired one. However, if the same person got a new born after the judgment rendered for his first child, his new born will take the nationality immediately by force of law and

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<sup>264</sup> Enayat Abd-ElHamid, the legislation of the regulation of the Egyptian nationality (2016) at 12.

<sup>265</sup> Fatouh *supra* note 262.

<sup>266</sup> Explanatory note of the Egyptian parliament of the law no. 154 of 2004.

<sup>267</sup> Abd-elMenem Zamzam, The Nationality of the Children of Egyptian Mother (2005) at 244; see also decree no. 14626 of 2004 and 15054 of 2005, ministry of interior, stating that people acquired the Egyptian nationality from the date of those decrees.

blood bond. Moreover, since those who were born before the law no 154 are considered an acquired nationality, they will be subject to the decree of the Ministry of Interior no 1197 of 1975 which forces those who apply for an acquired nationality to submit a certificate of their criminal status. Thus, a new procedure and a new restriction are imposed over them.

In addition, some literatures assume that this differentiation will lead to discrimination in exercising their political rights.<sup>268</sup> According to the nationality law no 26 of 1975 “any foreigner who acquires the Egyptian nationality in accordance with article 3, 4, 6 and 7 will not be able to exercise his political right until the lapse of a period of 5 years from the time of acquiring the nationality”.<sup>269</sup> He cannot also be elected or appointed in any parliamentary body.<sup>270</sup> Though it is understood from this article that it is applied only on the aforementioned articles, and the children of Egyptian mother are not addressed with its terms since they are regulated by different articles,<sup>271</sup> they still acquire the nationality on the same concept of those addressed by the aforementioned articles. All of them acquire the nationality as naturalization. Thus, they are expected to be subject to the rules of this article as well.<sup>272</sup> Accordingly, this discrimination has a big significance on children of Egyptian mother before 2004.

In addition, based on the aforementioned discriminatory regulation, those who were born for an Egyptian mother must submit a request to the ministry of interior on a set template.<sup>273</sup> This request must be attached with the documents that prove the nationality of the child. For instance, they must submit the birth nationality of the Egyptian mother, her father and her child. In addition, a new law was rendered in 2018 that increased the due fees for this request to be 10,000 Egyptian pounds instead of 50 pounds.<sup>274</sup> This increase is considered a heavy burden on the shoulders of those who were addressed with

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<sup>268</sup> *Id* at 245.

<sup>269</sup> Nationality Law, *supra* note 129, art. 9.

<sup>270</sup> *Id.*

<sup>271</sup> They acquire it from article 3 of the law 154 of 2004

<sup>272</sup> Abd-elMenem *supra* note 267, at 245.

<sup>273</sup> Nationality Law, *supra* note 129, art. 20; decree no. 12025 of 2004, Ministry of Interior.

<sup>274</sup> Article 1 of the Fee for developing the state's financial resources law no. 147 of 1984 used to impose fees for the nationality request 50 pounds. It is amended by the law no 153 of 2018 which increased the fees in article 1 to be 10,000.

this law. This matter was addressed by the court in one of the cases but the court did not impose this fee on the claimant since he filled his case before publishing the new law.<sup>275</sup>

Regardless of the fees needed to be paid, the Supreme Administrative Court through its consecutive judgments managed to find a solution for the prerequisite template that should be filled before filing a lawsuit. In many cases, the representative of the administrative authority claims that the plaintiff did not file a request on the required template before filing his case.<sup>276</sup> The court rejected this ground of defense since the administrative authority is presuming the case and defending its position while ignoring the request of the claimant which is considered a disclosure of its refusal, and requesting the filling the template is thus a useless procedure.<sup>277</sup>

In addition, the children of Egyptian mother must wait for the lapse of the period of year in order to be considered Egyptians unless the Ministry of Interior issued a decision before that date by either giving him the nationality or refusing with a reasoned decree.<sup>278</sup> Accordingly, the legislator left the acceptance or refusal of granting the nationality in the hands of the executive authority as a mandatory condition for acquiring the nationality.<sup>279</sup> Thus, there is not a guarantee that those who were born before the amendment no 154 would acquire the nationality. It is clear that the decision is left for the discretionary power of the executive power since the law has not stipulated for any objective standards as a restriction for its enhanced power.<sup>280</sup> The only limitation that exists on this absolute power is that they must give a reasoned decree for refusal so as the court can review their justification. This is considered a massive derogation for women's rights in this amendment. Not only they do not acquire the nationality from the aspect of blood bond and encumbered with many procedural restrictions, they also does not guarantee acquiring the nationality.

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<sup>275</sup> The court also did not give its opinion in the issue of applicability of this law on the children of the Egyptian mother; Case no 26219, Judicial Year no. 72, January 27, 2020, Administrative judiciary,.

<sup>276</sup> See for example the case no. 59254, Judicial Year no. 62, January 26, 2019, Supreme Administrative Court.

<sup>277</sup> Case no. 4469, Judicial Year no. 46, February 26, 2005, Supreme Administrative Court

<sup>278</sup> *Supra* note 258, art. 3.

<sup>279</sup> Enayat, *supra* note 264, at 59.

<sup>280</sup> Abd-elMenem, *supra* note 267, at 242.

Again the Supreme Administrative Court opposed claims raised by the administrative authority claiming that they have the full discretionary power to grant the Egyptian nationality in the aforementioned case. The court ruled that the legislator required only one condition which is to be born for an Egyptian mother, and it did not grant the administrative authority any discretionary power. Accordingly, the administrative authority cannot refuse granting the Egyptian nationality to a person who is born for an Egyptian mother.<sup>281</sup> Accordingly, through strategic litigation, granting nationality became liberated from the discretionary power of the administrative authority. Though administrative authority still opposing this interpretation adopted by the administrative court,<sup>282</sup> this opposition will only lead to lengthen of procedures and will not affect the right of passing the nationality.

Finally, the legislator acknowledged the right of Egyptian women after the law no 154 to pass their nationality to their children irrespective of the nationality of his father or whether he is anonymous or not. However, the legislator failed again to fill the gaps while phrasing the rights of Egyptian women before the law. He stipulated that “those who are born for an Egyptian mother and a non-Egyptian father”<sup>283</sup> and continued stating the cases of granting the nationality. However, this wording presumed that the father must be known.<sup>284</sup> Since we cannot deduce that the father is not Egyptian unless he is known. Subsequently, if an Egyptian mother has a child from an unknown father, she will not be able to pass her nationality to him according to this law. The only article that was regulating this issue was stated in article 3 of the law 26 of 1975. This article was deleted since the new amendment cured this situation from its roots. However, this left the children of mother from an unknown father before the law no. 154 deprived from the Egyptian nationality.

## **2. Second Generation:**

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<sup>281</sup> Case no. 36819, judicial year no. 57, March 23, 2019, Supreme Administrative Court.

<sup>282</sup> The Ministry of Interior continued to render administrative decrees refusing granting the Egyptian nationality based on security measures. For example, see decree no. 2237, year no.2019, Ministry of Interior; decree no. 795, year no.2019, Ministry of Interior.

<sup>283</sup> *Supra* note 258, art. 3.

<sup>284</sup> This is deduced from the Explanatory note of the Egyptian parliament on the law no 154 of 2004. See Enayat, *supra* note 263 at 45.

The legislator continued in article 3 his path towards regulating all the possible cases of those who were born for an Egyptian mother before the amendment. As we have mentioned before those who acquires the nationality according to this article will be considered as a naturalization nationality, and they will be considered Egyptians only from the date of obtaining it. Thus, if those who were born for an Egyptian mother before the law no. 154 have had children for their own, in other words grandchildren of the Egyptian mother, before they obtain the nationality, they will not be considered Egyptians as their parents had not obtained their Egyptian nationality at the time of their birth, and as we have previously illustrated their parents nationality will not have a retroactive effect.<sup>285</sup> Accordingly, the legislator interfered and regulated this case.

We have two cases in which the grandchildren could obtain their nationality. The first is that those who were born for an Egyptian mother is still alive and obtained the Egyptian nationality according to the first paragraph of article 3. In this case, if the grandchildren of the Egyptian mother are minors they will obtain the Egyptian nationality automatically immediately along with their parent.<sup>286</sup> However, if they reached the age of majority, they need to take the same procedures same as their parents. It is thus clear how a family born to an Egyptian mother could suffer from long exhausting procedures and very long time in order to acquire their Egyptian nationality. If the grandchildren of the Egyptian mother are adults, they need to wait for their father first to prove his nationality which will take in a best case scenario a period of one year. Then they could apply to acquire their nationality which will take another year if there is not any objection from the executive authorities.

However, a critical gap appeared nowadays as the legislator only aimed at regulating the second generation of children of the Egyptian mother “grandchildren”. Though this, nothing in the law has regulated the case of 3<sup>rd</sup> generations<sup>287</sup>. Some of the grandchildren that have been addressed by the second paragraph of article 3 did not get their nationality

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<sup>285</sup> *Id* at 244.

<sup>286</sup> *Supra* note 258 art. 3 para. 2.

<sup>287</sup> This refers to the grandchildren of those who were born for an Egyptian mother before the law no. 154 and acquired the nationality according to article 3 paragraph 1

directly after the publishing of the law.<sup>288</sup> Accordingly, they got children “3<sup>rd</sup> generation” before acquiring the Egyptian nationality officially. Those children at the time of birth are born for both foreign parents so they are not addressed by the amendment of law no 154 as it is only applied for those who were born to either an Egyptian father or mother. Thus, this generation and the following will be deprived of the Egyptian nationality without any justification or a valid reason.

Due to this pragmatic problem that was faced by the court in many cases, the Administrative Court referred article 3 paragraph 2 to the Supreme Constitutional Court.<sup>289</sup> The court found this paragraph could be deemed unconstitutional since it grants only children of the Egyptian mother and her grandchildren the Egyptian nationality while ignoring the case of following generations which is discriminatory rule. Thus, the principle of equality in front of the law which is adopted by all the consecutive constitutions is breached. It has also violated the rights and liberties adopted by the current constitution especially as it aims to eliminate all sort of discriminations.

On the other hand, the other case is where the children of the Egyptian mother died before the enactment of the amendment no. 154 while having children for their own “grandchildren of the Egyptian mother”. There is no doubt that before their death they did not get the nationality as they died before the new amendment. Thus, the legislator interfered to give their children “grandchildren of Egyptian mother” the Egyptian nationality. He stipulated that those grandchildren can acquire the Egyptian nationality by the same procedures that are stipulated for those whose parents did not die.<sup>290</sup> The legislator intended by this regulation to fill all the gaps that might exist for those who were born for an Egyptian mother. However, the legislator missed to regulate the case where those who were born for an Egyptian mother died after the law without applying to acquire the Egyptian nationality. In this case, the grandchildren of the Egyptian mother that their parent died after the law will not be able to apply to take the nationality; since as we have illustrated before their nationality is dependent on the nationality of their

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<sup>288</sup> Some of them did not know about the law and applied late. Others applied and got a refusal decree from the administrative authority, and filed a case that might take many years.

<sup>289</sup> Case 8861, Judicial Year no. 70, March 27, 2017 Administrative Judiciary,.

<sup>290</sup> *Supra* note 258, art. 3 para. 3.

parent. These grandchildren must not bear the intentional or unintentional decision of their parents when they decided not to apply to acquire the Egyptian nationality.

The Supreme Administrative Court did not adopt this understanding and referred paragraph 3 of article 3 to the Supreme Constitutional Court based on that the blood bond was cut by the death of the child of the Egyptian mother. Hence, the grandchildren do not have the right to acquire the nationality since nationality stands on a bondage that links this person to the nationality, and in this case there is not any connection between him and the community. Thus, since the child of the Egyptian mother did not get the Egyptian nationality, hence, the grandchildren were born for both foreign parents.<sup>291</sup> On the contrary, the State Commissioners Authority did not adopt this perspective and recommended the referral of the case to the Supreme Constitutional Court based on that grandchildren whose parents died after the law must have the nationality same as those died before it.

Apart from all of these deficiencies, the Egyptian administrative authority has kept on refusing to give the Egyptian nationality to children of the Egyptian mother where the father is a Palestinian.<sup>292</sup> This position was justified by referring to the League of Arab States decision in 1959 prohibiting any Arab country from passing their nationality to Palestinians in order to preserve the Palestinian identity.<sup>293</sup> Accordingly, all of them were deprived of the Egyptian nationality even though this decision was merely a recommendation for the Arab member states to facilitate the Palestinian accommodation in their lands while keeping their Palestinian nationality as a general concept. Regardless of the fact that this cannot be a ground to suspend the applicability of a law, there is not an objective reason to deprive those Palestinian who were born before the law from the Egyptian nationality and giving those who were born after the law the nationality by the power of law.<sup>294</sup> This Supreme Administrative Court judgment upheld the perspective adopted by this court on refusing the claim of the Administrative authority regarding the

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<sup>291</sup> Case no. 16765, Judicial Year no. 62, Administrative court.

<sup>292</sup> Fatouh, *supra* note 262, at 19.

<sup>293</sup> Decision no 1547 of the League of Arab States 9/3/1959.

<sup>294</sup> Abd-elMenem, *supra* note 267, at 278.

Palestinian people. The court relied on that the decision made by the Arab League was not considered as a treaty. Thus is not considered binding.<sup>295</sup>

### 3. Left Over Gender Discriminatory Articles

The issue of passing Egyptian nationality from Egyptian mother to her children was not the only discriminatory part of the nationality law. In fact, many of the articles of the nationality were directed, primarily, to men by considering them the household of the family. All other discriminatory articles are based on naturalization, but are directed only to men. Although the legislator interfered to solve the problem of the Egyptian mother, he ignored other articles that are discriminating against women. In article 4, the legislator gives the right for the ministry of interior to grant naturalization nationality to Egyptian men who were born for father whose origin is from Egypt.<sup>296</sup> This article is directly ignoring the equal treatment of women in the same circumstances. Similarly, article 6 and 7 of the nationality law is explicitly eliminating women from their jurisdiction. Article 6 give foreign men only, who acquire the Egyptian nationality, the power of passing the Egyptian acquired nationality to his wife and children based on the requirements stipulated in the law.<sup>297</sup> Similarly, article 7 stipulates the requirements in which foreign women could acquire the Egyptian nationality in case of marrying an Egyptian citizen.<sup>298</sup> Oppositely, Egyptian women who married a foreigner will not be able to pass her nationality to him.

Article 6 was declared, in an important judgment from the Supreme Constitutional Court, as unconstitutional based on the articles of the constitution that are eliminating discrimination between men and women. The court stated that the legal rules must not be interpreted apart from its goals and the legal framework of the law and constitution.<sup>299</sup> Hence, nationality law articles cannot be contradicting with the spirit of the constitution that praised women rights and tend to eliminate all sort of inequality in gender. It stated also that the CEDAW convention imposes a legal liability on the government to intervene

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<sup>295</sup> Case no. 36819, Judicial Year no. 57, Supreme Administrative Court.

<sup>296</sup> Nationality Law, *supra* note 129, art. 4 para. 1.

<sup>297</sup> *Id*, Article 6.

<sup>298</sup> *Id*, Article 7.

<sup>299</sup> Case no 131, Judicial year no. 39, 2019 Supreme Constitutional Court.

and amend all the current laws to be consistent with its rules. This judgment is considered one of the most recent victories for women's right achieved by activists through strategical litigation. Though this judgment has long been waited, it finally paved the way for similar ruling from the Supreme Constitutional Court in favor of women's equality in the nationality law.

#### **D. Assessment of the current position:**

As we have seen before, women have long been fighting for gaining their full rights as Egyptian citizens. They were long before considered as subordinate to men,<sup>300</sup> hence, a second degree citizen. Since nationality law is the international term used to define citizenship, having discrimination in nationality law means a defection in citizenship in whole, which is considered a cornerstone for the rights women have always been trying to achieve. The amendment of the nationality law no 154 of 2004 was one of the major developments on their path to achieve equity.

However, though this amendment gave part of women some of their deprived rights. According to ZamZam, the legislator with this perspective made the status of the children of the Egyptian mother unstable since giving them the nationality through a decree makes this decree subject to annulment based on incompetence, lack of reason, and violation of law.<sup>301</sup> In addition, the law did not equate between men and women in passing the Egyptian nationality by the blood right. The discrimination based on gender, thus, continued and citizenship equality is not achieved.<sup>302</sup>

The strategic litigation used in order to cut down all deformations existing in nationality law in accordance with women's right was very successful in altering some of the discriminating articles. The judicial perspective for handling cases of nationality has been very progressive. Based on the articles of the constitution related to rights and liberties and the intention of the legislator in the amendment number 154 of 2004, the judgments were able to overcome many struggles facing the application of the law. Most

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<sup>300</sup> Jansen, *Women Without Men*, at 2.

<sup>301</sup> Abd El-Menem, *supra* note 266, at 252.

<sup>302</sup> Abd El-Hamed Mahmoud, *The Role of Egyptian Mother in passing the Nationality to her Children* (2006), at 399.

importantly, it deprived the administrative authority from the power to decide over the nationality of children of the Egyptian mother. The pre-requisite condition of submitting a request was also overruled through deciding that filing the case itself is equivalent to submitting a request. Other articles that were contradicting with the essence of the constitution and nationality law were referred by the court to the Supreme Constitutional Court to decide on its constitutionality.

Apart from its progressive path, the judicial effort to overcome the problematic consequences resulting from the amendment of nationality law was not enough. First of all, though Administrative Judiciary Court set its ruling that the ministry of interior does not have the power to reject giving the nationality to children of Egyptian mother, the administrative authority kept on issuing decrees of refusal that will be referred afterwards as cases to courts.<sup>303</sup> Meanwhile, the court cases take a long time for a final decision to be available and enforceable. This is considered very devastating for those who are seeking the nationality due to their accommodation problems in Egypt and cost of litigation.

In addition, the judgments issued by the Administrative Judiciary for referring cases to the Supreme Constitutional Court mostly take a long period of time until it is rendered. For example, we can see that the case referred by the administrative Judiciary to the Supreme constitutional Court on the constitutionality of paragraph 3 of article 3 of the law 154 Of 2004 was referred in 2013 and there is not a judgment rendered until now.<sup>304</sup> Though the step of referring this article to Supreme Court by itself is considered a progressive step in strategic litigation, the longtime of litigation might weaken the overall movement and support for this problem. This is not the only problem. The issue is that though there is an inequality felt on the ground, however, we do not guarantee the outcome of the court judgment. In fact, the Supreme Constitutional Court recently rejected to grant the nationality for the following generations of the grandchildren of the Egyptian mother after four years of waiting for the judgment.<sup>305</sup> The court in this regard declared that this is a matter exclusively in the hands of the legislator and the court has no

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<sup>303</sup> See for example, decree no. 1023 of 2020, Ministry of Interior, June 2020 Egyptian gazette,.

<sup>304</sup> Case no 149, Judicial Year no. 35, Supreme Constitutional Court.

<sup>305</sup> The case for the constitutionality of paragraph 2 of article 3 was referred in 2017, and the judgment was issued on the 8<sup>th</sup> of May, 2021; case no. 145, Judicial Year no. 39, Supreme Constitutional Court.

power to impose a new exception for granting the Egyptian nationality.<sup>306</sup> Hence, the court might not be able to solve the problem since the court only applies rule of law derived from the constitution. Hence, from a legal perspective the issue might not be solved.

There are many other aspects that were not solved like the fact that children of Egyptian mother born before 2004 acquire the nationality as naturalization not by the blood right. Thus, they will be deprived of their political rights for five years after the date of acquiring the nationality.<sup>307</sup> They will still require applying for acquiring the nationality and waiting for the period of 1 year to lapse. They will pay extra fees that are not charged for women who give birth to children after the amendment.<sup>308</sup> Accordingly, the inequality in citizenship rights between the two genders still is not fully solved.<sup>309</sup>

Reasons behind this could lie behind the limitations existing around strategic litigation in Egypt. The legal framework in Egypt, though as previously proven could be considered suitable for strategic litigation, has failed to permit direct litigation from civil movement organizations and activists challenging patriarchal clauses directly in nationality law. The reason is that State Council has long applied the requirement of direct and personal injury in these cases and did not widen the aspect of claimant interest. Hence, activists cannot challenge the constitutionality of any article of the nationality law unless there exist a lawsuit filed by a claimant who has direct interest to challenge an administrative decree.<sup>310</sup> This limitation could be an obstacle for the activists on the ground to be able to prepare the required mobilization and propaganda for the case of gender discrimination in nationality law. Thus, the gender inequality problem in the nationality law lacks the broad support from the society. This limits the outcomes of strategic litigation in nationality law.

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<sup>306</sup> *Id.*

<sup>307</sup> Hoda Badran, *Reforming Citizenship Law: Reports from Tunisia, Algeria, and Egypt* (2010).

<sup>308</sup> *Id.*

<sup>309</sup> Abd El-Hamed Mahmoud, *The Role of Egyptian Mother in passing the Nationality to her Children* (2006) at 399.

<sup>310</sup> The constitutional law does not permit filing a law suit directly to challenge one of the law articles. There must exist a subjective law case in which one of the presumed unconstitutional law articles are applied. Law no. 48 of 1979, on the Supreme Constitutional Court, art. 27.

The problem of inequality in citizenship is not only a matter of law deficiency, but also due to the reluctant behavior of the administrative authority. Many cases, for example, for Egyptian women who were married to Palestinian men before the amendment were raised in front of the administrative court due to the refusals rendered by the ministry of interior.<sup>311</sup> These decrees were justified as a matter of security reasons. The issue is that security reason could not be a reasonable ground for all of these refusals since Egyptian women who are married to Palestinian man and gave birth after the amendment will pass the Egyptian nationality automatically without any interference from the ministry of interior's side.<sup>312</sup> So there is no sense in depriving these children of the nationality if born before the amendment for security reasons while giving it to them by the force of law if they are born after it. The issue about security reason could be solved, if existent, through first applying the law and granting the Egyptian nationality, and, afterwards, if there is any proven clues the administrative authority could drop their nationality based on the existence of one of the conditions required in the nationality law.

Though litigation in general and strategic litigation specifically could be very useful in some cases where it will succeed to grant women some of their deprived rights, it cannot solve by its own the paradigm of patriarchy in nationality law. Due to the nature of adjudication itself, strategic litigation is contributing as a tool for social reform, but cannot by itself achieve full gender equality. In addition to the limitations imposed on court due to its nature, courts are competent of interpreting the articles of the law not to change it.

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<sup>311</sup> Ministry of Interior *supra* note 282.

<sup>312</sup> Abd El-Hamed Mahmoud, *The Role of Egyptian Mother in passing the Nationality to her Children* (2006) at 397.

## V. Conclusion

Patriarchy prevails in Egyptian society and its legal structure. This is despite the fact that successive governments in Egypt have introduced some progressive development to promote gender equality. Those contributions remain far from enhancing the current situation; the legal scene is still characterized by being patriarchal. This malfunctioning ideology is part of our legal system. Most of the constituting committees that formed Egypt constitutions were either lacking any female representation or with a minimal one. This of course has impacted the articles of the constitution and the entire legal structure afterwards. Even the current constitution which is the most progressive one is formed by a male dominant committee. Hence, even if women do enjoy a slight protection under its articles, the idea of men controlling the amount of rights given to women is still patriarchal. In addition, laws whether new or old contain many deficiencies whether explicit or implicit. In a society where women are raised on the idea that their place should be in the home, giving only minor modifications in the legal system will look like a victory for women's rights. Unfortunately, this is not the case. One change or a couple of them does not alter the fundamental patriarchal composition of the society.

Taking nationality law as an example, we find that the amendment law no. 154 of 2004 did not end gender discrimination in nationality law. The patriarchal composition long existed before the amendment, and has continued to exist after it. After the practical application of the amendment of the nationality law, it is obvious that this amendment has failed to give the direct legal equity for Egyptian women in the nationality law. Even strategic litigation of gender inequality in nationality law has failed, on its own, to solve the problem. Many reasons lay behind this outcome. The fact that cases related to strategic litigation must be well studied and evaluated might be one of the reasons. In addition, the law includes many deficiencies that need more than adjudication to solve. Strategic litigation can be beneficial to spread awareness of discrimination or to alter the inequality of a certain issue, but putting the burden of achieving gender equality on strategic litigation is not constructive. Many points and inequalities that resulted in many cases have led to the dispersion of efforts exerted to highlight problems of inequalities in the nationality law. Another reason is that civil society organizations and activists have

not given this topic an appropriate level of attention which has led subsequently to the lack of public support and awareness of this problem. Thus, other channels for putting pressure to alter the situation are lacking. These channels are very important since courts only perform in a legal realm. Hence, other areas where a court might be restricted to trespass on due to its nature, considered as a social need more than being a legal right, have been left either with a rejection from the court or with a total ignorance from all parties.

In addition, taking into account the nature of court judgements, we can deduce that they are not considered a decisive method for confronting patriarchy that is deeply distorting the social system. A court judgment might in some cases favor the women's side in a way that some right will be upheld. However, the whole battle of gender inequality will not be changed.<sup>313</sup> Though patriarchy might be challenged sometimes through strategic litigation, this will not lead to the collective social organization.<sup>314</sup> A clear example of this is the numerous lawsuits brought by members of the majorities claiming that giving the minority groups privileges will be considered discriminating against them.<sup>315</sup> Hence settling the problem of discrimination through litigation will only be considered a cover up for the bigger problems rooted in society.

In this regard, there have been many suggestions for solving the problem of equity of Egyptian mother's children. Some literature calls for the absolute equity between men and women.<sup>316</sup> Others suggest the same absolute equity while giving the children of Egyptian mothers the right to abandon the nationality.<sup>317</sup> This suggestion is made since the nationality is a bilateral bond that also relies on reciprocal interest. For this, those

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<sup>313</sup> Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83 (1980) at 86.

<sup>314</sup> *Id.*

<sup>315</sup> United Steelworkers of America adopted a certain quota system to make a balance between white Americans and African Americans. Weber was a white employee who was passed over. The court ruled that employers could adopt a quota system in favor of minorities to eliminate the past discriminatory practices. See *United Steelworkers v. Weber*, 99 S.Ct. 2721 (1979); Bakke was a student who was applying for the UCD and was not admitted. The UCD adopted a special admission program. The court ruled in the Bakke case that the University of California at Davis admission program was unconstitutional due to imposing a special admission program which reserved 16 out of 100 sets in each class for the members of minority groups. See *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978).

<sup>316</sup> Foad Abd El-Menem, *The nationality and the status of Foreigners* (1988) at 7; Hafiza El-Said, *Lessons in the Private International Law*, at 57; Hassan Amin, *Problems of Nationality*, at 113.

<sup>317</sup> Abo El-Ela El Nemr, *The Nationality of Children of Egyptian Mother and Foreign Father*, at 635.

children might not want to acquire the Egyptian nationality in order not to be under any obligation enforced by the state.<sup>318</sup> However, in order to avoid imposing the nationality on those who were born before the law, the current problematic solution were adopted. All of these recommendations fall under a new amendment. Though this effort is appreciated and encouraged, it must not be done in isolation of the whole context of patriarchy in the Egyptian legal system.

Accordingly, since nationality law is only one of the products of legal system that advocates patriarchy in a society that has long been attributed to male dominance, women should not rely on common practices for achieving equality in the nationality law. Though law and adjudication might contribute to obtaining more privileges, the core subject of patriarchy will continue to exist. Women should take apart its social, political, economic and legal manifestations with and without using law.<sup>319</sup> It must not be ignored that, though women currently represent a quarter of the members of the People's Assembly, the dominant impetus for any law will be for men. Hence, ignoring the real problem that widespread in the legal system and trying to solve the problem with previously used methods will only lead to a new cycle of gender inequality.

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<sup>318</sup> Abd El-Hamed Mahmoud, *The Role of Egyptian Mother in passing the Nationality to her Children*, (2006) at 385.

<sup>319</sup> Lynne Henderson, *Law's Patriarchy*, 25 *LAW & Soc'y REV.* 411 (1991), at 412.