The American University in Cairo

School of Global Affairs and Public Policy

TOWARDS A STRUCTURAL JUDICIAL APPROACH IN THE EGYPTIAN ADMINISTRATIVE COURTS: PROPORTIONALITY AS A PRACTICAL SOLUTION

A Thesis Submitted by

Mohab Ali Rashdan

To the Department of Law

Spring 2023

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

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DEDICATION

This thesis work is dedicated to my family and many friends.
A special feeling of gratitude goes to my loving parents, whose prayers are the main reason for any success in my life.
I wish to express my deepest gratefulness to my siblings, particularly my sister, who is the kindest and most helpful person in the world.
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ABSTRACT

The lack of detailed and explicit law provisions governing human rights cases obliges judges to fill this legal gap by applying generic constitutional articles. Now that all human rights are interdependent and overlapping, they practically conflict with each other. Therefore, Egyptian judges are obliged to issue a decision in these cases despite such tensions, taking into consideration the lack of detailed and explicit law provisions regulating these disputes. The question here concerns the criteria that the administrative courts should adopt when overseeing administrative decisions to judge in a case when there are two or more disputing and conflicting interests organized by several constitutional articles with no plain or detailed legislation drawing their correlation and limitations. Realistically, the Egyptian administrative courts have applied various and disparate judicial approaches such as legitimacy, suitability, necessity, gross error in the assessment, and comparison between benefits and harms. The concern is that applying different methodologies may lead to different conclusions. This paper argues that using proportionality through its four degrees may unite the mechanism of judicial review, reconcile constitutional values to avoid a hierarchy amongst them, organize the mind of judges, and raise transparency within courts.

KEYWORDS: Proportionality Review- Administrative Courts- Margin of Appreciation - Lack of Methodology – Competing Value- Islamic *Shrīʿa* - Freedom of Expression – Freedom of Belief

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I. Introduction

Protecting people's rights and freedoms has become the clearest marker determining whether or not a specific society is free and democratic. While there are constitutions giving priority to specific rights over others such as the U.S. Constitution,[1] others do not such as the Egyptian Constitution.[2] Now that human rights are interdependent and overlapping, they often practically conflict with each other.[3] To this end, Egyptian judges are obliged to issue a decision in spite of such tensions existing in practical disputes. The problem occurs when the legislator does not organize, determine and rationally limit these rights and freedoms or ambiguously organizes them.[4] Accordingly, the executive power may issue or refrain from issuing administrative decisions, which may adversely affect people's interests derived from these enduring values, or impose arbitrary, unreasonable, or disproportionate measures. The question arising here is what criteria the administrative courts should adopt while overseeing administrative decisions in a case where there are two or more disputing and conflicting interests organized by different constitutional articles with no plain or detailed legislation, drawing boundaries and limitations among such interests derived from these different values. Realistically, the State Council Courts repeatedly attempt to be progressive. However, they lack a concrete and plain methodology while trying to do so. This is mainly because the same court may narrow the degree of

[1] The first amendment of the American Constitution reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." It can be concluded that the freedoms and rights mentioned in the first amendment have become the strongest compared to others.

[2] Although article (92) of the 2014 Egyptian Constitution assures that the rights and freedoms of individual citizens may not be suspended or reduced, it does not explicitly define or enumerate these individual rights. This opens a leeway to determine these rights and freedoms.

[3] It has been reported that the two types of rights recognized in the ICESCR and the (ICCPR) are universal, indivisible and interdependent and interrelated'; Vienna Declaration and Program of Action, World Conference on Human Rights, Vienna, 14-25 June 1993, U.N. Doc. A/CONF.157/23, para.5. *See* Sylvie Da Lomba, Immigration Status and Basic Social Rights: A Comparative Study of Irregular Migrants' Right to Health Care in France, the U.K., and Canada, 28 Neth. Q. Hum. Rts. 6 (2010).

[4] Legislations in Egypt are ranked based on their importance. First, the constitution is described as the supreme law of the state. Law and decrees deemed contrary to the constitution should always be declared unconstitutional by the Egyptian Supreme Constitutional Court. Based on importance, the second sort of legislation comprises essential and ordinary law. The third includes decrees. The fourth one is administrative decisions.

supervision or broaden it based on the political circumstances, special ideologies of judges, and their background experience, as it happens in most comparative judicial systems. This problem may be partially resolved if a structural judicial approach is applied to all administrative disputes. Comparing most of the judicial methodologies around the world may lead to adopting proportionality review as it has become widespread in the domain of administrative law.[5]
It has been said that its structural technique would organize the mind of judges, raise the transparency within courts and create an effective dialog within the court and enhance the objectivity of judicial discretion.[6]

I argue that the Egyptian legal system has concrete underpinnings to apply proportionality in administrative courts. I further argue that by comparing the current approaches and the suggested one in some practical cases whose judgments have already been issued, the effectiveness of adopting a proportionality review emerges. This effectiveness happens by first promoting people's human rights through supervising the broad margin of discretion that the administration has. And secondly, reducing the judges' clear and hidden ideologies applied in disputes by embracing a structural and clear judicial approach. Finally, this would lead to parties of disputes being more satisfied with the final decision by realizing the detailed reasoning behind the ruling.

This research is divided into four chapters. The introductory chapter sheds light on the judicial approaches embraced by the Egyptian State Council courts in overseeing the margin of appreciation that the administration practices in issuing or refraining from issuing negative administrative decisions, and the Egyptian jurisprudence regarding the same issue. Chapter I of this study provides a definition of a proportionality review and its degrees. It also introduces some of the judicial precedents issued according to proportionality review. Finally, it demonstrates P.A.'s main strengths and weaknesses regarding the particularity of the Egyptian legal system. Chapter II scrutinizes the P.A.'s practical and theoretical foundations in the

[5] Jud Mathews, *Proportionality Review in Administrative Law, in* COMPARATIVE ADMINISTRATIVE LAW 405 (2017), at 2.
[6] That can be plainly concluded from the books that support proportionality review as a judicial review mechanism in both constitutional and administrative law. *See,* for example, Jud Mathews, *Proportionality review in administrative law, in* COMPARATIVE ADMINISTRATIVE LAW 405 (2017), AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (2012), Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L. J. 3094 (2015).

Egyptian legal system comprising the Egyptian Constitution, legislation and ratified treaties. Chapter III compares the reasoning and outcomes of the rulings which result from applying the traditional Egyptian judicial review compared to the predictable outcomes that may occur if the P.A. is applied.

II. The Lack of Structural Methodology in the Egyptian Administrative Courts

Article 10 of the Egyptian State Council law issued by law no 47/1972 determines the judicial jurisdiction of the State Council Courts. It further specifies the grounds that can be claimed in appealing the administrative decisions before the court.7 According to the law, the reference for appealing final administrative decisions must be constituted upon the lack of jurisdiction, lack of required form, violation of regulations or decrees, including the error in their application or interpretation, or the abuse of power. However, overseeing the administrative decision's suitability, necessity, and proportionality is not included in the law determining the court's jurisdiction. However, administrative courts have adopted various degrees of review while overseeing the administration's margin of appreciation in issuing or refraining from issuing the administrative decision.

This chapter aims to shed light on the judicial approaches embraced by the Egyptian State Council courts in overseeing the margin of appreciation that the administration practices in issuing or refraining from issuing administrative decisions. It additionally reveals Egyptian jurisprudence regarding the same issue. Even though it is insuperable to reveal a comprehensive account of all the relevant distinctions amongst all doctrines said and methodologies embraced in this domain, it is nonetheless significant to draw much attention to a number of key differences amongst the various approaches concerning the issue.

A. Judicial Scrutiny on the Margin of Appreciation Applied by Administration on Disciplinary Lawsuits

The State Council courts have passed through two different phases. Previously, neither the Court of Administrative judiciary nor the Supreme Administrative Court oversees proportionality of the administrative sanction as an administrative decision. This is because evaluating the proportionality between the administrative sin and the punishment, according to the court at this

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تنص الفقرة الثانية من المادة رقم (10) من قانون مجلس الدولة الصادر بالقانون رقم 47 لسنة 1972 على أن " تختص محاكم مجلس الدولة دون غيرها بالفصل في المسائل الآتية:.....
ويشترط في طلبات إلغاء القرارات الإدارية النهائية أن يكون مرجع الطعن عدم الاختصاص أو عيباً في الشكل أو مخالفة القوانين أو اللوائح أو الخطأ في تطبيقها أو تأويلها أو إساءة استعمال السلطة."

time, was the administration's exclusive jurisdiction.8 Therefore, the Supreme Administrative Court has affirmed that “the administration has the exclusive discretion to impose the proportionate penalty without jurisdiction to the judiciary regarding evaluating the administration’s discretionary power as long as the administration takes into account all facts formulating the practical status of the case."[9]

Recently, the court has progressively converted its doctrine to embrace a broad and intensive judicial review on the administrative sanction centering around supervising the proportionality between the administrative sin and its punishment.10 For example, the Supreme Administrative Court has assured that "in spite of the fact that the administration has the competence to assess the practical facts of the case and consequently impose the suitable punishment, this punishment must not be extravagant. The extravagance means that there is no proportionate relationship between the administrative sin committed by the employee and the applied punishment”.[11]

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[8] ʾḥmd ʾḥmd al-mwāfī- bʿḍ mlāmḥ al-ātjāhāt al-ḥdīth a 2 fī al-rqāb a 2 al-qḍāʾī a 2 ʿlā al-sl ṭa 2 al-tqdīrī a 2 - dār al-nhḍa 2 al-ʿrbī a 2 ٢٠٠8 - ṣ11 ,12.

[9] Challenge No.478, Judicial Year 3, March 1, 1958, the Egyptian Supreme Administrative Court.

[10] Challenge No.563, Judicial Year 7, November 11, 1961, the Egyptian Supreme Administrative Court. *See* also Challenge No.235, Judicial Year 33, April 9, 1988, the Egyptian Supreme Administrative Court.

[11] Challenge No.12683, Judicial Year 53, October 11, 2008, the Egyptian Supreme Administrative Court. *See* Challenge No. 37845, Judicial Year 57, April 11, 2015, the Egyptian Supreme Administrative Court.

ذهب قضاء المحكمة الإدارية العليا إلى أن "هدف الجزاء هو تأمين انتظام المرافق العامة، وأنه ولئن كانت للسلطات التأديبية سلطة تقدير خطورة الذنب الإداري وما يناسبه من جزاء بغير معقب عليها في ذلك - مناط مشروعية هذه السلطة شأنها كشأن أي سلطة تقديرية أخرى ألا يشوب استعمالها غلو - من صور هذا الغلو عدم الملائمة الظاهرة بين درجة خطورة الذنب الإداري وبين نوع الجزاء ومقداره - نفس هذه الصورة تعارض نتائج عدم الملائمة الظاهرة مع الهدف الذي ابتغاه القانون من التأديب، وهو بصفة عام تأمين انتظام المرافق العامة ولا يتأتى هذا التأمين إذا انطوى الجزاء على مفارقة صارخة، فالشطط في القسوة يؤدي إلى إحجام عمال المرافق العامة عن حمل المسئولية خشية للتعرض لهذه القسوة والإفراط المسرف في الشفقة يؤدي إلى استهانتهم بأداء واجباتهم طمعاً في هذه الشفقة المفرطة من اللين، فكل من طرفي النقيض لا يؤمن انتظام سير المرافق العامة وبالتالي يتعارض مع الهدف الذي رمى إليه القانون من التأديب وعلى هذا الأساس يعد استعمال سلطة تقدير الجزاء في هذه الصورة مشوباً بالغلو فيخرج التقدير من نطاق المشروعية إلى نطاق عدم المشروعية، ومن ثم يخضع لرقابة هذه المحكمة ومعيار عدم المشروعية هو معيار موضوعي قوامه أن درجة خطورة الذنب الإداري لا تتناسب مع نوع الجزاء ومقداره."

B. Judicial Scrutiny on the Margin of Appreciation Applied by the Administration on Other Lawsuits

In this section, I will succinctly provide an overview of the legal argument that is academically said about judicial review on the margin of appreciation of the administration. I would further reveal the judicial review doctrines practiced by the Egyptian State Council courts on the same issue.

1. Academic Argument

Considerable arguments have been scholarly claimed to prove that the mere competence of the administrative judge is to oversee the decision's legitimacy. It has been said that judges cannot control the administration's discretionary power. This is because the court is practically far from the place where the facts occurred, and the judgment will be issued after a period of time from the actual occurrence of the facts, which leads to the lack of sufficient practical experience with these facts.12 In addition, The essence of discretionary power per se refuses restrictions. Therefore, it is either existent or non-existent. Accordingly, if the administration exercises its discretionary power, it must be free from any review as long as its acts are intended to achieve a legitimate purpose.13

Moreover, it has been argued that the content of judicial oversight on administrative decisions is for verifying that the administration respects the required law conditions. Conversely, discretionary power is linked to the idea of suitability. Therefore, if the law grants authority to the administration, it gives it the competency to assess its decision's suitability. Hence, the court should not interfere with the assessment of the administration regarding the decision's suitability in order to respect the principle of separation of powers.14

The second approach argued by jurisprudence centers around granting the judiciary the jurisdiction to review the decision's suitability. It has been indicated that the gross error in the assessment of the facts is based on the fact that there is a general legal obligation on all administrative bodies to exert their utmost effort to reach the best appropriate administrative

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[12] khāld sīd mḥmd ḥmād- ḥdūd al-rqāb$_a$2 al-qḍā ʾī$_a$2 ʿlā sl ṭ$_a$2 al- ʾdār$_a$2 al-tqdīrī$_a$2 - drās$_a$2 mqārn$_a$2 - dār al-nhḍ$_a$2 al-ʿrbī$_a$ - 2 - al- ṭbʿ$_a$2 - al-thānī$_a$2 2013- ṣ 548.

[13] sīlmān al- ṭmāwī - qḍāʾ al- ʾlghāʾ - dār al-fkr al-ʿrbī - al-qāhr$_a$2 1996 ṣ 231.

[14] sāmī jmāl al-dīn - al-rqāb$_a$2 al-qḍā ʾī$_a$2 ʿlā ʾʿmāl al- ʾdār$_a$2 (ālqḍāʾ al- ʾdārī) 1992- ṣ112.

decisions, and the gross error in the assessment is considered a violation of this obligation.[15] Some define the gross error of appreciation of the facts as the error that exceeds the limits of reasonableness and clarity. Judges can reach this conclusion through the examination of the whole case file and the various circumstances surrounding the case.[16]

Concerning overseeing the necessity of the administrative decision as a sort of supervising the decision's suitability, the former Chief Justice of the Egyptian Supreme Constitutional Court, jurist *(ʿūḍ al-mr)* has assured that the margin of appreciation that the legislator or executor practices is, in reality, a balance amongst different alternatives. The legislator has to select the less restrictive means of freedom and choose the ones that closely lead to reaching the objectives of the legislation or the administrative decision.[17]

Regarding proportionality review in its *Stricto Sencu,* it has been said that the principle of balancing benefits and harms requires the court to put the effects resulting from the administrative decision in balance. It has to compare its advantages to disadvantages before deciding which of them is much important.[18]

2. Judicial Scrutiny Approaches

The judicial review's doctrines practiced by the Egyptian State Council courts on the administration's margin of appreciation in issuing or refraining from issuing administrative decisions can be divided into two main approaches mainly, the supervision of legitimacy and the supervision of suitability. The second approach is divided into additional subsections. It is worthy of indicating that the intensity of this review differs from case to case as there is no transparent or structural methodology that the court always embraces. Judges may examine the logical relationship between measures adopted and the objective, the gross error of facts, the necessity of the administrative decision, and the balance between benefits and harms. Nonetheless, whenever the court utilizes a specific methodology in its scrutiny, it attempts to classify it based on the legitimacy principle.

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[15] *Supra* note 13, at 723.

[16] *Id.* at 724.

[17] ʿūḍ al-mr- al-rqāb$_a$2 al-qḍāʾī$_a$2 ʿlā dstūrī$_a$2 al-qwānīn fā mlāmḥhā al-rʾīsī$_a$2 - mrkz rīnīh – jān dbwī llqānūn wāltnmī$_a$2- ṣ 56.

[18] ūlīd mḥmd al-shnāwī- al-t ṭūrāt al-ḥdīth$_a$2 llrqāb$_a$2 al-qḍāʾī$_a$2 ʿlā al-tnāsb fī al-qānūn al-ʾdārī – dār al-fkr wālqānūn – ṣ72.

Firstly, the Supreme Administrative Court has asserted that, "The review of the Administrative judiciary on the administrative decisions, according to the constitution and law, is merely a legitimacy review to scrutinize these decisions based on law and public interest. If these decisions are issued contrary to law or public good, the court will annul them."[19] The court has added that "the court is not granted the jurisdiction to annul the administrative decision if it appears unsuitable as long as it is legitimate. If the judge does otherwise, he replaces himself as the issuer of the decision which is not allowed by the constitution in order to respect the principle of separation of powers." 20

Conversely, in other rulings, the court deems that overseeing the decision's suitability and proportionality is considered as a judicial review of the decision's legitimacy. The court has stated that:

> Originally, the administration, in all activities, aims to reach the public interest which gives it the jurisdiction to evaluate the suitability and proportionality of issuing the administrative decision, taking into consideration that the public interest varies in its levels and differs in its priorities. The administration, in all activities, must give every aspect of the public interest its significance, and not fully sacrifice one aspect in favor of another. In this case, proportionality of the administration's work is amalgamated with its legitimacy. Therefore, to consider an administrative decision legitimate, it must be proportional, which is subject to the review of this court.21

The court, in another ruling, has also confirmed that "judicial review to both the decision's legitimacy and suitability does not mean that the judiciary usurps the administration's

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[19] Challenge No.275, Judicial Year 35, December 13, 1992; Challenge No.488, Judicial Year 34, January 10, 1993; and Challenge No.6407, Judicial Year 57, July 3, 2011, the Egyptian Supreme Administrative Court.

[20] Challenge No.86537, Judicial Year 62, February 15, 2020, the Egyptian Supreme Administrative Court.

[21] Challenge No.12793, Judicial Year 49, February 4, 2009, the Egyptian Supreme Administrative Court. *See* also Challenge No.2585, Judicial Year 48, February 4, 2009, the Egyptian Supreme Administrative Court. The original text reads,

أن الأصل في نشاط الإدارة أنها تستهدف في كل أعمالها المصلحة العامة مما يجعلها تستقل بتقدير مناسبة وملاءمة إصدار " القرار الإداري، وبمراعاة أن المصلحة العامة تتفاوت في مدارجها وتتباين في أولوياتها بما يتطلب مراعاة ذلك في تصرفاتها، بحيث تعطي لكل وجه من أوجه المصلحة العامة أهمية، ولا تضحي بوجه منها لتثبت وجها آخر.....، وفي هذه الحالة تختلط مناسبة عمل الإدارة بمشروعيته، ويلزم لكي يكون مشروعا أن يكون مناسبا وهو ما تنبسط عليه رقابة هذه المحكمة."

jurisdictions. Furthermore, it is not considered an assault on the principle of separation of powers."[22]

Secondly, regarding the inevitable correlation between the means utilized in the decision and the decision objectives, the Egyptian Supreme Administrative Court has stated that:

> Every legislative regulation is not intended for itself; conversely, it is merely a mechanism to reach the objectives of the legislation that mirror its legitimacy. If this regulation contradicts planned purposes, as it cannot be logically linked with its objectives, that will create arbitrary discrimination which is not constituted upon neutral grounds.[23]

Thirdly, as a part of examining the decision's necessity,[24] The Egyptian Supreme Administrative Court has emphasized that:

> A blanket ban on the full-face veil in universities, schools, clubs, and other public places infringes both personal freedom and the constitution. While the competent administrative body has the authority to regulate that matter, this organization

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[22] Challenge No.22886, Judicial Year 51, December 24, 2011, the Egyptian Supreme Administrative Court. The original text reads,

"بسط رقابة القضاء الإداري على قرارات الإدارة، سواء من حيث مشروعيتها أو ملاءمتها، لا يعني حلولا محل جهة الإدارة في مباشرة الاختصاصات الموكولة لها، أو اعتداء على مبدأ الفصل بين السلطات."

[23] Challenge No.10193, Judicial Year 55, January 5, 2013, the Egyptian Supreme Administrative Court. The original text reads,

كل تنظيم تشريعي لا يعد مقصود لذاته بل لتحقيق أغراض تعكس مشروعيتها – فاذا كان التنظيم بما انطوى عليه من تميز " مصادماً لهذه الأغراض ، بحيث يستحيل منطقياً ربطه بها ، فان التميز يكون تحكمياً ومن غير مستند الى أسس موضوعية."

See also Challenge No. 14711, Judicial Year 62, January, 6,2018 the Unified Circle of the Egyptian Supreme Administrative Court. The original text read,

"إن كل تنظيم تشريعي لا يعتبر مقصودًا لذاته، بل لتحقيق أغراض بعينها، يعتبر هذا التنظيم ملبيًا لها، وتعكس مشروعية هذه الأغراض."

In the same meaning, *see* further the opinion of the General Assembly of Legal Opinion and Legislation at the Egyptian State Council, issued on December 20, 2000. No 662/2000. The original script reads,

"إن كل تنظيم تشريعي لا يعتبر مقصودًا لذاته، بل لتحقيق أغراض بعينها يعتبر هذا التنظيم ملبيًا لها، وتعكس مشروعية هذه الأغراض إطارًا للمصلحة العامة التي يسعي المشرع لبلوغها، متخذًا من القواعد القانونية التي يقوم عليها هذا التنظيم سبيلاً لها."

[24] Regarding the "necessity" supervision, the Egyptian Supreme Constitutional Court has confirmed that "the margin of appreciation that legislator has in organizing rights necessitates prioritizing amongst various substitutes to select the most appropriate measure that can advance the legitimate interests that the legislator has basically intended to protect them. Challenge No.116, Judicial Year 18, August 2, 1997. The original text reads,

"وحيث إن السلطة التقديرية التي يملكها المشرع في موضوع تنظيم الحقوق لازمه أن يفاضل بين بدائل متعددة مرجحا من بينها ما يراه أكفل لتحقيق المصالح المشروعة التي قصد الى حمايتها."

must be done only to the degree that gives the officials the power to verify from the veiled female, not completely preventing her from doing so.[25]

In this ruling, while the administration has, as a rule, the discretionary power to assess the less detrimental measures and the more effective ones, the court has reviewed the margin of appreciation of the administration in this regard. Based on the ruling, the same protection of the public interest, which is safeguarding public security, can be reached through less partial restriction on the right of those women. Therefore, the administration had to choose this substitute rather than the selected one.

It can be further concluded from the aforementioned ruling that the court, on some occasions, practically issues orders to the administration. In reality, the court has not only annulled the decision but also has determined the decision that must be issued. Profoundly inspecting the court reasoning will lead to the conclusion that while the competent administrative body has the authority to regulate that matter, this organization must be done only to the degree that gives the officials the power to verify the veiled female when she enters the school or does the exam.26 Here, the court has annulled the administration's decision because other obtainable means can reach the same purpose, and the administration will consequently be bound by the court's reasoning as long as the reasoning is strongly linked to the judgement's final conclusion.

In a similar vein, the Egyptian Supreme Administrative Court has ruled that "the essence of the margin of appreciation necessitates prioritizing amongst various available substitutes to

[25] Challenge No. 1396, Judicial Year 44, April 26, 2006; Challenge No.3219, Judicial Year 48, June 9, 2007; and challenge No. 5765, Judicial year 56, January 20, 2010, the Egyptian Supreme Administrative Court. The original text reads,

"حظر ارتداء النقاب بصورة مطلقة في المدارس أو الجامعات والأندية يمس الحرية الشخصية ويخالف الدستور، إذا كان للجهة الإدارية المختصة تنظيم ذلك، فيجب أن يتم ذلك بالقدر اللازم لتحقيق هذا التنظيم على نحو التحقق من شخصية المنتقبة وليس منعها."

Opposite to these judgments, the first circle of the Egyptian Court of the administrative Judiciary ruled on January 19, 2016, against the plaintiff who asked to cancel the Cairo University decision prohibiting her from teaching students while wearing the full-face veil. Case No. 5070 Judicial Year No. 70, January 19, 2016.

[26] Challenge No. 1396, Judicial Year 44, April 26, 2006, the Egyptian Supreme Administrative Court. The original text reads,

"حظر ارتداء النقاب ومنعه في المدارس مطلقًا يمس بالحرية الشخصية ويخالف الدستور- إذا كان للجهة الإدارية المختصة تنظيم شئون التلاميذ، فيجب أن يتم ذلك بالقدر اللازم لتحقيق هذا التنظيم، على نحو التحقق من شخصية المنتقبة أثناء دخولها المدرسة وأثناء أداء الامتحانات."

select the most appropriate means in order to reach the main purpose of the university education."27

Fourthly, regarding the principle of proportionality, the Egyptian Supreme Administrative Court has seldom supported the principle. One of the rare examples that the court adopts this judicial approach is the lawsuit of *ʿzba khīr al-lh*.[28] In the mentioned lawsuits, about sixty thousand people lived in a district in a state land called *ʿzba khīr al-lh*. Most of those people resided in houses equipped with electricity, drainage, and all other infrastructures. However, they

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[27] *See* Challenge No.10787, Judicial Year 58, September 16, 2020, the Egyptian Administrative Court. The original text reads,

"ليس ثمة إلزام على مجلس الجامعة أن يقر قواعد للرأفة على نمط محدد، أو في شكل معين، وإنما تتمثل جوهر سلطته التقديرية في هذا الشأن في المفاضلة بين البدائل المطروحة، واختيار أنسبها بما يراه محققاً للغاية المنشودة من التعليم الجامعي بالنظر إلى واقع الدراسة ونظامها بكل كلية أو معهد من كليات الجامعة ومعاهدها، متحرراً في ذلك من قيود المماثلة والمشابهة والمناظرة لجامعات أخرى، فلمجلس الجامعة أن يضع قواعد للرأفة في مرحلة دراسية معينة وله ألا يضعها، وإذا أقرها في مرحلة دراسية ما، يتعين أن يحدد بوضوح أطرها وضوابط استحقاقها ومقدارها، وبات القضاء ملزماً بتطبيق هذه القواعد ــ منحاً ومنعاً ــ ما دامت هذه القواعد قد التزمت الضوابط السالف بيانها، ولا يحق له أن يتجاوزها إلى تطبيق قواعد أخرى أقرتها جامعة أخرى، والقضاء الإداري في هذا الشأن إما أن يطبق قواعد الرأفة المعمول بها في الجامعة إذا قدر أن هذه القواعد خالية من العيوب الدستورية والقانونية، أو أن يقضي بإلغائها كلياً أو جزئياً إذا تيقن من مخالفتها للدستور والقانون، غير أنه في الحالة الأخيرة لا يجوز له استدعاء قواعد أخرى للرأفة أقرتها جامعة أخرى وإنما يعود الأمر إلى مجلس الجامعة المختص لتدارك ما شاب قواعده من مثالب وإقرارها من جديد متقيداً في ذلك بالضوابط التي سلف بيانها."

[28] It is worth mentioning that the Egyptian Supreme Constitutional Court has held that "Whereas the general tax law pursues to protect the state's tax interest, as obtaining the tax revenues is an intended goal in the first place, this interest must be balanced by social justice as a concept and a restrictive framework for the provisions of this law . . . . Moreover, to fulfill its interest in gaining the tax, the state must not impose a penalty that goes beyond the logical limits required to maintain its tax interest. The principle of being subject to law, determined based on a democratic concept, means that the perception of the legal rule, transcending in the legal state and being restrained by it, should be determined in light of the applicably minimum requirements in democratic states to ensure that the protection of citizens' rights granted by the state is not less than the acceptably and generically minimum requirements of human rights in a democratic society. This principle further entails that the criminal or civil punishment imposed on people's actions must not be excessive but proportionate. *See* Challenge No. 33, Judicial Year 16, February 3, 1996, the Egyptian Supreme Constitutional Court. The original text reads,

وحيث إن قانون الضريبة العامة، وإن توخى حماية المصلحة الضريبية للدولة باعتبار أن الحصول على إيرادها هدفاً مقصوداً منه ابتداء، إلا أن مصلحتها هذه ينبغي موازنتها بالعدالة الاجتماعية بوصفها مفهوماً وإطاراً مقيداً لنصوص هذا القانون.....ولا يجوز أن تعمد الدولة كذلك - استيفاء لمصلحتها في اقتضاء دين الضريبة- الى تقرير جزاء يكون مجاوزاً الحدود المنطقية التي يقتضيها صون مصلحته الضريبية." مبدأ خضوع الدولة للقانون – محدداً على مضمون ديمقراطي – يعنى أن مفهوم القاعدة القانونية التي تسمو في الدولة القانونية وتتقيد بها إنما يتحدد في ضوء مستوياتها التي التزمتها الدولة الديمقراطية باضطراد في مجتمعاتها لضمان ألا تنزل الدولة القانونية بالحماية التي توفرها لحقوق مواطنيها وحرياتهم عن الحدود الدنيا لمتطلباتها المقبولة بوجه عامة في الدولة الديمقراطية ويندرج تحتها ألا يكون الجزاء على أفعالهم جنائياً أو مدنياً مفرطاً بل متناسب معها."

did not have realty or facilities licenses. After many years of living there without interference from governmental institutions, the Cairo Governor issued an administrative decision eliminating these illegal realities because the governorate had sold this land to a real estate company to redevelop it. The court has affirmed that:

> Public interests are ranked the same way the legislative tools are. Accordingly, preserving the security and safety of citizens, protecting social peace, and not allowing private property to lead to displacing and destroying the lives of thousands of citizens without an urgent need justifying that, undoubtedly constitutes the most urgent compelling national public interest. At this stage, protecting this public interest is superior to the mere elimination of encroachment on state-owned land, which is legitimate but is deemed substandard in comparison to the first interest. In these cases, the suitability of the administrative decision is amalgamated with its legitimacy. To this end, to consider an administrative decision legitimate, it must be suitable and proportional. Therefore, the judicial review of the decision's suitability and proportionality has not been deemed an interference from the judiciary into the discretionary power of the administration. This is because the administration must take into consideration while issuing decisions, the balance between various public interests which are disparate in their level, weight and importance, as required by the constitution and the law. If it does not abide by the aforementioned, the administrative judiciary, by virtue of its constitutional mandate, should oblige it to the legality and rule of law due to the sound interpretation of the constitution.[29]

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[29] Challenge No. 1875 and 1914, Judicial Year 3., March 9, 1991, and Challenge No. 6585, Judicial Year55, February 6, 2010, the Egyptian Supreme Administrative Court. The original text reads,

"الصالح العام يندرج في الأهمية تدرجًا يشبه التدرج في مراتب الأدوات التشريعية المختلفة .....الحفاظ على أمن وسلامة المواطنين وحماية السلام الاجتماعي وعدم السماح بأن يترتب على الملكية الخاصة التشريد والتحطيم لحياة عشرات الآلاف من المواطنين دون ضرورة ملجئه تبرر ذلك وتشريدهم دون تدبير شئونهم وإشباع حاجاتهم والحفاظ على الأمن والاستقرار بينهم ولا شك أن هذه النتائج تشكل وجه المصلحة العامة القومية الأكثر إلحاحا وأخطر شأنا يتعين أن تكون في هذه المرحلة أولى بالرعاية من مجرد إزالة التعدي على أرض مملوكة للدولة وهو أمر مشروع ولكنه أدنى من أن يكون أحق بالتغليب ، إذ في هذه الحالات تختلط مناسبة العمل بمشروعيته ويلزم دائما ليكون مشروعا أن يكون ملائما ومناسبا وهو ما تنبسط عليه رقابة المشروعية من القضاء الإداري على نحو ما سلف بيانه وذلك دون أن يكون ذلك إقحام للقضاء في نطاق السلطة التقديرية للإدارة ، ذلك أن هذه الإدارة يتعين أن تصدر في تصرفاتها بما يراعى الموازنة بين المصالح العامة المتفاوتة المدارج والوزن والأهمية على النحو الذى الزمها به الدستور والقانون واذا لم تلتزم بذلك كان للقضاء الإداري بحكم ولايته التي أناطها به الدستور أن يردها إلى مجال المشروعية وسيادة القانون بحسب صحيح التفسير السليم لأحكام الدستور."

It can be inferred from the previous verdict that while the decision appears superficially legitimate because it aims to protect the three important public interests mainly, enhancing the modernity in the real state domain, implementing clear articles of law, and protecting the company's ownership in this district based on the contract applied between the state and investor, the predominant interest in this status, according to the court, is to protect the social security of more than 60.000 persons. This is particularly important because the administration does not provide a suitable substitute to those people in order to firstly protect them from displacement and secondly to save society from disturbance which will mostly occur as a result of this displacement. Hence, the court has clearly balanced the pluses and drawbacks of the contested decision in relation to the harms that will occur to other constitutional values.

In another judgment, the court of the Administrative Judiciary has ruled that:

> In practicing its public authority, under no circumstances shall accept the administrative entity's act that removes or corrects the violating constructions if the benefit to the public interest as a result of implementing the removing or correcting the works is much less than the damage that affects the individuals' private interest particularly if the violation does not constitute a blatant clash with the public order, an aggression against the rules of the organization, or a violation of restrictions concerning the maximum high of buildings, and threatening the safety of citizens. If the administration persists to issue the contested decision without concerning the reality's dimensions and the harm resulting from the implementation of its decision, its behavior, in this regard, constitutes an abuse of power. It is equal to the court if the administration intends to harm others positively by deliberately seeking to harm them, or if it belittles the serious harm that will occur to individuals as a result of issuing the challenged decision. This is particularly if there are alternative means that can be used by the administration to not leave the violation without legal action such as imposing a large financial fine on the violator.[30]

[30] Case No. 15822, Judicial Year 72, January 29, 2019, the Egyptian Court of the Administrative Judiciary. The original text reads,

"لا يجوز بحال من الأحوال التسليم للجهة الإدارية في سبيل استعمال سلطتها العامة في إزالة أو تصحيح أعمال البناء المخالفة أن يكون النفع العائد على المصلحة العامة جراء تنفيذ الإزالة أو تصحيح الأعمال أقل بكثير من الضرر الذي يصيب المصلحة الخاصة للأفراد ..... لا سيما أن المخالفة لا تشكل تصادماً صارخاً مع النظام العام أو عدواناً على خطوط التنظيم أو مخالفة لقيود الارتفاع وأن بقاءها لا يهدد سلامة المواطنين. مقتضى ذلك أنه إذا ما تنكبت الجهة الإدارية سواء السبيل في ذلك وامتطت متن الشطط بإصرارها على إصدار القرار المطعون فيه بإزالة أو تصحيح هذه الأعمال المخالفة دون مراعاة لأبعاد الواقع والضرر المترتب على تنفيذ قرارها فإن مسلكها في هذا الشأن يشكل إحدى صور التعسف في استخدام الحق والإساءة في استعمال السلطة، يستوى أن يكون نية الإضرار بالغير على نحو إيجابي بتعمد السعي إلى الإضرار به بإصدار القرار المطعون فيه أو على نحو سلبى بالاستهانة المقصودة بما يصيب الغير من ضرر فادح من استعمال الجهة الإدارية لحقها في إزالة أو تصحيح الأعمال المخالفة ..... لاسيما حال توفر الوسائل البديلة التي يمكن للجهة الإدارية من خلالها عدم ترك المخالفة دون اتخاذ إجراء قانوني حيالها كفرض غرامة مالية كبيرة على المخالف جزاء وفاقا لما اقترفه من مخالفة لقوانين البناء."

It can be concluded from the preceding judgment that while there is a violation of law, the administration must balance the benefit of applying the legislation in order to maximize the legality principle and the harms that will occur to individuals based on such an implementation. That exactly equals the fourth phase of the judicial review in proportionality approach, which is called proportionality in its *stricto sensu*. The court further has confirmed that for the decision to be considered legitimate, it must be necessary. Therefore, as long as there is a less intervening substitute capable of reaching the same purpose, it must be adopted first. Hence, the court has clearly applied both the necessity and proportionality phases, even if it does not explicitly indicate the principle.

C. Conclusion

In spite of the fact that the Egyptian administrative courts have applied all degrees of reiew on the administration's margin of appreciation, they have further lacked a concrete and plain methodology while applying these sorts of reviews. This is mainly because the same court at the close time with the same facts may apply the narrow meaning of legitimacy or suitability and may, at other times, broaden its supervision to include necessity and proportionality of the administrative decision based on the political circumstances, special ideologies of judges, and their background experience. This problem may be partially resolved if a structural judicial approach is applied to all administrative disputes and by all judges. Comparing most of the judicial methodologies around the world may lead to adopting proportionality review as it has become widespread in the domain of administrative law.[31] It has been said that its structural technique would organize the minds of judges, raise transparency within courts, create an effective dialog within the court, and enhance the objectivity of judicial discretion.32

Notwithstanding, embracing proportionality entails many prerequisites. Firstly, it is preliminary necessary to explain proportionality review and its advantages and disadvantages to ensure that it is the most appropriate methodology to be applied. Secondly, it is crucial to closely inspect whether or not applying proportionality in the Egyptian legal system will be consistent with its Constitution, law, and other legal obligations. Finally, it is essential to compare the

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[31] Mathews, *supra* note 5, at 2 and 22.
[32] *Supra* note 6.

traditional approaches with proportionality through its structural phases in some practical cases which have already been issued to realize whether applying it will be more effective or not.

III. Proportionality Review

The proportionality review has been recognized by many courts around the world as a mechanism to ensure that the major harms applied by governments should be submitted to and justified by the most restrictive review in order to deter human rights from derogation.33 In this chapter, I will explain the degree of proportionality review. I would further reveal some of the comparative judicial systems that embraced proportionality such as Germany, Canada, France, South Africa, and the United Kingdom.34 I would finally disclose some of the most popular critiques claimed against proportionality review.

A. Components of Proportionality

The concept of proportionality refers to a judicial approach utilized by many courts around the world. It is comprised of four components: legitimacy, suitability, necessity, and proportionality in its *stricto sensu.*

1. Legitimacy

Legitimacy is the first component of proportionality review. In this degree of supervision, the court must examine whether or not the administrative decision restricting people's enduring value has a legitimate objective. This legitimate objective can be the collective interest of the society such as public order, public health or/and public morals, or the rights and freedoms of others.[35] Therefore, this objective, to be considered legitimate and not only legal, entails a proper purpose justifying limiting people's human rights. This is what demonstrates the difference

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[33] T. Jeremy Gunn, *Deconstructing Proportionality in Limitations Analysis*, 19 Emory Int'l L. Rev. 465,465 (2005).

[34] It has been reported that proportionality was applied between the years 2000 and 2007 in cases pertaining to Rights and Security, about 61% by the ECtHR, 94% by Spanish courts of final appeal, 76% by France courts, 67% by German courts and 57% by United Kingdom courts. *See* Benjamin Goold, Liora Lazarus & Gabriel Swiney, *Public Protection, Proportionality, and the Search for Balance* (2007), at 7 to 10.

[35] AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (2012), at 246. http://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=833452 (last visited January 26, 2023).

between the legality and legitimacy principles.36 This legitimate aim does not have to be stated straightforwardly in the Constitution, but rather, it can be explicitly or implicitly derived from the Constitution or law.37 Therefore, the judiciary should profoundly detect the main and final purpose of the decision to ascertain whether or not it has a legitimate objective rooted in the Constitution or law.38

There are many examples of constitutionally explicit articles stipulating the necessary existence of the proper purpose to consider law or administrative decisions valid. To instantiate, the Canadian Charter of Rights and Freedoms indicates that "Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."39 Another example can be seen in the Constitution of the Republic of South Africa. Article 36 confirms that "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors including a) the nature of the right; b) the importance of the purpose of the limitation; c) the nature and extent of the limitation; d) the relation between the limitation and its purpose; and e) less restrictive means to achieve the purpose."40 Moreover, article 36 of the Swiss Constitution requires a preliminary provision pertaining to human rights limitations as it reads, "1. Restrictions on fundamental rights must have a legal basis. 2. Restrictions on fundamental rights must be

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[36] *Id*. It is worth mentioning that the main difference between legality and legitimacy is that the latter requires a justification to restrict a value in favor of another value. This justification should be logical, and restrictions must be applied in an appropriate manner.

[37] *ʿṣām sʿīd ʿbd al-ʿbīdī - mbdʾ al-tnāsb kḍābṭ lʿmlīa2 tqyīd al-ḥqūq al-dstūrīa2 - bḥth mnshūr bmjla klīa2 al-qānūn wālʿlūm al-qānūnīa2 wālsyāsīa2 - al-mjld 8 al-ʿdd 29 al-ʿām 2019- ṣ* 253.

[38] *mstshār dktūr mḥmd māhr ʾbū al-ʿnīn - t ṭūr qḍāʾ al-ʾlghāʾ ūdūr mjls al-dūla2 fī al-rqāba2 ʿlā al-qrārāt al-mtʿlqa2 bnzʿ al-mlkīa2 ūʿlā bʿḍ mṣādr al-mshrūʿīa2 - al-mrkz al-qūmī llʾṣdārāt al-qānūnīa2 – ṭbʿa2017 – al-mjld al-thānī - ṣ* 539.

[39] *See* part one of article one of the Canadian Charter (https://laws-lois.justice.gc.ca/eng/Const/page-15.html –). *See* also R. v. Oakes https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/117/index.do

[40] *See* the South Africa Constitution, official sitehttps://www.gov.za/documents/constitution-republic-south-africa-1996.

justified in the public interest or for the protection of the fundamental rights of others. 3. Any restrictions on fundamental rights must be proportionate. 41 Also, paragraph 1 of article 19 of the Basic Law for the Federal Republic of Germany states that "Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must generally apply and not merely to a single case. In addition, the law must specify the basic right affected and the article in which it appears.42 Even in the United States of America, where freedom of speech is deemed somehow absolute, the High Court used to restrict it if the practicing of such freedom creates a present and obvious danger.43 Therefore, such freedom can be limited if there is a justifiable and proper purpose.

Nevertheless, as previously mentioned, the necessity of justifying an administrative decision can be tacitly discerned from the generic article of the Constitution by emphasizing the importance of the rule of law and democratic values.44 Hence, it can be concluded that in order to restrict the enduring values of people by an administrative decision, there must be a justifiably proper purpose which must be a pressing social need. This is a preliminary condition to limit safeguarded rights. In this meaning, the European Court of Human Rights has assured that:

> For it to be compatible with the Convention, a limitation of this freedom must, in particular, pursue an aim that can be linked to one of those listed in this

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[41] *See* the Swiss Constitution issued on April 18, 1999 https://www.fedlex.admin.ch/eli/cc/1999/404/en

[42] *See* the Basic Law for the Federal Republic of Germany https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html

[43] The first amendment of the Constitution of the United States of America states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *See* the report issued by Democracy Reporting International on October 2012 under the title LAWFUL RESTRICTIONS ON CIVIL AND POLITICAL RIGHTS. https://democracy-reporting.org/

[44] The Egyptian Supreme Administrative Court has constantly affirmed that: deducing the purpose of the legislative articles by the court is not considered as exceeding the legitimacy's review. Rather, the judiciary does not create a purpose on its own to impose it on the administration, but it only reveals the explicit or implicit legislative purposes which the legislation was basically enacted to reach. The judicial review has not been deemed an intervention or substitution to the executive power, but it is an obvious application of the separation of power principle. *See* challenge No.5730 and 6585, Judicial Year 55, February 6, 2010, and challenges No 37114 and 32272, Judicial Year 55, July 7, 2012, the Egyptian Supreme Administrative Court.

> provision.[45] The court added that "under certain conditions, the "respect for the minimum requirements of life in society" referred to by the Government – or of "living together", as stated in the explanatory memorandum accompanying the bill can be linked to the legitimate aim of the "protection of the rights and freedoms of others.[46]

Regarding the intensity of the review applied by the court in this phase of supervision, the partially legitimate aim argued by the state should be judicially accepted and considered a legitimate aim because the administration should be granted a considerable margin of appreciation in determining the importance of the proper purpose based on two considerations. First, the administration's main target, as a rule, is to protect the public interest and people's human rights so that claiming otherwise must be obviously demonstrated. This is because the legitimate aim can be implicitly derived from the whole legal system. Second, it is crucial to balance the administrative and judicial powers because one of the essential jurisdictions of the administration is to weigh amongst interests in the society under the supervision of the judiciary. Nonetheless, this margin of discretion granted to the state does not mean that any reason presented as a purpose must always be accepted. Rather, if it is doubtful whether the aim is legitimate or not, the evaluation of the administration should prevail.

Finally, in this level of supervision, the court does not have to scrutinize whether or not the measures embraced by the administration rationally lead to the administration's objectives or to oversee the necessity and proportionality of the contested decision. Rather, the court must only test whether or not the challenged decision was issued to reach a legitimate purpose, as previously elaborated.

2. Suitability

Suitability is the second degree of proportionality examination. In this degree of assessment, the reviewing court has to test whether or not the measures taken to achieve the legitimate objective are rational and fair.[47] Rationality necessitates that the measures embraced are suited to further

[45] *See* the European Court of Human Rights, Grand Chamber, Case of S.A.S. v. France, Paragraph 113 of the ruling.
[46] *Id.* para 121.
[47] Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. Transnat'l L. 72 (2008). At 75.

and advance the legitimate aim.[48] It is hence essential that the means selected are on the realization of the purpose, leading to the increase in the probability of realizing the measures' purpose.[49] In this meaning, the Supreme Court of Canada has stated that:

> is the reverse onus clause in s. 8 rationally related to the objective of curbing drug trafficking? At a minimum, this requires that s. 8 be internally rational; there must be a rational connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking. Otherwise, the reverse onus clause could give rise to unjustified and erroneous convictions for drug trafficking of persons guilty only of possession of narcotics.[50]

Moreover, in South Africa, the Constitutional Court has tested legislation establishing an assumption with regard to possessing illegal weapons. The Court noted that there is no rational link between the purpose of the fight against the illegal possession of weapons and one's random presence at the location where such unlawful weapons were found.[51]

Concerning the minimum requirements of the relation between the measures embraced and the purpose aimed, the partial achievement of the legitimate purpose by the measures taken is sufficient to consider that there is a rational connection between the means and purpose.[52]

It is worth noting that law articles are not adequate to answer the rationality test. Conversely, facts derived from social reality, scientific data, and accumulative experience are central to evaluating the ability of the means used by the restricting decision to reach the proper purpose because the rational connection is a logical test in addition to the legal examination.[53][54]

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[48] *Id.*
[49] *ūlīdm, supra* note 18 at43.
[50] R. *v.* Oakes, [1986] 1 S.C.R. 103, Supreme Court of Canada, paragraph 77.
[51] BARAK, *supra* note, 35, at 304.
[52] *ūlīdm, supra* note, 18 at 43.
[53] BARAK, *supra* note 35, at 308.
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In this meaning, the Egyptian Supreme Constitutional Court has assured that: Every legislative regulation is not intended for itself; conversely, it is merely a mechanism to reach the objectives of the legislation that mirror its legitimacy. If this regulation contradicts planned purposes, as it cannot be logically linked with its objectives, that will create arbitrary discrimination which is not constituted upon neutral grounds. *See* challenge No.10193, Judicial Year 55, January 5, 2013, the Egyptian Supreme Administrative Court. The original text reads,

"كل تنظيم تشريعي لا يعد مقصود لذاته بل لتحقيق أغراض تعكس مشروعيتها – فاذا كان التنظيم بما انطوى عليه من تميز مصادماً لهذه الأغراض، بحيث يستحيل منطقياً ربطه بها ، فان التميز يكون تحكمياً ومن غير مستند الى أسس موضوعية."
See also Challenge No. 14711, Judicial Year 62, January, 6,2018 the Unified Circle of the Egyptian Supreme Administrative Court. The original text read,

In spite of the fact that most rulings issued based on proportionality review link the rational connection between the measures taken and the proper purpose on the one hand and the fairness of the measures adopted, on the other hand, some jurists are of the opinion that the arbitrary nature of the means adopted may or may not imply that the purpose is not proper.[55] It is conceivable that arbitrary means may rationally advance the accomplishment of the proper

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"إن كل تنظيم تشريعي لا يعتبر مقصودًا لذاته، بل لتحقيق أغراض بعينها، يعتبر هذا التنظيم ملبيًا لها، وتعكس مشروعية هذه الأغراض."

In the same meaning, *see* the opinion of the General Assembly of Legal Opinion and Legislation at the Egyptian State Council, issued on December 20, 2000. No 662/2000. The original script reads,

"إن كل تنظيم تشريعي لا يعتبر مقصودًا لذاته، بل لتحقيق أغراض بعينها يعتبر هذا التنظيم ملبيًا لها، وتعكس مشروعية هذه الأغراض إطارًا للمصلحة العامة التي يسعي المشرع لبلوغها، متخذًا من القواعد القانونية التي يقوم عليها هذا التنظيم سبيلاً لها."

See also ʿūḍ al-mr- al-rqāb$_a$*2 al-qḍāʾī*$_a$*2 ʿlā dstūrī*$_a$*2 al-qwānīn fā mlāmḥhā al-rʾīsī*$_a$*2 - mrkz rīnīh – jān dbwī llqānūn wāltnmī*$_a$*2- ṣ -3 and 1357.*

Furthermore, the Egyptian Supreme Administrative Court has recently affirmed that "While the administration has the right to create specific rules and conditions, deemed appropriate, to the administration, for occupying public professions by applicants such as stipulating a maximum age for the appointment in judicial jobs, these prerequisites must not infringe the Constitution or the law and not contravene the nature, logic, and fairness of things, and not derogate or adversely affect the legally basic foundations for equality in legal positions. To this end, setting a maximum age for the applicant to occupy the lowest judicial positions is a fundamental condition because of the reality, the nature of the legal and judicial work, and the necessity of the optimal investment of judges, given that the legal and judicial experience is formed over the years. Therefore, the judge's involvement in work at an early age allows the formation of these faculties in order to reach the utmost benefits." Challenge No.7760, Judicial Year 63, October 27, 2018, The Egyptian Supreme Administrative Court. The original context reads,

"أفادت المحكمة أنه من المستقر عليه في قضاء المحكمة الإدارية العليا أنه ولئن ساغ لجهة الإدارة أن تضع من الضوابط والشروط ما تراه مناسباً لشغل الوظائف الخاصة بها، بحسبانها القوامة على المرافق العامة، ومن بين هذه الضوابط الحد الأقصى لسن التعيين بهذه الوظائف، إلا أن مناط القبول بهذه الشروط ألا تخالف الدستور والقانون، وألا تجافي طبائع الأشياء ومنطقها وعدلها، وألا تهدر أو تمس الأصول المقررة عدلاً مساواة للمراكز القانونية. وضع حد أقصى لسن المتقدم لشغل أدنى الوظائف القضائية هو شرط يفرضه واقع الحال وطبيعة العمل القانوني والقضائي وضرورة الاستثمار الأمثل للقاضي، باعتبار أن الملكات والخبرات القانونية والقضائية تتكون على مر السنين عاماً بعد عام، وأن انخراط القاضي في العمل في سن مبكرة يسمح بتكوين تلك الملكات وترسيخها والاستفادة منها أكبر قدر ممكن ومن الخبرات التراكمية التي تكونت على مدار السنين."

[55] BARAK, *supra* note 35, at 307.

objective concerned. Therefore, the decision must be declared invalid not because of the lack of rationality, but because of the absence of reasonable equality.[56]

Finally, at the suitability level, the reviewing court should not test whether or not the measures embraced are the less restrictive means compared to other obtainable means because the court should make that in the third stage of examination. It should further not weigh the benefits that may take place as a result of applying the contested decision compared to the harms that may occur to people's human rights.[57]

3. Necessity

Necessity is the third component of proportionality review. Assuming that the administrative decision is issued by the competent authority to reach a proper purpose, and there is a rational connection between the measures embraced and the decision's objective, the reviewing court, in the third step of proportionality examination, will examine to what extent the measures are necessary. This requires that there are no less restrictive means that can be chosen to accomplish the purpose pursued.[58] In a similar vein, if there are other accessible measures, the question that must be hypothesized is which of these obtainable tools adversely affects other enduring values the least compared to the officially adopted one.[59] The same meaning was depicted by German jurist *Fritz Fleiner* when he held that "the police should not shoot at sparrows with cannons."[60] To this end, officials should start with the probable less detrimental footsteps and then continue up to reach the proper aim without a high restraint on intrinsic values. Hence, if a substitute administrative decision can realize the exact objective with less or no restriction of people's enduring values, then the administration must select this measure rather than the chosen one to

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[56] The Egyptian Supreme Constitutional Court has defined discrimination and arbitrariness as ""the forbidden discrimination, according to the constitution, is every discriminatory action constituted upon differentiation, restriction, preference or exclusion arbitrarily affecting rights and freedom covered by the Constitution or law." The original context reads,

"إن صور التميز المجافية للدستور وإن تعذر حصرها إلا أن قوامها كل تفرقة أو تقييد أو تفضيل أو استبعاد ينال بصوره تحكمية من الحقوق والحريات التي كفلها الدستور أو القانون."

[57] Mathews, *supra* note 5, at 4 and 5.

[58] Alec, *supra* note 47, at 75.

[59] (Jan H. Jans, *'Proportionality Revisited'*, (2000), 27, *Legal Issues of Economic Integration*, Issue 3, at240).

[60] Mathews, *supra* note 5, at 1.

not diminish the constitutional right behind what is necessary to reach the proportional objective in question.

This component of proportionality has been repeatedly seen in different courts worldwide. For instance, the European Court of Justice has confirmed that the measures utilized by Holland were unnecessary because the Government had choices to achieve the same objective but less restraint on practicing the freedom of trade between member states of the European Union.[61] Moreover, in the case of the *S v. Makwanyane*, the Supreme Court of South Africa held that:

> In the balancing process, deterrence, prevention, and retribution must be weighed against the alternative punishments available to the state. It can be concluded that the court searched for other alternatives which were less restrictive and deleterious on the basic human rights of people. The court declared that the death penalty was unconstitutional as life imprisonment would serve the same purpose but with a less adverse effect on other constitutional norms.[62]

Additionally, the Constitutional Court of Germany has overseen legislation banning the sale of sweets made of rice. The court, in balancing the consumers' right to not buy a manipulated product on the one hand and the freedom of creating the business on the other hand, held that the objective was proper. There is a rational connection between it and restricting legislation. However, the means adopted were unnecessary because there were other means that could advance the same purpose with less scope. To this end, a cautionary marker on the product would advance the same purpose with less restrictive means on human rights. Thus, the partial restriction previously mentioned on the freedom of occupation is less restrictive than the full restriction centering around the blanket ban of these products.[63]

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[61] (Case 104/75 de peijper 1976 ECR 613 Paragraph 16-29) quoted from ūlīd mḥmd al-shnāwī- al-t ṭūrāt al-ḥdīth$_a$2 llrqāb$_a$2 al-qḍāʾī$_a$2 ʿlā al-tnāsb fī al-qānūn al-ʾdārī – dār al-fkr wālqānūn – ṣ53.

[62] Paragraph (135) of the judgment, *see* the full judgment on the website of the Legal Information Institute of South Africa http://www.saflii.org/za/cases/ZACC/1995/3.html

[63] BARAK, *supra* note 35, at 319.

Some Egyptian judicial rulings and jurists acknowledge this degree of supervision. Firstly, the Egyptian Supreme Constitutional Court and the Egyptian Supreme Administrative Court have recognized the notion of necessity supervision. It has been ruled that "the margin of appreciation that legislator has in organizing rights necessitates choosing amongst various substitutes in order to select the most appropriate means which can advance the legitimate interests that the legislator has basically intended to protect them. *See* challenge No.116, Judicial Year 18, August 2, 1997, The Egyptian Supreme Constitutional Court. *See* also Challenge No.10787, Judicial Year 58, September 16, 2020, The Egyptian Administrative Court. The original text reads,

After revealing the previously comparative doctrines, it can be concluded that the margin of appreciation that the legislator and executor have is not absolute but relative. This relativity requires a concrete methodology to balance the judicial, legislative, and executive authorities while practicing their jurisdiction. Consequently, supervising the necessity of the legislation or administrative decisions by courts is central to certifying that there are no unnecessary restrictions on people's enduring values.

4. Proportionality

Suppose an administrative decision appears legitimate, suitable, and necessary, as earlier elaborated, the reviewing court will take a step forward in scrutinizing whether there is a proportional relationship between the benefits planned through applying the governmental goal, which must be a compelling interest on the one hand and drawbacks caused to other protectively

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"وحيث إن السلطة التقديرية التي يملكها المشرع في موضوع تنظيم الحقوق لازمه أن يفاضل بين بدائل متعددة مرجحا من بينها ما يراه أكفل لتحقيق المصالح المشروعة التي قصد الى حمايتها."

Moreover, the Egyptian Supreme Administrative Court has emphasized that " A blanket ban on the full-face veil in universities, schools, clubs, and other public places infringes both personal freedom and the constitution. While the competent administrative body has the authority to regulate that matter, this organization must be done only to the degree that gives the officials the power to verify from the veiled female, not completely preventing her from doing so. According to the court, the same protection of the public interest, which is safeguarding public security, can be reached through less partial restriction on the right of those women. Therefore, the administration had to choose this substitute rather than the selected one. Challenge No. 1396, Judicial Year 44, April 26, 2006. And Challenge No.3219, Judicial Year 48, June 9, 2007, and challenge No. 5765, Judicial year 56, January 20, 2010, the Egyptian Supreme Administrative Court. The original text reads,

"حظر ارتداء النقاب بصورة مطلقة في المدارس أو الجامعات والأندية يمس الحرية الشخصية ويخالف الدستور، إذا كان للجهة الإدارية المختصة تنظيم ذلك، فيجب أن يتم ذلك بالقدر اللازم لتحقيق هذا التنظيم على نحو التحقق من شخصية المنتقبة وليس منعها."

It is essential to refer to the judgments of the first circle of the Egyptian Court of the administrative Judiciary, which was ruled on January 19, 2016, against the plaintiff who asked to cancel the Cairo University decision prohibiting her from teaching students while wearing the full-face veil. Case No. 5070 Judicial Year No. 70, January 19, 2016.

It is worth mentioning that the former Chief Justice of the Egyptian Supreme Constitutional Court, jurist *ʿūḍ al-mr* has assured that "the margin of appreciation that the legislator or executor practices is, in reality, a balance amongst different alternatives. According to the jurist, the legislator has to select the less restrictive means on freedom and choose the ones that closely lead to reaching the objectives of the legislation or the administrative decision. *See ʿūḍ al-mr- al-rqāb$_a$2 al-qḍā ʾī$_a$2 ʿlā dstūrī$_a$2 al-qwānīn fā mlāmḥhā al-r ʾīsī$_a$2 - mrkz rīnīh – jān dbwī llqānūn wāltnmī$_a$2- ṣ 56.*

enduring values in question on the other hand. This is the fourth degree of examination called proportionality review in its *stricto sencu*.[64] Accordingly, to justify a limitation on a constitutional right, a suitable relation must occur among the benefits and harms as elaborated.[65] It entails an acceptable balance between the benefits that may be gained through applying the governmental measures and harms that may cause to other constitutional rights. Therefore, if the harms caused to the enduring values by the adopting measures surpass the benefits reached, these procedures must be declared invalid and vice versa.

In Canada, for example, the court held that the enactment of the legislation restricting dentists' advertisements must be declared invalid because the benefits of safeguarding professionalism and preventing deceptive advertisements are not proportionate to the impairment that occurred to the freedom of expression.[66] In the same meaning, the European Court on Human Rights in *Soering v United Kingdom* stated that: "The Court has to certify whether an appropriate weight was made between the importance of the general interest of the whole community and the essential rights of people . . . the search for this balance is inherent in the whole of the Convention."[67]

It is worth mentioning that the aforementioned comparison does not occur between the constitutional values per se, but, instead, it happens between the benefits and drawbacks occurring as a result of prioritizing one interest over the other in specific times and circumstances based on their social importance. Hence, the balancing between harms and benefits that occurs in proportionality review has special characteristics. The balance is derived from the specific history, customs, traditions, and nature of the social values of each country. The test of the social importance of competing values is not a mathematical test; instead, it is a social test encompassing the mentioned elements such as the whole political and legal system of the state and the custom and traditions stabilized among its population.[68]

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[64] Alec, *supra* note 47, at 76.
[65] *ʿṣām, supra* note 37 at 261.
[66] Health Disciplines Act, R.R.O. 1980, section 37. Quoted from Barak, A. (2012). *Proportionality: Constitutional rights and their limitations*. at 342.
[67] Amrei Muler, *Limitations to and Derogations from Economic, Social and Cultural Rights*, 9 HUM. Rts. L. R.E.V. 557 (2009). At 559.
[68] BARAK, *supra* note 35, at 349.

B. Comparative Analysis

In this section, I will briefly reveal some of the comparative judicial systems that adopt proportionality completely or partially. This is significant because realizing these judicial precedents' underpinnings may help in applying the approach.

1. Germany

proportionality review had moved from administrative law to constitutional law in Germany in the late nineteenth century.[69] In 1886, the Supreme Administrative Court of Prussia had ruled that the Administration could not require, based on public safety considerations, an owner to eliminate a post established at the brink of his property, but rather, all that was necessary to safeguard the community was necessitating the proprietor to light the post. Based on the court, protection from accidents is certainly the task of the administration entities. These public entities find their limits in that the selected measures must not exceed the goal of removing the threat.[70] In the same year, the court adjudicated that it was disproportional and, therefore, impermissible for the administration to close down a shop in reply to the behavior of the owner who distributed a drink without a license without taking into account that the operation of the shop was per se lawful. The court ruled that closing the shop up was a more severe step than the administration needed to meet the legitimate aim of requiring a distribution license.[71]

2. France

The principle of proportionality has not been explicitly mentioned in the French State Council. However, it has been argued by many scholars and judges that the principle of proportionality is considered a part of French law.[72] It is claimed that proportionality is applied through three various methods, namely limitations to civil liberties, apparent error of appreciation, and weighing drawbacks and benefits.[73] It is worth mentioning that even though French law has implicitly recognized the principle of proportionality, it has never acknowledged it systematically and explicitly through its four degrees of review. This may be because the French

[69] Mathews, *supra* note 5, at 5 and 6.
[70] *Id. at 7.*
[71] *Id.*
[72]Benjamin Goold, Liora Lazarus & Gabriel Swiney, *Public Protection, Proportionality, and the Search for Balance* (2007), at14.
[73] *Id*.

judiciary does not embrace the deliberated rulings mechanism, but instead, most French rulings are compendious in their reasonings.[74] In 2014, the French State Council assured that "restrictions imposed on the fundamental freedoms in order to protect public order must be necessary, suitable and proportionate".[75] Nonetheless, it cannot be argued that all decisions of the State Council have adopted this methodology or its structure.[76]

3. Canada77

R. v. Oakes[78] is one of the cases where the Canadian Supreme Court has employed proportionality test to protect human dignity as an important enduring value. Oakes was accused of illegal possession of a narcotic for the purpose of trafficking contrary to s. 4(2) of the Narcotic Control Act. However, Oakes contested the constitutional validity of s. 8 of the Narcotic Control Act because it imposes the onus of proof on him while S. 11 (d) of the Canadian Charter of Rights and Freedoms indicates that « Any person charged with an offense has the right (d) to be presumed innocent until proven guilty according to the law in a fair and public hearing by an independent and impartial tribunal ». Judge *Dickson,* one of the court judges, has stated: first, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair as little as possible the right or freedom in question. Third, there must be proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of sufficient importance.[79]

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[74] *ūlīdm, supra* note 18, at 173.
[75] *Id.* at 167.
[76] *Id.* at 177.
[77] The same criteria of the proportionality test are used in Canada with a different name, Oakes.
[78] On February 28, 1986, the S.C.C. has issued a ruling in the case between the Queen as an appellant and David Edwin Oakes as a respondent. The Ontario Court of Appeal was correct in holding that s. 8 of the Narcotic Control Act violates the Canadian Charter of Rights and Freedoms and is, therefore of no force or effect. Section 8 imposes a limit on the right guaranteed by s. 11 (d) of which is not reasonable and is not demonstrably justified in a free and democratic society for the purpose of s. 1 .

[79] Alec, *supra* note 47, at 114.

Since the Oakes case's ruling was issued, more than two hundred decisions have followed based on the same principle.[80] Moreover, based on the principles made by the court in the Oakes case, in 1987, the Republic Service Employee Relations Act clearly states that "requirement of proportionality of means to ends that normally has three aspects: a) there must be a rational connection between the measures and the objective they are to serve; b) the measures should impair as little as possible the right or freedom in question; and c) the deleterious effects of the measures must be justifiable in light of the objective which they are to serve."[81]

4. South Africa

In addition to applying proportionality in the *Oakes* case mentioned above, the Constitutional Court of South Africa adopted the same principle in many cases, particularly the case of *S v. Markwayne* regarding the death penalty.[82]

The Constitutional Court of South Africa has pointed out that:

> In the balancing process, the principal factors that have to be weighed are on the one hand the destruction of life and dignity that is a consequence of the implementation of the death sentence, the elements of arbitrariness and the possibility of error in the enforcement of capital punishment, and the existence of severe alternative punishment (life imprisonment) and, on the other, the claim that the death sentence is a greater deterrent to murder, and will more effectively prevent its commission, than would a sentence of life imprisonment, and that there is a public demand for retributive justice to be imposed on murderers, which only the death sentence can meet. Retribution cannot be accorded the same weight under our Constitution as the rights to life and dignity, which are the most important of all the rights in Chapter Three. It has not been shown that the death sentence would be materially more effective to deter or prevent murder than the alternative sentence of life imprisonment would be. Taking these factors into account, as well as the elements of arbitrariness and the possibility of error in enforcing the death penalty, the clear and convincing case that is required to justify the death sentence as a penalty for murder, has not been made out. The requirements of section 33(1) have accordingly not been satisfied, and it follows

[80] *Id.*
[81] *Id.* at 117,118.
[82] *See* South Africa legal Information Institute *available* at. http://www.saflii.org/za/cases/ZACC/1995/3.html.
See also Sandra Liebenberg, *Needs, Rights, and Transformation: Adjudicating Social Rights*, 17 Stellenbosch L. Rev. 5 (2006).

that the provisions of section 277(1)(a) of the Criminal Procedure Act, 1977 must be held to be inconsistent with section 11(2) of the Constitution.

5. The United Kingdom

The United Kingdom courts have passed through many stages regarding overseeing legislation and administrative decisions starting from *Wednesbury* to proportionality review in the cases associated with human rights. Regarding *Wednesbury*, Lord *Diplock* has described the reasonableness principle as "*Wednesbury"* unreasonableness as a principle that applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it."[83]

Embracing proportionality review, in some cases, by the U.K. courts was essential because of two reasons, mainly, the ambiguity of the meaning of reasonableness[84] and the enactment of the Human Rights Act in 1998, which instructed U.K. courts to certify the consistency of the legislation with the European Convention on Human Rights.[85] the Human Rights Act 1998 requires judges to decide whether or not the restrictions imposed on rights are justifiable.[86] To this end, Lord *Templeman* has stated that "in terms of the convention, as construed by the European Court of Human Rights, the interference with freedom of expression must be necessary and proportionate to the damage which the restriction is designed to prevent.". Conversely, Lord *Anker* has rejected the application of proportionality test because of the unsuitability of such a standard with the special nature of the England judicial review.[87] In addition, with respect to the important role of adopting restrictive review by the U.K. courts, Lord *Steyn* has asserted that "the intensity of review in public law cases will depend on the subject matter in hand that is even in cases involving convention rights. In law, context is everything.".[88]

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[83] *See* Council of Civil Service Union. V. Minister for the Civil Services (1984) 3 All ER 935, pp.950,951. Cited from *ūlīd mḥmd al-shnāwī- al-t ṭūrāt al-ḥdīth*$_a$*2 llrqāb*$_a$*2 al-qḍāʾī*$_a$*2 ʿlā al-tnāsb fī al-qānūn al-ʾdārī – dār al-fkr wālqānūn – ṣ228.*

[84] *ūlīdm, supra* note 18 at 234 and 235.

[85] MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE (2013), at 11. http://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=1357343).

[86] Benjamin, supra note 34, at 8.

[87] *ūlīdm, supra* note 18, at 235.

[88] *Id.* at 251.

6. Other Comparative Analysis

Regarding the International Covenant on Political and Civil rights[89] and the International Covenant on Economic, Social, and Cultural Rights, proportionality principle has been frequently adopted in their committees and courts' reasoning.[90] The same principle also has been acknowledged by almost all the European courts as a legal mechanism in order to balance competing values and interests to prioritize the most pressing one over others.[91] ECtHR has recognized the principle of proportionality in the *Soering v United Kingdom* judgment by stating that: inherent in the whole of the Convention [ECHR] is a search for a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights".[92] In addition, in the CCPR commentary, it has stated that "the severity and scope of interference must be proportionate to the emergency that threatens the life of the nation, limited to what is actually necessary to cope with that situation. Every single measure taken must bear a reasonable relationship to the threat. It must be linked to the facts of the emergency and must potentially be effective in helping overcome the grave situation.[93]

C. Against Proportionality and Retorts

There are many critiques that have been argued against proportionality review. Some of these are criticizing proportionality as it adversely affects the separation of power's principle, and it lacks the standard by which it can be evaluated. Firstly, regarding the separation of power principle as a constitutional principle, while balancing competing values and interests is the central role of the legislator who is basically elected to organize and order the society values, judges through proportionality review may exceed their role when balancing constitutional values as they may act as representatives. Secondly, respecting the lack of criteria that the P.A. has, it has been

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89 The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty adopted by the United Nations General Assembly. Resolution 2200A (XXI) on December 16, 1966, came into force on March 23, 1976. The Egyptian Government ratified the covenant and got into force on April 14, 1982.

90 The International Covenant on Economic, Social and Cultural Rights (ICESCR) is a multilateral treaty adopted by the United Nations General Assembly on December 16, 1966, through G.A. Resolution 2200A (XXI), came into force on January 3, 1976; the Egyptian Government ratified the covenant and got into force on April 14, 1982.

91 Alec, *supra* note 47, at 159.

92 Amrei, *supra* note 67, at 559.

93 *Id.* at 563 and 564.

argued that P.A. misses the standard because the evaluation between two competing values does not have a common base.[94]

Firstly, pertaining to the contradiction between the principle of the separation of powers and balancing competing interests and rights, this argument can be refuted by emphasizing the fact that the constitution that establishes the notion of the separation of powers gives concurrently courts the jurisdiction to review the legislation and administrative decisions.[95]

Secondly, criticism regarding the missing denominator in the P.A., this argument can be contested because balancing competing values will not be carried out amongst the values themselves. Conversely, the balance will occur between the social significance of the benefits derived from preventing harm to one constitutional right and the social importance of the benefits achieved by protecting one public interest.[96] Therefore, the balance will occur in the phase of realization of the right in specific circumstances and time, not among rights themselves.

Separation of Power, Proportionality, and Egyptian Law

Article 10 of law no 47/1972 regarding the Egyptian State Council determines the judicial jurisdiction of its courts, and it further specifies the grounds that can be claimed in appealing the administrative decisions before the court.[97] According to this article, the reference for appealing final administrative decisions must be constituted upon the lack of jurisdiction, lack of required form, violation of regulations or decrees including the error in their application or interpretation, or the abuse of power. Therefore, overseeing the rationality, necessity, and proportionality of the administrative decision is not included in the law determining the court's jurisdiction. Accordingly, the court may usurp the jurisdiction of the administrative authority if proportionality is applied. For example, the Supreme Administrative Court has asserted that "the mere competence that the State Council Courts have is to oversee the legitimacy of the administrative decisions; thus, the courts do not have the legal capacity to supervise the

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[94] BARAK, *supra* note 35, at 482.
[95] *Id*. at 490.
[96] *Id.* at 484.
[97]

تنص الفقرة الثانية من المادة رقم 10 من قانون مجلس الدولة الصادر بالقانون رقم 47 لسنة 1972 على أن " تختص محاكم مجلس الدولة دون غيرها بالفصل في المسائل الآتية:.....
ويشترط في طلبات إلغاء القرارات الإدارية النهائية أن يكون مرجع الطعن عدم الاختصاص أو عيباً في الشكل أو مخالفة القوانين أو اللوائح أو الخطأ في تطبيقها أو تأويلها أو إساءة استعمال السلطة."

suitability of the decisions because the governmental bodies have an exclusive power to precisely determine the suitability of the decisions."

Along the same vein, courts have issued many rulings confirming that "the supervision of the State Council Courts is merely a legitimacy supervision to verify that the administrative decisions conform with the law and to reach the public interest."[98] In addition, the administrative court must not oversee the suitability of the administrative decisions. This is because scrutinizing the decisions' suitability contradicts the separation of power principle confirmed by the Egyptian Constitution.[99]

In retorting these claims, it might be argued that article (97) of the 2014 Egyptian constitution forbids declaring administrative acts or decisions immune from judicial oversight.[100] Moreover, the Constitution stipulates, in organizing freedoms and rights, that the regulation must not restrict rights and freedom in such a way as infringes upon their essence and foundation.[101] Although the previous responses are valid in responding to the separation of powers argument because the constitutive power itself is the competent authority that gives the courts the jurisdiction to oversee the administrative decision, defending proportionality can be claimed through different arguments. Administrative courts realistically are adopting the four degrees of proportionality review as previously elaborated but without stable and structural techniques. Therefore, the problem, in reality, is not concerned with contradicting the separation of power

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[98] Challenge No.275, Judicial Year 35, December 13, 1992, The Egyptian Supreme Administrative Court. *See* also Challenge No.488, Judicial Year 34, January 10, 1993, The Egyptian Supreme Administrative Court.

[99] Challenge No.235, Judicial Year 33, April 9, 1988, The Egyptian Supreme Administrative Court.

[100] Article (97) of the 2014 Egyptian Constitution reads, " ……. It is forbidden to grant any act or administrative decision immunity from judicial oversight." The original article in Arabic reads,

"تنص المادة (97) من الدستور المصري المعدل في 2014 على أن "يحظر تحصين أي عمل أو قرار إداري من رقابة القضاء."

[101] Article (92) of the 2014 Egyptian Constitution reads, "Rights and freedoms of individual citizens may not be suspended or reduced. No law that regulates the exercise of rights and freedoms may restrict them in such a way as infringes upon their essence and foundation. The original article in Arabic reads,

"تنص المادة (92) من دستور جمهورية مصر العربية المُعدل في 18 يناير 2014 على أن "الحقوق والحريات اللصيقة بشخص المواطن لا تقبل تعطيلاً ولا انتقاصاً..

ولا يجوز لأي قانون ينظم ممارسة الحقوق والحريات أن يقيدها بما يمس أصلها وجوهرها."

principle. Undoubtedly, administrative courts in Egypt are used to supervise the suitability and necessity of administrative decisions.[102] Moreover, multiple rulings are issued based on applying the different degrees of proportionality.[103]

Nonetheless, in spite of the fact that the Egyptian administrative courts have applied all degrees of proportionality, they have been further suffering from the lack of a stable and structural methodology while applying these degrees. This is mainly because the same court at the close time with the same fact may apply only the narrow meaning of legitimacy or suitability and may broaden its supervision to include necessity and proportionality as demonstrated in the introductory chapter.

Therefore, proportionality review through its structural technique would organize the mind of judges, raise the transparency within courts, create an effective dialog within the court and enhance the objectivity of judicial discretion. Therefore, the argument related to the adverse impact of the separation of power principle is no longer a pragmatic critique.[104]

[102] For example, the Egyptian Supreme Administrative Court has emphasized that "A blanket ban on the full-face veil in universities, schools, clubs, and other public places infringes both personal freedom and the constitution. While the competent administrative body has the authority to regulate that matter, this organization must be done only to the degree that gives the officials the power to verify from the veiled female, not completely preventing her from doing so." *See* Challenge No.3219, Judicial Year 28, June 9, 2007, and challenge No. 5765, Judicial year 56, January 20, 2010, the Egyptian Supreme Administrative Court

[103] For instance, *see ʿzba khīr al-lh - jzīra al-qrṣāīa* Challenge No. 1875 and 1914, Judicial Year 3., March 9, 1991, and Challenge No. 6585, Judicial Year55, February 6, 2010, the Egyptian Supreme Administrative Court.

[104] *Supra* note 6.

IV. Proportionality in the Egyptian Legal System: Does the Egyptian Legal System Acknowledge Proportionality Review?

Although great attention has been given to the use of proportionality in the arena of constitutional law, less has been said about the role of proportionality within administrative law.[105] However, this judicial methodology presents an essential role in administrative law in order to control the discretionary power of the administration. Thus, proportionality has become widespread in the domain of administrative law.[106] To this end, this chapter endeavors to scrutinize the P.A. practical and theoretical foundations in the Egyptian legal system, comprising the Egyptian Constitution, legislation, ratified treaties. It is primarily central to go through the Egyptian Constitution, basic law, conventions ratified by the competent Egyptian authority and rulings issued by the Egyptian high courts as well in order to explore whether or not the Egyptian legal system acknowledges proportionality review. It is worth to emphasis that searching for plain provisions and texts recognizing proportionality review in the Egyptian legal system is not deemed viable, but rather, the tacit indication and strong underpinnings are the targets of this chapter.

A. Deriving Proportionality from the Egyptian Constitution

The Egyptian system is a democratic republic based on citizenship and the rule of law.[107] The rights and freedoms of individual citizens may not be suspended or reduced. No law that regulates the exercise of rights and freedoms may restrict them in such a way as infringes upon their essence and foundation.[108] The government exercises its functions to maintain the nation's

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[105] Mathews, *supra* note 5, at1.

[106] *Id.* at 7.

[107] The first paragraph of article (1) of the 2014 Egyptian Constitution, amended on January 18, 2014, reads, " The Arab Republic of Egypt is a sovereign state, united and indivisible, where nothing is dispensable, and its system is a democratic republic based on citizenship and the rule of law." The original text reads,

تنص الفقرة الأول من المادة (1) من دستور جمهورية مصر العربية المُعدل في 18 يناير 2014 على أن "جمهورية مصر العربية دولة ذات سيادة، موحدة لا تقبل التجزئة، ولا ينزل عن شيء منها، نظامها جمهوري ديمقراطي، يقوم على أساس المواطنة وسيادة القانون."

108 Article (92) of the 2014 Egyptian Constitution, amended on January 18, 2014, reads, "Rights and freedoms of individual citizens may not be suspended or reduced. No law that

security and protect the rights of citizens and the interests of the state.[109] Through these three constitutional articles, and others that will be revealed, I would prove to what extent the structural review of proportionality is necessary for democracy as a key pillar in the Egyptian Constitution, for settling the conflict between the interests of the people and state and for tackling the decisive contest occurring amongst people themselves in practicing their rights. This is mainly because these Constitutional articles necessitate that the government, under the supervision of the judicial power, to be impartial among these different conflicting interests.

1. Democracy and Proportionality in the Egyptian Constitution

It is agreed upon that the essential role of the constitution is to establish authorities, determine these authorities' jurisdictions, specify their interrelationship, and determine the ultra-principle of the state.[110] One of the highest substantial principles that the Egyptian Constitution gives exceptional weight to is democracy as an underpinning of the Egyptian State.[111] The preamble of

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regulates the exercise of rights and freedoms may restrict them in such a way as infringes upon their essence and foundation."
The original text reads,

تنص المادة (92) من دستور جمهورية مصر العربية المُعدل في 18 يناير 2014 على أن "الحقوق والحريات اللصيقة بشخص المواطن لا تقبل تعطيلاً ولا انتقاصاً..

ولا يجوز لأي قانون ينظم ممارسة الحقوق والحريات أن يقيدها بما يمس أصلها وجوهرها."

[109] The second point of article (167) of the 2014 Egyptian Constitution, amended on January 18, 2014, reads, "The government exercises the following functions in particular:
2. Maintain the security of the nation, and protect the rights of citizens and the interests of the state.". The original text reads,

ينص البند الثاني من المادة (167) من الدستور على أن "تمارس الحكومة، بوجه خاص، الاختصاصات الآتية:

.....1

2- المحافظة على أمن الوطن وحماية حقوق المواطنين ومصالح الدولة."

[110] Regarding the leading role of the constitution, *see* challenge No.23529, Judicial Year 57, September 4, 2016, The Egyptian Supreme Administrative Court.

[111] For example, the preamble of the 2014 Egyptian Constitution comes with that*: We believe in democracy as a path, a future, a way of life..... Freedom, human dignity, and social justice are a right of every citizen…… "We are now drafting a constitution that completes building a modern democratic state with a civil government.* The original text reads,

جاء في مقدمة دستور جمهورية مصر العربية المُعدل في 18 يناير 2014 أن " نحن نؤمن بالديمقراطية طريقاً ومستقبلاً وأسلوب حياة .....، الحرية والكرامة الإنسانية والعدالة الاجتماعية حق لكل مواطن.....

نحن - الآن - نكتب دستوراً يستكمل بناء دولة ديمقراطية حديثة، حكومتها مدنية."

the 2014 Egyptian Constitution expressly assures the central role of democracy in the Egyptian constitutional system as a way of life.

Additionally, article (1) of the same constitution affirms that the Egyptian system is a democratic republic based on citizenship and the rule of law."[112] The mentioned democracy, which will be linked later to proportionality, is not the representative one, but it is a constitutional democracy.[113] That can be comprehended by reading legislation no 81/1969 and 48/1979 establishing the Egyptian High Court and the Egyptian Supreme Constitutional Court. These codes have clearly adopted constitutional democracy by granting the High Court the jurisdiction to oversee whether or not the legislation and decrees are consistent with the constitution.[114]

The previous texts bear a tacitly particular connection between democracy, affirmed in the Egyptian Constitution, and proportionality as a judicial review methodology. Firstly, drawing clear boundaries between the governmental bodies and citizens on the one side[115] and amongst citizens themselves, on the other side, is an indispensable pillar for democratic systems.[116] In such a democracy, protecting people's human rights and exercising executive power its jurisdictions are two opposing considerations. In the first regard, the authority that is given to the

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The first paragraph of article (1) of the 2014 Egyptian Constitution, amended on January 18, 2014, reads, "The Arab Republic of Egypt is a sovereign state, united and indivisible, where nothing is dispensable, and its system is a democratic republic based on citizenship and the rule of law." The original text reads,
تنص الفقرة الأول من المادة (1) من دستور جمهورية مصر العربية المُعدل في 18 يناير 2014 على أن "جمهورية مصر العربية دولة ذات سيادة، موحدة لا تقبل التجزئة، ولا ينزل عن شيء منها، نظامها جمهوري ديمقراطي، يقوم على أساس المواطنة وسيادة القانون."

[112] *Id.*

[113] *ʿūḍ al-mr- al-rqāb$_a$2 al-qḍā ʾī$_a$2 ʿlā dstūrī$_a$2 al-qwānīn fā mlāmḥhā al-r ʾīsī$_a$2 - mrkz rīnīh – jān dbwī llqānūn wāltnmī$_a$2- ṣ 427 ʾlā 433.*

[114] The Egyptian Supreme Constitutional Court is the highest judicial body in Egypt. It undertakes judicial control in respect of the constitutionality of the law, interprets legislative texts and settles competence disputes between courts. It was established in 1969 with the name "the high court". In 1979, the court was finally established based on regulation no. 48/1979.

[115] The second point of article (167) of the 2014 Egyptian Constitution, amended on January 18, 2014, reads, "The government exercises the following functions in particular:
2. Maintain the security of the nation, and protect the rights of citizens and the interests of the state.".

[116] Vickic, *supra* note6, at 3108.

administration in order to regularly and continually organize the public entities must not be absolute, but, instead, it must be logically overseen in order to avert injustice or arbitrary conducts that these institutions may practice.

Correspondingly, the practical use of freedoms and rights of people cannot be acceptably conceived without restrictions. Hence, a specific ratio of restrictions on both governmental conduct and the rights and freedoms of people should be simultaneously applied in the democratic system.[117] In doing so, the overwhelming majority of freedoms and rights should be relatively, partially, and concurrently protected, granted and restricted to balance between the enduring constitutional values of citizens on the one hand and proportionate and necessary collective interests of the whole society on the second hand. Thus, if these bounds on people's rights and freedoms are conversely unproportionate or unnecessary, they will be deemed illegitimate because the state should be held accountable for its illegal and illegitimate acts done in the name of state security, either through the supervision of the judiciary or through parliament. Applying and conserving these two elements of democracy entail a balancing process between the collective interest and individual interests in certain circumstances and occasions. This structural process can be found in proportionality examination via balancing the individuals' rights and the high interests of the whole society, as discussed in chapter one.

Secondly, proportionality review presents a concrete approach dealing with the balance between the legislator elected by the majoritarian political channel on the one hand and protecting the minimum requirements of the fundamental human rights of people in the democratic society, particularly the minorities' rights on the second hand, but this issue is beyond the scope of this paper as the research essentially deals with administrative decisions, not legislation.

2. Conflicting Rights of People in their Relationship and Proportionality

In addition to the role of proportionality in settling the conflict between the public interest of the state and protecting people’s rights, there is another extensive conflict that needs to be tackled. In this point, I argue that proportionality review is considered the appropriate judicial method that can reconcile the competing rights of people in their relationship.

[117] Democracy Reporting International (D.R.I.), Lawful Restriction on Civil and Political Rights, Defining Paper 31, October 2012, at 4.

Considering the state obligations towards citizens, these obligations can be classified into positive and negative obligations. Positive obligations require governmental bodies to take necessary and reasonable actions to ensure the respect and protection of individuals' rights against any violation that may take place from others. Concurrently, the state's negative obligations entail the state to refrain from acts that may adversely affect people's human rights. Sometimes, fulfilling the state's negative obligation entails embracing positive procedures and measures to guarantee the full enjoyment of people's rights.[118]

To elaborate and exemplify, suppose that a citizen asks the state, either judicial or administrative authorities, to act positively to protect his right to privacy as articulated in Article (57) of the 2014 Egyptian Constitution[119] against the unreasonable interference that occurred by another citizen. Conversely, the mentioned interfering citizen asks the same governmental bodies to refrain, take a negative obligation, from intervening in his right to freely act or express as outlined in article (65) of the same constitution.[120] Both require the state to protect their inalienable rights indicated in article (92) of the same constitution.[121] Thus, the state has to

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[118] Manisuli Ssenyonjo, *Limburg Principles, Economic, Social and cultural rights in international law,*2009. at121.

[119] Article (57) of the 2014 Egyptian Constitution, amended on January 18, 2014, reads, "Private life is inviolable, safeguarded, and may not be infringed upon." The original text reads

تنص المادة (57) من دستور جمهورية مصر العربية المُعدل في 18 يناير 2014 على أن "للحياة الخاصة حرمة، وهي مصونة لا تمس."

[120] Article (65) of the 2014 Egyptian Constitution, amended on January 18, 2014, reads, "Freedom of thought and opinion is guaranteed.
All individuals have the right to express their opinion through speech, writing, imagery, or any other means of expression and publication."
The original text reads:
تنص المادة (65) من دستور جمهورية مصر العربية المُعدل في 18 يناير 2014 على أن " حرية الفكر والرأي مكفولة. ولكل إنسان حق التعبير عن رأيه بالقول، أو بالكتابة، أو بالتصوير، أو غير ذلك من وسائل التعبير والنشر."

[121] Article (92) of the 2014 Egyptian Constitution, amended on January 18, 2014, reads, "Rights and freedoms of individual citizens may not be suspended or reduced. No law that regulates the exercise of rights and freedoms may restrict them in such a way as infringes upon their essence and foundation."
The original text reads,
تنص المادة (92) من دستور جمهورية مصر العربية المُعدل في 18 يناير 2014 على أن "الحقوق والحريات اللصيقة بشخص المواطن لا تقبل تعطيلاً ولا انتقاصاً.....
ولا يجوز لأي قانون ينظم ممارسة الحقوق والحريات أن يقيدها بما يمس أصلها وجوهرها."

protect the two opposing constitutional values concurrently and has consequently an obligation to protect both constitutional values mainly the rights to privacy and the freedom of expression.

While there are no explicit constitutional or legislative articles governing the mentioned conflict, administrative judges must reconcile these conflicting values by embracing one of the following approaches. The first method that judges can adopt is to make, in the first example, a hierarchy between these two opposing values by prioritizing either the rights of privacy or the right to free speech. The second mechanism can be reached through determining the scope of the realization of the right at stake in the specific circumstances, not through entirely limiting one value in favor of other values.

The best solution, from my perspective, is to settle this conflict at the realization level, not through prevailing one value over the other because all constitutional values must equally exist within the legal system.[122] This is mainly because the validity of the rights, as constitutional values, cannot be derogated, but their enjoyment can be partially limited based on different circumstances.[123] Furthermore, it is worth noting that there is a considerable difference between limiting the right itself and limiting its realization. Restraining the right means limiting the constitutional values recognized by the constitutive power, but limiting the realization of the scope of rights based on the circumstances depends on the real and rational facts existing in the time when the judge inspects the issue at stake. These facts and circumstances can be changed. In this regard, the importance of proportionality review as judicial scrutiny is that it presents an empirical settlement amongst these constitutional conflicts without affecting the values themselves. In the previous example, the reviewing court may prioritize the enjoyment of privacy right in some status and vice versa based on the pertinent facts, the attainable substitutes that may be reached and the comparison between benefits and harms that may occur as a result of validating or invalidating the administrative decision associated with the issue, as demonstrated in chapter one.

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[122] In this meaning, the Egyptian Supreme Constitutional Court in challenge No 6, judicial year No 13, May 16, 1992.

[123] Concerning the effect of changing circumstances on issuing the administrative decision, *see* challenges No. 11935 and 14281, Judicial Year 54, January 18, 2014, The Egyptian Supreme Administrative Court.

B. Identifying Proportionality in the Egyptian Legislation

1. The Egyptian Civil Code

One of the most central and essential components in the Egyptian legal system is the Civil Code because it is deemed the main reference whenever there is no applicable article in the law regulating the matter at stake. To this end, Article (5) of the Egyptian Civil Code issued by law No 131/1948 reads, "The exercise of a right is considered unlawful in the coming states: B) if the interests aimed to realize are so trivial that they are not proportionate to the harm caused thereby to another person."[124] It can be inferred from the cited article that the Egyptian legislator embraces the principle of balancing between harms and benefits, resulting from practicing rights to differentiate between lawful and unlawful acts. This mechanism is similar to the fourth degree of proportionality review in its *Stricto Sensu*. The exact meaning was repeated in the mentioned article's preparatory acts, which read:

> The legislator has avoided the term "arbitrariness" because it is generic and ambiguous. He has further avoided all generic terms due to their vagueness and lack of accuracy. He has derived the three criteria included in the article from Islamic jurisprudence. It is evident that detailing these criteria in that way grants the judge beneficial elements to take guidance from, particularly since they are all considered as a result of practical applications that the Egyptian judiciary concluded through *ālājthād*. The first of these criteria is the criterion of using the right only for intending to harm others. The second criterion occurs when there is a conflict between using the right an essential public interest. In Islamic jurisprudence. Most of this criterion's application can be found when the state uses its authority to restrict people's rights in order to protect the public good. Nevertheless, the applications of this notion are not exclusive to what has been mentioned because they are only examples that can be broadened and be subject to analogy. The third criterion includes three cases. The first case is using the right in a way that aims to achieve an illegitimate interest. The second case is using the right in order to achieve a little significant interest that is not proportionate to the harm that occurs to others because of it. The third case is using the right in a way that would impede the use of other rights that conflict with the right in a manner that prevents their use in a usual way.[125]

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[124] The original title in Arabic reads,

تنص المادة (5) من القانون المدني الصادر بالقانون رقم 131 لسنة 1948 على أن:

يكون استعمال الحق غير مشروع في الأحوال الآتية:

ب) إذا كانت المصالح التي يرمي إلى تحقيقها قليلة الأهمية، بحيث لا تتناسب البتة مع ما يصيب الغير من ضرر بسببها."

[125] Preparatory acts of the Egyptian Civil Law. The original text reads,

After revealing the previous article and its pertinent preparatory acts, it has become plainly visible that this constitutive article implicitly recognizes the principle of balancing. Therefore, the legislator acknowledges that there are no absolute rights, and all rights are interdependent and overlapping. Such interdependence entails balancing these rights at the level of realization, not completely abrogating one right in favor of others. Consequently, it can be concluded that there is a foundation in the Egyptian Civil Code to apply proportionality, or at least it can be inferred that this judicial measure does not contradict the Egyptian legal system.

2. International Treaties Ratified by the Competent Egyptian Authority

Egypt is considered one of the most enthusiastic signatory countries to international bilateral and multilateral instruments. It would be crucial to pose some examples of the international treaties the competent Egyptian authority endorsed to explain whether proportionality review has a concrete foundation in these conventions. The International Covenant on Civil and Political Rights and the one on Social, Economic, and Cultural Rights are two treaties the Egyptian authority has ratified.[126] According to the Egyptian Constitution, these treaties have the force of Egyptian law after following the constitutional stages.[127]

جاء في الأعمال التحضيرية الخاصة بالمادة (5) من القانون المدني المصري الصادر بالقانون رقم 131 لسنة 1948 أن المشرع تحامي اصطلاح التعسف لسعته وإبهامه وجانب أيضًا كل تلك الصيغ العامة بسبب غموضها وخلوها من الدقة، وأستمد من الفقه الإسلامي بوجه خاص الضوابط الثلاثة التي اشتمل عليها النص. ومن المحقق أن تفصيل هذه الضوابط على هذا النحو يهيئ للقاضي عناصر نافعة للاسترشاد لاسيما إنها جميعا وليدة تطبيقات عملية انتهى إليها القضاء المصري عن طريق الاجتهاد. وأول هذه المعايير هو معيار استعمال الحق دون أن يقصد من ذلك سوء الإضرار بالغير. والمعيار الثاني قوامه تعارض استعمال الحق مع مصلحة عامة جوهرية. وأكثر ما يساق من تطبيقات في هذا الصدد عند فقهاء المسلمين يتعلق بولاية الدولة في تقييد حقوق الأفراد صيانة للمصلحة العامة على أن الفكرة في خصبها لا تقف عند حدود هذه التطبيقات، فهي مجرد امثله تحتمل التوسع والقياس. والمعيار الثالث يتدرج تحته حالات ثلاث : الحالة الأولى: حالة استعمال الحق استعمالاً يرمي إلى تحقيق مصلحة غير مشروعة. الحالة الثانية: حالة استعمال الحق ابتغاء تحقيق مصلحة قليلة الأهمية لا تتناسب مع ما يصيب الغير من ضرر بسببها. الحالة الثالثة: حالة استعمال الحق استعمالا من شأنه أن يعطل استعمال حقوق تتعارض معه تعطيلاً يحول دون استعمالها على الوجه المألوف."

[126] The two conventions were ratified on January 14, 1982, and their publication was on April 8, 1982. *See* https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=54&Lang=EN

[127] The Egyptian Supreme Constitutional Court, the Egyptian Court of Cassation, the General Assembly of the Fatwa and Legislation Departments, and the Egyptian Supreme Administrative Court have repeatedly affirmed that the ratified treaties have the force of law after following the constitutional stages and provisions. *See* article (151) of the 1971 Constitution, article (145) of the 2012 Constitution and article (93) of the 2014 Constitution. In this meaning, *see*; the

Therefore, profoundly scrutinizing the scholarly methodology adopted within these two treaties regarding recognizing, respecting, and fulfilling people's human rights, the limitation restricting the practice of these rights, and the prerequisite conditions that must be found in these limitations would be crucial to understand to what extent theses treaties adopt proportionality review and consequently the Egyptian legal system acknowledges this approach.

Reading most articles of the International Covenant on Civil and Political Rights will lead to the conclusion that the limitations imposed on the people's human rights must be imposed only by law, applied only for the purpose of the law, necessary in a democratic society, and proportionate to achieve its function. For example, articles (18, 19, 21, 22) of the covenant regulating the right to freedom of thought, conscience and religion, the right to freedom of expression, the right to peaceful assembly and the right to form and join a trade union repeats the same stipulations that should be found before limiting people's human rights.[128]

In this meaning, the Human Rights Committee in its General Comment No. 34regarding freedoms of opinion and expression has stated that:

> The restrictions must be "provided by law"; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality.42 Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.[129]

It has further stated, concerning the meaning of necessity and proportionality, that:

> The Committee observed in general comment No. 27 that "restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected…The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law. The principle of

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Egyptian High Court, Challenge no. 7, judicial year 2. 1/3/1975. The Court of Cassation, Civil Circuit, Challenge no. 137, Judicial year 22. 8/3/1956. The General Assembly of the Fatwa and Legislation Departments, Fatwa no.895, statement no. 681/6/86. 9/12/2012, and Fatwa no.413, statement no. 702/2/37. 23/12/2009. The Egyptian Supreme Administrative Court, Challenge no.27047, judicial year 61. 17/6/2017.

[128] *see* the entire covenant, https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

[129] United Nations, Human Rights Committee, 102nd session, Geneva, 11-29 July 2011, General comment No. 34 General remarks section, principle No 22.

> proportionality must also take into account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.[130]

Along the same vein, Article (4) of the ICESCR has stated that "the States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society." [131] In addition, another example, according to article (8) of the Covenant associating with everyone's right to form and join trade unions, states must not restrict exercising these rights by any limitations other than the restrictions determined by the law, necessary in a democratic society.[132] and crucial for the protection of the rights and freedoms of others.[133]

For any limitation to comply with Article (4), it must satisfy three essential features. Firstly, the limitation must be 'determined by law'. This means that the limitation should have a basis specifically in domestic law consistent with the Covenant; the law must be adequately accessible; the relevant domestic law must be formulated with sufficient precision; and the law must not be arbitrary, unreasonable, discriminatory or incompatible with the principle of

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[130] *Id.* principle No 34.

[131] *See* the entire covenant https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

[132] Concerning the meaning of the democratic society in conjunction with the freedom of association and expression, the ECtHR has pointed out that "It has also pointed to the importance of political expression as well as the protection of plural centers of power and influence' through upholding freedom of association and expression as vital elements of a democratic society. This includes respect for the opinions of minorities. Transferring this to the context of Article 4 ICESCR would imply that decisions to limit ESC rights should be based on some consultation process (as inclusive as possible), should not be ordered unilaterally and should be subject to popular control. Even if not directly referring to Article 4, the CESCR has noted that it would, when assessing whether a state party has 'taken reasonable steps to the maximum of its available resources to achieve progressively the realization of the provisions of the ICESCR, place 'great importance on transparent and participative decision-making processes at the national level'. Arguably, a 'transparent and participative decision-making process' is exactly one requirement that should be met under the provision 'in a democratic society, concerning decisions on limiting ESC rights to promote the general welfare. This finding is also supported by Craven's remark that democratic principles find explicit recognition in other Articles of the ICESCR". *See* Amrei, *supra* note 67 at 557–601.

[133] *See* the entire covenant, https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

interdependence of all human rights. Thus, there must be a measure of legal protection in domestic law against arbitrary interference by the public as well as private authorities with ESC rights and adequate safeguards against abuse. ”[134]

Hence, it can be concluded that the two mentioned conventions have adopted proportionality review by first enumerating the limitations that the state can impose in practicing human rights and secondly determining the prerequisite conditions that must be found in these limitations to be deemed valid. These limitations and their prerequisites oblige the state entities to choose the less restrictive measure on individuals' human rights from the obtainable means and to balance between the benefits gained by reaching the governmental goal, which must be a pressing government interest and the harms caused to the individuals' rights derived from the constitutional value in question.

[134] Manisuli Ssenyonjo, *Limburg Principles, Economic, Social and cultural rights in international law,*2009. At100, 101, 102, 434.

V. Proportionality and Its Practical Application

After revealing the legal foundations granting the Egyptian Judiciary the capability to apply the judicial review of PA to disputes associated with human rights in case no explicit articles are organizing the matter at stake, it is crucial to follow that with a comparison of the current approaches with a suggested one to shed light on the practical significance of applying PA.

This comparison occurs by first exhibiting and analyzing some cases issued by the Egyptian State Council Courts in matters relating to human rights in order to examine if judges adopt a concrete approach or if they lack the structural methodology. And secondly, reanalyze these cases based on proportionality review. Thirdly, the last aim is to compare the judgments' reasonings and outcomes resulting from either applying the current methods or the proposed one. The chapter comprises two cases. Each case includes its facts, followed by the mainstay principles stated by the court, and concludes with a comparison between the court's approach and the suggested methodology.

A. Freedom of Expression v. Preserving Collective Religious Values

Freedom of opinion and expression are basically related, and they are indispensable prerequisites for the full realization of all other human rights.[135] They have additionally been deemed the cornerstone underpinnings for any democratic society as they provide the instrument for the exchange and development of opinions and protect the principles of transparency and accountability.[136]

For the reasons set out above, freedom of expression is recognized as one of the most broadly protected values around the world either in the states adopting a written constitution and bill of rights or the ones embracing the customary law.[137] Notwithstanding, all legal systems

[135] The main difference between freedom of opinion and expression centers about that the first one is not subject to the impairment of any basis, but freedom of expression can be limited in specific circumstances and to protect pressing social needs. *See* United Nations, Human Rights Committee, 102nd session, Geneva, 11-29 July 2011, General Comment No. 34.

[136] United Nations, Human Rights Committee, 102nd session, Geneva, 11-29 July 2011, General Comment No. 34 General remarks section.

[137] Most constitutions worldwide organize freedom of expression in their constitution. For example, article (65) of the 2014 Egyptian Constitution, the USA first amendment, article (5) of German Basic Law, Sections (1) and (2) of the Canadian Charter of Human rights, and article (10) of the European Convention on Human rights are among the constitutions and bills of rights which specialize independent articles for the freedom of expression. Conversely, other states do

impose limitations on practicing freedom of expression either through the same constitutional articles organizing the freedom, generic constitutional articles, legislation, or via Administrative decisions.[138] Even in systems where the freedom of expression occupies theoretically absolute

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not articulate freedom of expression in their constitutions such as the Australian Constitution and the U.K. before incorporating the European Convention on Human Rights in British laws.

[138] Although the vast majority of the constitutions limit freedom of expression, there are crucial technical distinctions as to how these fetters are depicted. The first category can be found in constitutions comprising a generic limitation applicable to all or most rights in a constitution. For example, Article (92) of the 2014 Egyptian Constitution implicitly allows imposing restrictions on practicing the inalienable rights of people by stating that regulating the exercise of rights and freedoms by law cannot be done in a manner prejudicing the substance and the essence thereof. An extra instance related to the same notion can be found in Canada, Section (1) of the Canadian Charter of Rights and Freedoms places more stress on how the restrictions on freedom of speech and other valuable rights can be legally imposed, stating that "Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The rights and freedoms in the Charter are not absolute. They can be limited to protect other rights or important national values. For example, freedom of expression may be limited by laws against hate propaganda or child pornography." The second category can be imagined in constitutions and legislations including the limitations on freedom of expression in the same articles organizing the right per se. The example belonging to this family can be remarked in the German legal system as paragraph (2) of the article (5) of the German Basic law regarding the freedom of speech states that these rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons and the right to personal honor. Moreover, paragraph (2) of article (16) of the Constitution of the Republic of South Africa considering freedom of expression states that “The right in subsection (1) does not extend to propaganda for war, incitement of imminent violence, or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

In the Egyptian legal system, article (93) of the 2014 Egyptian Constitution grants the ratified treaties the force of law by stating that the State shall be bound by the international human rights agreements, covenants and conventions ratified by Egypt, and which shall have the force of law after publication in accordance with the prescribed conditions. The original text reads,

تنص المادة (93) من الدستور المصري على أن "تلتزم الدولة بالاتفاقيات والعهود والمواثيق الدولية لحقوق الإنسان التي تصدق عليها مصر، وتصبح لها قوة القانون بعد نشرها وفقاً للأوضاع المقررة."

protection such as the United States of America, its applications are practically subject to judicial restrictions.[139]

mḥmd al-ṣādq shʿlān v. shīkh al-ʾzhr

In the forthcoming case, I highlight how the court copes with the conflict between the freedom of opinion and expression on the one hand and other competing values recognized by the Egyptian community on the other hand. I would further apply the principle of proportionality to examine whether or not it will be a more appropriate judicial methodology for reconciling competing values.

1. Case Facts:

mḥmd al-ṣādq shʿlān sued the state *(al-ʾzhr)* before the court of the Administrative Judiciary, seeking to cancel the Islamic Research Academy's negative decision of (*mjmʿ al-bḥūth al-ʾslāmīa*) which precludes his rights to publish his book entitled "The Innocence of Prophet Yusuf from inclining to do obscenity "براءة نبي الله يوسف من الهم بالسوء والفحشاء."[140]

In elucidating his case, the plaintiff argued that the comments of the Islamic Research Academy, affiliated to *(al-ʾzhr)*, are not decisive and do not affect the objective and scientific value of the entire work. The plaintiff added that the administration has abused its discretionary power in preventing his book.

The administration, in its report, constituted its refusal upon that the writer is not specialized in the Arabic language and is incapable of perfectly mastering its rules, leading to

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One of these conventions the Egyptian power has ratified is the international Covenant on civil and political rights which organizes freedom of expression and its limitations in articles (19) and (20). Article (19) clarifies how the restrictions on exercising freedom of expression can be valid through conditioning that these restrictions must be provided by law and necessary for respect of the rights or reputations of others and for the protection of national security or of public order or public health or morals.

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[139] Adrienne Stone, *The Comparative Constitutional Law of Freedom of Expression*, (2010), at 5 to 10. https://papers.ssrn.com/abstract=1633231.

[140] The case was examined before the court of the Administrative Judiciary as a court of the first instance. Its judicial number was 23221 for the judicial year 62.

linguistic errors affecting his understanding of Quranic meanings. Moreover, the book is a weakly scientific work, and it contains unconnected or clear ideas. It further contains methods and expressions not used in such religious works.

2. Judgments

a. The Court of the Administrative Judiciary

On March 30, 2010, the court of the Administrative Judiciary ruled in favor of the plaintiff and against the state after revealing articles number (47) and (49) of the 1971 Egyptian Constitution and articles number (2), (8), (15), and (25) of Law No. 103 of 1961 regarding the reorganization of *al-ʾzhr* and its bodies, and articles (38, 40) of the executive regulation of Law No. 103 of 1961 mentioned. The court, after reviewing the mentioned articles, ruled that:

> It has become evident to the court that the book was devoid of anything that would constitute a contradiction with the foundations of the Islamic belief or the pillars of the religion or inconsistent with the Holy *Qur'an* and the purified Sunnah. And, it has been confirmed to the court that the only way to object to such an intellectual work is through a similar intellectual work to grant every Muslim and anyone who has an opinion the right to comment, approve or reject such an intellectual act.[141]

The court added that "The intellectual level's declination or the weakness of the scientific approach of the book is not sufficient reason to prohibit the publication of the book to the community. Therefore, the Islamic Research Academy (*mjmʿ al-bḥūth al-ʾslāmīa*) should not have prevented the publication due to such a ground."142 The court moreover added that:

> it must be taken into consideration that what *al-ʾzhr* declares regarding the examination of Islamic writings upon its authority to preserve, publicize the Islamic heritage, and carry the faithfulness of the Islamic message to all people of the earth must be respected. Nonetheless, this authority finds its limits and

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ولما كان الثابت للمحكمة أن الكتاب قد خلا مما من شأنه أن يشكل مساساً بأصول العقيدة الإسلامية أو بثوابت الدين أو بالمعلوم منه بالضرورة أو التعارض مع القرآن الكريم والسنة النبوية المطهرة. وتأكد للمحكمة أن مثل هذا العمل الفكري لا سبيل إلى الاعتراض عليه إلا بعمل فكري مماثل يكون لكل مسلم وصاحب رأي أو اجتهاد أن يدلي بدلوه في الموافقة أو الرفض أو التعقيب.

142 وما كان لمجمع البحوث الإسلامية أن يتخذ من هبوط المستوى الفكري أو ضعف الإضافة العلمية للكتاب مسبباً في عدم التصريح بنشره للمجتمع.

boundaries in adherence to the constitutional principles governing freedom of opinion and expression.[143]

Accordingly, the court ruled in favor of the claimant.

b. The Egyptian Supreme Administrative Court

The state appealed the previous ruling before the Egyptian Supreme Administrative Court. On February 23, 2019, the court struck down the court of the first stance's ruling and ruled in favor of the state, against the writer. The court grounded its verdict upon many considerations and created many principles; one of which pertains to freedom of expression as a constitutional value. The court indicated that:[144]

> Whereas the Judiciary of this court has agreed upon that freedom of opinion and expression is deemed one of the public freedoms, and restricting it without a legitimate need divests personal freedom from some of its characteristics and undermines its correct structure. However, what has been mentioned entails that allowing freedom of opinion and expression has to be the original standard, and preventing them must be the exception.[145] Nonetheless, that does not mean that the exercise of this right is free from any restriction, but rather, it has to be practiced within the framework of the law such as other rights. And, regulating such a right within the framework of the law without exaggeration or negligence by the legislator or competent authority is not considered a prohibition or repression of practicing such a right. This is mainly because there is no contradiction between freedom and regulation, but instead, regulating rights is what prepares the appropriate environment for exercising the right. And, without such regulation, freedom becomes chaos that the individual cannot live within.[146]

The court further declared the stipulations of *ālājthād* and to what extent freedom of expression is permissible in matters related to Islamic *shrīʿa* by indicating that:

> *ālājthād* is permissible in issues that do not collide with rulings that are absolutely certain with respect to their authenticity and meaning (*al-ahkam al-shar'iyya alqat'iyya fi thubutiha wa dalalatiha*). These issues are subject to *ālājthād* by

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[143] وأخذ بعين الاعتبار أن ما يبديه الأزهر في شأن فحص المؤلفات والمصنفات الإسلامية وإبداء الرأي فيها يجب أن ..... يحترم باعتباره القوام على حفظ التراث الإسلامي ونشره وحمل أمانة الرسالة الإسلامية إلى كل شعوب الأرض، إلا أن ذلك يجد حدوده وتخومه في التزام المبادئ الدستورية الحاكمة لحرية الرأي والتعبير.

[144] *See* challenge No.24896, Judicial Year 56, February 23, 2019, The Egyptian Supreme Administrative Court.

[145] وحيث إن قضاء هذه المحكمة قد جرى على أن حرية الرأي والتعبير تنخرط في مصاف الحريات العامة، وأن تقييدها دون مقتض مشروع إنما يجرد الحرية الشخصية من بعض خصائصها ويقوض صحيح بنيانها، ولازم ذلك أن يكون الأصل هو حرية الرأي والتعبير، والاستثناء هو المنع.

[146] إلا أن ذلك لا يعني أن تكون ممارسة هذا الحق بمنأى عن أي قيد، ذلك أن شأنه شأن أي حق من الحقوق العامة يجب ممارسته في حدود القانون، وأن قيام المشرع أو السلطة المختصة بتنظيم ذلك الحق في إطار القانون دون إفراط ولا تفريط، لا يعد منعاً أو صداً عن ممارسة هذا الحق، ذلك انه لا يوجد تعارض بين الحرية والتنظيم، بل أن التنظيم هو الذي يعطي المناخ الملائم لممارسة الحق، وبدون التنظيم تضحى الحرية فوضى لا يمكن للفرد أن يحيا في نطاقها.

researchers and thinkers to express their thoughts and opinions in understanding Quranic texts, particularly those that have multiple opinions and interpretations.[147] *ālājthād* is permissible until the day of judgment provided that it is within the framework of the Islamic *shrīʿa*'s universal principles (*mabaduʾha al-kulliyya*) and does not exceed them. And, there are prerequisite conditions that should be fulfilled by anyone who wants to strive in interpreting the *Qur'anic* texts: Firstly, he must perfectly comprehend the *Qur'an*. Secondly, he has to accurately master the Arabic language rules to be able to realize the meaning of verses and their structures and properties. Thirdly, having considerable knowledge of the *Sunnah* of the Prophet, the second source of *shrīʿa* and the *Qur'an's* interpreter, is also a must to make *ālājthād*. Fourthly, he must know the principles of jurisprudence, the purposes of *shrīʿa* and the consensus of jurists and the time when such consensus takes place.[148]

The court after revealing the prementioned principled associated with freedom of expression and its limitations, particularly the ones related to *ālājthād* in Islamic *shrīʿa* issues, concluded that the book of the respondent, subject to litigation, has lost the necessary stipulations to be licensed by the Islamic Research Academy as it is considered the competently honest authority specialized in reviewing publications related to the religious works. Consequently, the appellant administrative authority's decision refusing to authorize the publication of the book in question is justified and hence consistent with the law.

3. Comparison and Analysis

As previously indicated, the major reciprocal component of these examined cases is the scarcity of explicit law provisions organizing the given issue. However, these issues are organized by generic rules outlined in the constitution or legislation, so judges are obliged to reconcile these conflicting constitutional values directly.[149] It is worth mentioning that in case of the absence of

[147] المسائل التي يجوز فيها الاجتهاد ولا تصطدم بأحكام قطعية الثبوت والدلالة، فيترك للباحثين وأصحاب الفكر والرأي التعبير عن أفكارهم وآرائهم واجتهادهم في فهم النصوص القرآنية وبخاصة تلك التي تتعدد فيها الآراء والتفاسير.

[148] فالاجتهاد جائز شرعاً حتى تقوم الساعة، شريطة أن يكون دوماً واقعاً في إطار الأصول الكلية للشريعة بما لا يجاوزها، ومن الواجب فيمن يجتهد في تفسير النصوص القرآنية أن تتوافر فيه عدة شروط منها أن يكون عارفاً بكتاب الله، ملماً بقواعد اللغة العربية حتى يعرف معاني الآيات، وفهم مفرداتها ومركباتها وخواصها، وأن يكون لديه معرفة بالسنة النبوية، المصدر الثاني للشريعة، المفسرة للقرآن، وأن يكون ملماً بأصول الفقه ومقاصد الشريعة وعارفاً بمواقع الإجماع وأحوال عصره.

[149] The Egyptian Supreme Administrative Court has assured that the administrative court has the Jurisdiction to directly apply the constitutional articles to disputes even if there is no legislation

this factor, judges will be obliged either to apply the applicable law or to refer the case to the constitutional court to decide the extent of the constitutionality of the applicable law.[150]

In the scrutinized case, both the Egyptian Court of Administrative Judiciary and the Egyptian Supreme Administrative Court confirmed that freedom of expression is a protected constitutional right so that guaranteeing it is the basic rule and restricting it should be only the exception based on proper purpose. They also agree upon that what *al-ʾzhr* does, concerning reviewing Islamic texts, must be respected as it is considered the main competent power specializing in conserving the Islamic heritage and carries the faithfulness of the Islamic message to all peoples of the earth.

Like the court of the first instance, the appellate court confirmed that *ālājthād* is permissible in issues that do not collide with rulings that are absolutely certain concerning their authenticity and meaning (*al-ahkam al-shar'iyya alqat'iyya fi thubutiha wax dalalatiha)*.[151] However, the Egyptian Supreme Administrative Court confirmed a condition for anyone who wants to make *ālājthād.* This condition is that this person should have certain qualifications such as being an expert in Arabic language rules, having considerable knowledge on the *Sunnah* of the Prophet and knowing the principles of jurisprudence, the purposes of *shrīʿa*, the consensus of jurists, the time when such consensus takes place. Totally, he/she should be suchlike a jurist in Islamic *shrīʿa*.

Conversely, the court of the first instance assured everyone the right to express his opinion in Islamic *shrīʿa* matters irrespective of his/her profession as long as his work does not contradict the rulings that are absolutely certain with respect to their authenticity and meaning under the framework of the Islamic *shari*'a's universal principles *(mabadu'ha al-kulliyya*). It added that the only way to object to an intellectual work is through a similar intellectual act to allow everyone to comment, approve or reject such an intellectual act, not prevent the work dissemination.

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regulating the matter in question. *See* challenges No.5344 and 5329, Judicial Year 47, August 27, 2001, The Egyptian Supreme Administrative Court.

[150] In this meaning, *See* challenge No.4, Judicial Year 12, October 9, 1990, The Egyptian Supreme Constitutional Court.

[151] *See* challenge No.8, Judicial Year 17, May 4, 1996, The Egyptian Supreme Constitutional Court.

Now that there are no plain constitutional or legislative articles setting the limits between freedom of expression and the role of the official Islamic institutions in preserving Islamic heritage, the two prementioned courts made their special law by creating specific rules to apply to the dispute.

4. Applying Proportionality

In this part, I apply proportionality review to the two degrees of litigation illustrated above. This entails starting with a repeatedly logical and practical premise which is that all human rights, freedoms and interests are interdependent and overlapping, and they often practically conflict with each other. This includes the rights and freedoms of others and the collective interests of the entire society. Taking into consideration such a conception and regarding applying PA to the present case, the main two opposing values that the court should balance between are respecting A free, uncensored and unhindered expression of people on the one hand and protecting one of the most crucial values to the Egyptian society centering around respecting Islamic rules, principles and heritage on the other hand.

Therefore, a balance must be occurred between the applicant's rights to freely express and distribute his book as a sort of intrinsic value, entrenched in the Egyptian Constitutions from1923 Constitution so far on the one side[152] and preserving the main principles of Islamic *shrīʿa* in a society where the vast majority of its population are Muslims believing that *al-ʾzhr* is the official institution responsible for protecting Islamic values in the entire world, particularly in Egypt. In doing this balance, I will follow the four degrees of supervision demonstrated and suggested in chapter one of this paper based on the grounds revealed in chapter two.

1. First Question: - Whether There is a Legitimate Aim

As illustrated in chapter one, a legitimate aim "proper purpose" can be deemed the collective interest of the whole society or the rights and freedoms of others. This proper purpose can be derived from explicit or implicit constitutional and legislative articles.[153] With reference to the principles created by the prementioned rulings, there is undoubtedly a legitimate aim in

[152] Freedom of expression has been protected in all Egyptian Constitutions. For example, article (14) of the 1923 Egyptian Constitution, article (47) of the 1971 Egyptian Constitution, article (45) of the 2012 Egyptian constitution, and article (65) of the 2014 Egyptian Constitution have protected everyone's right to express his opinion freely.

[153] BARAK, *supra* note 35, at 246.

restricting the book's distribution. This legitimate aim is to protect and conserve the Islamic values in a state where the majority of its population are Muslims, and Islam's principles are deemed one of the essential sources of Egyptian customs and traditions.[154] To apply this, article (2) of the 2014 Egyptian Constitution explicitly confirms that "Islam is the religion of the state and Arabic is its official language, and the principles of Islamic *shrīʿa* are the principal source of legislation."[155] In addition, the first paragraph of article (7) of the same Constitution assures that " *al-ʾzhr* is an independent scientific Islamic institution, with an exclusive competence over its affairs. It is the main authority for religious sciences and Islamic affairs. It is responsible for preaching Islam and disseminating the religious sciences and the Arabic language in Egypt and the world."[156]

Hence, the margin of appreciation that must be given to the state *"al-ʾzhr*" in appreciating whether there is a proper purpose or not should be broadened in this stage of scrutiny because of the obvious articles. Consequently, I agree with the two rulings regarding the permissibility of restricting freedom of expression based on protecting Islamic values without inspecting whether the book breaks these values or not to in this degree of review.

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[154] The Committee of Human Rights in the United Nations has declared that when a state party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in a specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat. *See* United Nations, Human Rights Committee, 102nd session, Geneva, 11-29 July 2011, General Comment No. 34 General remarks section. Principle No 34, Principle No 35.

[155] The original text reads

تنص المادة (2) من دستور جمهورية مصر العربية المعدل في 18 يناير 2014 على أن "الإسلام دين الدولة، واللغة العربية لغتها الرسمية، ومبادئ الشريعة الإسلامية المصدر الرئيسي للتشريع."

see the translation of the 2014 Egyptian Constitution https://www.constituteproject.org/constitution/Egypt_2019?lang=en To *see* the original articles in Arabic, serve this official site http://www.egypt.gov.eg/arabic/laws/constitution/default.aspx

[156] The original text reads,

تنص الفقرة الأولى من المادة (7) من دستور جمهورية مصر العربية المُعدل في 18 يناير 2014 على أن "الأزهر الشريف هيئة إسلامية علمية مستقلة، يختص دون غيره بالقيام على كافة شئونه، وهو المرجع الأساسي في العلوم الدينية والشئون الإسلامية، ويتولى مسئولية الدعوة ونشر علوم الدين واللغة العربية في مصر والعالم."

2. Second Question: - Whether There Is a Rational Connection Between the Measures and Objectives, or Whether These Measures Were Arbitrary, Unfair, or Discriminatory

It is crucial to indicate that the principal factor in such a phase is to ensure whether the limiting decision's means are capable of advancing the decision's explicit or underlying purpose. Thus, whenever the means chosen do not advance the purpose – or have no effect–they fail the rational connection test.[157] Moreover, it is not compulsory to entirely reach the purpose of the restricting decision by the means adopted, but, rather, the partial realization would be adequate to pass this phase of supervision. In addition, it is worth stressing that law articles are inadequate to answer the rationality test. Conversely, facts deriving from social reality, scientific data, and accumulative experience are central to evaluating the ability of the means used by the restricting decision to reach the proper purpose because the rational connection is a logical test in addition to a legal examination.[158]

In applying the prescribed principles to the case, it can be concluded from the court of the first instance's verdict that the means selected by the administration do not rationally lead to the purpose of the limiting administrative decision which is preserving the Islamic principles and its heritage. This is because the court confirms that the writer's book was free from anything that would contradict Islamic belief's foundations. In addition, the court creates a fundamental principle that the only way to object to an intellectual work is through a similar intellectual act, not through preventing the work dissemination.

Conversely, the appellate court was of the opinion that there is a rational connection between the measure adopted and the objective aimed. This is based on the fact that the law made by the court centering around conditioning certain perquisites such as mastering the Arabic language and having considerable knowledge of Islamic sciences are not mentioned in the constitution or enacted by law. However, the court created these conditions to express its

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[157] BARAK, *supra* note 35.

[158] In this meaning, the Egyptian Supreme Constitutional Court has assured that "as a rule, the legislative articles in the legal state must be logically connected to their objectives because the legislation is not intended for itself, but, rather, it is merely a measure to reach its objective. This entails exhibiting whether the contested legislation is logically harmonious with the scope of the domain in which it organizes" *See* challenge No.116, Judicial Year 22, May 6, 2017, The Egyptian Supreme Constitutional Court.

approval of the existence of the rational connections between the prohibiting decision and its purposes.

In evaluating the two rulings in such a phase, I agree with the court of the first instance's ruling and take issue with the appellate court methodology. This is for many reasons. First, there are prerequisite conditions made by the court will make freedom of expression in Islamic matters exclusive only to scholars who are mostly approved by the official institutions, leading to adversely affecting the principle of interdependence of all human rights through restricting both freedom belief and its practices in light of freedom of expression in a democratic society.[159] Second, although the appellate court confirmed the rationality of the decision, it did not proceed with its review to include other decision aspects such as its necessity and proportionality in order to reconcile the two protected values set forth in the constitution. Therefore, I would supposedly review the third and fourth degrees of supervision.

3. Third Question: - Whether the Measure Adopted Is Necessary for a Democratic Society

Assuming that there is a rational linking between the measures embraced and the decision's purpose, the reviewing court, in the third step of proportionality examination, must examine to what extent the measures adopted are necessary. Necessity means that there are no less restrictive means that can be embodied in order to accomplish the purpose pursued.160 Therefore, if there are other accessible measures, the question that must be addressed is which of these obtainable tools would adversely affect other enduring values as less as possible compared to the officially adopted one.[161]

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[159] The Egyptian Supreme Constitutional Court has repeatedly explained the ultimate authority of the legislator in organizing rights by affirming that "organizing rights necessitates judging within the limits imposed by the Constitution. One cannot violate the constitutional limits by exceeding, transgressing, or undermining these limits. Ignoring or minimizing the rights that are guaranteed by the Constitution attacks fields of vitality that are needed to breathe. It is likewise forbidden to organize these rights in a way that contradicts their meaning; it [the organization of rights] must be equitable and justified. *See* the translation CASE NO. 8 OF JUDICIAL YEAR 17 (MAY 18, 1996) the translation made by NATHAN J. BROWN & CLARK B. LOMBARDI

[160] Alec, *supra* note 47, at 75.

[161] Jan, *supra* note 59 at 240. The same meaning has been depicted by German jurist Fritz Fleiner when he held that "the police should not shoot at sparrows with cannons." *See* Jud Mathews, *Proportionality review in administrative law, in* COMPARATIVE ADMINISTRATIVE LAW 405 (2017), at 1.

I would hypothetically scrutinize if less detrimental footsteps and opinions are probable to reach the proper aim without a high restraint on freedom of expression as an intrinsic value. Firstly, the administration can ask the writer to linguistically revise his book in specifically certified centers to overcome the problem of the lack of language proficiency rather than completely prohibiting its dissemination. Second, if *al-ʾzhr* officials believe that the book contains informative mistakes, they can specialize the book's first or last page to reveal that the writer has perplexity in points such as ……. Thirdly, suppose *al-ʾzhr* officials think the book contradicts pillar issues in Islamic *shrīʿa*. In that case, they can write on the first page that the information indicated in the book does not express *al-ʾzhr* official opinion or the opinion of *Sunni* and so on. This is mainly because restrictions must not be overbroad. Instead, they must be appropriate to achieve their protective function by being the least intrusive instrument amongst those which might achieve their protective function.[162]

Consequently, if the court, while reviewing the administrative decision, finds that the proper aim of the administration regarding persevering the major Islamic principles can be realized by the measures I have mentioned rather than the high restraint measures adopted, it must strike down the decision. If not, the court must approach the last degree of supervision, proportionality in its *stricto sensu*.

D. Last Degree of Supervision: - Proportionality Between Benefits planned and Harms Caused

If an administrative decision seems legitimate, suitable, and necessary, as previously explained, the reviewing court will take a step forward in scrutinizing whether there is a proportional relationship between the benefits planned through applying the governmental measures in order to protect Islamic principles and drawbacks caused to other protectively enduring values which is freedom of expression[163]. That requires an acceptable balance between the benefits that may be gained through applying governmental measures and the harm that may cause to the constitutional rights in question. Therefore, if the harms surpass the benefits, these procedures

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[162] *See* United Nations, Human Rights Committee, 102nd session, Geneva, 11-29 July 2011, General Comment No. 34 General remarks section. Principle No 34.

[163] Alec, *Supra* note 47, at 114.
See also *ʿṣām, supra* note37 at 261.

must be declared invalid and vice versa. It is worth mentioning that the aforementioned comparison does not occur between the constitutional values per se, but, instead, it happens between the benefits and drawbacks resulting from prioritizing one interest over the other in specific times and circumstances.[164]

To apply that in the present case, the court should firstly enumerate both benefits and harms as mentioned above, and secondly balance between them as follow:

The first benefit that can be resulted from reading article (2) in conjunction with article (7) from the 2014 Egyptian Constitution is that restricting decisions can be conceivably acceptable for protecting the community from counterfeit information, which may lead to distortion or devastation of the main principles of religion.

Reading article (86) of the 2014 Egyptian Constitution which places considerable emphasis on protecting the national security of the state[165] in conjunction with paragraph (3) of article (19) of the International Covenant on Civil and Political Rights[166] which enumerates public order as a reasonable ground for restricting freedom of expression can be imagined as a basis for the limiting decision in order to protect the public order of the whole society.[167] Practically, giving everyone the capacity to write about Islamic issues without intense observation may lead to a

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[164] MOSHE, *supra* note 85, at106.

[165] *see* the translation of the 2014 Egyptian Constitution
https://www.constituteproject.org/constitution/Egypt_2019?lang=en
To *see* the original articles in Arabic, serve this official site
http://www.egypt.gov.eg/arabic/laws/constitution/default.aspx

[166] Article (19) of the Covenant read as follows "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or public order (ordre public), or of public health or morals."

[167] For more information about how the Egyptian Courts and scholars deal with the issue of public order, *see mstshār dktūr ʿmād ṭārq al-bshrī- fkra2 al-n ẓām al-ʿām fā al-n ẓrīa2 wālt ṭbīq - drāsa2 mqārna2 bīn al-qwānīn al-ūḍʿīa2 wālfqh al-āslāmī - al-ṭbʿa al-thānīa2 ٢٠١١ - mktba2 al-shrūq al-dūlīa2.*

See also Mona Oraby, Winnifred Fallers Sullivan, *Law and Religion: Reimagining the Entanglement of Two Universals*, Annual Review of Law and Social Science, 10.1146/annurev-lawsocsci-020520-022638, 16, 1, (257-276), (2020).

conflict between *Sunni*, *Shiite*, liberals, and conservatives. Consequently, organizing everyone's right to publish his opinion in a book is better than freely allowing them to do so to protect society from societal tensions which may occur in the long term amongst these sects.[168] However, the court should also enumerate the harms that will predictably occur to the writer's freedom of expression from the contested decision such as:

The first drawback which may take place as a result of applying the restricting decision is hiding the truth and transparency of the society. This is fundamentally because freedom of expression as a value promotes the truth by revealing the opinion and its opposition, giving everyone a chance to choose what he/she is persuaded without interference. Moreover, revealing everyone's opinion will prevent one person or institution from monopolizing the truth.

The second harm pertains to the value of individual autonomy that the contested decision will adversely and concurrently affect both the writer and the community. This is basically because freedom of expression grants individuals the chance to form their personal opinions about their beliefs and actions, leading to self-development. This personal development is an indispensable part of the whole community's development.[169]

Regarding protecting the national security of the state as a ground which validates the restricting decision as mentioned in the benefits part, the court should also put into its consideration that the role of the administration in such circumstances is not to eradicate the cause of tension by eliminating variety but to ensure that the competing groups tolerate each

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[168]Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523 (2003). It is worth mentioning that, unlike the United States, and much like Canada, Germany treats freedom of expression as one constitutional right among many rather than as paramount or even as first among equals. *See* the assessment of the German Constitutional Court's treatment of free speech claims: First, the value of personal honor always trumps the right to utter untrue statements of fact made with knowledge of their falsity. If, on the other hand, untrue statements are made about a person after an effort was made to check for accuracy, the court will balance the conflicting rights and decide accordingly. Second, if true statements of fact invade the intimate personal sphere of an individual, the right to personal honor trumps freedom of speech. But if such truths implicate the social sphere, the court once again resorts to balancing. Finally, if the expression of an opinion—as opposed to fact-constitutes a serious affront to the dignity of a person, the value of personal honor triumphs over speech. But if the damage to reputation is slight, then again, the outcome of the case will depend on careful judicial balancing. This statement is copied from the article of Michel Rosenfeld, Hate Speech in Constitutional Jurisprudence – a comparative Analysis, at 1548.

[169] Adrienne, supra note 140, at 17.

other. This is because pluralism and tolerance are hallmarks of modern society which should be formulated based on dialogue.[170]

The second step that should be fulfilled by the court in inspecting the validity of the restricting decision is to compare the indicated harms and benefits at the time of the case and under the actual circumstances of the society. Therefore, the comparison above does not occur between the constitutional values per se; instead, it happens between the benefits and drawbacks resulting from prioritizing one interest over the other in specific times and circumstances.

B. Freedom of Belief- Right to Education - Right to Work- V. Public Order

This case demonstrates how the Egyptian State Council courts, either the Court of Administrative Judiciary as a court of the first instance or the Supreme Administrative Court as a court of appeal, cope with conflicting values and interests. It further draws attention to the lack of a methodology that judges have been experiencing while tackling such disputes. This is mainly because the case includes opposing interests that need to be settled in order to avoid the infringement of one value in favor of others.

1. Case Facts

On December 8, 1976, the plaintiff in his capacity as a natural guardian of his son filed the case number 84 of judicial year 31 in the Court of Administrative Judiciary of Alexandria against the Alexandria University and the ministry of interior, demanding firstly a judgment canceling the Alexandria University's decision which writes of his son's name from the records of the faculty of education. And secondly, canceling the ministry of interior's negative decision that refuses to give his son an identification card proving his actual belief.

In explaining his claim, the plaintiff argued that his son is an Egyptian *Baha'i* born to *Baha'i* parents on August 19, 1957. He enrolled in the faculty of education at Alexandria University, and in order to postpone his military service to be capable of completing his study, the officials asked him to present his identification card. In doing so, the student asked the competent Civil Registry Department in the ministry of interior to issue this ID, but the competent public servant refused to do so because the student wanted to prove *Baha'i* as his

[170] *See* the European Court of Human Rights, Grand Chamber, Case of SAS v. France, Principle No 128.

religion. Thus, the university wrote off the student registration from the university records. Accordingly, the plaintiff filed this case suing both the university and the ministry of the interior at the Alexandria Court of Administrative Judiciary, asking for the mentioned demands.

The plaintiff constituted his claim based on the fact that these decisions are in violation of articles (40, 46, 57) of the 1971 Egyptian Constitution guaranteeing first equality before the law without discrimination, particularly religion or creed, and second, the freedom of belief and freedom of practicing rites, and third criminalizing any assault on individual freedom.[171]

The State Litigation Authority submitted a memorandum demanding the rejection of the case because of many considerations. First, now that *Baha'ism* is not an acknowledged Abrahamic religion but rather is a colonial and Zionistic doctrine, it is prohibited to record it in identification cards because such recording contradicts the public order. Second, law number 263 issued in 1960 has abolished all *Baha'i* acts in Egypt. The Egyptian High Court in 1975 ruled on the constitutionality of this law because *Baha'ism* according to the Islamic jurists' unanimity is not deemed a religion and whoever believes in it is considered an apostate. Hence, the constitution does not grant the freedom to practice its rituals.

The legal representative of the university, in its response to the plaintiff, assured that the plaintiff's son can no longer be a student at the university since law number 505 enacted in 1955

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[171] Article (40) of the 1971 Egyptian Constitution reads, "All citizens are equal before the law. They have equal public rights and duties without discrimination due to sex, ethnic origin, language, religion or creed."
Article (46) of the 1971 Egyptian Constitution reads, "The State shall guarantee the freedom of belief and the freedom of practicing religious rights."
Article (57) of the 1971 Egyptian Constitution reads, "Any assault on individual freedom or on the inviolability of the private life of citizens and any other public rights and liberties guaranteed by the Constitution and the law shall be considered a crime, whose criminal and civil lawsuit is not liable to prescription. The State shall grant fair compensation to the victim of such an assault."

The original texts read,

تنص المادة (40) من دستور جمهورية مصر العربية الصادر عام 1971 على أن"المواطنون لدى القانون سواء، وهم متساوون في الحقوق والواجبات العامة، لا تمييز بينهم في ذلك بسبب الجنس أو الأصل أو اللغة أو الدين أو العقيدة."
تنص المادة (46) من دستور جمهورية مصر العربية الصادر عام 1971 على أن
" تكفل الدولة حرية العقيدة وحرية ممارسة الشعائر الدينية."

تنص المادة (57) من دستور جمهورية مصر العربية الصادر عام 1971 على أن
"كل اعتداء على الحرية الشخصية أو حرمة الحياة الخاصة للمواطنين وغيرها من الحقوق والحريات العامة التي يكفلها الدستور والقانون جريمة لا تسقط الدعوى الجنائية ولا المدنية الناشئة عنها بالتقادم، وتكفل الدولة تعويضاً عادلاً لمن وقع عليه الاعتداء."

which organizes the national and military service obliges all educational institutions to not accept applying to or continuing at these institutions from the students who reach 19 except in case of possessing the military service's identification card. Therefore, because the student does not have the mentioned ID, the university has no margin of appreciation in such a matter. Nevertheless, whenever the student is able to get such an ID, the university has no opposition to his enrollment at the university. The legal representative added that if the university follows otherwise, its officials will be criminally punished.

On May 16, 1979, the Egyptian Court of Administrative Judiciary ruled against the plaintiff. The plaintiff appealed the Court of Administrative Judiciary's ruling because of a set of considerations; first, the inclusion of the religious status in the ID is a must according to the Civil Status Law, and the student cannot change his actual religion written in his birth certificate because such a change conforms the counterfeit crime set forth in the Egyptian Criminal Law. Second, a distinction between the dissolution of the *Baha'ism* administrative institutions and *Baha'i*'s Egyptian citizens who must enjoy constitutional rights including the freedom to freely believe is a must. Third, writing off the student's name from the university's records is completely linked and subsequent to the negative administrative decision refusing to issue the ID. In addition, the plaintiff's son neither escapes from his military service duty nor neglects to issue his ID. Therefore, the two decisions lack valid reasons, and the court of the first instance's ruling does not conform to the law.

On January 29, 1983, the Egyptian Supreme Administrative Court, as a court of appeal, ruled as follows: to formally accept the case; to firstly cancel the court of the first instance's judgment regarding refusing to cancel the negative administrative decision which refused to issue the prescribed ID to the appellant's son, and secondly to refuse otherwise.

2. Judgments

The Egyptian Court of administrative Judiciary, On May 16, 1979, constituted its judgment upon numbers of grounds as follows:

> The second article of the Egyptian Constitution confirms that Islam is the official religion of the state and the principles of Islamic *shrīʿa* are the principal source of legislation. Therefore, other constitutional principles such as the ones organizing the freedom of belief and nondiscrimination between citizens on religious or creed grounds must be read in light of the limitations that Islam admits, and must not contradict its rules. And whereas *Baha'ism* contradicts the Islamic religion and

other recognized Ibrahimic religions, it must not assume an external appearance. Therefore, the plaintiff's son has no right to persist to have ID encompassing *Baha'ism* as his religion. Consequently, the competent Civil Registry Department's negative decision to issue this prescribed ID is a valid administrative decision. And, whereas the National and Military Service law obliges the university to abstain from providing its service to students who reach 19 years except those holding a military ID, and the plaintiff's son does not present such paper, writing off the enrollment of the plaintiff's son is further considered as a valid administrative decision constituted upon reasonable grounds. [172]

However, the Egyptian Supreme Administrative Court constituted its ruling, regarding proving the religion of the appellant's son in his identification card, based on the fact that:

According to Islamic jurisprudence, the Islamic state throughout history includes non-Muslims irrespective of their religions, and it does not coerce other religions' followers to change what they believe in. However, revealing other religions' rituals in Egypt is exclusive to Christians and Jews according to the Islamic custom of the Egyptians. In addition, proving the actual religious status in the ID is compulsory according to the Civil Status Law no 260/1960, and such proof does not contradict the Islamic rules even if this creed's rituals oppose Islamic *shrīʿa* such as *Baha'ism*. Moreover, proving people's real beliefs is necessary to differentiate between Muslims and others respecting their legal standings, and to preclude conflicts in their personal relationships which may occur as a result of proving unreal personal status.[173]

Conversely, the court refused to annul the administrative decision which erases the appellant's son's registration from the university because of two principal reasons as follows:

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[172] وبجلسة 1979/5/16 قضت المحكمة برفض الدعوى مستندة إلى أن نص المادة الثانية من الدستور على أن دين الدولة الإسلام ومبادئ الشريعة الإسلامية المصدر الرئيسي للتشريع، وفى ضوء هذا الأصل يتعين النظر إلى أحكام الدستور الأخرى المتعلقة بحرية العقيدة وعدم التفرقة بين المواطنين بسبب الدين أو العقيدة، فتفسر هذه الأحكام في حدود ما يسمح به الإسلام وعلى نحو لا يتعارض مع مبادئه. وإذا كانت البهائية تناقض الديانات السماوية المعترف بها، فلا يجوز أن تأخذ مظهراً خارجياً ولا يكون لابن المدعى أن يصر على أن تصدر له بطاقة شخصية يذكر فيها أنه بهائي ويكون امتناع السجل المدني عن استخراج هذه البطاقة قراراً سليماً صحيحاً ولا سند لطلب إلغائه وإذ يحظر قانون الخدمة العسكرية والوطنية بقاء الطالب بعد بلوغه التاسعة عشرة من عمره في الجامعة ما لم يكن حاملاً بطاقة الخدمة العسكرية، وإذ لم يتقدم ابن المدعى بهذه البطاقة فإن قرار شطبه من كلية التربية يكون قائماً على سبب يبرره."

[173] ومن حيث إن الذي يبين من مدونات الفقه الإسلامي أن دار الإسلام قد وسعت غير المسلمين على اختلاف ما يدينون يحيون فيها كسائر الناس بغير أن يكره أحد منهم على أن يغير شيئاً مما يؤمن به ولكن لا يقر على الظهور من شعائر الأديان ألا ما يعترف به في حكومة الإسلام، ويقتصر ذلك في أعراف المسلمين بمصر على أهل الكتاب من اليهود والنصارى وحدهم.....فما أوجبه قانون الأحوال المدنية رقم 260 لسنة 1960 من استخراج بطاقة شخصية لكل مصري يبين فيها اسمه ودينه هو مما تفرضه أحكام الشريعة الإسلامية وليس يخالف عن أحكامها ذكر الدين في تلك البطاقة وان كان مما لا يعترف بإظهار مناسكه، كالبهائية ونحوها، بل يجب بيانه حتى تعرف حال صاحبه ولا يقع له من المراكز القانونية ما لا تتيحه له تلك العقيدة بين جماعة المسلمين."

First, the provisions of both the National and Military Service law and the Civil Status Law stipulate that students must possess the ID of both the military service and one of the civil services as a prerequisite in order to be able to continue at university. Therefore, officials do not have a margin of discretion to evaluate the student's circumstances and his justifications. Second, what makes the decision compulsory is that the student believes in *Baha'ism*. This is because one like him is not sufficiently qualified and honest to teach minors as he may attempt to stray those minors from their real religions. Therefore, there is no reason to study at the faculty of education since he will not be capable of working as a teacher. Notwithstanding, that does not deny his fundamental right to choose his preferable type of work insofar as his chosen work does not jeopardize the societal collective interest from his belief. Consequently, the decision is considered legitimate.[174]

3. Comprising, Analyzing and Applying Proportionality

As previously indicated, the major reciprocal component of the examined cases is the scarcity of explicit law provisions organizing the given issue. However, the issue is organized by generic rules outlined in the constitution or legislation so that judges are obliged to directly reconcile these conflicting constitutional values.[175] It is worth mentioning that in case of the absence of this factor, judges will be obliged either to apply the applicable law or to refer the case to the constitutional court to decide the extent of the constitutionality of the applicable law.[176] Hence, I would analyze the courts' approach and then apply proportionality to the present case.

[174] ومن حيث أن القرار الصادر بشطب ابن الطاعن من كلية التربية قد استند إلى ما يفرضه قانون الخدمة العسكرية والوطنية من تقديم بطاقة تلك الخدمة كما يحظر قانون الأحوال المدنية بقاء طالب بالكلية في مثل سن ابن الطاعن إلا إذا كان حاصلاً على بطاقة شخصية، ولا سبيل لتلك الكلية إلى التحلل مما تفرضه أحكام تلك القوانين ولا يعفيها من الجزاء الجنائي أن هي تعدتها مما يعتذر به ابن الطاعن من عجزه عن الحصول على هاتين البطاقتين إذ لا يخولها القانون تقديراً تتقصى به ظروف الطالب وأعذاره في هذا الشأن. ويكون قرار الشطب قد صدر عن سبب صحيح. وكذلك يوجب هذا الشطب ما تبين من اعتناق الطالب البهائية فمثله لا يصلح أن يتولى شيئاً من تربية النشء، لأنه لا يؤمن أن ينفث فيمن يعلمه ما يزيغ قلبه عن الدين الحق أو ما يلبسه عليه، ويقتضي امتناع العمل التربوي أن يصرف الطالب عن التهيؤ له، ولا يأتي ذلك على أصل حقه في اختيار العمل الذي يرتضيه فإن له سعة في سائر أبواب العمل التي لا يتهدد الجماعة فيها خطر من حالته العقيدية وبذلك تثبت مشروعية قرار الشطب من كلية التربية ولا يبقى وجه ينعاه الطاعن عليه."

[175] The Egyptian Supreme Administrative Court has assured that the administrative court has the Jurisdiction to directly apply the constitutional articles to disputes even if there is no legislation regulating the matter in question. *See* challenges No.5344 and 5329, Judicial Year 47, August 27, 2001, The Egyptian Supreme Administrative Court.

[176] In this meaning, *see* challenge No.4, Judicial Year 12, October 9, 1990, The Egyptian Supreme Constitutional Court.

a. The Court of Administrative Judiciary

As illustrated in chapter one, a legitimate aim "proper purpose" can be considered the collective interest of the whole society or the rights and freedom of others. This proper purpose can be derived from explicit or implicit constitutional and legislative articles.[177]

Unlike the Egyptian Supreme Administrative Court, the Court of the Administrative Judiciary was of the opinion that the omitting decision regarding refusing to prove the actual belief of the plaintiff's son in his identification card was legitimate. The court constituted its verdict upon that while the freedom of belief and non-discrimination among citizens are constitutional values based on articles (40, 46) of the 1971 Egyptian Constitution, these rights can be limited to conserve other constitutional values such as protecting the society's collective interest. Therefore, the court restricted the freedom of belief and non-discrimination between citizens based on article (2) of the same constitution stating that *shrīʿa* principles are a main source of legislation. The court affirmed that whereas principles that *Baha'is* believe contradict the Islamic religion and other recognized Ibrahimic ones, the plaintiff's son has no right to persistently demand to have an ID, encompassing *Baha'ism* as his religion.

The court did not illustrate why proving the actual belief of the plaintiff's son challenges Islamic *shrīʿa* rules and principles. In addition, the court did not differentiate between the Islamic *Shrīʿa's* rules which are certain regarding their authenticity and meaning on the one hand and the relative principles which are subject to change by time and place on the second hand.[178] This is substantial because limitations on constitutional rights cannot be deemed valid unless the right and its limitations can applicably coexist with each other. These limitations, to be valid, must further be compatible with the nature of the right[179]in a democratic society and must not be arbitrary, unreasonable, discriminatory, or incompatible with the principle of interdependence of all human rights.[180]

It is worth mentioning that although the previous ruling was issued from the court of the first instance, and it had been already struck down by the court of appeal (The Egyptian Supreme

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[177] BARAK, *supra* note 35, at 246.

[178] Challenge No.8, Judicial Year 17, May 4, 1996, The Egyptian Supreme Constitutional Court.

[179] *See* the translation of the 2014 Egyptian Constitution https://www.constituteproject.org/constitution/Egypt_2019?lang=en To *see* the original articles in Arabic, serve this official site http://www.egypt.gov.eg/arabic/laws/constitution/default.aspx

[180] Manisuli, *supra* note 136, at 4.

Administrative Court),[181] This judicial precedent made by the court is deemed the major principle in the Egyptian Judiciary.[182] Exceptionally, there was a ruling issued in 2009 giving *Baha'is*, in some circumstances, the right to write dash (-) in their ID.[183]

Regarding the expunging decision, this decision is regarded as a direct and decisive subsequence of the previously negative decision. This is mainly because the provisions of the National and Military Service law are definite concerning banning students who reach 19 years from continuing at educational institutions, except in case of holding a military ID. The latter document cannot be issued without first issuing the civil ID. Therefore, now that the court decided the lawfulness of the mentioned negative decision, it would accordingly confirm the validity of the expunging decision. Even if the expunging decision was deemed as a compulsory implication resulting from the negative decision, the court should refer the case to the constitutional court in order to decide the constitutionality of this schizophrenic legal situation.[184]

b. The Egyptian Supreme Administrative Court

Unlike the Court of Administrative Judiciary, the Egyptian Supreme Administrative Court judged that the negative decision was illegitimate. The court firstly confirmed that proving a religious status in the ID is compulsory based on the Civil Status Law no 260/1960, and such proving does not violate the Islamic *Shrīʿa* rules even if these religion's rituals are not allowed to be declared in Egypt. Therefore, the court declared that the negative decision that refuses to give the plaintiff's son an identification card proving his actual belief is invalid.

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[181] This judgment was canceled by ruling No 1109 of the judicial year No 25, January 29, 1983, the Egyptian Supreme Administrative court.

[182] The current judicial approach does not give *Baha's* the right to prove their belief in their Identification card. *See* cases No 16834 and 18971 of judicial year 52, December 16, 2006, the Egyptian Supreme Administrative court.

[183] It is worth mentioning that the Egyptian minister of interior issued the ministerial decree No 520/2009 giving *Baha's* who were previously marked as such in their probative documents or who can prove that a blood relative is *Baha'i* the authorization to indicate a dash on their vital records. This ministerial decree was issued directly after the Egyptian Supreme Administrative Court ruling, giving *Baha's* in specific circumstances the right to prove dash (-) in their official papers. *See* the ruling issued in case No 10831 of judicial year 54, march 16, 2009.

[184] *See* law No 48/1979 with respect to the Egyptian Supreme Constitutional Court particularly articles (28) and (29) organizing the courts' jurisdiction in referring the case to the constitutional court if there is a probability of a contradiction between the applicable law and the constitution.

Relating to supervising the decision's suitability, the court confirmed that proving people's actual beliefs is an indispensable procedure to differentiate between Muslims and other religions' followers respecting their legal standings and precluding conflicts in their personal relationships which may occur as a result of proving unreal personal status.[185] It can be concluded that the court sees that there is no rational relationship between the measure embraced by the state and the decision's purpose, which is protecting the public order of the entire society. Consequently, the court reviewed the decision's legitimacy and suitability.

Regarding the expunging decision, the court upheld the administrative decision. The court first confirmed the legitimacy of the decision based on the fact that the applicable legislation stipulates that as soon as the student reaches the age of 19, he must hold the two essential IDs to be able to complete his education at the university. Therefore, according to the court, officials are bound by law and do not enjoy a margin of discretion in this regard.

Secondly, the court similarly assured the decision's suitability because the prementioned measures, embraced by the government, furthered its objective which is protecting the community's public order from the person who is believing in a misguided belief. In light of protecting the community's public order, the court confirmed that since the student believes in *Baha'ism*, he is not sufficiently qualified and honest to teach minors. This is because he may attempt to stray those minors from their religions. Therefore, there is no reason to study at the faculty of education since the student will not be capable of working as a teacher in the future. Notwithstanding, the court does not deny his basic right to choose his preferred type of work insofar as his chosen work does not jeopardize the collective interest of society. Consequently, the expunging decision is considered suitable.

After revealing the court approach, it is essential to hypothetically review the decision according to proportionality review. it is initially worth revealing that the examined verdict was issued on January 29, 1983, while both the International Covenant on Civil and Political Rights and the one on Social, Economic and Cultural Rights were ratified by the competent Egyptian authority.[186] Thus, these covenants have been considered an integral part of Egyptian law

[185] In this meaning and with regard to the citizens who return to Christianity, *see* Challenge No.14590, Judicial Year 53, February 9, 2008, The Egyptian Supreme Administrative Court.

[186] These Covenants are multilateral treaties adopted by the United Nations General Assembly on December 16, 1966, through GA. Resolution 2200A (XXI), and came into force on January 3,

according to the 1971 Egyptian Constitution and the succeeding constitutions.[187] Consequently, these covenants' rules must be taken into consideration while evaluating the court approach.

1. First Question: - Whether There is a Legitimate Aim

This question concerns whether or not restricting the enduring values of the appellant's son was based on a legitimate aim. While the rights to education and work are indispensable human rights outlined in articles (13, 14, 18) of the 1971 Egyptian Constitution[188] and articles (6, 13) of the International Covenant on Economic, Social and Cultural Rights,[189] protecting the practical

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1976; the Egyptian government ratified the covenants and they consequently got into force on April 14, 1982.

[187] The first paragraph of article (151) of the 1971 Egyptian Constitution reads "The President of the Republic shall conclude treaties and communicate them to the parliament, accompanied with suitable clarifications. They shall have the force of law after their conclusion, ratification and publication according to the established procedure." The original article reads,

تنص الفقرة الأولى من المادة (151) من دستور1971 على أن "رئيس الجمهورية يبرم المعاهدات، ويبلغها مجلس الشعب مشفوعة بما يناسب من البيان. وتكون لها قوة القانون بعد إبرامها والتصديق عليها ونشرها وفقاً للأوضاع المقررة."

[188] The first paragraph of the article (13) of the 1971 Egyptian Constitution reads as follows: Work is a right, a duty, and an honor ensured by the State. Distinguished workers shall be worthy of the appreciation of the State and society. The original article reads,

تنص الفقرة الأولى من المادة (13) من دستور جمهورية مصر العربية الصادر عام 1971 على أن " العمل حق وواجب وشرف تكفله الدولة، ويكون العاملون الممتازون محل تقدير الدولة والمجتمع."

Article (14) of the 1971 Egyptian Constitution reads as follows: Citizens are entitled to public offices, which are assigned to those who shall occupy them in the service of people. The State guarantees the protection of public officers in the performance of their duties in safeguarding the interests of the people. The original article reads,

تنص المادة (14) من دستور جمهورية مصر العربية الصادر عام 1971 على أن "الوظائف العامة حق للمواطنين، وتكليف للقائمين بها لخدمة الشعب، وتكفل الدولة حمايتهم وقيامهم بأداء واجباتهم في رعاية مصالح الشعب....."

Article (18) of the 1971 Egyptian Constitution reads as follows: Education is a right guaranteed by the State. It is obligatory in the primary stage. The State shall work to extend the obligation to other stages. The State shall supervise all branches of education and guarantee the independence of universities and scientific research centers, with a view to linking all this with the requirements of society and production. The original article reads,

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[189] Article (6) of the covenant read as follows: Everyone has the right to work, including the right to gain one's living at work that is freely chosen and accepted.

interests of other people can be imagined as a legitimate limitation on the mentioned rights because this student may, in the future, attempt to stray those minors from their religions. Consequently, I am of the opinion that there is a legitimate aim, giving the state the right to restrict the appellant's son's rights in order to balance between the abovementioned competing values.

Nonetheless, it could be argued that the rights to education and work are not subject to limitations except the ones that may be determined by law only in so far as this may be compatible with the nature of the right and solely for the purpose of promoting the general welfare in a democratic society according to article (4) of the International Covenant on Social, Economic and Cultural rights[190]. Therefore, these rights are not subject to public order limitations contrary to political and civil rights.[191] Consequently, the court did not have to invoke the public order considerations to restrict the rights of the appellant's son.

This argument can be retorted by affirming that the court may not invoke the limitation of the public order, but, rather, it attempted to balance between the appellant's son's rights on the

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Article (13) of the covenant read as follows: Everyone has the right to education. Primary education should be compulsory and free to all.

[190] Article (4) from the covenant states that "The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society." It is worth mentioning that the only two exceptions in the Economic, Social and Cultural Rights which are subject to the public order limitations are the rights to peacefully strike and the right to form trade unions set forth in article (8) of the covenant.

[191] The expression 'public order *(ordre public*)' as used in the Covenant may be defined as the sum of rules which ensures the functioning of society or the set of fundamental principles on which a society is founded. Respect for economic, social and cultural rights is part of public order *(ordre public*). *See* Manisuli Ssenyonjo, *Limburg Principles, Economic, Social and cultural rights in international law,*2009, at436.

In several rulings, the Court of Cassation has defined public policy as "the social, political, economic or moral principles in a state related to the highest (or essential) interest *(maslaha 'ulya, or: masalih jawhariyya*) of society," or as "the essence (*kiyan*) of the nation. *See* Challenges No. 714, Judicial Year 47, April 26, 1982; No. 1259, Judicial Year 49, June 13, 1983. The court, several times, has stated that these rules pertain to public policy due to their "strong link to the legal and social foundations which are deep-rooted in the conscience of [Egyptian] society.

one hand and protecting the rights and freedoms of others (minors) on the other hand. As repeatedly assured, the margin of discretion, in this phase of review, should be broadened in favor of the state decision. Consequently, I am of the opinion that the decision can be declared legitimate.

2. Second Question: - Whether There is a Rational Connection between Measures and Objectives

After confirming the legitimacy of the decision based on the wide margin of appreciation given to the state, the question that should be raised here is whether the measures taken were designed to achieve the objective. To do so, some inevitable questions need to be raised and tackled. Will the same concerns occur if the appellant's son is a Christian teaching Muslim minors or a Muslim teaching Christian minors? It is crucial to mention that it is theoretically and practically tolerable, according to the educational system in Egypt, that Muslims teach Christians and vice versa. Therefore, the court had to clarify the differences between the appellant's son's case and the mentioned probabilities.

Another crucial point should be discussed in this regard is that whether these measures were arbitrary, unfair or discriminatory. Despite the fact that most Social, Economic and Cultural rights are not immediate obligations to be reached because of the limits of available resources, non-discrimination is deemed an immediate and cross-cutting obligation.[192] That entails states parties to the covenant to guarantee non-discrimination in the exercise of these rights, particularly rights to education and work. Regarding accessibility as an essential feature of the right to education, the minimum core obligation includes an obligation to ensure the right of access to public educational institutions and programs on a nondiscriminatory basis. Hence, education must be accessible to all without discrimination on any grounds.[193] Unfortunately, the administration did otherwise. It denied the appellant's son from the right to get his preferable type of education and work.

In the same meaning, the general comment No (20) about non-discrimination in Economic, Social and Cultural rights emphasizes that discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment based on prohibited grounds directly or

[192] GENERAL COMMENT No. 20 - *Non-discrimination in economic, social and cultural rights*. Paragraph No 7.

[193] *See* IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS General Comment No. 13 (Twenty-first session, 1999) *The right to education* (article 13 of the Covenant) Paragraph 6.

indirectly. In a similar example to the case facts, it has been assured that requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates. Similarly, the Egyptian Supreme Constitutional Court has affirmed that "the right to work is completely linked to human dignity and the right to life. Imposing subjective discrimination with regard to access to work is considered unconstitutional. Consequently, the measures taken by the administration and affirmed by the court were discriminatory arbitrary and consequently invalid.

However, it may be argued that the ICESCR rules regarding this issue must be excluded by virtue of the reservation of the Egyptian State on the International Covenant on Social, Economic, and Cultural rights.[194] This claim may be refuted by affirming that the rulings of *Shrīʿa* law that restrict the rules of applicable legislation, including ratified treaties, are those rules that are absolutely certain concerning their authenticity and meaning (*al-ahkam al-shar'iyya alqat'iyya fi thubutiha wa dalalatiha)*.[195] Nevertheless, the court did not thoroughly illustrate how practicing the right to education and work by the appellant's son contradicts these principles. Therefore, this argument is not sufficiently persuasive.

Consequently, while it may be claimed that such measures can advance the objective because the partial realization of the purpose is considered an adequate reason to pass this phase of supervision, it is inconceivable to claim that the measures embraced are not discriminatory.

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[194] The reservation of the Egyptian authority reads, "Taking into consideration the provisions of the Islamic *shrīʿa* and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it" *See* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en

[195] *See* challenge No.24896, Judicial Year 56, February 23, 2019, The Egyptian Supreme Constitutional Court has affirmed that "*ālājthād* is permissible in issues that do not collide with rulings that are absolutely certain with respect to their authenticity and meaning (al-*ahkam al-shar'iyya alqat'iyya fi thubutiha wa dalalatiha*). These issues are subject to *ālājthād* by researchers and thinkers to express their thoughts and opinions in understanding Quranic texts, particularly those that have multiple opinions and interpretations." The original text reads "المسائل التي يجوز فيها الاجتهاد ولا تصطدم بأحكام قطعية الثبوت والدلالة، فيترك للباحثين وأصحاب الفكر والرأي التعبير عن أفكارهم وآرائهم واجتهادهم في فهم النصوص القرآنية وبخاصة تلك التي تتعدد فيها الآراء والتفاسير."

VI. Conclusion

Following a concrete judicial approach has become both a social and legal necessity to tackle the problem of conflicting interests within society because of the interdependence of most human rights. It has been seen that the Egyptian legal system has concrete underpinnings not only to apply PA by senior judges in high courts in exceptional rulings such as *ʿzba khīr al-lh - jzīra al-qrṣāīa* but also to give all judges such opportunity based on considering proportionality as an essential judicial doctrine in the Egyptian legal system particularly in administrative disputes related to human rights.

PA presents a sophisticated and comprehensive judicial approach, guiding judges to follow a structural degree of examination to determine the legitimacy, suitability, necessity and proportionality of the decision. Therefore, judges' conscious, unconscious, hidden, and apparent ideologies will accordingly be decreased. This is mainly because courts have to pass through the degrees of PA, demonstrating why the decision is legitimate, rationale, non-discriminatory, and nonarbitrary. The court has to illustrate further whether the measures adopted by the administration were the less intrusive measures that can be taken in such circumstances amongst other obtainable options, and it must balance between the benefits gained by reaching the governmental goal, which must be a compelling governmental interest on the one hand and the harms caused to the individuals' rights derived from the constitutional value in question on the other hand. This will decrease judges' ideologies because the long clarifications and demonstrations will oblige judges to investigate all the aspects of the case, not to express their background experience in generic terms such as public order and the public good.

PA also will help organize the margin of appreciation the administration has while issuing the administrative decisions. This is mainly because the administration under the supervision of the court must prioritize achieving expeditious, urgent, and crucial interests and give them precedence over other interests. Therefore, the administration while issuing its decisions must balance amongst, in the realization level, the different national interests which are disparate in their hierarchy and importance based on time and circumstances factors. The court must supervise such administrative decisions to be certain that the officials do not override lesser objectives over the higher ones.

Nonetheless, PA will not eliminate the margin of discretion that judges and the administration have, but rather, it will organize it. Moreover, because of the social dialog which will occur within the court through applying PA, parties of disputes will be more satisfied with the final decision by realizing the detailed reasoning behind the ruling.

VII. Recommendations

After enlightening the approaches adopted by the Egyptian Judiciary regarding the review of the administration's margin of discretion and revealing proportionality review's main characteristics, it is recommended to adopt the following measures. First, it is advisable to amend article (92) of the 2014 Egyptian Constitution, which reads, "Rights and freedoms of individual citizens may not be suspended or reduced. No law that regulates the exercise of rights and freedoms may restrict them in such a way as infringes upon their essence and foundation" to become:

Rights and freedoms set forth in the present constitution are subject solely to the limitations which are reasonable and justifiable in a free and democratic society based on human dignity, equality, and citizenship, taking into consideration the following elements:

a) the nature and essence of the right;

b) the importance of the purpose of the limitation and their interrelationship;

e) less intrusive means to reach the purpose compared to obtainable options.

F) overall benefits of prioritizing the limitations must exceed the harms caused to the right."

Second, I recommend adding the phrase: "In light of article (92) of the 2014 Egyptian Constitution" to the end of the article (10) of law no 47/1972 regarding the Egyptian State Council. The article after the recommended amendment should be: "And, in requesting the cancelation of the final administrative decisions, the reference for the appeal must be constituted upon the lack of jurisdiction, lack of required form, violation of regulations or decrees including the error in their application or interpretation or the abuse of power, In light of article (92) of the 2014 Egyptian Constitution."

Third, refereeing to the dissenting opinion of minority judges at the end of the rulings after the conclusion would be appropriate with PA review. This is because revealing the various opinions of judges will develop the process of decision-making, particularly in applying PA which depends on both legal foundation and social facts in the second, third, and fourth-degree of supervision. That would further increase popular participation and supervision on the court and decrease the ideology of judges in addition to enhancing legal thoughts. However, it is fully recommended that the names of the majority and minority judges not be referred at the judgment to avoid political clashes.

Fourth, more efforts need to be exerted to resolve the problem of fortified principles made by the administrative courts while applying the constitution directly to cases where there is no explicit regulation organizing the issue at tested. Discrete research suggesting a detailed different constitutional supervision over these rulings is a must.

IX. APPENDIX

This schedule has been specified to include a translation of the constitutional and legislative articles indicated in the paper. It further includes the case law mentioned, in both languages. All these materials are translated from Arabic to English, taking into consideration the following:

I. As a concession to the English style, the longest sentences have been broken into shorter ones.
II. Arabic tends to use more pronouns and commas. To sufficiently clarify the meaning in English, some of these pronouns and commas are easier converted to nouns or deleted.
III. In situations where the language remains vague, some words are either written in Arabic according to the style of the International Journal of Middle East Studies or replaced with a phrase in order to ease delivering the meaning.

Page	English	Arabic	No
35	The preamble of the Egyptian Constitution, amended on January 18, 2014, comes with that, "We believe in democracy as a path, a future, and a way of life,……. Freedom, human dignity, and social justice are a right of every citizen…….. We are now drafting a constitution that completes building a modern democratic state with a civil government."	جاء في مقدمة دستور جمهورية مصر العربية المُعدل في 18 يناير 2014 أن " نحن نؤمن بالديمقراطية طريقاً ومستقبلاً وأسلوب حياة .....، الحرية والكرامة الإنسانية والعدالة الاجتماعية حق لكل مواطن..... نحن - الآن - نكتب دستوراً يستكمل بناء دولة ديمقراطية حديثة، حكومتها مدنية."	1
36	The first paragraph of article (1) of the 2014 Egyptian Constitution, amended on January 18, 2014, reads, "The Arab Republic of Egypt is a sovereign state, united and indivisible, where nothing is dispensable, and its system is a democratic republic based on citizenship and the rule of law.	تنص الفقرة الأول من المادة (1) من دستور جمهورية مصر العربية المُعدل في 18 يناير 2014 على أن "جمهورية مصر العربية دولة ذات سيادة، موحدة لا تقبل التجزئة، ولا ينزل عن شيء منها، نظامها جمهوري ديمقراطي، يقوم على أساس المواطنة وسيادة القانون."	2
53	Article (2) of the 2014 Egyptian Constitution, amended on January 18, 2014, reads, "Islam is the religion of the state and Arabic is its official language, and the principles of Islamic *shrīʿa* are the principal source of legislation."	تنص المادة (2) من دستور جمهورية مصر العربية المُعدل في 18 يناير 2014 على أن "الإسلام دين الدولة، واللغة العربية لغتها الرسمية، ومبادئ الشريعة الإسلامية المصدر الرئيسي للتشريع."	3
53	The first paragraph of article (7) of the 2014 Egyptian Constitution, amended on January 18, 2014, reads, " *al-ʾzhr* is an independent scientific Islamic institution, with exclusive competence over its affairs. It is the main authority for religious sciences and Islamic affairs. It is responsible for preaching Islam and disseminating the religious sciences and the Arabic language in	تنص الفقرة الأولى من المادة (7) من دستور جمهورية مصر العربية المُعدل في 18 يناير 2014 على أن "الأزهر الشريف هيئة إسلامية علمية مستقلة، يختص دون غيره بالقيام على كافة شئونه، وهو المرجع الأساسي في العلوم الدينية والشئون الإسلامية، ويتولى مسئولية الدعوة ونشر علوم الدين واللغة العربية في مصر	4

	Egypt and the world.”	والعالم."	
38	Article (57) of the 2014 Egyptian Constitution, amended on January 18, 2014, reads, "Private life is inviolable, safeguarded and may not be infringed upon…………………………”	تنص المادة (57) من دستور جمهورية مصر العربية المُعدل في 18 يناير 2014 على أن "للحياة الخاصة حرمة، وهي مصونة لا تمس......."	5
38	Article (65) of the 2014 Egyptian Constitution, amended on January 18, 2014, reads, "Freedom of thought and opinion is guaranteed. All individuals have the right to express their opinion through speech, writing, imagery, or any other means of expression and publication.”	تنص المادة (65) من دستور جمهورية مصر العربية المُعدل في 18 يناير 2014 على أن " حرية الفكر والرأي مكفولة. ولكل إنسان حق التعبير عن رأيه بالقول، أو بالكتابة، أو بالتصوير، أو غير ذلك من وسائل التعبير والنشر."	6
1 32 34 36	Article (92) of the 2014 Egyptian Constitution, amended on January 18, 2014, reads, “Rights and freedoms of individual citizens may not be suspended or reduced. No law that regulates the exercise of rights and freedoms may restrict them in such a way as infringes upon their essence and foundation.”	تنص المادة (92) من دستور جمهورية مصر العربية المُعدل في 18 يناير 2014 على أن "الحقوق والحريات اللصيقة بشخص المواطن لا تقبل تعطيلاً ولا انتقاصاً.. ولا يجوز لأي قانون ينظم ممارسة الحقوق والحريات أن يقيدها بما يمس أصلها وجوهرها."	7
46	Article (93) of the 2014 Egyptian Constitution, amended on January 18, 2014, reads, “The state is committed to the agreements, covenants, and international conventions of human rights that were ratified by Egypt. They have the force of law after publication in accordance with the specified circumstance.”	تنص المادة (93) من دستور جمهورية مصر العربية المُعدل في 18 يناير 2014 على أن "تلتزم الدولة بالاتفاقيات والعهود والمواثيق الدولية لحقوق الإنسان التي تصدق عليها مصر، وتصبح لها قوة القانون بعد نشرها وفقاً للأوضاع المقررة."	8
32	Article (97) of the 2014 Egyptian Constitution, amended on January 18, 2014, reads, “And it is forbidden to grant any act or administrative decision immunity from judicial oversight.”	تنص المادة (97) من الدستور المصري المُعدل في 2014 على أن "........ويحظر تحصين أي عمل أو قرار إداري من رقابة القضاء، ......"	9
35	The second point of article (167) of the 2014 Egyptian Constitution, amended on January 18, 2014, reads, "The government exercises the following functions in particular: 2. Maintain the security of the nation, and protect the rights of citizens and the interests of the state.”	ينص البند الثاني من المادة (167) من الدستور على أن "تمارس الحكومة، بوجه خاص، الاختصاصات الآتية: 1....... 2- المحافظة على أمن الوطن وحماية حقوق المواطنين ومصالح الدولة.	10

67	Article (13) of the 1971 Egyptian Constitution reads, “Work is a right, a duty and an honor ensured by the State. Distinguished workers shall be worthy of the State’s and society’s appreciation.”	تنص الفقرة الأولى من المادة (13) من دستور جمهورية مصر العربية الصادر عام 1971 على أن " العمل حق وواجب وشرف تكفله الدولة، ويكون العاملون الممتازون محل تقدير الدولة والمجتمع."	11
67	Article (14) of the 1971 Egyptian Constitution reads, “Citizens are entitled to public offices, which are assigned to those who shall occupy them in the service of people. The State guarantees the protection of public officers in the performance of their duties in safeguarding the interests of the people……..”	تنص المادة (14) من دستور جمهورية مصر العربية الصادر عام 1971 على أن "الوظائف العامة حق للمواطنين، وتكليف للقائمين بها لخدمة الشعب، وتكفل الدولة حمايتهم وقيامهم بأداء واجباتهم في رعاية مصالح الشعب....."	12
67	Article (18) of the 1971 Egyptian Constitution reads, “Education is a right guaranteed by the State, and it is obligatory in the primary stage. The State shall work to extend the obligation to other stages. The State shall supervise all branches of education and guarantee the independence of universities and scientific research centers, with a view to linking all this with the requirements of society and production.”	تنص المادة (18) من دستور جمهورية مصر العربية الصادر عام 1971 على أن "التعليم حق تكفله الدولة، وهو إلزامي في المرحلة الابتدائية، وتعمل الدولة على مد الإلزام إلى مراحل أخرى. وتشرف على التعليم كله، وتكفل استقلال الجامعات ومراكز البحث العلمي، وذلك كله بما يحقق الربط بينه وبين حاجات المجتمع والإنتاج."	13
60	Article (40) of the 1971 Egyptian Constitution reads, “All citizens are equal before the law. They have equal public rights and duties without discrimination due to sex, ethnic origin, language, religion or creed.”	تنص المادة (40) من دستور جمهورية مصر العربية الصادر عام 1971 على أن ”المواطنون لدى القانون سواء، وهم متساوون في الحقوق والواجبات العامة، لا تمييز بينهم في ذلك بسبب الجنس أو الأصل أو اللغة أو الدين أو العقيدة."	14
60	Article (46) of the 1971 Egyptian Constitution reads, “The State shall guarantee the freedom of belief and the freedom of practicing religious rights.”	تنص المادة (46) من دستور جمهورية مصر العربية الصادر عام 1971 على أن "تكفل الدولة حرية العقيدة وحرية ممارسة الشعائر الدينية."	15

60	Article (57) of the 1971 Egyptian Constitution reads, “Any assault on individual freedom or on the inviolability of the private life of citizens and any other public rights and liberties guaranteed by the Constitution and the law shall be considered a crime, whose criminal and civil lawsuit is not liable to prescription. The State shall grant fair compensation to the victim of such an assault.”	تنص المادة (57) من دستور جمهورية مصر العربية الصادر عام 1971 على أن "كل اعتداء على الحرية الشخصية أو حرمة الحياة الخاصة للمواطنين وغيرها من الحقوق والحريات العامة التي يكفلها الدستور والقانون جريمة لا تسقط الدعوى الجنائية ولا المدنية الناشئة عنها بالتقادم، وتكفل الدولة تعويضاً عادلاً لمن وقع عليه الاعتداء."	16
67	The first paragraph of article (151) of the 1971 Egyptian Constitution reads, “The President of the Republic shall conclude treaties and communicate them to the parliament, accompanied with suitable clarifications. They shall have the force of law after their conclusion, ratification, and publication according to the established procedure.”	تنص الفقرة الأولى من المادة (151) من دستور1971 على أن "رئيس الجمهورية يبرم المعاهدات، ويبلغها مجلس الشعب مشفوعة بما يناسب من البيان. وتكون لها قوة القانون بعد إبرامها والتصديق عليها ونشرها وفقاً للأوضاع المقررة."	17
40	Article (5) of the Egyptian Civil Code issued by law No 131/1948 reads, “The exercise of a right is considered unlawful in the coming states: B) if the interests aimed to realize are so trivial that they are not proportionate to the harm caused thereby to another person.” The preparatory works of article (5) of the Egyptian Civil Code, issued by law No 131/1948 come with that, "The legislator has avoided the arbitrariness term (the abuse of power) because it is generic and ambiguous. He has further avoided all generic terms due to their vagueness and their lack of accuracy. He has extracted the three criteria included in the article from Islamic jurisprudence. It is evident that detailing these criteria in that way grants the judge beneficial elements to take guidance from, particularly since they are all considered as a result of scientific applications that the Egyptian judiciary concluded through *ālājthād*. The first of these criteria is the criterion of using the right only for intending to	تنص المادة (5) من القانون المدني الصادر بالقانون رقم 131 لسنة 1948 على أن: يكون استعمال الحق غير مشروع في الأحوال الآتية: ب) إذا كانت المصالح التي يرمي إلى تحقيقها قليلة الأهمية، بحيث لا تتناسب البتة مع ما يصيب الغير من ضرر بسببها." جاء في الأعمال التحضيرية الخاصة بالمادة (5) من القانون المدني المصري الصادر بالقانون رقم 131 لسنة 1948 أن " المشرع تحامي اصطلاح التعسف لسعته وإبهامه وجانب أيضًا كل تلك الصيغ العامة بسبب غموضها وخلوها من الدقة، وأستمد من الفقه الإسلامي بوجه خاص الضوابط الثلاثة التي اشتمل عليها النص. ومن المحقق أن تفصيل هذه الضوابط على هذا النحو يهيئ للقاضي عناصر نافعة للاسترشاد لاسيما إنها جميعا وليدة تطبيقات علمية انتهى إليها القضاء المصري عن طريق الاجتهاد. وأول هذه المعايير هو معيار استعمال الحق دون أن يقصد من ذلك سوء الإضرار بالغير. والمعيار الثاني	18

	harm others. The second criterion is that using the right conflicts with an essential public interest. This is a practical criterion that the legislator has derived from Islamic jurisprudence. In Islamic jurisprudence, most of this criterion's application can be found when the state uses its authority to restrict people's rights in order to protect the public good. Nevertheless, the applications of this notion are not exclusive to what has been mentioned because they are only examples that can be broadened and be subject to analogy. The third criterion includes three cases: The first case: using the right in a way that aims to achieve an illegitimate interest. The second case: using the right in order to achieve a little significant interest that is not proportionate to the harm that occurs to others because of it. The third case: using the right in a way that would impede the use of rights that conflict with the right in a manner that prevents their use in a usual manner."	قوامه تعارض استعمال الحق مع مصلحة وهذا معيار مادي استقاءه عامة جوهرية، المشرع من الفقه الإسلامي، وأكثر ما يساق من تطبيقات في هذا الصدد عند فقهاء المسلمين يتعلق بولاية الدولة في تقييد حقوق الأفراد صيانة للمصلحة العامة على أن الفكرة في خصبها لا تقف عند حدود هذه التطبيقات، فهي مجرد امثله تحتمل التوسع والقياس. والمعيار الثالث يتدرج تحته حالات ثلاث: الحالة الأولى: حالة استعمال الحق استعمالاً يرمي إلى تحقيق مصلحة غير مشروعة. الحالة الثانية: حالة استعمال الحق ابتغاء تحقيق مصلحة قليلة الأهمية لا تتناسب مع ما يصيب الغير من ضرر بسببها. الحالة الثالثة: حالة استعمال الحق استعمالا من شأنه أن يعطل استعمال حقوق تتعارض معه تعطيلاً يحول دون استعمالها على الوجه المألوف."	
4 3 1	The second paragraph of article (10) of the Egyptian State Council law, issued by law no 47/1972 reads, “the reference for appealing final administrative decisions must be constituted upon the lack of jurisdiction, lack of required form, violation of regulations or decrees, including the error in their application or interpretation, or the abuse of power.	تنص الفقرة الثانية من المادة رقم (10) من قانون مجلس الدولة الصادر بالقانون رقم 47 لسنة 1972 على أن " تختص محاكم مجلس الدولة دون غيرها بالفصل في المسائل الآتية: ويشترط في طلبات إلغاء القرارات الإدارية النهائية أن يكون مرجع الطعن عدم الاختصاص أو عيباً في الشكل أو مخالفة القوانين أو اللوائح أو الخطأ في تطبيقها أو تأويلها أو إساءة استعمال السلطة."	19
22	The Egyptian Supreme Constitutional Court has stated that "the forbidden discrimination, according to the constitution, is every discriminatory action constituted upon differentiation, restriction, preference or exclusion arbitrarily affecting rights and freedom covered by the Constitution or law.” *See* Challenge No.56, Judicial Year 31, August 5, 2012, the Egyptian Supreme Constitutional Court.	ذهبت المحكمة الدستورية العليا إلى أن "صور التمييز للدستور وإن تعذر حصرها إلا أن قوامها كل تفرقة أو تقييد أو تفضيل أو استبعاد ينال بصوره تحكمية من الحقوق والحريات التي كفلها الدستور أو القانون."	20
11	The Egyptian Supreme Constitutional Court has	وحيث إن قضاء المحكمة الدستورية العليا	21

	held that "Whereas the general tax law pursues to protect the state's tax interest, as obtaining the tax revenues is an intended goal in the first place, this interest must be balanced by social justice as a concept and a restrictive framework for the provisions of this law . . . . Moreover, to fulfill its interest in gaining the tax, the state must not impose a penalty that goes beyond the logical limits required to maintain its tax interest. The principle of being subject to law, determined based on a democratic concept, means that the perception of the legal rule, transcending in the legal state and being restrained by it, should be determined in light of the applicably minimum requirements in democratic states to ensure that the protection of citizens' rights granted by the state is not less than the acceptably and generically minimum requirements of human rights in a democratic society. This principle further entails that the criminal or civil punishment imposed on people's actions must not be excessive but proportionate. Challenge No. 33, Judicial Year 16, February 3, 1996, the Egyptian Supreme Constitutional Court.	قد ذهب إلى أن "قانون الضريبة العامة، وإن توخى حماية المصلحة الضريبية للدولة باعتبار أن الحصول على إيرادها هدفاً مقصوداً منه ابتداء، إلا أن مصلحتها هذه ينبغي موازنتها بالعدالة الاجتماعية بوصفها مفهوماً وإطاراً مقيداً لنصوص هذا القانون.....ولا يجوز أن تعمد الدولة كذلك - استيفاء لمصلحتها في اقتضاء دين الضريبة- الى تقرير جزاء يكون مجاوزاً الحدود المنطقية التي يقتضيها صون مصلحته الضريبية." مبدأ خضوع الدولة للقانون – محدداً على مضمون ديمقراطي – يعنى أن مفهوم القاعدة القانونية التي تسمو في الدولة القانونية وتتقيد بها إنما يتحدد في ضوء مستوياتها التي التزمتها الدولة الديمقراطية باضطراد في مجتمعاتها لضمان ألا تنزل الدولة القانونية بالحماية التي توفرها لحقوق مواطنيها وحرياتهم عن الحدود الدنيا لمتطلباتها المقبولة بوجه عامة في الدولة الديمقراطية ويندرج تحتها ألا يكون الجزاء على أفعالهم جنائياً أو مدنياً مفرطاً بل متناسب معها."	
8	The judiciary of the Egyptian Supreme Administrative Court has agreed that "The review of the Administrative judiciary on the administrative decisions, according to the constitution and law, is merely a legitimacy review to scrutinize these decisions based on law legitimacy and public interest. If these decisions are issued contrary to law or public good, the court will annul them." **In another ruling,** the court has added that the court is not granted the jurisdiction to annul the administrative decision if it appears unsuitable as long as it is legitimate. If the judge does otherwise, he/she replaces himself as the issuer of the decision which is not allowed by the constitution in order to respect the principle of separation of powers." Challenge No.275, Judicial Year 35, December 13, 1992. The Egyptian Supreme Administrative	ذهب قضاء المحكمة الإدارية العليا إلى أن " رقابة القضاء الإداري على القرارات الإدارية وفقًا لأحكام الدستور والقانون هي رقابة مشروعية تسلطها على القرارات المطعون فيها لتزنها بميزان القانون والمشروعية والمصلحة العامة، فتلغيها أو توقف تنفيذها لو تبين لها صدورها مخالفة للقانون بصفة عامة أو لانحرافها عن الغاية الوحيدة التي حددها الدستور والقانون لسلامة تصرفات الإدارة وقراراتها وهي تحقيق الصالح العام. **وقد أضافت المحكمة**، في حكم آخر، إنها لا تملك إلغاء القرار إن رأت عدم ملائمته حتى ولو في مداه دون قيام ما يمس مشروعيته إذ يحل في ذلك القاضي محل مُصدر القرار وهو ما لا يجيزه الدستور احترامًا لمبدأ الفصل بين السلطات.	22

	Court. *See* also Challenge No.488, Judicial Year 34, January 10, 1993, The Egyptian Supreme Administrative Court. In the same meaning, Challenge No.86537, Judicial Year 62, February 15, 2020.		
9 - 20	The Egyptian Supreme Administrative Court has stated that "Every legislative regulation is not intended for itself; conversely, it is merely a mechanism to reach the objectives of the legislation that mirror its legitimacy. If this regulation contradicts planned purposes, as it cannot be logically linked with its objectives, that will create arbitrary discrimination which is not constituted upon neutral grounds." Challenge No.10193, Judicial Year 55, January 5, 2013, the Egyptian Supreme Administrative Court. See also Challenge No. 14711, Judicial Year 62, January, 6,2018 the Unified Circle in the Egyptian Supreme Administrative Court. In the same meaning, see the opinion of the General Assembly of Legal Opinion and Legislation at the State Council, issued on December 20, 2000. No 662/2000.	ذهبت المحكمة الإدارية العليا إلى أن "كل تنظيم تشريعي لا يعد مقصود لذاته بل لتحقيق أغراض تعكس مشروعيته – فاذا كان التنظيم بما انطوى عليه من تميز مصادماً لهذه الأغراض، بحيث يستحيل منطقياً ربطه بها، فإن التمييز يكون تحكمياً ومن غير مستند الى أسس موضوعية." في ذات المعنى ذهبت دائرة توحيد المبادئ بالمحكمة الإدارية العليا إلى "أن كل تنظيم تشريعي لا يعتبر مقصودًا لذاته، بل لتحقيق أغراض بعينها، يعتبر هذا التنظيم ملبيًا لها، وتعكس مشروعية هذه الأغراض. وذهبت كذلك الجمعية العمومية لقسمي الفتوى والتشريع في فتوى لها إلى "أن كل تنظيم تشريعي لا يعتبر مقصودًا لذاته، بل لتحقيق أغراض بعينها يعتبر هذا التنظيم ملبيًا لها، وتعكس مشروعية هذه الأغراض إطارًا للمصلحة العامة التي يسعي المشرع لبلوغها، متخذًا من القواعد القانونية التي يقوم عليها هذا التنظيم سبيلاً لها.	23
8	The Egyptian Supreme Administrative Court has stated that "Originally, the administration, in all activities, aims to reach the public interest which gives it the jurisdiction to evaluate the suitability and proportionality of issuing the administrative decision, taking into consideration that the public interest varies in its levels and differs in its priorities. The administration, in all activities, must give every aspect of the public interest its significance, and not fully sacrifice one aspect in favor of another. In this case, the proportionality of the administration's work is amalgamated with its legitimacy. Therefore, to consider an administrative decision legitimate, it must be proportional, which is subject to the review of this	ذهبت المحكمة الإدارية العليا إلى أن " الأصل في نشاط الإدارة أنها تستهدف في كل أعمالها المصلحة العامة مما يجعلها تستقل بتقدير مناسبة وملاءمة إصدار القرار الإداري، وبمراعاة أن المصلحة العامة تتفاوت في مدارجها وتتباين في أولوياتها بما يتطلب مراعاة ذلك في تصرفاتها، بحيث تعطي لكل وجه من أوجه المصلحة العامة أهمية، ولا تضحي بوجه منها لتثبت وجها آخر.....، وفي هذه الحالة تختلط مناسبة عمل الإدارة بمشروعيته، ويلزم لكي يكون مشروعا أن يكون مناسبا وهو ما تنبسط عليه رقابة هذه المحكمة."	24

	court." Challenge No.12793, Judicial Year 49, February 4, 2009, the Egyptian Supreme Administrative Court. See also Challenge No.2585, Judicial Year 48, February 4, 2009, the Egyptian Supreme Administrative Court.		
8	The Egyptian Supreme Administrative Court has stated that "judicial review to both the decision's legitimacy and suitability does not mean that the judiciary usurps the administration's jurisdictions. Furthermore, it is not considered an assault on the principle of separation of powers." Challenge No.22886, Judicial Year 51, December 24, 2011, the Egyptian Supreme Administrative Court.	ذهبت المحكمة الإدارية العليا إلى أن "بسط رقابة القضاء الإداري على قرارات الإدارة، سواء من حيث مشروعيتها أو ملاءمتها، لا يعني حلولا محل جهة الإدارة في مباشرة الاختصاصات الموكولة لها، أو اعتداء على مبدأ الفصل بين السلطات."	25
9 24 33	The Egyptian Supreme Administrative Court has emphasized that "A blanket ban on the full-face veil in universities, schools, clubs, and other public places infringes both personal freedom and the constitution. While the competent administrative body has the authority to regulate that matter, this organization must be done only to the degree that gives the officials the power to verify from the veiled female, not completely preventing her from doing so." Challenge No. 1396, Judicial Year 44, April 26, 2006, Challenge No.3219, Judicial Year 48, June 9, 2007, and challenge No. 5765, Judicial year 56, January 20, 2010, the Egyptian Supreme Administrative Court.	ذهبت المحكمة الإدارية العليا إلى أن "حظر ارتداء النقاب بصورة مطلقة في المدارس أو الجامعات والأندية يمس الحرية الشخصية ويخالف الدستور، إذا كان للجهة الإدارية المختصة تنظيم ذلك، فيجب أن يتم ذلك بالقدر اللازم لتحقيق هذا التنظيم على نحو التحقق من شخصية المنتقبة وليس منعها."	26
10	The Egyptian Supreme Administrative Court has ruled that "the essence of the margin of appreciation necessitates prioritizing amongst various available substitutes to select the most appropriate means in order to reach the main purpose of the university education." *See* Challenge No.10787, Judicial Year 58, September 16, 2020, the Egyptian Administrative	ذهبت المحكمة الإدارية العليا إلى أن "تتمثل جوهر سلطته التقديرية في هذا الشأن في المفاضلة بين البدائل المطروحة، واختيار أنسبها بما يراه محققاً للغاية المنشودة من التعليم الجامعي."	27

	Court.		
12	The Egyptian Supreme Administrative Court has affirmed that "Public interests are ranked the same way the legislative tools are. Accordingly, preserving the security and safety of citizens, protecting social peace, and not allowing private property to lead to displacing and destroying the lives of thousands of citizens without an urgent need justifying that, undoubtedly constitutes the most urgent compelling national public interest. At this stage, protecting this public interest is superior to the mere elimination of encroachment on state-owned land, which is legitimate but is deemed substandard in comparison to the first interest. In these cases, the suitability of the administrative decision is amalgamated with its legitimacy. To this end, to consider an administrative decision legitimate, it must be suitable and proportional. Therefore, the judicial review of the decision's suitability and proportionality has not been deemed an interference from the judiciary into the discretionary power of the administration. This is because the administration must take into consideration while issuing decisions, the balance between various public interests which are disparate in their level, weight and importance, as required by the constitution and the law. If it does not abide by the aforementioned, the administrative judiciary, by virtue of its constitutional mandate, should oblige it to the legality and rule of law due to the sound interpretation of the constitution." Challenge No. 1875 and 1914, Judicial Year 3., March 9, 1991, and Challenge No. 6585, Judicial Year55, February 6, 2010, the Egyptian Supreme Administrative Court.	ذهبت المحكمة الإدارية العليا إلى أن "الصالح العام يندرج في الأهمية تدرجًا يشبه التدرج في مراتب الأدوات التشريعية المختلفة .....الحفاظ على أمن وسلامة المواطنين وحماية السلام الاجتماعي وعدم السماح بأن يترتب على الملكية الخاصة التشريد والتحطيم لحياة عشرات الآلاف من المواطنين دون ضرورة ملجئه تبرر ذلك وتشريدهم دون تدبير شئونهم وإشباع حاجاتهم والحفاظ على الأمن والاستقرار بينهم ولا شك أن هذه النتائج تشكل وجه المصلحة العامة القومية الأكثر إلحاحا وأخطر شأنا يتعين أن تكون في هذه المرحلة أولى بالرعاية من مجرد إزالة التعدي على أرض مملوكة للدولة وهو أمر مشروع ولكنه أدنى من أن يكون أحق بالتغليب ، إذ في هذه الحالات تختلط مناسبة العمل بمشروعيته ويلزم دائما ليكون مشروعا أن يكون ملائما ومناسبا وهو ما تنبسط عليه رقابة المشروعية من القضاء الإداري على نحو ما سلف بيانه وذلك دون أن يكون ذلك إقحام للقضاء في نطاق السلطة التقديرية للإدارة ، ذلك أن هذه الإدارة يتعين أن تصدر فى تصرفاتها بما يراعى الموازنة بين المصالح العامة المتفاوتة المدارج والوزن والأهمية على النحو الذى الزمها به الدستور والقانون واذا لم تلتزم بذلك كان للقضاء الإداري بحكم ولايته التي أناطها به الدستور أن يردها إلى مجال المشروعية وسيادة القانون بحسب صحيح التفسير السليم لأحكام الدستور."	28
21	The Egyptian Supreme Administrative Court has recently affirmed that "While the administration has the right to create specific rules and conditions, deemed appropriate, to the administration, for occupying public professions	ذهبت المحكمة الإدارية العليا إلى أن "من المستقر عليه في قضاء المحكمة الإدارية العليا أنه ولئن ساغ لجهة الإدارة أن تضع من الضوابط والشروط ما تراه مناسباً لشغل الوظائف الخاصة بها، بحسبانها	29

	by applicants such as stipulating a maximum age for the appointment in judicial jobs, these prerequisites must not infringe the Constitution or the law and not contravene the nature, logic, and fairness of things, and not derogate or adversely affect the legally basic foundations for equality in legal positions. To this end, setting a maximum age for the applicant to occupy the lowest judicial positions is a fundamental condition because of the reality, the nature of the legal and judicial work, and the necessity of the optimal investment of judges, given that the legal and judicial experience is formed over the years. Therefore, the judge's involvement in work at an early age allows the formation of these faculties in order to reach the utmost benefits." Challenge No.7760, Judicial Year 63, October 27, 2018, The Egyptian Supreme Administrative Court.	القوامة على المرافق العامة، ومن بين هذه الضوابط الحد الأقصى لسن التعيين بهذه الوظائف، إلا أن مناط القبول بهذه الشروط ألا تخالف الدستور والقانون، وألا تجافي طبائع الأشياء ومنطقها وعدلها، وألا تهدر أو تمس الأصول المقررة عدلاً مساواة للمراكز القانونية. وضع حد أقصى لسن المتقدم لشغل أدنى الوظائف القضائية هو شرط يفرضه واقع الحال وطبيعة العمل القانوني والقضائي وضرورة الاستثمار الأمثل للقاضي، باعتبار أن الملكات والخبرات القانونية والقضائية تتكون على مر السنين عاماً بعد عام، وأن انخراط القاضي في العمل في سن مبكرة يسمح بتكوين تلك الملكات وترسيخها والاستفادة منها أكبر قدر ممكن ومن الخبرات التراكمية التي تكونت على مدار السنين."	
49 50	The Egyptian Supreme Administrative Court has stated that " The Judiciary of this court has agreed upon that freedom of opinion and expression is deemed one of the public freedoms, and restricting it without a legitimate need divests personal freedom from some of its characteristics and undermines its correct structure. However, what has been mentioned entails that allowing freedom of opinion and expression has to be the original standard, and preventing them must be the exception." Nonetheless, that does not mean that the exercise of this right is free from any restriction, but rather, it has to be practiced within the framework of the law such as other rights. And, regulating such a right within the framework of the law without exaggeration or negligence by the legislator or competent authority is not considered a prohibition or repression of practicing such a right. This is mainly because there is no contradiction between freedom and regulation, but instead, regulating rights is what prepares the appropriate	ذهبت المحكمة الإدارية العليا إلى أن "حرية الرأي والتعبير تنخرط في مصاف الحريات العامة، وأن تقييدها دون مقتض مشروع إنما يجرد الحرية الشخصية من بعض خصائصها ويقوض صحيح بنيانها، ولازم ذلك أن يكون الأصل هو حرية الرأي والتعبير، والاستثناء هو المنع. إلا أن ذلك لا يعني أن تكون ممارسة هذا الحق بمنأى عن أي قيد، ذلك أن شأنه شأن أي حق من الحقوق العامة يجب ممارسته في حدود القانون، وأن قيام المشرع أو السلطة المختصة بتنظيم ذلك الحق في إطار القانون دون إفراط ولا تفريط، لا يعد منعاً أو صداً عن ممارسة هذا الحق، ذلك انه لا يوجد تعارض بين الحرية والتنظيم، بل أن التنظيم هو الذي يعطي المناخ الملائم لممارسة الحق، وبدون التنظيم تضحى الحرية فوضى لا يمكن للفرد أن يحيا في نطاقها.	30

	environment for exercising the right. And, without such regulation, freedom becomes chaos that the individual cannot live within. The court has further declared that "*ālājthād* is permissible in issues that do not collide with rulings that are absolutely certain with respect to their authenticity and meaning (*al-ahkam al-shar'iyya alqat'iyya fi thubutiha wa dalalatiha*). These issues are subject to *ālājthād* by researchers and thinkers to express their thoughts and opinions in understanding Quranic texts, particularly those that have multiple opinions and interpretations." *ālājthād* is permissible until the day of judgment provided that it is within the framework of the Islamic *shrīʿa*'s universal principles (*mabaduʾha al-kulliyya*) and does not exceed them. And, there are prerequisite conditions that should be fulfilled by anyone who wants to strive in interpreting the *Qur'anic* texts: Firstly, he must perfectly comprehend the *Qur'an*. Secondly, he has to accurately master the Arabic language rules to be able to realize the meaning of verses and their structures and properties. Thirdly, having considerable knowledge of the *Sunnah* of the Prophet, the second source of *shrīʿa* and the *Qur'an's* interpreter, is also a must to make *ālājthād*. Fourthly, he must know the principles of jurisprudence, the purposes of *shrīʿa* and the consensus of jurists and the time when such consensus takes place." *See* challenge No.24896, Judicial Year 56, February 23, 2019, The Egyptian Supreme Administrative Court.	وأضافت المحكمة أن "المسائل التي يجوز فيها الاجتهاد ولا تصطدم بأحكام قطعية الثبوت والدلالة، فيترك للباحثين وأصحاب الفكر والرأي التعبير عن أفكارهم وآرائهم واجتهادهم في فهم النصوص القرآنية وبخاصة تلك التي تتعدد فيها الآراء والتفاسير." وأضافت المحكمة كذلك أن "فالاجتهاد جائز شرعاً حتى تقوم الساعة، شريطة أن يكون دوماً واقعاً في إطار الأصول الكلية للشريعة بما لا يجاوزها، ومن الواجب فيمن يجتهد في تفسير النصوص القرآنية أن تتوافر فيه عدة شروط منها أن يكون عارفاً بكتاب الله، ملماً بقواعد اللغة العربية حتى يعرف معاني الآيات، وفهم مفرداتها ومركباتها وخواصها، وأن يكون لديه معرفة بالسنة النبوية، المصدر الثاني للشريعة، المفسرة للقرآن، وأن يكون ملماً بأصول الفقه ومقاصد الشريعة وعارفاً بمواقع الإجماع وأحوال عصره."	

62 63	The Egyptian Supreme Administrative Court has stated that "According to Islamic jurisprudence, the Islamic state throughout history includes non-Muslims irrespective of their religions, and it does not coerce other religions' followers to change what they believe in. However, revealing other religions' rituals in Egypt is exclusive to Christians and Jews according to the Islamic custom of the Egyptians. In addition, proving the real religious status in the ID is compulsory according to the Civil Status Law no 260/1960, and such proof does not contradict the Islamic rules even if this creed's rituals oppose Islamic *shrīʿa* such as Baha'ism. Moreover, proving people's real beliefs is necessary to differentiate between Muslims and others respecting their legal standings, and to preclude conflicts in their personal relationships which may occur as a result of proving unreal personal status. Conversely, the court refused to annul the administrative decision which erases the appellant's son's registration from the university because of two principal reasons as follows: First, the provisions of both the National and Military Service law and the Civil Status Law stipulate that students must possess the ID of both the military service and one of the civil services as a prerequisite in order to be able to continue at university. Therefore, officials do not have a margin of discretion to evaluate the student's circumstances and his justifications. Second, what makes the decision compulsory is that the student believes in *Baha'ism*. This is because one like him is not sufficiently qualified and honest to teach minors as he may attempt to stray those minors from their real religions. Therefore, there is no reason to study at the faculty of education since he will not be capable of working as a teacher. Notwithstanding, that does not deny his fundamental right to choose his preferable type of work insofar as his chosen work does not jeopardize the societal collective interest from his belief. Consequently, the decision is considered	وحيث إن المحكمة الإدارية العليا قد ذهبت إلى أن" من مدونات الفقه الإسلامي أن دار الإسلام قد وسعت غير المسلمين على اختلاف ما يدينون يحيون فيها كسائر الناس بغير أن يكره أحد منهم على أن يغير شيئاً مما يؤمن به ولكن لا يقر على الظهور من شعائر الأديان ألا ما يعترف به في حكومة الإسلام، ويقتصر ذلك في أعراف المسلمين بمصر على أهل الكتاب من اليهود والنصارى وحدهم.....فما أوجبه قانون الأحوال المدنية رقم 260 لسنة 1960 من استخراج بطاقة شخصية لكل مصري يبين فيها اسمه ودينه هو مما تفرضه أحكام الشريعة الإسلامية وليس يخالف عن أحكامها ذكر الدين في تلك البطاقة وان كان مما لا يعترف بإظهار مناسكه، كالبهائية ونحوها، بل يجب بيانه حتى تعرف حال صاحبه ولا يقع له من المراكز القانونية ما لا تتيحه له تلك العقيدة بين جماعة المسلمين. وعلى العكس من ذلك، رفضت المحكمة إلغاء قرار شطب نجل المدعى من الجامعة بناء على سببين وهم "ومن حيث أن القرار الصادر بشطب ابن الطاعن من كلية التربية قد استند إلى ما يفرضه قانون الخدمة العسكرية والوطنية من تقديم بطاقة تلك الخدمة كما يحظر قانون الأحوال المدنية بقاء طالب بالكلية في مثل سن ابن الطاعن إلا إذا كان حاصلاً على بطاقة شخصية، ولا سبيل لتلك الكلية إلى التحلل مما تفرضه أحكام تلك القوانين ولا يعفيها من الجزاء الجنائي أن هي تعدتها مما يعتذر به ابن الطاعن من عجزه عن الحصول على هاتين البطاقتين إذ لا يخولها القانون تقديراً تتقصى به ظروف الطالب وأعذاره في هذا الشأن. ويكون قرار الشطب قد صدر عن سبب صحيح. وكذلك يوجب هذا الشطب ما تبين من اعتناق الطالب البهائية فمثله لا يصلح أن يتولى شيئاً من تربية النشء، لأنه لا يؤمن أن ينفث فيمن يعلمه ما يزيغ قلبه عن الدين الحق أو ما يلبسه عليه، ويقتضي امتناع العمل التربوي أن يصرف الطالب عن التهيؤ له، ولا يأتي ذلك على أصل حقه في	31

	legitimate." Challenge No 1109, judicial year 25, January 29, 1983, the Egyptian Supreme Administrative Court.	اختيار العمل الذي يرتضيه فإن له سعة في سائر أبواب العمل التي لا يتهدد الجماعة فيها خطر من حالته العقيدية وبذلك تثبت مشروعية قرار الشطب من كلية التربية ولا يبقى وجه ينعاه الطاعن عليه."	
13	The court of the Administrative Judiciary has ruled that "In practicing its public authority, under no circumstances shall accept the administrative entity's act that removes or corrects the violating constructions if the benefit to the public interest as a result of implementing the removing or correcting the works is much less than the damage that affects the individuals' private interest particularly if the violation does not constitute a blatant clash with the public order, an aggression against the rules of the organization, or a violation of restrictions concerning the maximum high of buildings, and threatening the safety of citizens. If the administration persists to issue the contested decision without concerning the reality's dimensions and the harm resulting from the implementation of its decision, its behavior, in this regard, constitutes an abuse of power. It is equal to the court if the administration intends to harm others positively by deliberately seeking to harm them, or if it belittles the serious harm that will occur to individuals as a result of issuing the challenged decision. This is particularly if there are alternative means that can be used by the administration to not leave the violation without legal action such as imposing a large financial fine on the violator. Case No. 15822, Judicial Year 72, January 29, 2019, the Egyptian Court of the Administrative Judiciary.	ذهبت محكمة القضاء الإداري إلى أن "لا يجوز بحال من الأحوال التسليم للجهة الإدارية في سبيل استعمال سلطتها العامة في إزالة أو تصحيح أعمال البناء المخالفة أن يكون النفع العائد على المصلحة العامة جراء تنفيذ الإزالة أو تصحيح الأعمال أقل بكثير من الضرر الذي يصيب المصلحة الخاصة للأفراد ..... لا سيما أن المخالفة لا تشكل تصادماً صارخاً مع النظام العام أو عدواناً على خطوط التنظيم أو مخالفة لقيود الارتفاع وأن بقاءها لا يهدد سلامة المواطنين. مقتضى ذلك أنه إذا ما تنكبت الجهة الإدارية سواء السبيل في ذلك وامتطت متن الشطط بإصرارها على إصدار القرار المطعون فيه بإزالة أو تصحيح هذه الأعمال المخالفة دون مراعاة لأبعاد الواقع والضرر المترتب على تنفيذ قرارها فإن مسلكها في هذا الشأن يشكل إحدى صور التعسف في استخدام الحق والإساءة في استعمال السلطة، يستوى أن يكون نية الإضرار بالغير على نحو إيجابي بتعمد السعي إلى الإضرار به بإصدار القرار المطعون فيه أو على نحو سلبى بالاستهانة المقصودة بما يصيب الغير من ضرر فادح من استعمال الجهة الإدارية لحقها في إزالة أو تصحيح الأعمال المخالفة ..... لاسيما حال توفر الوسائل البديلة التي يمكن للجهة الإدارية من خلالها عدم ترك المخالفة دون اتخاذ إجراء قانوني حيالها كفرض غرامة مالية كبيرة على المخالف جزاء وفاقا لما اقترفه من مخالفة لقوانين البناء..	32
48 49	The Court of the Administrative Judiciary has stated that "It has become evident to the court that the book was devoid of anything that would constitute a contradiction with the foundations of	ذهبت محكمة القضاء الإداري إلى أن "ولما كان الثابت للمحكمة أن الكتاب قد خلا مما من شأنه أن يشكل مساساً بأصول العقيدة الإسلامية أو بثوابت الدين أو	33

	the Islamic belief or the pillars of the religion or inconsistent with the Holy *Qur'an* and the purified Sunnah. And, it has been confirmed to the court that the only way to object to such an intellectual work is through a similar intellectual act to grant every Muslim and anyone who has an opinion the right to comment, approve or reject such an intellectual act. The court added that "the intellectual level's declination or the weakness of the scientific approach of the book is not sufficient reason to prohibit the publication of the book to the community. Therefore, the Islamic Research Academy (*mjmʿ al-bḥūth al-ʾslāmīa*) should not have prevented the publication due to such a ground. It further added that "it must be taken into consideration that what *al-ʾzhr* declares regarding the examination of Islamic writings upon its authority to preserve, publicize the Islamic heritage, and carry the faithfulness of the Islamic message to all peoples of the earth must be respected. Nonetheless, this authority finds its limits and boundaries in adherence to the constitutional principles governing freedom of opinion and expression." Case No.23221, Judicial Year 62, March 30, 2010, the Egyptian Court of the Administrative Judiciary.	بالمعلوم منه بالضرورة أو التعارض مع القرآن الكريم والسنة النبوية المطهرة. وتأكد للمحكمة أن مثل هذا العمل الفكري لا سبيل إلى الاعتراض عليه إلا بعمل فكري مماثل يكون لكل مسلم وصاحب رأي أو اجتهاد أن يدلي بدلوه في الموافقة أو الرفض أو التعقيب. وقد أضافت المحكمة أن "ما كان لمجمع البحوث الإسلامية أن يتخذ من هبوط المستوى الفكري أو ضعف الإضافة العلمية للكتاب مسبباً في عدم التصريح بنشره للمجتمع." وأضافت كذلك "وأخذ بعين الاعتبار أن ما يبديه الأزهر في شأن فحص المؤلفات والمصنفات الإسلامية وإبداء الرأي فيها يجب أن يحترم باعتباره القوام على حفظ التراث الإسلامي ونشره وحمل أمانة الرسالة الإسلامية إلى كل شعوب الأرض، إلا أن ذلك يجد حدوده وتخومه في التزام المبادئ الدستورية الحاكمة لحرية الرأي والتعبير."	
61	The Egyptian Court of administrative Judiciary, On May 16, 1979, has stated that "The second article of the Egyptian Constitution confirms that Islam is the official religion of the state and the principles of Islamic *shrīʿa* are the principal source of legislation. Therefore, other constitutional principles such as the ones organizing the freedom of belief and nondiscrimination between citizens on religious or creed grounds must be read in light of the limitations that Islam admits, and must not contradict its rules. And whereas Baha'ism contradicts the Islamic religion and other recognized Ibrahimic religions, it must not assume an external appearance. Therefore, the plaintiff's	وحيث إن محكمة القضاء الإداري بجلسة 1979/5/16 ذهبت إلى أن "نص المادة الثانية من الدستور على أن دين الدولة الإسلام ومبادئ الشريعة الإسلامية المصدر الرئيسي للتشريع، وفى ضوء هذا الأصل يتعين النظر إلى أحكام الدستور الأخرى المتعلقة بحرية العقيدة وعدم التفرقة بين المواطنين بسبب الدين أو العقيدة، فتفسر هذه الأحكام في حدود ما يسمح به الإسلام وعلى نحو لا يتعارض مع مبادئه. وإذا كانت البهائية تناقض الديانات السماوية المعترف بها، فلا يجوز أن تأخذ مظهراً خارجياً ولا يكون لابن المدعى أن يصر على أن تصدر له بطاقة شخصية يذكر فيها أنه بهائي ويكون امتناع	34

	son has no right to persist to have ID encompassing Baha'ism as his religion. Consequently, the competent Civil Registry Department's negative decision to issue this prescribed ID is a valid administrative decision. And, whereas the National and Military Service law obliges the university to abstain from providing its service to students who reach 19 years except those holding a military ID, and the plaintiff's son does not present such paper, writing off the enrollment of the plaintiff's son is further considered as a valid administrative decision constituted upon reasonable grounds." Case No. 84, Judicial Year 31, May 16, 1979, the Egyptian Court of the Administrative Judiciary of Alexandria.	السجل المدني عن استخراج هذه البطاقة قراراً سليماً صحيحاً ولا سند لطلب إلغائه وإذ يحظر قانون الخدمة العسكرية والوطنية بقاء الطالب بعد بلوغه التاسعة عشرة من عمره في الجامعة ما لم يكن حاملاً بطاقة الخدمة العسكرية، وإذ لم يتقدم ابن المدعى بهذه البطاقة فإن قرار شطبه من كلية التربية يكون قائماً على سبب يبرره.	