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The Constitutionality of the Niqab Ban in Egypt: A Symbol of Egypt's Struggle for a Legal Identity

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The Constitutionality of the *Niqab* Ban in
Egypt: A Symbol of Egypt's Struggle for a
Legal Identity

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I. INTRODUCTION

Hundreds of thousands of Egyptians who had gathered in Tahrir Square in Cairo on February 11, 2011 erupted at the announcement: after nearly thirty years of rule, Egypt's President, Hosni Mubarak, would finally step down after eighteen days of protest.¹ The responses were dramatic: some protestors prayed, some cried, some danced, and some ululated—all undoubtedly felt a fervid pride in being Egyptian and in fighting for their cause.² And yet, in the aftermath of the 2011 Egyptian Revolution, many around the world saw a startling parallel to the 1979 street movement that ousted the Iranian Shah Reza Pahlavi from power.³ Many expressed fear over the influence of Islam in the Egyptian movement—reflecting an underlying dread that Egypt might become the next Iran.⁴ However, Egypt's history is rich with a multitude of influences including religion, but also secularism and democracy. The difficulty in balancing such factors, particularly the place of Islamic law in the country, is at the core of Egypt's struggle for its legal identity.

For purposes of this note, the Muslim veil, specifically the *niqab*, serves as an instructive metaphor for this struggle and facilitates a broader analysis of the future of Egypt's legal system.⁵ Two Egyptian courts, from separate branches of the Egyptian judicial system and exercising independent jurisdiction, have decided cases involving the legality of banning the *niqab*.⁶ These courts analyzed two key questions:

1. *Hosni Mubarak Resigns as President*, AL JAZEERA (Feb. 11, 2011), <http://english.aljazeera.net/news/middleeast/2011/02/2011121125158705862.html>; see also David D. Kirkpatrick, *Egypt Erupts in Jubilation as Mubarak Steps Down*, N.Y. TIMES (Feb. 11, 2011), <http://www.nytimes.com/2011/02/12/world/middleeast/12egypt.html>.
2. See *Hosni Mubarak Resigns as President*, *supra* note 1. A number of catalysts helped spark the Egyptian Revolution, including rampant unemployment, political oppression, and inflation. See, e.g., David D. Kirkpatrick & Michael Slackman, *Egyptian Youths Drive the Revolt Against Mubarak*, N.Y. TIMES (Jan. 26, 2011), <http://www.nytimes.com/2011/01/27/world/middleeast/27opposition.html?pagewanted=1&sq=Egypt,%20corruption,%20catalyst,%20revolution&st=cse&scp=4>. However, undoubtedly, young Egyptians, through the use of social media websites such as Facebook and Twitter, helped spread the message as a form of protest, particularly after the brutal murder of Khaled Said, a twenty-eight-year-old Egyptian businessman, by two police officers. See Jennifer Preston, *Movement Began With Outrage and a Facebook Page That Gave It an Outlet*, N.Y. TIMES (Feb. 5, 2011), <http://www.nytimes.com/2011/02/06/world/middleeast/06face.html?pagewanted=all>.
3. Fareed Zakaria, *Egypt's Real Parallel to Iran's Revolution*, WASH. POST (Feb. 7, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/06/AR2011020603398.html>.
4. *Id.*; see also Souad Mekhennet & Nicholas Kulish, *With Muslim Brotherhood Set to Join Egypt Protests, Religion's Role May Grow*, N.Y. TIMES (Jan. 27, 2011), <http://www.nytimes.com/2011/01/28/world/middleeast/28alexandria.html>.
5. For purposes of this note, I will focus mainly on one form of the Muslim veil: the *niqab*. The *niqab* refers to a veil covering the entirety of a woman's face, except her eyes. FADWA EL GUINDI, VEIL: MODESTY, PRIVACY AND RESISTANCE 105 (1999). For more information on other types of Muslim veils, see *infra* notes 77–80 and accompanying text.
6. The modern debate regarding the legality of banning certain forms of the Muslim veil has spread across Europe and the Middle East. Many view the Muslim veil as a “symbol of the repression of women, and . . . of extremist fundamentalism.” *France MPs' Report Backs Muslim Face Veil Ban*, BBC NEWS (Jan. 26, 2010, 16:05 GMT), <http://news.bbc.co.uk/2/hi/8480161.stm>. President Nicolas Sarkozy of France, for example, has announced:

first, whether a form of veiling is required under Islamic law, a claim made by countries such as Saudi Arabia and Iran;⁷ second, the constitutionality of bans on a woman's right to wear a *niqab*.⁸ These questions implicate a tension that exists within the Egyptian Constitution: Article 2 of the Egyptian Constitution declares that *Sharia* is the principal basis of law in the country.⁹ Yet the Constitution also includes provisions safeguarding the freedom of religion and individual rights.¹⁰ The two courts reached different, and inconsistent, conclusions about the appropriate role for *Sharia* within a secular constitutional system.¹¹

The Supreme Constitutional Court (SCC), the highest court in the country, held that veiling is not mandatory under Islam and that a ban on a woman's right to wear a *niqab* was permissible. Similarly, the High Administrative Court (HAC) held that, though veiling is not mandatory under Islamic law, it is permissible. However, in contrast to the SCC, the HAC found that a ban is in direct violation of other constitutional provisions relating to individual rights.¹² Thus, whereas the SCC based its holding on Islamic law and ended its analysis there without applying other constitutional provisions, the HAC turned to other constitutional provisions to make its determination on whether a *niqab* ban could be upheld.¹³

The problem of the burka [one form of Muslim veil] is not a religious problem, it's a problem of liberty and women's dignity. It's not a religious symbol, but a sign of subservience and debasement. I want to say solemnly, the burka is not welcome in France. In our country, we can't accept women prisoners behind a screen, cut off from all social life, deprived of all identity. That's not our idea of freedom.

Angelique Chrisafis, *Nicolas Sarkozy Says Islamic Veils Are Not Welcome in France*, THE GUARDIAN (June 22, 2009, 14:35 ET), <http://www.guardian.co.uk/world/2009/jun/22/islamic-veils-sarkozy-speech-france>. The French Senate voted almost unanimously for a bill, which President Nicolas Sarkozy's cabinet had approved, to make it illegal to wear clothes designed to hide the face in public. Lizzy Davies, *France: Senate Votes for Muslim Face Veil Ban*, THE GUARDIAN (Sept. 4 2010, 20:29 BST), <http://www.guardian.co.uk/world/2010/sep/14/france-senate-muslim-veil-ban>.

For an assessment of the various policy measures adopted in Europe, see Sevgi Kilic et al., *Introduction: The Veil: Debating Citizenship, Gender and Religious Diversity*, 15 Soc. POL. 397 (2008). For an analysis of the headscarf ban in France, see Ellen Wiles, *Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality*, 41 LAW & SOC'Y REV. 699 (2007).

7. See, e.g., Shahla Haeri, *Women, Religion, and Political Agency in Iran*, in CONTEMPORARY IRAN: ECONOMY, SOCIETY, POLITICS 125, 127 (Ali Gheissari ed., 2009); BARBARA FREYER STOWASSER, *WOMEN IN THE QUR'AN, TRADITIONS, AND INTERPRETATION* 131 (1994).
8. See *supra* note 5; see also *infra* notes 77–80 and accompanying text.
9. *Id.*
10. Article 40 of the Egyptian Constitution, for example, states: "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." CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 40, Sept. 11, 1971, as amended, May 22, 1980, May 25, 2005, March 26, 2007, translated in HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT app. A, at 283–320 (Kevin Boyle & Adel Omar Sherif eds., 1996).
11. See *infra* Part V.
12. See *infra* Part V.
13. See *infra* Part V.

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These inconsistent holdings raise important questions with respect to Egypt's legal future, namely: Will Egypt follow in the footsteps of Iran, ruled by a strict Islamic regime with *Sharia* as the sole basis for every legal decision? Or can it find a balance among Islam, its democratic roots, and secular forces? Though this note does not attempt to predict the political or legal future of Egypt, it does analyze the inconsistency in these legal holdings within the greater context of the Egyptian legal system. Specifically, it deconstructs the methodology used for the analysis of Islamic legal principles within Egypt, which has historically incorporated a democratic foundation, Islam, and secular European constitutional principles.¹⁴

Part II of this note asks: Just how Muslim is Egypt? And, historically, how is Egypt Muslim? This section surveys the development of Islam in the region and the extent of the religion's influence in the country. Part III describes Egypt's judicial system. Part IV examines Egypt's Article 2 jurisprudence as highlighted by litigation over *niqab* bans in the country. Part V analyzes the Egyptian courts' conflicting interpretations.¹⁵ Part VI describes how the varied interpretations of the Constitution within the Egyptian courts are representative of Egypt's larger struggle to formulate a unique legal identity distinct from other countries that also adhere to Islamic law. Part VII concludes.

II. HOW MUSLIM IS EGYPT? AND HOW IS EGYPT MUSLIM?

A. A Historical Analysis of Islam and Egypt

As Robert Fisk wrote, “[i]t’s a sobering thought that only al-Qa’ida and Iran and their most loathed enemies, the anti-Islamist Arab dictators, believed that religion lay behind the mass rebellion of pro-democracy protesters.”¹⁶ In fact, it is commonly understood that Egypt’s 2011 Revolution was not solely based on religion, but rather on a general, passionate desire for change throughout Egyptian society.¹⁷ Beyond the Revolution itself, Egypt’s history incorporates a variety of influences, with Islam being just one such influence. As many commentators have noted, it seems unlikely, based on Egypt’s rich history, that it is on the path to becoming an Islamic theocracy.¹⁸ Nevertheless, in the aftermath of the 2011 Revolution, the country is faced with assessing the appropriate role for *Sharia* within its legal system.

14. See *infra* Part VI.

15. Translations from Arabic to English of both the 1989 and 2007 HAC case are the author’s own. All translations are on file with the *New York Law School Law Review*.

16. Robert Fisk, *These Are Secular Popular Revolts—Yet Everyone is Blaming Religion*, INDEPENDENT (Feb. 20, 2011), <http://www.independent.co.uk/opinion/commentators/fisk/robert-fisk-these-are-secular-popular-revolts-ndash-yet-everyone-is-blaming-religion-2220134.html>.

17. See, e.g., *id.*

18. *Id.* In fact, according to Professor Kristin Stilt, the Muslim Brotherhood (the most powerful religious group in the country) has endorsed not just the Constitution, but the Supreme Constitutional Court, and even Article 2. Kristin Stilt, “*Islam is the Solution*”: *Constitutional Visions of the Egyptian Muslim Brotherhood*, 46 TEX. INT’L L.J. 73, 87–91 (2010). For a description of the Supreme Constitutional Court and its role, see *infra* Part III.A.

Discussions with respect to the place of religious law are not unusual in a post-colonial country,¹⁹ and it is a question that remains in the Egyptian legal and political discourse to this day. As Professor Lama Abu-Odeh has argued, “the main question that has occupied the Egyptian elite over the past century is whether it is acceptable for laws to be derived from Islam or from secular, European sources . . . in Egypt, a country that identifies itself as Muslim.”²⁰ The struggle to find an appropriate answer with respect to the legality of *niqab* bans in Egypt is reflective of Egypt’s struggle with its own identity: namely, the country’s attempt to balance countervailing forces of religiousness, secularism, and democracy.

The contemporary roots of this struggle can be traced to the formation of the Muslim Brotherhood in Egypt in 1928. Founded by a schoolteacher named Hasan al-Banna, the organization initially focused on supporting the Muslim community and “improving their levels of morality and religiosity.”²¹ It continued to grow, pressing political activity as a major focus of its agenda.²² In July 1952, Jamal Abdul Nasser overthrew the Egyptian monarchy, which had been pursuing a Western-oriented “path of development,” including legal developments.²³ Nasser, a dynamic leader, was determined to create a “Pan-Arab” nation—a unique identity rooted in the Middle East’s Arab-Islamic heritage that would separate the Arab world from the European colonizers. Nasser’s message was still pro-secular at its core—causing a friction with the Brotherhood that would lead to an assassination attempt by the group in 1954.²⁴ Under Nasser’s rule, *fatwas*, or legal opinions, were obtained by Egypt’s state-controlled al-Azhar University, the country’s foremost religious university.²⁵ Such *fatwas* were used by the government to “legitimate and promote the Islamic character of Arab socialism.”²⁶ The government’s struggle to control al-Azhar University exemplifies its attempts to control the rise of Islam among the population, its attempt to control the Islamists as a party, and its struggle to retain legitimacy.²⁷ Professor Tamir Moustafa notes that the government’s dominance over al-Azhar would ultimately prove not to be in the interests of the state, in that it led

19. From 1882 to 1914, Egypt was a British colony. WILLIAM L. CLEVELAND, *A HISTORY OF THE MODERN MIDDLE EAST* 103–09 (3d ed. 2004).

20. Lama Abu-Odeh, *Egyptian Feminism: Trapped in the Identity Debate*, 16 *YALE J.L. & FEMINISM* 145, 149 (2004).

21. Stilt, *supra* note 18, at 76–77.

22. *Id.*

23. JOHN L. ESPOSITO, *ISLAM: THE STRAIGHT PATH* 169–70 (3d ed. 2005).

24. *Id.* at 170.

25. *Id.*

26. *Id.*

27. See generally Tamir Moustafa, *Conflict and Cooperation Between the State and Religious Institutions in Contemporary Egypt*, 32 *INT’L J. MIDDLE EAST STUD.* 3 (2000).

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to the gradual growth of radical Islam in Egypt.²⁸ Nasser responded to the growth of the Muslim Brotherhood by arresting thousands of its members.²⁹

The slow demise of Pan-Arabism began with the Arab defeat in the 1967 Arab-Israeli War, which heralded in a new era in Egyptian politics.³⁰ Nasser died of a heart attack in September 1970, leading to the appointment of Vice President Anwar Sadat as President. Sadat followed Nasser's method of secular rule,³¹ though he initially spoke in favor of the Muslim Brotherhood, partly as a means of separating himself from Nasser.³² However, by 1979, the Brotherhood had turned against Sadat after his agreement with Israel at the Camp David Accords.³³ Islamic organizations grew more vocal and critical of Sadat and his policies,³⁴ and groups such as Muhammad's Youth, the Army of God, and the Jihad Organization staged armed attacks in the hopes of overthrowing Sadat's government.³⁵ On October 6, 1981, Anwar Sadat was assassinated by one such group, Tanzim al-Jihad,³⁶ which ultimately led to the rise of Hosni Mubarak, who had served as Vice President under Sadat.³⁷ As President, Mubarak subsequently declared the country to be in a state of emergency, a declaration that remained in effect during the thirty years that he controlled the country.³⁸ During Mubarak's rule, the Muslim Brotherhood continued to grow and became a powerful political force, though not an official political party.³⁹ In 1995, Mubarak responded to this growth by arresting hundreds of its members and sending them to be tried in military—rather than civil—courts.⁴⁰ Mubarak ruled the country until the 2011 Revolution.⁴¹

With the end of Mubarak's reign, one of the primary questions left to the transitional government was the place of *Sharia* in Egypt.⁴² Immediately after Egypt's

28. *Id.* at 17.

29. Stilt, *supra* note 18, at 77.

30. ESPOSITO, *supra* note 23, at 170.

31. *Id.* at 171; *see also* BEVERLY MILTON-EDWARDS, *CONTEMPORARY POLITICS IN THE MIDDLE EAST* 89 (2000).

32. Stilt, *supra* note 18, at 77.

33. *Id.*

34. MILTON-EDWARDS, *supra* note 31, at 116.

35. ESPOSITO, *supra* note 23, at 170–72.

36. *Id.* at 173.

37. *Id.*

38. *See* Sadiq Reza, *Endless Emergency: The Case of Egypt*, 10 *NEW CRIM. L. REV.* 532 (2007).

39. Stilt, *supra* note 18, at 79.

40. *Id.*

41. *See supra* note 1 and accompanying text. For a detailed look at the Muslim Brotherhood's history in Egypt, *see* Stilt, *supra* note 18.

42. *See* Nathan J. Brown & Kristin Stilt, *A Haphazard Constitutional Compromise*, *CARNEGIE ENDOWMENT FOR INT'L PEACE* (Apr. 11, 2011), <http://www.carnegieendowment.org/2011/04/11/haphazard-constitutional-compromise/2q1>. For an interesting perspective on the future of Islam in Egypt, *see Islam in Egypt: Fear*

Supreme Council of the Armed Forces (SCAF) took over power, it established a committee charged with drafting a new constitution.⁴³ On March 30, 2011, SCAF declared via Facebook that the 1971 Constitution was repealed and replaced by a Constitutional Declaration that included many of the same provisions.⁴⁴

B. Egypt's Article 2 Jurisprudence

After the Egyptian Constitution was adopted in 1971, a debate erupted about how to incorporate *Sharia* into the Constitution. In 1980, the government acquiesced to pressure from those who wanted to “Islamize” the Constitution by codifying *Sharia* as the primary source of legislation in the country.⁴⁵ Article 2 was amended, replacing the phrase “*Sharia* is a principal source of legislation” with the phrase “*Sharia* is the principal source of legislation.”⁴⁶ Thus, Article 2 of the Egyptian Constitution instituted *Sharia*-based jurisprudence as the primary legal foundation within the country.⁴⁷ In 1985, five years after the amendment, the SCC defined the breadth and meaning of Article 2 within Egyptian law, holding that *Sharia* principles were to be a check on the state’s legislative power.⁴⁸ The 2011 Declaration leaves Article 2 unchanged, allowing *Sharia* to remain as the principal source of law in the country.⁴⁹ Therefore, it is presumed that the SCC will now begin hearing claims under the Constitutional Declaration rather than the Constitution.⁵⁰

III. EGYPT’S JUDICIAL SYSTEM

To appreciate Egypt’s struggle for its legal identity, one must understand how the Egyptian judicial system functions. As Figure 1 illustrates, the Egyptian judicial system can be represented as a “pyramidal” hierarchy. The highest court is the

and Fantasy, GUARDIAN (Feb. 5, 2011), <http://www.guardian.co.uk/commentisfree/2011/feb/05/islam-in-egypt-fear-and-fantasy>.

43. *Id.*

44. *Id.*

45. *The Constitution of the Arabic Republic of Egypt*, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 1, 3 (Rudiger Wolfrum & Rainer Grote eds., 2007).

46. *Id.* at 5 (emphasis added). This change is reflected in Arabic in the word “masdr,” or root: “al-shari’a al-islammiya masdarun ra’isiyan lil-tashri’u,” was changed to “al-shar’a al-Islammiya al-masdaru al-ra’isiyu lil-tashri.” *Id.*

47. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT Sept. 11, 1971, art. 2, as amended, May 22, 1980, May 25, 2005, March 26, 2007. For an English translation of the Egyptian Constitution, see *The Constitution of the Arab Republic of Egypt*, *supra* note 45.

48. Shannon M. Roesler, *Modern Legal Reform in Egypt: Shifting Claims to Legal Authority*, 14 CARDOZO J. INT’L & COMP. L. 393, 418 (2006).

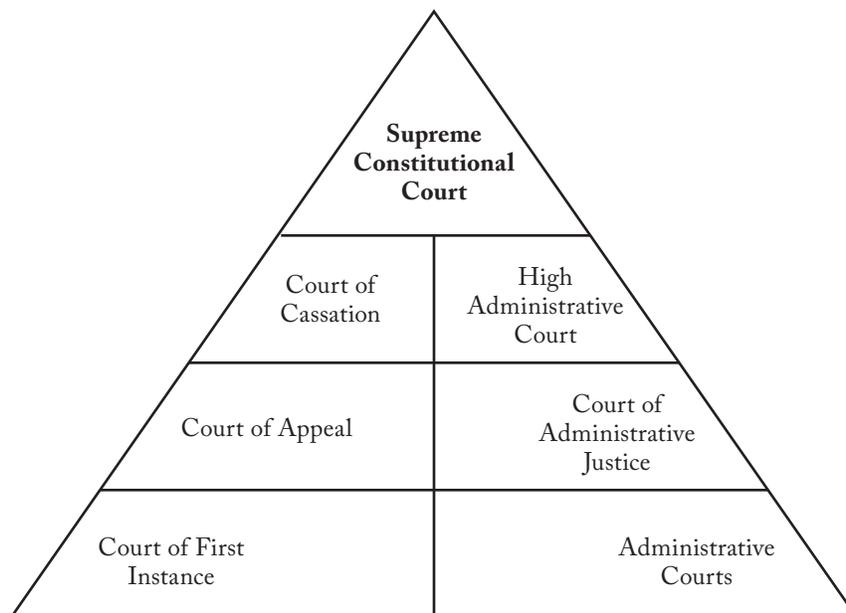
49. *Islam Likely to Stay Egypt’s State Religion: Sources*, AL-ARABIYA (Feb. 17, 2011), <http://www.alarabiya.net/articles/2011/02/17/138073.html>.

50. See Brown & Stilt, *supra* note 42.

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Supreme Constitutional Court.⁵¹ The Court of Cassation is the highest court for what is considered “ordinary justice”—the majority of judicial activity in Egypt—and handles civil, commercial, and criminal matters. The High Administrative Court has the final word on issues of administrative law and is the highest branch of the State Council.⁵²

Figure 1⁵³



As a general matter, the SCC is said to settle “conflicts on competence between judicial bodies belonging to the different orders of jurisdiction.”⁵⁴ Egypt is therefore comprised of what might be considered two independent judicial bodies: the “ordinary” courts of civil and criminal jurisdiction, and the State Council, which deals with administrative disputes over which the High Administrative Court presides.⁵⁵

51. Baudouin Dupret & Nathalie Bernard-Maugiron, *Introduction: A General Presentation of Law and Judicial Bodies*, in EGYPT AND ITS LAWS xxxvi (Baudouin Dupret & Nathalie Bernard-Maugiron eds., 2002) [hereinafter EGYPT AND ITS LAWS]; W. Mahmoud, *Civil and Criminal Justice*, in EGYPT AND ITS LAWS, *supra*, at 135.

52. Dupret & Bernard-Maugiron, *supra* note 51, at xxviii. The High Administrative Court is also known in some scholarship as the Supreme Administrative Court. *See, e.g., id.*

53. *See id.* at xxxvi.

54. *Id.* at xxviii.

55. M. Randy, *Administrative Justice*, in EGYPT AND ITS LAWS, *supra* note 51, at 248.

A. The Supreme Constitutional Court

The SCC, established by the 1971 Constitution, is the highest court in Egypt.⁵⁶ Its decisions are legally binding on all lower courts and it is considered an “independent and autonomous judicial body.”⁵⁷ The SCC stands uniquely outside of the regular court system and is considered a “special court.”⁵⁸ According to the 1971 Constitution, the SCC has the exclusive authority to: (1) issue binding interpretations of existing legislation should there be inconsistent interpretation by the lower courts; (2) resolve jurisdictional conflicts between judicial bodies, typically from the civil and administrative branches; and (3) perform judicial review, through constitutional interpretation, of existing legislation.⁵⁹ This authority includes the right to assess legislation for conformity with Islamic law.⁶⁰ With respect to the third role of the SCC, Article 29 of Law 48/1979 empowers the SCC to perform judicial review only when it receives cases transferred from the lower courts.⁶¹ This can occur in two ways: through the litigants themselves or by a judge from “courts of merit.”⁶² If the judge finds the constitutionality of a particular law as applied questionable, the judge can suspend the proceeding and bring a petition for transfer to the SCC.⁶³ Upon making a determination on the constitutionality of the law, the case is returned to the lower court, proceeding with the clarification provided by the SCC.⁶⁴

B. The High Administrative Court

One unique aspect of Egyptian law, which stems from the influence of the French legal system, is the existence of administrative courts that are separate from the civil and criminal courts.⁶⁵ The State Council, created in 1946, has the power to

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56. A. Sherif, *Constitutional Adjudication, in EGYPT AND ITS LAWS*, *supra* note 51, at 326.
57. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT Sept. 11, 1971, art. 174, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007. It is known in Arabic as “al-mahkamat al-dusturiyya al-‘ulya.” See Dupret & Bernard-Maugiron, *supra* note 51, at xxxiii.
58. Clark Benner Lombardi, *Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State*, 37 COLUM. J. TRANSNAT’L L. 81, 84 (1998).
59. Dupret & Bernard-Maugiron, *supra* note 51; Tamir Moustafa, *Law Versus the State: The Judicialization of Politics in Egypt*, 28 LAW & SOC. INQUIRY 883, 894 (2003).
60. For an interesting history on Egypt’s struggle to interpret Article 2, see Clark Lombardi, *supra* note 58.
61. Moustafa, *supra* note 59, at 894.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at xxxi. Interestingly, the Egyptian legal system is based on the French legal system, which also is facing similar dilemmas over the legality of bans on various forms of religious expression. For a critical analysis of France’s ban on religious symbols, see Ruti Teitel, *Through the Veil, Darkly: Why France’s Ban on the Wearing of Religious Symbols Is Even More Pernicious Than It Appears*, FINDLAW.COM (Feb. 16, 2004), http://writ.news.findlaw.com/commentary/20040216_teitel.html; see also Ruti Teitel, *The Veil Wars*, PROJECT SYNDICATE (June 20, 2001), <http://www.project-syndicate.org/commentary/teitel1/English>.

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control administrative action regarding laws and regulations.⁶⁶ The High Administrative Court, run by the President of the State Council, is the highest court in the realm of administrative law.⁶⁷ There are a limited number of ways that the HAC can hear a case.⁶⁸ The HAC has exclusive jurisdiction over matters related to administrative disputes.⁶⁹

IV. THE HISTORY OF THE MUSLIM VEIL

Much of the discussion regarding veiling practices in Egypt stems from the debate among scholars of *Sharia* over whether veiling is a requirement in Islam. A brief discussion of the history of veiling, and Islamic legal doctrine, is thus helpful to understand the Egyptian courts' legal analyses.

Discussions regarding Islamic veiling practices often involve what have been described as “polemical overtones” that stress “Islam’s incongruity with the freedom of women.”⁷⁰ Those countries that allow or enforce veiling are considered to be opposed to Western democratic values and freedoms.⁷¹ In order to understand this debate, we must look at where the practice originated, as well as its foundation in Islam.

In modern times, veiling seems inextricably tied to the Islamic world. However, veiling did not originate with Muslims.⁷² In ancient Mesopotamia, for example, female veiling was a symbol of social class and respectability.⁷³ Furthermore, there is biblical evidence that women veiled during the time of the Old Testament.⁷⁴ Early in

66. Dupret & Bernard-Maugiron, *supra* note 51, at xxxi.

67. *Id.* The order of authority is: High Administrative Court, Court of Administrative Justice, the administrative courts, the disciplinary courts, and the State Commissioners' Body. *Id.* at 190.

68. These include: “(1) if the decision contested is built on a breach of the law, or on an erroneous implementation or interpretation of the law; (2) if the judgment is invalid or if the invalidity of a procedural measure bears on the judgment; (3) if the decision is at variance with a precedent judgment having the force of res judicata, whether or not that precedent is mentioned in the plea.” M. Rady, *supra* note 55, at 254.

69. *Id.* at 248–49.

70. Sevgi Kilic et al., *supra* note 6, at 403.

71. Dima Dabbous-Sensenig, *Speaking in His Name? Gender, Language and Religion in the Arab Media*, in *SHARI'A AS DISCOURSE: LEGAL TRADITIONS AND THE ENCOUNTER WITH EUROPE* 179, 179 (Jorgen S. Nielsen & Lisbet Christoffersen eds., 2010). An example of a similar identity struggle can be found in Turkey. See Ayse Saktanber & Gül Çorbacioğlu, *Veiling and Headscarf—Skepticism in Turkey*, 15 *Soc. POL.* 514, 517–18 (2008) (“The conflict relating to this accommodation of Islam and secularism revealed itself best in the headscarf issue to the extent that it created a fault line between the ideals of democratization and westernization. In the Turkish context, the former promised the entailment of the individual freedom of expression, whereas the latter gave priority to the secularization of state and society and put the secularization of public sphere before anything else.”).

72. Fadwa El Guindi & Sherifa Zuhur, *Hijab*, *THE OXFORD ENCYCLOPEDIA OF THE ISLAMIC WORLD*, http://www.oxfordislamicstudies.com/Public/book_oeiw.html (last visited Oct. 14, 2011).

73. *Id.*

74. Such biblical evidence can be found in *Genesis* 24:65–66, “And Rebekah lifted up her eyes and when she saw Isaac . . . she took her veil and covered herself”; in *Isaiah* 3:18–23, “In that day the Lord will take away the finery of the anklets . . . the headdresses . . . and the veils”; and in 1 *Corinthians* 11:3–7. See FADWA EL GUINDI, *supra* note 5.

Islamic history, the veil was a sign of an upper-class lifestyle, as upper-class urban women veiled themselves in order to participate in society and explore town comfortably.⁷⁵ Village and rural women initially did not veil because it interfered with work in the fields.⁷⁶

In Arabic, different terms are used for the various styles, or options, of veiling, with each option dependent upon the region and the culture.⁷⁷ The *hijab*, the most commonly recognized, is a scarf that covers the head and neck but does not cover the face.⁷⁸ The *niqab* refers to a veil covering the entirety of a woman's face, except her eyes.⁷⁹ The *burqa* is a veil that covers the entire body, including a woman's face, eyes, and hands.⁸⁰

A. Sources of Islamic Law

An admittedly brief discussion of the sources of Islamic law is necessary to further understand interpretations and analyses by the Egyptian courts with respect to the legality of *niqab* bans.

The *fiqh* is “the collection of the legal rules [*ahkam*] concerned with the acts and words of man, conveyed by texts for those as to which texts appear, or discovered from other legal proofs for those which texts do not appear.”⁸¹ *Usul al-fiqh*, which translates from Arabic to “the root of *fiqh*,” is the study of legal methodology in Islamic law.⁸² Thus, *usul al-fiqh* deals with the methods by which legal rules are deduced from the sources of law and the practice of *ijtihad*,⁸³ best defined as “the total expenditure of effort made by a jurist in order to infer, with a degree of probability the rules of *Shari'a* from their detailed evidence in the sources.”⁸⁴

Islamic law derives from four primary sources. Two of them, the *Quran* and the *Sunna*, provide the textual bases for *Sharia*.⁸⁵ The *Quran*, the book containing the speech of God revealed to the Prophet Muhammad, is the foundational source “that

75. ESPOSITO, *supra* note 23, at 99.

76. *Id.*

77. The “hijab” is known in the contemporary Islamic world as both the veil that covers just the head of a woman, as well as to a particular style of dress considered “modest” and “Islamic.” El Guindi & Zuhur, *supra* note 72. These Arabic terms include: “burqu” (or burqa), “abāyah,” “tarhah,” “burnus,” “jilbāb,” and “milāyah.” There are also overgarments such as the “abāyah” commonly known for use in Saudi Arabia and Iraq. *Id.*

78. *The Islamic Veil across Europe*, BBC NEWS (June 15, 2010), <http://news.bbc.co.uk/2/hi/5414098.stm>.

79. FADWA EL GUINDI, *supra* note 5, at 105.

80. HADIA MUBARAK, *Burqa*, THE OXFORD ENCYCLOPEDIA OF THE ISLAMIC WORLD, http://www.oxfordislamicstudies.com/Public/book_oeiw.html (last visited Oct. 20, 2011).

81. ‘ABD AL-WAHHĀB KHALLAF, *ILM USŪL AL-FIQH* 59 (Frank E. Vogel) (1942).

82. MOHAMMAD HASHIM KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* 1 (1989).

83. *Id.*

84. KAMALI, *supra* note 82, at 469.

85. See, e.g., Asifa Quraishi, *Who Says Shari'a Demands the Stoning of Women? A Description of Islamic Law and Constitutionalism*, 1 BERKELEY J. MIDDLE E. & ISLAMIC L. 163 (2008); see also KAMALI, *supra* note 82, at 1.

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guides the spiritual, political, moral, and social aspects” of Islamic life.⁸⁶ It is the “Supreme Law” of the Islamic world. *Sunna* as a general term can mean a “course of conduct.”⁸⁷ In the context of Islamic law specifically, the *Sunna* is “all that is narrated from the Prophet, his acts, his sayings and whatever he has tacitly approved, plus all the reports, which describe his physical attributes and character.”⁸⁸ Early Muslim scholars elaborated on the *Sunna* of the Prophet by attempting to complete the picture of the Prophet’s life on the basis of the *hadith*, or “accounts of his words and deeds transmitted by his companions and others from the first generation of Muslims.”⁸⁹ The two other sources of Islamic law are *Ijma*, or consensus, and *Qiyas*, or analogical reasoning.⁹⁰

B. Basis for Veiling under Sharia

The *Quran* does not offer a clear doctrinal answer to whether veiling is a requirement under Islam. The most cited reference to veiling in Islam is the Quranic verse *Surat al-Noor*:

And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw their veils over their bosoms and not display their beauty except to their husbands, their fathers, their husband’s fathers, their sons, their husband’s sons, their brothers or their brothers’ sons, or their sisters’ sons or their women⁹¹

This text has been interpreted to require modesty,⁹² and has therefore been cited by a number of *ulama*, or Muslim scholars, as the basis for requiring some type of veiling, whether in the form of the *hijab* or the *niqab*.⁹³

Other verses within the *Quran* have been interpreted to imply that a woman should dress modestly and remain secluded from all but close relatives. *Surat al-Ahzab*, for example, dictates limitations for women: “And stay in your houses. Do not adorn

86. Azizah Y. al-Hibri, *Islamic and American Constitutional Law: Borrowing Possibilities or a History of Borrowing?*, 1 U. PA. J. CONST. L. 492, 503 (1999).

87. KAMALI, *supra* note 82, at 58.

88. *Id.*

89. Azim A. Nanji, *Sunnab*, THE OXFORD ENCYCLOPEDIA OF THE ISLAMIC WORLD, http://www.oxfordislamicstudies.com/Public/book_oeiw.html (last visited Oct. 20, 2011).

90. KAMALI, *supra* note 82, at 228, 264.

91. Quran 24:30, 24:31, *translated in* ‘ABDULLAH YÜSUF ‘ALİ, THE MEANING OF THE HOLY QUR’AN, at 873–84 (11th ed. 2004).

92. SUSAN A. SPECTORSKY, WOMEN IN CLASSICAL ISLAMIC LAW: A SURVEY OF THE SOURCES 50 (2010).

93. *See id.* It is important to note that there are limitations on men as well: “Say to the believing men that they should lower their gaze and guard their modesty: that will make for greater purity for them: And Allah is well acquainted with all that they do.” Quran 24:30, *translated in* ‘ABDULLAH YÜSUF ‘ALİ, *supra* note 91, at 873.

yourselves with the adornment of the Time of Ignorance.”⁹⁴ One of the most controversial lines of the *Quran* has often been interpreted to require a form of the veil: “And when you ask of them (the wives of the Prophet) anything, ask it of them from behind a curtain. That is purer for your hearts and their hearts.”⁹⁵ However, it is important to take such a verse in context so as to get a better understanding of its application. Here, the text describes a wedding banquet celebrating the marriage of the Prophet to one of his wives.⁹⁶

Much like the *Quran*, the *Sunna* does not offer a clear answer as to whether veiling is required.⁹⁷ However, *hadith* do exist that imply a “requirement” for women to veil.⁹⁸ According to Sherifa Zuhur, the works of Imam Al-Bukhari, one of the most famous Sunni *hadith* scholars, reveal that veiling practices stemmed from “themes of ritual purification and the idea that the believer must separate the realm of prayer and the contemplative portion of his consciousness from the sexual distractions of women.”⁹⁹ One particular *hadith* declares: “I know (about) the Hijab (the order of veiling of women) more than anybody else . . . Thereupon the Prophet hung a curtain between me and him[,] and the Verse regarding the *order for* . . . Hijab was revealed.”¹⁰⁰ Other *hadith* reference a story in which the Prophet Muhammad explained that a woman who reaches puberty should cover her entire body with the exception of her hands and her face.¹⁰¹

V. THE STRUGGLE TO DEFINE EGYPT: CONFLICTING RULINGS ON LAWS BANNING THE NIQAB

Inconsistent judicial rulings on laws banning the *niqab* suggest Egyptian courts apply inconsistent approaches to the methodology of interpreting Islamic law in the constitutional system of Egypt. The broader implications concern not only what

94. *Quran* 33:33, translated in SPECTORSKY, *supra* note 92, at 45; see also ‘ABDULLAH YÜSUF ‘ALİ, *supra* note 91, at 1066.

95. *Quran* 33:53, translated in SPECTORSKY, *supra* note 92, at 45.

96. SPECTORSKY, *supra* note 92, at 47.

97. For an interesting debate on this point, see the arguments posed by both Islamic law experts in Freeman v. Dep’t of Highway Safety & Motor Vehicles, 924 So. 2d 48 (Fla. Dist. Ct. App. 2006).

98. Though there are a number of *hadith* on the subject of veiling, I have chosen to limit my inclusion of them. For many other *hadith* on this matter, see Dorthe Bramsen, *Divine Law and Human Understanding—The Idea of Shari’a in Saudi Arabia*, in SHARI’A AS DISCOURSE: LEGAL TRADITIONS AND THE ENCOUNTER WITH EUROPE 172–74 (Jorgen S. Nielsen & Lisbet Christoffersen eds., 2010).

99. SHERIFA ZUHUR, REVEALING REVEILING: ISLAMIST GENDER IDEOLOGY IN CONTEMPORARY EGYPT 5 (1992); see also Jonathan A. C. BROWN, *Muhammad ibn Ismā’il ibn Ibrāhīm ibn al-Mughīra al-Bukhārī*, OXFORD ISLAMIC STUDIES ONLINE, http://www.oxfordislamicstudies.com/article/opr/t236/e1139?_hi=0%29&_pos=4#match (last visited Oct. 20, 2011).

100. Univ. of S. Cal. Compendium of Muslim Texts, Partial Translation of Sahih Bukhari Volume 7, Book 65, No. 375 (Ahmad Hassan trans., MSU) (emphasis added), available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/abudawud>. See Univ. of S. Cal. Compendium of Muslim Texts, Partial Translation of Sahih Muslim, Book 008, Number 3334: The Book of Marriage (Kitab Al-Nikah).

101. JAMILA HUSSAIN, ISLAM ITS LAW AND SOCIETY 67 (4th ed. 2004).

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methodology will prevail but also what the true source of legal authority is in Egypt. Such issues are central to understanding the role of Islamic law today.

The SCC has chosen to interpret Article 2 through a two-step methodology.¹⁰² Such a methodology offers an approach for Egyptian courts when evaluating a law for its conformance to the fundamental principles of Islamic law.¹⁰³ This methodology is as follows: the SCC first identifies the fundamental principles of *Sharia*.¹⁰⁴ Second, the SCC determines whether the law is in violation of such fundamental principles.¹⁰⁵ The two-step analysis is helpful in understanding the SCC's methodology with respect to questions of Islamic law, and is also helpful in the comparative analysis of the HAC cases on *niqab*-related issues. It is important, however, to note that each case involves unique factual circumstances, though each case analyzes the overarching issue of banning the *niqab* on school or university grounds.

A. 1996 SCC Veil Case

In 1996, the SCC ruled on an administrative order from the Ministry of Education prohibiting elementary-school girls from wearing the *niqab*, finding that the ban did not violate *Sharia* and was therefore constitutional.¹⁰⁶ This administrative order, issued in 1994, forbade school girls from wearing the *niqab* and required them to obtain parental permission to wear the *hijab*.¹⁰⁷ The government argued that the order was necessary to establish control in the classroom, while ensuring that young girls were not being pressured into wearing the *hijab*.¹⁰⁸ The father of a *niqab*-wearing female student filed an Article 2 claim against the Minister of Education, the Director of Education within the directorate of Alexandria, and the principal of his daughter's school, alleging that the order violated the right to freedom of religion found in Article 46 of the Egyptian Constitution.¹⁰⁹

As a threshold matter, the SCC analyzed whether it had jurisdiction to hear the issue based on the Islamic legal foundation of the case. The SCC concluded that Article 2 of the Constitution gives the court

102. See Lombardi, *supra* note 58, at 99; Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT'L L. REV. 379, 415–25 (2006); Stilt, *supra* note 18, at 81–82.

103. Lombardi, *supra* note 58, at 99.

104. *Id.*

105. *Id.*

106. Nathan J. Brown & Clark B. Lombardi, *Translation: The Supreme Constitutional Court of Egypt on Islamic Law, Veiling and Civil Rights: An Annotated Translation of Supreme Constitutional Court of Egypt Case No. 8 of Judicial Year 17 (May 18, 1996)*, 21 AM. U. INT'L L. REV. 437 (2005–2006).

107. Shannon M. Roesler, *Modern Legal Reform in Egypt: Shifting Claims to Legal Authority*, 14 CARDOZO J. INT'L & COMP. L. 393, 424 (2006).

108. *Id.*

109. Brown & Lombardi, *supra* note 106, at 439, 457.

the right [to perform his own] *ijtihad* to facilitate the affairs of the people and reflect what is correct from among their customs and traditions, so long as they do not contradict the universal goals of their *shari'a* [These universal goals] are not violated . . . in regulating girls' dress.¹¹⁰

This was the foundational basis for the SCC's holding, as described below.

According to the two-step methodology described above,¹¹¹ the SCC first looked to *Sharia* and "identified the fundamental principle that women must dress *modestly*."¹¹² The SCC determined that "it is not immodest for women to walk about with their hair and faces uncovered."¹¹³ Though conceding that veiling practices were permissible under *Sharia*, the SCC concluded that veiling is not mandatory: "[w]omen under Islamic law have no definitive requirement for their dress."¹¹⁴ The SCC explained that the *niqab* was, indeed, permissible, but not required: "If not [connected to an absolutely certain scriptural text], it becomes probable according to the basis of the principle of permissibility." The SCC continued, "[T]here is no indicator . . . in the Qu'ranic texts or in our honorable sunna that legally conforming women's clothing, to be approved by the *shari'a*, must veil totally."¹¹⁵ Thus, the SCC found that the fundamental principle under *Sharia* was simply one of "modesty" and that neither the *hijab* nor the *niqab* were requirements under *Sharia*.¹¹⁶

In coming to this determination, the SCC reasoned that a woman's modesty should not impede her everyday life:

[A] [woman's] clothing should be in accordance with the *shari'a*, displaying her piety in a way that does not inhibit her movement in life nor is limited to beautifying her and that is not an obstacle without her awareness. . . . Accordingly, it is not permitted for [a woman's] clothing to exceed the bounds of moderation. It should not cover the entire body so as to restrict her.¹¹⁷

Upon finding the question of whether there is a veiling requirement to be open under Islamic law, the SCC next engaged in a "utilitarian" analysis, weighing the benefits of the ban versus the perceived social harm from requiring women to unveil

110. *Id.* at 456–57.

111. See Lombardi, *supra* note 58.

112. *Id.* at 110 (emphasis added).

113. *Id.* at 111.

114. Lama Abu-Odeh, *Egyptian Feminism: Trapped in the Identity Debate*, 16 YALE J.L. & FEMINISM 145, 152 n.37 (2004) (citing Awad Mohammed El-Morr, *Judicial Sources for Supporting the Protection of Human Rights*, in THE ROLE OF THE JUDICIARY IN THE PROTECTION OF HUMAN RIGHTS 5, 14–19 (1997)).

115. Brown & Lombardi, *supra* note 106, at 455.

116. As Lombardi explains, "the SCC concluded that modesty cannot require covering that is so complete as to impede the realization of the general goals in society." CLARK BENNER LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARI'A INTO EGYPTIAN CONSTITUTIONAL LAW 197 (2006).

117. Brown & Lombardi, *supra* note 106, at 454.

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their faces.¹¹⁸ According to the SCC, there are social benefits to veiling, including the prevention of illicit sexual enticements and activity.¹¹⁹ However, the SCC compared such benefits to the burdens of veiling, such as the potential creation of a psychological burden for the schoolgirls.¹²⁰ Weighing such social benefits against the benefits of *unveiling*, the SCC found that unveiling “is more protective of [a woman’s] virtue (*hiya*’), preserves her psychological health, and keeps her from being stigmatized.”¹²¹ Thus, on these bases, the SCC concluded that the Ministry of Education’s administrative order banning the *niqab* for elementary-age schoolgirls did not violate the principles of *Sharia* and that on this basis alone, pursuant to Article 2, it did not violate the Egyptian Constitution. The SCC’s analysis for purposes of its holding ended there.

Nevertheless, the SCC also significantly specified, albeit not in its main holding, that such a ban would not be in violation of the constitutional guarantees of freedom of religion and individual rights under Articles 41 and 46.¹²² The SCC explained that allowing the face veil would, in some ways, be discriminatory: “[I]t is not for [the state] to kindle strife among religions by discriminating in favor of some [creeds] at the expense of others. Nor may the freedom of creed be separated from the freedom to practice the rites of a creed.”¹²³ However, the SCC asserted that the ban was not an infringement on freedom of creed or expression.¹²⁴ As Professors Brown and Lombardi observed in their translation of the case, “the SCC argues that a regulation on face-veiling in public schools is consistent not only with Islamic law, but with the Egyptian Constitution’s guarantees of freedom of religion and freedom of expression.”¹²⁵ However, as described below, the HAC did not follow the same reasoning.¹²⁶

B. 1989 HAC Ain Shams University Case

Though the two-step methodology may capture the SCC’s reasoning with respect to Article 2 jurisprudence, the HAC has followed a different approach. Soon after Article 2 was revised to institute *Sharia* as *the* principal source of law in Egypt, the HAC adopted its own legal methodology when incorporating *Sharia* into its legal reasoning. In a 1989 case, the HAC found a university procedure banning the *niqab* from certain areas of a college to be a violation of personal rights and religious

118. Lombardi, *supra* note 58, at 112.

119. *Id.*

120. *Id.*

121. *Id.*

122. Brown & Lombardi, *supra* note 106, at 438.

123. *Id.* at 457.

124. *Id.* at 458.

125. *Id.* at 438.

126. *See infra* Part V.C and accompanying text.

freedom under the Constitution.¹²⁷ A part-time female student at the College of Literature of Ain Shams University in Egypt filed suit against the university after she was banned from entering the campus for wearing a *niqab*. Her suit claimed that a university regulation banned female students from wearing the *niqab* in violation of women's personal rights and religious freedoms under Articles 40 and 41 of the Constitution. In response, the university argued, among other points, that the *niqab* was not required under Islamic law¹²⁸ and that the ban was necessary to protect students from "imposters" or "intruders" on campus grounds.¹²⁹ The government, representing the university, argued that the *hijab*, and not the *niqab*, is required in Islam.¹³⁰ The HAC ruled against the university, requiring it to revoke the order banning the *niqab* on campus grounds.

In reaching its holding, the HAC first applied Article 2, analyzing the legality of veiling and of banning the veil under Islamic law.¹³¹ The HAC described the varied interpretations of requiring the veil by the *ulama*.¹³² Engaging in its own *ijtihad*, the HAC reasoned that, because *Sharia* does not state that covering a woman's face is improper, a woman has the right to cover her face if she so chooses:

The majority of Islamic scholars, or the *ulama*, agree that a woman's face is not forbidden, for if you marry her she can unveil. Even though a woman is not supposed to cover her face, there is no rule to say that she cannot cover her face. According to some *ulama*, the only instance when a woman should not cover her face is when she does her pilgrimage around the *Kaaba*, though some *ulama* think she can cover it all the time. According to Islam, covering the face is not prohibited. Some *ulama* believe that, in some cases, women are required to cover the face in order to hide her eyes from a man. The law does not prevent a woman from covering her face, nor does the common knowledge say the right to cover one's face does not exist.¹³³

Upon concluding that a woman has the right to cover her face under Islamic law, the HAC looked towards other provisions of the Constitution to determine whether a ban of the *niqab* was unconstitutional. The HAC invoked individual rights "as described in the Constitution" to conclude that a woman has "individual rights and

127. Case no. 183/1989/ Al-Mahkama al-Idarea al-a'Lea, (Egypt) (trans. by author).

128. *Id.* To this point, the University argued that many legal scholars had written that it is not necessary to cover the face of a woman because wearing the *niqab* obstructs the ability of a student to study and creates problems during exams because of the inability for a proctor to know the identity of the student. *Id.*

129. *Id.* The university also argued: (1) that the Plaintiff lacked standing because she was a part-time student who only attended the university for exams; and (2) that the right to wear clothing is not an absolute right, and is subject to limitation based on the need to ensure public order. *Id.*

130. *Id.* For the distinctions between these Arabic terms, see *supra* notes 77–80 and accompanying text.

131. Case no. 183/1989/ Al-Mahkama al-Idarea al-a'Lea, (Egypt) (trans. by author).

132. *Id.*

133. *Id.*

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the freedom of religion” that cannot be taken away from her by a state-mandated regulation.¹³⁴

[T]he *niqab* remains freely in the domain of individual rights and freedom of religion and this atmosphere of freedom may not be blocked or prevented by the example/illustration of this college upon this woman at a specific destination or a specific place, in which this woman was entitled to visit. What this ban, or absolute prohibition, represents is an encroachment on personal freedom with respect to clothing choice. And the restriction of freedom of religion or an individuals’ determined or chosen ideology by someone else’s authorization is in incompatible with the law and in collision with customary law/legal practice. But the ideal determination of a woman’s appearance is one of modesty, . . . for it provides a woman with a personal choice to represent the strength of her faith by wearing the *niqab* and not to rely on the easier option of the *hijab*, whatever one’s views . . .¹³⁵

The HAC also reasoned that there was a logical alternative to the ban. The HAC explained that the university could easily check a woman’s identity by posting a female officer at the entrance of the university. Using this reasoning, the HAC found that a complete ban was a violation of a woman’s individual rights and an infringement upon the freedom to exercise her religion.¹³⁶ The HAC described such rights as empowering “a woman with a personal choice to represent the strength of her faith” through her choice in veiling with the *hijab* or the *niqab*.¹³⁷

C. 2007 HAC American University of Cairo Case

In 2001, the American University in Cairo, pursuant to an administrative regulation, denied a female student’s privilege to use its library while veiled, citing security reasons.¹³⁸ The student, Iman Al-Zainy, was a doctoral student of English at al-Azhar University, but had held library privileges at the American University in Cairo for over a decade. In 2007, the HAC ruled that the American University in Cairo’s ban on the *niqab* was unconstitutional, citing constitutional rights to personal and religious freedom as grounds for its ruling.¹³⁹

The HAC cited its 1989 holding in the *Ain Shams* case discussed above and reached its decision using a similar methodology to that used in its 1989 case.¹⁴⁰ Mimicking its holding in the 1989 case, the HAC began its legal analysis by

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Cynthia Johnston, *Egypt Court Rules Against U.S. University on Face Veil*, REUTERS (June 9, 2007), <http://www.reuters.com/article/idUSL0943570620070609>.

139. Case no. 3219/ 2007/ Al-Mahkama al-Idarea al-a’Lea, (Egypt) (trans. by author).

140. *Id.*

referencing Article 2 of the Constitution.¹⁴¹ It stated, “*Sharia* . . . is the main source of legislation in accordance with Article 2.”¹⁴² In analyzing the Islamic legal concepts on point, the HAC conceded that “there is no explicit evidence in the *Quran* and *Sunna* that women should hide their face and cover their hands.”¹⁴³ However, the HAC clarified that, although covering a woman’s face and hands “is not obligatory, it falls within what is deemed permissible [under Islamic law].”¹⁴⁴ In other words, the HAC determined that Islamic law permits, but does not require, women to wear a veil. The question for the court, then, was whether an administrative order could constitutionally limit a woman’s choice to do so.

Furthering its analysis, and in clear contrast to the SCC’s reasoning in 1996, the HAC then invoked the personal rights found in Articles 40 and 41 of the Constitution to answer this constitutional question.¹⁴⁵ The HAC held that that the Constitution “put up a wall for protection for personal liberty and the rights and public freedoms associated with it,” and added, “[B]ecause wearing the veil for Muslim women is a manifestation of this freedom, it is not permissible in terms of an administrative body to enforce an absolute prohibition [on wearing the *niqab*].”¹⁴⁶

D. 2010 HAC Al-Azhar University Case

On January 3, 2010, the HAC ruled against al-Azhar University, the leading Islamic educational institution in the country, overturning the University’s ban prohibiting its female students and teachers from wearing the *niqab* during university examinations.¹⁴⁷ The HAC ruled that the ban was an unconstitutional violation of individual rights under the Constitution.¹⁴⁸ The HAC declared that the “[f]reedom to wear the *niqab* is guaranteed by human rights and constitutional liberties, and a girl’s right to dress the way she sees fit in accordance with her beliefs and her social environment is a firm right that cannot be violated.”¹⁴⁹

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. The author was unable to obtain the judgment from this case and is therefore unable to consider the HAC’s analysis in full.

148. Dina Zayed, *Egypt Court Overturns Ban on Full Veils in Exams*, REUTERS (Jan. 20, 2010), <http://uk.reuters.com/article/idUKTRE60J4PO20100120>.

149. *Id.*

VI. THE NIQAB AS A SYMBOL FOR EGYPT'S STRUGGLE TO ESTABLISH A LEGAL IDENTITY

It is difficult to reconcile the SCC's legal methodology with that of the HAC. Both courts identify fundamental principles under *Sharia*.¹⁵⁰ With respect to the legality of *niqab* bans, both courts concluded that the *niqab* was not required under Islamic law. From there, however, their respective analytical methodologies diverge. Whereas the HAC found that the *niqab* was expressly *permissible* under Islamic law,¹⁵¹ the SCC found that the *niqab* was *not* expressly permitted. The SCC held that "it is not permitted for [a woman's] clothing to exceed the bounds of moderation. It should not cover her entire body so as to restrict her."¹⁵² Additionally, whereas the SCC based its holding on whether the *niqab* ban violated this Islamic legal principle of "modesty" and, finding that it did not, ended its analysis there without applying other constitutional provisions, the HAC, having found veiling clearly permissible, turned to *constitutional* provisions to make its determination on whether the ban could be upheld.¹⁵³ Specifically, the HAC based its holding on individual rights and freedom of religion under Articles 40 and 41 of the Egyptian Constitution.¹⁵⁴ The SCC addressed those constitutional provisions in dicta only; its constitutional analysis was limited to Article 2's statement that *Sharia* is the principle source of law.

The HAC's reasoning is in direct contrast to the reasoning offered by the SCC. In its 1996 decision, the SCC stated that such a ban was in no way a violation of any constitutional provision.¹⁵⁵ The SCC reasoned that "[t]he concept of the right to

150. Compare Brown & Lombardi, *supra* note 106, at 457 ("There should be no showing her features in a way that repudiates modesty."), with Case no. 183/1989/ Al-Mahkama al-Idarea al-a'Lea, (Egypt) ("But the ideal determination of a woman's appearance is one of modesty . . .").

151. "[C]overing the face and hands of Muslim women is not obligatory, but falls within the permissible." Case no. 3219/ 2007/ Al-Mahkama al-Idarea al-a'Lea, (Egypt) (trans. by author).

152. Brown & Lombardi, *supra* note 106, at 454.

153. Compare *id.* at 455–56 ("There is no indicator (dalil) in the Qur'anic texts or in our honorable sunna that legally conforming women's clothing, to be approved by the shari'a, must veil totally . . . This is not an acceptable interpretation, nor is it known by necessity of religion."), with Case no. 3219/ 2007/ Al-Mahkama al-Idarea al-a'Lea, (Egypt) ("[I]t is not permissible to ban the wearing of the veil at all, and to oppose this view goes against personal liberties that are guaranteed by [Articles 40 and 41 of] the Constitution.").

154. Case no. 3219/ 2007/ Al-Mahkama al-Idarea al-a'Lea, (Egypt) (trans. by author). Article 40 reads, "All citizens are equal before the law. They have equal rights and duties without discrimination between them due to race, ethnic origin, language, religion, or creed." Article 41 adds, "Individual liberty is a natural right and shall not be touched." *The Constitution of the Arab Republic of Egypt*, *supra* note 45.

155. The SCC stated:

And whereas: The plaintiff complains that the contested decree violates personal freedom, claiming that the mainstay of that freedom is the self independence of each person in all matters in questions that are most closely connected to his fate and that are having the most impact on his life conditions, according to the model chosen to complete the features of his personality. This [argument] is rejected . . . This means that individual freedom (hurriyya shaksiyya) does not bar the legislator "acting within the sphere of his affairs" from placing limits on the clothes that some people wear "in their place within this sphere" so that [their clothes] have a distinct identity.

Brown & Lombardi, *supra* note 106, at 459.

freedom of creed does not grant the protection to someone practicing [his creed] in a manner that harms other creeds.”¹⁵⁶ With respect to the argument that wearing the *niqab* is protected under the guise of freedom of religion and the freedom to practice certain religious rights, the SCC held that such rights may be “limited,” particularly in the interests of the “protection of public order.”¹⁵⁷

A narrow view of this inconsistency is that, when dealing with the legality of a *niqab* ban, the HAC simply takes a different methodological approach than the SCC when incorporating Islamic legal interpretation into its legal analysis. Thus, whereas the SCC first discussed whether the *niqab* ban violates this Islamic legal principle of “modesty” and, finding that it does not, ended its analysis there, the HAC, having found veiling clearly permissible, turned to *constitutional* provisions to make its determination on whether the ban could be upheld.

The broader question is jurisprudential: What does Article 2 of the Egyptian Constitution truly compel courts to do with respect to *Sharia*? And who has the authority to decide how courts should interpret *Sharia*? Though the two-step methodology may accurately reflect the approach used by the SCC when conducting Islamic legal analysis,¹⁵⁸ such an account does not seem to accurately depict the legal methodology chosen by other courts in Egypt’s judicial system.

Both the 1989 and the 2007 HAC cases similarly held that *niqab* bans on university premises are unconstitutional.¹⁵⁹ However, it is not clear why the HAC did not find itself constrained by the SCC’s legal methodology. Such inconsistent holdings lead to a pivotal question: Why did the HAC chose to invoke a provision of the Egyptian Constitution on the question of a *niqab* ban, while the SCC found its answer within the bounds of *Sharia* and confined its constitutional analysis to Article 2?

A. Three Potential Explanations

The HAC’s purpose in choosing to reject the legality of banning the *niqab* for college-age women could be three-fold: (1) The HAC has decided that there is a factual distinction between school-age girls, as was the case in the 1996 SCC case, versus adults, as in the 1989, 2007, and 2010 HAC decisions; (2) the HAC simply did not agree with the SCC ruling, or did not agree with the SCC’s methodology of incorporating Islamic law, and was thus trying to avoid it, or preferred a different methodology; or (3) put simply, the absence of a clear precedent by the SCC put the HAC in the position of freely reaching its own answer, and so it approached the issue through an individual rights analysis rather than attempting to find the answer through a *Sharia*-based analysis.

It is possible that the HAC could have decided that the factual distinction between school-age girls and university-age women was substantial enough to control

156. *Id.* at 457.

157. *Id.* at 458.

158. LOMBARDI, *supra* note 116.

159. *See supra* Part V.B–C.

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the outcome in each case. Much like in the U.S. system, where ambiguities in Supreme Court cases give lower courts some flexibility in their interpretations, the lower Egyptian courts may take certain liberties of interpretation so long as they do not exceed the limits set by the Constitution. Similarly, the HAC may be limiting the SCC's 1996 ruling by narrowly reading it to apply to school-age girls only, and not to university-age women. Under this reasoning, the HAC simply determined that the precedent set by the SCC had to do with the ability, or inability, of a schoolgirl to express her devoutness to her faith. For example, both the 1989 and the 2010 HAC cases specifically discuss the *Quran's* imposition on "women," as opposed to girls, to remain modest in their dress.¹⁶⁰

A second plausible reason for the HAC's seeming opposition to the highest court in the country is that it simply did not agree with the SCC methodology regarding Islamic law. Thus, such a holding could reflect the HAC's attempt at offering a new method of interpreting *Sharia*. In the *nigab* cases, the HAC chose to look beyond the provisions of Islamic law to other, more secular rights as bestowed by the Egyptian Constitution. As was conceded by the SCC, Islamic law does not clearly prohibit a woman from veiling her hands and her face.¹⁶¹ However, the SCC held that a *nigab* ban is permissible under both Islamic law and constitutional law, giving greater weight to its interpretations of veiling under *Sharia*. The HAC, in effect, similarly found that the practice of veiling is considered "permissible" under Islamic law. However, the HAC also chose to draw on constitutional provisions in making its determination regarding the ban. Clearly opposing the SCC's reasoning from 1996, the HAC found that Article 40 imposed a "wall" of individual rights that cannot be broken when ruling on the constitutional validity of a law or regulation.¹⁶² In doing so, the HAC might have found an opportune moment to make a statement about a disagreement with the SCC's methodology with respect to *Sharia*.

The purported lack of SCC precedent on point represents a third plausible reason why the HAC might have held as it did. This gap allowed the HAC to fashion its own answer with respect to the appropriate legal stance towards *nigab* bans on university premises. As a result, the HAC based its holding and methodology on the constitutional issue rather than the Islamic law issue.¹⁶³ This could reflect the judicial

160. See *supra* Part V. The Arabic word used for "women" in both the 1989 and the 2007 HAC cases is "al-imara'a" or "al-mar'a" in the plural. According to the *Hans Wehr Arabic-English Dictionary*, such words mean "woman" or "wife." HANS WEHR, ARABIC-ENGLISH DICTIONARY (J. Milton Cowan ed., 4th ed., 1994). This seems to be in direct contrast to the language referring to the plaintiffs in the 1996 Supreme Constitutional Court case. In Clark Lombardi's translation of the case, he uses words such as "girls" and "schoolgirls." Brown & Lombardi, *supra* note 106, at 456-57.

161. Brown & Lombardi, *supra* note 106, at 457.

162. Case no. 3219/ 2007/ Al-Mahkama al-Idarea al-a'Lea, (Egypt). As Bernard Weiss has described, "If man cannot achieve absolute knowledge of God's commandments, he may rely on his own learned judgment regarding what God requires." Bernard Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 AM. J. COMP. LAW 199, 204 (1978).

163. See *supra* note 106 and accompanying text.

counterpart to the political issues that developed in the years between the two cases and typify Egypt's socio-cultural struggle for identity.¹⁶⁴

VII. CONCLUSION

This note has analyzed Egypt's legal dilemma by looking at the history of Islam in Egypt, the place of Islam in the country's legal system, and how two courts have analyzed Islamic legal issues according to different methodologies. Based on their inconsistent methodological approaches to Islamic law, the Supreme Constitutional Court and the High Administrative Court have come to different and seemingly incompatible decisions on whether *niqab* bans are constitutional. Such inconsistencies reflect a larger struggle that is taking place in Egypt: the struggle to remain democratic and incorporate the diverse views of Muslim people, while also staying comfortably secular. As the country moves forward, it remains to be seen how it will balance Islamic law and constitutional law in the context of Egypt's multiple identities and influences.

And so, as the confetti is swept up around Tahrir Square and the country begins to rebuild, the question of Egypt's legal future inevitably remains. In order for Egypt's legal identity to solidify, an important question must be answered: How—and how much—should *Sharia* be used to decide modern legal issues? For Egypt, this question has existed since the beginning of its legal discourse, as is evident by the history of Article 2, and it continues to this day.¹⁶⁵

164. For a discussion on the political and social implications of the Egyptian legal system, see *supra* Part V.

165. See *supra* Part II.B.