

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)*

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INTRODUCTION

In an article that precedes this translation, we discuss the Article 2 jurisprudence of the Supreme Constitutional Court of Egypt

* Editor's Note: *ILR* editors typically check citation Bluebook form and verify the substantive aspects of both the text and footnotes. This article draws upon a number of foreign language sources, including case law in Arabic. *ILR* has edited citation form to the greatest extent possible, but our substantive editing of these foreign sources is not exhaustive. With respect to the rendering of Arabic words: following law review custom, Arabic words in this text have not been fully transliterated. An apostrophe (') has been used to render the letter "hamzah" and a reverse apostrophe (´) has been used to render the letter "ain." Macrons have not been used nor have dots been put under consonants unique to Arabic. This translation will be printed in the LEXIS and Westlaw databases, which currently do not print diacritics.

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("SCC").¹ To illustrate the way in which the Court applies its new approach to develop a liberal, rights-protecting interpretation of *shari'a*, we summarized *Case No. 8 of Judicial Year 17*, decided on May 18, 1996.

Although summaries of cases can be very useful, it is important that scholars, students, policy-makers and practitioners be able to read unabridged translations of important Article 2 opinions—even if they are unable either to acquire copies of the opinion² or read them in Arabic.³ Of these opinions, *Case No. 8* should be of particular interest.

In this opinion, 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. Not only does it illustrate the SCC's approach to Islamic legal reasoning, but it gives insight into the Court's views with respect to a number of important constitutional areas—particularly in the area of civil and political rights. The case also provides intriguing opportunities for comparative legal scholars. Regulations restricting women's right to veil have been challenged as unconstitutional in many countries.⁴ This should thus be of great interest to scholars of comparative law, comparative

1. 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 (2006).

2. Anyone who has tried to get copies of Article 2 opinions will testify to the difficulty of acquiring them. Cases are published in the Official Gazette and in a reporter that is published by the Court. Nevertheless, few reference libraries carry the Egyptian gazette and none, to the best of our knowledge, stocks a full set of the reporters. The authors are thus indebted to Justice Adel Omar Sherif who has, over the years, generously made available to us photocopies of numerous cases from the Supreme Constitutional Court's library and has helped us understand their nuances.

3. Not only are these opinions written in Arabic, but they employ numerous technical terms and refer regularly both to classical Islamic jurisprudence and to modern Egyptian constitutional jurisprudence.

4. For an overview and an online interactive map of countries that have seen litigation concerning governmental regulation of headscarves, see *Headscarves in the Headlines*, BBC NEWS, Feb. 10, 2004, <http://news.bbc.co.uk/1/hi/world/europe/3476163.stm> (last visited Oct. 27, 2005).

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constitutionalism and international human rights. By making this SCC opinion available, we hope to facilitate comparative discussion about, *inter alia*, free exercise of religion, freedom of expression, women's rights, and children's rights.

The Arabic text that we used for this translation was published in the Egyptian Official Gazette (*al-jarida al-rasmiyya*), No. 21, at pages 1026 to 1041 (May 20, 1996). The case was also printed in Volume VIII of the official SCC reporter at pages 657 to 679. In preparing the translation, we have employed the following conventions:

(1) When the Court uses technical terms or an Arabic word that is capable of several plausible meanings in context, we have included parentheses giving the Arabic word. In transliterating these Arabic words, we have followed the method used by the *International Journal of Middle East Studies*.

(2) As a concession to English style, we have broken some of the longest sentences into shorter sentences. We have only done so, however, where the Arabic sentence can easily be divided without changing its meaning.

(3) Arabic tends to use more pronouns than English writing, and it is not always clear to which predicate a pronoun refers. In places where the use of pronouns may be ambiguous or confusing, we have replaced the pronoun with brackets containing the noun to which we believe the pronoun refers.

(4) In places where the language remains ambiguous, we have added explanatory footnotes giving guidance as to our own interpretation of the passage.

(5) For the reasons discussed in the first starred footnote above, we have deleted most of the transliteration marks that would be used in specialized journals for Islamic or Middle East Studies.

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[21:437]

TRANSLATION**In the Name of the People
The Supreme Constitutional Court**

In public session held 18 May 1996/30 Dhu al-Hijja 1416 A.H.,
under the presidency of Counselor Dr. 'Awad Muhammad 'Awad al-Murr, President of the Court;

and [with] the membership of Counselors: Muhammad Wali al-Din Jalal, Nihad 'Abd al-Hamid Khilaf, Faruq 'Abd al-Rahim Ghunaym, 'Abd al-Rahman Nusayr, Dr. 'Abd al-Majid Fayyad, and Muhammad 'Ali Sayf al-Din;

and [in] the presence of Counselor Dr. Hanafi 'Ali Jabali . . .
President of the Commissioners Body;

and [in] the presence of Hamadi Anwar Sabir . . . secretary-general.

Issued the following judgment

In the case recorded in the registry of the Supreme Constitutional Court as number 8 of constitutional judicial year 17,

Referred to the Court from the Administrative Court by judgment issued in Case number 21 of judicial year 49

Undertaken by

Mahmud Sami Muhammad 'Ali Wasil, in his capacity as natural guardian of his two daughters, Maryam and Hajir

Against

- 1-The Minister of Education
- 2-The director of the Education Directorate of Alexandria
- 3-The principal of Isis Secondary School for Girls in al-Siyuf

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Procedures

The office of the Clerk of the Court received the file of Case Number 21 of judicial year 49 after the Administrative Court of Alexandria ruled that the papers should be referred to the Supreme Constitutional Court to rule on the constitutionality of the Decision Number 113 of 1994 by the Minister of Education, as explicated by Decision Number 208 of 1994.⁵

The State Litigation Authority⁶ submitted a memorandum defending it [the ministerial Decision at issue] and requesting rejection of the case. After preparing the case, the Commissioners Body⁷ lodged a report with its opinion. The case was examined, as recorded in the minutes of the session, and the Court decided to issue its ruling in the session today.

The Court

After examining the papers and deliberating:

The facts—as appear in the journal of the case and all the papers—are that Mahmud Sami ‘Ali Wasil, in his capacity as natural guardian

5. Egyptian administrative courts have primary jurisdiction over most cases in which the state is a party. This case centers on the actions of a school principal who is acting in accordance with an official administrative directive issued by the Minister of Education. It thus had to be filed, initially, in an administrative court. However, administrative courts are not permitted to interpret the Constitution. Thus, when confronted with a case that requires an interpretation of the Constitution, an administrative court must refer the case to the Supreme Constitutional Court. The SCC is then permitted, in the interest of efficiency, to resolve non-constitutional issues and to issue a final decision in the case.

6. The State Litigation Authority is the entity responsible for representing the state in litigation. For a brief discussion of its role in constitutional litigation, see Adel Omar Sherif, *Constitutional Law, in EGYPT AND ITS LAWS* 315, 319 (Nathalie Bernard-Maugiron & Baudouin Dupret eds., Arab & Islamic L. Series No. 22, 2002).

7. The Commissioner’s Body is a group of judges attached to the SCC that is responsible for managing cases before the Court and for issuing an advisory report detailing the issues raised by the case and proposing a solution to the judges deciding the case. For discussion of this Body, see Awad Mohammad El-Morr et al., *The Supreme Constitutional Court and Its Role in the Egyptian Legal System, in HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT* 37, 43-44, 51-53 (Kevin Boyle & Adel Omar Sherif eds., 1996); and Adel Omar Sherif, *Constitutional Adjudication, in EGYPT AND ITS LAWS, supra* note 6, at 325, 329-30.

of two daughters, Maryam and Hajir, filed Case number 21 of Judicial Year 49 in the Administrative Court of Alexandria against the Minister of Education. He [the father] demanded a ruling halting implementation of and canceling the negative decision that had been issued barring entry by the two girls into one of the secondary schools. In explaining his claim, he [the father] said that he had gone with the two girls to the Isis Secondary School for Girls in al-Siyuf. Moreover, he was surprised when the two girls were expelled from the school due to the issuance of a Decision by the Minister of Education⁸ forbidding female students wearing the *niqab* from entering [schools],⁹ [a Decision which the father asserts is] in violation of Articles 2 and 41 of the Constitution. The first of these [constitutional articles] stipulates that Islam is the religion of the state and that the principles of the Islamic *shari'a* are the chief source of all its legislation. The second of these two [constitutional articles] guarantees the preservation of personal freedom [and bars] violation of it.¹⁰ During its examination of the summary phase of the

8. Egyptian law establishes a hierarchy of legislative enactments: from the Constitution through statute, regulation, and down to "Decision." The "Decision" being challenged here is therefore a formal administrative enactment.

9. Many "veiled" women in Egypt wear a limited type of veil known as the *hijab*, which covers the hair and neck, but leaves the entire face uncovered. Some, however, wear the *niqab*, which is a more complete veil (the *niqab* covers most of the face, leaving only the eyes uncovered). Wearing the *niqab* is, for some, a sign of allegiance to rigid, puritanical forms of Islam and is in some cases taken to be a sign of allegiance to political Islamism. At the time of this case, some Islamist groups espousing such interpretations of Islam had been engaged in a violent struggle seeking to overturn the secularist Egyptian government. Wearing the *niqab* (or having one's girls wear the *niqab*) was thus an act that was fraught with potential significance. On types of women's dress in Egypt, see ANDREA RUGH, REVEAL AND CONCEAL: DRESS IN CONTEMPORARY EGYPT (1987). For a discussion of the politics associated with different types of veiling at the time this case was decided, see GENEIVE ABDO, NO GOD BUT GOD: EGYPT AND THE TRIUMPH OF ISLAM 143-61 (2000) (arguing that the veil and its symbolism provide the "most prominent vehicle for debating women's rights").

10. Article 41 of the Egyptian Constitution reads:

Personal freedom is a natural right not subject to violation except in cases of *flagrante delicto*. No person may be arrested, inspected, detained or have his freedom restricted in any way or be prevented from free movement except by an order necessitated by investigations and the preservation of public security. This order shall be given by the competent judge of the Public Prosecution in accordance with the provisions of the law.

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case, the administrative court first ruled: to formally accept the motion; to suspend execution of the defendant's [ministerial] Decision including its prohibition on the plaintiff's two daughters entering their school wearing the *niqab*; to require the administration to bear the costs; and to order execution of the [administrative court's] ruling according to its draft without publication.¹¹ Second, the [administrative] court referred the papers to the Supreme Constitutional Court to decide the extent of the constitutionality of the Decision of the Minister of Education Number 113 of 1994 as explicated by Decision Number 208 of 1994. The Administrative Court based its judgment on the fact that the [secondary school's] decision [to expel the girls] was based on Decision 113 of 1994 by the Minister of Education, issued on August 17, 1994, defining the form of the school uniform in its color, shape, and composition, and explicated by virtue of his [ministerial] Decision Number 208 of 1994, and it is within the sole competence of the Supreme Constitutional Court to judge whether these two [ministerial] Decisions—even if they involved only general principles (*qawa'id 'amma*)—violate freedom of [religious] creed, which is protected in the Constitution according to the text of Article 46.¹² The Supreme Constitutional Court's word as to compatibility or incompatibility with the Constitution is definitive, thus mandating the referral of the

EGYPT CONST. art. 41.

11. Under Egyptian law, one can make a claim for the costs of bringing a case to rectify an administrative wrong or, in some cases, the costs incurred as a result of the wrong. On this point, see M. Rady, *Administrative Justice, in EGYPT AND ITS LAWS*, *supra* note 6, at 271, 286. It is unclear which costs are being referred to in this passage.

12. The SCC has said that the father raised challenges only under Articles 2 and 41 of the Constitution. The SCC, through its *ex-officio* jurisdiction, however, has determined that Article 46 issues are indirectly implicated in the case. Article 46 of the Egyptian Constitution reads: "The State shall guarantee the freedom of belief and the freedom to practice religious rites." EGYPT CONST. art. 46. In the sentence above, the Court defines the freedom created in Article 46 as freedom of creed (*'aqida*) rather than freedom of religion (*din*). On the ability of the SCC to consider issues not raised specifically by the parties to the case, see the comments of Chief Justice Awad el-Morr in El Morr et al., *supra* note 7, at 48-50; and Sherif, *supra* note 7, at 334-35 (explaining that Article 27 provides more opportunities to challenge the constitutionality of legislation because it expands the scope of the Court's review to include any legislative provision linked to a dispute before the Court).

papers to the Court, in accordance with clause (a) of Article 29 of the law [of the Supreme Constitutional Court] for decision as to the constitutionality of these two [ministerial] Decisions.

And whereas: It is clear from the aforementioned Decision 113 of 1994 that its first article stipulates that male and female pupils in government and private schools are required to wear a single uniform in accordance with the following characteristics:

First, primary stage, boys and girls:

A linen apron in the color designated by the educational directorate—it is permitted to wear pants in winter so long as they are uniform and appropriate according to what the educational directorate has decided. It is permitted for girls to substitute for the apron a blouse and skirt of appropriate length and for boys to substitute a shirt and pants, wearing a sweater or jacket in the winter, in accordance with what the educational directorate decides—[along with] appropriate school shoes and socks in the color chosen for the uniform.

Second, preparatory stage:

1. Boy pupils: Long pants—shirt in appropriate color—in the winter a sweater or jacket may be worn in accordance with what the educational directorate decides.
2. Girl pupils: White blouse—linen apron with suspenders in the color chosen by the educational directorate—in the winter it is permitted [for the students] to wear a wool apron or for the student to wear a sweater or jacket in the color of the apron. The apron may be substituted with a long blouse of appropriate length—school shoes and socks in a color appropriate for the color chosen for the uniform. Upon written request from the guardian, the pupil may wear a covering for the hair in a color selected by the educational directorate, so long as it does not obscure the face.¹³

13. Such a rule permits schoolgirls to wear the *hijab* veil, but not the *niqab*.

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Third: the secondary stage and its equivalent:

1. Boy pupils: Long pants—shirt in an appropriate color. [I]n winter it is permitted to wear a sweater or jacket according to what the educational directorate decides.
2. Girl pupils: White blouse—skirt of appropriate length in a color designated by the educational directorate. [I]n the winter it is permitted to wear a wool apron and for the pupil to wear a sweater or jacket in the color of the apron— upon written request from the guardian, the pupil may wear a covering for the hair in a color selected by the educational directorate, so long as it does not obscure the face.

The second and third articles of the [ministerial] Decision provide that the designated school uniform for the boy and girl pupils in every school will be posted in a visible place prior to the beginning of the school year by at least two months. Pupils who violate the first article of the [ministerial] Decision may not enter their school or be affiliated with it. Care should be taken that their uniforms are appropriate in all cases both in appearance and in manner of wearing.

And whereas: The Minister of Education, following the first Decision—and in the face of the ambiguity obscuring its meaning— issued a second Decision explaining the earlier [ministerial] Decision and specifying its substance. The subsequent Decision—and this was—Decision Number 208 of 1994, stipulated that in applying the provisions of Decision 112 of 1994, the following expressions would carry these clarifying meanings:

First, in relation to the girl pupils of the preparatory and secondary stages:

1. “Upon written request from the guardian”: The guardian must be aware of the pupil’s choice to wear hair covering, and [must be aware that the choice] comes from her own desire without pressure or compulsion from a person or party other than the guardian. The pupil shall not be forbidden from entering her school if she wears a covering for her hair. Her entrance shall take place pending investigation of the guardian’s knowledge.

2. "Covering for the hair": The covering which the pupil chooses according to her wish may not cover the face. No examples or clarifying sketches for covering the hair shall be prepared that contradict this.

Second, in relation to pupils in all three educational stages:

The uniform shall be appropriate in appearance and the manner in which it is worn, preserving the uniform by means of what guards modesty and [what] accords with the teachings and morals of their society. Each uniform that infringes on this modesty is a violation of the school uniform; and it is not permitted for the female pupil wearing one to enter her school.

And whereas: The judiciary of the Supreme Constitutional Court has been consistent regarding what the Constitution stipulates in its second article—ever since [that article's] amendment in 1980—namely that the principles of the Islamic *shari'a* are the chief source of legislation. And it has been devoted to a requirement binding both of the two branches, the legislative and executive, to observe it and defer to it with respect to legislation issued after the amendment. Among those [acts of legislation that were issued after the amendment] are the provisions of the challenged [ministerial] Decision Number 113 of 1994, as explicated by [ministerial] Decision Number 208 of 1994. It is not permitted for a legislative text to contradict those *shar'i* rulings that are absolutely certain with respect to their authenticity and meaning (*al-ahkam al-shar'iyya al-qat'iyya fi thubutiha wa dalalatiha*), considering that these rulings alone are those for which *ijtihad* is forbidden,¹⁴ because they signify

14. As noted in the accompanying article, Lombardi & Brown, *supra* note 1, at 398-402, some classical jurists used the term "*ijtihad*" broadly to refer to the process of developing an understanding of God's law through either of two means: (a) by finding unambiguous text of unimpeachable authenticity and, thus, coming up with an interpretation about which one could be absolutely certain, or (b) using human reason to interpret or supplement scriptures that are ambiguous or of dubious authenticity and thereby to come up with rules that (unless they are ratified by scholarly consensus) are only "presumptive" rules of *shari'a*. The SCC here is adopting an alternative approach. Following some jurists, it is limiting the

the Islamic *shari'a*'s universal principles (*mabadu'ha al-kulliyya*) and its fixed roots (*'usuluha al-thabita*), which accept neither interpretation nor substitution.¹⁵ And accordingly, it is unimaginable that the understanding of [such rulings] would change with a change of time and place. They cannot be amended. It is forbidden to contravene them or twist their meaning. The Supreme Constitutional Court has been charged with the duty to watch out for violation of these [*shari'a* rulings that are absolutely certain with respect to both their authenticity and meaning] and to overturn any [statutory] rule (*qa'ida*) that contradicts them. This is inasmuch as the second article of the Constitution places the rulings of the Islamic *shari'a* in its roots and universal principles (*ahkam al-shari'a al-Islamiyya fi usuliha wa mabadi'ha al-kulliyya*) in a position of precedence over these [statutory] rules (*qawa'id*). These [rulings] are [the *shari'a*'s] general framework and foundational pillars, whose demands impose themselves permanently and prevent establishment of any legal rule that violates them. This is not to be considered undesirable or a negation of what is known by necessity of religion (*'alim min al-din bi al-darura*); presumptive rulings (*al-ahkam al-zanniyya*) are not absolutely certain with respect to their authenticity, their meaning, or both.¹⁶ They fall within the realm to which *ijtihad* is limited and beyond which *ijtihad* does not extend. They develop by their

meaning of the term "*ijtihad*," using it to refer only to the second process—namely the process of developing presumptive rules through the act of interpreting ambiguous and/or impeachable scriptures.

15. The Court is saying that once Muslims have identified with certainty a universal principle of *shari'a* or a fixed rule that has been revealed in an indubitably authentic scriptural text with an unambiguous meaning, they must respect this principle or rule "as is," and they may not try to explain it away or reason out another rule.

16. This passage refers to an epistemological distinction drawn by the classical jurists between knowledge that was "necessary" (*daruri*) and knowledge that was "acquired" (*muktasab*). The former was known through *a priori* knowledge or sense perception or, in a question of textual interpretation, through finding an univocal statement in an unimpeachable scriptural source. Such knowledge was considered absolutely certain (*qat'i*). Something known by "necessity" knowledge was thus indisputable. In contrast, "acquired" knowledge was obtained—at least in part—through the operation of human reason. Conclusions derived with the assistance of reason were at best presumptive (*zanni*). For a discussion of this distinction in classical thought, see WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES 37-39 (1997).

nature—changing according to time and place, in order to guarantee their [own] flexibility and vitality, and to confront different events. They organize the affairs of the people (*al-'ibad*) with an eye to protecting those interests of [the people] that are legally appropriate (*masalihhim al-mu'tabira shar'^{qn}*) and should not interfere with their activities in life.¹⁷ *Ijtihad* must always fall within the framework of the *shari'a*'s universal roots (*al-'usul al-kulliyya li al-shari'a*) . . . adhering to [the *shari'a*'s] fixed controls (*dawabitihā al-thabita*). It [*ijtihad*] must pursue methods of reasoning out the rulings (*al-ahkam*) and binding supports (*al-qawa'id al-dabita*) for the branches of *shari'a* (*furu'ihā*),¹⁸ guarding the general goals of the *shari'a* (*maqasid al-'amma li al-shari'a*) so that religion, life, reason, honor/modesty, and worldly goods are protected.¹⁹

17. This sentence and the subsequent sentences implicitly make reference to the theory of the “goals of the *shari'a*”—a theory that was first developed in the classical theory and adopted, in modified form, by Islamic modernists such as Rashid Rida. On the classical theory and modernist theories, see Lombardi & Brown, *supra* note 1, at 394-414. The Court has stated in the preceding passages that in cases where one can find no unambiguous rule of absolutely certain authenticity to resolve the case, a person seeking an Islamic ruling should use *ijtihad* to come up with a “presumptive” ruling. Here and in subsequent sentences, when reasoning out such presumptive rules, the interpreter must bear in mind at all times the human “interests” that we know are “goals” (*maqasid*) of the *shari'a*. These interests/goals represent the practical results that God wants societies to promote whenever possible.

18. This sentence draws upon classical Islamic terminology, which described various Islamic norms through the metaphor of a tree. The “roots” of Islamic law (*usul al-fiqh*) were the rules governing how to derive and interpret Islamic legal rulings—i.e. the rules for performing *ijtihad*. The “branches” of Islamic law (*furu'*) were the rulings that had been emerged through proper *ijtihad*. See Lombardi & Brown, *supra* note 1, at 395 & n.37; see also BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* 22-23 (1998) (building on the arboreal metaphor to include the “fruit” (*thamara*) or the rules produced by jurists, and the “harvesting” (*istithmar*), or the extraction of rules from the sources, both of which require husbandry by the jurist to facilitate the growth of law out of its roots).

19. Here the SCC again draws on classical Islamic legal writing, which discusses the importance of considering the human interests (*masalih*) that seem to be the “goals” (*maqasid*) of the *shari'a*. Many classical jurists, such as al-Ghazali and Shatibi, and many Islamic modernists, such as Rashid Rida, believed that a jurist could not accurately derive Islamic legal rulings without considering whether they advance the universal goals of *shari'a*. The SCC here goes beyond the assertion that there are such things as “goals of the *shari'a*” and identifies five of them—which is intriguing. Most classical and modern jurists agreed with the Court that there were five universal goals—though some said six. See Aron Zysow, *The*

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And whereas: Use of the rule of reason, where there is no [scriptural] text, develops practical rules (*qawa'id 'amliyya*) that are, in their ramifications, gentler for the people and more concerned with their affairs and [that] better protect their true interests (*masalihhim al-haqiqiyya*). Legislative provisions seek to realize [such true interests] in a manner that is appropriate for [the people], affirming that the essence of God's *shari'a* is truth and justice, that being limited by the *shari'a* is better than widespread depravity, and that closing it [i.e. barring the further re-interpretation of the *shari'a*] once and for all is neither acceptable nor necessary. The statements of the classical Islamic jurists (*fuqaha'*) on a matter related to the *shari'a* are not granted any sanctity or placed beyond review or reexamination. Rather, they can be replaced by other [interpretations of Islamic law]. Opinions based on *ijtihad* in debated questions do not in themselves have any force applying to those who do not hold them. It is not permitted to hold [such opinions] to be firm, settled *shari'a* law that cannot be contravened. To do so would be to end contemplation of and reflection over Almighty God's religion; it would deny the truth that error is possible in all *ijtihad*. Even among the companions of the Prophet (*sahaba*),²⁰ there were those who hesitated to give legal opinions out of fear! It is therefore correct to say that the *ijtihad* of one of the classical Islamic jurists (*fuqaha'*) is not more authoritative (*ahaqq bi al-itiba'*) than the *ijtihad* of another. Perhaps the opinion with weaker support is the most appropriate of all [the competing opinions] for the changing circumstances, even if it [this weaker opinion] violates the settled and established opinions of the past! This is the Islamic *shari'a* in its roots and its sources (*fi usuliha wa-manabitiha*), developing by necessity, rejecting rigidity. In matters where there is no [clear scriptural] text [on point], *ijtihad* is only restricted by [the *shari'a*'s] universal controls (*dawabituha al-kulliyya*). [And in such matters,] so long as [the *shari'a*'s] goals

Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory 343-44, 435 n.259 (Jan. 16, 1984) (unpublished Ph.D. dissertation, Harvard University). The SCC's list here is idiosyncratic in that it drops from the list of universal goals the goal of progeny (which all classical and modernist jurists accepted as a universal goal), but includes honor/modesty (*'ird*) (which only a minority of jurists accepted).

20. The companions of the prophet Muhammad and thus those closest to the messenger of divine revelation.

are not obstructed, it is not allowed to require the *wali al-amr*²¹ to [follow mere] opinions in matters of the practical Islamic legal rulings (*ahkam al-fara'iyya*) that respond by their nature to development, or, with respect to these to [require him to] follow them.²² Nor [is it permitted] to rest upon *ijtihad* belonging to a specific [earlier] moment in time, as if [through this past *ijtihad*] the appropriate legal interests had already been established.²³

And whereas: it is established—in light of the preceding—that it is left to the *wali al-amr* to legislate in a disputed matter,²⁴ referring to God and his prophet, praying in regard to that [matter] that the interests (*masalih*) that are being considered are those [interests] which are appropriate (*munasib*) to the goals of the *shari'a* (*maqasid al-shari'a*), and match them, being, therefore, interests whose applications neither expire nor are limited, but are limited—in content and extent—in light of their changing circumstances. Supporting this, is [the fact] that the Prophet's companions (*al-sahaba*), those of the generation born after the death of the prophet Muhammad (*al-tabi'in*) and the *imams* who used *ijtihad* (*a'imat al-mujtahidin*)²⁵ [each] often made rulings²⁶ striving absolutely for the interests (*masalih*) of the people—seeking their welfare, keeping them from harm (*darar*), and rescuing them from distress, bearing in mind that these interests develop in light of the circumstances of their society—provided, however, that there was no *shar'i* indicator

21. The term “*wali al-amr*” (lit. “holder of power”) is a term used regularly by classical jurists, including Ibn Taymiyya and other champions of the theory of *siyasa shar'iyya*. It refers to the ruler. See Lombardi & Brown, *supra* note 1, at 404. In modern Islamic political philosophy it is often used to refer to the political branches of a government—particularly the executive.

22. lit: “to not depart from them.”

23. In other words, it is not permitted to simply assume that past jurists had performed *ijtihad* correctly and, thus, rely on the rulings that they had derived.

24. Here reading “*yusharri'a*” (form II subjunctive) for “*yusharra'u*” (form II passive). Many thanks to Professor Robert Morrison for suggesting this solution to a perplexing passage in the published opinion.

25. In other words, the great early jurists, including those who founded the four Sunni schools of law. See Lombardi & Brown, *supra* note 1, at 402 & n.62, for a discussion of the history of the early jurists.

26. Disregarding here the accusative ending on the word “*qararu*” in the printed text.

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[that required either] taking them [the rulings] into account or precluding them [the rulings].²⁷

And whereas: The root of the authority of the legislator in the field of organizing rights (*huquq*) necessarily entails judging within the limits imposed by the Constitution. One cannot violate the [constitutional] limits by exceeding, transgressing, or undermining them [these limits]. Ignoring or minimizing the rights that are guaranteed by the Constitution attacks fields of vitality that are needed in order 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.²⁸

And whereas: It is clear that the claims that the court hearing the case related to the contested Decision, as well as those made by plaintiff, in his capacity as father of the two students who were expelled from their school for wearing the *niqab*, are *not* connected with boys' uniforms in the primary, preparatory, secondary or equivalent stages. Rather, [these constitutional claims] deal essentially with the uniforms demanded of female students, the appearance [of these uniforms], their characteristics, and the manner of wearing them. Furthermore, they deal specifically with the means of covering [female students].²⁹ One may not transgress the constitutional provisions in this sphere (*nitaq*).

And whereas: The contested [ministerial] Decision ordered that each girl associated with one of the stipulated educational stages have a prescribed form of uniform that safeguards her overall characteristics, that is appropriate for her and that does not reveal

27. In other words, according to the SCC, exemplary figures and great jurists often made legal rulings entirely on the basis of an analysis of people's interests—but would not do so if there was a scriptural indicator that dictated what the ruling should be.

28. In many constitutional systems (especially those operating in the civil law tradition), the constitution explicitly mentions rights but leaves the matter of their definition and organization to legislation. This is a potential loophole in that defining or organizing a right can rob it of much of its meaning. In this paragraph, the Court states its general approach to legislating rights. According to the Court, it is unacceptable for legislation to undermine a freedom in the guise of organizing its exercise.

29. I.e., the challenge to the law deals only with the question of whether the Egyptian government can restrict girls' right to wear a *hijab* or *niqab*.

what must be concealed, and it even [ordered] that, the manner of wearing [the uniform] must protect her modesty, following the traditions and morals of her society.

And whereas: The Islamic *shari'a*—in refining the human soul and shaping the individual personality—establishes only the essence of the rulings [*jawhar al-ahkam*] through which it builds a framework for defending the creed. With respect to the actions of those entrusted,³⁰ which are appropriate for their considered interests, [those entrusted] shall not seek perversion, and they shall never stray from the path to their Lord most high. Within the framework [for defending the creed], their actions must be most pure of heart and most summoned to piety. Islam raised the share of the woman. It inspired her to safeguard her chastity (*afafiha*). It commanded her to protect herself from shame and degradation so that woman would raise herself above those things that could sully her or dishonor her, especially through her attire, tenderness in speech, refinement in walking, bringing her allurements into view, tempting others, or revealing “adornments” that were concealed. [The woman] does not have the right to freely choose her dress as she desires, select it according to her fancy, or claim that her dress is only her personal concern. Rather, her nature must be upright and her clothing must support her in undertaking her responsibilities in the world. The form of her clothes and appearance are not [however] fixed by scriptural texts that have been determined to be certain either with respect to their authenticity or with respect to their meaning (*nusus maqta'a biha sawa' fi thubutiha aw dalalatiha*). These [i.e. the form of clothes and appearance] are matters of debate on which *ijtihad* never stops. They remain open within a fixed, general framework defined by Qur'anic texts (*itar dabit 'amm hadadatihi al-nusus al-Qur'aniyya*). The Exalted One has said: “Let them draw their veils (*khumur*) over their bosoms;”³¹ “Let them not reveal their

30. It is unclear from the context of this passage exactly who these “people entrusted” are.

31. Qur'an 24:31. This and subsequent citations to the Qur'an are based upon the translations in THE MEANING OF THE GLORIOUS KORAN 255 (Mohammed Marmaduke Pickthall trans., 1954) [hereinafter MEANING OF THE GLORIOUS KORAN]. Translations have been modified by the authors (primarily in grammatical structure) to reflect the way that they are used in this case.

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adornments except what is outward[ly apparent];”³² “Let them draw close their cloaks;”³³ and “Nor let them stamp their feet so that their hidden adornments may be known.”³⁴ It cannot be concluded from this that a woman’s dress falls among those matters of piety that cannot be altered.³⁵ Rather, so long as they do not contradict an absolutely certain [scriptural] text, the *wali al-amr* has absolute authority to legislate practical rules within its/their boundaries, limiting the form of [a woman’s] attire or dress in light of what prevails in her society among the people so that it is appropriate with their traditions and customs. Indeed, its content changes according to time and place. As long as the covering realizes the conception, the dress of the woman shall be considered an expression of her belief.

And whereas: the classical Islamic jurists (*fuqaha*’) disagreed among themselves in the subject of the interpretation of Qur’anic texts and of what has been transmitted from the Prophet in the form of strong and weak *hadiths*.³⁶ Their opinions were similar with regard to the dress of a woman and with regard to what she must cover of her body. The Islamic *shari’a*—in the essence of its rulings and in respect of its goals—requires regulation of her clothing. If her

32. Qur’an 24:31; *cf.* MEANING OF THE GLORIOUS KORAN, *supra* note 31, at 255.

33. Qur’an 33:59; *cf.* MEANING OF THE GLORIOUS KORAN, *supra* note 31, at 306.

34. Qur’an 24:31; *cf.* MEANING OF THE GLORIOUS KORAN, *supra* note 31, at 255.

35. In other words, the question of whether a woman’s face and hands must be covered is not resolved by texts that are absolutely certain with respect to both their authenticity and meaning. Accordingly, each generation may use *ijtihad* to answer this question for themselves. While the jurists of the past may have reached one conclusion, Muslims of later generations may reach contrary ones.

36. *Hadiths* (sing. *hadith*, pl. *ahadith*) are formal reports of the statements and actions of Muhammad that are collected and presented along with a “chain of transmission” of the people who witnessed the report and those who have heard it related. As prophet and transmitter of the divine revelations in the Qur’an, the Prophet is considered to have insight into the correct practice for Muslims, and thus Islamic legal scholars have turned to *hadiths* in developing Islamic law. While there is a large body of *hadith* literature, not all is considered reliably authentic. Classical Islamic scholars devised techniques for assessing the reliability of a *hadith*, and the Court’s reference to “strong and weak” *hadiths* refers to the necessity that a legal specialists consider not only a *hadith*’s meaning, but also its trustworthiness.

position [in society] is to be elevated and she is not to be defined primarily by her animality, then her behavior must be refined, neither vulgar nor haughty. It must not place her in embarrassing situations, as would be the case if her whole body were considered *'awra*,³⁷ with all the requirements [that the concept of *'awra* imposes] with respect to knowledge of what makes her different [from men]. She must perform tasks that will involve her mixing with others. It is therefore unimaginable that life in all its aspects would surge around her while she would be specifically required to be an apparition clad only in black or the like. Rather, her 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. Nor [should her clothing inhibit] her performance of various activities that her needs or the good of her society impose on her. Rather, [her clothing] shall balance between the two [requirements], defined in light of necessity and safeguarding what are considered to be the appropriate customs and traditions. Accordingly, 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. With respect to the statement of the Exalted One: "Let them draw their veils (*khumur*) over their bosoms;"³⁸ and the connected statement "Let them draw close their cloaks;"³⁹ her covering should not be lowered behind her back but rather should be

37. The term *'awra* here is almost impossible to translate. It refers to those parts of the body that are inherently sexual and must be covered. Some dictionaries translate the term as "genitals" or "pudenda." See, e.g., HANS WEHR, A DICTIONARY OF MODERN WRITTEN ARABIC (Milton Cowan, ed., 1974). Others translate it as "private part" which, though accurate, may leave the misimpression that it corresponds to those areas that are considered "private parts" in the West. In the Islamic world, classical jurists believed that other parts of the body are also inherently sexual and thus should be covered from public view. Modern Muslims disagree about what parts of the body are inherently sexual. The whole point of the next few lines is to determine exactly which parts of the body were explicitly declared *'awra* in the Qur'an and which parts were considered *'awra* by the different classical jurists and, based on the results of the analysis, to determine which parts of the body the Egyptian government is constitutionally required to consider *'awra*.

38. Qur'an, 24:31; cf. MEANING OF THE GLORIOUS KORAN, *supra* note 31, at 255.

39. Qur'an 33:59; cf. MEANING OF THE GLORIOUS KORAN, *supra* note 31, at 306.

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attached to her chest and neck so that they will not be uncovered. Nothing should appear of their beauty except what is not (*'awra*), namely her face and palms. Some of the classical Islamic jurists held that her feet are, in the words of the Hanafis,⁴⁰ “tempting by their exposure,” and they should not be stamped “lest their hidden adornments become known.” God Most High called all the people to accept their beauty but not be ostentatious, and this is what is met by maintaining moderation. It is necessary that a woman’s clothing not reveal her or display the femininity underneath. Total veiling [of a woman] is not known by necessity to be *shar‘i*,⁴¹ and neither is concealing her beauty so as to totally obscure it. Instead, her appearance must manifest her modesty, [must] facilitate her legitimate contribution to what the affairs of her life require and [must] protect her from debasement. And men should not rush to make advances towards her because of the appearances of her body, leading her to sin and corruption, and causing damage to her lot and position.

And whereas: in light of the foregoing, when dealing with the prohibition of a thing or a concern, it is [i.e. the prohibition must be] related not to something [merely] probable, but rather to something known through an absolutely certain scriptural text (*nass qat‘i*). If not [connected to an absolutely certain scriptural text], it becomes probable according to the basis of the principle of permissibility. There is no indicator (*dalil*) in the Qur’anic texts or in our honorable *sunna*⁴² that legally conforming women’s clothing, to be approved by the *shari‘a*, must veil totally; [that it must] include a *niqab* draped over her so that nothing appears except her eyes and two eye sockets; and [that it] must require the covering of her face, palms, (and, according to some, feet). This is not an acceptable interpretation, nor

40. The Hanafis are the classical jurists who were members of the hanafi guild of law and who developed the hanafi school of Islamic legal interpretation—one of the four classical, orthodox “schools” of Sunni Islamic legal interpretation. See Lombardi & Brown, *supra* note 1, at 402 & n.62, for more background on the guilds of jurists, including the Hanafis.

41. Necessary knowledge is knowledge about which we can be absolutely certain. Thus, this sentence means that the rule in question is not known with absolute certainty to be a rule of *shari‘a*.

42. The practice of the prophet and the early community, which can be recovered through study of the *hadiths*.

is it known by necessity of religion.⁴³ The agreed-upon meaning of *'awra* does not extend to these parts of her body. Instead, [a woman] revealing her face allows her to mix with people who know her and [thus] imposes a type of oversight over her behavior. Likewise it protects her, [by] leading her to avert her gaze, protecting a modest mentality, and keeping her out of sin. What some opine about this—that everything about a woman is private, even her fingernails—is refuted by the fact that Malik, Abu Hanifa, Ahmad ibn Hanbal (in one opinion attributed to him),⁴⁴ and the majority of the Shafi'i jurists (*al-mashhurin al-shafi'in*) did not hold such [an opinion].⁴⁵ The Prophet, peace be upon him, explained that when a woman reaches puberty, it is necessary that her robe cover her body except her face and palms.

And whereas: Examination of the provisions that occur in the contested decision indicates that each student [may] wear a covering that does not hide the face and that she has chosen according to her wish, provided that her guardian certifies that her covering her head is not the result of the meddling of others in her affairs but instead arises from her free will, [a certification] which may be given after she begins her studies. Likewise, the [ministerial] Decision here indicates that [a schoolgirl's] uniform must be appropriate in appearance and tailoring—not [appropriate] according to her personal standards but rather [appropriate] in a way that guards her modesty and accords with the traditions and morals of her society. It is also not permitted for her way of wearing of this uniform to indicate lewdness.

The contested Decision does not contradict, in light of the foregoing, the text of Article 2 of the Constitution. The *wali al-amr* has—in disputed questions—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* (*al-maqasid al-kulliyya li*

43. On the concept of “necessary” knowledge, see *supra* note 16.

44. These are the eponymous “founders” of three of the orthodox classical “schools” of Islamic jurisprudence.

45. The Shafi'i school is the remaining orthodox classical school of Islamic jurisprudence.

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shari'atihim). [These universal goals] are not violated by the *wali al-amr*—acting in the sphere of his capacities—in regulating girls' dress. For there should be no revealing of her *'awra* or legs, nor any informing about her body. There should be no showing her features in a way that repudiates modesty. And the Decision aims at this [result] when it obliges each female pupil associated with one of the stipulated educational stages to wear an appropriate uniform, which screens her without revealing her and which covers her nakedness and display of charms. Her manner of wearing the uniform must avoid this and be suitable to religious values, which connect her by necessity to the morals of her society and to its traditions. Likewise, [a proper schoolgirl's] covering according to this Decision only conceals her head and does not hide her face or palms. If it is to fall to her chest and neck, it would not be enough to drape it behind her back.

And whereas: The plaintiff's complaint that the contested Decision violates the freedom of creed stipulated in Article 46 of the Constitution is rejected. This freedom—at root—means that an individual is not to be compelled to accept a creed that he does not share or to renounce a creed that he has entered into or that he has proclaimed. One creed should not be discriminated against in favor of others through denunciation, contempt, or disdain. Rather, the religions (*al-adyan*) should tolerate each other; there must be mutual respect.

Likewise: The concept of the right to freedom of creed does not grant the protection to someone practicing [his creed] in a manner that harms other creeds. Nor is the state to encourage—secretly or publicly—conversion to a creed under its protection, pressuring others to embrace it. It may not intervene by penalizing (as punishment) those who practice a faith that it has not designated. In particular, it 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. This is what the Constitution imposed when it connected these two freedoms in a single sentence in the forty-sixth article, stipulating that freedom of creed and freedom to practice

religious rites are guaranteed.⁴⁶ This indicates their complementarity; indeed, they are two parts that are not to be separated. The second represents the manifestation of the first, considering that it transforms creed from mere faith and vital inspiration into a practical expression of its [the faith's] content so that it may be practically applied and not hidden inside. This makes it possible to say that the first freedom [i.e. freedom of creed] is unlimited. The second freedom [to practice religious rites] may be limited by ordering it, affirming some of the higher interests connected with it—in particular, what connects it with the protection of the public order and ethical values and the defense of the rights of others and their freedoms.

And whereas: In view of this, the contested [ministerial] Decision does not infringe on freedom of creed, destroy its foundations, or obstruct the rites of [religious] practice. It does not defy the essence of religion (*din*) in the universal roots (*al-usul al-kulliyya*) upon which the *shari'a* is founded. Rather it expresses the legitimate, acceptable exercise of *ijtihad* aiming only to regulate girls' dress—within the realm of educational institutions in the various educational stages that it stipulates—so as not to impair her life, violate her modesty, or betray her *'awra*. The Decision is within the realm of permitted regulation and cannot be considered a weakening of the freedom of creed.

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.⁴⁷ This [argument] is rejected as even if it were possible to say that the appearance of a person

46. EGYPT CONST. art. 46.

47. The Court of Administrative Justice in the 1950s overturned a decision made by the director of a secondary school to ban the girls wearing the *niqab* from his school. In reaching its decision, the Court of Administrative Justice held that the director's decision violated an, as of that time uncodified, right to "personal freedom." See Rady, *supra* note 11, at 309. The plaintiff's decision here to press an Article 46 claim apparently reflects an attempt to argue that the right to wear the veil was recognized even before the enactment and amendment of Article 2.

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through his or her clothing crystallizes the will of choice that represents a layer of individual freedom, caring for its foundations and maintaining its core characteristics. This will of choice should nevertheless restrict the sphere of its implementation to what is closely connected to human personality, [i.e. is] connected to the identity of the person in a sphere that reveals the personal features of his life in its most precise proclivities and most noble purposes, like the right to choose a spouse, to create a family and to have a child. It is furthermore not permitted to expand it [the personal sphere] to a specified regulation (*tanzim*) confined to a specific circle within which public welfare⁴⁸ is represented ordering the affairs of those who fall within its domain, and among [those who fall within its domain] are male and female students of the primary, secondary and intermediate levels. 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. Their [the student’s] clothes will not be mixed with other than them [i.e. other types of clothing]. Rather, with respect to their appearance, they [the students] will be distinguished from others in such a way that their apparel is uniform, is of one type and is suitable, indicating them and making them known, facilitating the manner of dealing with them. Therefore, this sphere of theirs is not a looting (*nahb*) by others who would invade it out of acquisitiveness and enmity, while those who truly and credibly belong to it, mistake the matter with respect to this issue.⁴⁹

And whereas: Even if education is a right guaranteed by the state—according to what is stipulated by Article 18 of the Constitution—education in its entirety is subject to the supervision of the state, and according to the foregoing, it is incumbent upon the state to watch over the entire educational process in all its components and [to watch over] the ties between education and

48. “*Al-salih al-‘amm.*” See WEHR, *supra* note 39, at 523.

49. The meaning of the Arabic in this paragraph is obscure. The SCC seems to be asserting that the ministerial Decision regulating veiling in schools was not decreed for malevolent reasons, and does not touch upon issues in which Egyptian citizens have a constitutionally protected “right of personal freedom” (a right to express themselves as they see fit).

society's needs. [The state's] regulation of the affairs of male and female students in some institutions is justified through the logical relationship and connection between [the content] of the object insured [by the regulation] and the goals that are its [the regulation's] purpose and are connected to [the regulation]. This is fulfilled in the current dispute, which is occurring over the terms which the contested Decision established for the uniforms of the three stipulated educational stages. This Decision did not release the clothing of the male and female students from all restrictions. Rather, it made their [the student's] clothing modest, uniform, and appropriate, so that they [the students] would not amalgamate with others or associate intimately with those other than themselves. Instead, [the students'] clothing in the institutions of these [educational] stages makes them known [as students], indicating them as such, protecting their psychological and mental health, not upsetting their religious values and not dividing them.

And whereas: the contested Decision does not contradict the provisions of the Constitution in any way:

For these reasons

The court rules against the plaintiff.

Hamdi Anwar Sabir, Secretary,

'Awad al-Murr, President of the Court.