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# The Legal Framework Of Apostasy in Egypt: A Manifestation Of Secular Reconstruction Of Sharia By A Modern State

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**The American University in Cairo**

**School of Global Affairs and Public Policy**

**THE LEGAL FRAMEWORK OF APOSTASY IN EGYPT:  
A MANIFESTATION OF SECULAR RECONSTRUCTION OF SHARIA BY  
A MODERN STATE**

**A Thesis Submitted to the**

**Department of Law**

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

**By**

**Ahmed Sedky**

**September 2020**

The American University in Cairo  
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Ahmed Sedky

Supervised by Professor Hani Sayed

ABSTRACT

The legal consequences of renouncing Islam or apostasy, which include depriving the apostate from some civil rights, and the non-recognition of the act itself by law in Egypt have been usually criticized as a blatant violation of the right to religious freedom. Such criticisms are based on the right's definition according to international human rights law precisely the International Covenant on Civil and Political Rights. The dominant reasoning for this violation according to the majority of the related literature is the conservative interpretation of Sharia, the principal source of law, that has been adopted by Egyptian judiciary for more than fifty years. The advocates of this point of view argue that such violation could be resolved through adopting more lenient Sharia rulings concerning apostasy. Investigating the situation of apostasy from a broader legal perspective beyond the rhetoric of human rights demonstrates that resolving the complicated legal status of apostasy starts from realizing the legal framework of apostasy in Egypt as a single indication among others of legal pluralism. It is a problem that stems from the conflict between the rulings of both Sharia and IHRL, as law sources, regarding apostasy and their interpretation by the state. In light of its approach regarding constitutional Islamization, the Egyptian state through its legislature and judiciary has maintained the ambiguity of the legal situation of apostasy to balance between its constitutional obligation to apply Sharia and its international obligation to ensure the consistency of its laws with IHRL. Egyptian courts have undertaken this mission through reconstructing the application of some apostasy juristic and legal consequences under some secular legal regulations and the concept of public policy in contrast to the juristic position of apostasy according to Sharia.

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## **I. Introduction:**

Most Muslim states, including Egypt, became parties to different international human rights treaties including the International Covenant on Civil and Political Rights (ICCPR), which was adopted on 16 December 1966. After signing and ratifying the ICCPR, Muslim states became obliged to ensure the rights that were recognized in this treaty to all individuals within their territories without any kind of distinction. All states parties to the ICCPR have to use their domestic laws to facilitate the implementation of the recognized rights according to Article 2(2) of the treaty.<sup>1</sup>This obligation has posed many challenges to domestic legal systems of Muslim states. These legal systems have to balance between the full implementation of the ICCPR provisions and the full adherence to Sharia, which is the main source of law in many Muslim states like Egypt.<sup>2</sup>

The fulfillment of the notion of religious freedom as recognized in the ICCPR is one of the main challenges that face these legal systems because it contradicts with some aspects of the concept of religious freedom in Sharia. The difference between religious freedom in Sharia and IHRL has resulted in major areas of contention concerning religious freedom in the Middle East. These areas include the practice of monotheistic religions (like preaching and building churches), freedom of non-monotheistic religions, conversion from Islam to another religion, pluralism within the same religious field, and freedom of expression. This research focuses mainly on assessing the legal situation of one of these areas of contention in Egypt precisely apostasy or conversion from Islam. In order to fulfill its international obligation regarding the right to religious freedom, the Egyptian state confirmed through its constitution that the State shall guarantee the freedom of belief and the freedom of practice of religious rites.<sup>3</sup>Moreover, Egyptian courts have always asserted in their verdicts the consistency of their rulings with the ICCPR's definition of religious freedom.

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<sup>1</sup>International Covenant on Civil and Political Rights, adopted 19 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 Mar. 1976), available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

<sup>2</sup>CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, as amended, May 22, 1980, art. 2.

<sup>3</sup>*Id.* art. 46



The tension between on the one hand the Egyptian state's constitutional obligation to adhere to Sharia as the principal source of legislation and on the other hand its international obligation to ensure the fulfilment of the concept of religious freedom according to IHRL invites this research to study the legal framework of apostasy in Egypt as a clear indication of it. The purpose of this research is to assess this legal framework from different aspects to understand how the Egyptian state through its legislature and judiciary managed the conflict between different law sources regarding apostasy to impose its understanding of the concept of religious freedom in both Sharia and IHRL; as a result, the state could shape the legal framework of apostasy. Consequently, in order to understand and assess this legal situation, it is crucial to examine some key aspects of this issue which include features of legal pluralism in Egypt, the legal position of Sharia as a principal source of law in Egypt, the juristic situation of apostasy in Sharia, the ICCPR's definition of the concept of religious freedom, Egyptian court's approach regarding apostasy, and the role of public Policy as a key factor in Imposing state's definition of religious freedom and some apostasy consequences in Egypt.

This thesis argues that the legal framework of apostasy in Egypt is a manifestation of secular reconstruction of Sharia by a modern state. In addition, it argues that the legal situation of apostasy in Egypt contradicts with the concept of religious freedom in both Sharia and IHRL. Accordingly, it challenges the dominant debate that has limited apostasy law in Egypt as only a violation of the Egyptian state's international obligation to ensure religious freedom and a reflection of conservative interpretation and implementation of Sharia rules by judiciary. Rather, Egyptian courts have exploited the legal regulation of apostasy, which is characterized by ambiguity and fragmentation, to enforce state's definition of religious freedom through the reconstruction of some apostasy legal consequences either under some legal regulations or the concept of public policy.

The thesis is composed of two main chapters. The first chapter investigates the scope of religious freedom in Sharia and IHRL as key factors in shaping the legal framework of apostasy in Egypt. The first section of this chapter focuses on illustrating the concept of legal pluralism and its features in Egypt including the legal situation of Sharia as the principal source of law. The second section examines the scope of religious freedom according to Sharia focusing precisely on illustrating the juristic position of apostasy (renouncing Islam). The third section defines the

scope of religious freedom as considered by IHRL and the interpretation of this international obligation by Egyptian courts. The second chapter evaluates the legal framework of apostasy in Egypt. The first section of this chapter assesses this legal framework in different law fields according the legal regulation of apostasy rules and Egyptian courts' approach in this regard. The second section of this chapter explains the role of the concept of public policy as a key factor in imposing state's definition of religious freedom and shaping the legal framework of apostasy.

## **II. Understanding the Scope of Religious Freedom in Both Sharia and IHRL as key Factors in Shaping the Legal Framework of Apostasy in Egypt:**

The legal framework of apostasy in Egypt must be understood as a single indication between others of legal pluralism in Egypt. Accordingly, discussing this framework requires examining the role of Sharia as the main source of law in Egypt and its definition by the SCC. Such definition has demarcated the ambiguous legal situation of conversion from Islam in Egypt since decades. Moreover, it also requires investigating the legal position of apostasy according to each of the conflicting law sources in Egypt Sharia and IHRL. The first section of this chapter focuses on illustrating the concept of legal pluralism and its features in Egypt including the legal situation of Sharia as the principal source of law. The second section examines the scope of religious freedom according to Sharia focusing precisely on illustrating the juristic position of apostasy. The third section defines the scope of religious freedom as considered by IHRL and the interpretation of this international obligation by Egyptian courts. Through the introduced analysis in this chapter, we could conceive the ambiguity of the definition of Sharia principles in the Egyptian legal system and the apparent contradiction between Sharia and IHRL regarding apostasy or conversion from Islam.

### **A. Legal Pluralism in Egypt:**

The legal framework of apostasy in Egypt must be understood as a single indication between others of legal pluralism in Egypt. The concept of legal pluralism simply means the coexistence of more than one legal source or system that govern the same conduct within the same social field. Examining this legal concept and its main features enables us not to conceive apostasy law in Egypt as an isolated legal phenomenon, but as a result of legal pluralism in Egypt and the conflict between different law sources (Sharia, IHRL, State secular law). Consequently, reforming religious freedom related laws and their jurisprudence including apostasy legal

framework could not be achieved by limiting the discussed issue as a human rights problem that can be resolved by adopting more liberal law provisions within the existing legal system; otherwise, it is a problem that stems from the conflict between different law sources and their interpretation by the state. This requires us to understand the definition of legal pluralism, examine the position of Sharia as the main source of law in Egypt and display the role of the Supreme Constitutional Court (SCC) in defining Sharia law in Egypt.

## **1. Defining the Concept of Legal Pluralism:**

### **a. The Idea of Legal Pluralism:**

Legal pluralism has no single or strict definition; rather it has various definitions that reflect its nature as a model for analysis aims to achieve reconceptualization of the law and society relation. Legal pluralism traditionally defined as “a situation in which two or more legal systems coexist in the same social field.”<sup>4</sup> Considering the broad meaning of this definition entails that legal pluralism also includes situations when any social “functioning subgroup” constructs its own internal legal order, that varies from other subgroups’ and also from the state’s legal system.<sup>5</sup> These subgroups may include political confederations, factories, syndicates, universities, families, tribes, etc. This broadens the definition of legal system not only to include the system of courts, judges and law enforcement forces supported by the state but also to include non-legal forms of normative ordering;<sup>6</sup> hence, this may lead us to conclude that “virtually every society is legally plural.”<sup>7</sup> <sup>4</sup>From another perspective, defining legal pluralism according to the governing law code could be “a multiplicity of diverse communicative processes that observe social action under the binary code of legal/illegal.”<sup>8</sup> There are more than one code governing the existing legal system and judging social conducts and these normative codes could be either legal or

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<sup>4</sup>John Griffiths, *What Is Legal Pluralism?*, 18 J. of Legal Pluralism & Unofficial L.1-55 (1986), cited in Sally Engle Merry, *Legal Pluralism*, [22, No.5.] L. & Soc'y Rev. 869, 869-96 (1988).

<sup>5</sup>Sally Engle Merry, *Legal Pluralism*, [22, No.5.] L. & Soc'y Rev. 869, 869-96 (1988).

<sup>6</sup>*Id.*

<sup>7</sup>*Id.* at 871.

<sup>8</sup>Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 Cardozo L. Rev.1443 (1992), cited in Kilian Bälz, *Shari'a and Qanun in Egyptian Law: A Systems Theory Approach to Legal Pluralism*, 2 Y.B. Islamic & Middle E. L. 37, 53 (1995).

illegal (like religious law or customary law) in nature.<sup>9</sup> Furthermore, if we review legal pluralism as an observed socio legal phenomenon, it may be defined as “the condition in which a population observes more than one body of law”<sup>10</sup> Accordingly, this negates the idea of legal centralism, which supposes the emergence of all law rules from the state, because the condition of plurality is achieved by merely the observance of more than one body of law regardless of their sources either the state or not. As we can see, according to the mentioned definitions there is no one theory or single definition of legal pluralism. This confirms that it is a model for analysis aims to achieve reconceptualization of the law and society relation that “seemed to need modification according to each specific case.”<sup>11</sup>

Elaborating the idea of legal pluralism and the premises of its definitions requires referring to some of the leading literature in this regard to be able to comprehend the different situations of legal pluralism that will be discussed in this section. Jacques Vanderlinden in *Le Pluralisme Juridique* defines legal pluralism as “the existence within a particular society of different legal mechanisms applying to identical situations.”<sup>12</sup> The type of the applicable law in this situation varies according to the subject of law who committed the conduct. Barry Hooker in his book *Legal Pluralism* defines legal pluralism as “the situation in which two or more laws interact”<sup>13</sup> Hooker in his work focuses mainly on instances of legal pluralism which have resulted from the transplantation of a developed body of law in a new territory without replacing the original law sources of this territory.<sup>14</sup> This case was manifested in the colonial period when many colonized territories received colonizers’ laws to coexist with their original laws including religious or customary law. John Griffiths in his paper *What is Legal Pluralism?* defines legal pluralism as “the state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs”<sup>15</sup> Griffiths believes that state law acts only as an order among others in

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<sup>9</sup>Kilian Bälz, *Shari‘a and Qanun in Egyptian Law: A Systems Theory Approach to Legal Pluralism*, 2 Y.B. Islamic & Middle E. L. 37, 53 (1995).

<sup>10</sup>BAUDOUIN DUPRET, MAURITS BERGER & LAILA AL-ZWAINI, LEGAL PLURALISM IN THE ARAB WORLD 3(1999).

<sup>11</sup>*Id.* at xii.

<sup>12</sup>Jaques Venderlin, *Le Pluralisme Juridique: Essai De Synthèse*, in LA PLURALISME JURIDIQUE (l’Université de Bruxelles ed., 1972), cited in BAUDOUIN DUPRET, MAURITS BERGER & LAILA AL-ZWAINI, LEGAL PLURALISM IN THE ARAB WORLD 4(1999).

<sup>13</sup>*Id.* at 5.

<sup>14</sup>*Id.*

<sup>15</sup>*Id.* at 9.

any social field. According to this idea, legal pluralism only happens when there are other parallel independent legal orders operating outside that of the state in the same social field or territory, so any other subdivision or plurality within the state's legal system is "a feature of the arrangement of state law."<sup>16</sup> Such point of view has been rejected by many legal authors who emphasize the practical usefulness of identifying situations of legal pluralism within state law.<sup>17</sup> I think that even if we take into account that the majority of legal authors and lawyers believe in the existence of legal pluralism within state law, these different perspectives could show us that the utility of the model of legal pluralism in solving situations of conflict between different bodies of law could vary according to the types of these laws and their relations in these situations. Legal pluralism is only useful if it helps to develop the existing laws and legal policies to be compatible with another body of law without violating the essence of the latter.

The realization of Legal pluralism as a model for analysis, that introduces different solutions to reform state laws so that they could reconcile with other bodies or sources of law, requires recognizing types of law in situations of legal pluralism and different possibilities of their relation. We could distinguish between types of law in situations of legal pluralism according to two typologies or classifications; the first one is the distinction between state and non-state law, and the second is identifying law types as constituent elements of situations of legal pluralism.<sup>18</sup> State law refers to all normative orders that are associated and administrated by state institutions, so state law may include legislation, customary law, precedents (which are combinations of legislation and customary law).<sup>19</sup> On the other hand, non-state law is considered to be all normative orders unassociated with the state like customary law, religious law and foreign legislations. Recognizing the mentioned classification of law entails distinction between two general categories of legal pluralism: state law pluralism and deep legal pluralism.<sup>20</sup> State law pluralism arises when "a state law is composed in a part of an elaborated body of norms first developed as a state law, and in part of another body of norms which has been developed outside the context of state law and given recognition by state law in question."<sup>21</sup> For instance, the

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<sup>16</sup>*Id.* at 10.

<sup>17</sup>*See generally Id.* at 4-14 (demonstrating the weakness of this point of view and the significance of internal legal pluralism).

<sup>18</sup>*Id.* at 11.

<sup>19</sup>*Id.*

<sup>20</sup>*Id.* at 5.

<sup>21</sup>*Id.* at 8.

mentioned example of colonized territories that received colonizers' laws to coexist with their original laws including religious or customary law. In the most of these cases the colonizers' law had been developed to serve as state law, whereas natives' laws were given effect and recognized to operate in particular law fields. State law pluralism has two main features; firstly, it aims at regulating the relations between different laws to avoid "internal conflict of laws"<sup>22</sup> and uncertainty of the applicable law. Secondly, it is studied to identify methods of recognition of one law by its counterpart. In deep legal pluralism, the constituent elements of this situation are state law and non-state law which is not recognized by the state. In this case there is a conflict between these different normative orders in the same social field or territory. Now let us turn to the second typology, the distinction between law types as constituent elements of situations of legal pluralism.<sup>23</sup> According to this classification, these constituent elements could be one of three types: legislation, customary law, and religious law.<sup>24</sup> Legislation is regarded as the common form of state law, and it becomes law only after passing through certain institutional procedures. It also could be made in non-state law and proclaimed orally. Customary law is "created by a consensus within a community, reached over a period of time in a relatively informal manner. It is not normally written, although some customary laws have been recorded in writing."<sup>25</sup> So customary law could be transformed into written legislations in sometimes. Religious law usually refers to rules or normative orders which are derived from any religion and gain their authority from their divine origin. When any religious law is recognized by a modern state as a source of law, this creates a situation of legal pluralism. For instance, this paper primarily discusses a situation of legal pluralism in Egypt, which Sharia is one of its constituent elements. The observance of more than one body of law of the mentioned types creates situations of legal pluralism. The relations between these constituent laws in situations of legal pluralism could be one of the following<sup>26</sup> agglomeration, conflict, integration, recognition, separation, and unification.<sup>27</sup> Agglomeration happens when two bodies of legal norms govern separate fields of activity in the same social field. Conflict exists when "the laws in a situation of legal pluralism

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<sup>22</sup>*Id.* at 9.

<sup>23</sup>*Id.* at 15.

<sup>24</sup>For the purpose of this paper, it is not intended here to mention the various definitions and the main features of these three types, but only to make a passing reference to them.

<sup>25</sup>DUPRET ET AL., *supra* note10, at 15.

<sup>26</sup>The author based this classification on Vanderlinden's in his work *Le Pluralisme Juridique*.

<sup>27</sup>DUPRET ET AL., *supra* note10, at 16-19.

contain norms which impose mutually contradictory requirements upon the population.”<sup>28</sup>This means that while one law urges its subjects to commit a certain deed, the other one forbids them from committing it. The conflict could be avoided by integration because this kind of legal pluralism redesigns the norms of both laws to be compatible with each other. For example, if one law urges its subjects to commit a certain deed, the other one should at least neither forbid nor require it. In the situation of recognition, one constituent law of a case of legal pluralism recognizes the other law(s) and refers to their existence.<sup>29</sup>If this recognition leads only to achieve compatibility between these laws, this form could be regarded as a case of agglomeration. In addition to this form, recognition has two other important forms. Normative recognition occurs when “one body of law includes provisions requiring its own institutions to give effect to the norms of another law.”<sup>30</sup>Secondly, institutional recognition occurs when the institutions of the recognized law are incorporated within their counterparts of the recognizing law. Both normative and institutional recognition usually occurs in situations of state law pluralism, when the recognizing state law receives another body of law. Legal pluralism is terminated in both cases of separation and unification, when the different bodies of laws either unified or separated. After displaying types of law in situations of legal pluralism and different possibilities of their relation, this could enable us to identify and analyze legal plurality in Egypt especially concerning the position of Sharia as the main source of law.

**b. Investigating some Features of Legal Pluralism in Egypt and the Arab World:**

By scrutinizing the Egyptian legal system, as a leading example of the existing legal systems in the Arab world, it appears clearly that Sharia acts as the main legal player that forms legal pluralism in Muslim countries. According to the mentioned types of laws and situations of legal pluralism, legal pluralism in these states could be regarded as a normative recognition in a situation of state law pluralism. This because most of the Arab countries during the colonization era since the early nineteenth century received the colonizers’ law, which had been developed to serve as state law. On the other hand, Sharia that was the common law of Muslim countries before this time was given effect and recognized to operate in particular law fields like personal

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<sup>28</sup>*Id.* at 17.

<sup>29</sup>*Id.* at 18.

<sup>30</sup>*Id.*

status law.<sup>31</sup>The marginalization of Sharia started gradually by adopting “Islamic” law codes modeled on secular or European codes like the *Mecelle* of the ottoman empire that was promulgated in the 1870s.<sup>32</sup>Although Egypt was not under effective control of the Ottoman empire in this time, it also started a similar legal “reform” as a result of “the imperialist, liberal, and statist pressures[.]”<sup>33</sup>In 1883 the Egyptian government issued codes based on the French code at this time.<sup>34</sup>This was followed by establishing a new national centralized court system mirrored that of the French system to apply the issued codes.<sup>35</sup>The adoption of such reforms was at the expense of the implementation of Sharia and the jurisdiction of Sharia courts, which was abrogated finally in 1955. There was no effective political opposition to the trend of secularization of law until the early twentieth century.<sup>36</sup>Islamist political opposition during the decolonization era introduced Islamic law or the application of Sharia as “the national legal tradition, providing the basis for a law that reflects the national character as opposed to borrowed European codes that were increasingly perceived as the legacy of the colonial age.”<sup>37</sup>The struggle of this opposition, its powerful support by the Egyptian public, and the acceptance of the Islamic trend by the ruling regime in Egypt (as an alternative political choice to liberalism, communism, socialism, etc.) and other regimes in the middle east led finally to the recognition of Sharia as a source of law in these states. Finally, in 1971 the Egyptian constitution recognized Sharia in Article 2 as a “a chief source of legislation” before being amended in 1980 to regard Sharia principles as “the chief source of legislation”<sup>38</sup>Accordingly, Arab or Muslim countries could be divided into two groups in matters of legislations.<sup>39</sup>The first group countries recognize Sharia as a source of law among other sources of legislation, while the second group countries found their legislation entirely on Sharia by codifying its legal rules and principles which were derived from its sources (Quraan, Sunnah, etc.). In Egypt, as it will be explained in detail, Sharia is recognized by the constitution as the chief source of law and not merely as a source among

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<sup>31</sup>Bälz, *supra* note 9, at 37.

<sup>32</sup>The *Mecelle* is the Islamic civil code of the ottoman empire.

<sup>33</sup>NATHAN J. BROWN, *THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF* 23 (1997).

<sup>34</sup>CLARK BENNER LOMBARDI, *STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARĪ‘A INTO EGYPTIAN CONSTITUTIONAL LAW* 71 (2006).

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

<sup>36</sup>*Id.* at 72.

<sup>37</sup>Bälz, *supra* note 9, at 37.

<sup>38</sup>LOMBARDI, *supra* note 34, at 133.

<sup>39</sup>DUPRET ET AL., *supra* note 10, at 125.



others. Whether this constitutional recognition of Sharia within a secular based legal system is sufficient or not to restore the historical role of Sharia as the common law of the state or achieve a real reconciliation between Sharia and a European modeled legal system in an assumed situation of legal pluralism is always a disputed matter. I think that since these amendments it has become obvious that the restoration of the historical role of Sharia without restoring the privileged positions of its judicial system and Ulama is practically impossible. Concerning the compatibility of the existing laws and judicial decisions with Sharia, the upcoming analysis of apostasy law in Egypt in this paper would show us that this recognition has not solved the contradiction between Sharia norms and the secular based legal system in Egypt.

The successive failure of the Egyptian state to achieve the proposed compatibility between Sharia and its secular modeled legislations since 1971 has made some legal writers consider the constitutional recognition of Sharia in Egypt as a kind of legal duality and contradiction rather than a situation of legal pluralism.<sup>40</sup>The proponents of this point of view justify it on the grounds that the word pluralism by itself implies a peaceful legal coexistence among different legal systems or bodies of norms, whereas legal duality means that there are contradictions between different law sources within an official legal system. Accordingly, in Egypt this duality exists because there are contradictions within the official legal system between secular western law references and purely religious law references like Sharia.<sup>41</sup>It is believed that “[t]he state always produces such dualities through the elaboration of official constitutional and political laws which the state hastens to violate.”<sup>42</sup>Also, if we would categorize the existing contradiction under the concept of legal pluralism it could be categorized as a conflict in a situation of state law pluralism rather than a recognition. I think that the primary standard to assess whether there is a situation of duality or plurality in any legal system is the degree of adherence to the genuine essence and standards of the recognized source of law. Also, the genuine standards of this source of law should not be defined according to the recipient law, but according to the recognized law itself. For instance, if we talk about religious freedom in Sharia, the adherence to this notion should be assessed according to Sharia standards and not to “the official definition of religious

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<sup>40</sup>*Id.* at 159.

<sup>41</sup>*Id.*

<sup>42</sup>*Id.* at 161.

freedom in Sharia by Egyptian jurisprudence”. Thus, if the recognition of Sharia as a source of law within the Egyptian legal system achieved reconciliation between different law sources without breaching sharia standards according to Sharia itself, then it is a situation of legal pluralism. On the other hand, if this recognition results in contradictions between different law sources and breaches Sharia standards as defined by it, then we face a situation of duality or conflict. As it will be discussed later in this paper, such legal duality is employed to impose modern state’s definitions of the constituent law sources and, as a result, its definitions of the scope of all rights.

Before explaining in detail the position of Sharia as the main source of law in Egypt, I think that a crucial question to our analysis should be answered. If we are faced with legal duality or a conflict situation of legal pluralism in Egypt, how could two contradicting legal orders coexist and interact within a legal system of a modern state?<sup>43</sup>I agree with the point of view that prefers to answer this question in “a manner that permits a move away from a rather simplistic model of "influence" to a more sophisticated paradigm which offers an explanation as to how two autonomous legal orders that remain radically divorced nevertheless interact.”<sup>44</sup>Accordingly, the relation between Sharia and western based legislations should be discussed from another perspective other than that focuses on considering the relation between both systems of norms as a simple mutual influence that has resulted in the “Islamization” of secular modeled laws or “secularization” of Sharia norms. In this regard, there is an analysis that could give us a deeper explanation for this relation. Kilian Bälz reintroduced the paradigm of "operational closure and cognitive openness" that was proposed by the theory of autopoiesis<sup>45</sup>to provide a new explanation for the study of legal pluralism in the Middle East concerning the relation between Sharia (traditional law) and Qanun (modern law). According to this analysis, the development of modern legal systems as alternatives to the existing traditional (Islamic) legal systems in Muslim states involves splitting the existing legal system into modern legal system that operates on

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<sup>43</sup>The following paragraph draws heavily on Kilian Bälz, *Shari‘a and Qanun in Egyptian Law: A Systems Theory Approach to Legal Pluralism*, 44-53.

<sup>44</sup>Bälz, *supra* note 9, at 40.

<sup>45</sup>Autopoiesis is the central concept on which the theory of social systems is based. This theory was developed by Niklas Luhmann, who argues that that society is fragmented into various functionally differentiated, autonomous subsystems. These radically autonomous subsystems are operationally closed and cognitively opened to reproduce themselves and maintain their existence within society.

modern law code, and traditional legal system that operates on traditional law code.<sup>46</sup>As it was illustrated previously, the marginalization of traditional legal system takes place through shrinking its jurisdiction in favor of modern legal order and its newly promulgated laws. After this fragmentation, both traditional and modern legal systems have operated as two autonomous legal systems, which struggle to preserve their operational closure and autonomy through being cognitively opened systems. The proposed analysis assumes the operational closure of any subsystem implies or means that this system's operations are guided by "a specific distinction the binary code."<sup>47</sup>Accordingly, both traditional and modern legal systems apply their own normative codes of legal/illegal or valid/void. This means that each legal system decides whether any deed is valid or void only according to its normative rules. In order to adapt to various social or political conditions, each legal system reconstructs other legal systems' elements and extra-legal concepts as external references into the system.<sup>48</sup>By adopting such cognitive openness, these normative orders maintain their operational closure and existence. Bälz illustrates the application of this paradigm concerning the interaction between Sharia and "man-made" or modern law when he points out that:

one can isolate a pattern similar to that underlying the renewal of Islamic law. The system of secular law must remain operationally closed. Letting Islamic law take over the code, i.e. leaving the decision legal/illegal to Islamic law, would lead to an immediate dissolution of the system. However, facing the political challenge of the call for a comprehensive Islamization of the law, the system of secular law can only maintain operational closure by being cognitively open, i.e. reconstructing principles of Islamic law within the system. However, the principles of Islamic law contained in the Draft Code are a purely internal construct of the system of secular law. As in the case of the application of Islamic law by the Mixed and National Courts, the reconstruction of the principles of Islamic law in the Draft Code caused a transformation of the principles of traditional Islamic law.<sup>49</sup>

This transformation took place through the process of codifying the principles of Islamic law in the language of modern statutory law. I believe that even if this process of codification has traditionally been regarded or declared by legislators as an urgent development of Islamic law to cope with the requirements of the modern state without distorting Sharia's identity, it has been the main guarantee of the existence of secular legal systems in Muslim states. We can say that

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<sup>46</sup>Bälz, *supra* note 9, at 41.

<sup>47</sup>*Id.* at 40.

<sup>48</sup>*Id.* at 53.

<sup>49</sup>*Id.*

through this process modern legal system could have governed the “terms of the game”. These terms include choosing the incorporated principles of Sharia, choosing the adopted juristic opinions, and having the exclusive power of interpreting “Islamized” law statutes. Through these terms Islamic law principles have been re-constructed to be compatible with secular legal systems’ policies and not vice versa. For instance, Islamic draft code of civil transactions, which was drafted by the Egyptian parliament in the late 1970s to replace 1948’s civil code, validated insurance transactions.<sup>50</sup>Such kind of transactions are void according to Sharia because “they contain an unlawful aleatory moment (*gharar*)”<sup>51</sup>The draft code reconstructed the principal of partnership in profit and loss (*sharikat al-mudaraba*) in Sharia as a basis for insurance contract that was defined by the draft as a cooperative contract. The main conclusion that could be drawn from the displayed analysis is that legislating Islamic law represents no more than a process of reconstruction of these norms to achieve policies of a modern legal system by using an Islamic scheme to overcome any calls for the application of Sharia.

## **2. Sharia as the Principal Source of Law in Egypt:**

As it will be illustrated in the last section of this chapter, Egyptian statutory laws do not explicitly regulate apostasy law in Egypt. The absence of this explicit regulation has always made the Egyptian constitutions have a direct rule in shaping the legal framework of apostasy in Egypt. This because the absence of any regulation of apostasy in the codified laws drives Egyptian courts to interpret constitutional provisions regarding Sharia and religious freedom to make their decisions on apostasy related cases. Consequently, displaying the position of Sharia throughout different Egyptian constitutions is a substantial point for the current research. Illustrating the different references to Sharia in these constitutions and focusing primarily on its position since 1971’s constitution could show us how the ambiguity of Islamic supremacy clause could be used by successive ruling regimes in Egypt as a guarantee of their legitimacy and political power. The ambiguity of the discussed clause has resulted in promoting the role of the Egyptian judiciary in demarcating Islamization and all its related cases, like apostasy, in Egypt. This could give us an explanation for the absence of any explicit regulation of the act of apostasy

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<sup>50</sup>*Id.* at 51.

<sup>51</sup>Bälz, *supra* note 9, at 52.

in statutory laws in Egypt. The Egyptian state has always maintained this legal ambiguity to impose its own definition of Sharia and its principles.

The legal status of Sharia in the Egyptian constitutions has been changed since the promulgation of the first Egyptian constitution in 1882.<sup>52</sup> Islam was referred to as the official religion of the state for the first time<sup>53</sup> in 1923's constitution and its counterparts in years 1930, 1953, 1956, 1958, and 1964. The Egyptian constitution of 1971 adopted for the first time the principles of Sharia as a principal source of legislation in Article 2, which states that "Islam is the religion of the state. Arabic is its official language, and the principles of the Islamic Sharia shall be a chief source of legislation."<sup>54</sup> There are two main observations about this article; firstly, by regarding the principles of Sharia as "a chief" source of legislation, Article 2 did not consider Sharia as a supreme source over other sources of legislation.<sup>55</sup> Thus, the inconsistency of any Egyptian law with Sharia under this constitution did not have to entail the invalidity of this law. Secondly, Article 2 was vague as it did not identify the principles of Sharia or how they could be interpreted.<sup>56</sup> These observations were directly related to the political interests of the ruling regime at this time that inspired its adoption of such article for the first time. President Anwar al-Sadat managed to enhance the legitimacy of his regime and face his predecessor's political supporters by gaining the support of other marginalized political groups.<sup>57</sup> He released many political prisoners including Islamists, liberalists, judges, and lawyers. Moreover, the new constitution that was promulgated in 1971 included a number of liberal measures<sup>58</sup> as well as Sharia close in Article 2. It is believed that "Sadat's motivation in including an Islamic supremacy clause then lay in using it as a political device that would legitimate extensive presidential authority contained in this constitution."<sup>59</sup> Accordingly, this constitution focused on fusing many political

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<sup>52</sup>Dawood Ahmed & Tom Ginsburg, *Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions*, University of Chicago Public Law & Legal Theory Working Paper, No. 477 (2014).

<sup>53</sup>Moataz Ahmed El Fegiery, *Islamic Law and Freedom of Religion: The Case of Apostasy and Its Legal Implications in Egypt*, 10(1) MWJHR 1-26(2013).

<sup>54</sup>Egyptian Constitution, *supra* note 2, 11 Sept. 1971, art. 2.

<sup>55</sup>LOMBARDI, *supra* note 34, at 125.

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

<sup>57</sup>*See generally* Ahmed & Ginsburg, *supra* note 52, at 56-76 (discussing the political background of constitutional Islamization in Egypt).

<sup>58</sup>This constitution based the government on the rule of law, prohibited torture, guaranteed freedom of speech, etc.

<sup>59</sup>Ahmed & Ginsburg, *supra* note 52, at 60.

powers in the person of the president.<sup>60</sup> Through being regarded as the “Believing President” who adopted the Islamic supremacy clause for the first time in any Egyptian constitution, Sadat could acquire Islamists’ and public’s political support to promulgate a constitution that broadened his presidential authority. I believe that these political circumstances could justify the vagueness of Article 2. The ambiguity of Article 2 drove the Supreme Court in April 1976 to issue a striking opinion pointing out that “Article 2, as vague as it was, might require all Egyptian law[s] to be consistent with the essential principles of Sharia.”<sup>61</sup> Also, the vagueness of Article 2 enabled the government or the ruling regime to negotiate Islamization terms with both Islamists and liberalists to acquire their political support without giving up the state’s ultimate control over the process.<sup>62</sup> Searching for more political support from Islamists and ordinary Egyptians to face the increasing domestic opposition to its economic and foreign policies, Sadat’s ruling regime rushed to negotiate Islamization for the second time in 1980. On May 22, 1980, Article 2 was amended to state that “. . . the principles of Islamic Sharia are the chief source of legislation”<sup>63</sup> According to this amendment, any Egyptian law contradicts with Sharia principles would be invalid. However, Article 2 still vague as it does not identify the principles of Sharia or how they could be interpreted. The claimed intention of the legislature through adopting this amendment was clarified by the report of the official committee which states that “[The amendment] means that it is imperative to review the laws which were in effect before the Constitution of 1971 and to amend these laws in such a manner as to make them conform to the principles of Islamic law. . . .”<sup>64</sup> This normative recognition of Sharia in the Egyptian constitution imposed a constitutional obligation on the legislature and judiciary to give effect to Sharia norms. Regarding the identification of the principles of Sharia, the drafting committee points out that the legislature should consider “Quran, the Sunna and the opinions of learned jurists and imams.”<sup>65</sup> It was intended to leave the interpretation methodology of Sharia principles as ambiguous as it was to acquire the ruling regime a flexible position in negotiating Islamism with different political powers. Such flexibility would be lost if Sharia principles or their

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<sup>60</sup>For instance, Article 108 authorized the president to issue decrees having force of law in situations of emergency. Furthermore, according to this constitution, the president is also appointed as the chair of the Supreme Judicial Council.

<sup>61</sup>LOMBARDI, *supra* note 34, at 129.

<sup>62</sup>*Id.* at 132.

<sup>63</sup>Egyptian Constitution, *supra* note 54, as amended, May 22, 1980, art. 2.

<sup>64</sup>The Report of the Drafting Committee, cited in LOMBARDI, *supra* note 34, at 133.

<sup>65</sup>*Id.* at 134.

interpretation methodology was identified by the amended constitution. Also, authorizing the official religious institution “Al-Azhar” to take over this process might threaten state’s control over it. It is notable that the amendment of Article 2 in 1980 was also accompanied by amending another article to enable Sadat to stay in power.<sup>66</sup>The proposed comprehensive Islamic review of the existing laws has not been carried out since amending Article 2 in 1980. It is believed that the executive in Egypt renounced its public commitment to Islamization after the assassination of Sadat in 1981 by an extremist Islamic military cell.<sup>67</sup>The intended closure of such a political process, that could carry out a comprehensive Islamic law review of the existing laws, has promoted the role of litigation as an alternative process through which Islamists could enforce Article 2.<sup>68</sup>This justifies the crucial role of Egyptian judiciary in shaping legal Islamization in Egypt during 80s and 90s. The Egyptian courts led by the SCC had to develop their official methodology of interpreting Article 2 and deducing Sharia norms to be able to make their decisions on lawsuits concerning the application of Sharia. Most of these lawsuits were brought to courts by Islamists against legislations that were claimed to be contrary to Sharia principles. In addition, others were filed by normal people or lawyers to challenge both state and non-state actions that they believed to be contrary to Sharia norms. Through this litigation process, the Egyptian state could control the borders of constitutional Islamization in Egypt. This will be demonstrated in the next section through exploring the SCC’s methodology of interpreting Article 2. After shutting down all other political channels, it seems that liberals, Islamists and all other political powers in Egypt accepted the litigation choice as the only way was permitted by the ruling regime in Egypt to challenge, define or fulfil constitutional Islamization. I believe that it is important to refer that the ambiguity of Article 2 in the discussed constitution not only served the political interests of the ruling regime in Egypt but also served as a guarantee of non-conservative or modernist application of Sharia in Egypt. This simply because defining Sharia principles and the methodology of interpreting Quran and Sunnah by the constitution would make judges under a constitutional obligation to adhere to all these rules strictly. Moreover, authorizing the official religious institution Al-Azhar to takeover this process would ensure a stricter application of Sharia norms than to be applied by western educated judges. This point

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<sup>66</sup>Article 77 of the 1971 constitution presented a stumbling block since it limited the President to two six-year terms. It was amended to include the phrase “the President may be reelected for other successive terms.”

<sup>67</sup>*See generally* LOMBARDI, *supra* note 34, at 135- 139.

<sup>68</sup>*Id.* at 139.

leads us to take a look at the status of Sharia in Egypt's 2012 constitution.<sup>69</sup> Examining the position of Sharia in this short-lived constitution could show us how liberals and human rights activists are very susceptible to any constitutional amendment that could resolve the legal ambiguity of Article 2 and, as a result, lead to more conservative interpretation of Sharia. After the fall of the regime of Hosni Mubarak in 2011, a new Egyptian constitution was promulgated in 2012. It was promulgated by the Constituent Assembly whose membership was dominated by the Muslim Brotherhoods and Salafis.<sup>70</sup> This domination happened because “[t]he transitional provision regulating the election of the C A—a provision approved in the March 2011 referendum—required an absolute majority vote of the elected members of Parliament.”<sup>71</sup> Both the Freedom and Justice Party (representing the Muslim Brotherhoods) and Al-Nur party (representing Salafis) had a majority exceeding two thirds of seats of the newly elected parliament at this time. With a majority of Islamists, the Constituent Assembly of the 2012 constitution added some constitutional articles to consolidate and clarify the authority of Islamic law in the new adopted constitution.<sup>72</sup> In addition to Article 2, whose form was not changed, Articles 4 and 219 were added to clarify the ambiguity of the definition of Sharia principles and their implementation. Article 4 states that:

Al-Azhar is an independent Islamic institution of higher learning. It handles all its affairs without outside interference. It leads the call into Islam and assumes responsibility for religious studies and the Arabic language in Egypt and the world. *The al-Azhar's Body of Senior Scholars is to be consulted in matters pertaining to Islamic law.*<sup>73</sup>

According to this article Al -Azhar could provide advisory opinions on any matter related to Sharia, while Article 175 reserved the SCC's exclusive jurisdiction on the constitutional matters. Article 219 explains the principles of Sharia as it states that “Sharia principles include Sharia's general evidences (adillah kulliyah), rules of jurisprudence (qawa'id usuliyyah) and juristic principles (qawa'id fihiyyah) and the sources considered by the Sunni schools of law”<sup>74</sup>

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<sup>69</sup>I would like to refer that the focus of this section is to examine the status of Sharia in the 1971 constitution as Egypt's most enduring constitution that shaped the legal situation of Sharia and, consequently, apostasy case law for forty years. However, pointing to Sharia related constitutional articles in the 2012 and 2014 constitutions is significant to show how the ambiguity of Sharia constitutional articles could also achieve the interests of the modernist or secular point of view as well as the State's.

<sup>70</sup>Gianluca P. Parolin, *Shall We Ask Al-Azhar? Maybe Not Lessons from the Şukūk Bill Incident*, 7 Middle E. L. & Governance 212-35 (2015).

<sup>71</sup>*Id.* at 217.

<sup>72</sup>El Fegiery, *supra* note 53, at 4.

<sup>73</sup>CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 30 Nov. 2012, art. 4.

<sup>74</sup>*Id.* at art. 219.



Introducing Art. 4 into the new adopted constitution resulted in raising many objections from liberals and human rights activists as Moataz El Fegiery summarizes in the following paragraph:

This Article has provoked outrage from a wide range of liberals and human rights activists. In a public statement, 23 Egyptian human rights NGOs considered this move as a bold step towards theocracy, where unaccountable religious scholars intervene in the work of the elected bodies. They expressed worries that this Article copies the Iranian system of *wilayat al faqih* but in a different shape. According to them, Article 4 ‘undermines the concept of the modern democratic state and sets the country up for significant legal uncertainty’. Even though the opinions of the Association of Senior Scholars are not mandatory, the Constitution provides religious scholars with a powerful moral and religious authority over elected parliamentarians. Their opinions would be hardly ignored.<sup>75</sup>

These objections and worries from liberals, NGOs, and human rights activists could show us how the legal ambiguity of Article 2 and its interpretation is not only sponsored by the Egyptian state but also backed up by secular or liberal elites. I think that according to this perspective, legal ambiguity that leads to a modernist interpretation of Sharia is more acceptable than legal certainty that could lead to a conservative interpretation of Sharia. Moreover, “advisory” opinions of “unaccountable” religious scholars in Sharia matters is a blatant intervention in the work of the elected bodies, while the binding interpretation of Sharia by secular educated and state appointed judges has not been regarded as an intervention in the work of the elected bodies since 80s! It is not supposed here, according to the scope of this research, to assess whether or not these added Articles could end the existing legal ambiguity or to examine the surrounding political circumstances that caused these amendments.<sup>76</sup>The point here is to be aware that leaving Article 2 with its original ambiguous form since 1981 has enabled the Egyptian judiciary to adopt a centrist or modernist interpretation of Sharia. Liberals opposed the added articles because “[u]nder Articles 4 and 219, liberal and un-orthodox approaches of Islamic law have no legitimacy in Egyptian legal reasoning.”<sup>77</sup>This point is crucial to the upcoming analysis of the legal framework of apostasy in Egypt. I believe this because, with such ambiguous definition of Sharia principles, it is irrational to agree with any claims considering this legal framework as a result of a conservative interpretation or implementation of Sharia in Egypt. Then why did liberals, NGOs, and human rights activists objected the consultation of al-Azhar in matters

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<sup>75</sup>El Fegiery, *supra* note 53, at 4.

<sup>76</sup>See generally Gianluca P. Parolin, *Shall We Ask Al-Azhar? Maybe Not Lessons from the Şukūk Bill Incident*, 7 Middle E. L. & Governance 212-35 (2015).

<sup>77</sup>El Fegiery, *supra* note 53, at 5.

pertaining to Islamic law if we already have a conservative interpretation of Sharia by the state? I think that the answer is because there is a difference between the state's modernist interpretations of Sharia under a single ambiguous constitutional article and its classic interpretations by religious scholars under a constitutional article defining its principles. After the deposition of Morsi and his government in the summer of 2013, the new military backed government drafted a new constitution that was approved by a national referendum in January 2014.<sup>78</sup> Article 2 was kept with the same form in the new constitution, whereas Art. 219 and the paragraph stating the consultation of Al-Azhar in matters pertaining to Islamic law were both omitted.

Before explaining the SCC's methodology of interpreting Article 2, let's summarize some important findings that should be taken into consideration. The political intention of adopting Article 2 or Sharia supremacy clause since 1971 was not to enforce Sharia principles within the Egyptian legal system; rather, it was adopted to consolidate the political power of the ruling regime at this time. Consequently, Article 2 was formulated and kept with its vagueness without a definite interpretation of Sharia principles or the methodology of their deduction to push all its related political and legal conflicts to courts and litigation process. This process has been the only remained channel to discuss or reform constitutional Islamization after the closure of all other political channels including legislation. As it will be demonstrated, the vague form of Article 2 has enabled the state through its constitutional judiciary to have an ultimate control over the definition of Sharia principles and the scope of its enforcement. Also, the ambiguity of the definition of Sharia principles has been backed up by liberals or secularists who have opposed any further mandatory constitutional definition of these principles that could lead to a more conservative interpretation of Sharia. The present findings confirm that "the introduction of Article 2 has not substantially changed the Egyptian legal system, which has maintained its secular features."<sup>79</sup> Now, let's see how the SCC has adopted a modernist approach to interpret and deduce Sharia principles and norms. Such approach has kept "the incorporation of Islamic law into the Egyptian legal system to a minimum."<sup>80</sup>

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<sup>78</sup>Ahmed & Ginsburg, *supra* note 52, at 67.

<sup>79</sup>El Fegiery, *supra* note 53, at 3.

<sup>80</sup>Maurits S. Berger & Nadia Sonneveld, *Sharia and National Law in Egypt*, in *SHARIA INCORPORATED A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT* (JanMichiel Otto ed., Leiden Univ. Press), cited in El Fegiery, *supra* note 53.

### 3. Examining the Supreme Constitutional Court (SCC)'s Approach to the Interpretation of Article 2:

The Supreme Constitutional Court (SCC) has an exclusive power to interpret and apply constitutional provisions; thus, the SCC has a main role in interpreting Article 2 including the definition of Sharia principles and the scope of their application within the Egyptian legal system. The evolution of the SCC's substantive Article 2 jurisprudence since its establishment right now is a direct result of the historical evolution of constitutional review in the Egyptian legal system. For many decades before 1969, all Egyptian courts had the authority to consider or discuss the constitutionality of legislations.<sup>81</sup> Accordingly, any court could decide not to apply laws that were considered by the court to be unconstitutional according to a legal practice called abstention control.<sup>82</sup> In 1969 the Supreme Court was established by Law No. 81 of 1969 to have an exclusive authority of constitutional review of all legislations.<sup>83</sup> The 1971 constitution introduced for the first time the SCC to "undertake the judicial control in respect of the constitutionality of the laws and regulations and .. undertake the interpretation of the legislative texts in the manner prescribed by law."<sup>84</sup> The court was established in 1979 under Law No. 48, which regulates the operation of the court.<sup>85</sup> According to this law, lower courts act as gate keepers that "determine which constitutional claims can be brought before the SCC [through] a function that is often referred to as their 'gate keeping function'."<sup>86</sup> Since the early 1990s the court's justices have worked to identify the general principles that should govern their interpretation of all constitutional texts.<sup>87</sup> The court has consistently confirmed through its official reports and publications that the "constitution must be interpreted as an organic whole."<sup>88</sup> This implies that the interpretation of any constitutional text must be consistent with all governing constitutional principles that are identified by the court. These principles include: the commitment to democracy and separation of powers, the commitment to equitable social and economic policies, the commitment to ensure that Egyptian law respects the "rule of law", and

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<sup>81</sup> LOMBARDI, *supra* note 34, at 143.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 144.

<sup>84</sup> Egyptian Constitution, *supra* note 54, art. 175.

<sup>85</sup> LOMBARDI, *supra* note 34, at 144.

<sup>86</sup> *Id.* at 145.

<sup>87</sup> *Id.* at 150.

<sup>88</sup> *Id.* at 149.

the commitment that Egyptian law must respect the principles of Sharia.<sup>89</sup>Both the third and the fourth principles has shaped the SCC's methodology of interpreting Article 2. The commitment to ensure that Egyptian law respects the "rule of law" has been interpreted by the court to mean that "the government [has] to respect human rights, including ones widely recognized as fundamental human rights in international agreements and by constitutional courts around the world."<sup>90</sup>In addition, the fourth principle requires from the court to ensure that all its interpretations of constitutional texts must be consistent with Sharia norms as the main source of legislation in Egypt. The court's desire to balance between these two principles has ensured its liberal interpretation of Article 2 to fulfil its international commitment to human rights. In other words, the SCC's commitment to develop "a holistic interpretation of the constitution led it to demand that Egyptian constitutional law be harmonized with unwritten international human rights norms."<sup>91</sup>I think that there is a rational question that could be raised here; why it is assumed here that the SCC's commitment to a holistic interpretation of the constitution has led to a liberal interpretation of Sharia and not to a conservative interpretation of international human rights? There are two reasons that confirm this assumption. The first one is that the upcoming analysis of the court's methodology of interpreting Article 2 would show us how it has developed such methodology to ensure a liberal or non-conservative interpretation of Sharia norms. The second reason is because the SCC as the exclusive interpreter of Article 2, and as a result, of Sharia principles it is not restricted to any other interpretation of Sharia principles. On the other hand, the SCC's interpretation of human rights is restricted to IHRL and could be criticized or reviewed by international human rights organizations and international community. In order to take its time to develop its own theory of Islamic legislation and to identify its methodology of interpreting Sharia principles, the SCC postponed any substantive Article 2 opinions till 1993.<sup>92</sup>The court had ensured this by issuing two opinions in 1985 to confirm that "it had limited authority to exercise Article 2 review. It could not exercise review of laws that were in force at the time that Article 2 was amended in 1980. It could, however, review laws that entered into force thereafter."<sup>93</sup>It is believed that the court applied the principle of non-

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<sup>89</sup>*Id.* at 150.

<sup>90</sup>*Id.*

<sup>91</sup>*Id.* at 158.

<sup>92</sup>*Id.* at 172.

<sup>93</sup>*Id.* at 164.

retroactivity of legislation to the constitutional amendment of Art. 2 because it was reluctant to reveal a systematic theory of Islamic legal interpretations before taking its time to ensure that its reasoning would be accepted by the executive branch, lower courts, political powers including liberals and Islamists, public, and international community. According to what will be illustrated, we could see how this intention has resulted in an ambiguous theory that is formulated in concepts and terms drawn from different theories of Islamic law.<sup>94</sup>

The critical question that the SCC has tried to answer through its methodology of interpreting Sharia principles: under which circumstances are legislations to be considered unconstitutional on the basis that they violate the principles of Sharia?<sup>95</sup> In order to answer this question, the court defines Sharia principles in one of its decision on the case known as the “battle over the veil”, which states that:

It is not permitted for a legislative text to contradict those *shari'a* rulings that are certain with respect to their authenticity and meaning (*al-ahkam al-shar'iyya alqat'iyya fi thubutiha wa dalalatiha*), considering that these rulings alone are those for which *ijtihad* is forbidden, because they signify [the Islamic *shari 'a*'s] universal principles (*mabadi 'aha al-kulliyya*) and its fixed roots (*usulaha al-thabita*), which accept neither interpretation nor substitution. 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.<sup>96</sup>

In its interpretation of Article 2 the SCC has attempted to “develop an approach to Islamic legal interpretation that would be respected by a wide range of people-including a wide range of Islamists”<sup>97</sup> and consistent with the protection of IHRL as well. According to the SCC’s interpretation to Article 2, the Egyptian laws should meet two criteria; firstly, consistency “with

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<sup>94</sup>*Id.* at 174.

<sup>95</sup>Kilian Balz, *The Secular Reconstruction of Islamic Law the Egyptian Supreme Constitutional Court and the "Battle Over the Veil" in State-Run Schools*, in DUPRET ET AL., *supra* note 10.

<sup>96</sup>Case No.8 of Judicial Year 17, S.C.C. (1996), translated in Nathan J. Brown & Clark B. Lombardi, *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. 437-60 (2006).

<sup>97</sup>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. 379-43 (2006).

universally applicable scriptural rules of Islamic Shari'a."<sup>98</sup> Secondly, these laws must advance the goals of Sharia.<sup>99</sup> Regarding the first standard, the SCC identified “universally applicable scriptural rules of Islamic Shari'a” by searching for principles that are authentic and have certain meaning. The court accepted the Quran as authentic, but has not clarified its method of “separating the absolutely trustworthy hadiths from the merely probable.”<sup>100</sup> Since the SCC considers a scriptural command is not binding unless it is certain with respect to both authenticity and meaning, the Court could find few of such binding scriptural commands. The next question that had to be answered by the court’s theory of interpretation was: how to differentiate between universally applicable scriptural rules of Islamic Shari'a, for which *ijtihad* is forbidden, and other Sharia rulings which are subject to change or contradiction by enacted laws? The court defines these “flexible” Sharia principles as:

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*)... 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.<sup>101</sup>

Accordingly, the violation of these disputed or flexible rules of Islamic law regarding texts that are speculative in their origin or meaning (*zannī al-tubūt aw al-dalālah*) by any legislative enactment does not entail its unconstitutionality unless the SCC decides so. Moreover, the court has an exclusive authority to decide which of Sharia norms are regarded as universally applicable scriptural rules and which are flexible rules. The court also could elevate any disputed rule to be a universally applicable scriptural rule through preventing its contravention by any enacted law.<sup>102</sup> It is believed that the SCC had to explain some issues that govern its categorization and deduction of Sharia norms to lend its new developed methodology much more legal credibility, and to give lower courts’ judges more guidance about how to deduce, interpret and categorize Sharia rules. These issues include: what is the adopted Islamic legal theory by the court to

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<sup>98</sup>*Id.* at 418.

<sup>99</sup>Case No.7 of Judicial Year 8, S.C.C., cited in *Id.*

<sup>100</sup>Lombardi & Brown, *supra* note 96, at 419.

<sup>101</sup>Case No.8, *supra* note 96, at 449.

<sup>102</sup>DUPRET ET AL., *supra* note 10, at 236.

deduce rules from Sharia principal and supplementary sources? How do the court purify and categorize the Prophet's hadiths as a principal source of Sharia? How would the court integrate the rulings of both Quran and Sunnah within its legal reasoning? The lack of any answer to these questions has made it obvious that "the SCC exploits the differentiation between definite and flexible rules of Islamic law in order to enlarge the scope of legislative discretion."<sup>103</sup> The court has misused Islamic technical terms without rational Islamic legal reasoning to declare its constitutional theory of interpretation as an Islamic. Concerning Sharia goals, the court believes that there are specific goals that should be promoted by specific types of laws and general goals that must be promoted or not be impeded by all laws.<sup>104</sup> The Court determines specific goals through textual analysis and analysis of history, while the general goals are derived by reason. According to the Court, the general goals "must give effect to the unambiguous, utilitarian principle announced in the *hadith*, namely 'no harm and no retribution' (*la darar wa-la dirar*)"<sup>105</sup> Thus, they include advancing human welfare. The flexibility of the SCC's theory of interpretation of Article 2 enables it to ensure that enforcing Sharia norms on enacted legislations will be consistent with its international commitments to liberal economic philosophy and to the protection of civil and political rights. This because the justices of the court have always considered "the enjoyment of human rights (as these have been defined by the court) as axiomatically good"<sup>106</sup>; as a result, their violation by any law is not permitted. The SCC has written its Article 2 opinions in a compact language that does not illustrate how the court reached its liberal conclusions about Sharia command.<sup>107</sup> The members of the court haven't clearly explained their methodology of interpretation of Sharia for their successors or lower courts to follow because they might be uncertain themselves about the adequacy of their approach.<sup>108</sup> Other courts including the Court of Cassation, administrative courts, and regular courts have followed the SCC's theory in a slightly more conservative approach.<sup>109</sup> This does not absolutely mean that these courts have always adopted more conservative juristic opinions that contradict the liberal approach of the SCC; rather, their decisions only implied more systematic use of

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<sup>103</sup>*Id.* at 237.

<sup>104</sup>*See generally* Lombardi & Brown *supra* note 96, at 421-425.

<sup>105</sup> Case No. 35 of Judicial Year 9, S.C.C. at 354, cited in *Id.*

<sup>106</sup> LOMBARDI, *supra* note 34, at 257.

<sup>107</sup>*Id.* at 259.

<sup>108</sup>*Id.* at 260.

<sup>109</sup>*Id.* at 262.

Hadith or Sunnah literature. Hence, “[t]he most striking pattern in the judiciary’s application of the SCC’s theory is the implicit resistance to the SCC use (or non-use) of the *hadith* literature.”<sup>110</sup>In the absence of any guidance from the SCC, checking the authenticity and the interpretation of any Hadith falls only under the discretion of the concerned court. judges who have different training than traditional Islamic religious scholars could not introduce an alternative theory of Islamic interpretation, but they misuse Islamic technical terms in order to ‘Islamize’ state law in a pattern that is consistent with democracy, international human rights and economic liberalism.<sup>111</sup>

The main conclusion that can be drawn is that the SCC has adopted a modernist approach to interpret and deduce Sharia principles and norms to maintain the secular nature of the Egyptian legal system. In the absence of a clear definition of Sharia principles by the adopted constitution of 1981 and precisely by the discussed Article, on one hand, and renouncing a comprehensive Islamic review of the existing laws to be carried out by legislatures, on the other hand, the SCC had to innovate an interpretation theory to face the increasing resort to litigation procedure to reach political ends. The constitutional court managed to innovate its interpretation theory to balance between two requirements; firstly, to have an Islamic template to be accepted by the public, Islamists, and judges of other courts. Secondly, to create an interpretation methodology that ensures a liberal or modern interpretation of Sharia sources and norms as a fulfillment of its international commitments to protect international human rights and economic liberalism. In order to achieve this balance, the court’s methodology has relied upon a process of a secular reconstruction of Islamic law.<sup>112</sup>

On the other hand, there is a counter point of view challenging the “secularizing effect” of the constitutional judicial review of Sharia in Egypt. For instance, in her article *The Least Religious Branch? Judicial Review and The New Islamic Constitutionalism* Intisar Rabb argues that “prior judicial practice reveals that Egypt’s constitutional court engaged rather than contained or secularized Islamic law; and the more it engaged, the stronger and more legitimate the bases for

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<sup>110</sup>*Id.*

<sup>111</sup>Lombardi & Brown *supra* note 96, at 386.

<sup>112</sup>DUPRET ET AL., *supra* note 10, at 242.



the Court's decisions.”<sup>113</sup>She asserts that Article 2 established jurisprudence closely examines and explores the elements of the Islamic legal tradition. Intisar adds that the SCC’s judges throughout 1990s and 2000s interpreted a variety of Islamic law sources, arguments, classical interpretations, general goals of law, classical and modern notions of public interest, and legal maxims.<sup>114</sup>Our analysis here does not deny such engagement; rather, it proves that the Court’s consideration of some elements of Islamic legal tradition has aimed to control their interpretation and integration within the Egyptian legal system. The paradigm of operational closure and cognitive openness is manifested in the court’s adopted methodology. The court’s theory ensures that Egyptian courts led by the SCC are the official readers and interpreters of Sharia texts and norms; thus, they have the authority to categorize sacred texts and Sharia sources, determine their obligatory nature, choose adopted juristic opinions, and choose the incorporated principles of Sharia. The system of secular law has maintained its operational closure by reconstructing principles of Islamic law within itself. In his impressive analysis of the SCC’s interpretation of Article 2, Balz asserts that this interpretation:

[I]llustrates the struggle to defend the autonomy of the secular legal order. The underlying strategy of the Court’s decision[s] is to *gain control over the authoritative interpretation of Islamic law*: the SCC pays rhetorical tribute to being “bound” by the rules of Islamic law in principle, while it reserves the right to determine the substance of these rules. It is exactly this “substantializing” of Islamic legal rules within the secular legal order that allows the latter to maintain its autonomy.<sup>115</sup>

However, such adopted interpretation methodology has not introduced a real alternative theory of Islamic interpretation to be followed by judges to take over the process. The SCC has only misused Islamic technical terms to Islamize its interpretation of Sharia upon which its decisions were built. The present findings confirm that the normative recognition of Sharia as a main source of law in Egypt since 1971 has not created a real case of legal pluralism in Egypt where the existing laws and legal policies were developed to be compatible with Sharia without violating the essence of the latter. In contrast, it has created a situation of legal duality or conflict where the modern state monopolized and exploited the interpretation of the constituent law

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<sup>113</sup>Intisar Rabb, *The Least Religious Branch: Judicial Review and the New Islamic Constitutionalism*, 17 UCLA J. Int'l L. Foreign Aff. 75 (2013).

<sup>114</sup>*Id.* at 106.

<sup>115</sup>*Id.* at 233.

sources and, as a result, its definitions of the scope of all rights. As supposed earlier in this research, the primary standard to assess whether there is a situation of duality or plurality in any legal system is the degree of adherence to the genuine essence and standards of the recognized source of law. The genuine standards of this source of law should not be defined according to the recipient law, but according to the recognized law itself. Having a full picture of how the discussed interpretation of Sharia as the main source of law in Egypt by the SCC has led to the current contradicting and ambiguous legal framework of apostasy, it is substantial to have a brief or a simple introduction to Sharia sources and Islamic legal theory. Such introduction would give us a general background about the classic or the “genuine” categorization of Sharia sources and Sunni legal theory (Usul al-Fiqh) that has been used in deducting Sharia rules from sources.

## **B. The Scope of Religious Freedom According to Sharia:**

Assessing and analyzing the legal framework of apostasy in Egypt requires examining the main features of religious freedom according to Sharia as a key aspect of our current research. The importance of such examination stems from the assumption that evaluating Egyptian courts’ approach (including the SCC’s) to the act of turning away from Islam or apostasy should include exploring the position of the same act in Sharia. This because the status of apostasy within Sharia, as the main source of law in Egypt, is considered as the original reference according to which apostasy is prohibited or criminalized, and its legal consequences are applied. Thus, regarding Egyptian judges’ approach to the act and its legal framework as a conservative, liberal, secular, or ambiguous should be supported by the comparison with its status in Sharia. After explaining the concept of Sharia as defined and understood by the SCC, I will start here by a simple introduction to the classic or the traditional definition of Sharia sources and Islamic legal theory. This introduction could show us how the SCC’s definition and interpretation of Sharia differs from its definition from the perspective of Sharia itself. The definition of the classic meaning of Sharia will be followed by investigating the scope of religious freedom according to Sharia including main juristic opinions regarding the legal consequences of apostasy.

### **1. What do we Mean by Sharia?**

Before defining Sharia and its sources, it is substantial to identify the conceptual indication of the term Sharia in this thesis. Sharia refers to the traditional or scriptural meaning of the word.

Consequently, refers to juristic rulings which are derived from divinely revealed scriptures of the Quran or Sunnah and they acquire their authority from their Divine origin. These rulings could be stated explicitly in Quran legislative verses or in Sunnah speeches of the Prophet Muhammad (ﷺ). Deriving Sharia rulings has been practiced through scholars and jurists “who develop their own methodology for the classification of sources, derivation of specific rules from general principles, and so forth.”<sup>116</sup>Such traditional or fundamentalist concept of Sharia contradicts with some modernist and functionalist approaches, which consider Sharia as mere normative rules produced from human practice of reasoning and interpretation of jurists and scholars to reach to what they believe to be the law of God and they also include law in action.<sup>117</sup>Accordingly, from this perspective, Sharia norms are not always connected with scriptural legitimacy or acquire sacredness. Holding the traditional concept of Sharia in this thesis is based upon two main reasons; firstly, besides its consideration as the “dominant Islamic religious belief”<sup>118</sup>among Muslims, the prohibition of apostasy in Islam is stated explicitly in Quran and acquires its juristic authority from its Divine origin. Secondly, as we pointed out earlier, the drafting committee of the 1971 constitution referred that in order to identify the principles of Islamic Sharia, the legislatures must consider Quran, the Sunna and the opinions of learned jurists and imams.

Defining and explaining the meaning of Sharia here as a key concept of this research includes a simple introduction to the literal meaning of the term itself, Sharia sources, and its legal theory. Sharia literally means in Arabic “the right path or the clear approach”<sup>119</sup>Sharia could be defined as “the divine law as embodied by God’s Word (the Quran) and the sayings and actions of His prophet Muhammad (the Sunna)”<sup>120</sup> The term could be also defined as “a ‘divine,’ ‘religious,’ or ‘sacred’ law representing the will of God as expressed in revealed scriptures to the Prophet Muhammad.”<sup>121</sup>Sharia has different categories of sources from which its rules and norms are deduced. The primary sources are the Quran and the Sunnah, while secondary sources are

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<sup>116</sup> Abdullahi Ahmed An-Na'im, *Shari'a and Legislation: Is an Islamic Possible or Viable*, 5 Y.B. Islamic & Middle E. L. 29 (1998-1999).

<sup>117</sup> See generally Amr A. Shalakany, *Islamic Legal Histories*, 1 Berkeley J. Middle E. & Islamic L. (2008).

<sup>118</sup> Amr A. Shalakany, *Islamic Legal Histories*, 1 Berkeley J. Middle E. & Islamic L. (2008), at 7.

<sup>119</sup> Al-Maaani Mu'jam. The official website available at: <https://www.almaany.com/ar/dict/ar-ar/%D8%B4%D9%8E%D8%B1%D9%8A%D8%B9%D8%A9/> [accessed 30 September 2018].

<sup>120</sup> Maurits S. Berger, *The Shari'a and Legal Pluralism The Example of Syria*, in Dupret et al., *supra* note 10.

<sup>121</sup> JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 302 (1982), cited in Shalakany, *supra* note 118, at 4.

consensus (*ijma'*) and analogy (*qiyas*). In addition, Sharia disputed sources include public interest (*istislah*), juristic preference (*istihsan*), custom (*urf*), etc.<sup>122</sup> Quran is considered by Muslims as “the most sacred source of law, embodying knowledge that God had revealed about human beliefs, about God himself, and about how the believer should conduct himself or herself in this world.”<sup>123</sup> Concerning the authenticity of Quranic texts, Quran is regarded by Muslims as wholly certain. The second primary source of Sharia is Sunnah, which had the form of specific narratives called hadith.<sup>124</sup> Hadith corpus narrates the Prophet’s deeds and speeches along his life. The legitimacy and the importance of Sunnah as a primary source of norms in Islam stems from Muslims’ belief that the Prophet Muhammad (ﷺ) “was God’s chosen messenger [who] understood God’s [messages and orders] better than anyone else and acted upon them in his daily life.”<sup>125</sup> The authenticity of the hadiths concerning their transmission chain (*isnad*), their main texts (*matn*) and other aspects has been confirmed through different criteria determined by scholars and jurists through the science of hadith and its rubrics. Jurists refined trustworthy hadiths from other weak or fabricated ones and produced several collections of hadith including main six canonical collections that report Sunnah. In addition to the primary sources of Sharia, jurists and scholars use secondary sources when Quran and Sunnah are silent regarding the researched case. Consensus (*ijma'*) could be defined as “the agreement of community as represented by its highly learned jurists living in a particular age or generation, an agreement that bestows on those rulings or opinions subject to it a conclusive, certain knowledge.”<sup>126</sup> It has commonly been assumed that consensus has been considered as dead source of law because it became practically impossible to ascertain after the dispersion of Muslims across wide Islamic territories.<sup>127</sup> Accordingly, the normative legitimacy of consensus as a source of Islamic law is limited to the era preceding the Prophet's death in 632 CE. Analogy (*qiyas*) is considered as the fourth source of law in Sharia.<sup>128</sup> It could be defined as “a form of analogical reasoning through which prescribed norms in the *Qur'an*, *Sunna* or *Ijma'* can be extended to unregulated legal problems if they share the same *'illa*, or *ratio legis*.”<sup>129</sup> The other disputed sources of norms in

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<sup>122</sup>Wael B. Hallaq, *An Introduction to Islamic Law* (Cambridge Univ. Press 2009).

<sup>123</sup>*Id.* at 16.

<sup>124</sup>*Id.*

<sup>125</sup>*Id.*

<sup>126</sup>*Id.* at 21.

<sup>127</sup>Shalakany, *supra* note 118, at 12.

<sup>128</sup>Hallaq, *supra* note 122, at 22.

<sup>129</sup>Shalakany, *supra* note 118, at 12.

Sharia are sources which there is a disagreement among jurists and scholars about their legitimacy as sources of rules. This means that while some jurists regard these sources could include rules and norms to solve issues that primary and secondary sources are silent about, others deny this. They include public interest (*istislah*), juristic preference (*istihsan*), custom (*urf*), Prophet's companions' consensus, prior judicial decisions of Sharia judges and Muftis, preceding nations' rulings (*Sharā' min qablinā*), etc.

Deriving rules from various Sharia sources to deal with the new arising issues facing Muslims in their daily life has not been practiced through a random process, but according to standards set by Islamic legal theory which called in Sharia the science of Usul al-Fiqh. The science of Usul al-Fiqh is defined as “the general principles that are used to deduce the legal rules of conduct from their detailed sources.”<sup>130</sup> Thus, Usul al-Fiqh is the methodology of deriving the rules of Sharia, that governs the conducts of Muslims, from its primary, secondary and disputed sources of Sharia. The main function of Usul al-Fiqh is to develop methods to enable jurists to understand and combine between the judgements that are mentioned explicitly in Quran and authentic Sunnah reports; for instance, Usul al-Fiqh mentions the required conditions to apply abrogation among different Quranic or hadith texts. Moreover, it develops methods for jurists to discover what is supposed to be God's judgment about the issues that are not mentioned explicitly in these sources; for example, it sets the required rules of analogy. To avoid the error that may result from the personal judgement of any jurist, Usul al-Fiqh “draw[s] a master plan of systematic methodology not only for the purpose of understanding the contents of the sources but also for drawing conclusions that are thought to be identical to those of the *lex divina*.”<sup>131</sup> The foundation of the science of Usul al-Fiqh and its development have been progressed as a response to the need of Muslims to discover Sharia rules regarding the arising issues in each era of the Islamic history. Starting with the age of the Prophet (ﷺ), the Prophet's companions used to ask him about any arising questions regarding Sharia rules. These questions were answered either by Quran or by the Prophet (ﷺ) himself (hadith). During their age, the prophet's companions did not face many hurdles in interpreting Quran and Sunnah and discovering Sharia

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<sup>130</sup>MOHAMED SOLIMAN AL-ASHKAR, *Al-Wadeh Fe Ausul Al-Feqh Lel Mobtade'en* (7th ed. Dar Al-Nafaes 2008).

<sup>131</sup>Wael B. Hallaq, *Considerations on the Function and Character of Sunni Legal Theory*, 104 J. of the Am. Oriental Soc'y 679-89 (1984).

rules for the new arising issues. This because they had known the interpretation of these sources and the occasion of each text from the Prophet.<sup>132</sup> Also, in answering the new arising questions, which were few, they used some methods of Usul al- Fiqh like analogy only as a concept without reference to their terms. During the era of followers, jurists expanded in their reference to the methods that have been used in deducting Sharia rules from sources due to the increasing number of the new arising cases.<sup>133</sup> By the second century of hijra, jurists managed to establish the science of Usul al-Fiqh to avoid any error in deducing Sharia rules from sources due to the mixture of Arabs and non-Arabs (ajam) Muslims and the expansion of the territories of the Islamic state. Al-Shafii's book Al-Resala is considered as the first significant book that assembled the main rules of Usul al-Fiqh as a distinctive science of Sharia. This historical background shows that the study and the development of Usul a-Fiqh in any age has been inspired by the needs of the Islamic community to discover Sharia rules regarding the arising problems and should be adopted by scholars and jurists who have "complete understanding of the Qur'an and the Sunna, the foremost sources of law"<sup>134</sup>

The concluded corpus of legal rules regarding any case are called in Sharia Fiqh rulings. The science of fiqh could be defined as "the knowledge of Shari'a rules concerning the acts of worshipers or Muslims."<sup>135</sup> The usage of Usul Al- fiqh methodologies and methodological tools does not ensure reaching the same conclusions regarding *furu* or unprecedented questions by different jurists; rather, it may lead to a variety of juristic opinions for the same issue. This justifies the fact that "no less than 19 schools (*Fiqh Madhhab*) developed during the first four centuries of Islam producing diverse juristic opinions."<sup>136</sup> The main Sunni doctrinal legal schools in Islamic law are: the *Hanafi*, *Maliki*, *Shafii*, and *Hanbali*. They are named after their founder jurists. The reached fiqh rulings regarding any act or issue aim to establish a legal norm for every

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<sup>132</sup>AL-ASHKAR, *supra* note 130, at 14.

<sup>133</sup>*Id.*

<sup>134</sup>Hallaq, *supra* note 131, at 680.

<sup>135</sup>AL-ASHKAR, *supra* note 130, at 8.

<sup>136</sup>Reconstruction of Religious Thought in Islam. Muhamed Iqbal. Lecture VI: The Principle of Movement in the Structure of Islam and Description. Page 116 available at: <https://cdn.wccftech.com/kursed/The%20Reconstruction%20of%20Religious%20Thought%20in%20Islam.pdf> [accessed 25 February 2018], cited in Ali Moussa, The Judicial Resolution of the Tension between Human Rights Treaties and Shari'a Law Reservations under The Constitution of 2014 (May 2018) (unpublished M.D. dissertation, The American University in Cairo).

new case.<sup>137</sup> Sharia recognizes five types of norms under which the entire range of human activity is categorized. According to this categorization, any act committed by Muslim could be considered as forbidden (*muharram*), obligatory (*wajeb*), neutral (*mubah*), recommended (*mandoob*), or disapproved (*makrouh*).<sup>138</sup> Thus, any jurist aims through his reasoning to establish a judgement on the conducts of Muslims that he believes is identical to God's judgment about the researched issues.

One of the most significant findings to emerge from our investigation here is that there is a major difference between the classic or the "genuine" meaning of Sharia (including its sources, legal theory, and legal rules) and its interpretation as elaborated by the SCC. The SCC's interpretation of Sharia principles could be considered as a distorted or deficient recognition of Sharia. A possible explanation for this might be that such recognition failed to introduce a clear review of the adopted approach to deal with Sharia sources other than Quran, its legal theory, and its different juristic perspectives. Hence, we are talking about a case of recognition where the recipient legal system ignored to take into consideration the constituent elements of the recognized law. This deficient recognition of Sharia within the Egyptian legal system has resulted in the contradicting legal position of apostasy in Egypt as what will be illustrated later in this research.

## **2. The Scope of Religious Freedom According to Sharia:**

The principle of non-compulsion in religion is ensured under Islamic law. This principle is confirmed in many Quranic verses such as verse (2:256) that states that "There shall be no compulsion in [acceptance of] the religion. The right course has become clear from the wrong. So, whoever disbelieves in Taghut and believes in Allah has grasped the most trustworthy handhold with no break in it. And Allah is Hearing and Knowing."<sup>139</sup> Also, God urges the Prophet (pbuh), and consequently, his followers after him in Quran not to let their keenness to call non-Muslims to embrace Islam as justification for coercion. In this regard, verse (10:99)

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<sup>137</sup>HALLAQ, *supra* note 122, at 19.

<sup>138</sup>*See generally Id.*, at 19-21 (defining each of these categories and giving explanatory examples).

<sup>139</sup>sūrat l-baqarah: verse (2:256); *See* MASHOOD A. BADERIN, *INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW* (Oxford University Press) (2003), ch. 3, at 120-122 (exploring different juristic opinions regarding the interpretation of this verse and the cause of its revelation).

states that “And had your Lord willed, those on earth would have believed - all of them entirely. then, [O Muhammad], would you compel the people in order that they become believers?”<sup>140</sup> This implies that imposing any form of coercion either physically or psychologically<sup>141</sup> psychologically<sup>133</sup> to enforce non-Muslims to embrace Islam is prohibited in Sharia. Muslims have a general duty to call non-Muslims to embrace Islam by good exhortation and not to coerce them to do so as verse (16:125) confirms “Call to the way of your Lord with wisdom and goodly exhortation, and have disputations with them in the best manner; surely your Lord best knows those who go astray from His path, and He knows best those who follow the right way.”<sup>142</sup> Consequently, forced conversion to Islam is void under Sharia. Such juristic ruling is illustrated by the twelfth century *Hanbali* jurist Ibn Qudamah, who points out that:

It is not permissible to force a non-believer into embracing Islam. For instance, if a non-Muslim citizen (*Dhimmi*) or a protected alien (*Musta'man*) is forced to embrace Islam, he will not be considered as a Muslim except his embrace of Islam is of his own choice... The authority of this prohibition of coercion is the words of God Most High that says: ‘There is no compulsion in religion’.<sup>143</sup>

Religious freedom in Sharia is not only governed by the principle of non-compulsion to ensure the full persuasion of any person embraces Islam, but it is also restricted by the principle of the prohibition of conversion from Islam or apostasy. Such conclusion is justified by the fact that while the principle of non-compulsion in religion is confirmed in many Quranic verses, Quran also includes repeated threats and strong warnings of punishment for apostasy in the Hereafter as a major sin. The act of conversion from one religion to another is also prohibited and punished in other Heavenly religions, namely Judaism and Christianity.<sup>144</sup> Apostasy is the English translation of the Arabic term *Riddah* which literally means “turning back.”<sup>145</sup> Apostasy could be defined as

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<sup>140</sup>sūrat yūnus (Jonah): verse (10:99).

<sup>141</sup>For instance, a narrated precedent of the second Caliph Umar supports this principle. An old Christian woman was reported to have come to the Caliph with some request which the Caliph fulfilled, after which he invited her to Islam. The woman declined. The Caliph was reported to have then stated his sincerity of purpose in the following words: ‘My lord, I did not intend to compel her, because I am aware that there must be no compulsion in religion the right path has certainly become distinguished from the wrong path.’ Cited in MASHOOD A. BADERIN, *INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW* (Oxford University Press) (2003), ch. 3, at 122.

<sup>142</sup>sūrat l-naḥl: verse (16:125).

<sup>143</sup>IBN QUDAMAH, *AL-MUGNI* cited in MASHOOD A. BADERIN, *INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW* (Oxford University Press) (2003), ch. 3, note 385.

<sup>144</sup>ABDALLAH SAEED & HASSAN SAEED, *FREEDOM OF RELIGION, APOSTASY AND ISLAM 38* (Ashgate Publishing Company) (2004).

<sup>145</sup>*Id.* at 36.



“‘turning away from Islam’ (al-rudjfi ‘an din al-islam) or ‘severing the ties with Islam’.”<sup>146</sup>The apostate or murtad is the Muslim who renounces his religion. The prohibition of conversion from Islam or apostasy is stated in many Quranic verses like verse (2:217), which states “And whoever of you reverts from his religion [to disbelief] and dies while he is a disbeliever - for those, their deeds have become worthless in this world and the Hereafter, and those are the companions of the Fire, they will abide therein eternally.”<sup>147</sup>Accordingly, any Muslim either by birth or by conversion is not allowed to renounce his religion regardless he subsequently embraces another faith or not.

### **3. Main Juristic Opinions Regarding the Legal Consequences of Apostasy in Sharia:**

Apostasy in Sharia has different forms, which are classified in three main categories: utterance related, action related, and belief related.<sup>148</sup>Utterance related apostasy could be explicit like mocking or abjuring Islam and its rites,<sup>149</sup>insulting God (sab Allah), and insulting the Prophet (sab Al-Rasol).<sup>150</sup>Using of foul language with regard to God, the Prophet, the angles, other Prophets, and the Companions of the Prophet constitutes a serious offence of blasphemy.<sup>151</sup>Blasphemy offence expression is not stated explicitly in the Quran or Sunnah speeches. Such offence in Sharia is one of the greatest sins regardless of the religion of its committer was Muslim or non-Muslim. There is a difference of opinion among jurists regarding the status of the Muslim committers of blasphemy in Sharia. While most jurists consider the Muslim committers of this act as apostates condemned to death, some jurists consider them as Muslims deserve death penalty. The considered punishment of this act is based on certain reported incidents in the lifetime of the Prophet (pbuh).<sup>152</sup>If the perpetrator of this act was non-Muslim he will also incur death punishment.<sup>153</sup>Implicit apostasy statements include repudiation of some of the Scriptures by adding or omission Quran verses<sup>154</sup>and repudiation of the axiomatic articles of faith (ma

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<sup>146</sup>Rudolph Peters & Gert J. J. De Vries, *Apostasy in Islam*, 17 DIE WELT DES ISLAMIS 1-25 (1977).

<sup>147</sup>sūrat Al-baqarah: verse (2:217).

<sup>148</sup>SAEED & SAEED, *supra* note 144, at 37.

<sup>149</sup>Peters & De Vries *supra* note 146, at 3.

<sup>150</sup>AL-MAWSOA AL-FEQHYA (2nd ed. The Ministry of endowments & Islamic affairs- Kuwait 1992). Part 22, p.180-7.

<sup>151</sup>SAEED & SAEED, *supra* note 144, at 38.

<sup>152</sup>*Id.*

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

<sup>154</sup>Peters & De Vries, *supra* note 146, at 4.

'ulima min al-din bl- darura).<sup>155</sup>The refusal to judge, or to be judged, according to the Shari'a is also considered as implicit apostasy<sup>156</sup>according to verse (5:44) that states “And whoever does not judge by what Allah has revealed – then it is those who are the disbelievers.”<sup>157</sup>Action related apostasy could be committed by any acts mocking Islam like throwing Quran in a dirty place intentionally, etc.<sup>158</sup>Also, Apostasy could happen by negative acts like leaving any of the axiomatic articles of faith (such as praying).<sup>159</sup>Belief related apostasy happens by merely the intention of unbelief which “ covers many cases, including doubts about the existence of Allah and/or about the message of the Prophet Muhammad or any other Prophet; doubts about the Quran, the Day of judgement . . .”<sup>160</sup>Like the act of apostasy, which is subjected to certain conditions, the committer of this act must fulfill specific conditions to be accountable for such acts.<sup>161</sup>

In Islam, there is no doubt that apostasy is regarded as a grievous sin.<sup>162</sup>Apostasy is punished by death penalty in Sharia.<sup>163</sup>This opinion is held by the main four Islamic juristic schools and the majority of Muslim scholars (gumhor al-fuqaha’).<sup>164</sup>This opinion is primarily based on some speeches of the Prophet Muhamed (pbuh) in *Sunna* such as "whoever changes his religion, then kill him."<sup>165</sup>Also, the Prophet Muhamed (pbuh) said “[t]he blood of a fellow Muslim should never be shed except in three cases: that of a married adulterer, the murder, and one who has abandoned his religion, while splitting himself off from the community.”<sup>166</sup>It is important here to refer that there are two isolated opinions of premodern jurists Ibrahim al-Nakha'I and Sufian al-Thawri oppose the mainstream position and see that the apostate should be asked forever to

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<sup>155</sup>Abd Allah Ahmad AN-Na'im, *The Islamic Law of Apostasy and its Modern Applicability: A Case from the Sudan*, in 'ABD ALLĀH AHMAD NA'IM & MASHOOD A. BADERIN, *ISLAM AND HUMAN RIGHTS: SELECTED ESSAYS OF ABDULLAHI AN-NA'IM* 197-224 (Ashgate2010), p.234; *See also* Dr. Ali Gomaa, *Repudiating the Axiomatic Articles of Faith (ma'ulima min al-din bl- darura)* (2015), <https://www.youtube.com/watch?v=2RLIIFVAVyQ> [accessed October 10, 2018].

<sup>156</sup>Metwally Al-Sharawy, *Tafseer Sorat Al-Maeda verses 44-47* (2012), [https://www.youtube.com/watch?v=OeV\\_DcpZmxo](https://www.youtube.com/watch?v=OeV_DcpZmxo) [accessed November 11, 2016].

<sup>157</sup>sūrat l-māidah: verse (544).

<sup>158</sup>AL-MAWSOA AL-FEQHYA, *supra* note 150, at 186.

<sup>159</sup>*Id.* at 183, 187.

<sup>160</sup>SAEED & SAEED, *supra* note 144, at 37.

<sup>161</sup>*See* AL-MAWSOA AL-FEQHYA, *supra* note 150; Peters & De Vries *supra* note 146.

<sup>162</sup>SAEED & SAEED, *supra* note 144, at 51.

<sup>163</sup>AL-MAWSOA AL-FEQHYA *supra* note 150, at 186.

<sup>164</sup>'ABD ALLĀH AHMAD NA'IM & MASHOOD A. BADERIN, *ISLAM AND HUMAN RIGHTS: SELECTED ESSAYS OF ABDULLAHI AN-NA'IM* 197-224 (Ashgate2010), at 233.

<sup>165</sup>*Man baddal dinahu fa-'qtulfihi*. Cf. Bukhari: Jihdd, 2.

<sup>166</sup>*La yahill dam imri' muslim illa bi-ihda thalath: Al-sayb al-zani, wal-nafs bl-nafs, wl-tarek le-denoh al-mofarek lel-gama'*. Cf. Bukhari: diyat, 6.

repent and not be killed.<sup>167</sup>There is a difference of opinion among jurists regarding the nature or the categorization of this punishment in Sharia.<sup>168</sup>This difference is based on the fact that death sanction is not prescribed for apostasy in Quran. Sharia recognizes three kinds of punishment: hadd which is fixed punishment, qisas which is retaliation, and ta'zir which is discretionary punishments prescribed either by the ruler or his deputy (judge).<sup>169</sup>Some jurists including Shafi'is believe that the death punishment for apostasy is a hadd.<sup>170</sup>On the other hand, others hold the view that this punishment is ta'zir because it is not stated explicitly in Quran. The predominant opinion of Sharia jurists emphasizes that apostasy death sanction could only be imposed by the governor (Waly Al-amr) or his deputy after granting the apostate a reprieve of few days to repent (Istatabah) and remembrance Islam.<sup>171</sup> Concerning the legal categorization of repentance and its duration there are two positions in Islamic jurisprudence. The majority of jurists consider offering the apostate an opportunity for repentance as obligatory, while others like Hanafies consider it as a recommended act.<sup>172</sup>Repentance duration according to the majority's point of view is three days, and according to other jurists like some of the Shafi'is the apostate should be offered repentance immediately and killed unless he reembraces Islam.<sup>173</sup>Moreover, there are two opinions in Sharia regarding the punishment of apostate woman. The first point of view, which is held by Malikis, Shafi'is and Hanbalis, see that "the apostate woman must repent within three days; otherwise she faces the death penalty."<sup>174</sup>The second opinion, which is held by Hanafies, exclude female apostate from capital punishment and see that she should be imprisoned and beaten until she repents or dies.<sup>175</sup> Apostasy in Sharia entails other legal consequences other than death penalty. Concerning the apostate's property, the majority of jurists including Malikis, Shafi'is, Hanafis and Hanbalis<sup>176</sup> Hanbalis<sup>167</sup>see that the apostate does not lose his property by apostasy, but his disposal rights are

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<sup>167</sup>MOHAMMED BARAA' YASSIN, APOSTATE SANCTION IN SHARIA AND ANSWERING DENIERS' OBJECTIONS (1st ed. Tassel 2014), at 158.

<sup>168</sup>SAEED & SAEED, *supra* note 144, at 56.

<sup>169</sup>*Id.*

<sup>170</sup>*Id.*

<sup>171</sup>*Id.* at 55.

<sup>172</sup>YASSIN, *supra* note 167, at 60.

<sup>173</sup>*Id.* at 63.

<sup>174</sup>SAEED & SAEED, *supra* note 144, at 52.

<sup>175</sup>*Id.*; See YASSIN, *supra* note 167, at 50-56 (illustrating different reasonings of both opinions).

<sup>176</sup>SAEED & SAEED, *supra* note 144, at 53.

suspended.<sup>177</sup> Accordingly, the apostate is not allowed to perform any legal transaction of his property until his situation becomes clear either by repentance or execution. Once he returns to Islam, he restores these rights. This implies that if the apostate did not repent and died as “as an unbeliever, his acts are legally void; if he readopts the faith, they are considered to have been legally from the beginning and without interruption.”<sup>178</sup> Another opinion is argued by some Hanafi jurists such as Abu Yusuf and Shaybani who believe that the apostate’s right to ownership of property is not affected or suspended by apostasy as they consider his situation as “a criminal awaiting his execution, who does not lose his legal capacity either.”<sup>179</sup> Also, we have a third opinion held by some jurists like Abu Ishak Al-Sherazy see that the apostate loses all his property which transfers to the Islamic state’s public treasury as (*fay*).<sup>180</sup> Some Hanafis also see that female apostate does not lose any of the mentioned rights because she is excluded from death penalty.<sup>181</sup> Concerning the right to inheritance, apostasy in Sharia affects both apostate’s rights as well as his heirs’. The apostate does not have the right to inheritance even from those whose co-religionist he has become because his conversion is not approved or accepted according to Sharia.<sup>182</sup> In Islamic jurisprudence there are three different opinions regulate inheriting apostate’s estate. The first one, which is argued by Shafi’is, Malikis, and Hanbalis, see that whole apostate’s property should transfer to the Islamic state’s public treasury as (*fay*).<sup>183</sup> This opinion is based upon the Prophet’s speech which states that “a Muslim does not inherit an unbeliever (*kafir*) and an unbeliever does not inherit a Muslim.”<sup>184</sup> Secondly, some jurists like Abu Yusuf see that the Muslim heirs should inherit everything that the apostate owned either before or after his apostasy.<sup>185</sup> Thirdly, Hanafi legal theory differentiates between property acquired before the act of apostasy and property acquired after it; while the first part transfers to his Muslim heirs, the other part of his estate becomes *fay*’.<sup>186</sup> Apostasy entails also some legal consequences on marriage in

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<sup>177</sup>Peters & De Vries *supra* note 146, at 7.

<sup>178</sup>*Id.*

<sup>179</sup>*Id.*

<sup>180</sup>AL-MAWSOA AL-FEQHYA *supra* note 150, at 197. *Fay*’ is enemy property “returning” to the Islamic Treasury without warfare as distinct from *ghanimah* or booty taken from the enemy after a military victory.

<sup>181</sup>Peters & De Vries *supra* note 146, at 7.

<sup>182</sup>AL-MAWSOA AL-FEQHYA *supra* note 150, at 199.

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

<sup>184</sup>*La yarth al muslim al kafir wa la yarth al kafir al muslim*. Cf. Bukhari: Al Faraa’id, speech no. 6764.

<sup>185</sup> AL-MAWSOA AL-FEQHYA *supra* note 150, at 199.

<sup>186</sup>Peters & De Vries *supra* note 146, at 8; See YASSIN, *supra* note 167, at 65-70 (illustrating different reasonings of the mentioned opinions).

Sharia. Apostasy results in annulment of the marriage contract upon apostasy of one or both partners without need for judicial decision.<sup>187</sup> Thus, a new marriage is to be contracted if the apostate repents and wants to return to his or her spouse. Hanafis and Malikis see that spouses should be separated immediately after committing the act of apostasy, while Shafis and some of Hanbalis see that spouses may not be separated during the wife's waiting period ('iddah)<sup>188</sup>, so that, if the apostate repents during this period the marriage remains valid.<sup>189</sup> The apostate does not have the right to marry even those whose co-religionist he has become because his conversion is not approved or accepted according to Sharia and his marriage in this case will be considered as void.<sup>190</sup> In regards to children, any child whom mother was pregnant with before the apostasy of the parents (either one or both) is considered as Muslim<sup>191</sup> and cannot be allowed to follow any other religion other than Islam.<sup>192</sup> Our examination of the main consequences of apostasy in Sharia has shown that the impact of renouncing Islam is not only limited to capital punishment, but it also affects the whole life of the apostate. According to what was illustrated, the apostate suffers in Sharia from a civil death as he is not allowed to inherit, marry, and dispose of his property. The apostate is also separated from his spouse and not allowed to choose another religion other than Islam for his children in some cases. I think that these consequences are directly related to the legal nature of Islam as a religion. Islam like many other beliefs (including Christianity and Judaism) all its rulings and norms are based upon a main principle, which is the distinction between believers and unbelievers; consequently, embracing Islam or renouncing it automatically results in many other legal consequences in Sharia. Such legal consequences are related to principal and general norms in Sharia and their ignorance or elimination is not an allowed choice from religious perspective. For instance, the apostate husband is separated from his spouse simply because Muslim woman is not allowed to marry a non-Muslim, and this general principal in Sharia is confirmed by many Quranic verses such as verse (2:221), which states "And do not marry polytheistic women until they believe. And a believing slave woman is better than a polytheist, even though she might please you. And do not marry polytheistic men [to your women] until they

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

<sup>188</sup>'*Iddah* in Sharia is the period that a woman should wait before marrying another man after her divorce or after the death of her ex-husband.

<sup>189</sup>AL-MAWSOA AL-FEQHYA *supra* note 150, at 198.

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

<sup>191</sup>*Id.*

<sup>192</sup>SAEED & SAEED, *supra* note 144, at 53.

believe. And a believing slave is better than a polytheist, even though he might please you. Those invite [you] to the Fire, but Allah invites to Paradise and to forgiveness, by His permission.”<sup>193</sup> Another example could be added in this regard, the apostate is also deprived from his right to inherit from any of his Muslim relatives and this deprivation is based upon, as mentioned above, a general principle in Sharia that “a Muslim does not inherit an unbeliever (*kafir*) and an unbeliever does not inherit a Muslim.”<sup>194</sup> Hence, apostasy consequences in Sharia could not be eliminated or abolished simply by abolishing death penalty because these consequences are set in Sharia either because they are related to general norms or because apostasy is a grievous sin and prohibited act that cannot be approved or accepted from the perspective of Sharia. I believe that it is essential to refer to this point here before displaying different points of views concerning capital punishment of Apostasy. The importance of such reference here stems from the fact that usually the rhetoric of human rights when addresses the legal framework of apostasy in Muslim countries, as a limitation on freedom of belief, concentrates the discussion on the question whether apostate deserves the death penalty or not although this sanction is no longer applied in the most of Muslim countries.<sup>195</sup> The proponents of this perspective consider capital punishment of apostasy in Sharia as the main obstacle in achieving reconciliation between the notion of religious freedom in both Sharia and IHRL. From their point of view, abolishing capital sanction of apostasy in Sharia is a plausible argument to prove that apostasy rules at all is a disputed matter in Sharia that negates with the principle of no compulsion in religion<sup>196</sup> religion<sup>187</sup> and, as a result, Muslim states should ignore them to make their laws and judicial practice consistence with the concept of religious freedom as defined by IHRL. Our investigation here of apostasy consequences in Sharia has shown that either applying or abolishing its capital sanction could not justify regarding the whole of its rules and legal framework in Sharia as a disputed matter that could be abolished from the perspective of Sharia.

Capital punishment for apostasy has been debated by many scholars as a main feature of the legal discourse concerning apostasy. Although apostates are no longer being put to death in most

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<sup>193</sup>sūrat al-baqarah: verse (221).

<sup>194</sup>*La yarth al muslim al kafir wa la yarth al kafir al muslim*. Cf. Bukhari: Al Faraa'id, speech no. 6764.

<sup>195</sup>Peters & De Vries *supra* note 146, at 22.

<sup>196</sup>See, e.g., Yara Nassar, *The Legal Framework of Apostasy in Egypt: An Illegal Limitation on Freedom of Belief* (June 2014) (unpublished M.D. dissertation, The American University in Cairo); SAEED & SAEED, *supra* note 144; Susanne Olsson, *Apostasy in Egypt: Contemporary Cases of Hisbah*, 98 THE MUSLIM WORLD 95–115 (2008); Peters & De Vries *supra* note 146; AN-Na'im, *supra* note 155; TAHA GABER AL-ELWANY, NO COMPULSION IN RELIGION (*LA IKRAH FE AL-DEEN*) (2nd ed. Shorouk 2006).

of Muslim countries since the first half of the last century,<sup>197</sup> some modernist thinkers, jurists, and religious scholars challenge the traditional position of pre-modern or classic Muslim jurists and scholars. As was pointed out earlier, except one or two isolated opinions, there is an almost consensus or agreement among the main four Islamic juristic schools and the majority of Muslim scholars (gumhor al-fuqaha') that apostasy is punished with death penalty. Some modern thinkers and jurists challenge the traditional position on apostasy and hold that the apostate should not be put to death on the mere ground of his apostasy. It is believed that their argument is inspired by their belief that capital punishment of apostasy in Sharia is the main obstacle in achieving reconciliation between the notion of religious freedom in both Sharia and IHRL. According to this approach, the whole issue should be rethought in the light of significant change in time and circumstances.<sup>198</sup> From their point of view, abolishing capital sanction of apostasy in Sharia is a plausible argument to prove that apostasy rules at all is a disputed matter in Sharia that negates with the principle of no compulsion in religion and, as a result, Muslim states should ignore them to make their laws and judicial practice consistent with the concept of religious freedom as defined by IHRL. In order to support their argument to be accepted by the judiciary and even the public, they have tried to justify it from within Sharia. Some of these arguments are going to be displayed here to assess their plausibility from the perspective of Sharia and to see if it could offer the proposed compatibility with the "international" concept of religious freedom. The most well-known argument in this issue is that the apostate should not be put to death on the mere ground of his apostasy because apostasy is mentioned in Quran in many verses without prescribing any temporal punishment on this act. Apostasy is mentioned in Quran as a grievous sin whose committer is threatened with a severe punishment in the afterlife; for instance, verse (2:217) states "And whoever of you reverts from his religion [to disbelief] and dies while he is a disbeliever - for those, their deeds have become worthless in this world and the Hereafter, and those are the companions of the Fire, they will abide therein eternally."<sup>199</sup> Some modernist thinkers see that capital sanction for apostasy is based upon two speeches relying on only one authority (khabar al-ahdd) and were not widely known among the Prophet's companions;<sup>200</sup> consequently, these speeches could not be relied upon to establish a fundamental

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<sup>197</sup>Peters & De Vries *supra* note 146, at 14.

<sup>198</sup>SAEED & SAEED, *supra* note 144, at 93.

<sup>199</sup>sūrat Al-baqarah: verse (2:217).

<sup>200</sup>Peters & De Vries *supra* note 146, at 15.

principle of Islam especially that there is no evidence that the Prophet executed an apostate because of his apostasy.<sup>201</sup> They claim that apostasy speeches contradict with explicit Quran verses, like verse (2:256) which makes freedom of belief a basic right in Islam.<sup>202</sup> Another point of view asserts that only the apostate who revolts against Islam or constitutes a harm to the community should be punished with death sanction, while those who abandon Islam quietly as individuals do not deserve this punishment.<sup>203</sup> <sup>194</sup>In this regard, a contemporary Islamic thinker Mohammed Al-Awa expresses that:

The [death] punishment is inflicted in cases in which the apostate is a cause of harm to the society, while in those cases in which an individual simply changes his religion the punishment is not to be applied. But it must be remembered that unthreatening apostasy is an exceptional case, and the common thing is that apostasy is accompanied by some harmful actions against the society or state. A comparison between the concept of punishing those who commit treason in modern systems of law and those who commit apostasy in Islamic law would be useful.<sup>204</sup>

A similar argument correlates between apostasy sanction and treason. The supporters of this idea contend that apostasy speeches were stated in a time when Islam constituted a socio-political order, and apostasy in this time did not just mean renouncing Islam but meant treason and joining enemies.<sup>205</sup> Accordingly, death sanction was imposed on apostates not because of their apostasy but because of their treason. They refer to the Prophet's speech as an evidence, when He said "[t]he blood of a fellow Muslim should never be shed except in three cases: that of a married adulterer, the murder, and one who has abandoned his religion, while splitting himself off from the community."<sup>206</sup> Other modernist thinkers also suggest that abolishing death penalty could be based upon the two isolated opinions of premodern jurists Ibrahim al-Nakha'I and Sufian al-Thawri, who oppose the mainstream position and see that the apostate should be asked forever to repent and not be killed.

In this regard, there are many counter arguments that could face the mentioned opinions from the viewpoint of Sharia. Saying that death sanction of apostasy should be abolished basing on its

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<sup>201</sup> SAEED & SAEED, *supra* note 144, at 96.

<sup>202</sup> Peters & De Vries *supra* note 146, at 15.

<sup>203</sup> SAEED & SAEED, *supra* note 144, at 90.

<sup>204</sup> MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW (Am. Trust Publications, U.S. 1993), p. 64 cited in *Id.*

<sup>205</sup> Yara Nassar, The Legal Framework of Apostasy in Egypt: An Illegal Limitation on Freedom of Belief (June 2014) (unpublished M.D. dissertation, The American University in Cairo), at 54-56.

<sup>206</sup> *La yahill dam imri' muslim illa bi-ihda thalath: Al-sayb al-zani, wal-nafs bi-nafs, wl-tarek le-denoh al-mofarek lel-gama'*. Cf. Bukhari: diyat, 6.



non-prescription in Quran contradicts with the fact that Sunnah is a primary source of norms in Sharia. A reasonable argument to refute this position could be that the non-prescription of capital punishment for apostasy in Quran does not negate its existence in Sharia because there are many provisions of Sharia only mentioned in *Sunnah*. As was pointed out earlier in this section, the legitimacy and the importance of Sunnah as a primary source of norms in Islam stems from Muslims' belief that the Prophet Muhammad was God's chosen messenger who understood God's messages and orders better than anyone else and acted upon them in his daily life; hence, Sunnah is a complementary source to Quran as it explains some of its meanings and elaborates some provisions that are not mentioned explicitly in the Noble Book. For example, this has been seen in the case of Muslim prayers as the way by which Muslims are praying is only elucidated in *Sunnah* and not Quran. Also, the reliance of apostasy speeches on one authority (khabar al-ahdd) does not affect the authenticity of these traditions as long as the narrator is a trusted person, and this principle has many evidences in Sharia.<sup>207</sup> The most of apostasy speeches were narrated by many well-known companions of the Prophet as Othman,<sup>208</sup> Ibn Masoud, and the Prophet's wife A' esha.<sup>209</sup> It is important here to refer that a well-known pre-modern jurists like Al-Shafii<sup>210</sup> and some proponents of the modernist approach see that some narrators in the transmission chain (*isnad*) of some apostasy speeches are not trusted. However, such observations have not changed the mainstream opinion of pre-modern jurists that apostasy is punished with death penalty because such penalty is mentioned in other speeches even with more trusted transmission chains (*isnad*) and even with different main texts (*matn*). This could justify why Al-Shafii himself and his doctrinal school after him considers that apostasy is punished with death penalty depending on other more authentic speeches.<sup>211</sup> Furthermore, the assertion that the Prophet (pbuh) did not execute an apostate because of his apostasy as an evidence to suggest the non-existence of death sanction could be challenged. It is believed that all apostates who declared their apostasy since establishing the Islamic state in Al-Madina (a state that could impose sanctions) during the Prophet age escaped away; accordingly, there is no evidence in

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<sup>207</sup>YASSIN, *supra* note 167, at 126-128; *Single narrator's speech: its meaning and the obligation of its acceptance*, <http://fatwa.islamweb.net/fatwa/index.php?page=showfatwa&Option=FatwaId&Id=8406>.

<sup>208</sup>*Id.* at 14.

<sup>209</sup> See TAHA GABER AL-ELWANY, *NO COMPULSION IN RELIGION (LA IKRAH FE AL-DEEN)* (2nd ed. Shorouk 2006), at 126-139; *Factual and narrated evidence that the apostate must be killed in Islam*, <http://fatwa.islamweb.net/fatwa/index.php?page=showfatwa&Option=FatwaId&lang=A&Id=13987>.

<sup>210</sup>YASSIN, *supra* note 167, at 130.

<sup>211</sup>*Id.* at 131.

Sunnah that any apostate continued to enjoy his normal life in Al-Madina after declaring his apostasy.<sup>212</sup> One of the most repeated arguments in this discourse that apostasy speeches contradict with explicit Quran verses, like verse (2:256) which makes freedom of belief a basic right in Islam. The contradiction between Quran and authentic *Sunna* traditions is not an acceptable idea in Sharia because it cannot exist either among Quran verses or between Quran and *Sunnah*.<sup>213</sup> It is impossible to say that the Prophet (pbuh) God's chosen messenger who understood God's messages and orders better than anyone else could say speeches contradicting with Quran. Consequently, any belief in the existence of this contradiction is resulted from a misinterpretation of the interpreter according to his limited understanding to the apparent meanings of texts. As illustrated above, Sunnah is a complementary source to Quran as it explains some of its meanings and elaborates some provisions that are not mentioned explicitly in the Noble Book. After examining reasons for revelation of apostasy speeches and Quranic texts concerning religious freedom (like verse (2:256) that states "no compulsion in religion"), the majority of Muslim jurists have agreed upon using the rubric of *takhsis al-'amm* (specification of the general term) under Islamic legal theory or Usul al- Fiqh to specify the apparent generalization of the mentioned Quranic texts by apostasy speeches.<sup>214</sup> The same methodology has been used by Muslim jurists in deducing other provisions in Sharia even related to some prescribed punishments (hudud) in Quran.<sup>215</sup> Other modern jurists and some human rights advocates see that only the apostate who revolts against Islam, constitutes a harm to the community, or commits treason should be punished with death sanction, while those who abandon Islam quietly as individuals do not deserve death penalty. They deduced this limitation from their interpretation of some related speeches as I have referred above. From a juristic perspective such argument is not based upon any real evidence other than their interpretation, whereas they ignore other reported speeches (and their related incidences) in the same issue

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<sup>212</sup>*Is it true that apostates were not punished in the era of Prophecy?*, <https://islamqa.info/ar/answers/277442/>; *Contra* AL-ELWANY, *supra* note 200, at 101-105 (The author mentions apostasy incidents during the age of the Prophet as an evidence for the mentioned assertion; however, these incidents prove that all apostates escaped from Al-Madina).

<sup>213</sup>YASSIN, *supra* note 167, at 117.

<sup>214</sup>*Id.*

<sup>215</sup>For instance, verse (5:38) states that "[As for] the thief, the male and the female, amputate their hands in recompense for what they committed as a deterrent [punishment] from Allah. And Allah is Exalted in Might and Wise." Jurists specified the general meaning of the verse depending on some Sunnah speeches to deduce the minimum value of robbery and the other required conditions to impose the prescribed punishment in Quran.

which confirm that death penalty is directly related to the act of apostasy itself.<sup>216</sup> Also, the connection between apostasy and “splitting off from the community” could be understood as a prima facie connection between apostasy and revolting against community or religion especially that the apostate suffers in Sharia from a civil death. A serious weakness with this argument, however, is that there is no one strict definition of treason or harm according to which jurists or judges could judge when an apostate deserves death penalty. Accepting this point of view also could imply that death sanction may be abolished only in cases of non-announced (inner belief) apostasy; otherwise, any announced apostasy (either explicit or implicit) is susceptible to death penalty because it can be considered as a danger to the state especially when it is accompanied by calling other Muslims to follow certain thoughts that corrupt their belief. This idea transforms apostasy from a matter of belief in Sharia to a political issue assessed according to the political standards of the state or rulers. As I have referred, another opinion proposes that abolishing death penalty could be based upon the two isolated opinions of premodern jurists Ibrahim al-Nakha'I and Sufian al-Thawri, who oppose the mainstream position and see that the apostate should be asked forever to repent and not be killed. Some scholars find that there are some contradictions related to these opinions, and from a juristic perspective the consensus of the Prophet's companions about the issue and their practice could not be refuted by these isolated opinions.<sup>217</sup> Sufian al-Thawri narrates this opinion about Ibrahim al-Nakha'I and agrees with him; however, the most contradicting thing concerning this opinion that it is narrated about Ibrahim al-Nakha'I, who also agrees with other jurists who see that apostate woman should face death penalty.<sup>218</sup>

The main goal of the current analysis was to explore the framework of the act of apostasy in Sharia including main juristic opinions regarding it and its legal consequences. This because the status of apostasy within Sharia, as the main source of law in Egypt, is the original reference according to which apostasy is prohibited or criminalized, and its legal consequences are applied in the Egyptian legal system. Apostasy is punished by death penalty in Sharia. This opinion is held by the main four Islamic juristic schools and the majority of Muslim scholars (gumhor al-fuqaha'). Only two isolated opinions of traditional Muslim jurists see that the apostate should be

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<sup>216</sup>YASSIN, *supra* note 167, at 139.

<sup>217</sup>*Id.* at 154-157.

<sup>218</sup>*Id.* at 159.

asked forever to repent and not be killed. Some jurists including Shafi'is believe that the death punishment for apostasy is a hadd. On the other hand, others hold the view that this punishment is ta'zir because it is not stated explicitly in Quran. Apostasy in Sharia entails other legal consequences other than death penalty. The apostate suffers in Sharia from a civil death as he is not allowed to inherit, marry, and dispose of his property. The apostate is also separated from his spouse and not allowed to choose another religion other than Islam for his children in some cases. These consequences are set in Sharia either because they are related to general norms or because apostasy is a grievous sin and prohibited act that cannot be approved or accepted from the perspective of Sharia. Some modern thinkers and jurists challenge the traditional position on apostasy and hold that the apostate should not be put to death on the mere ground of his apostasy. It is believed that their argument is inspired by their belief that capital punishment of apostasy in Sharia is the main obstacle in achieving reconciliation between the notion of religious freedom in both Sharia and IHRL. According to this approach, the whole issue should be rethought in the light of significant change in time and circumstances. From their point of view, abolishing capital sanction of apostasy in Sharia is a plausible argument to prove that apostasy rules at all is a disputed matter in Sharia that negates with the principle of no compulsion in religion and, as a result, Muslim states should ignore them to make their laws and judicial practice consistence with the concept of religious freedom as defined by IHRL. Our investigation of the most prominent arguments in this issue has led us to some important conclusions that are to be elaborated here. Firstly, these arguments are refutable from the juristic point of view. Secondly, even agreeing with abolishing apostasy capital punishment will not change the fact that conversion from Islam is regarded as a grievous sin in Sharia. Thirdly, abolishing death penalty could not be accepted from a juristic perspective as a reason for abolishing apostasy legal consequences and regarding them as disputed matter in religion because they are set in Sharia, for they are related to general norms and apostasy is a grievous sin that could not be approved in Islam.

### **C. The Scope of Religious Freedom as Considered by International Human Rights Law:**

The legal framework of apostasy in Egypt is not only regulated according its counterpart in Sharia as the principal source of law in Egypt, but it is also governed and affected by the international obligation of the Egyptian state to ensure the consistency of its domestic laws with international human rights law including its definition to the right to freedom of religion. The source of such obligation is stipulated in Article 151 of the 1971 constitution, which states “[t]he President of the Republic shall conclude treaties and communicate them to the People’s Assembly, accompanied with suitable clarifications. They shall have the force of law after their conclusion, ratification and publication according to the established procedure.”<sup>219</sup>

<sup>210</sup>Consequently, after Egypt had ratified the International Covenant on Civil and Political Rights (ICCPR) and published this ratification in the Official Gazette it has acquired the force of law in Egypt. Also, as was pointed out earlier in this research, the SCC has consistently confirmed through its official reports and publications that the constitution must be interpreted as an organic whole. This implies that the interpretation of any constitutional text must be consistent with all governing constitutional principles that are identified by the court. These principles include: the commitment to democracy and separation of powers, the commitment to equitable social and economic policies, the commitment to ensure that Egyptian law respects the “rule of law”, and the commitment that Egyptian law must respect the principles of Sharia. The commitment to ensure that Egyptian law respects the “rule of law” has been interpreted by the court to mean that “the government [has] to respect human rights, including ones widely recognized as fundamental human rights in international agreements and by constitutional courts around the world.”<sup>220</sup> Accordingly, the legal framework of apostasy in Egypt has been demarcated by the evident intention of the Egyptian state, through its legislature and judiciary, to balance between respecting human rights as recognized in international agreements and the full adherence to Sharia as the main source of law in Egypt. Having examined the status of apostasy within Sharia as the original reference according to which apostasy could be criminalized and its legal consequences are applied in Egypt, I will now move to discuss the notion of the right to freedom of religion as recognized by the ICCPR. I will focus precisely on legal permissibility of the right to change one’s current religion with another belief under the covenant. The purpose of this part

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<sup>219</sup>Egyptian Constitution, *supra* note 54, art. 151.

<sup>220</sup>LOMBARDI, *supra* note 34, at 150.

of thesis is to investigate the main features of the concept of religious freedom according to the ICCPR to assess its compatibility with the legal status of apostasy within Sharia. This would enable us to track how the state's attempt to balance between these two competing legal orders has shaped the ambiguous legal status of apostasy within the Egyptian legal system.

### **1. ICCPR's Definition of Religious Freedom:**

The right to freedom of religion, conscience, and thought is a fundamental right that has been stipulated and confirmed by international human rights law through many of its instruments since the proclamation of the Universal Declaration of Human Rights (UDHR) by the United Nations' General Assembly in Paris on 10 December 1948.<sup>221</sup>The notion of religious freedom was stipulated for the first time by the United Nations in Article 18 of the UDHR which states “[e]very one has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”<sup>222</sup>Nine Muslim majority nations out of ten voted in favor of the declaration including Egypt despite some of their reservations about Article 18's clause that mentions the right to change religion or belief.<sup>223</sup>For the same reason, Saudi Arabia abstained from the final vote on the declaration. Johannes Morsink refers to the Egyptian reservation in this regard when he states:

In the plenary General Assembly debate, the Egyptian foreign ministry's legal adviser, Wahid Fikry Raafat, noted his country's support for the UDHR generally, but he had “reservations” about this right to change religion or belief. These reservations were set aside when Egypt supported the UDHR text as a whole.<sup>224</sup>

These reservations by Muslim majority countries were early indicators that the concept of religious freedom as defined by IHRL will create a continuous source of controversy in these states due to its apparent contradiction with Sharia norms. It is believed that such

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<sup>221</sup> Universal Declaration of Human Rights, G. A. res. 217A (III), U.N. Doc A/810 at 71 (1948), *available at*, <http://www.un.org/en/universal-declaration-human-rights/> (last visited Dec. 1, 2018).

<sup>222</sup>*Id.* art.18.

<sup>223</sup>JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE CHALLENGE OF RELIGION* (Columbia: Univ. of Mo. Press 2016), p.162.

<sup>224</sup>*Id.* at 163.

contradiction results from the secular imprint of IHRL and its instruments that collides with any religious based laws.<sup>225</sup> While the UDHR is respectful of all existing religious beliefs, it abolishes and prevents any restrictions on the right to freedom of religion (according to its definition) that could be based upon any of these beliefs. According to what will be explained in our upcoming analysis of Article 18 of the ICCPR, IHRL only permits some political limitations that could be imposed by the state on some aspects of the right to religious freedom. Since the adoption of the UDHR its binding legal character has been controversial and such controversy urged the United Nations to develop it and establish its fundamental rights into a wide range of legally binding conventions like the ICCPR.<sup>226</sup>

The ICCPR is considered as the only binding treaty that introduces a comprehensive articulation of the right to religious freedom as defined by IHRL.<sup>227</sup> The right to freedom of religion is emphasized in Article 18 of the ICCPR, which states that:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.<sup>228</sup>

This article defines subject, content, and limitations of religious freedom. The right to freedom of religion is entitled to “everyone”. This means any individual in any territory around the world must enjoy this right. The content of this right includes freedom from coercion to adopt a

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<sup>225</sup>*Id.* at 159.

<sup>226</sup>HANA SADIK EL-GALLAL, *ISLAM AND THE WEST: THE LIMITS OF FREEDOM OF RELIGION* (Peter Lang AG, Internationaler Verlag der Wissenschaften 2014), p.31.

<sup>227</sup>*Id.* at 32.

<sup>228</sup>International Covenant on Civil and Political Rights, *supra* note 1.

religion or belief, liberty of parents to ensure the religious and moral education of their children, and freedom to manifest religion or belief. The only freedom that can be limited in this right is freedom to manifest one's religion. The first draft of this article was faced by reservations and abstentions from some Muslim and socialist states including Egypt.<sup>229</sup> This because it included "freedom to change one's religion or belief" like article 18 of the UDHR. Later, this statement was amended to "freedom to have or adopt a religion or belief of one's choice."<sup>230</sup> It is believed that the reason for these reservations from Muslim majority countries like Saudi Arabia was based upon the contradiction of the mentioned clause with the principles of Islam that prohibit apostasy.<sup>231</sup> The reached compromise that aimed to acquire the largest number of signatory Muslim states to the new adopted convention at this time has raised many criticisms by human rights advocates and scholars who think that it has resulted in a contradiction between Article 18 of ICCPR and Article 18 of UDHR.<sup>232</sup> According to this point of view, Article 18 of UDHR ensures a wider protection for religious freedom as it includes freedom to change one's religion or belief, whereas Article 18 only refers to the right to freedom to have or adopt a religion or belief of one's choice.

This supposed difference or contradiction between Article 18 of UDHR and its counterpart in ICCPR could be solved by arguing that freedom to have or adopt a religion or belief of one's choice under ICCPR implies freedom to change one's religion.<sup>233</sup> The Human Rights Committee (HRC) held this point of view in its interpretation of the Article. The HRC is established under article 28 of the Covenant and it is composed of independent experts who must be nationals of States parties to the Covenant.<sup>234</sup> The principal mission of this committee is to monitor the implementation of the covenant by its state parties. It also publishes its interpretation of the content of human rights provisions, known as general comments. Accordingly, understanding the

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<sup>229</sup> Mashood A . Baderin, *Islamic Law and the Implementation of International Human Rights Law: A Case Study of the International Covenant on Civil and Political Rights*, in MANISULI SSENYONJO & MASHOOD A . BADERIN, *INTERNATIONAL HUMAN RIGHTS LAW: SIX DECADES AFTER THE UDHR AND BEYOND* 337-358 (Routledge 2016).  
<sup>230</sup> *Id.* at 345.

<sup>231</sup> Ali Ahmari-Moghaddam, *Towards International Islamic Human Rights: A comparative study of Islamic Law, Shari'ah, with universal human rights as defined in the International Bill of Human Rights* (June 2012) (unpublished M.D. dissertation, University of Toronto), at 53.

<sup>232</sup> *Id.* at 54.

<sup>233</sup> *Id.*

<sup>234</sup> *Civil and Political Rights: The Human Rights Committee*, available at <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx>.



scope of the freedom to change one's religion under Article 18 of the ICCPR, for the purpose of this research, requires examining the official interpretation of the Article by the HRC. The committee interpreted Article 18 of the ICCPR in its general comment no. 22 which was adopted on 30 July 1993. I think that it is important here to refer that such interpretation was adopted in 1993 after most of States parties to the covenant had signed and ratified it like Egypt that signed the covenant in 1967 and ratified it on 14 Jan 1982.<sup>235</sup> This means that even regarding general comment no. 22 as the official obligatory interpretation of Article 18 contradicts with the fact that it has not existed since the adoption of the treaty in 1966 to be taken into consideration by signatory States. General comment no. 22 included many principles that identify the scope of the freedom to change one's religion under Article 18 of the ICCPR, and they could be summarized in the following points:

- The scope of protection under Article 18 includes theistic and non-theistic beliefs and not only limited to traditional religions.<sup>236</sup>
- The committee insisted that the freedom to have or to adopt a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another, and it also added that "18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert."<sup>237</sup>
- Imposing any restrictions on the freedom to manifest religion must be prescribed by law for the protection of public safety, order, health or morals, or the fundamental rights and freedoms of others.
- Limitations on the freedom to manifest religion to protect public morals must not be driven from a single tradition.

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<sup>235</sup>*Ratification of International Human Rights Treaties – Egypt*, available at <http://hrlibrary.umn.edu/research/ratification-egypt.html>.

<sup>236</sup>UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, available at: <https://www.refworld.org/docid/453883fb22.html> [accessed 24 December 2018].

<sup>237</sup>*Id.* at 2.

- Any limitation on the freedom to manifest religion “must not be applied in a manner that would vitiate the rights guaranteed in article 18.”<sup>238</sup>
- The recognition of a specific religion as a state religion that is embraced by the majority of the population should not impair the enjoyment of the recognized rights in this covenant even if this belief is treated as the official ideology in state’s constitutions and statutes.

Having investigated the scope of the right to freedom of thought, conscience or religion and focusing precisely on the freedom to change one’s religion under Article 18 of the ICCPR as identified and interpreted by the HRC, it is important here to restate subject, content, and limitations of this right. Any individual in any territory around the world must enjoy this right. The content of this right includes freedom from coercion to adopt a religion or belief, liberty of parents to ensure the religious and moral education of their children, and freedom to manifest religion or belief. The only freedom that can be limited in this right is freedom to manifest one’s religion. The scope of protection under Article 18 includes theistic and non- theistic beliefs; however, it prevents any restrictions on the right to freedom of religion that could be based upon any of these beliefs. The freedom to have or to adopt a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one’s current religion or belief with another. Accordingly, the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs is banned under this Article. Imposing any restrictions on the freedom to manifest religion must be prescribed by law for the protection of public safety, order, health or morals, or the fundamental rights and freedoms of others. Such restrictions or limitations based upon public morals must not be driven from a single tradition or applied in a manner that would vitiate the rights guaranteed in article 18.

Recognizing any religion or belief as the official ideology in state’s constitutions and statutes should not impair the enjoyment of the recognized rights in the ICCPR. One of the more significant findings to emerge from our analysis is that the covenant as an instrument of international human rights law adopts a secular approach to the definition of the right to freedom of thought, conscience, or religion. While it is respectful of all religious beliefs including theistic

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<sup>238</sup>*Id.*

and non-theistic beliefs, it bans any limitations on religious freedom that could be based upon any of these beliefs. In contrast, imposing any restrictions on the freedom to manifest religion must be based upon the protection of public safety, order, health or morals. The notable thing here is that neither the ICCPR nor the HRC comment in this regard introduced a strict or an obligatory definition of any of the mentioned categories. Consequently, we could say that the combination between emphasizing the illegality of any limitation on religious freedom that is driven from a single religion and the absence of any clear strict definition of public safety, order, health or morals according to which any state could limit freedom to manifest religion has offered a loophole for states parties to the covenant to breach its concept of the right. This means that any state could limit any aspect of the right to freedom of thought, conscience or religion as long as this aspect is categorized by the state as a freedom to manifest religion, which varies from one belief to another. Furthermore, any state party to the covenant could justify such limitations by the protection of public safety, order, health or morals, which have no strict definition. Accordingly, the secular approach of the Article has ensured that only political limitations could be imposed by the state on some aspects of the right to religious freedom. The legal framework of apostasy in Egypt is a clear manifestation of this paradigm. The case law of the Egyptian civil courts regarded apostasy as a part of the practice of belief that is regulated by the “internal order” of Islam and can be restricted on the bases of public policy.<sup>239</sup> Public policy is used to ground apostasy rules, which are based on Sharia principles, into the Egyptian legal system and to ensure their application without being stated in any statutory law.<sup>240</sup>

## **2. The Egyptian Reservation in this Regard:**

Egypt ratified the ICCPR in 1982 after declaring that "Taking into consideration the provisions of the Islamic Shari'a and the fact that they do not conflict with the text [i.e. the Covenant] ... we accept, support and ratify it"<sup>241</sup> Although the amended statement still ensure the freedom to change one's religion (as it was confirmed in the HRC comment), Egyptian government officials expressed that “this provision does not violate ‘the rules of Shari'a law.’”<sup>242</sup> Maurits Berger refers that some scholars believe that the Egyptian statement in this regard is an exception close or

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<sup>239</sup>Maurits S. Berger, *Apostasy and Public Policy in Contemporary Egypt: An Evaluation of Recent Cases from Egypt's Highest Courts*, 25 HUMAN RIGHTS QUARTERLY 720–740 (2003), at 737.

<sup>240</sup>*Id.* at 733.

<sup>241</sup>*Id.* at 734.

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

reservation, while others interpret it as a confirmation of the consistency the ICCPR provisions precisely Article 18 with Sharia.<sup>243</sup> Concerning the legal effect of this kind of reservations on the binding nature of the ICCPR's provisions and other human rights instruments, the HRC has addressed this issue in its general comment no.24. Firstly, the HRC distinguishes between reservations and declarations to a State's understanding of the interpretation of a provision as the comment states that "If a statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to the State, it constitutes a reservation. Conversely, if a so-called reservation merely offers a State's understanding of a provision but does not exclude or modify that provision in its application to that State, it is, in reality, not a reservation."<sup>244</sup> In addition, the comment insists that the covenant neither prohibits reservations nor mentions permitted reservations, and the absence of such prohibition does not imply the permission of any reservation to the covenant provisions.<sup>245</sup> Reservations under the covenant and its first optional protocol is governed by international law precisely Article 19(3) of the Vienna Convention on the Law of Treaties.<sup>246</sup> Accordingly, the permission for any reservation concerning the covenant provisions is correlated with its compatibility with the object and the purpose of the covenant. General comment no. 24 defines the object and the purpose of the covenant when it states:

The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.<sup>247</sup>

Basing on applying the "object and the purpose test", the HRC considers that all the covenant provisions represent preemptory norms of customary international law and may not be subject of reservations. Also, after taking into consideration that there is no there is no hierarchy of importance of rights under the Covenant, the committee ruled that the suspension of the

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<sup>243</sup>*Id.* at note 54.

<sup>244</sup>UN Human Rights Committee (HRC), *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, 4 November 1994, CCPR/C/21/Rev.1/Add.6, available at:

<https://www.refworld.org/docid/453883fc11.html> [accessed 8 January 2019].

<sup>245</sup>*Id.* at 2.

<sup>246</sup>Article 19 states that: A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

<sup>247</sup>UN Human Rights Committee (HRC), *supra* note 244, at 2.

operation of certain rights is not allowed. For instance, a State may not reserve to “deny freedom of thought, conscience and religion [or] to presume a person guilty unless he proves his innocence.”<sup>248</sup> Through applying all the mentioned standards and categorizations on the Egyptian statement or “reservation”, we can assess its legal consequences on its international obligation to ensure the protection of the right to freedom of thought, conscience and religion, as defined by the ICCPR, in the Egyptian territories. Thus, the Egyptian statement which states “Taking into consideration the provisions of the Islamic Shari'a and the fact that they do not conflict with the text [i.e. the Covenant] ... we accept, support and ratify it”<sup>249</sup> could not be considered as a reservation according to the distinction set by general comment no. 24, and it is merely a statement of policy or a State's understanding of the interpretation of a provision. Even if this statement is considered according to some scholars as an exception close or reservation, this reservation could not suspend the operation of certain rights of the ICCPR in Egypt or limit them. This because the HRC considers that all the covenant provisions represent preemptory norms of customary international law and may not be subject of reservations, which negates the object and the purpose of the covenant. I think that it is important here to note that the Egyptian statement in this issue, as some scholars emphasize, indicates how Sharia as the highest source of law in Egypt plays a crucial role in the interpretation of the international obligations of the Egyptian State.<sup>250</sup> It also, “shows that Islamic Shari'a is a higher source of law in Egypt than international obligations and that its application is the highest legal obligation according to [the Egyptian constitution at this time].”<sup>251</sup>

### **3. The Judicial Enforcement of this International Obligation by Egyptian Courts:**

While ensuring the application of constitutional provisions and their interpretation falls within the exclusive jurisdiction of the SCC, the international treaties signed and ratified by Egypt could be applied by any Egyptian court or called upon by Egyptian litigants.<sup>252</sup> This stems from the fact that ratified international treaties acquire the force of law in Egypt after fulfilling certain procedures. As stated earlier in this research, such legal principle that incorporates the rules of

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<sup>248</sup>*Id.*

<sup>249</sup>Berger, *supra* note 239, at 737.

<sup>250</sup>Nassar, *supra* note 205, at 37.

<sup>251</sup>*Id.*

<sup>252</sup>Berger, *supra* note 239, at 735.

ratified international instruments within the Egyptian legal system was set by Article 151 of the 1971 constitution, which reads “[t]he President of the Republic shall conclude treaties and communicate them to the People’s Assembly, accompanied with suitable clarifications. They shall have the force of law after their conclusion, ratification and publication according to the established procedure.”<sup>253</sup>The same position is emphasized in both constitutions of 2012 and 2014 with some changes.<sup>254</sup>Consequently, it is believed that “[t]he fulfillment of some formal requirements is a prerequisite for the legal enforcement of these instruments, [and] the ratified instruments are only enforceable after their parliamentary approval and publication in the Official Gazette.”<sup>255</sup>Ratified international instruments including human rights treaties are considered as sovereign acts, which are excluded from the jurisdiction of domestic courts according to Article 17 of the Judicial Authority Law no 64. Year 1972.<sup>256</sup>The SCC has also confirmed this rule in various precedents.<sup>257</sup>On the other hand, the SCC could invalidate the ratification of an international treaty in the case of the non- fulfillment of the formal requirements of this process according to the constitution. Thus, our investigation here could lead us to a conclusion that the ICCPR provisions precisely Article 18 has the force of law before courts that have to ensure their enforcement within the Egyptian legal system.

### **III. The Legal Framework of Apostasy in Egypt between Law and Judicial Practice:**

The previous analysis of the legal position of apostasy or turning away from Islam in both Sharia and IHRL proves that we are in front of two contradicting rulings that govern the same conduct in two different legal orders. From the perspective of Sharia, apostasy is a grievous sin whose committer predominately faces death penalty (according to the main four Islamic juristic schools

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<sup>253</sup>Egyptian Constitution, *supra* note 54, art.151.

<sup>254</sup>According to the determined scope of this paper that primarily focuses on analyzing the legal framework of apostasy under the 1971 constitution and its amendments, it is not intended here to examine the differences among the mentioned constitutions regarding the discussed provision.

<sup>255</sup>ABD EL GALIL AWAD, INTERNATIONAL TREATIES BEFORE THE CONSTITUTIONAL COURT. DAR AL NAHDDA AL’ ARABIA, at 32. (2008), INTERNATIONAL TREATIES BEFORE THE CONSTITUTIONAL COURT. Dar Al Nahdda Al’ Arabia Page32. (2008), cited in Ali Mousa, The Judicial Resolution of the Tension between Human Rights Treaties and Shari’a Law Reservations under The Constitution of 2014 (May 2018) (unpublished M.D. dissertation, The American University in Cairo), at 12.

<sup>256</sup>Ali Mousa, The Judicial Resolution of the Tension between Human Rights Treaties and Shari’a Law Reservations under The Constitution of 2014 (May 2018) (unpublished M.D. dissertation, The American University in Cairo), at 14.

<sup>257</sup>*Id.*

and the majority of Muslim scholars) and civil death. On the other hand, according to IHRL precisely Article 18 of the ICCPR, the protected freedom to have or to adopt a religion or belief necessarily entails the freedom to choose a religion or belief including the right to replace one's current religion or belief with another. Accordingly, the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs is banned under this Article. The enjoyment of such recognized freedom should not be impaired by the recognition of any religion or belief as the official ideology in state's constitutions and statutes. The normative recognition of Sharia in the Egyptian constitution as the principal source of law imposed a constitutional obligation on the legislature and judiciary to give effect to Sharia norms and to ensure the consistency of all Egyptian laws with Sharia principles. As shown earlier in the previous chapter, the supremacy of Sharia "principles" as a source of law over all other law sources within the Egyptian legal system has been officially declared by the reports of constitution drafting committee, SCC's decisions, and even the Egyptian statement concerning the ratification of the ICCPR, which indicates how Sharia "principles" as the highest source of law in Egypt plays a crucial role in the interpretation of the international obligations of the Egyptian State. Furthermore, the Egyptian state represented in its judiciary and legislature faces another constitutional obligation to enforce ratified international covenants like the ICCPR, which acquired the force of law after its conclusion, ratification and publication according to the established procedure. The legal framework of apostasy in Egypt reflects the political will of the Egyptian state to balance between these two obligations through the reconciliation between two contradicting legal frameworks in two different legal orders. This approach has taken place in a manner that ensures state's monopoly over interpretation of both Sharia principles and its international obligation regarding the ICCPR's notion of religious freedom. Such political approach has resulted in the current legal position of apostasy in Egypt, which has been formed by Egyptian legislature and judiciary. Their approach created the current ambiguous legal framework that, as we will see, violates the standards of religious freedom in both Sharia and IHRL. Egyptian statutory laws do not explicitly regulate the act of apostasy or conversion from Islam; rather, they regulate some of its forms like blasphemy and apply some of its legal consequences. The existence of some apostasy consequences within the Egyptian legal system has been usually criticized by the proponents of IHRL as an aspect of Sharia enforcement that "allows the judiciary in some cases to adopt rulings the are irrational, illogical, lacking in

humanity, and completely incompatible with the progress that has been achieved as a whole in the field of human rights.”<sup>258</sup> On the other hand, our analysis here will prove that the criticized rulings are direct result of a secular reconstruction of Sharia principles by the Egyptian state that contradict with apostasy rulings in Sharia as well. This chapter seeks to examine the legal framework of apostasy and to answer many questions including how did the Egyptian legal system through its statutes and judiciary try to balance between these constitutional obligations regarding the legal framework of apostasy? How did it address the contradiction between apostasy rulings in both Sharia and the ICCPR? Does the legal framework of apostasy in Egypt agree with standards of religious freedom in Sharia and the ICCPR? By which reasoning could Egyptian courts reach their established jurisprudence in this regard? this chapter will examine all apostasy and religious freedom related articles in different law fields, and in the light of codified law we will understand how Egyptian judiciary has applied and interpreted Egyptian statutory laws to establish its jurisprudence and rulings concerning apostasy related cases. Afterwards, I will focus on explaining the role of the concept of public policy as a key factor in defining the scope of religious freedom by the Egyptian judiciary and how it has been used to ground some apostasy consequences into the Egyptian legal system and ensure their application without being stated in any statutory law.

Before starting our Investigation of the legal framework of apostasy in Egypt, I think it is important to refer to one of the most impressive literature in this regard. In his article *Apostasy and Public Policy in Contemporary Egypt: An Evaluation of Recent Cases from Egypt's Highest Courts*, Maurits S. Berger introduces a critical analysis of the legal situation of apostasy in Egypt. Berger points out that the abandonment of Islam in Egypt is sub divided into the act of apostasy and its legal consequences. From his point of view, apostasy enjoys a limbo status in Egypt because Egyptian statutory law does not make any reference to apostasy or to its punishment like in Islamic law. Berger argues that “both the act of apostasy as well as its consequences, which are two entirely different issues, and their relation to the freedom of religion can be understood more clearly in light of the concept of public policy.”<sup>259</sup> He based his argument on the evaluation of case law of the highest civil courts in Egypt including the Court of

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<sup>258</sup>DUPRET ET AL., *supra* note 10, at 219.

<sup>259</sup>Berger, *supra* note 239, at 721.



cassation, the Administrative courts of the State Council, and the SCC regarding apostasy and religious freedom. His research focuses only on personal status cases related to apostasy and judicial decision of apex courts that defines religious freedom and its relation to the concept of public policy. Such research does not include any cases do not deal with apostasy in terms of conversion per se except Abu Zayd's case. Berger considers that the legal side of apostasy manifests itself solely in the realm of Egyptian Muslim personal status.<sup>260</sup>In addition, he asserts that Egyptian highest courts have used public policy to ground apostasy legal consequences into the Egyptian legal system for two reasons "a) because these rules were based on essential principles of the Islamic Shari'a, and b) to ascertain their applicability in light of a lack of any statutory rules."<sup>261</sup>Berger refers that In Abu Zayd case (that will be discussed in this research) the Court of Cassation adopted a different approach through using public policy as a mean to protect Islam and society fundamentals The introduced analysis of the case law of the three highest Egyptian civil courts concludes that apostasy in the courts' definition does not pertain to a freedom of belief, but to the practice of a belief which is left to the internal order of that particular religion, and related to public policy. It also, assumes that there is a blatant contradiction between, on the one hand, the prohibition of apostasy and, on the other hand, the constitutional guarantee of "freedom of belief" and similar provisions in the IHRL instruments to which Egypt has committed itself.<sup>262</sup>Berger believes that such violation of human rights is not caused by the political atmosphere like most violations of human right in Muslim countries; rather, he argues that "this political dimension is absent in the particular case of apostasy in Egypt: we are dealing with a sound rule of Islamic law that has been upheld for many decennia by a judiciary that generally is recognized as independent."<sup>263</sup>He reasoned this by assuming that power struggle between Muslim jurists and apex courts in Egypt over the monopoly on authoritative interpretation of Islamic law has pushed these courts, which are secular courts with a long-standing reputation of neutrality and non-partiality, to adopt a conservative position with regard to Islamic law precisely the prohibition of apostasy. Through this approach only these courts could win the monopoly on authoritative interpretation of Sharia.<sup>264</sup>

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<sup>260</sup>*Id.* at 722.

<sup>261</sup>*Id.* at 732.

<sup>262</sup> *Id.* at 738.

<sup>263</sup>*Id.* at 739,740.

<sup>264</sup>*Id.* at 739.

The current study introduces a wider view of the legal framework of apostasy in Egypt to end up with supporting some Berger's arguments and challenging some of his conclusions. Through our analysis we could see how the non-categorization of apostasy in codified laws has resulted in its legal ambiguous status in Egypt. As Berger refers, only the legal consequences of apostasy rather than the act itself plays a role in Egyptian case law.<sup>265</sup> The legal enforcement of some apostasy consequences in Egypt and its relation to religious freedom could be understood more clearly in light of the concept of public policy according to the caselaw of apex courts. This research will illustrate how these courts have used this concept to ground the application of some apostasy consequences through categorizing apostasy under the practice of a belief which is left to the internal order of that particular religion, and related to public policy. Such consequences are considered as violation of the concept of religious freedom as defined by the ICCPR. On the other hand, this research does not limit the investigation of the legal side of apostasy in Egypt to the realm of Egyptian Muslim personal status because renouncing Islam in Egypt could result in other legal consequences in other law fields in Egypt like criminal law and administrative law fields. Consequently, our analysis will also include some aspects of judicial practice that does not deal with apostasy in terms of conversion like blasphemy cases in criminal law domain. Examining a variety of judicial decision concerning apostasy will illustrate that grounding the enforcement of some apostasy legal consequences has been practiced by some courts under some legal regulations other than the concept of public policy. For instance, the Court of Cassation and some lower personal status courts ground their application of some apostasy legal consequences on personal status matters basing on Article 3 of the Egyptian Personal Status law. Furthermore, public policy was invoked by some courts to reason the recognition of the abandonment of Islam in identity cards. The main argument of this research contradicts with Berger's conclusion that the political dimension is absent in the particular case of apostasy, and that Egyptian secular courts adopted a conservative position regarding the prohibition of apostasy. In contrast, this paper argues that the legal framework of apostasy in Egypt is a manifestation of secular reconstruction of Sharia by a modern state through its judiciary.

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<sup>265</sup>*Id.* at 720.

### **A. Examining the Legal Framework of Apostasy in Egypt:**

The fact that Egyptian codified laws do not regulate the act of apostasy or impose its legal consequences in explicit and definite law articles has made its legal framework in Egypt characterized by ambiguity and fragmentation.<sup>266</sup> Ambiguity is manifested in the legal approach of the Egyptian state that avoided to make any formal reference to apostasy regulating rules and consequences through its constitutions or law codes. Such avoidance stems from the State awareness that imposing any legal limitation on conversion from one religion to another would be regarded as an obvious breach of the notion of religious freedom as defined by IHRL and, as a result, it would be considered by international community as a breach of its international obligations towards IHRL. The fragmentation of apostasy rules within the Egyptian legal system means that committing the act of conversion from Islam to any other belief entails its legal consequences in different law fields like administrative law, criminal law, and personal status law. Our analysis here could prove that the Egyptian state through its legislature and judiciary has maintained its approach regarding constitutional Islamization or Islamism to shape the legal framework of apostasy in Egypt. Creating an ambiguous legal framework to replace the need for a clear codified regulation resulted from a clear political decision by legislature to ensure the state control over the process. The intended closure of such a political process has promoted the role of litigation as an alternative process. Similar to the adopted methodology of interpreting Sharia “principles” in constitutional Article 2, the state judiciary has a flexible position in interpreting Sharia norms concerning apostasy and choosing which of these norms could be incorporated within the Egyptian legal system and which could not from the perspective of the state or “judges”.<sup>267</sup> The Egyptian judiciary in this case is not restricted by any obligatory religious interpretation by Al-Azhar or any other institution unlike the case of interpreting IHRL, where the state is accounted by international community according to the prescribed

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<sup>266</sup>I would like to refer here that using the expression of fragmentation to describe the position of apostasy rules within the Egyptian legal system is borrowed from Yara Nassar’s thesis in this issue. It was one from other important readings that inspired choosing the topic of this paper due to their direct contradiction to the writer’s point of view. *See generally* Nassar, *supra* note 205.

<sup>267</sup>The assumption in this paper that judicial decisions defining and interpreting Sharia related norms usually reflect the point of view of the executive is based on the fact that the justices of apex courts in Egypt (like the SCC) are appointed by a decree from the President of the Republic, and it will be supported by the upcoming analysis of Egyptian courts approach in shaping apostasy consequences in Egypt. Such assumption does not negate the existence of any aspect of judicial independence in Egypt, which is supported by various striking judicial decisions in different law fields.

interpretation of religious freedom that I have explained earlier. Accordingly, this flexible position helps judges to at least formulate their verdicts in a manner that is consistent with the state formal obligations to apply Sharia principles and respect IHRL.

### **1. Religious Freedom and the Egyptian Constitution:**

As stated earlier in this research, the absence of an explicit regulation of apostasy has always made the Egyptian constitutions have a direct rule in shaping the legal framework of apostasy in Egypt. This because the absence of apostasy in the codified laws drives Egyptian courts to interpret constitutional provisions regarding Sharia and religious freedom to make their decisions on apostasy related cases. Chapter one of this paper introduced a detailed examination of the status of Sharia in the 1971 constitution as Egypt's most enduring constitution that shaped the legal situation of Sharia and, consequently, apostasy case law for more than forty years. Now, we have to understand status of religious freedom according to this constitution. Article 46 of the 1971 constitution reads "[t]he State shall guarantee the freedom of belief and the freedom of practice of religious rites"<sup>268</sup>The Supreme Court defined the scope of religious freedom in a landmark case in 1975 as El Fegiery refers that:

The Court upheld that freedom of religion is not absolute and that the manifestation of religious beliefs must be subject to and considered in relation to public order, morals and values. The Court pointed out that Islamic Shari'a and its principles are constitutive elements of public order and that under this the constitutional right of freedom of religion can be restricted.<sup>269</sup>

This judicial decision has been cited by many Egyptian courts including the SCC, which added in one of its decisions that "freedom of belief is absolute, while the practice of beliefs may be subject to restrictions based on public order, morals and the protection of rights and reputation of others."<sup>270</sup>These decisions show that the manifestation of beliefs or the practice of belief is the only aspect of religious freedom that is subject to restrictions based on public order, morals, and values. This stable interpretation of the scope of religious freedom in the Egyptian constitution of 1971 could lead us to three main observations; firstly, it apparently agrees with the notion of religious freedom as defined by the ICCPR as it only restricts freedom to practice belief as long as these restrictions are based upon public order, morals or values. Secondly, it used the

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<sup>268</sup>Egyptian Constitution, *supra* note 54, art. 46.

<sup>269</sup>El Fegiery, *supra* note 53, at 6.

<sup>270</sup>Case No.8, *supra* note 96.

ambiguity that blurred the ICCPR's definition of religious freedom to gain a more flexible position in defining the scope of religious freedom in Egypt. According to what this paper referred previously, neither the ICCPR nor the HRC comment in this regard introduced a strict or an obligatory definition of both the categories of public order and freedom to practice belief. Consequently, we could say that the combination between emphasizing the illegality of any limitation on religious freedom that is driven from a single religion and the absence of any clear strict definition of public safety, order, health or morals according to which any state could limit freedom to manifest religion has offered a loophole for states parties to the covenant to breach its concept of the right. This means that any state could limit any aspect of the right to freedom of thought, conscience or religion as long as this aspect is categorized by the state as a freedom to manifest religion, which variates from one belief to another. Furthermore, any state party to the covenant could justify such limitations by the protection of public safety, order, health or morals, which have no strict definition. The next two sections of this chapter will show us how Egyptian judiciary has defined public policy and freedom to manifest religion to legitimize and impose some legal consequences of apostasy in the Egyptian legal system. The third observation is that the Supreme Court and the SCC after it used Sharia principles (as defined by them), which has no definite meaning in the constitution, under the cover of public order to base some restrictions on freedom to manifest one's belief. Again, we can understand here how the Egyptian State through its constitutional judiciary has controlled "the terms of the game" through its exclusive power to define different vague terms like Sharia principles, public policy (al nizam al amm), and freedom to practice belief. The upcoming analysis of the main features of apostasy related case law will reflect how constitutional or legal vagueness of these terms lend judiciary more flexibility in defining apostasy consequences in Egypt. Accordingly, resorting the current legal position of apostasy in Egypt simply to the role of Sharia as the main source of law in Egypt reflects a superficial understanding of this legal situation.

## **2. Apostasy in the Egyptian Penal Code:**

### **a. Examining Apostasy Related Articles in the Penal code:**

The Egyptian penal code does not regulate the act of apostasy directly; however, it includes some articles that deal with some offences against religion. Although these articles are not limited to protect Islam only, they have been used as the legal base to charge Muslim apostates or converts

especially when their apostasy is accompanied with any of the criminalized offences like blasphemy.<sup>271</sup> This does not negate that they also have been used to charge non-Muslims if they commit such stated offences against any heavenly religion. Egypt's main blasphemy law is found in Article 98(f) of the Egyptian penal code, which also includes other Articles that criminalize different forms of religious insult. They include Articles 160 and 161. I will start by and focus on investigating Article 98(f) because it is the main Article which has been used to charge Muslim apostates in front of criminal courts. Article 98(f) reads:

Detention for a period of not less than six months and not exceeding five years, or paying a fine of not less than five hundred pounds and not exceeding one thousand pounds shall be the penalty inflicted on whoever exploits and uses the religion in advocating and propagating by talk or in writing, or by any other method, extremist thoughts with the aim of instigating sedition and division or disdaining and contempting any of the heavenly religions or the sects belonging thereto, or prejudicing national unity or social peace.<sup>272</sup>

Many important observations concerning the statement of this Article Should be highlighted for the purpose of our analysis here. Article 9(f) does not refer to apostasy from Islam or conversion from other heavenly religions as a form of acts that are considered by their nature as disdaining and contempting of these religions. The scope of protection under this Article is limited to heavenly religions (Islam, Christianity, and Judaism). Egyptian legislature has continued to adopt the same approach to formatting religious related articles, which is using vague expressions and terms like “national unity” and “social peace” (that was omitted later) to ensure a wide range of flexibility for judicial interpretations. The legislature also used these vague, secular or non-religious terms to ensure the apparent consistency of the Article with the ICCPR's notion of religious freedom. Finally, Article 98(f) categorized blasphemy as a misdemeanor whose committer face detention or pay a fine.

The comparison between the criminalization of blasphemy under Article 98(f), as the legal base to charge Muslim apostates and Egypt's main blasphemy law, with the legal or juristic position of apostasy according to Sharia reveals many contradictions between both. The previous examination of the juristic status of apostasy under Sharia demonstrates that the act of turning

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<sup>271</sup>Asma T. Uddin, *BLASPHEMY LAWS in MUSLIM-MAJORITY COUNTRIES*, *The Rev. of Faith & Int'l Aff.* 47-55 (2011).

<sup>272</sup>Egypt: *Penal Code* [Egypt], No. 58 of 1937, August 1937, available at: <https://www.refworld.org/docid/3f827fc44.html>. [accessed 15 March 2019].

away from Islam has different forms which are classified in three main categories: utterance related, action related, and belief related. In Sharia, blasphemy is a synonym for the serious offence of using of foul language with regard to God, the Prophet, the angles, other Prophets, and the Companions of the Prophet. As I referred before, depending on certain reported incidents in the lifetime of the Prophet Muhammad (pbuh) mentioned in the hadith literature, the majority of Muslim jurists consider blasphemy as a form of apostasy that entails death penalty.<sup>273</sup> On the other hand, some jurists regard the committers of these offence as Muslims who deserve death penalty.<sup>274</sup> Consequently, we could comprehend how Article 98(f) does not represent a legal regulation based upon a juristic position in Sharia, but in contrast, it's a secular legal regulation of a criminalized act by the state that contrasts with its juristic description in Sharia. Such contradiction is manifested in many aspects. For instance, insulting God, the prophet or the religion is a grievous sin in Sharia and punished by death penalty, while the discussed Article categorizes it as a misdemeanor whose perpetrator is punished by either detention or fine. Moreover, Article 98(f) does not refer to any Islamic juristic source as a base for its rulings; rather, I think that it only reflects a quick legal interference by a modern state to suppress any public speech or writing that may lead to sectarian clashes in the future.<sup>275</sup>

On the other hand, Article 98(f) has been usually criticized by human rights organizations and advocates as an unjustified and unconstitutional limitation on freedoms of expression and belief that is incompatible with international human rights standards. In its 2010 special report, Freedom House described Egypt's blasphemy and religious insult laws, including Article 98(f), as "incompatible with international human rights standards [because] they place serious and unjustified limitations on freedom of expression and freedom of religion, and have a broad and negative impact on the enjoyment of other human rights."<sup>276</sup> The report referred that the broadness and vagueness of Article 98(f) terms have made it a tool for "settling personal or political scores; silencing regime critics, human rights defenders, and opposition parties; and

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<sup>273</sup>See SAEED & SAEED, *supra* note 144, at 38-39.

<sup>274</sup>*Id.*

<sup>275</sup>This assumption is supported by the fact that Article 98(f) was promulgated according to law no.29 of 1982 that enacted after the bloody sectarian violence happened in El Zawya Al Hamra in Cairo and resulted in the death of tens of citizens

<sup>276</sup>FREEDOM HOUSE, POLICING BELIEF: THE IMPACT OF BLASPHEMY LAWS ON HUMAN RIGHTS (2010), available at: <https://freedomhouse.org/report/special-reports/policing-belief-impact-blasphemy-laws-human-rights>. [accessed 10 March 2019].

targeting vulnerable groups like homosexuals.”<sup>277</sup> Amnesty International had also confirmed this in its year 2000 report titled *Egypt: Muzzling Civil Society* when it emphasized that:

Amnesty International believes that Article 98 (f) of the penal code . . . is vaguely worded and has been abused in such a way as to allow for the imprisonment of prisoners of conscience. Some defendants have been sentenced for the publication of materials discussing religious issues, whilst others have been imprisoned because their religious practice has been considered a criminal offence. Over the last two years at least 30 people have been brought to trial under charges based on Article 98 (f) for “exploiting religion for extremist ideas”, though none of these defendants has used or advocated the use of violence.<sup>278</sup>

Other human rights organizations pointed out that religious related Articles in the Egyptian penal code have been used to suppress any differing interpretations of Islam; for instance, the Becket Fund for Religious Liberty in one of its published submissions mentioned that “Articles 98(f), 160, 161, 176, and 178 of the Penal Code are consistently used against individuals who engage in peaceful debate about religion.”<sup>279</sup> The Egyptian Initiative for Personal rights through one of its released reports in 2016 argued for the unconstitutionality of Article 98(f) because it does not agree with the required constitutional standards of drafting penal law articles.<sup>280</sup> The Article does not state explicitly the criminalized acts and their composing elements, but instead it includes vague and broad terms.<sup>281</sup> Some of the mentioned reports referred that the abuse of the discussed Article has been promoted by the practice of Egyptian courts. Freedom House report pointed out that the 1966 ruling of the Court of Cassation which allowed to convict individuals basing on *Hisba* principle promoted the abuse of Article 98(f).<sup>282</sup> *Hisba* is “[t]he Islamic legal principle [that] basically gave citizens, which would be regularly considered to have no personal interest in the case, the right to file cases against others in the name of protecting the right of God or the essential elements of the Islamic Faith.”<sup>283</sup> The report added that the procedural permission of this principle resulted in the prosecution of dozens of Egyptian academics and intellectuals during 1980s and 1990s and they were convicted of blasphemy as a result of *Hisba* suits.<sup>284</sup> In

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<sup>277</sup> *Id.* at 25.

<sup>278</sup> AMNESTY INT’L, EGYPT: MUZZLING CIVIL SOCIETY (2000), available at: <https://www.amnesty.org/en/documents/mde12/021/2000/en/>. [accessed 10 March 2019].

<sup>279</sup> Becket Fund for Religious Liberty, *United Nations Human Rights Council Universal Periodic Review: Egypt*, 4.

<sup>280</sup> THE EGYPTIAN INITIATIVE FOR PERS. RIGHTS, REASONS FOR THE UNCONSTITUTIONALITY OF BLASPHEMY ARTICLE (2016).

<sup>281</sup> *Id.* at 9.

<sup>282</sup> FREEDOM HOUSE, *supra* note 276, at 26.

<sup>283</sup> Nassar, *supra* note 205, at 26.

<sup>284</sup> FREEDOM HOUSE, *supra* note 276, at 26.



1996 the Egyptian parliament limited the use of Hisba suits by enacting a law that “prohibits hisba claims from reaching court unless they are first deemed valid by a prosecutor.”<sup>285</sup> Furthermore, some human rights organizations consider that enforcing blasphemy and religious insult articles of the Egyptian penal code as an illegitimate restriction on freedom of expression.<sup>286</sup> According to their point of view, this because they have been applied for prepublication censorship to ban many religious related books and charge their authors of blasphemy. Recently, such censorship expanded to include internet blogs.<sup>287</sup> Article 98(f) has been criticized as a discriminatory Article because the scope of protection under it is limited to heavenly religions (Islam, Christianity, and Judaism), while “[u]nrecognized minority religious groups such as the Baha’i and Ahmadiyya . . . are not protected and are disproportionately affected by the law.”<sup>288</sup> Human rights proponents see another feature of its discriminatory effects is promoted by judicial practices and decisions that use Article 98(f) to punish Muslims who convert to another belief and violate their right to change their religion.

The Egyptian penal code includes other Articles that criminalize different forms of religious insult and some acts that are considered as assault on religious rituals. Article 160 reads:

A penalty of detention and paying a fine of not less than one hundred pounds and not exceeding five hundred pounds or either penalty shall be inflicted on the following: First: Whoever perturbs the holding of rituals of a creed or a related religious ceremony or obstructs it with violence or threat. Second: Whoever ravages, breaks, destroys, or violates the sanctity of buildings provided for holding religious ceremonies, symbols or other objects having their profound reverence and sanctity in relation to the members of a creed or a group of people.<sup>289</sup>

Also, Article 161 criminalizes other forms of religious insult that aim to disdain religious celebrations. It states that:

These penalties shall be imposed on any encroachment that takes place by one of the methods prescribed in Article 171, on a religion whose rituals are publicly held. The following shall fall under the provisions of this Article: First: Printing and publishing a book which is viewed as holy by members of a religion whose rituals are publicly held, if a text of this book is perverted in a way that changes its meaning. Second: Imitating a

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

<sup>286</sup>*Id.* at 27.

<sup>287</sup>*Id.* at 28.

<sup>288</sup>*Id.* at 29.

<sup>289</sup>The Egyptian Penal Code, *supra* note 272, art. 160.

religious celebration in a public place or public community, with the aim of ridicule, or for the attendants to watch.<sup>290</sup>

One of the more significant findings to emerge from our analysis here is that there is no explicit regulation or criminalization of the act of apostasy or conversion from Islam through the Egyptian penal code. However, this code includes some articles that deal with some forms of this act like religious insult and blasphemy. None of them refer to apostasy from Islam or conversion from other heavenly religions as a form of acts that are considered according to their nature as disdaining and contempting of these religions. Egypt's main blasphemy law is found in Article 98(f) that has been used as the legal base to charge Muslim apostates or converts especially when their apostasy is accompanied with any of the criminalized offences like blasphemy. It does not state explicitly the criminalized acts and their composing elements, but instead it includes vague and broad terms. This article represents the adopted secular (non-religious based) approach by the Egyptian state to deal with some religious related crimes that contradicts with the legal position of apostasy and the standards of religious freedom in both Sharia and IHRL.

#### **b. Criminal Courts' Approach to Blasphemy Related Cases:**

Before investigating the judicial practice of Egyptian criminal courts regarding blasphemy cases and the practice of other Egyptian courts regarding apostasy related cases, it is important to understand the structure of the Egyptian court system. The structure of the Egyptian court system is established in a pyramidal form.<sup>291</sup> At the top of this pyramid is the Supreme Constitutional Court whose jurisdiction includes interpreting constitutional provisions, reviewing the constitutionality of laws and regulations, settling the conflicts on competence between judicial bodies, and interpreting laws and regulations that have the force of law.<sup>292</sup> Under the SCC the Egyptian court system is divided into two parallel systems: common or general justice court system and administrative justice court system. The jurisdiction of general court system includes civil, criminal, commercial, and personal status matters.<sup>293</sup> It has three basic levels: Courts of First Instance, Courts of Appeal, and the Court of Cassation. The Courts of First Instance

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<sup>290</sup>*Id.* at art. 161.

<sup>291</sup>The introduced explanation in this paragraph draws heavily on Badouin Dupret & Nathalie Bernard-Maugiron, *Introduction: A General Presentation of Law and Judicial Bodies*, in *EGYPT AND ITS LAWS* (Nathalie Bernard-Maugiron & Badouin Dupret eds., Kluwer Law Int'l 2002).

<sup>292</sup>*Id.* at xxxv.

<sup>293</sup>*Id.* at xxx.

include: Summary Courts (mahkaim juz'iaa), Elementary Courts (mahakim ibtda'iya), and Plenary Courts (mahakim kullya). Each of these courts has its prescribed competence and composition.<sup>294</sup> Appeals against Summary Courts' judgments are raised before Courts of First Instance, while appeals against the decisions of First Instance Courts are placed before the Courts of Appeal. Courts of Appeal (mahakim al-isti'naf) are divided into two chambers civil chamber and criminal chamber. The civil one hears appeals for plenary courts' judgments, and the criminal chamber that is called criminal court (mahkamit al-jinayat) has competence to decide on felonies. The rulings of Courts of Appeal, except that of death penalty, are not subject to appeal before the Court of Cassation concerning the facts of the decided cases. The Court of Cassation is the supreme court of Egypt's common court system its main function is summarized in the following paragraph:

Its [mission] is to control the judgments of the Courts of Appeal following a motion for cassation introduced by any interested party, including the public prosecutor. The motion must be founded on an error of law which would have been committed by the lower court. The allegations can be the misapplication or misinterpretation of law, irregularity in the language of the judgement or procedural errors. The control of the Court of Cassation only bears on these questions and not on the facts.<sup>295</sup>

The administrative justice court system, which is adopted from the French legal tradition, is headed by the State Council (majlis al-dawla) that represents the entire administrative court system in Egypt. According to its prescribed competence by constitution and law, the State Council has an exclusive jurisdiction to take decisions in administrative disputes, disciplinary cases and appeals, and disputes pertaining to its decisions. It consists of two sections; the first one is the legislative advisory section, which is responsible for giving legal opinion on draft laws, draft regulations, and actions practiced by the government or any public entity.<sup>296</sup> The second section is the judiciary section. It is structured in three levels of judicial jurisdiction that includes: administrative courts and disciplinary courts (first instance courts), Court of Administrative Justice (appeals court), Supreme Administrative Court (apex court).<sup>297</sup>

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<sup>294</sup> *See Id.*

<sup>295</sup> *Id.* at xxxi.

<sup>296</sup> *Id.*

<sup>297</sup> For a more detailed explanation of the mentioned courts' jurisdiction and composition *See Id.* at xxii, xxxiii.

According to the limited scope of the current research, this subsection is not going to introduce a full survey of all blasphemy related cases, but it will focus on examining some significant judgments that could enable us to understand how Egyptian judiciary defines the elements of blasphemy crime in the light of its vague definition in the penal code. It is significant here to take into our consideration that in most decisions of blasphemy cases there is no direct reference to the position of apostasy or blasphemy in Sharia because the concerned court only focuses on applying blasphemy provisions in the penal code. This judicial approach is consistent with the legal drafting of blasphemy articles that do not refer to any Islamic juristic source as a base for its rulings and only reflect a quick legal interference by a modern state to suppress any public speech or writing that may lead to sectarian clashes. Accordingly, in most of blasphemy cases the defendant could be brought to the court because of his blasphemous statements that evoked public outrage and could constitute a grievous sin according to Sharia, while the court tries him for committing blasphemy misdemeanor. Some researches refers that only the office of the Public Prosecutor can file blasphemy cases basing on Article one of the Egyptian Criminal Procedures law which rules that criminal lawsuits could be filed only through Public Prosecutor's office except in cases provided by law.<sup>298</sup> However, blasphemy cases like other cases of misdemeanors and petty offences could be referred to the court directly by the civil rights plaintiff according to Article 232 of the same law.<sup>299</sup> This explains the situations when some writers, actors, etc. were brought to courts to face blasphemy accusations in cases filed by normal people.

In one of its rulings dated 7 January 1996 on the appeal no. 41774, the Court of Cassation defined the constituting elements of blasphemy crime which is stated in Article 98(f) of the Egyptian penal code.<sup>300</sup> The facts of the case could be summarized as follows: according to the speeches of both the plaintiff and his father the defendant used a razor to make the sign of the cross on the plaintiff's right hand and threatened him to make the same sign using electricity. He also promised the defendant to give him some money if he converted to Christianity. The

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<sup>298</sup>Nassar, *supra* note 205, at 21.

<sup>299</sup>The Egyptian Criminal Procedures Code, No.150 of 1950, available at: <https://egyptjustice.com/criminal-law>. [accessed 14 March 2019]. Due to the misuse of this right by some litigators, the legislator has restricted it after this by Article 251(bis), which states that "Civil claims filed under the provisions of the present law may only be for personal damage directly resulting from the crime and certain to be sustained in the present or in the future."

<sup>300</sup>Court of Cassation, Jan. 7, 1996, appeal 41774 judicial year 54.

defendant filed an appeal before the Court of Cassation against the conviction ruling of the first instance court and the appeal court according to which he was sentenced to detention for one year under Article 98(f) of the penal code. As a fulfillment of its prescribed competence to review law application by lower courts, the Court of Cassation reversed the ruling of lower courts on this case. The court see that the rulings of lower courts did not prove that the criminal incident satisfy the elements of blasphemy crime. The court reasoned its decision and defined the elements of blasphemy crime as follows:

According to Article 310 of the Criminal Procedures law any conviction ruling should include a clear statement of the criminal incident that entails the decided punishment . . . it is not enough to make a passing reference to such incident, but the ruling should narrate the significance of each evidence in a comprehensive manner elucidates its support for the whole criminal incident and its consistency with other facts. . . the crime of exploiting and using religion in propagating extremist thoughts, which is stated in Article 98(f) of the Penal code, requires to be exist the presence of a materialistic aspect [the criminal act] which is exploiting and using religion in advocating and propagating by talk or in writing or by any other method, extremist thoughts, and the presence of a moral aspect [criminal intent] that the perpetrator must aim through his acts to instigate sedition and division or to disdain and contempt any of the heavenly religions or the sects belonging thereto or prejudicing national unity or social peace.<sup>301</sup>

In another blasphemy case in 2012, a plaintiff brought an action in the Agouza Summary Court of First instance (mahkamit al-ajuza al-juza'ya) demanding the punishment of the Egyptian actor Adel Emam and others according to Article 98(f) of the Egyptian Penal code accusing them of insulting Islam and Muslims by exploiting religion in their work (movies and plays) to promote extremist ideas; with the aim of provoking strife, contempting Islam in general and Islamic political groups in particular.<sup>302</sup> After reviewing the case facts the court dismissed both criminal and civil actions on the grounds that the case facts and incidents do not represent a criminal act at all. Although the court dismissed both criminal and civil actions, its reasoning behind the decision could reflect the secular approach of the judiciary in defining blasphemy and even apostasy consequences within Egyptian legal system. In this ruling the judge explains that the court as a part of the Egyptian legal system, which belongs to civil law systems, is not restricted in its reasoning by precedent case law. The court refers that in contrast to common law systems,

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<sup>301</sup>*Id.* at 19.

<sup>302</sup>Case no.529 of judicial year 201, Agouza District Summary Court, available at: <http://qadaya.net/?p=3465>. [accessed 15 March 2019].

the court's obligation to follow precedent case law could only represent a moral obligation rather than a constitutional or legal obligation. This assumption is based on the ruling of Article 1 of the Egyptian Civil code no. 131 of the year 1948 that mentions sources from which judges should deduce legal rules if there is no law provision governing the reviewed case or issue, and they do not include precedent case law:

1. Legislative texts shall apply to all matters dealt with in these texts in their explicit language or in their content.
2. If there is no legislative text to be applied, the judge shall rule by custom, if there is no, under the principles of Islamic law, if it does not exist, in accordance with the principles of natural law and the rules of justice.<sup>303</sup>

Accordingly, depending on its interpretation authority, the court believes that Article 98(f) aims to protect national unity and social peace not heavenly religions or their sects.<sup>304</sup> Thus, committing blasphemy crime under Article 98(f) requires the existence of a criminal intent to prejudice national unity or social peace and instigate sedition.<sup>305</sup> Through this ruling the court emphasizes that its "role is to interpret the codified law itself, article 98 (f), and not Islamic Shari'a."<sup>306</sup> Also, the judge adds that:

if the perpetrator aimed to obstruct the holding of rituals of a religion, the legislature could intervene to criminalize such acts under Articles 160 and 161; but whoever has another opinion should refer to an evidence either from Quran or Sunnah because contempting religion is not punished by hadd or qisas in Sharia as verse (5:105) states that " O you who have believed, upon you is [responsibility for] yourselves. Those who have gone astray will not harm you when you have been guided. To Allah is you return all together; then He will inform you of what you used to do."<sup>307</sup>

Despite the court's emphasis on its role to interpret codified law precisely blasphemy related provisions in the penal code and not Sharia, the ruling introduces the court's understanding of the concept of religious freedom in Sharia to support its adopted interpretation. According to this interpretation, the notion of religious freedom in Sharia is based upon the principle of no compulsion in religion; thus, this means that there is no compulsion to follow or embrace an

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<sup>303</sup>The Egyptian Civil Code, No. 131 of 1948.

<sup>304</sup>Case No.529, *supra* note 302.

<sup>305</sup>*Id.*

<sup>306</sup>Nassar, *supra* note 205, at 73.

<sup>307</sup>Case No.529, *supra* note 302.

orthodox religious thought. There is no prohibition against criticizing any religious thought, and this does not contradict with saying that there is a punishment for apostates in Sharia.<sup>308 292</sup>In accordance with some modernist thinkers who challenge the traditional position of pre-modern or classic Muslim jurists and scholars regarding apostasy, the judge adopted some of their arguments (that was discussed and refuted previously in this paper) to support his understanding of religious freedom in Sharia. For instance, the judge argues that the apostate should not be put to death on the mere ground of his apostasy because apostasy is mentioned in Quran in many verses without prescribing any temporal punishment on this act. Apostasy is mentioned in Quran as a grievous sin whose committer is threatened with a severe punishment in the afterlife. The judgment refers that there is an almost consensus or agreement among the main four Islamic juristic schools and the majority of Muslim scholars (gumhor al-fuqaha') that apostasy is punished with death penalty; however, the court concurs with some modernist opinions considering apostasy capital punishment as a political sanction, and as a result, an apostate should not be killed for his mere apostasy except if this act was followed by a harm to the community or the state. The judge assumes like some modernist thinkers that capital sanction for apostasy is based upon a speech relying on only one authority (khabar al-ahdd) "whoever changes his religion, then kill him."; consequently, according to this assumption, this speech could not be relied upon to establish a fundamental principle of Islam because there is a juristic rule in Usul Al- fiqh considers single narrated speeches as a non-authoritative source from which juristic or legal rules could be deduced in Sharia.<sup>309</sup>The court believes that its interpretation of Article 98(f) is consistent with one of recent fatwas issued by the Grand Mufti of Egypt at this time which rules that the apostate should be asked forever to repent and not be killed. Furthermore, from its perspective this interpretation is also consistent with the ICCPR's definition of religious freedom.

On the 28<sup>th</sup> of December 2015 South Cairo Elementary Court issued an important ruling on the case no. 21078.<sup>310</sup>In this case the court reviewed the appeal of the ruling issued by a first instance court (Misr Al-kadima Misdemeanors Court) on a blasphemy case. The defendant

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

<sup>309</sup>*Id.*

<sup>310</sup>Case no. 21078 of judicial year 77, South Cairo Elementary Court.

brought the appeal to South Cairo Elementary Court after he was sentenced to five years of detention as a punishment for blasphemy crime. This case acquired its fame in the media in Egypt because it is related to media censorship. The defendant is a TV program presenter called Islam Bahery, and he was brought to the court basing on his opinions and sayings that he expressed through a TV program called “With Islam Bahery” and his social media accounts.<sup>311</sup>The plaintiffs brought an action in Misr Al-kadima Misdemeanors Court demanding the punishment of the defendant according to Articles 98(f), 160, and 161 of the Egyptian Penal code accusing him of insulting Islam and Muslims through exploiting religion in his TV program aiming to instigating sedition and disdaining Islam in general. They added in their plea that the defendant aimed to disdain Imams, jurists, scholars, and followers in particular, who carried the burden of transferring the Prophet’s sunnah to us through a unique scientific methodology. Consequently, they consider that his approach leads to prejudicing national unity and social peace.<sup>312</sup>South Cairo Elementary Court refers that its ruling on this appeal is guided by the Court of Cassation’s definition of the constituting elements of blasphemy crime on the appeal no. 41774 (that was examined previously) and also its decision on the appeal no. 653 which states:

Saying that freedom of belief is guaranteed according to the constitution does not allow to any person argues against the axiomatic articles of any religion to intentionally disdain or contempt this religion. If it became apparent that these arguments intended to prejudice the sanctity of a religion, it could not be protected under the cover of religious freedom. The existence of the moral aspect [of blasphemy crime] – like in all crimes- could be concluded by the court through the facts of the case. It is not required in this case that the conviction ruling includes explicit statements of the convict to prove his criminal intent, but it is sufficient that his statements and speeches as whole could prove his intention.<sup>313</sup>

After reviewing the case facts, the court confirmed the accusations of the plaintiffs against the defendant. The ruling explains that the court reached its decision through its belief that the criminal incident satisfy the elements of blasphemy crime. The ruling states that the defendant speeches through his television program constitutes the materialistic aspect of blasphemy crime (exploiting and using religion in advocating and propagating by talk or by any other method extremist thoughts), and they include the following opinions:

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<sup>311</sup>*Id.* at 2.

<sup>312</sup>*Id.* 1.

<sup>313</sup>*Id.* at 11.



- He stated that jurists and scholars the authors of tradition (juristic) books did not construct a valid science, but in contrast their writings represent backwardness, deviance and racism.
- He described the science of hadith as a trivial science; accordingly, he believes that every Muslim should judge any hadith according to his thinking and could refuse it even if it is authentic.
- He described the four Imams (the founders of the main Sunni doctrinal legal schools in Islamic law: *Abu Hanifa*, *Malik*, *Al-Shafii*, and *Ebn Hanbal*) as corrupt and terrorists who should be killed.
- He said that the Islamic tradition is rubbish.
- He described the ruling of adultery punishment in Quran and its conditions as fool speech.<sup>314</sup>

Concerning the fulfilment of the moral aspect of blasphemy crime in the discussed incidents, the court refers that “after reviewing the case facts and watching the related videos it concluded that the convict intended through his speeches and writings to instigate sedition by disdain Islam to prejudice national unity.”<sup>315</sup>This criminal intent is manifested in his insulting statements and extremist methodology that he used to present his opinions to the public. Accordingly, the criminal incident satisfies the elements of blasphemy crime according to Article 98(f). At the end, the court decided basing on its discretion authority to decrease the detention punishment of the convict from five years to one year. After this, the convict was released by a presidential clemency before finishing the detention period.

Now, let us answer the key questions of this chapter regarding the criminal aspect of the legal framework of apostasy in Egypt. How did the Egyptian legal system through its penal code and criminal courts try to balance between its constitutional obligations to respects the “rule of law” (respect human rights and enforce ratified international covenants like the ICCPR) and respect the principles of Sharia? In consistency with the Egyptian penal code that does not criminalize the act of apostasy explicitly and only deals with some offences against religion like blasphemy,

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<sup>314</sup>*Id.* at 13.

<sup>315</sup>*Id.*

which is used as the legal base to charge Muslim apostates especially when their apostasy is accompanied with any of the criminalized acts, in most decisions of blasphemy cases there is no direct reference to the position of apostasy or blasphemy in Sharia because the concerned court only focuses on applying blasphemy provisions in the penal code. Accordingly, the legislature used many vague secular or non-religious terms, as I referred previously, to ensure the apparent consistency of the statutes with the ICCPR's notion of religious freedom. On the other hand, ignoring the juristic rulings of apostasy or blasphemy in Sharia to be considered in the penal code reflects the legislature's monopoly over interpreting Sharia principles including the authority to choose which of these norms could be incorporated within the Egyptian legal system and which could not. How did the discussed approach could deal with the contradiction between apostasy rulings in both Sharia and the ICCPR? In order to escape from solving this conflict or facing the consequences of privileging any of the contradicting normative orders over the other, the Egyptian legislature avoided to regulate or categorize the act of apostasy in the penal code. Does the criminal aspect of the legal framework of apostasy in Egypt agree with standards of religious freedom in Sharia and the ICCPR? According to the elaborated juristic rulings of apostasy in Sharia, we could easily conclude that Article 98(f) and other religious insult Articles do not represent a legal regulation based upon a juristic position in Sharia, but in contrast, it's a secular legal regulation of criminalized acts by the state that contrasts with their juristic rulings in Sharia. Such contradiction is manifested in many aspects; For instance, insulting God, the prophet or the religion is a grievous sin in Sharia and punished by death penalty, while the penal code categorizes it as a misdemeanor whose perpetrator is punished by either detention or fine. Such example is manifested in the decision of Islam Bahiry's case. The court proved that the convict described some Quranic rulings as fool speech and repudiated some of the axiomatic articles of faith. These speeches are considered as implicit apostasy whose committer deserves apostasy punishment (includes the corporal punishment and civil death) from the perspective of Sharia. In this case the convict was sentenced to one year of detention as a punishment for blasphemy crime in contrast to Sharia rulings. On the other hand, assessing religious related articles on the penal code precisely Article 98(f) and their implementation by Egyptian courts according to the ICCPR's standards of religious freedom could show some contradictions to these standards. In spite of its secular wording that aimed to ensure the apparent consistency of the Article with the ICCPR's notion of religious freedom through non basing its ruling upon any

religious norm, the scope of protection under Article 98(f) is limited to heavenly religions (Islam, Christianity, and Judaism) in violation of the scope of protection under Article 18 which includes theistic and non- theistic belief. The practice of criminal court in this regard has focused on reviewing cases of religious insult or assault according to law and not apostasy or religious conversion cases. However, as it was mentioned in this chapter, many human rights organizations have criticized Egyptian courts approach as they believe that the vague wording of penal law articles and has been abused by judges in such a way as to allow for the imprisonment of prisoners of conscience and to charge authors of religious related books and accusing them of blasphemy. By which reasoning could Egyptian courts reach their established jurisprudence in this regard? Egyptian courts based their decisions on blasphemy related cases upon the existence or the absence of the constituting elements of blasphemy crime in any examined case. These elements include the materialistic aspect of blasphemy crime (exploiting and using religion in advocating and propagating by talk or by any other method extremist thoughts) and the moral aspect (to instigate sedition by disdaining Islam to prejudice national unity).

### **3. Apostasy Situation in the Domain of Personal Status Law:**

#### ***Identifying Historic Evolution of Personal Status Law:***

As it was pointed out to earlier in this research, most of the Arab countries during the colonization era since the early nineteenth century received the colonizers' law, which had been developed to serve as state law. On the other hand, Sharia that was the common law of Muslim countries before this time was given effect and recognized to operate in particular law fields like personal status law. The term "Personal Status Law" was not originated from Sharia, but it could be equivalent to the idea of family rights norms in Sharia.<sup>316</sup>In order to identify its substance and scope, the Egyptian Court of Cassation was keen to explain the meaning of personal status law in one of its early decisions in 1934; the court defines the Personal Status Law as: "what differentiates one person from another in terms of natural and family characteristics and which is taken into consideration by the law to entail legal effects governing his/her social life: whether he/she is a man or a woman; a spouse, a widow, a divorcee, a father, a legitimate child; whether

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<sup>316</sup>Dupret & Maugiron , *supra* note 291, at 19.

he/she enjoys full legal capacity or not.”<sup>317</sup>Thus, Family Law regulates the personal lives of individuals including marriage, divorce, inheritance, children rights, donations, alimony, . . . etc. The first promulgated in Egypt to regulate family relationships was Law No. 25 of 1920, and it was based on the Hanafi school that was the Islamic doctrinal school adopted by the Ottoman Empire.<sup>318</sup>This promulgated law was amended and by many subsequent laws like Law No. 25 of 1929, Law No. 44 of 1979, Law No. 100 of 1985, and Law No. 1 of 2000. All these laws were promulgated as temporary solutions to face some of the new arising social and economic realities, but not as a comprehensive code governing family rights.<sup>319</sup>Concerning the jurisdiction over personal status cases, before 1955 personal status domain in Egypt has been a system of multiple Jurisdictions.<sup>320</sup>Since the falling of Egypt under the political domination of the Ottoman Empire, each religious group in Egypt had its own courts with competence to review personal status cases.<sup>321</sup>Sharia courts were competent to review personal status cases among Muslims. It also had jurisdiction over non-Muslims if one of the spouses was a Muslim or when two non-Muslim courts had competence to judge the same case.<sup>322</sup>In 1955 by virtue of law No. 462 of 1955 Sharia courts and all other religious courts were abrogated. National courts instead have become competent to hear personal status cases.

### ***The Applicable Law in Personal Status Cases:***

Regarding the applicable law in personal status matters, Article 3 of the Egyptian Personal Status law states that:

Judgments [in personal status matters] shall be issued in accordance with the Personal Status and Endowment Laws in force. In cases where the codified laws do not state a rule the most predominant opinion of Imam Abu Hanifa doctrine shall be applied. However, judgments shall be rendered in personal status disputes between non-Muslim Egyptians who belong to the same sect . . . according to their religious laws as long as they do not contradict with public order.<sup>323</sup>

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<sup>317</sup>*Id.*

<sup>318</sup>DUPRET ET AL., *supra* note 10, at 193.

<sup>319</sup>Dupret & Maugiron, *supra* note 291, at 20

<sup>320</sup>Nassar, *supra* note 205, at 25.

<sup>321</sup>*Id.*

<sup>322</sup>*Id.*

<sup>323</sup>The Egyptian Personal Status Code, No.25 of 1920.

In addition, the Court of Cassation has been confirming this approach through its jurisprudence. In one of its rulings dated 3 January 2005 on the appeal no. 485, the Court of Cassation elaborated the role of Sharia in personal status cases:

According to the stable rule in the Cassation Court's jurisprudence Sharia is the general applicable law in personal status matters. . . according to the most predominant opinion of Imam Abu Hanifa doctrine except in cases where the issued laws included articles regulating the reviewed matters. In these cases, codified law rules should be applied. Accordingly, any silence of the codified law concerning any matter should not be understood as an intention by the legislature to contradict with any statement in Quran, authentic Sunnah, or a ruling constituted a consensus reached by Muslim jurists.<sup>324</sup>

Through the mentioned rulings we could understand that in Egypt “the application of a law in personal status matters is based on the religion of the parties”<sup>325</sup> unless the legislature issued another ruling in the same matter. In these cases, Muslims are governed by Sharia rules precisely in accordance to the most predominant opinion of Imam Abu Hanifa doctrine. Non-Muslims who belong to the same sect are governed by their religious laws as long as they do not contradict with public order. Thus, in cases where non-Muslim litigators are not belonging to the same religious sect or their religious rules regarding the reviewed matter are considered by the issue court as contradicting with public order, they are governed by Sharia rules. This legal situation justifies why the domain of family law in Egypt has been the most affected legal field by Sharia even after the abrogation of Sharia courts. According to our upcoming analysis, the main reason of this impact of Sharia is caused by the fact that many of personal status cases are judged basing upon a direct application of Sharia norms with a direct reference to their sources in Sharia and the adopted juristic opinions. Such implementation of Sharia norms in family cases has taken place under the control of the legislature who chose the incorporated norms in the codified law, the matters to be silent about in the law, and the juristic doctrine to be followed by courts in these silence cases. Accordingly, the legislature has incorporated Sharia norms in personal status law field in a more prominent manner due to the nature of the judged cases. This religious nature also has resulted in arising apostasy issue in family cases more than any other field of Egyptian law. The issue court has to be sure about the religious identity of the litigators because any change in it could result in changing the applicable law or the court ruling. On the other hand, sometimes

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<sup>324</sup>Court of Cassation, Jan. 3, 2005, appeal 485 judicial year 69.

<sup>325</sup>Nassar, *supra* note 205, at 25.

some litigators convert to another religion or sect to change the applicable law or the decision of the court in their favor. Furthermore, any party could claim the apostasy of the other litigator to affect the court decision.

**a. Apostasy Consequences in Personal Status Law and Egyptian Courts Competence to Declare Someone an Apostate:**

Regarding Sharia as the general applicable law in personal status matters in cases where codified law is silent about makes Sharia norms applicable on apostasy related cases. This because personal status statutes do not regulate apostasy consequences in family matters. Thus, apostasy consequences are to be determined by the court through seeking the guidance of the most predominant opinion of Imam Abu Hanifa doctrine in Sharia. For instance, basing on juristic rulings of apostasy consequences in Sharia that was reported in more detail in this research, if the court examines a marriage of an apostate it should base its decision on the juristic rule of Hanafi doctrine that Apostasy results in annulment of the marriage contract upon apostasy of one or both partners without need for judicial decision. Hence, Egyptian courts have to follow Hanafi juristic doctrine's approach in apostasy consequences in marriage, inheritance, property, children's religion, . . etc. I think that it important before examining the judicial practice of personal status courts in apostasy related cases to understand the scope of this practice. The previous analysis of our research to the juristic situation of apostasy crime in Sharia has shown us that the impact of renouncing Islam is not only limited to capital punishment, but it also affects the whole life of the apostate, who suffers in Sharia from a civil death. Such legal consequences are related to principal and general norms in Sharia and their ignorance or elimination is not an allowed choice from religious perspective. In contrast, the application of apostasy consequences in family trials is only limited to the discussed case and its facts. Accordingly, if the issue court established the apostasy of any person basing on the reviewed facts, this would only affect the court decision on this case without resulting in depriving the apostate from any other civil rights basing on his apostasy except by another court decision. Therefore, depriving from civil rights converted from an inevitable consequence of apostasy in Sharia to isolated legal consequences applied by the court on the demand of harmed plaintiffs. Again, we could see how the legislature's approach and the practice of courts limited the scope of the applied Sharia norms even in the domain of personal status Law the most affected legal

field by Sharia in Egypt. Through this approach, the Egyptian state could control the substance and the borders of apostasy consequences in family matters.

If, as mentioned before, religion determines the applicable law in personal status matters in Egypt, how can Egyptian courts judicially establish conversion from Islam? In his article *Submitting Faith to Judicial Scrutiny through the Family Trial: The "Abu Zayd Case"*, Kilian Bälz identifies Egyptian courts approach in this regard.<sup>326</sup> Since embracing a belief or conversion from it is a purely spiritual affair that could be hardly judicially established, Bälz refers that the Court of Cassation in the past followed a pragmatic approach for this problem.<sup>327</sup> This pragmatic approach means that:

apostasy can only be established in two cases: (i.) if someone pronounces an acknowledgement [iqrar] declaring to have turned away from Islam, or (ii.) if a document has presented according to which he has opted for another religion. In other words, someone who considers himself a Muslim is also legally considered a Muslim. The question whether someone is truly a Muslim is beyond judicial scrutiny: A court has no right to declare someone an infidel but is bound to the submissions of the parties.<sup>328</sup>

Bälz reports that this pragmatic approach has been replaced by Egyptian courts in some latter cases with another approach, which allows for a judicial scrutiny of faith:

In contrast to the aforementioned approach, however, there are cases in which courts have permitted the establishment of apostasy on the basis of evidence presented by witnesses. The performance of duties and acts of worship of Christianity, for example, have been considered sufficient evidence for turning away from Islam. The second approach thus allows for a judicial scrutiny of faith.<sup>329</sup>

Family courts are competent to review personal status matters including, for instance, an action for dissolution of marriage on grounds of apostasy.<sup>330</sup> Accordingly, in any apostasy related case personal status courts are competent to establish apostasy as a preliminary question falls within the jurisdiction of the court. The issue court could establish it basing on the acknowledgement of the litigant himself, an official document, or evidence presented by witnesses or other parties. The Court of Appeals reasoned this approach by distinguishing between apostasy as a crime with

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<sup>326</sup>Kilian Bälz, *Submitting Faith to Judicial Scrutiny Through the Family Trial: The "Abu Zayd Case"*, 37 DIE WELT DES ISLAMIS 135-55 (1997).

<sup>327</sup>*Id.* at 143.

<sup>328</sup>*Id.* at 143, 144.

<sup>329</sup>*Id.* at 144.

<sup>330</sup>*Id.*

a substantial element that falls under judicial scrutiny and belief which is matter of conscience that does not fall under judicial examination.<sup>331</sup>The Court also defined apostasy as:

Apostasy [ridda] ... is legally defined as 'turning away from Islam' [ruju' 'an din al-Islam]. The apostate [murtadd] is the one who turns away from Islam to unbelief [kufr]. This requires a declaration of unbelief through an explicit declaration or an act in which it is implicit .... [These conditions are met if] someone denies what is established through the verses of the Qur'an or the Hadith of the Holy Prophet.<sup>332</sup>

This definition is consistent with apostasy definition in Sharia as it includes both explicit and implicit apostasy forms. Now, let us examine the approach of personal status courts to the application of apostasy consequences in the light of the displayed legislative situation.

#### **b. Personal Status Courts' Approach in this regard:**

Due to the nature of their jurisdiction, personal status courts have to deal with apostasy consequences in family cases. Regarding Sharia as the general applicable law in personal status matters in cases where codified law is silent about makes apostasy consequences in Sharia applicable in family cases. According to the limited scope of the current research, this subsection is not going to introduce a full survey of all apostasy related cases in family caselaw, but it will focus on examining some significant judgments that could enable us to understand how Egyptian personal status courts apply apostasy consequences basing on Sharia norms and their adopted reasoning behind their decisions. Following the same categorization in Sharia, our analysis will include apostasy consequences in inheritance, marriage, property, apostates' children religion.

#### **1) Inheritance:**

In one of its old rulings in 1966, the Court of Cassation elaborated two important standards governing apostate's inheritance in Egypt.<sup>333</sup>Firstly, the ruling confirms that apostasy could be only judicially established basing on the acknowledgement of the person himself because the question whether someone is truly a Muslim is beyond judicial scrutiny. Secondly, apostasy is a de jure impediment to inheritance. The court based this on the juristic consensus among Muslim jurists that the apostate does not have the right to inheritance even from those whose co-

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<sup>331</sup>*Id.* at 145.

<sup>332</sup>*Id.* at 146.

<sup>333</sup>Court of Cassation, Jan. 19, 1966, appeal 28 Judicial year 33.



religionist he has become because, as it was mentioned before, his conversion is not approved or accepted according to Sharia. The decision adds that the silence of the codified law concerning this matter should not be understood as an intention by the legislature to contradict with this juristic ruling because in such cases the legislature states that the most predominant opinion of Imam Abu Hanifa doctrine shall be applied.<sup>334</sup>The discussed ruling could lead us to some significant observations. The Court of Cassation in this old ruling followed the pragmatic approach to assess apostasy judicial establishment. Also, basing on our previous analysis to apostasy consequences in Sharia, the court applied Sharia ruling concerning apostate's inheritance depending on the juristic consensus in this regard. However, this decision was not concluded through deducing this rule from Sharia primary sources or making any reference to them; rather, it was reached through applying the most predominant opinion of Imam Abu Hanifa doctrine according to the law and the court's jurisprudence.

## 2) Property:

In another apostasy related case in 1990, the Court of Cessation issued a significant decision regarding the legal situation of apostate's property.<sup>335</sup>The ruling includes three important principles that guided the court decision. Firstly, adopting the pragmatic approach, the ruling asserts that apostasy could be only judicially established basing on the acknowledgement of the person himself because the question whether someone is truly a Muslim is beyond judicial scrutiny. Also, the explicit statement of *Al- Shihadateen*<sup>336</sup>is considered satisfactory by the court to consider any person as a Muslim. Secondly, the court sees that the that the apostate does not lose his property by apostasy, but his disposal rights are suspended. Thirdly, the apostate should be asked to repent, and in case of repentance only he could restore his property and disposal rights that were suspended by apostasy. This decision is consistent with the adopted reasoning of the aforementioned ruling; however, it added another point concerning the act of apostasy itself. Despite the court refers that the apostate should be asked to repent, the ruling does not mention

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<sup>334</sup>*Id.* at 180.

<sup>335</sup>Court of Cassation, Nov. 27, 1990, appeal 34 judicial year 55.

<sup>336</sup>*Al- Shihadateen* is an Islamic religious statement that reflects the essence of the religion and required to be stated by anyone to embrace Islam. It simply means the belief that there is no God except Allah and the prophet Muhammed (pbuh) is Allah's messenger.

the legal procedures of this action or the responsible entity for this act. I think this because apostasy is not categorized or criminalized by law.

### **3) Apostates' Children Religion:**

Identifying apostate's children religion is one from other questions that Egyptian courts have to answer in order to judge apostasy related cases in personal status field. In this regard, the Court of Cassation issued a ruling on the appeal no. 255 in 1998.<sup>337</sup>The court decided that apostates' children are considered Muslims if they were born before apostasy. Children who were born after apostasy are not considered Muslims or follow their parent's new belief, but they choose their religion after reaching puberty age.<sup>338</sup>The court reasoned this decision as follows:

According to Islamic jurisprudence, apostates' children are considered Muslims if they were born before apostasy because they follow them in Islam and not apostasy. Sons who were born between non-Muslim parents after apostasy do not become Muslims. Children subordination to parents in Islam ends after the appearance of puberty signs or reaching the age of fifteen because the Prophet (pbuh) said "any baby born with instinct until his tongue identifies him either thankful or infidel." Accordingly, apostate's son could choose any religion or sect after puberty and he will be considered belonging to this religion because Islam supported religious freedom for non-Muslims as our God said "no compulsion in religion" which means that do not compel anyone to embrace Islam.<sup>339</sup>

After this, the court also followed the pragmatic approach through confirming that religious belief could be only judicially established basing on the acknowledgement of the person himself because the question whether someone is truly a Muslim is beyond judicial scrutiny. The court ruling concerning the religion of apostates' sons is consistent with the legal position of apostate's children in Sharia. In addition, the reasoning of the court in this case is directly based upon the main opinion in Islamic jurisprudence with a passing reference to a speech of the Prophet from Sunnah and a Qur'anic verse. The court ignored to discuss the act of apostasy itself or repentance, like the last ruling, and focused its investigation to identifying the religion of apostates' sons.

### **4) Marriage:**

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<sup>337</sup>Court of Cassation, Dec. 28, 1998, appeal 255 judicial year 68.

<sup>338</sup>*Id.* at 779.

<sup>339</sup>*Id.*

Like in Sharia, apostasy in personal status field in Egypt entails legal consequences on marriage. The most discussed case in this regard was the Nasr Hamed Abu Zayd case because of the many controversial legal questions that have been raised by this case.<sup>340</sup> These questions include the competence of a secular court to declare someone an apostate or infidel, basing apostasy on academic writing, the relation between apostasy and fundamental rights guaranteed under the Egyptian constitution, and the right of a third party to bring an action to a court demanding dissolution of a marriage on grounds of apostasy.<sup>341</sup> In 1996, the Egyptian Muslim scholar Nasr Abu Zayd was declared an apostate by the Egyptian Court of Cassation. The facts of the case could be summarized as follows: in 1993 a group of lawyers in Cairo brought an action against Abu Zayd, an assistant professor of Islamic studies and literature at Cairo University, in Giza First Instance Court to demand the dissolution of Abu Zayd's marriage and his wife.<sup>342</sup> The plaintiffs accused Abu Zayd of apostasy basing on some of his writings that they considered as heretical. Since apostasy could be only invoked in personal status cases, the claimants who had no relation to Abu Zayd used the procedure of *hisaba* to "invoke his apostasy as a legal impediment to his marriage."<sup>343</sup> The claimants used this way because it was the only legal mean to affirm Abu Zayd's apostasy. The plaintiffs' action was dismissed by first instance court because it considered them as a third party who were not entitled to the action. The plaintiffs appealed against the ruling of first instance court in front of the Cairo Court of Appeals. The court reversed the ruling asserting that "Abu Zayd was an apostate and that his marriage must therefore be dissolved."<sup>344</sup> The public prosecutor and the defendants appealed against the ruling in the Court of Cassation, which upheld the ruling of the Court of Appeals. After this, the defendants filed a petition to the executive judge in Giza First Instance court demanding to suspend the execution of the decision.<sup>345</sup> On 25 Sep. 1996 the execution court ruled that dissolving the marriage of Abu Zayd cannot be executed.

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<sup>340</sup> Bälz, *supra* note 326, at 136

<sup>341</sup> *Id.* at 136.

<sup>342</sup> *Id.* at 135.

<sup>343</sup> Berger *supra* note 239, at 729.

<sup>344</sup> Bälz, *supra* note 326, at 135.

<sup>345</sup> *Id.* at 152.

In this ruling the Court of Cassation permitted the establishment of apostasy basing on evidence presented by plaintiffs, which was some of Abu Zayd's writings. The Court of Cassation reasoned its decision as follows:

According to the majority of the Muslim legal scholars, among them the Hanafis, it suffices to consider a person an apostate once he deliberately speaks or acts in unbelief, as long as he meant to be degrading, contemptuous, obstinate, or mocking. He denounces that the Quran is the word of God, describing it as "a cultural product," . . . and as being affiliated to a human culture, rendering it an incarnated human text. . . . He attacks the application of the Shari'a by describing it as backward and reactionary. He claims that the Shari'a is the reason behind the backwardness of Muslims and their degradation. . . . He denies that God Almighty is [physically] on His great Throne and that His Chair encompasses the Heavens and Earth . . . He is an apostate, because he has revealed his unbelief after having been a believer, even if he claims to be a Muslim. An apostate cannot be excused when he claims to be a Muslim, because he has adopted a stance contrary to Islam.<sup>346</sup>

In order to justify its reasoning in a manner making it consistent with the constitutional freedom of religion, the Court of Cassation linked apostasy with public policy.<sup>347</sup> Maurits Berger refers that when apostasy rules are dealt as a matter of fact, Egyptian courts used to focus on applying its consequences on apostates. In this case public policy has been used to ground these consequences into the Egyptian legal system for two reasons "a) because these rules were based on essential principles of the Islamic Shari'a, and b) to ascertain their applicability in light of a lack of any statutory rules."<sup>348</sup> In Abu Zayd case the Court of Cassation adopted a different approach through using public policy as a mean to protect Islam and society fundamentals as the ruling states that:

To depart from Islam is to revolt against it, and this necessarily finds its reflection in the loyalty of the individual to the Shari'a, the state, and his ties with the society. This is what no law or state tolerates. . . . No individual has the right to proclaim that which contradicts the public policy or morals (al-nizam al-'amm aw al-'adab), use his opinion to harm the fundamentals upon which the society is built, to revile the sacred things, or to disdain Islam or any other heavenly religion.<sup>349</sup>

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<sup>346</sup>Court of Cassation, Aug. 5, 1996, appeals 475, 478 and 481, judicial year 65, cited in Berger *supra* note 230, at 728.

<sup>347</sup>Berger *supra* note 239, at 732.

<sup>348</sup>*Id.* at 732.

<sup>349</sup>Court of Cassation, Aug. 5, 1996, *supra* note 346.

The controversy of this case and describing it as the most prominent apostasy case in Egyptian law<sup>350</sup> have been caused by the huge criticisms which faced this ruling. This decision has been usually criticized by many legal scholars and human rights advocates as a manifestation of the legal abuse of family trials in Egypt to submit faith to judicial scrutiny or an example of how the highest court in Egypt committing takfir. Accordingly, for the purpose of this research, it is important to assess this ruling from different aspects. IHRL advocates see that the court enabled a third party to exploit the Islamic legal principle of *hisba* to abuse a family trial to declare apostasy of a Muslim who considers himself a believer.; as a result, Sharia principles have been applied in Egypt to shape the legal framework of apostasy and limit religious freedom.<sup>351</sup> The plaintiffs in this case used family trials because it was the only legal mean to affirm Abu Zayd's apostasy basing on his writings that provoked outrage of the public. Thus, such abuse of family trials is caused by the ambiguous legal status of apostasy in Egypt as a neither criminalized nor permitted act. Also, it is an extension to the Egyptian state's approach to legal Islamization that promoted the role of litigation as an alternative process to a political legislative solution through which Sharia norms could be enforced. Such ruling could be considered as a breach to standards of religious and expression freedoms according to IHRL because the ruling is based on a single tradition; however, the Cassation Court used public order loophole to protect its decision. As it was asserted before in this research, any state party to the ICCPR could justify limitations on the freedom to manifest religion by the protection of public safety, order, health or morals, which have no strict definition. The court in this case "argued that a Muslim making public statements contrary to the orthodoxy of Islam violates Egyptian public policy."<sup>352</sup> Consequently, the court here interpreted public policy not in terms of religious freedom, but in terms of freedom of expression because the convict who considered himself a Muslim wrote opinions disdaining Islam.<sup>353</sup> In contrast to the pragmatic approach, the Court of Cassation established Abu Zayd's apostasy on the basis of evidence presented by witnesses, and considered his writings equivalent to an acknowledgement of explicit unbelief.<sup>354</sup> I think that this ruling is only a reflection of the limited application of apostasy consequences in personal status law field in Egypt. The ruling

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<sup>350</sup>Nassar, *supra* note 205, at 28.

<sup>351</sup>*Id.* at 737.

<sup>352</sup>Berger, *supra* note 239, at 737

<sup>353</sup>*Id.*

<sup>354</sup>Nassar, *supra* note 205, at 28.

tried to absorb public outrage through confirming that declaring Abu Zayd's apostasy was based upon adopting the opinion of the majority of Muslim scholars, among them the Hanafis, to protect Islam from disdaining, while turned a blind eye to the opinion of this majority who sees that the apostate should face death penalty and be deprived from all other civil rights to end up with deciding the dissolution of Abu Zayd's marriage and his wife! The notable thing that even this dissolution was not executed after this. This approach is consistent with all apostasy related cases 'rulings in personal status field, which converted depriving from civil rights from an inevitable consequence of apostasy in Sharia to isolated legal consequences applied by the court on the demand of plaintiffs. Moreover, this ruling is not based on an Islamic juristic reasoning, but in contrast like in most of personal status it is based on a legal secular reasoning that aims to enforce the state's definition of Sharia principles and the scope of their implementation according to law.

Finally, let us answer the key questions of this chapter regarding the legal situation of apostasy within the field of personal status law in Egypt. How did the Egyptian legal system through its personal status law try to balance between its constitutional obligations to respects the "rule of law" (respect human rights and enforce ratified international covenants like the ICCPR) and respect the principles of Sharia? in Egypt the application of a law in personal status matters is based on the religion of the parties unless the legislature issued another ruling in the same matter. In these cases, Muslims are governed by Sharia rules precisely in accordance to the most predominant opinion of Imam Abu Hanifa doctrine. In consistency with the state's approach regarding apostasy, no rule prohibiting apostasy can be found in the codified part of personal status law. The legislature avoided to issue any statutory law prohibiting apostasy or imposing its legal consequences to avoid any explicit statement in law that criminalizes conversion from Islam in contradiction with the ICCPR. On the other hand, apostasy rules can be found only on caselaw as application of Sharia rules because the Court of Cassation has confirmed in its jurisprudence that any silence of the codified law concerning any matter should not be understood as an intention by the legislature to contradict with any statement in Quran, authentic Sunnah, or a ruling constituted a consensus reached by Muslim jurists. How did the discussed approach could deal with the contradiction between apostasy rulings in both Sharia and the ICCPR? Since religion is a governing factor in family cases, family courts focus only on

answering the question whether any of the parties is an apostate or not. In case of the establishment of apostasy, it is “perceived as a legal impediment to almost all personal status rights by virtue of the apostate having incurred civil death.”<sup>355</sup>The apostate in this case is only deprived from the examined right in the discussed case and not all civil rights like in Sharia. In most of personal status cases in this regard there is no reference to religious freedom or the punishment of the act of apostasy itself; however, in cases related to blasphemy or published writings like Abu Zayd’s cases the Court of Cassation categorizes the application of apostasy consequences under public policy to avoid any apparent contradiction with the ICCPR’s definition of religious freedom or freedom of expression and the constitutional obligation with these rights. Does the legal framework of apostasy rules in personal status field in Egypt agree with standards of religious freedom in Sharia and the ICCPR? The answer is no because it contradicts with both. From the perspective of IHRL imposing any legal consequences as a punishment for conversion from any belief to another basing on a single tradition. On the other hand, even if we could agree that the imposed apostasy consequences in family trials are consistent with its ruling in Sharia this legal framework contradicts with the juristic position of apostasy rules in Sharia as it converted depriving from civil rights from an inevitable consequence of apostasy in Sharia to isolated legal consequences applied by the court only on the demand of plaintiffs in separated cases. By which reasoning could Egyptian courts reach their established jurisprudence in this regard? According to our analysis, we could find that issue courts did not conclude their rulings through deducing apostasy rules from Sharia primary sources by using Islamic legal theory; rather, they were reached through applying the most predominant opinion of Imam Abu Hanifa doctrine according to the law and the court’s jurisprudence through a legal secular reasoning that reconstructs the implementation of apostasy consequences in some cases under secular categorizations like public policy.

#### **4. Apostates’ Legal Situation According to Administrative Law:**

##### **a. The Recognition of Conversion from Islam in Administrative Law:**

Apostasy or conversion from Islam has also arose in administrative law domain in Egypt. Most of these cases are related to Egyptian Muslims who converted from Islam and filed cases against the government whose representatives refused to record their new religious status in identity

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<sup>355</sup>Berger *supra* note 239, at 723.

cards and documents.<sup>356</sup>As it was stated previously in this research, the State Council’s judicial section has an exclusive jurisdiction to take decisions in administrative disputes precisely that related to state actions “in all cases in which a state administrative body is involved.”<sup>357</sup> Accordingly, cases concerning the registration of new religious status in identity cards are examined by administrative courts. In these cases, the government represented in the Civil Status Department of the Ministry of Interior refused to acknowledge conversion from Islam through recording the new religion of the convert in identification cards.<sup>358</sup>Identity card in Egypt is an obligatory requirement by law from citizens to operate their legal rights like work, health insurance, marriage, etc.<sup>359</sup>Computerized identity cards must include the religion of the person that could only be from the three heavenly religions. Accordingly, apostasy related cases in this regard in Egypt could be classified into three categories: “cases filed by citizens who were Christians but converted to Islam and then reverted to Christianity, cases filed by citizens who were born and brought up as Christians and whose fathers [embraced] Islam before they reached 16 and could hold their own identity cards, and the third category includes cases filed by Muslims who converted to Christianity and who failed to have their new religious status registered in their identity cards.”<sup>360</sup>

#### **b. Administrative Courts’ Approach to Conversion from Islam**

In order to understand the approach of the State Council concerning the right of apostates to record their new religious status in identity cards, it is essential to examine its reasoning in different cases of conversion from Islam. In his article *Islamic Law and Freedom of Religion: The Case of Apostasy and Its Legal Implications in Egypt* Moataz El Fegiery introduces a critical analysis of a series of recent decision of the State Council in this regard that could be useful for this research. Thus, I will depend on this analysis here to examine the practice of Administrative judiciary concerning apostasy cases. Through his analysis, El Fegiery concludes that “[t]he

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<sup>356</sup>El Fegiery, *supra* note 53, at 8. The following subsection draws heavily on Moataz Ahmed El Fegiery, *Islamic Law and Freedom of Religion: The Case of Apostasy and Its Legal Implications in Egypt* as it introduced a critical analysis of Administrative courts’ approach in this issue.

<sup>357</sup>Nassar, *supra* note 205, at 13.

<sup>358</sup>*Id.* at 12.

<sup>359</sup>*Id.*

<sup>360</sup>El Fegiery, *supra* note 53, at 8.



jurisprudence of the State Council has exhibited three trends in its handling of the issue: the hardline approach, the liberal approach and the pragmatic approach.”<sup>361</sup>

### **1) The Hard-line Approach: The Non-Recognition of Conversion from Islam:**

The hardline approach is considered as the mainstream approach regarding conversion from Islam in the jurisprudence of the State Council.<sup>362</sup> According to this approach that was followed by the State Councils’ courts for three decades, Egyptian Muslims are not allowed to modify their religious status in identity cards to reflect conversion from Islam to any other religion. It is believed that this approach is based on the prohibition of apostasy in Islam to protect public order in Egypt as a Muslim majority country.<sup>363</sup> For instance, the court of Administrative Justice followed this approach in the case of Nabil Hassan Sabry in 1980.<sup>364</sup> Nabil was a Muslim reverted to Christianity, and he filed this case after the refusal of the Civil Status Department of the Ministry of Interior to modify his identity card to record the new religion of the convert. El Fegierly summarizes the plaintiff’s claims as follows:

The plaintiff argued that the Civil Code does not prohibit any individual from changing his religion. He also invoked the Law of Civil Status which allows citizens to change data in their documents as long as they present proof of the new data. The plaintiff cited Article 46 of the Egyptian Constitution of 1971, which guarantees freedom of religion. He then argued that Islamic law is not applicable in this case, since there is a clear provision in the Law of Civil Status, which includes the changing of religious information.<sup>365</sup>

On the other hand, the Court of Administrative Justice confirmed the illegality of the required modification, and reasoned its decision by arguing that:

[T]he rules of Islamic law are applicable in this case based on Article of 2 of the Constitution and Article 1(2) of the Civil Code, which allow judges to refer to customary law, Islamic Shari‘a and the rules of equity in the absence of a legal provision applicable to the case being examined. It then stated that there was no law regulating the issue of apostasy for those who embrace Islam; that customary law in this case is related to moral issues and that, therefore, the rules of Islamic law are applicable in this case. Apostates, according to the Court, have no civil rights in Islamic law. The right to change religious affiliation can only be provided for non-Muslims, but Muslims cannot denounce their

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<sup>361</sup>*Id.* at 9.

<sup>362</sup>*Id.*

<sup>363</sup>*Id.* at 10.

<sup>364</sup>Court of Administrative Justice, April 8, 1980, Case 20/29, cited in El Fegierly, *supra* note 53, at 10.

<sup>365</sup>*Id.* at 10.

religion, whether to convert to another religion or to become non-religious. The Court affirmed that based on Islamic Shari‘a, apostasy must be prevented. The Court then moved to the facts of the case and observed that since the plaintiff converted to Islam, he was subject to its rules, and the refusal to make the required modification was legal, because the state could not condone his apostasy. Such an act, according to the Court, would violate a rule of public order, and therefore the state cannot legally recognize this act. The Court in this case also argued that the scope of Article 46 of the constitution on freedom of religion should be in line with Article 2, which considers Islamic law as the main source of legislation [and since the plaintiff has embraced Islam, he must then submit to its law which does not condone apostasy].<sup>366</sup>

Through its decision, the Court of Administrative Justice has established many principles that have governed the right of apostates to record their new religious status in identity cards in Egypt. Firstly, the Court affirmed the Supreme Court’s definition of the scope of the constitutional right of religious freedom, which was elaborated in its mentioned ruling in 1975.<sup>367</sup> According to this definition, the scope of the constitutional right of religious freedom is limited by “the consideration of public order, to which the rules of Islamic law are fundamental”<sup>368</sup> Secondly, the ruling differentiates between the scope of religious freedom basing on the religion of the convert.<sup>369</sup> While non-Muslims are free to change their religion, Muslims are not allowed to abandon their religion. Thirdly, this ruling has also affirmed the supremacy of Sharia rules over all other law sources to be applied on apostasy related cases basing on the supremacy clause of the constitutional Article 2. Fourthly, the decision refers that according to Sharia apostasy must be prevented.

The discussed ruling demonstrates the followed reasoning behind the hardline approach. The ruling asserted the fact of the supremacy of Sharia or Islamic law over all other law sources in the Egyptian legal system. Accordingly, all constitutional rights, including the right of religious freedom, should be interpreted in a manner that does not contradict with what the court considers as Sharia rules like the prohibition of apostasy in Sharia. However, in consistency with judiciary’s approach in most of the discussed rulings in different law fields in this research, the court limited the application of apostasy rules in Sharia to a specific right and ignored the

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<sup>366</sup>*Id.*

<sup>367</sup>El Fegiery, *supra* note 53, at 11.

<sup>368</sup>*Id.*

<sup>369</sup>*Id.* at 12.

application apostasy juristic rulings in Sharia regarding other civil rights and capital punishment. Furthermore, the court reasoned the obligatory nature of the application of apostasy rules in Sharia by categorizing it under a secular categorization which is public policy rather than using any Islamic juristic reasoning based upon Islamic legal theory.

The Court of Administrative Justice also followed the hardline reasoning in the case of Jerjes Malak Wasef.<sup>370</sup> The plaintiff brought the case to the court to claim his right to record his new religious status in identity card after conversion from Islam. The plaintiff's father was a Christian who embraced Islam in 1990. He changed his son's religion to Islam in his birth certificate when he was 7 years old.<sup>371</sup> The court refused the plaintiff's claim and reasoned its decision as El Fegiery refers that:

The Court made a distinction between the right of a person to embrace religious beliefs and his or her right to manifest these beliefs in society. It reasoned that while the former concerns the individual and his private relationship with God, the latter affects society and can be limited. It, therefore, argued that the constitutional right of religious freedom should not infringe on public order and public morals, as affirmed before by the Supreme Court's landmark decision in 1975. Then, the Court observed that Islam is the majority-religion in Egypt, and although its rules respect the right of non-Muslims to believe in any divine religion, Islamic rules prohibit those who become affiliated with Islam, to leave it. This rule according to the Court is a part of public order that must be respected in the country. . . It has also pointed out that Egyptian legislators have not criminalized apostasy. However, when the judiciary examines claims brought by apostates to secure legal recognition of their conversion, the Court affirmed that judges should be guided by the requirements of public order, where Islam represents the main component of it. The Court has ruled that persons who voluntarily decided to become Muslims are not allowed to manipulate religion after that and employ the state's institutions to legitimize their apostasy. . . Moreover, the Court has argued that the ratification of the International Covenant on Civil and Political Rights (ICCPR) cannot be invoked in this case by the claimant, because Egypt made a general reservation on the convention on the basis of the rules of Islamic law. Therefore, it cannot be applied in a way that violates rules of Islamic law that are an integral part of the public order in Egypt.<sup>372</sup>

Through its issued ruling in Malak Wasef 's case, we could note how the Court of Administrative Justice added some new aspects to its reasoning behind the hardline approach. Firstly, the court categorized conversion from Islam or apostasy under the right to manifestation

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<sup>370</sup>Court of Administrative Justice, June 30, 2009, Case 4475/58, cited in El Fegiery, *supra* note 53, at 12.

<sup>371</sup>El Fegiery, *supra* note 50, at 12.

<sup>372</sup>*Id.* at 12, 13.

of belief that could be limited by public order, public morals, etc.. Secondly, the court interpreted the Egyptian statement regarding the ratification of the ICCPR as a general reservation on the convention on the basis of the rules of Islamic law and, as a result, the ICCPR's provisions including Art. 18 cannot be applied in a way that violates rules of Islamic law that are an integral part of the public order in Egypt.

### **1) The Liberal Approach: a Solution for Converts of Christian Origin:**

The liberal approach or reasoning constitutes, like the pragmatic approach, an exception to the mainstream reasoning regarding conversion from Islam in the jurisprudence of the State Council. According to this reasoning, the Court of Administrative Justice accepted the claims of only plaintiffs who reverted to Christianity to register their new religion in their identity cards. Such approach was adopted by the court under the leadership of Judge Farouk Abd el-Qader between April 2004 and September 2006 in 22 cases.<sup>373</sup> For instance, in Mohammed Mahdy's case the Court ordered the Ministry of Interior to change the plaintiff's affiliation in his identity card after his reversion to Christianity.<sup>374</sup> El Fegiery summarizes the Court reasoning in this case as he states that:

In these cases, the Court considered the Ministry's refusal to alter the identity card an unjustifiable interference in his personal choice. The Court has also argued that the act is just an administrative procedure that reflects reality and that this registration is necessary to establish rights and duties based on the correct religious status. In its response to the argument based on public order, the Court affirmed that Article 40 of the Egyptian constitution provides for equality between citizens in all rights and duties without discrimination based on religion, language, origin and sex. It also referred to Article 46, which protects the rights of individuals not only to freely believe in religions but to manifest religious faith. The Court cited the Universal Declaration of Human Rights and the Arab Charter of Human Rights while also arguing that many centuries ago, Islam demonstrably recognized freedom of religion. To show the compatibility between Islam and religious freedom, the Court cited several Quranic verses that highlight the principles of freedom and non-compulsion in religious conviction. However, the Court's understanding of freedom of religion in Islam was not applied to citizens who are born and brought up as Muslims and decided to convert to any other religion. In explaining this position, the Court ambiguously submitted that, according to Islamic jurisprudence, a Muslim cannot be considered apostate unless he or she feels comfortable with his or her apostasy. This argument infers that the Court would only guarantee the rights of persons

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<sup>373</sup>*Id.* at 14.

<sup>374</sup>Court of Administrative Justice, April 26, 2005, Case 26103/85, cited in El Fegiery, *supra* note 53, at 14.

who became Muslims for a while and then decided to apostatize from Islam. By this reasoning, the Court avoided engaging in a thorough discussion on the issue.<sup>375</sup>

Through this approach, we could understand how the Court of Administrative Justice, like the whole Egyptian judiciary, could use its exclusive authority of interpretation to define Sharia principles, human rights, and public order to establish its arbitrary reasoning of contradicting judicial rulings regarding the legal position of apostasy in Egypt. After taking into consideration the exceptional nature of this reasoning in comparison with the mainstream reasoning regarding conversion from Islam in the jurisprudence of the State Council, I think that the arbitrariness of the court reasoning stems from the fact that its reasoning either in this case or in the other discussed cases does not reflect a clear interpretive, juristic, or legal theory. Rather, it could reflect the conflicting judgments of the court, which demonstrate how a modern state through its judiciary could exploit its interpretive authority to impose its definition of the scope of religious freedom in contradiction to its definition in Sharia or the constitution. Accordingly, the limitation of the court's rulings as a transformation from a conservative interpretation of religious freedom in Sharia to a more liberal one does not introduce a real understanding to the legal position of apostasy in Egypt. This because the former does not constitute a conservative and the latter does not constitute a liberal from the perspective of Sharia. Also, the court's arguments regarding the constitutional religious freedom in the light of public order refute each other. Concerning apostasy in Sharia, the court in this ruling the Court cited several Quranic verses that highlight the principles of freedom and non-compulsion in religious conviction to demonstrate the compatibility between Islam and religious freedom, and as a result, establish its decision. In contrast to its approach regarding Christian reverts, the Court see that according to Islamic jurisprudence citizens who are born and brought up as Muslims and decided to convert to any other religion are not allowed to register their new religion in their identity cards. This because, according to the juristic explanation of the court, Muslim cannot be considered apostate unless he or she feels comfortable with his or her apostasy. Our previous analysis of the juristic position of apostasy in Sharia could let us see how the court used this arbitrary argument to create such distinction between apostasy of apostates of Muslim origin and Christian reverts. In addition, the court's approach contradicts with its precedent rulings that established the non-permission of

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<sup>375</sup>El Fegiery, *supra* note53 , at 14.

Muslim converts to secure a legal recognition of their conversion basing on the application of Sharia principles which prohibit apostasy. Both arguments contradict with each other and contradict with the juristic situation of apostasy in Sharia. The court only misused or reconstructed some Islamic terms to justify its decision even in adopting contradicting approaches. Concerning the interpretation of the constitutional right of religious freedom in the light of public order, the court in cases that belong to the liberal approach argues that that Article 40 of the Egyptian constitution provides for equality between citizens in all rights and duties without discrimination based on religion, language, origin and sex. It also refers to Article 46 which protects the rights of individuals not only to freely believe in religions but to manifest religious faith. This argument contradicts with what has been elaborated by the mainstream reasoning regarding conversion from Islam in the jurisprudence of the State Council. The hardline approach followed the Supreme Court's definition of the constitutional right of religious freedom as a non-absolute right and that the manifestation of religious beliefs must be subject to and considered in relation to public order and its constitutive elements including Sharia principles. Thus, we could say here that the Court of Administrative Justice in its liberal approach did not even respect the interpretation authority of the Supreme Court in defining the scope of the constitutional right of religious freedom to justify its limitation under the category of public order like the mainstream approach.

## **2) The Pragmatic Approach:**

The pragmatic approach has been adopted by the Supreme Administrative Court in some cases.<sup>376</sup>The court aimed through this reasoning to permit the registration of the new religion of only persons who reverted to Christianity to register their new religion in their identity cards without raising or solving the legal issue of apostasy and religious freedom in Egypt. The court believes that allowing the registration of the new religion of Christian reverts agrees with the requirements of Egyptian law to include true information in citizen's identity cards to avoid any legal errors.<sup>377</sup>For example, on the 9th of February 2008, the Supreme Administrative Court issued a similar ruling in the case of Beshay Rizq.<sup>378</sup>The court reasoned its decision by arguing that:

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<sup>376</sup>*Id.* at 15.

<sup>377</sup>*Id.*

<sup>378</sup>Supreme Administrative Court, February 9, 2008, Case 13496/53, cited in El Fegiery, *supra* note 53, at 15.

the Egyptian law requires that each citizen carries an identity card, by which he/she can interact with the state and society, and that the card should include true information about a citizen's sex, profession, religion and marital status. Any change in this information should be reported to the mandated authority as stipulated in Article 47 of the law of civil affairs. This Article does not limit the changing of information related to their religion, as long as the change occurs among the three monolithic religions. The Court highlighted the fact that the registration only reflects the real status of a person who has already changed his religion. It does not mean that the mandated authority accepts the act or that it establishes a new legal status by the registration itself. The Court made an analogy with the change in legal status resulting from marriage, in which the registration does not establish this legal status, but that rather the satisfaction of the legal pillars and conditions of marriage, as stipulated in the law, is the basis under which the legal status of marriage can be established. The Court also argued that the registration of the new religious status of the claimant is necessary to protect the public order and societal interest, and it will protect against societal complexities or impermissible acts such as the marriage of non-Muslim male to a Muslim woman [which is prohibited in Islam]. . . Rather, the registration of this new religious status is a requirement of a modern nation state. Finally, the Court decided that while the claimant can register his affiliation to Christianity in his official documents, his previous affiliation to Islam should also be mentioned in these documents.<sup>379</sup>

Accordingly, the Supreme Administrative Court used the mentioned argument to avoid any legal discussion about apostasy or religious freedom. The court reasoning focused on the legal requirement to include true information in citizen's identity cards to establish its ruling. However, the court also categorized the registration of the new religious status of the claimant under the protection of public order, which has been usually invoked by all State Council courts to reason their rulings regardless of their approach. The Supreme Administrative Court also maintained the discriminatory approach that was followed in liberal approach rulings as it limited the permission for the registration of the new religion for only persons who reverted to Christianity and not for converts of Muslim origin.<sup>380</sup> I think that this discrimination is very sufficient to refute all the court's invoked arguments to allow changing the religion of Christian reverts in identity cards. In addition, the court in this approach insisted that the previous affiliation to Islam should be mentioned in identity card, which is considered by some human rights advocates as a kind of social stigmatization through referring to their rejection to Islam.<sup>381</sup>

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<sup>379</sup>El Fegiery, *supra* note 53, at 15, 16.

<sup>380</sup>*Id.* at 15.

<sup>381</sup>*Id.* at 16.

Finally, let us answer the key questions of this chapter regarding the legal situation of apostasy within the field of Administrative law in Egypt. How did the Egyptian legal system through its Administrative judiciary try to balance between its constitutional obligations to respects the “rule of law” (respect human rights and enforce ratified international covenants like the ICCPR) and respect the principles of Sharia? As it was stated previously in this research, Apostasy or conversion from Islam has arose in administrative law domain in Egypt mostly in cases which are related to Egyptian Muslims who converted from Islam and filed cases against the government whose representatives refused to record their new religious status in identity cards and documents. Accordingly, Administrative courts have discussed apostasy and religious freedom in cases during “the process of reaching a ruling on the administrative issue, which is within the jurisdiction of the court.”<sup>382</sup>This means that Administrative courts have tried to balance between these constitutional obligations through limiting its judicial review to answer the question of the legality of registering the new religion of Muslim converts in their identity cards to decide the legality of state actions in this regard. How did Administrative judiciary’s approach could deal with the contradiction between apostasy rulings in both Sharia and the ICCPR? According to the displayed analysis we are talking here about three different approaches. The hardline approach asserted the fact of the supremacy of Sharia or Islamic law over all other law sources in the Egyptian legal system. Accordingly, all constitutional rights, including the right of religious freedom, should be interpreted in a manner that does not contradict with what the court considers as Sharia rules like the prohibition of apostasy in Sharia. However, in consistency with judiciary’s approach in most of the discussed rulings in different law fields in this research, this reasoning limited the application of apostasy rules in Sharia to a specific right and ignored the application apostasy juristic rulings in Sharia regarding other civil rights and capital punishment. Furthermore, it reasoned the obligatory nature of the application of apostasy rules in Sharia by categorizing it under a secular categorization which is public policy rather than using any Islamic juristic reasoning based upon Islamic legal theory. Through this categorization Administrative courts could avoid any apparent contradiction with the ICCPR. Through the liberal approach the Court of Administrative Justice accepted the claims of only plaintiffs who reverted to Christianity to register their new religion in their identity cards. Concerning apostasy in Sharia, the court in this approach the cited several Quranic verses that

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<sup>382</sup>Nassar, *supra* note 205, at 17.



highlight the principles of freedom and non-compulsion in religious conviction to demonstrate the compatibility between Islam and religious freedom, and as a result, establish its decision. In contrast to its approach regarding Christian reverts, the Court see that according to Islamic jurisprudence citizens who are born and brought up as Muslims and decided to convert to any other religion are not allowed to register their new religion in their identity cards. This because, according to the juristic explanation of the court, Muslim cannot be considered apostate unless he or she feels comfortable with his or her apostasy. The Supreme Administrative Court aimed through the pragmatic approach to permit the registration of the new religion of only persons who reverted to Christianity to register their new religion in their identity cards without raising or solving the legal issue of apostasy and religious freedom in Egypt. The court believes that allowing the registration of the new religion of Christian reverts agrees with the requirements of Egyptian law to include true information in citizen's identity cards to avoid any legal errors. However, the court also categorized the registration of the new religious status of the claimant under the protection of public order, which has been usually invoked by all State Council courts to reason their rulings regardless of their approach. Does the legal framework of apostasy rules in administrative law domain in Egypt agree with standards of religious freedom in Sharia and the ICCPR? The answer is no because it contradicts with both. From the perspective of IHRL the three adopted approaches contradict with the freedom to have or to adopt a religion or belief which necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another. This because the mainstream approach of State Council's courts rules that Muslims converts regardless of their religious origin are not allowed to modify their religious status in identity cards to reflect conversion from Islam to any other religion, whereas the two other exceptional approaches allow this modifications for only Christian reverts. On the other hand, I think that from the viewpoint of Sharia the three adopted approaches contradict with apostasy juristic rulings in Sharia. Firstly, the arising of apostasy related cases within the field of administrative law in Egypt has continued the legal fragmentation of apostasy rules in different law domains in Egypt to contradict with the juristic position of apostasy rules in Sharia as it converted depriving from civil rights from an inevitable consequence of apostasy in Sharia to isolated legal consequences applied by the court only on the demand of plaintiffs in separated cases. Secondly, both permission or non-permission for changing the religion of Muslim converts in their identity cards contradicts with apostasy juristic

rulings in Sharia. The non-permission for registering the new religion of Muslim converts, which represents the hardline approach, will lead to prohibited acts according to Sharia such as the marriage of non-Muslim male to a Muslim woman. As it was illustrated previously in this research, Islam like many other beliefs (including Christianity and Judaism) all its rulings and norms are based upon a main principle, which is the distinction between believers and unbelievers; consequently, embracing Islam or renouncing it automatically results in many other legal consequences in Sharia. The Supreme Administrative Court has invoked this argument through its pragmatic approach. Furthermore, the permission for registering the new religion of Muslim converts also contradicts with apostasy juristic rulings in Sharia because apostate suffers in Sharia from a civil death as he is not allowed to inherit, marry, and dispose of his property. Accordingly, even if the registration of the new religion in identity card does not establish this legal status, as stated by Supreme Administrative Court, it simply enables apostates to practice and enjoy all their civil in contrast to Sharia norms. By which reasoning could Egyptian courts reach their established jurisprudence in this regard? The hardline approach reasoned the non-permission of registering the new religion of Muslim apostates basing on the supremacy of over all other law sources in the Egyptian legal system and the protection of public order. The liberal approach reasoned its permission to Christian reverts to modify their religion in identity cards basing on the court's interpretation of the constitutional rights of religious freedom and equality between citizens from one side, and religious freedom in Islam from another side. The pragmatic approach reasoned its permission to Christian reverts to modify their religion in identity cards basing on the legal requirement of the Egyptian law to include true information in citizen's identity cards and the protection of public order.

## **B. Understanding the Role of Public Policy as a key factor in Imposing State's Definition of Religious Freedom and Apostasy Consequences in Egypt:**

### **1. Examining Cassation Court's Definition of Public Policy:**

According to the introduced analysis of the legal framework of apostasy in Egypt, we could note how the concept of public order has been used by Egyptian judiciary to define the scope of the (international and constitutional) right of religious freedom and ground the application of some apostasy consequences in Egypt without the existence of any reference to the prohibition of apostasy or its legal consequences in Egyptian statutory law. In order to understand the role of the concept of public policy in demarcating the legal framework of apostasy in Egypt, it is important

to display its definition by Egyptian courts precisely the Court of Cassation. Egyptian law borrowed the concept of public policy among other legal concepts from the French law by the end of the nineteenth century.<sup>383</sup> Such legal concept usually refers to fundamental legal principles to a society, which are not allowed to be contradicted or violated by any normative rules or laws of this society.<sup>384</sup> The Court of Cassation has defined public order as:

[Public order] comprises the principles (qawa'id) that aim at realizing the public interest (al-maslaha al-'amma) of a country, from a political, social as well as economic perspective. These [principles] are related to the natural, material and moral state of affairs (wad'a) of an organized society, and supersede the interests of individuals. The concept of [public order] is based on a purely secular doctrine that is to be applied as a general doctrine (madhab 'amm) to which society in its entirety can adhere and which must not be linked to any provision of religious laws. However, this does not exclude that [public order] is sometimes based on a principle related to religious doctrine, in the case when such a doctrine has become intimately linked with the legal and social order, deep-rooted in the conscience of society (damir al-mujtama), in the sense that the general feelings (al-shu'ur al-'amma) are injured if it is not adhered to. (...) The definition (taqdir) [of public order] is characterized by objectivity, in accordance with what the largest majority (aghlab 'a amm) of individuals in the community believe.<sup>385</sup>

Two main conclusions could be concluded from this definition. Firstly, there is no clear definition of the mentioned "principles" or "interest" that constitute the concept of public policy because they are considered according to the circumstances and standards of a given society at a particular time.<sup>386</sup> Thus, the courts are responsible for defining them on ad hoc basis to assess any legal act or statute to be considered as a breach of public order or not.<sup>387</sup> Secondly, the paradox<sup>388</sup> of the public order stems from the irresolvable tension between formal legal equality and the values of the majority. This means that the issue court could base its ruling concerning any right on public order either because it decided to apply (what the court considered) formal legal equality among all citizens or the values of the majority. For instance, the discussed cases in this research could show us how Egyptian courts have adopted public policy in some times to

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<sup>383</sup>Berger *supra* note 239, at 725.

<sup>384</sup>*Id.*

<sup>385</sup>Maurits Berger, *Public Policy and Islamic Law: The Modern Dhimmī in Contemporary Egyptian Family Law*, 8 88-136 (2001), cited in Hussain Ali Agrama, *Secularism, Sovereignty, Indeterminacy: Is Egypt a Secular or a Religious State?*, 52 *Comparative Studies in Society and History* 495–523 (2010).

<sup>386</sup>Berger *supra* note 239, at 726.

<sup>387</sup>*Id.*

<sup>388</sup>Hussain Ali Agrama, *Secularism, Sovereignty, Indeterminacy: Is Egypt a Secular or a Religious State?*, 52 *Comparative Studies in Society and History* 495–523 (2010).

impose apostasy consequences basing on the application of Sharia principles as the values of majority, and to deny the application of these consequences in other rulings basing on the legal equality among all citizens to practice, what the court considered, their constitutional and legal rights of religious freedom. For this reason, it is believed that the “active principle of secularism” is manifested in the legal notion of public order as the issue court has the authority to decide what constitutes values of the majority, legal equality rules, essential religious principles of society, and when to adhere to any of these rules or make exceptions to them under the umbrella of public order.<sup>389</sup> In his article entitled *Secularism, Sovereignty, Indeterminacy: Is Egypt a Secular or a Religious State?* Hussein Ali Agrama illustrated this paradox of public order when he explained that:

The paradox of the public order arises not just from the tension it embodies between formal legal equality and the substantive values of the majority, that is, between competing norms. It is also because those substantive values have become identified with state sovereignty, which, in turn, is legally expressed through exceptions. This results in a profound confusion about whether a court, in invoking the public order, is promoting norms or making exceptions to them.<sup>390</sup>

## **2. Public Policy as a legal Base for Imposing State’s Definition of Religious Freedom and Implementing of Apostasy Consequences in Egypt:**

Egyptian judiciary’s definition of public policy has shaped the scope of the right to religious freedom in Egypt. According to what was demonstrated in this research, the ICCPR’s confirms that any restrictions on the freedom to manifest religion must be prescribed by law for the protection of public safety, order, health or morals, or the fundamental rights and freedoms of others. Such restrictions or limitations based upon public morals must not be driven from a single tradition or applied in a manner that would vitiate the rights guaranteed in article 18. Consequently, we could say that the combination between emphasizing the illegality of any limitation on religious freedom that is driven from a single religion and the absence of any clear strict definition of public safety, order, health or morals according to which any state could limit freedom to manifest religion has offered a loophole for states parties to the covenant to breach its concept of the right. This means that any state could limit any aspect of the right to freedom of thought, conscience or religion as long as this aspect is categorized by the state as a freedom to

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<sup>389</sup>*Id.* at 507.

<sup>390</sup>*Id.* at 509.

manifest religion, which varies from one belief to another. Furthermore, any state party to the covenant could justify such limitations by the protection of public safety, order, health or morals, which have no strict definition. While the Egyptian constitution confirms that State shall guarantee the freedom of belief and the freedom of practice of religious rites, the Supreme Court considers that freedom of religion is not absolute, and that the manifestation of religious beliefs must be subject to and considered in relation to public order, morals and values. In its landmark ruling in 1975, the Court pointed out that Islamic Shari‘a and its principles are constitutive elements of public order and that under this the constitutional right of freedom of religion can be restricted. Accordingly, the case law of the Egyptian civil courts, as it was shown in this research, regarded apostasy as a part of the practice of belief that is regulated by the “internal order” of Islam and can be restricted on the bases of public policy.<sup>391</sup> However, in some cases Egyptian courts use or exploit their exclusive interpretive authority to enlarge the scope of religious freedom through the ambiguous concept of public order. For example, the liberal approach, which was adopted by the Court of Administrative Justice in a series of cases, considered that the recognition of conversion from Islam in identity cards agrees with Article 46, which protects the rights of individuals not only to freely believe in religions but to manifest religious faith, and consistent with public order. Accordingly, we could understand how the paradox of public order works between invoking norms or making exceptions to them.

On the other hand, this study has illustrated the fact that the concept of public order has been also used by Egyptian judiciary to ground and limit the application of some apostasy consequences in Egypt without the existence of any reference to the prohibition of apostasy or its legal consequences in Egyptian statutory law. Through our examination of some apostasy related case law, we could understand the duality<sup>392</sup> of apostasy in the Egyptian legal system which subdivided it into the act of apostasy and its legal consequences. Public policy has been used by judiciary to define and to categorize both. Concerning the act of apostasy, as it was mentioned before in this research, in some cases judges considered acts constituting apostasy (unless they are not criminalized by criminal law) like reviling the sacred things or to disdain Islam as acts violating society fundamentals and, in this case, they adopt public policy as a mean to protect

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<sup>391</sup>Berger *supra* note 239, at 737.

<sup>392</sup>*Id.* at 738

Islam and society fundamentals like in Abu Zayd case.<sup>393</sup> However, according to what this study demonstrated, such protection against these non-criminalized acts by law usually takes place through verbal statements and condemnations in court's rulings without any legal punishments for these acts like in Sharia. Concerning the application of apostasy consequences, in this case public policy has been used to ground these consequences into the Egyptian legal system for two reasons "a) because these rules were based on essential principles of the Islamic Shari'a, and b) to ascertain their applicability in light of a lack of any statutory rules."<sup>394</sup> However, public policy has been invoked by Egyptian courts in some cases also to refuse the application of some apostasy consequences. For instance, when the Supreme Administrative Court in some cases adopted the pragmatic approach to permit the registration of the new religion of only persons who reverted to Christianity to register their new religion in their identity cards, it argued that the registration of the new religious status of the claimant is necessary to protect the public order and societal interest, and it will protect against societal complexities or impermissible acts such as the marriage of non-Muslim male to a Muslim woman. Again, public order has been invoked by Egyptian courts to justify the application of some apostasy consequences or deny their application at the same time.

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<sup>393</sup>Court of Cassation, Aug. 5, 1996, *supra* note 346.

<sup>394</sup>Berger *supra* note 239, at 732.

#### IV. Conclusion:

##### ***The Dominant Debate: Criticizing Egyptian Jurisprudence as a Limitation on Freedom of Belief as Defined by IHRL:***

The legal framework of apostasy in Egypt has been usually criticized as a violation of the Egyptian state's international obligation to ensure religious freedom as defined by IHRL.<sup>395</sup> This research has shown that such violation does exist. Having investigated the scope of the right to freedom of thought, conscience or religion and focusing precisely on the freedom to change one's religion under Article 18 of the ICCPR as identified and interpreted by the HRC, we reached that the scope of protection under Article 18 includes theistic and non-theistic beliefs; however, it prevents any restrictions on the right to freedom of religion that could be based upon any of these beliefs. The freedom to have or to adopt a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another. Accordingly, the use of threat of physical force, penal sanctions, or deprivation of any civil rights to compel believers or non-believers to adhere to their religious beliefs is banned under this Article. Human rights organizations and advocates usually hold that the legal situation of Muslim "converts" in Egypt also contradicts with Article 46 of the Egyptian constitution that guarantee the freedom of belief and the freedom of practice of religious rites. Apostates in Egypt could face some legal consequences of conversion from Islam in different law fields. The Egyptian penal code does not regulate the act of apostasy directly; however, it includes some articles that deal with some offences against religion. Although these articles are not limited to protect Islam only, they have been used as the legal base to charge Muslim apostates or converts especially when their apostasy is accompanied with any of the criminalized offences like blasphemy. Egypt's main blasphemy law is found in Article 98(f) of the Egyptian penal code, which also includes other Articles that criminalize different forms of religious insult.

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<sup>395</sup>See generally AMNESTY INT'L, *supra* note 278, FREEDOM HOUSE, *supra* note 276, Becket Fund for Religious Liberty, *supra* note 279, THE EGYPTIAN INITIATIVE FOR PERS. RIGHTS, *supra* note 280, Berger, *supra* note 239, Kilian Bälz, *supra* note 326, Ahmed Seif Al-Islam, *Legal Plurality and Legitimation of Human Rights Abuses: A Case Study of State Council Rulings Concerning the Rights of Apostates*, in Dupret et al., *supra* note 10, Nassar, *supra* note 205, El Fegiery, *supra* note 53, Susanne Olsson, *Apostasy in Egypt: Contemporary Cases of Hisbah*, 98 *The Muslim World* (2008).

Besides, in the domain of personal status law regarding Sharia as the general applicable law in personal status matters in cases where codified law is silent about makes Sharia norms applicable on apostasy related cases. As a result, the apostate could be deprived from any of his civil rights like inheritance, property disposal right, marriage, etc. if the court decided so upon the demand of any concerned plaintiff. In Administrative law field, Egyptian Muslims who converted from Islam, as it was explained, could face legal refusal to record their new religious status in identity cards and documents. Consequently, all these legal consequences of apostasy in Egypt are considered according to the standards of IHRL as a violation of the right to religious freedom.

Such point of view that criticizes the non-recognition conversion from Islam and the implementation of some apostasy consequences usually argues that this approach contradicts with the general approach of Islam to freedom of belief as apostasy rules at all is a disputed matter in Sharia and negates with the principle of no compulsion in religion.<sup>396</sup> This study has found that such argument is refutable from the perspective of Sharia. The proponents of this perspective argue that Quran forbids religious coercion in many of its verses. In addition, they challenge the traditional position on apostasy and hold that the apostate should not be put to death on the mere ground of his apostasy. It is believed that their argument is inspired by their belief that capital punishment of apostasy in Sharia is the main obstacle in achieving reconciliation between the notion of religious freedom in both Sharia and IHRL. According to this approach, the whole issue should be rethought in the light of significant change in time and circumstances. From their point of view, abolishing capital sanction of apostasy in Sharia is a plausible argument to prove that apostasy rules at all is a disputed matter in Sharia that negates with the principle of no compulsion in religion and, as a result, Muslim states should ignore them to make their laws and judicial practice consistence with the concept of religious freedom as defined by IHRL. Our investigation of the most prominent arguments in this issue has led us to some important conclusions that are to be elaborated here. Firstly, these arguments are refutable from the juristic point of view. Secondly, even agreeing with abolishing apostasy capital

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<sup>396</sup> See, e.g., Yara Nassar, *supra* note 205 ; SAEED & SAEED, *supra* note 144; Susanne Olsson, *Apostasy in Egypt: Contemporary Cases of Hisbah*, 98 THE MUSLIM WORLD 95–115 (2008); Peters & De Vries *supra* note 146; AN-Na'im, *supra* note 155; TAHA GABER AL-ELWANY, NO COMPULSION IN RELIGION (*LA IKRAH FE AL-DEEN*) (2nd ed. Shorouk 2006).



punishment will not change the fact that conversion from Islam is regarded as a grievous sin in Sharia. Thirdly, abolishing death penalty could not be accepted from a juristic perspective as a reason for abolishing apostasy legal consequences and regarding them as disputed matter in religion because they are set in Sharia, for they are related to general norms and apostasy is a grievous sin that could not be approved in Islam.

The limitation of apostasy legal problem in Egypt as a mere human rights problem that has been caused by conservative interpretation of disputed Sharia norms has led the advocates of this point of view to consider Egyptian courts' approach in this regard as conservative interpretation and implementation of Sharia rules; as a result, they see that such violation of could be resolved through adopting more lenient Sharia rulings.<sup>397</sup>The most obvious finding to emerge from this study is that the legal framework of apostasy in Egypt does not represent a conservative interpretation of Sharia rulings; in contrast, it contradicts with the juristic position of apostasy in Sharia and represents a manifestation of secular reconstruction of Sharia rulings by Egyptian state through its statutes and judiciary. The rhetoric of human rights has always limited the problem of apostasy in Egypt to the conservative interpretation of Sharia. Such rhetoric confirms that there are juristic solutions in Sharia that to achieve the standards of religious freedom as defined by the ICCPR through the recognition of conversion from Islam to any other belief without imposing any legal impediments on converts. Accordingly, Egyptian judges have to adopt non conservative or liberal interpretation of apostasy rules in Sharia to fulfil Egyptian international obligation to Article 18 of the ICCPR.

***The Ignored Debate: The Legal Framework of Apostasy in Egypt as a Manifestation of Secular Reconstruction of Sharia by a Modern State:***

The ambiguity of Article 2 or Sharia supremacy clause in the Egyptian constitution has a direct rule in shaping the legal framework of apostasy in Egypt. This because the absence of any regulation of apostasy in the codified laws drives Egyptian courts to interpret the constitutional provision regarding Sharia principles as the main source of law to make their decisions on apostasy related cases. The ambiguity of the discussed clause has resulted in promoting the role of the Egyptian judiciary in demarcating Islamization and all its related cases, like apostasy, in

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<sup>397</sup>Yara Nassar, *supra* note 205, at 72.

Egypt. This could give us an explanation for the absence of any explicit regulation of the act of apostasy in statutory laws in Egypt. The Egyptian state has always maintained this legal ambiguity to impose its own definition of Sharia principles. The political intention of adopting Article 2 or Sharia supremacy clause since 1971 was not to enforce Sharia principles within the Egyptian legal system; rather, it was adopted to consolidate the political power of the ruling regime at this time. Consequently, Article 2 was formulated and kept with its vagueness without a definite interpretation of Sharia principles or the methodology of their deduction to push all its related political and legal conflicts to courts and litigation process. This process has been the only remained channel to discuss or reform constitutional Islamization after the closure of all other political channels including legislation. The vague form of Article 2 has enabled the state through its constitutional judiciary to have an ultimate control over the definition of Sharia principles and the scope of its enforcement. Also, the ambiguity of the definition of Sharia principles has been backed up by liberals or secularists who have opposed any further mandatory constitutional definition of these principles that could lead to a more conservative interpretation of Sharia. The present findings confirm that “the introduction of Article 2 has not substantially changed the Egyptian legal system, which has maintained its secular features.”<sup>398</sup>

The SCC has adopted a modernist approach to interpret and deduce Sharia principles and norms to maintain the secular nature of the Egyptian legal system. In the absence of a clear definition of Sharia principles by the adopted constitution of 1981 and precisely by the discussed Article, on one hand, and renouncing a comprehensive Islamic review of the existing laws to be carried out by legislatures, on the other hand, the SCC had to innovate an interpretation theory to face the increasing resort to litigation procedure to reach political ends. The constitutional court managed to innovate its interpretation theory to balance between two requirements; firstly, to have an Islamic template to be accepted by the public, Islamists, and judges of other courts. Secondly, to create an interpretation methodology that ensures a liberal or modern interpretation of Sharia sources and norms as a fulfillment of its international commitments to protect international human rights and economic liberalism. In order to achieve this balance, the court’s methodology has relied upon a process of a secular reconstruction of Islamic law. The paradigm of operational

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<sup>398</sup>Berger & Sonneveld, *supra* note 80, cited in El Fegiery, *supra* note 53.

closure and cognitive openness is manifested in the court's adopted methodology. The court's theory ensures that Egyptian courts led by the SCC are the official readers and interpreters of Sharia texts and norms; thus, they have the authority to categorize sacred texts and Sharia sources, determine their obligatory nature, choose adopted juristic opinions, and choose the incorporated principles of Sharia. The system of secular law has maintained its operational closure by reconstructing principles of Islamic law within itself. However, such adopted interpretation methodology has not introduced a real alternative theory of Islamic interpretation to be followed by judges to take over the process. The SCC has only misused Islamic technical terms to Islamize its interpretation of Sharia upon which its decisions were built.

Affected by the legal ambiguity of Sharia principles, the legal framework of apostasy in Egypt enjoys a limbo<sup>399</sup> status. The fact that Egyptian codified laws do not regulate the act of apostasy or impose its legal consequences in explicit and definite law articles has made its legal framework in Egypt characterized by ambiguity and fragmentation. Ambiguity is manifested in the legal approach of the Egyptian state that avoided to make any formal reference to apostasy regulating rules and consequences through its constitutions or law codes. Such avoidance stems from the State awareness that imposing any legal limitation on conversion from one religion to another would be regarded as an obvious breach of the notion of religious freedom as defined by IHRL and, as a result, it would be considered by international community as a breach of its international obligations towards IHRL. The fragmentation of apostasy rules within the Egyptian legal system means that committing the act of conversion from Islam to any other belief entails its legal consequences in different law fields like administrative law, criminal law, and personal status law. The Egyptian state through its legislature and judiciary has maintained its approach regarding constitutional Islamization or Islamism to shape the legal framework of apostasy in Egypt. Creating an ambiguous legal framework to replace the need for a clear codified regulation resulted from a clear political decision by legislature to ensure the state control over the process. The intended closure of such a political process has promoted the role of litigation as an alternative process. Similar to the adopted methodology of interpreting Sharia "principles" in constitutional Article 2, the state judiciary has a flexible position in interpreting Sharia norms

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<sup>399</sup>Berger *supra* note 239, at 722.

concerning apostasy and choosing which of these norms could be incorporated within the Egyptian legal system and which could not from the perspective of the state or judges. The Egyptian judiciary in this case is not restricted by any obligatory religious interpretation by Al-Azhar or any other institution unlike the case of interpreting IHRL, where the state is accounted by international community according to the prescribed interpretation of religious freedom that I have explained earlier. Accordingly, this flexible position helps judges to at least formulate their verdicts in a manner that is consistent with the state formal obligations to apply Sharia principles and respect IHRL.

Through the adopted approach, the implementation of apostasy legal consequences has been limited and fragmented in different law fields in contrast to its the juristic status in Sharia. The Egyptian penal code does not regulate the act of apostasy directly; however, it includes some articles that deal with some offences against religion. Although these articles are not limited to protect Islam only, they have been used as the legal base to charge Muslim apostates or converts especially when their apostasy is accompanied with any of the criminalized offences like blasphemy. Egypt's main blasphemy law is found in Article 98(f) of the Egyptian penal code, which also includes other Articles that criminalize different forms of religious insult. They include Articles 160 and 161. In most decisions of blasphemy cases there is no direct reference to the position of apostasy or blasphemy in Sharia because the concerned court only focuses on applying blasphemy provisions in the penal code. This judicial approach is consistent with the legal drafting of blasphemy articles that do not refer to any Islamic juristic source as a base for its rulings and only reflect a quick legal interference by a modern state to suppress any public speech or writing that may lead to sectarian clashes. Accordingly, Egyptian courts based their decisions on blasphemy related cases upon the existence or the absence of the constituting elements of blasphemy crime in any examined case. These elements include the materialistic aspect of blasphemy crime (exploiting and using religion in advocating and propagating by talk or by any other method extremist thoughts) and the moral aspect (to instigate sedition by disdaining Islam to prejudice national unity). According to the elaborated juristic rulings of apostasy in Sharia, we could easily conclude that Article 98(f) and other religious insult Articles do not represent a legal regulation based upon a juristic position in Sharia, but in contrast, it's a secular legal regulation of criminalized acts by the state that contrasts with their juristic rulings in Sharia. In personal status law field, the application of a law in personal status matters is based

on the religion of the parties unless the legislature issued another ruling in the same matter. In these cases, Muslims are governed by Sharia rules precisely in accordance to the most predominant opinion of Imam Abu Hanifa doctrine. In consistency with the state's approach regarding apostasy, no rule prohibiting apostasy can be found in the codified part of personal status law. The legislature avoided to issue any statutory law prohibiting apostasy or imposing its legal consequences to avoid any explicit statement in law that criminalizes conversion from Islam in contradiction with the ICCPR. On the other hand, apostasy rules can be found only on caselaw as application of Sharia rules because the Court of Cassation has confirmed in its jurisprudence that any silence of the codified law concerning any matter should not be understood as an intention by the legislature to contradict with any statement in Quran, authentic Sunnah, or a ruling constituted a consensus reached by Muslim jurists. Since religion is a governing factor in family cases, family courts focus only on answering the question whether any of the parties is an apostate or not. In case of the establishment of apostasy, the apostate is only deprived from the examined right in the discussed case and not all civil rights like in Sharia. In most of personal status cases in this regard there is no reference to religious freedom or the punishment of the act of apostasy itself; however, in cases related to blasphemy or published writings like Abu Zayd's cases the Court of Cassation categorizes the application of apostasy consequences under public policy to avoid any apparent contradiction with the ICCPR's definition of religious freedom or freedom of expression and the constitutional obligation with these rights. Even if we could agree that the imposed apostasy consequences in family trials are consistent with its ruling in Sharia this legal framework contradicts with the juristic position of apostasy rules in Sharia as it converted depriving from civil rights from an inevitable consequence of apostasy in Sharia to isolated legal consequences applied by the court only on the demand of plaintiffs in separated cases. Furthermore, according to our analysis, we could find that issue courts did not conclude their rulings through deducing apostasy rules from Sharia primary sources by using Islamic legal theory; rather, they were reached through applying the most predominant opinion of Imam Abu Hanifa doctrine according to the law and the court's jurisprudence through a legal secular reasoning that reconstructs the implementation of apostasy consequences in some cases under secular categorizations like public policy. Apostasy or conversion from Islam has also arose in administrative law domain in Egypt. Most of these cases are related to Egyptian Muslims who converted from Islam and filed cases against the

government whose representatives refused to record their new religious status in identity cards and documents. According to the displayed analysis, administrative courts adopted three different approaches in this regard. The hardline approach asserted the fact of the supremacy of Sharia or Islamic law over all other law sources in the Egyptian legal system. Accordingly, all constitutional rights, including the right of religious freedom, should be interpreted in a manner that does not contradict with what the court considers as Sharia rules like the prohibition of apostasy in Sharia. However, in consistency with judiciary's approach in most of the discussed rulings in different law fields in this research, this reasoning limited the application of apostasy rules in Sharia to a specific right and ignored the application apostasy juristic rulings in Sharia regarding other civil rights and capital punishment. Furthermore, it reasoned the obligatory nature of the application of apostasy rules in Sharia by categorizing it under a secular categorization which is public policy rather than using any Islamic juristic reasoning based upon Islamic legal theory. Through this categorization Administrative courts could avoid any apparent contradiction with the ICCPR. Through the liberal approach the Court of Administrative Justice accepted the claims of only plaintiffs who reverted to Christianity to register their new religion in their identity cards. Concerning apostasy in Sharia, the court in this approach the cited several Quranic verses that highlight the principles of freedom and non-compulsion in religious conviction to demonstrate the compatibility between Islam and religious freedom, and as a result, establish its decision. In contrast to its approach regarding Christian reverts, the Court see that according to Islamic jurisprudence citizens who are born and brought up as Muslims and decided to convert to any other religion are not allowed to register their new religion in their identity cards. This because, according to the juristic explanation of the court, Muslim cannot be considered apostate unless he or she feels comfortable with his or her apostasy. The Supreme Administrative Court aimed through the pragmatic approach to permit the registration of the new religion of only persons who reverted to Christianity to register their new religion in their identity cards without raising or solving the legal issue of apostasy and religious freedom in Egypt. The court believes that allowing the registration of the new religion of Christian reverts agrees with the requirements of Egyptian law to include true information in citizen's identity cards to avoid any legal errors. However, the court also categorized the registration of the new religious status of the claimant under the protection of public order, which has been usually invoked by all State Council courts to reason their rulings regardless of their approach.

The concept of public order the “active principle of secularism”<sup>400</sup> has been used by Egyptian judiciary to ground and limit the application of some apostasy consequences in Egypt without the existence of any reference to the prohibition of apostasy or its legal consequences in Egyptian statutory law. Through our examination of some apostasy related case law, we could understand the duality of apostasy in the Egyptian legal system which subdivided it into the act of apostasy and its legal consequences. Public policy has been used by judiciary to define and to categorize both. Concerning the act of apostasy, as it was mentioned before in this research, in some cases judges considered acts constituting apostasy (unless they are not criminalized by criminal law) like reviling the sacred things or to disdaining Islam as acts violating society fundamentals and, in this case, they adopt public policy as a mean to protect Islam and society fundamentals like in Abu Zayd case. However, according to what this study demonstrated, such protection against these non-criminalized acts by law usually takes place through verbal statements and condemnations in court’s rulings without any legal punishments for these acts like in Sharia. Concerning the application of apostasy consequences, in this case public policy has been used to ground these consequences into the Egyptian legal system for two reasons “a) because these rules were based on essential principles of the Islamic Shari'a, and b) to ascertain their applicability in light of a lack of any statutory rules.”<sup>401</sup> However, public policy has been invoked by Egyptian courts in some cases also to refuse the application of some apostasy consequences. Again, public order has been invoked by Egyptian courts to justify the application of some apostasy consequences or deny their application at the same time.

***The Implausibility of the Balance between the Two Contraries:***

The evidence from this study suggests that the balance or reconciliation between the standards of religious freedom regarding apostasy in Sharia and the right to conversion from Islam according to IHRL is implausible. This research has demonstrated that we are in front of different law sources or normative orders one of them generally prohibits renouncing Islam, while the other permits or even encourages conversion from one belief to another upon the free will of the convert. Such contradiction could appear clearly even from naming the same act either by Sharia or IHRL. The word “apostasy” itself could reflect the prohibition of the act in Islam and its

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<sup>400</sup>Agrama *supra* note 388, at 503.

<sup>401</sup>Berger *supra* note 239, at 732.

negative categorization by Sharia. On the other hand, the word “conversion” could reflect the neutral or the permissive approach of IHRL concerning replacing one belief with another. In Sharia, Apostasy is punished by death penalty in Sharia. This opinion is held by the main four Islamic juristic schools and the majority of Muslim scholars (gumhor al-fuqaha’). Only two isolated opinions of traditional Muslim jurists see that the apostate should be asked forever to repent and not be killed. The apostate suffers in Sharia from a civil death as he is not allowed to inherit, marry, and dispose of his property. The apostate is also separated from his spouse and not allowed to choose another religion other than Islam for his children in some cases. These consequences are set in Sharia either because they are related to general norms or because apostasy is a grievous sin and prohibited act that cannot be approved or accepted from the perspective of Sharia. On the other hand, under Article 18 of the ICCPR, any individual in any territory around the world must enjoy the right to freedom of religion including the freedom to change one’s religion. The content of this right includes freedom from coercion to adopt a religion or belief, liberty of parents to ensure the religious and moral education of their children, and freedom to manifest religion or belief. The only freedom that can be limited in this right is freedom to manifest one’s religion. The scope of protection under Article 18 includes theistic and non- theistic beliefs; however, it prevents any restrictions on the right to freedom of religion that could be based upon any of these beliefs. The freedom to have or to adopt a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one’s current religion or belief with another. Accordingly, the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs is banned under this Article. Imposing any restrictions on the freedom to manifest religion must be prescribed by law for the protection of public safety, order, health or morals, or the fundamental rights and freedoms of others. Such restrictions or limitations based upon public morals must not be driven from a single tradition or applied in a manner that would vitiate the rights guaranteed in article 18. Recognizing any religion or belief as the official ideology in state’s constitutions and statutes should not impair the enjoyment of the recognized rights in the ICCPR. Consequently, one of the more significant findings to emerge from this research is that any legal attempt to balance between these direct contradicting norms could lead to the emergence of a legal framework that contradicts with both, like the case in Egypt.



### ***Towards Resolving the Criticized Legal Situation of Apostasy in Egypt:***

Resolving the complicated legal status of apostasy in Egypt starts from realizing that the legal framework of apostasy in Egypt as a single indication among others of legal pluralism in Egypt. Consequently, reforming religious freedom related laws and their jurisprudence including apostasy legal framework could not be achieved by limiting the discussed issue as a human rights problem that can be resolved by adopting more liberal law provisions within the existing legal system; otherwise, it is a problem that stems from the conflict between different law sources and their interpretation by the state. This means that such reform would take place through renouncing the Egyptian state's interpretation of religious freedom (the reason of the current legal ambiguity regarding apostasy) and replacing it with a clear legal regulation of the act itself and its legal consequences basing on giving effect to one source of law to regulate and categorize apostasy. In this case, the concept of legal pluralism could help in regulating the relations between different law sources to avoid internal conflict of laws and uncertainty of the applicable law. Accordingly, resolving the current situation of legal duality or conflict could be achieved through either agglomeration or integration between apostasy related regulations in Sharia and IHRL to enact clear legal regulations to categorize and deal with apostasy and identify its legal consequences. For instance, as we explained previously, agglomeration in this case could be applied through giving effect to one source of law to be applied in this law field, while limiting the application of other contradicting legal norms of other law sources in this field.

Reforming the legal framework of apostasy in Egypt through a clear legal regulation should happen through a political process rather than judicial resolution. In this case, the legal process or litigation would act only as a guarantee to the implementation of the reached legal solution. As we referred previously in this research, the Egyptian state has maintained the ambiguity of the legal framework of apostasy and blocked all possible political channels to reform it by the legislature. As a result, the state could choose and limit the applied legal consequences of this act through litigation. I believe that the reason of such approach stems from the fear that opening any public political discussion by the legislature to reform the legal situation of apostasy or the act of renouncing Islam could lead to a more conservative implementation of Sharia rules in this regard. Accordingly, the state has chosen legal ambiguity that leads to a modernist

implementation of Sharia rules rather than legal certainty that could lead to a more conservative implementation of Sharia to deal with or punish renouncing Islam. Through this policy the Egyptian state could maintain its formal respect to human rights including ones widely recognized as fundamental human rights in international agreements like the right to religious freedom. This means that adopting or starting any political discussion about reforming the legal situation of apostasy is conditioned by the permission of the Egyptian state through its executive and parliament.