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The American University in Cairo
School of Global Affairs & Public Policy

**The Judicial Resolution of the Tension between Human Rights Treaties and Shari'a
Law Reservations under The Constitution of 2014**

A Thesis Submitted to the
Department of Law

In partial fulfillment of the requirements for
The LLM degree in International & Comparative Law

By
Ali Moussa

May 2018

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

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The Constitution of 2014

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The Judicial Resolution of the Tension between Human Rights Treaties and Shari'a Law Reservations under
The Constitution of 2014

Ali Moussa

Supervised by Professor Hani El Sayed

ABSTRACT

The thesis explores the path of ratified human rights treaties in the Egyptian legal system. Although these treaties have the force of law, as mandated by the constitution, the examination of court practice in Egypt shows plenty of cases where the ratified treaties have been judicially discarded due to the conflict with domestic laws or the inconsistency with the rulings of Shari'a law. The thesis examines the judicial phenomenon of overthrowing ratified human rights treaties under the Egyptian constitutional provisions. In order to grasp the foundation of this phenomenon, the thesis studies the rules which regulate the formulation of reservations under the Vienna Convention on the Law of Treaties, Egypt's position towards the application of international law on the domestic level, and the interpretation of Shari'a law. The thesis presents three examples of cases where the conflict between ratified human rights treaties, domestic laws, and Shari'a law reservations arise. The thesis demonstrates how the courts' judgments resolved the conflict, and that the resolution upheld the application of domestic law and overthrew the ratified human rights treaties. Whereas the discussed judgements were made under the former constitutions, the paper investigates the judicial application of ratified human rights treaties under the provisions of the Constitution of 2014. The paper analyzes the novel provisions introduced to the Constitution of 2014 which are related to the application of human rights treaties. Based on these provisions, the paper argues that the constitution of 2014 opens the door for further judicial application of ratified human rights treaties.

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I. Introduction

Egypt is an active signatory state to human rights instruments.¹ It was among the first to sign and ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).² In addition to Egypt's international obligation to adhere to the standards prescribed therein, these instruments are binding legal instruments on the domestic level. The Egyptian Constitution confers the force of law on ratified international instruments which have been signed, ratified, and published in the Official Gazette.³ As a result, those instruments are to be judicially applied akin to laws.

Nevertheless, numerous laws and judicial practices in Egypt contradict the provisions of the ratified human rights instruments.⁴ This contradiction constitutes a legal difficulty for domestic courts. The difficulty arises when a provision of a ratified human rights instrument is invoked against the application of a non-compliant law.⁵ In this situation, the court is presented with two inconsistent legal instruments, namely: the enacted law and the ratified instrument which possesses the force of law. The Egyptian Constitution does not resolve this contradiction; likewise, the judicial practice towards the resolution of this contradiction is not uniform.

Moreover, Egypt has abundantly formulated Shari'a law reservation to ratified human rights instruments. By virtue of these reservations, the provisions of a ratified instrument cease to apply when they are inconsistent with the rulings of Shari'a law. The permissibility of such reservations is a debatable question under the rules of the Vienna Convention on the Law of Treaties (VCLT); the latter disallows reservations which defeat the object and purpose of the instrument. Shari'a law allegedly defeats the object and purpose due to its breadth and multiplicity which can be relied on to strike down any provision of the ratified instrument.⁶ However, the paper is rather concerned with the difficulty of

¹ The paper uses the word "instruments" to refer to international human rights treaties, conventions, agreements, protocols, and covenants. A list of Human rights treaties to which Egypt is a signatory state is available at The Human Rights Library of the University of Minnesota, <http://hrlibrary.umn.edu/research/ratification-egypt.html> (last visited at April 2018). The United Nations Human Rights. Office of the High Commissioner (OHCR),

² See *Id.*

³ The second Section of Chapter II examines the legal authority of ratified treaties on the domestic level. See II.B. The signature, ratification, and publication dates of the ICESCR, the ICCPR, and the CEDAW are outlined in Chapter III, See III.

⁴ In Chapter III, three cases of contradiction are presented, namely: prohibition of apostasy versus freedom of religion, the prohibition of labour strike and the ICESCR, and gender discriminatory penal provisions and CEDAW.

⁵ The paper uses the term (non-compliant law) to refer to domestic laws which are inconsistent with the ratified human rights instruments.

⁶ The third Section of Chapter II elaborates on the multiplicity and breadth of the rulings of Shari'a law. See II.C.

the “competent court”⁷ to assess the compatibility of the invoked instrument and the rulings of Shari’a law. This difficulty stems from the massive jurisprudence of Islamic religion that encompasses dissimilar and sometimes contradictory views.⁸ Although the Egyptian Supreme Constitutional Court (SCC) has articulated an interpretation of Shari’a law which is confined to the rulings of absolute authenticity and meaning,⁹ the judicial practice of the Egyptian Administrative Court shows a clear deviation from this interpretation. Due to this inconsistency in the judicial practice, the court’s discretion in individualistically interpreting Shari’a law is unavoidable.

The interpretation of Shari’a law plays a crucial role in the resolution of the tension between ratified human rights instruments and laws. i.e. if the articulated interpretation disallows the invoked provision of the ratified instrument, the instrument’s application should be halted by virtue of Shari’a law reservation formulated thereto.

Due to these difficulties, various ratified human rights instruments have been “judicially assassinated” in Egypt.¹⁰ For example, the Egyptian Administrative Court found that Shari’a law prohibits the practice of labour strikes, and thus halted the application of the ICESCR’s obligation to guarantee the legality of labour strike. Likewise, it rejected the notarization of conversion from Islam based on Shari’a prohibition of apostasy in spite of the freedom of religion as prescribed in the ICCPR.¹¹

This paper coins the term “trilemma” to describe the situation when a ratified human rights instrument is invoked against the application of a non-compliant law, and where that instrument embodies a Shari’a law reservation. This situation symbolizes a trilemma because the competent court should address its attention to three different paths: the application of non-compliant law, the legal authority of ratified human rights instruments, and the interpretation of the Shari’a law reservation.

The legal tension between ratified human rights instruments and non-compliant laws is expected to escalate under the present Constitution.¹² Before 2014, the domestic enforcement of ratified instruments was solely regulated by Article 151 of the Constitution which vests the force of law over instruments which have been signed, ratified and published in the Official Gazette.¹³ Based on that

⁷ The paper uses the term “competent court” to refer to the domestic court before which a ratified treaty is invoked against the application of a non-compliant law.

⁸ The multiplicity and diversity of the Islamic jurisprudence is the subject of the third section of Chapter II.

⁹ With reference to the second Article of the Constitution that designates the rulings of Shari’a law as the main source of legislation. *Supra* note 6.

¹⁰ *Supra* note 4.

¹¹ The judgements made in these cases are detailed under Chapter III. See III.

¹² Constitution of the Arab Republic of Egypt [Egypt], 18 January 2014, available at: <http://www.refworld.org/docId/3ae6b5368.html> [accessed 21 February 2018]

¹³ *Supra* note 3.

Article, the SCC held that ratified instruments and laws possess equal legal force; thus, the application of either instrument over the other is not a constitutional violation. As a result, the application of non-compliant laws over ratified human rights instruments was not recorded as a constitutional violation. However, The Constitution of 2014 added Article 93 as a distinct provision for the enforcement of ratified human rights instruments. The Article confers the force of law over ratified human rights instruments and binds the state with these instruments.

This paper argues that the ratified human rights instruments should supersede non-compliant laws under the Constitution of 2014. The argument is chiefly premised on the novel provision of Article 93 of the Constitution of 2014. The paper also argues that the competent court should cite the interpretation of Shari'a law as articulated by the SCC in resolving the tension between ratified human rights instruments and Shari'a law reservations.

Chapter II introduces the relevant legal foundations that create the legal tension between ratified human rights instruments, non-compliant laws, and the interpretation of Shari'a law. The Chapter embodies three sections: (I) The first section explores the permissibility of reservation according to the rules of the VCLT. (II) The following section elaborates on the legal force of ratified instruments in Egypt. The section outlines the legal framework of the enforcement of ratified instruments and demonstrates the judicial practice thereof. (III) The last section focuses on the difficulty of interpreting Shari'a law reservation; it discusses the breadth and multiplicity of the jurisprudence in the Islamic religion and presents the interpretation of Shari'a law as articulated by the SCC.

Chapter III provides three examples of cases where the trilemma arises: (I) The first section deals with the judicial contention to notarize conversion from Islam versus freedom of religion as prescribed in the ICCPR. (II) The second section focuses on the legal prohibition of labour strikes versus the right to strike as dictated by the ICESCR. (III) the last section addresses the discriminatory character of penal provisions against CEDAW's obligation to repeal any penal discriminatory provision. In the three discussed examples, the interpretation of Shari'a law brings about crucial effect on the resolution of the tension between the ratified human rights instrument and the non-compliant law.

Chapter IV is the cornerstone of this paper. It provides a legal methodology for the resolution of the trilemma. The Chapter presents two main arguments: firstly, the application of ratified human rights instruments should supersede any non-compliant law based on the interpretation of the novel provision of Article 93 of the Constitution of 2014; secondly, the competent court should not use its discretion in interpreting Shari'a law reservation; rather, it should cite the interpretation of Shari'a law as

articulated by the SCC. Based on these two arguments, Chapter V concludes the paper by suggesting that the resolution of the tension between ratified human rights instruments and laws as well as Shari'a law reservation should no longer constitute a difficulty to the competent court under the constitutional provisions of 2014.

II. Background

Prior to delving into the details of the legal trilemma that arises among (i) the application of non-compliant laws, (ii) the legal authority of ratified human rights instruments, and (iii) the interpretation of Shari'a law reservations formulated to those instruments, the paper briefly demonstrates their respective legal foundations.

The Chapter begins by elaborating on the legal framework of the reservation principle enshrined in the VCLT; it then explores Egypt's constitutional stance regarding the application of ratified human rights instruments; finally, it discusses the difficulty of interpreting Shari'a law reservations in a judicial context.

A. The Legal Framework of Reservations to International Treaties

This section explores the rules regulating the formulation of reservations to international treaties. The first subsection elaborates on the historical development of the rules regulating reservations prior to the enactment of the VCLT in 1969. The second subsection briefly explains the impermissibility of reservations according to the provisions of the VCLT and focuses on the impermissibility of reservations which are incompatible with the object and purpose of the reserved treaty.

1. The Historical Progression of Reservations to International Treaties

The rules governing the admissibility of reservations to international treaties have greatly changed since the nineteenth century.¹⁴ At that time, the admissibility of reservations was decided by the "unanimity doctrine."¹⁵ The doctrine regards international treaties as contractual instruments subject to the rules of contract law; thus, a reservation made by a state party required a tacit or express acceptance by all other state parties.¹⁶ In case one or more objections were raised, the reservation would not bear any legal effect over the treaty, and the reserving state could make the choice between either becoming a party to the treaty without the proposed reservation, or not becoming a party at all.

¹⁴ OLIVER DORR & KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY. Page 242.

¹⁵ See *Id.*

¹⁶ As voiced in the Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide: "To this principle was linked the notion of integrity of the Convention as adopted, a notion which, in its traditional concept, involved the proposition that no reservation was valid unless it was accepted by all contracting parties." Reservation to the convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports 1951, p 15, Para. 21.

Although the unanimity doctrine paved the way for a smooth interpretation and application of treaties, it decreased the number of state signatories to multilateral treaties.¹⁷

As result, in 1951 and with relation to reservations formulated by numerous states to the Convention on the Prevention and Punishment of the Crime of Genocide,¹⁸ the General Assembly requested an advisory opinion from the International Court of Justice (ICJ) on the validity of reservations.¹⁹ In response to that request, the ICJ rejected the traditional unanimity doctrine and introduced the notion of the compatibility with the object and purpose of the treaty as the determining factor for the validity of reservations.²⁰ Despite the lack of endorsement from the International Law Committee (ILC)²¹, the General Assembly adopted the flexible framework to reservations as pronounced by the ICJ,²² and eventually incorporated it into the VCLT with minute modifications.²³

2. Reservations under the VCLT

As defined in Article 2 lit d of the VCLT, a reservation is “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions to the treaty in their application to that State.”²⁴ The framework stipulated for reservations under the VCLT has been a controversial discussion in the academic arena of international law as well as among international lawyers.²⁵ Article 19 approves state liberty to formulate any reservations;²⁶ however, it restricts such liberty in three

¹⁷ OLIVIER CORTEN & PIERRE KLEIN, THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY. THE EVENTFUL HISTORY OF THE PROVISIONS RELATING TO RESERVATIONS. Page 409.

¹⁸ Convention on the Prevention and Punishment of the Crime of Genocide. Adopted by the General Assembly of the United Nations on 9 December 1948. (<https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf>).

¹⁹ UNGA (United Nations General Assembly) Resolution 478 (V). (<http://www.un.org/documents/ga/res/5/ares5.htm>).

²⁰ *Supra* note 16

²¹ ILC Yearbook, 1950, Vol 1, 53 meeting, page 90.

(http://legal.un.org/ilc/publications/yearbooks/english/ilc_1950_v1.pdf)

²² See General Assembly, Official Documents, 17th session, Sixth Commission, 736th to 744th meetings (A/C.6/SR.736-44) PP 13- 56 and A/5287, para 24. See also *Supra* note 17 at 415.

²³ *Supra* note 17 at 415.

²⁴ As defined in Article 2 lit (d) of VCL. United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.refworld.org/docId/3ae6b3a10.html> [accessed 18 February 2018]

²⁵ “The subject of reservations to multilateral treaties is one of unusual – in fact baffling – complexity and it would serve no useful purpose to simplify artificially an inherently complex problem.” Sir Hersch Lauterpacht, Report on the Law of Treaties, Doc. A/CN.4/63, Yrbk ILC (1953), II, at 124. Likewise, Paul Reuter claimed that “the question of reservations has always been a thorny and controversial issue, and even the provisions of the [1969] Vienna Convention may not have eliminated all these difficulties”. Tenth Report, A/CV.4/341 vol. II, Part One, P 56.

(http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_341.pdf&lang=EFS)

²⁶ ANTHONY AUST, MODERN TREATY LAW AND PRACTICE. RESERVATION GENERALLY NOT PROHIBITED. Page 121

cases: (i) If the treaty itself does not permit any state party to formulate reservations, Article 19 lit a;²⁷ (ii) If the treaty only permits certain reservations among which the formulated reservation is not included, Article 19 lit b;²⁸ and (iii) If the formulated reservation is incompatible with the object and purpose of the treaty, Article 19 lit c.²⁹

Whereas the application of Article 19 lit a and lit b can be ascertained through an evident treaty clause that stipulates the explicit or implicit prohibition of reservations, the application of Article 19 lit c raises some perplexing questions. The Article does not provide a defining criterion of the content of the object and purpose of the treaty, nor does it design a proper methodology to test the compatibility between this notion and the formulated reservation. More importantly, although the VCLT has imposed certain limitations on state's liberty to formulate reservations, it is mute on creating a competent authority empowered to decide on the permissibility of reservations, nor does it specify the legal consequences of formulating an impermissible reservation.³⁰ Within the uncertainty and vagueness of this regime, state practice towards reservations has been the subject of several theoretical and practical questions.³¹

The following sub-sections elaborate the previous attempts by the ILC to elucidate the object and purpose of the treaty, explores the permissibility of reservations to human rights treaties, and discusses the permissibility of vague and general reservations.

a) The Enigma: The Notion of the Object and Purpose of the Treaty³²

The notion of the object and purpose was coined in the ICJ Advisory Opinion of 1951 as the validity pivot of reservations.³³ It was introduced as a means to strike balance between the collective interest of protecting the essence of the treaty and the individualistic desire for each state to tailor the treaty obligations as per its national interests. Nevertheless, due to the silence of the VCLT on defining the terms of Article 19 lit c and the implications of formulating an impermissible reservation, many scholars have expressed their struggle with their attempts to grasp the scope of application of the

²⁷ For example, the 1998 Rome Statute of the International Criminal Court. Article 120 states "No reservations may be made to this Statute". (https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf)

²⁸ An example of a treaty which only permits certain reservation to be formulated is the United Nations Convention Relating to the Status of Refugees. Paragraph 1 of Article 42 states "At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(i), 33, 36-46 inclusive."

²⁹ As stated by Article 19 of VCLT. *Supra* note 24

³⁰ *Supra* note 26. Page 129

³¹ The ILC has presented 17 reports on treaty reservation on an attempt to allay the vagueness of VCLT framework to reservation.

³² The term "enigma" is inspired from the authors Isabelle Buffard & Karl Zemanek. The "Object and Purpose" of a Treaty: An Enigma? (<http://fulltext.calis.edu.cn/kluwer/pdf/13851306/3/233264.pdf>)

³³ *Supra* note 16

Article. Lijnzaad pointed out the difficulty of the notion by suggesting that “the claim that a particular reservation is contrary to object and purpose is easier made than substantiated.”³⁴ Reuter described the ambiguity of the notion “as uncertain as when it first appeared in the Court’s Advisory Opinion of 1951.”³⁵ In response to this ambiguity, the ILC has theorized in its Draft Guidelines that “the object and purpose of the treaty means the essential provisions of the treaty, which constitute its “raison d’être.”³⁶ The ILC elucidated this finding in the Draft Guideline 3.1.6 stating:

The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context. Recourse may also be had in particular to the title of the treaty, the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice agreed upon by the parties.³⁷

It is worth noting that in spite of the ILC attempts to diminish the ambiguity of Article 19 lit c, the confusion arising out of it remains intact. The emphasis of the question has shifted from defining the object and purpose of the treaty to determining the essential clauses of the treaty and its “raison d’être.”³⁸

b) Reservations to Human Rights Treaties

It could be argued that the concept of reservation is ill-fitted to deal with human rights instruments because of their non-reciprocal nature.³⁹ Reservations bear a consequential effect on the obligations and privileges created by treaties. As a result, state parties cautiously examine the formulated reservations in reciprocal treaties. Conversely, with relation to human rights instruments, states are less concerned with the formulated reservations. The reason for this lies in the characteristic dissimilarity of reciprocal treaties to human rights instruments. Whereas the former is modeled as a state-state agreement, the latter is a state- individual agreement. In other words, the benefits of reciprocal treaties are exchanged between/among its signatory states while the beneficiary of human rights instruments is a citizen committed to the legal regime of the signatory state, who gets an undertaking from the state party that the domestic laws will be mitigated to become in compliance with the standards prescribed in the ratified human rights instrument. As a result, reservations in human

³⁴ L. Lijnzaad. Reservations to UN-Human Rights Treaties: Ratify and Ruin? Page 82-3.

³⁵ Reuter, Introduction to The Law of Treaties. Page 82.

³⁶ Draft Guideline 3.1.5. *Supra* note 14 page 264.

³⁷ *Supra* note 14 page 265.

³⁸ *Supra* note 36.

³⁹ *Supra* note 14 page 267.

rights instruments are of a different nature than reciprocal treaties in terms of their formulation, admissibility, and application.⁴⁰

Furthermore, the object and purpose of the human rights instruments steers the discourse towards the impermissibility of any reservations to these instruments. One can argue that the object and purpose of human rights instruments is to create legally binding standards for human rights with which signatory states should comply with. This argument has been pronounced in the Human Rights Committee Report in its General Comment No.24 with relations to reservations formulated to the ICCPR.⁴¹ To a similar effect, the ILC drafted the Guideline 3.1.12 on reservations to human rights instruments in which it suggested that a reservation to a human right instrument should not annihilate any of the fundamental rights and privileges embodied in the treaty.⁴²

c) Vague and General Reservations: Shari'a Law Reservations

In addition to the complexity of the legal framework to reservations, state practice has revealed the formulation of reservations which are of a vague and general character. The shortcoming of these reservations lies in the difficulty of defining the scope of their application. These reservations are unclear, and their contexts are undefined. As a result, the compatibility test between such reservations and the object and purpose of the reserved instrument is farfetched. State practice shows that these reservations have been abundantly formulated. For example, the reservation made by the United States of America to the Genocide Convention stating that: "Nothing in the convention requires or authorizes legislation or other action by the United States of America prohibited by the constitution of the United

⁴⁰ Kasey L. McCall-Smith claimed the impressibility of reservations to human rights treaties because of the non-reciprocal nature of human rights treaties stating "It is generally accepted that the law of treaties is premised on reciprocal contractual relationships between State Parties. However, because human rights treaties embody obligations towards individuals, whose well-being is the responsibility of the state, rather than obligations between State Parties, there has been a general apathy by states in their duty to guard the integrity of these instruments." Kasey L. McCall-Smith, *Mind the Gaps: The ILC Guide to Practice on Reservations to Human Rights Treaties*, 16 *Int'l Comm. L. Rev.* 263, 305 (2014) Page 274.

⁴¹ UN Human Rights Committee (HRC), Report of the Human Rights Committee (Volume I), 3 October 1995, available at: <http://www.un.org/documents/ga/docs/50/plenary/a50-40.htm> [accessed 20 February 2018]. "In an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the Covenant. 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."

⁴² See the text of the Yearbook of the International Law Commission 2007 Volume II Part Two, A/62/10, 2007, chap. IV, Page 32-33. available at: <http://legal.un.org/docs/?path=../ilc/reports/2007/english/chp4.pdf&lang=EFSRAC> [accessed 20 February 2018] "[t]o assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account should be taken of the indivisibility, interdependence and interrelatedness of the rights set out in the treaty as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it."

States as interpreted by the United States.”⁴³ and the reservation formulated by Malaysia to the Convention on the Rights of the Child accepting a number of provisions “only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.”⁴⁴

The ILC responded to the formulation of vague reservations with Draft Guideline no. 3.5.2 stating that: “A reservation shall be worded in such a way as to allow its meaning to be understood, in order to assess in particular its compatibility with the object and purpose of the treaty”.⁴⁵ The ILC relied on the definition of reservation as articulated in Article 2 lit d of VCLT as it excludes or modifies “the legal effects of certain provisions of the treaty in their application.”⁴⁶ With this being said, “across the board reservations”⁴⁷ inherently violate Article 19 of the VCLT because their legal effect is not confined to “certain provisions” of the instrument.

Moreover, the Report of the Human Rights Committee has pointed out the inadequacy of the vague and general reservations by stating that:

Reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other States parties may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto.⁴⁸

A Shari’a law reservation is classified under vague and general reservations.⁴⁹ Since Shari’a law does not have a monolithic clerical authority, it is not a coherently unified system of rules.⁵⁰ Rather, it is an abundance of juristic and scholarly views which happen to be contradictory and, sometimes, paradoxical.⁵¹ An example of these reservation is the one formulated by Mauritania to the CEDAW stating that it accepts the convention “in each and every one of its parts which are not contrary to

⁴³ See UN General Assembly, Report of the International Law Commission, 26 April-3 June and 4 July-12 August 2011, A/66/10/Add.1, available at: <http://legal.un.org/ilc/reports/2011/english/addendum.pdf> [accessed 20 February 2018]

⁴⁴ See *Id.*

⁴⁵ See *Id.*

⁴⁶ *Supra* note 24

⁴⁷ The term describes the reservation which conditions the application of the whole instrument on another system of rules. The term is inspired from the ILC Draft Guideline. *Supra* note 44

⁴⁸ 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, Para. 19, available at: <http://www.refworld.org/docId/453883fc11.html> [accessed 20 February 2018]

⁴⁹ As indicated in Report of the International Law Commission. *Supra* note 44.

⁵⁰ The paper vacates the third section of Chapter II to further explain the difficulty of interpreting Shari’a law reservations and to elaborate on the breadth of Islamic jurisprudence.

⁵¹ See *Id.*

Islamic Sharia and are in accordance with our Constitution.”⁵² In fact, most Muslim countries have invoked Shari’a law as a reservation to CEDAW.⁵³ The shortcoming in these reservations is the difficulty of defining their scope and testing their compatibility with the object and purpose of the reserved treaty, as asserted by the ILC: “it is the impossibility of assessing the compatibility of such reservations with the object and purpose of the treaty, and not the certainty that they are incompatible, which makes them fall within the purview of Article 19 (c) of the Vienna Convention on the Law of Treaties.”⁵⁴

In sum, Shari’a law reservations are depicted as to being of vague and general character. This vagueness obfuscates the scope of their application and makes, for those who are concerned with the application of the instrument, the compatibility test with the object and purpose of the treaty unachievable; thus, makes them inconsistent with the rules of VCLT.

B. The Judicial Enforcement of Ratified International instruments in Egypt

Domestic laws regulate the relationships between individuals and govern any conflict arising among individuals and the administrative apparatus. International law is more concerned with the states’ relations.⁵⁵ However, such distinction is, as described by Shaw, “overly simplistic.”⁵⁶ Although it might appear that both international law and the domestic law are two separate legal system, several tricky questions arise out of the relationship between these two legal systems. For instance, in the event that a rule of international law is invoked as a defense before a domestic court, to what extent is the domestic court legally obliged to recognize and apply such a rule? The question gets more perplexing when there is an evident contradiction between domestic laws and rules of international law; in that case, the application of one rule necessarily defeats the other.

The question of the relationship between international law and domestic law is to be answered in the light of the theories of dualism and monism.⁵⁷ Whereas dualist states regard international law as an independent legal system which only applies domestically if it is backed up by enforceable national legislation, monist regimes incorporate international law into their domestic legal system. The

⁵² UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at:

<http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> [accessed 20 February 2018]

⁵³ Including but not limited to: Bahrain, Egypt, Bangladesh, Egypt, Iraq, Kuwait. See *Id.*

⁵⁴ *Supra* note 43.

⁵⁵ MALCOM SHAW, INTERNATIONAL LAW, 130, (2008). Cambridge, UK, Cambridge University Press. International Law and Municipal Law. Page 130.

⁵⁶ *Id.* Page 130, Paragraph 2

⁵⁷ JAMES CRAWFORD & IAN BROWNLIE, BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW. Page 48 (2012)

difference between these two regimes is an ongoing discourse in the scholarship of international law; however, this discourse goes beyond the focus of this paper. The paper is rather focused on the enforcement of human rights instruments in Egypt as stipulated by the constitutional provisions.

In this section, Egypt's position regarding the legal enforcement of international treaties is explained. The first subsection explores the constitutional provisions regulating the authority of ratified instruments with more focus on human rights instruments. The second subsection explores the power of the SCC to review the legality of reservation formulated to ratified instruments. The third subsection explicates the judicial practice towards the enforcement of human rights instruments in Egypt.

1. The Constitutional Provisions on the Authority of International Instruments

Egypt incorporates ratified international instruments to its domestic legal system. This is exemplified by Article 151 of the Constitution of 1971 stating that: "the 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."⁵⁸ The same provision has been incorporated in the Constitution of 2012 under Article 145 stating that: "The President of the Republic represents the state in its foreign relations. He concludes treaties. Once both chambers agree to the treaties, they are considered ratified. Once issued, these treaties have the force of law, in accordance with agreed-upon rule."⁵⁹ The position is confirmed in the present Constitution of 2014 under Article 151 reading: "The President of the Republic shall represent the State in its foreign relations and conclude treaties and ratify them after the approval of the House of Representatives. Such treaties shall acquire the force of law following their publication in accordance with the provisions of the Constitution."⁶⁰

Therefore, Egypt is a monist state; however, the domestic enforceability of ratified international instruments is not absolute. The fulfillment of some formal requirements is a prerequisite for the legal enforcement of these instruments. Based on the mentioned Article, the ratified instruments are only enforceable after their parliamentary approval and publication in the Official Gazette. Therefore,

⁵⁸ Constitution of the Arab Republic of Egypt [Egypt], 1971, available at: <http://www.wipo.int/edocs/lexdocs/laws/en/eg/eg002en.pdf> [accessed 21 February 2018]

⁵⁹ Constitution of the Arab Republic of Egypt [Egypt], 2012, available at: http://www.wipo.int/wipolex/ar/text.jsp?file_Id=297102 [accessed 21 February 2018]

⁶⁰ *Supra* note 12.

signed instruments which have neither been approved by the parliament nor published in the Official Gazette do not possess any legal authority on the domestic level.⁶¹

In addition to Article 151, the enforcement of human rights instruments was emphasized in The Constitution of 2014; Article 93 states: “The State shall be bound by the international human rights agreements, covenants and conventions ratified by Egypt, and which shall have the force of law after publication in accordance with the prescribed conditions.”⁶²

Although both Article 151 and Article 93 regulate the enforcement of international treaties and human rights instruments respectively, their content is not identical. First, the scope of application of Article 151 applies to all types of international treaties whereas Article 93 is only confined to human rights instruments. Second, the formal requirement of the parliamentary approval is not explicitly stipulated for the enforcement of human rights instruments in Article 93. Third, and most importantly, both Articles vest the force of law in ratified treaties, but Article 93 creates an obligation over “the state”⁶³ to be bound by ratified human rights instruments.

2. The Legal Nature of Ratified Instruments in the Egyptian legal System

As explained in the previous subsection, ratified instruments possess the force of law as mandated by the constitution; however, an important question regarding the legal nature of ratified instruments may arise. As an elaboration, if the SCC is entitled to review the constitutionality of laws and regulation, to what extent can the SCC review the legality of the ratified instruments? The question becomes more perplexing when it is related to the power of the SCC to review the legality of the formulated reservation to a valid ratified instrument. This subsection deals with this question. The first part explains the legal nature of ratified instruments; the second explores the power of the SCC to invalidate the whole treaty; and the last part investigates the power of the SCC to invalidate reservations formulated to the ratified instrument.

a) Ratified Instruments are Sovereign Acts

Ratified international instruments are considered sovereign acts and are subject to no judicial examination. The decision to ratify an international instrument is a political decision undertaken by the competent body of the state; however, this decision results in a legal effect since the ratified

⁶¹ ABD EL GALIL AWAD, INTERNATIONAL TREATIES BEFORE THE CONSTITUTIONAL COURT. Dar Al Nahdda Al'Arabia Page32. (2008).

⁶² *Supra* note 60.

⁶³ Little is known about the connotation of the term “the state” embodied in Article 93. One can argue that the term refers to all state authorities including the judiciary; thus, court must uphold the application of these instruments. The second section of Chapter IV presents an interpretation to the term “the state” embodied in the Article.

instrument will become an enforceable instrument on the domestic level. Due to the political considerations involved with the state's decision to ratify a treaty, it is considered as a sovereign act.

Domestic courts do not have the jurisdiction to examine sovereign acts. This can be seen in Article 17 of the Judicial Authority Law no 64. Year 1972 which reads: "courts may not directly or indirectly examine sovereign acts."⁶⁴ To a similar effect, Article 11 of State Council Law no. 74. Year 1972 which read: "The circuits of the State Council shall not review any requests pertaining to sovereign acts."⁶⁵

The SCC has recognized the political nature of ratifying treaties and characterized it as sovereign acts; and thereby, excluded it from the jurisdiction of the judiciary in multiple precedents.⁶⁶

b) The Power of the SCC to Review Ratified Instruments

In spite of the finding of the last part, the SCC may invalidate the ratification of an international instruments upon the non-fulfillment of the formal requirements of the constitution. As an elaboration, the constitution mandates the force of law over international instruments which have been signed, ratified, and published in the Official Gazette; in case one of these formal requirements is not met, the SCC is entitled to decide whether the instrument possesses the force or not on the domestic court. However, the merits of the ratified instrument represent the substance of the act of sovereignty; as a result, the SCC does not have the jurisdiction to review the legality of the substance of the treaty.⁶⁷

c) The Power of the SCC to Invalidate a Reservation

It could be argued that the decision to formulate a reservation is subject to the judicial review of the SCC. The latter is entitled to invalidate the domestic effect of reservations which are impermissible under the rules of the VCLT.⁶⁸ Such an argument can be predicated on the monism of the Egyptian legal system; Since Egypt has signed the VCLT, it has become part of the domestic law which is enforceable. As a consequence, the formulation of reservations should be enacted in accordance with the rules of the VCLT not only because of its force on the international level, but also because of its force on the domestic level. Therefore, the state is bound to comply with the rules of the VCLT when formulating a reservation to an international instrument.

⁶⁴ Law of the Judicial Authority No. 64 of the Year 1972.

⁶⁵ Law of the State Council No. 67 of the Year 1972.

⁶⁶ *Supra* note 61.

⁶⁷ *See Id.*

⁶⁸ The permissibility of reservation is deeply explained in the first section of Chapter II. See II.A.2

Based on that theorization, one can argue that the SCC is entitled to invalidate reservation which are formulated in violation to rules of the VCLT. Nevertheless, three main implications oppose the power court to do so, namely: (i) it would be legally difficult to draw a distinction between the sovereign nature of ratifying a treaty and formulating a reservation. In this regard, it could be argued that the formulation of the reservation is an indispensable act to the ratification of the instrument. As a result, the formulation of the reservation is also a sovereign act which courts are incompetent to examine. (ii) Egypt signed the VCLT in 1982. If, *arguendo*, based on the theorized argument that the SCC has the power to review the legality of formulated reservations, such argument would only apply to reservation formulated in a later date to 1982 because law should not apply retroactively. (iii) Egypt has not ratified the VCLT. Although Egypt has accessed to the Convention in 1982, it has not been yet either ratified or published in the Official Gazette; as a result, the VCLT has not fulfilled the constitutional criteria required for conferring the force of law upon it on the domestic level.

3. The Judicial Practice

Based on the constitutional provisions on the enforcement of the ratified instruments, court rulings recognized the authority of these instruments and enforced them. For example, The Court of Cassation found that: “Whereas the Covenant entered into between the governments of Egypt and Sudan was ratified by the Council of Nizars on 17 May 1902 and published in the Official Gazette, therefore it is one of the laws of the state...”⁶⁹ The Court of Cassation further ruled that Vienna Convention on Diplomatic Relations of 1961 has become an integral part of the domestic laws based on Egypt’s ratification and publication to that Convention.⁷⁰

In a famous judgment ruled by the Court of High State Security in 1987, the court detected the discrepancy between (i) Article 124 of the Egyptian Penal Code (EPC)⁷¹ which criminalizes civil servants’ striking and (ii) the ICESCR which confirms the legality of labor strike.⁷² The Court found that, based on the rule of “*lex posterior derogat legi priori*,”⁷³ the Covenant overruled Article 124. The Court premised its finding based on the following reasoning:

The right to strike involves a group of employees refusing to temporarily conduct their work chores as an arrangement to reach a joint interest. In

⁶⁹ The Court of Cassation, Civil Circuit, Challenge no. 137, Judicial year 22. 8/3/1956. Page 274.

⁷⁰ The Court of Cassation, Civil Circuit, Challenge no. 450, Judicial year 45. 17/1/1979. Page 274.

⁷¹ Hereinafter (EPC). See Egypt: Penal Code [Egypt], No. 58 of 1937, August 1937, available at: <http://www.refworld.org/docId/3f827fc44.html> [accessed 23 February 2018]

⁷² According to article (8) of this covenant, state parties undertake to ensure the labor right to strike. See UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docId/3ae6b36c0.html> [accessed 23 February 2018]

⁷³ The rule dictates that a later law repeals an inconsistent earlier law.

reviewing the ICESCR against Article 124 of EPC, we detect an evident contradiction. In order to dismiss this contradiction, we should identify which rule supersedes the other; in other words, evaluating the legal force of EPC versus the ICESCR.

In doing so, an important question is raised: why should be the judiciary obliged to apply the provisions of international treaties? In answering this question, we confirm that international treaties are to be applied by the Egyptian judiciary not because it is merely an international obligation that the government accepted towards the international community, rather as an integral part of the domestic laws of the country.

Based on the first paragraph of Article 151 of the Egyptian Constitution of 1971 which states the following “The President of”⁷⁴ As the Covenant imposes certain standards that are related to the state sovereignty, it was admitted by The People’s Assembly and published by virtue of the Presidential Decree No. 537 in 1981 which was published in 14th Edition of the Official Gazette on April 8, 1981. Hence, the Covenant became an integral part of domestic laws by virtue of Article 151 of the Constitution.

Since the Covenant was signed, ratified, and published in a subsequent date to the enactment of EPC, Article 124 is superseded. Based on the second Article of the Egyptian Civil Code which conditions for the repealing of an existing provision of law that a new subsequent law includes a contradicting provision of law.

As a consequence, Article 124 is no longer in force and the legislator ought to regulate the practice of the labor right to strike.⁷⁵

In addition to the judicial practice on the enforcement of international instruments, the Egyptian judiciary has also shown recognition to customary international law.⁷⁶ This can be observed in Opinion No.583 dated August 19th, 1961 of the General Assembly of the Legal Opinion and Legislation Departments of the State Council.⁷⁷ This Opinion concluded that the established practice in international law is “enforceable in the territory of the state whether or not internal legislation mandating its enforcement has been passed.”⁷⁸ To a similar effect, The Court of Cassation recognized

⁷⁴ *Supra* note 58.

⁷⁵ See the original Arabic text of the court ruling found on the official website of the Human Rights public library, <http://old.qadaya.net/node/61> [accessed 23 February 2018]

⁷⁶ The sources of international law as enumerated in Article 38 of the Statute of the International Court of Justice (ICJ) includes treaties and international custom. United Nations, Statute of the International Court of Justice, 18 April 1946, available at: <http://www.refworld.org/docid/3deb4b9c0.html> [accessed 6 April 2018]. More information about the rules of customary international law is explained in the third Part “Sources of International Law” of International law. See *supra* note 55.

⁷⁷ NATHALIE BERNARD-MAUGIRON & BAUDOIN DUPRET, EGYPT AND ITS LAWS, Kluwer Law International, 388 (2012).

⁷⁸ *Id.* Page 389.

international customary rules and found that foreign diplomats may not be forced to testify before national courts.⁷⁹

In sum, Egypt is a monist state i.e. the domestic legal system accommodates the ratified instruments according to the conditions prescribed in the Constitution. Moreover, the Constitution of 2014 has reinforced the application of human rights instruments. The position of the Egyptian judiciary has validated the constitutional approach through showing recognition and enforcement to ratified international instruments.

C. The Difficulty of Interpreting Shari'a Law Reservations

As explained in the first section of this Chapter, a reservation bears a legal consequence on the treaty as “it purports to exclude or to modify the legal effect of certain provisions to the treaty in their application to that State.”⁸⁰ As a result, the application of the treaty provisions, with relation to the reserving state, is restricted insofar as the reservation is formulated.⁸¹ Muslim states have shown a tendency to formulate Shari'a law reservations to human rights instruments. In some cases, such reservations are formulated to one or more provision of the treaty; in other cases, the reservation is “across the board.”⁸² For example, Egypt has formulated an “across the board” reservation to the ICESCR declaring that: “[t]aking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it.”⁸³ Likewise, Saudi Arabia reserved the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) stating that: “[t]he Government of Saudi Arabia declares that it will implement the provisions of the above Convention, providing these do not conflict with the precepts of the Islamic Shariah.”⁸⁴ Bahrain formulated a reservation to ICCPR stating that: “[t]he Government of the Kingdom of Bahrain interprets the Provisions of Article 3, (18) and (23) as not affecting in any way the prescriptions of the Islamic Shariah.”⁸⁵ The state of Libya formulated a reservation to the Convention on the Rights of Persons with Disabilities (CRPD) stating that it: “ratifies the Convention

⁷⁹ The Court of Cassation, Criminal Circuit, Challenge no. 1508, Judicial year 23. 28/12/1953. Page 190.

⁸⁰ *Supra* note 24

⁸¹ The legal effect of reservations is stipulated in Article 21 of VCLT. United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.refworld.org/docId/3ae6b3a10.html> [accessed 22 February 2018]

⁸² *Supra* note 47

⁸³ See the reservation formulated to the ICESCR. UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&lang=en#EndDec [accessed 23 February 2018]

⁸⁴ *Id*

⁸⁵ See UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docId/3ae6b3aa0.html> [accessed 23 February 2018]

and interprets Article 25 (a) thereof, concerning the provision of health-care services without discrimination on the basis of disability, in a manner that does not contravene the Islamic sharia and national legislation.”⁸⁶

In these examples, the domestic application of the reserved provision of the instrument is to be ceased if found to be inconsistent with the rulings of Shari’a law. In cases of “across the board” reservations, any inconsistent provision with the rulings of Shari’a law should be judicially discarded. Egypt, as a monist state, vests in ratified international instruments the legal force of law.⁸⁷ As a result, those instruments should be applied by domestic courts akin to laws; however, if any treaty embodies a Shari’a law reservation, the application of the provisions should be judicially rejected where found inconsistent with the rules of Shari’a law. As a result, the competent court should apply a compatibility test between the reserved treaty and the rulings of Shari’a law and halt the application of any inconsistent provision with such rulings. However, this test is confounded by the indeterminacy of Shari’a law as a system of rules.

This section focuses on the difficulty of interpreting Shari’a law reservations in a legal sense. The first subsection highlights the difficulty of articulating a monolithic definition of Shari’a law due to the breadth of the Islamic jurisprudence. The second subsection draws upon guidance from the SCC judgements with regards to the interpretation of Shari’a law.

1. What is Shari’a law?

The term “Shari’a law” subtly triggers multiple denotations and dissimilar connotations. It is the draconic regime which promotes violence against non-believers and applies cruel punishments to whoever disobeys it, and/or the misogynistic system of rules that strongly suppresses women and privileges men. Shelves of bookstores are congested with books that relate Shari’a law to violent behavior such as terrorism, chopping off the heads of disbelievers, and stoning sinners. Other books depict Shari’a law as the model of patriarchal regimes which allows polygamy and encourages female submissiveness and inferiority.

On the other hand, Shari’a law is regarded by Muslims, and many non-Muslims, as a morally uplifting system of rules which promotes justice and peace. In political discourse, Shari’a law was devised as “the solution” by political parties in some Muslim countries while some western politicians stigmatize

⁸⁶ For a breakdown of all ratification and reservation made to UN Human rights treaties, See the official website of the UN available at: <http://indicators.ohchr.org/> [accessed 23 February 2018]

⁸⁷ As explained in the second section of the second chapter of this paper. See also *Supra* note 60

Shari'a law as a regime which is essentially incompatible with the values of freedom and equity. The user of the term "Shari'a law" and the context within which it is being used can drastically change the meaning it refers to.⁸⁸

Against these conflicting views, one may plausibly ask: Do Muslims equate the cruelty and patriarchy of Shari'a law, as portrayed by some westerners, with the notions of goodness, peace, and justice? How can the conception of "Shari'a law" accommodate this labyrinth? What is Shari'a law?

As captivating as it could be to attempt to answer these questions, it is slightly beyond the purpose of this paper. This part of the paper is rather concerned with highlighting the difficulty of articulating an interpretation of Shari'a law in a legal context.

It is of primary importance to draw a distinction between the terms Shari'a, *Fiqh*, and Islamic law. Although these terms are sometimes used interchangeably, their meaning and significance in the scholarship of the Islamic religion is substantially different.⁸⁹ On the one hand, Shari'a, or *Al Shari'a*, is an Arabic word which literally means "the right path."⁹⁰ Shari'a refers to the primary sources of the Islamic religion, namely the Holy Qur'an (the word of God) and the *Sunnah* (the words and acts of the Prophet Muhammed). These two sources are of a divine nature and their commandments are immutable.⁹¹ On the other hand, *Fiqh*, in the Arabic language, means precise understating or comprehension.⁹² *Fiqh* refers to the methodology of deducing rules based on the rational reading and interpretation of the sources of the Islamic religion.⁹³ In addition to the primary sources of the Islamic religion, the Qur'an and the *Sunnah*, there are two subordinate sources, namely: *Ijma'* and *Qiyas*.⁹⁴ The former means the consensus, and it refers to the matters on which scholars of Islam have agreed on their rules while the latter refers to rules which can be deduced by the logic of analogy. The term

⁸⁸ This introduction is inspired from the introduction of the following sources: Hallaq, Wael B. *An Introduction to Islamic Law*. Cambridge; New York: Cambridge University Press, 2009. & Maurits Berger, *Sharia – A Flexible Notion*, R&R 2006 / 3.

⁸⁹ *Understanding Islamic Law*. Hisham M. Ramadan. *Islamic Law: Definition and Description*. Page 3

⁹⁰ Al-Maaani Mu'jam. The official website available at: <https://www.almaany.com/ar/dict/ar-ar/%D8%B4%D8%B1%D9%8A%D8%B9%D8%A9/> [accessed 23 February 2018]. See also the holy *Qur'an* 45:18 the word Shari'a is translated as the right way "Then We put thee on the (right) Way of Religion: so follow thou that (Way), and follow not the desires of those who know not." See also *International Human Rights and Islamic Law*, Mashhood A. Baderin, *Nature of Islamic Law*. Page 33.

⁹¹ *Supra* note 89 Page 4.

⁹² Al-Maaani Mu'jam. The official website available at: <https://www.almaany.com/ar/dict/ar-ar/%D8%A7%D9%84%D9%81%D9%82%D9%87/> [accessed 23 February 2018]. The holy *Qur'an* 9:122 the word *Fiqh* is translated as obtaining knowledge "And it is not for the believers to go forth [to battle] all at once. For there should separate from every division of them a group [remaining] to obtain understanding in the religion and warn their people when they return to them that they might be cautious."

⁹³ See *Supra* note 89 Page 6 & *Supra* note page 90 34.

⁹⁴ *Id* at page 6.

Islamic law, or Shari'a law, generally refers to the regime of Islamic religion including: the primary sources, the subordinate sources, and the methodology of deducing rules (*Fiqh*).⁹⁵

The primary sources of the Islamic religion are of a divine nature; they are timeless and unchangeable.⁹⁶ Subordinate sources, however, are deduced by human intellectual process called *Ijtihad*.⁹⁷ The findings of *Ijtihad* are not symmetrical among the scholars of the Islamic religion. For that reason, despite having one Qur'an and *Sunnah*, no less than 19 schools (*Fiqh Madhhab*) developed during the first four centuries of Islam producing diverse juristic opinions.⁹⁸ As a result, Shari'a law, as a system of rules or a legal regime, is not monolithic since it accommodates a magnitude of jurisprudential difference within it. Afshari describes the non-monolithic character of Islamic law by suggesting that: "one must keep in mind the diversity and complexity of Islamic traditions. When reference is made to (Islamic law) a host of diverse positions, numerous schools of law, and many Islamic sects, each pronouncing conflicting interpretations, comes into the picture."⁹⁹

This multiplicity of the Islamic jurisprudence constitutes a confounding challenge to the competent court. The latter should overrule the enforcement of ratified instruments if they are incompatible with the rulings of Shari'a law. The way to reach this conclusion, is to apply a compatibility test between the ratified instrument and the rulings of Shari'a law; however, in applying such a test, the court is left with multiple scholarly groups, diverse juristic opinions and no legislative guiding.

The following subsection sheds light on guidance from the provisions of the constitution and the practice of the SCC

2. Shari'a Law in the Constitution

Over almost fifty years, Shari'a law has been a cornerstone in the lawmaking process in Egypt. It started with the Constitution of 1971 which stated in the second Article that "Principles of Shari'a law is a main source of legislation."¹⁰⁰ In 1980, the wording of this Article was amended to "Principles of Shari'a law is the main source of legislation."¹⁰¹ Since 1980 and until the present constitution, the

⁹⁵ *Id* at page 3 & *Supra* note 90 at page 34.

⁹⁶ *Supra* note 88 at page 4.

⁹⁷ *Supra* note 89 at page 6.

⁹⁸ 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].

⁹⁹ Reza Afshari, An Essay on Islamic Cultural Relativism in the Discourse of Human Rights Human Rights Quarterly, Vol. 16, No. 2 (May 1994), pp. 235-276. Page 235.

¹⁰⁰ See the second article of The Egyptian Constitution of 1971 *Supra* note 58.

¹⁰¹ See the second article The Egyptian Constitution of 1971 after its amendment in 1980 *Supra* note 58.

wording of this provision has remained unchanged.¹⁰² The interpretation of this provision, especially after the 1980 amendment, has summoned academic, political, and legal discussions.¹⁰³ Such discussions remained unresolved until the SCC commenced to approach the matter. In the following paragraphs, the endeavors of the SCC will be chronologically outlined.

In 1985, Al-Azhar University, one of the most influential Islamic institutions in the world, was sued for failing to honor a contractual payment. The plaintiff (the creditor) claimed the right to collect interest on the outstanding debt as established by Article 226 of the Egyptian Civil Code. In counter, Al-Azhar University claimed that the mentioned Article contradicts the principles of Shari'a law and, therefore, invoked its unconstitutionality. The case was referred to the SCC to decide over the constitutionality of the Article. The court held that the constitutional reference to the principles of Shari'a law bears a prospective legal effect and does not apply retroactively. Practically, this means that the conformity of domestic legislation with the principles of Shari'a law is to be observed in all laws and amendments enacted in a subsequent date to the constitutional provision. In the word of the judgment, the court held that:

[F]rom the date of the coming into effect of the amended text of the last phrase of Article 2 of the Constitution of 23 May, 1980, The Legislative Authority has become bound, in its new enactments, or in amendments it introduces to its former legal enactments, to see to it that such enactments conform to the principles of Islamic law, and do not constitute infringement of the norm and limitations laid down in other constitutional texts... [I]n view of the fact that the obligation imposed on the Legislator to follow the principles of the Shari'a and to consider them as the principal source of legislation is aimed only at the legislative enactments which are issued after the date of the imposition of the said obligation, and does not cover former legislative enactments... [S]uch prior enactments are immune from the application of the limitation because of its anterior date, which is the determining factor on which proper constitutional control is based...¹⁰⁴

Defining the scope of application of Article 2 with regards to the time was a significant progress in determining its effect on the existing laws. Following this judgement, the constitutionality of all laws enacted prior to 1980 is not subject to the application of this Article. However, the ambiguity of

¹⁰² See the second Article of the Constitution of 2012 and the second Article of the Constitution of 2014 *Supra* note 59 & 60.

¹⁰³ Clark B. Lombardi, Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State, 37 Colum. J. Transnat'l L. 81(1998). See part one of the notes which highlights the debates arising out of the interpretation of the principles of Shari'a law being "the" main source of legislation.

¹⁰⁴ Supreme Constitutional Court of Egypt, Challenge No. 20, Judicial Year 1. The translation of the whole judgement is published by Brill at Arab Law Quarterly, Vol. 1, No. 1 (Nov., 1985), pp. 100-107. Available at: <http://www.jstor.org/stable/3381676> [accessed 26 February 2018].

defining the reference of “principles of Shari’a law” as pronounced in the constitutional provision remained unresolved. As a result, the Article was devised as a challenge of unconstitutionality against a number of legislation and administrative decrees.¹⁰⁵ In these challenges, the SCC concluded that “principles of Shari’a law” refers to the fundamental principles of Shari’a which are well-established in the Islamic religion and accepted by all Muslims and agreed on by all scholars of Islam. This approach will be further detailed below.

In Case No. 8 of Judicial Year 17, the SCC has described the fundamental principles of Shari’a as the rulings which are absolutely certain with respect to their authenticity and meaning. The case tells the story of a father whose both daughters were refused entry to their secondary school based on the ministerial decision forbidding students wearing “*Niqab*”¹⁰⁶ from entering schools. The father challenged the constitutionality of this decree upon the violation of principles of Shari’a law and personal freedom.¹⁰⁷ The Court overturned the challenge and reasoned its finding based on the following:

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.... These [rulings] are [the shari’a’s] general framework and foundational pillars, whose demands impose themselves permanently and prevent establishment of any legal rule that violates them.... They fall within the realm to which *ijtihad* is limited and Beyond which *ijtihad* does not extend....

Islam raised the share of the woman. It inspired her to safeguard her chastity (afafiha). It commanded her to protect herself from shame and degradation so that woman would raise herself above those things that could sully her or dishonor her, especially through her attire, tenderness in speech, refinement in walking, bringing her allurements into view, tempting others, or revealing "adornments" that were concealed....

¹⁰⁵ See for example Supreme Constitutional Court of Egypt, Case No. 29, Judicial Year 11. Supreme Constitutional Court of Egypt, Case No. 8, Judicial Year 11. Supreme Constitutional Court of Egypt, Case No. 35, Judicial Year 9. Supreme Constitutional Court of Egypt, Case No. 6, Judicial Year 9. Supreme Constitutional Court of Egypt Case No. 8 of Judicial Year 17 For a detailed study on the findings of these judgements see *Supra* note 103.

¹⁰⁶ *niqab* is a full-face veil worn by some Muslim women in public, covering all of the face apart from the eyes. See Andrea Rugh, *Reveal and Conceal: Dress in Contemporary Egypt* (1987) Page 150.

¹⁰⁷ Article 41 of the 1971 Constitution on personal freedom “Personal freedom is a natural right not subject to violation except in cases of flagrante delicto. No person may be arrested, inspected, detained or have his freedom restricted in any way or be prevented from free movement except by an order necessitated by investigations and the preservation of public security. This order shall be given by the competent judge of the Public Prosecution in accordance with the provisions of the law. *Supra* note 58.

The form of her clothes and appearance are not [however] fixed by scriptural texts that have been determined to be certain either with respect to their authenticity or with respect to their meaning....

And whereas: the classical Islamic jurists (fuqaha') disagreed among themselves in the subject of the interpretation of Qur'anic texts and of what has been transmitted from the Prophet in the form of strong and weak hadiths. Their opinions were similar with regard to the dress of a woman and with regard to what she must cover of her body....

And whereas: In view of this, the contested [ministerial] Decision does not infringe on freedom of creed, destroy its foundations, or obstruct the rites of [religious] practice. It does not defy the essence of religion (din) in the universal roots (al-usul al-kulliyya) upon which the Shari'a is founded. Rather it expresses the legitimate, acceptable exercise of *ijtihad* aiming only to regulate girls' dress within the realm of educational institutions...

The Decision is within the realm of permitted regulation and cannot be considered a weakening of the freedom of creed.¹⁰⁸

Through this approach, the SCC has significantly reduced the reference of “principles of Shari'a law” to the very few fundamental rules of the Islamic religion which are agreed upon by all jurists. The SCC has also provided clear guidance to other courts on how to assess the compatibility of other laws with the rulings of Shari'a law in order to evaluate their constitutionality.

In this context, light should be shed on the preamble of the Constitution of 2014 which states: “We are drafting a Constitution that affirms that the principles of Islamic Sharia are the principal source of legislation, and that the reference for the interpretation of such principles lies in the body of the relevant Supreme Constitutional Court Rulings.”¹⁰⁹ Therefore, the constitution has conferred upon the SCC the sole power to interpret the rulings of Shari'a law.

In sum, Shari'a law is a vague term which usage can have varied connotations. This vagueness creates a legal challenge when courts are required to interpret the constitutional reference to Shari'a law. The SCC has attempted to dispel this vagueness by interpreting Shari'a law in a narrowed scope of Islamic jurisprudence; thus, it has formulated a methodology for inferior courts before which the question of defining what is meant by Shari'a law could be raised.

¹⁰⁸ See the translation of the whole judgement. *Law Review*, Vol. 21, Issue 3 (2006), pp. 437-460
Brown, Nathan J. Lombardi, Clark B. 21 *Am. U. Int'l L. Rev.* 437 (2005-2006)

¹⁰⁹ *Supra* note 60.

III. The Trilemma

Egypt has shown a tendency to formulate Shari'a law reservations when ratifying human rights instruments. By virtue of this reservations, the ratified instrument ceases to apply when its provisions are inconsistent with Shari'a law. Since Egypt is a monist state i.e. it confers upon ratified international instruments the force of law, ratified human rights instruments are legally enforceable.¹¹⁰ As a result, domestic laws enacted at a later date following the ratification of those instruments should be compliant with the standards prescribed in those instruments; likewise, existing laws should be mitigated or amended to comply with those standards. However, domestic laws in Egypt present numerous discrepant provisions to ratified human rights instruments. In such cases, the ratified instruments can be invoked as a defense against the application of non-compliant laws in order to cease their application. However, the allegation of violating Shari'a law can halt the invocation of the ratified instrument. Thus, the competent court, in this situation, is presented with three separate legal instruments: (i) the non-compliant law, (ii) the ratified human rights instrument, and (iii) the formulated Shari'a law reservation.

This Chapter deals with the difficulty that arises when a ratified treaty is invoked against the application of a non-compliant law. This difficulty can be manifested in three questions: (1) Should the competent court apply the non-compliant law despite the conflict with the ratified human rights instrument? (2) Should the ratified instrument overrule the non-compliant law? (3) In case the treaty embodies Shari'a law reservation, how can the competent court interpret Shari'a law? The first section introduces the trilemma and elaborates on the difficulty of resolving it. The following sections analyze three cases where the trilemma arises and examines the court resolution thereof.

A. Why is it a Trilemma?

A trilemma is "a state of things in which it is difficult to determine which one of three courses to pursue."¹¹¹ This paper uses this term to describe the situation when a ratified human rights instrument is invoked against the application of a non-compliant law, and where the instrument must comply with the rulings of Shari'a law in order to overrule the application of the instrument. This situation symbolizes a trilemma because the competent court should normally apply domestic law, but it should also apply ratified human rights instruments for their legal force; in addition, the court should assess the compatibility of the ratified instrument with the rulings of Shari'a law by virtue of the formulated

¹¹⁰ The second section of Chapter II discusses the enforcement of ratified international treaties and instruments. See II.B.1

¹¹¹ Merriam-Webster Dictionary Available at: <https://www.merriam-webster.com> [accessed 1 March 2018]

reservation. In this trilemma, the court is left with no clear guidance from the legislator or from the judicial practice of superior courts.

The provision of the constitutional Article 151 vests on ratified international instruments the legal force of law when these treaties are parliamentary-approved and published in the Official Gazette.¹¹² As a consequence, a ratified instrument that fulfills the conditions stipulated by the Constitution becomes an integral part of the domestic law. This constitutional provision gives no real guidance to the competent court in resolving the conflict between ratified instruments and domestic law. The mentioned provision makes the ratified instruments as enforceable as law, but it does not regulate the situation when a conflict arises therein.

Judicial practice has attempted to fill this legislative void. The Court of High State Security attempted to resolve the conflict between the provision of the EPC and the ICESCR towards labor strikes by applying the rule of “*lex posterior derogat legi priori*”¹¹³ which entails that a subsequent law repeals any conflicting earlier laws.¹¹⁴ Based on this criterion, ratified instruments should overrule the application of any conflicting law enacted in an earlier date.

Although the application of rule *lex posterior derogat legi priori* deems legally plausible and practical, the SCC has differently decided the conflict between freedom of religion as established by the Universal Declaration of Human Rights (UDHR)¹¹⁵ and the administrative decree banning the practice of Bahá’í rituals.¹¹⁶ The court held that Article 151 confers the legal force of laws on ratified instruments and found that the application of a non-compliant law over a ratified treaty is not a constitutional violation.¹¹⁷ The court reasoned the finding as follows:

The UDHR signed by Egypt merely constitutes a non-binding recommendation to the Egyptian government to consider its provisions. The UDHR does not hold the legal authoritativeness of ratified international treaties. Even with those treaties, the enactment of a law or the issuance of an administrative decree violating their provisions does

¹¹² *Supra* note 110.

¹¹³ *Supra* note 73.

¹¹⁴ *Supra* note 75. The court judgement is explained in further details in the second subsection of the second section of the background chapter, under the title “The judicial practice.” II.B.2.

¹¹⁵ The Universal Declaration of Human Rights. UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docId/3ae6b3712c.html> [accessed 2 March 2018]

¹¹⁶ Bahá’í is a religion followed by some people around the world. For further information about it, see J. E. Esslemont, Bahá’u’lláh and the New Era: An Introduction to the Bahá’í Faith (2006), available at: <http://www.bahai.org/library/other-literature/publications-indiv/dual-authors/bahauallah-new-era/bahauallah-new-era.pdf?2f8be806> [accessed 2 March 2018]

¹¹⁷ Supreme Constitutional Court of Egypt, Challenge No.7, Judicial Year 2, Court hearing dated on 1st March 1975.

not constitute a constitutional violation. Those treaties hold the legal force of laws, yet they do not supersede laws.¹¹⁸

Following this dictum, the competent court is not obliged to apply the ratified instrument, but it is entitled to apply it. In either course, no constitutional violation shall be recorded.

In addition to the difficulty of deciding the conflict between domestic laws and ratified treaties, the interpretation of Shari'a law reservations intensifies the complexity of the trilemma. The invoked instrument's provision should be rendered inoperative if it is found in contradiction with the rulings of Shari'a law. The competent court is left with no legislative guidance or clear judicial practice on the methodology of applying the compatibility test between the invoked instrument and the rulings of Shari'a law.

If the competent court is entitled to examine the legality of Shari'a law reservation and review its domestic effect, the competent court could invalidate Shari'a law reservation based on its violation to the rules of the VCLT. Therefore, this trilemma would simply turn into the classical dilemma of the conflict between international law and domestic law. However, as previously explained,¹¹⁹ the power of the competent court to examine the legality of ratified instruments is opposed by multiple implications.¹²⁰

In sum, when the trilemma arises, the competent court is presented with two complex questions, namely: (1) Should the ratified instrument supersede the non-compliant law, or vice versa? (2) How can Shari'a law reservations be interpreted? Neither the legislature nor the judicial practice provides consistent guidance on the resolution of the two questions. As a result, the competent court is entitled to apply the non-compliant law despite its contradiction with the ratified instrument, or vice versa; the court is also entitled to discretionally interpret Shari'a law reservation formulated in the invoked instrument.

B. The Notarization of Apostasy between the ICCPR and the rulings of Shari'a Law

This section examines the trilemma arising out of the legal framework of notarizing a conversion from Islam, freedom of religion as established by the ICCPR, and Shari'a law reservation formulated thereof. The first subsection explains the legal foundations for the discussed trilemma. The second subsection demonstrates the Administrative Court's approach in resolving the trilemma.

¹¹⁸ *Id.* The same approach was echoed in a different judgement decided by the SCC. See Supreme Constitutional Court of Egypt a challenge No. 73, Judicial year 28, Court hearing dated 15th December 2010.

¹¹⁹ Under the Second Section of Chapter II. See II.B.2.c)

¹²⁰ See *Id.*

1. Apostasy in the Egyptian Legal System

It is of primary importance to identify the terminology of apostasy. The term “Apostasy” or “*Ridda*” refers to the cases when a Muslim chooses to abandon Islam or renounce it. The essence of apostasy is inherent to abandoning Islam. Hence, there is no difference whether the apostate chooses another religion or not. Also, the term does not apply to non-Muslims who choose to abandon their religions, and in case they convert to Islam, they are said to have “embraced Islam.”¹²¹

The Egyptian Constitution does not prohibit apostasy; conversely, it affirms freedom of belief. The first paragraph of Article 64 of the present Constitution reads: “Freedom of belief is absolute.”¹²² As a result, one can argue that based on the “absolute” freedom of belief endorsed by the constitution, apostasy is not an illegal action.

To a similar effect, Egypt is a signatory state to the ICCPR.¹²³ Article 18 of the Covenant 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.¹²⁴

Since Egypt has ratified the Covenant, and the ratification was published in the Official Gazette,¹²⁵ the Covenant has become an integral part of domestic laws based on the authority of ratified international instruments as stipulated by the Constitution.¹²⁶ However, Egypt has restricted the application of the ICCPR with the following reservation: “Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it.”¹²⁷ Thus, the ICCPR should cease to apply in cases which are inconsistent with Shari’a law.

¹²¹ See Human Rights Quarterly, Vol. 25, Issue 3 (August 2003), pp. 720-740. Page 722

¹²² Article 64 of the Constitution of 2014. See *Supra* note 60. The same provision has existed in the constitutions of 1971 and 2012 in articles 46 & 43, respectively. See *Supra* notes 58 & 59.

¹²³ Egypt has ratified the international covenant on Civil and Political Rights in 1982. *Supra* note 86.

¹²⁴ *Supra* note 85.

¹²⁵ The presidential decree no. 536 of year 1981, Issued on the October 1st, 1981.

¹²⁶ The second section of the Chapter II discusses the legal force of ratified instruments. See II.B.1

¹²⁷ *Supra* note 86.

Moreover, no criminal or civil statute directly deals with apostasy by prohibition. Therefore, and based on the rule of “*Nullum crimen sine lege*,”¹²⁸ an apostate should not suffer a punishment if the action is not legally punishable. However, an examination of judicial practice towards cases of apostasy reveals that the action does bear legal consequences on the criminal, administrative, and personal status levels.

In spite of the absence of any clear provision criminalizing the action of apostasy, a criminal charge can be instituted against an apostate. Article 98 (f) of EPC deals with blasphemy, or the exploitation of religion for propagating extremist thoughts or disdaining a divine religion.¹²⁹ The application of this Article has been judicially extended to apply to cases of apostasy on the premise that whoever commits apostasy is necessarily committing blasphemy against Islam. As observed in The Egyptian Initiative for Personal Rights and Human Rights Watch report that:

The government has used Article 98(f) of the Penal Code to criminalize actions or other expressions of unorthodox religious views, including conversion from Islam...As the testimonies in this report indicate, officials have interpreted this Article to proscribe conversion from Islam on the grounds that such conversion disparages Islam and is thus incompatible with public order.¹³⁰

In the realm of personal status law, the act of apostasy results in consequences with regards to marriage and inheritance. In the famous case of Nasser Abu Hamed, the Court found that Abu Hamed has committed apostasy based on his critical writings about Islamic jurisprudence and annulled his marriage to a Muslim woman in repercussion.¹³¹ The Court of Cassation also held that an apostate is not entitled to inherit from Muslims.¹³² In case someone is found apostate, the court even interferes to determine the religious status of the apostate’s children.¹³³

¹²⁸ The principle means “no crime without a law.” If the action is not criminalized, the doer of such action can not suffer a criminal punishment thereof. See the definition of the principle on the official website of Corner Law school, available at https://www.law.cornell.edu/wex/nullum_crimen_sine_lege [accessed 2 March 2018]

¹²⁹ Article 98 (f) of the EPC 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” See *Supra* note 71

¹³⁰ See Hossam Bahgat And Joe Stork, Prohibited *Identities*, The Egyptian Initiative for Personal Rights And Human Rights Watch (Nov. 2007) Volume 19, No. 7(E) Available at <https://www.hrw.org/sites/default/files/reports/egypt1107webwcover.pdf> [accessed 2 March 2018].

¹³¹ The Egyptian Court of Cassation, Nos. 475, 478, 481, Year 65, 5 Aug. 1996.

¹³² The Egyptian Court of Cassation, Jan. 19, 1966, Appeal 28 Judicial year 33.

¹³³ The Egyptian Court of Cassation Dec. 28, 1998, Appeal 255 Judicial year 68.

Although apostasy appears in the judicial practice of criminal and personal status courts, this section is chiefly concerned with the intersection where apostasy meets the administrative law, as shall be discussed below.

Civil Status Law No. 143 of year 1994 requires all citizens, upon reaching the age of sixteen, to obtain an identification card.¹³⁴ The failure to adhere to this provision is punishable by a fine not exceeding two hundred pounds.¹³⁵ The law also requires all citizens to report to the Civil Status Department any change of the details embodied in the identification card.¹³⁶ However, the law does not permit the change of religion except by virtue of a court judgment. Article 47 of the law reads:

Any change or rectification of the details regarding birth, death, or family matters is doable when permitted by a decision from the committee mentioned in the last article. Changes or rectifications regarding nationality, religion, or profession are only doable by virtue of court judgments or authenticated documents issued from competent offices.¹³⁷

Against this backdrop, an apostate is legally obliged to report the abandonment of Islam to the Civil Status Department, but the latter is not allowed to apply such modification except by virtue of a court judgement declaring this person as no longer an affiliate of the Islamic religion. As a result, the Civil Status Department turns down the apostate's request to have its conversion from Islam authenticated in the details of the identification card. The apostate takes the rejection to the Administrative Court demanding the enforcement of its request to change the religious detail by the Civil Status Department. In establishing the request, recourse can be made to the absolute freedom of belief as endorsed by the constitution, as well as Egypt obligation to guarantee freedom of belief as stated by the ICCPR.

The court in the mentioned scenario encounters the legal trilemma. On the one hand, the court should allow the notarization of apostasy based on the constitutional provision on the absolute freedom of belief as well as Egypt's obligation towards the ICCPR to guarantee such freedom. On the other hand, if apostasy is found inconsistent with the rulings of Shari'a law, the application of the ICCPR is to be halted by virtue of the formulated reservation.

¹³⁴ Article 47 of the Civil Status Law no. 143 of year 1994.

¹³⁵ Article 66 of the Civil Status Law no. 143 of year 1994.

¹³⁶ Article 53 of the Civil Status Law no. 143 of year 1994.

¹³⁷ *Supra* note 134.

2. The Court Resolution

In 2008, The Egyptian Administrative Court heard the case of an apostate who had converted from Islam to Christianity.¹³⁸ The plaintiff requested the Civil Status Department to notarize the conversion; however, his request was rejected. The plaintiff demanded an official recognition of his conversion. The demand was predicated on the constitutional provision of freedom of belief as well as Egypt's obligation to guarantee such freedom as stated in the ICCPR. The court examined the case and analysed the plaintiff's request in light of constitutional and legislative provisions. The court analysis acknowledged Egypt's obligation towards the ICCPR. The court also highlighted that the Covenant's application is restricted in cases where it is inconsistent with Shari'a law based on the formulated reservation thereto. The court held that the action of apostasy is an essential violation of Shari'a law, and thus overruled the plaintiff's request. The court justified its ruling by:

Most of the Egyptian people are Muslims. Islam affirms freedom of belief. It grants non-Muslims the freedom to choose their divine religion, but it bans those Muslims who practiced its rituals from abandoning it because it is the last word of God. Islam is modelled as an aspect of the Egyptian public policy, and it should, thus, be respected.

Whereas the action of apostasy whether in the form of conversion, disdaining Islam, or denying its fundamental rules has existed parallel to the Islamic religion, Islamic jurisprudence despite disagreeing on its punishment, has long agreed that apostasy is a great sin.

Divine religions have descended from God in an order. The conversion that follows that order is permissible. Judaism was the first word of God, Christianity followed, and Islam ended that order. Hence, he who believes in Judaism is invited to Christianity, and he who believes in Christianity is invited to embrace Islam. Any conversion that violates that order should not be permitted because it violates the divine order of religions as well as Egypt's public policy.

Islam elevates freedom of religion, among its rules is that: (i) no coercion in religion, (ii) he who wishes to, let him believe and he who decides to, let him disbelieve. Therefore, Muslims are not allowed to force non-Muslims to follow Islam, and those non-Muslims are entitled to withstand their religion. This is how freedom of belief is manifested. Nevertheless, a Muslim who consented to believe and accepted its norms is not allowed, as states by holy verses, to abandon Islam.

The plaintiff also premised his request on the international instruments signed by Egypt which uphold the absolute freedom of people to believe what they perceive as religion. Although these instruments became, based on its ratification, an integral part of domestic laws....

¹³⁸ The Egyptian Administrative Court, Challenge No. 35647, Year 61, Court hearing dated on January 29th, 2008.

Nonetheless, Egypt is a Muslim country and most of the Egyptian people are Muslims; as result, the Egyptian government used its legislative sovereignty when ratified the mentioned instruments, and reserved their application in cases of inconsistency with Shari'a law.¹³⁹

In this case, the court approached the trilemma by establishing that apostasy is prohibited by rulings of Shari'a law; hence, it ousted the ICCPR based on Shari'a law reservation formulated thereto and upheld the bureaucratic renunciation to notarize conversion from Islam. The same reasoning has been employed in an abundance of court rulings disallowing the notarization of conversion from Islam.¹⁴⁰ Likewise, courts have also showed reluctance to notarize non-Abrahamic religions such as the Bahá'í faith.¹⁴¹

In sum, Egypt has endorsed freedom of belief as stated in the ICCPR. Since Egypt has ratified, approved, and published the ICCPR, it has become an integral part of its domestic law. However, the notarization of conversion from Islam deems to be impressible in Egypt based on the law of Civil Status. When this conflict arose before the Administrative Court, the latter decided to set aside the ICCPR based on the Islamic prohibition of apostasy.

C. The Legality of Labor Strike between ICESCR and the Interpretation of Shari'a Law

This section focuses on the trilemma arising out of the rules regulating labor strikes in Egypt. The first subsection examines those rules in the (i) constitution, (ii) ratified international instruments, (iii) and domestic laws. The second subsection analyses the trilemma arising out of these rules and shows the court resolution to it.

1. Labor Strike in the Egyptian Legal System

The position of labor strike in the Egyptian legal system poses a crucial legal question. Although the legality of the action is affirmed by the constitution and other legal instruments, the Administrative Court has applied penalties upon its doers.

The Constitution affirms the legality of strikes. Article (15) of the Constitution of 2014 states that: "Peaceful strike is a right regulated by Law."¹⁴² Thus, going on a strike is a constitutional right. Moreover, one can argue that the exercise of a constitutional right cannot be converted into a crime.¹⁴³

¹³⁹ This is the author's translation to parts of the judgement. *Id.*

¹⁴⁰ The Egyptian Administrative Court, Challenge No. 34768, Year 60, Court hearing dated on December 25th, 2007.

¹⁴¹ The Egyptian Administrative Court, Challenge No. 12780, Year 61, Court hearing dated on January 29th, 2008. See also The Egyptian Administrative Court, Challenge No. 18354, Year 58, Court hearing dated on January 19th, 2009.

¹⁴² *Supra* note 60. The Constitution of 2012 included the same provision in Article 64. See *Supra* note 59.

¹⁴³ *Miller v. United States*, 230 F.2d 486 (5th Cir. 1956)

However, the right to strike is not absolute; it is conditional on its peaceful character. If the strike involves public indecency, any form of violence, endangering property or disrupting public safety, the strike is not peaceful, and is thus punishable.¹⁴⁴

Furthermore, the fourth book of the Egyptian Labor Law no.12 of 2003 regulates the exercise of labor strikes in the fourth book of the law.¹⁴⁵ Article 192 reads “The workers shall have the right to stage a peaceful strike.”¹⁴⁶

In addition to the Constitution, Egypt has ratified the ICESCR, but formulated a reservation against its application in cases where it contradicts Shari’a law.¹⁴⁷ Article 8 lit (d) of the Covenant states: “The States Parties to the present Covenant undertake to ensure:...the right to strike, provided that it is exercised in conformity with the laws of the particular country.”¹⁴⁸ The ratification was approved by the parliament and published in the Official Gazette.¹⁴⁹ The ICESCR has, thus, become an integral part of Egyptian domestic law.¹⁵⁰

In recognizing the domestic authority of the covenant, The Court of High State Security has found that the action of labour strike cannot be a crime based on the ratification of the ICESCR. The Court relied on the rule of “*lex posterior derogat legi priori*” and further held that Article 124 of the Egyptian Penal Code has been set aside with the ratification of the covenant.¹⁵¹

Nevertheless, with relation to the Egyptian Revolution in 2011, Presidential Decree No. 34 of Year 2011 was issued.¹⁵² The Decree declared a state of emergency all over the country and banned any form of demonstration or strike that might hinder the progress of public offices and governmental institutions.¹⁵³

¹⁴⁴ The Egyptian Administrative Court, Challenge No. 21992, Year 59, Court hearing dated on January 9th, 2016.

¹⁴⁵ See the translation of The Egyptian Labor Law on the official website of the Egyptian government. Available at <http://www.egypt.gov.eg/english/laws/labour/> [accessed 6 March 2018].

¹⁴⁶ *Id.*

¹⁴⁷ Egypt has ratified the ICESCR on January 14th, 1982. See the full text of the ICESCR and its state signatories at the official website of the United Nations Treaty Collection. Available at:

https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-3&chapter=4&lang=en. [accessed 2 March 2018]. *Supra* note 86.

¹⁴⁸ See the full text of the Covenant at UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at:

<http://www.refworld.org/docId/3ae6b36c0.html> [accessed 6 March 2018].

¹⁴⁹ The Presidential Decree No. 536, Year 1982.

¹⁵⁰ Based on the constitutional provision on the force of ratified international instrument as stipulated in Article 151 of the Constitution. The second section of Chapter II discusses this question. See II.B.

¹⁵¹ *Supra* note 75. The judgement is further explained in the second section of the background chapter. See II.B.2

¹⁵² Due to the dissolution of the parliament, making laws was at the hand of ruler of the country.

¹⁵³ See the first article of the presidential Decree No. 34 of Year 2011.

Based on the above-mentioned rules, peaceful strikes are, in principal, legitimate actions, and their exercise should not result in any legal charges against its doers.

2. The Court Resolution

In spite of the legal provisions and the previous court findings guaranteeing the legality of labor strike, the Administrative Court has, in a later judgement,¹⁵⁴ found that the labor strike is a violation of the “due behavior of public servants.”¹⁵⁵ The Court decided to outlaw labor strikes, and premised its finding on the detrimental consequences resulting from strikes. The Court also revised the application of the ICESCR with regards to the labor strike, and further held that the action of the labor strike is against the rulings of Shari’a law. The Court concluded that the ICESCR is ousted by virtue of its Shari’a law reservation. The judgment was reasoned as follows:

Article (8) of the ICESCR restricts the implementation of the rights stipulated therein to the conformity with the applicable domestic laws. The mentioned Article reads: “... provided that it is exercised in conformity with the laws of the particular country.” Besides, Egypt signed the Covenant, yet formulated a reservation to the implementation of this Covenant in cases of inconsistency with the rulings of Shari’a law. Moreover, the Presidential Decree No 527 of Year 1981 precludes the applicability of the Covenant in cases of inconsistency with the rulings of Shari’a law. The Covenant was published in the Official Gazette in April 8, 1982. Therefore, the Egyptian government undertook to ensure the right to strike; however, the exercise of such right must be in conformity with the rulings of Shari’a law.

For the Covenant to be applied, the right to strike is to be examined, and found consistent with the jurisprudential rulings of Shari’a law.

Shari’a law classifies the concept of interest, or Al Maslaha¹⁵⁶ into three categories, namely: (i) an interest related to an individual, (ii) an interest related to a group of persons, and (iii) an interest related to the public. In regulating those interests, Shari’a law has coined principles such as: (avoiding harm prevails/supersedes obtaining gain), (less harm can be used to repel greater harm), (public harm is to repelled even by inflicting individual harm), and (harm cannot be repelled through an equal harm).

Labor strike is a collective and deliberate refusal to fulfill the work chores. Labor resort to striking as a tool of pressure against their employer to reach a joint gain. Although labor are entitled to seek their collective benefits through going on strikes, the service provided for the public should not be disrupted or jeopardized as a result of such strikes. In other words, if the service provided for the public is ceased, worsened,

¹⁵⁴ The Egyptian Administrative Court, Challenge No. 162, Year 13.

¹⁵⁵ The term “due behavior of public servants” refers to the norms of behavior that each civil servant should adhere to.

¹⁵⁶ The term means the interest or the gained profit to an individual or a group of individual or to all people.

or degraded, the labor strike would be a means that inflicts harm to the public and conveys gain to an individual or a group of individuals. Whereas the interest of the public prevails the interest related to an individual or a group of individuals, labor strike is an impermissible action as per Shari'a law rulings. Therefore, the ICESCR is out of action.¹⁵⁷

The Court analyzed the action of striking against the rulings of Shari'a law. Based on the concept of gain and harm, the court held that striking is inconsistent with the rulings of Shari'a law; thus, concluded that ICESCR is inoperative. The Court found the strikers guilty and referred them to early retirement as a penalty for their action.

This judgement has been exposed to intense scrutiny and critique.¹⁵⁸ On the one hand, the judgement neglected the Constitutional provision on the legality of peaceful strike. Likewise, the judgement premised its finding on an outdated law (Presidential Decree No.34 of Year 2011). On the other hand, the Court articulated an ambiguous interpretation of Shari'a law, and decided to strike down the application of the ICESCR based on that interpretation. However, the purpose of this section is to highlight how the court approached the trilemma and resolved in legal terms.

In sum, this section tackles the trilemma arising out of the position of labor strike in the Egyptian legal system. A peaceful strike is a constitutional right; moreover, Egypt has ratified the ICESCR which obliges its signatory states to guarantee the legality of the action. However, Egypt has formulated a Shari'a law reservation to the ICESCR and restricted its application in cases where it violates the rulings of Shari'a law. However, Presidential Decree No. 34 of Year 2011 banned all strikes during the time of emergency. The Administrative Court approached the trilemma and held that the rulings of Shari'a law ban the striking, and further held that the ICESCR is inapplicable thereof. The Court found the strikers guilty for violating the due behavior of public servants and referred them to early retirement.

D. Penal Provisions Constituting Discrimination against Women and CEDAW

Women's rights have joined the discourse of human rights in 1948 by virtue of the UDHR.¹⁵⁹ Those rights have been crystalized in both the ICCPR and ICESCR.¹⁶⁰ In 1979, the UN General Assembly

¹⁵⁷ *Supra* note 154.

¹⁵⁸ See the declaration of Cairo Institute for Human Rights Studies towards this judgement. Available at: <https://cihrs.org/10-%D9%86%D9%82%D8%A7%D8%B7-%D8%AD%D9%88%D9%84-%D8%AD%D9%83%D9%85-%D8%A7%D9%84%D8%A5%D8%AF%D8%A7%D8%B1%D9%8A%D8%A9-%D8%A7%D9%84%D8%B9%D9%84%D9%8A%D8%A7-%D8%A8%D8%AD%D8%B8%D8%B1-%D8%A7%D9%84%D8%A5/> [accessed 6 March 2018].

¹⁵⁹ See Article 3 of UDHR. *Supra* note 115.

¹⁶⁰ See Articles 2, 3, 7, 10 of the ICESCR & articles 2, 3, 23, 26 of the ICCPR. *Supra* note 72 & 85.

passed CEDAW as a comprehensive instrument for the issue of discrimination against women.¹⁶¹ CEDAW lays down a strong framework for addressing the issue of gender discrimination. The first Article formulates a full-scale definition of the concept of “discrimination against women.”¹⁶² More importantly, CEDAW imposes an obligation upon signatory states to formulate immediate policies aimed at eradicating discrimination against women. Article 2 of the Convention reads:

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

...

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.¹⁶³

¹⁶¹ For information about the date of entry into force and state signatories of the treaty, see the official website of the United Nation Treaty Collection website, Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&lang=en [accessed 6 March 2018]. Also see *supra* note 52.

¹⁶² Article one of CEDAW reads: “For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” See *Id.*

¹⁶³ *Id.*

Based on this Article, signatory states are obliged to ensure the non-discriminatory character of their national legislation. As a result, legislation must be enacted in compliance with the non-discriminatory provision of the Convention and existing discriminatory legislation must be mitigated in order to become compliant with such provisions. The state is, likewise, obliged to refrain from any administrative practice that undermines women's rights.

Egypt became a signatory state to CEDAW in 1981. The ratification of CEDAW was published in the Official Gazette.¹⁶⁴ Thus, CEDAW has become an enforceable legal instrument within the Egyptian legal system.¹⁶⁵ Nevertheless, the obligation to comply with CEDAW is not absolute. Egypt has formulated a Shari'a law reservation against Article 2 of CEDAW.¹⁶⁶ The reservation reads: "The Arab Republic of Egypt is willing to comply with the content of this article, provided that such compliance does not run counter to the Islamic Sharia."¹⁶⁷ Therefore, Egypt is not obliged by the provisions of Article 2 in cases of inconsistency with the rulings of Shari'a law.

This section examines the trilemma that arises among (i) the discriminatory provisions of the EPC (ii) the obligation prescribed in Article 2 lit (g) of CEDAW, and (iii) Shari'a law reservation formulated thereto. The first subsection presents two examples of penal provisions which stipulate unequal legal treatment to women. The second subsection discusses the tension between CEDAW obligations and the Shari'a law reservation formulated thereto.

1. The De Jure Gender Discrimination in EPC

As prescribed in Article 2 lit (g) of CEDAW, Egypt is obliged to "repeal all national penal provisions which constitute discrimination against women."¹⁶⁸ Egypt has, however, reserved the application of the Article in case its application is inconsistent with the rulings of Shari'a law.¹⁶⁹ This subsection presents two examples of discriminatory penal provisions, namely: adultery and honor killing.

a) Adultery: An Unjustified Discriminatory Legal Framework

The provisions regulating adultery in the EPC form a clear example of gender discrimination. The legislator has designated separate paths to establish the commitment of adultery against wife and husband. The legislature has also prescribed a harsher punishment for adultery against the wife than the husband. This legislative approach can be seen in Articles 274 and 277 of the EPC. The former

¹⁶⁴ The Egyptian Foreign Minister Decree No. 111, Year. 1981.

¹⁶⁵ See II.B.1.

¹⁶⁶ *Supra* note 86.

¹⁶⁷ *Id.*

¹⁶⁸ *Supra* note 162.

¹⁶⁹ *Supra* note 86.

states: “[a] married woman whose adultery is established shall be punished with detention for a period not exceeding 2 years.”¹⁷⁰ Article 277 reads: “[a]ny husband who commits adultery in the marital house... shall be punished with detention for a period not exceeding six months.”¹⁷¹ Based on the reading of these two Articles, the gender discrimination, with regards to the establishment of the crime and its punishment is apparent.

With regards to the commitment of adultery, the legislature draws a clear distinction between husband and wife. Unlike wife adultery, which is merely established by the commitment of the action, husband adultery is only established if the action is committed in the marital house. As an elaboration, a husband may have sexual affairs with women other than his wife anywhere outside his marital house, and his action will remain crime free.¹⁷² Conversely, the wife’s adultery is criminalized irrespective of the location where the crime takes place.

To a similar effect, the legislature has prescribed a harsher punishment against wife adultery than a husband’s. A detention for a period not exceeding two years is the punishment of wife adultery whereas husband adultery is punishable by detention not exceeding six months.

Against this legislative approach, one may ask: if the act of infidelity is the inherent ground of criminalizing adultery, why is the husband’s action of infidelity outside the marital house is not criminalized? Likewise, why is the punishment for wife adultery is four times harsher than husband adultery? Nevertheless, commenting on the peculiarity of the legal framework to adultery in EPC is beyond the purpose of this subsection.¹⁷³ The purpose here is to demonstrate the discriminatory character of such framework.

b) Honor Killing¹⁷⁴

The Egyptian legislature recognizes the concept of honor killing. Article 237 of the EPC confers a punishment reduction on the murderer’s husband who catches his adulteress wife red-handed. The

¹⁷⁰ See article 237 of EPC. *Supra* note 71.

¹⁷¹ See article 277 of EPC. *Supra* note 71.

¹⁷² The action is legal as long as his adulteress is not married; otherwise, the husband would be considered an accomplice in his adulteress’s adultery.

¹⁷³ See Fatouh ElChazli Towards a full-fledged legal protection for Egyptian women against violence and discrimination, 2012. Available at: <http://ncw.gov.eg/wp-content/uploads/2016/05/en15.pdf> [accessed 6 March 2018]. See also George Sadek, Egypt: Sexual Violence Against Women, The Law Library of Congress. Available at: <https://www.loc.gov/law/help/sexual-violence-against-women/egypt-sexual-violence-against-women.pdf> [accessed 6 March 2018].

¹⁷⁴ Further elaboration on the concept of honor-based violence as well as honor kill, see Journal of Family Violence April 2016, Volume 31, Issue 3, pp 303–314. Available at: (<https://link.springer.com.libproxy.aucegypt.edu/content/pdf/10.1007%2Fs10896-016-9801-7.pdf>) [accessed 6 March 2018]

Article reads: “Whoever surprises his wife in the act of adultery and kills her on the spot together with her adulterer-partner shall be punished with detention instead of the penalties prescribed in articles 234 and 236.”¹⁷⁵ While a murderer is to be prosecuted via Article 234 of the EPC which stipulates a punishment of “permanent or temporary hard labor,”¹⁷⁶ a murderer husband who kills his wife upon catching her committing adultery will not face that punishment.

Jurists and scholars of the EPC have justified the differentiation between murder and honor killing upon the psychological state of mind of the murderer husband. The latter, upon the sight of his wife committing adultery, develops a sinister state of mind that makes his subsequent actions less controllable. Thus, the murder resulting from such a state of mind is of different nature than planned murder, and the punishment prescribed thereto should be different.¹⁷⁷ Based on that juristic determination, the punishment reduction of honor killing deems conceivable.

Nevertheless, unlike the Jordanian and Algerian penal codes which confer the punishment reduction in case of honor killings to both spouses,¹⁷⁸ the EPC confines the provision of Article 237 only to the husband. As a result, a wife who witnesses her adulterer husband in action, and kills him, does not benefit from the provision of Article 237; that wife would face the charge of Article 234 which is punishable by permanent or temporarily hard labor.¹⁷⁹

In Article 237, the Egyptian legislature has recognized the concept of honor killing and reduced the punishment for the killing occasioned with honor. However, the legislature restricted the benefit of the Article to husbands over wives.

2. The Penal Gender Discrimination Versus CEDAW

The two mentioned examples in the last subsection show plain gender discrimination. Whereas Article 2 lit (g) of CEDAW obliges its signatory states to repeal all discriminatory penal provisions, Egypt has accepted that obligation. In addition, CEDAW has been ratified and published in the Official Gazette;¹⁸⁰ thus, it has acquired the force of domestic law. Against this backdrop, the paper postulates

¹⁷⁵ See article 237 of the EPC. *Supra* note 71

¹⁷⁶ See article 234 of the EPC. *Supra* note 71. Noting that the punishment is aggravated to death penalty if the murder is premeditated and/or ambushed. Article 230 -232 of EPC.

¹⁷⁷ Ahmed F. Srouf, Private Section-Penal Code, Crimes Prejudicial to The Public Interest – Crimes of Individuals – Funds Crimes, 734 (Dar Al-Nahda Al-Arabiyya 2013) (2013).

¹⁷⁸ See article 279 of the Algerian Penal Code. Alegria: Penal Code [Algeria], Issued by Decree No. 66-156, June 1966, available at: <http://www.wipo.int/wipolex/en/details.jsp?id=7998> [accessed 23 February 2018]. See also article 340 Jordan: Penal Code [Jordan], No. 16 of 1960 as amended by Law No. 8 of 2011, available at: <http://www.wipo.int/wipolex/en/details.jsp?id=15077> [accessed 23 February 2018]

¹⁷⁹ *Supra* note 176.

¹⁸⁰ *Supra* note 164.

two hypothetical scenarios: (i) CEDAW is invoked by an adulteress wife as a defense against the application of Article 274 of the EPC claiming that this Article constitutes discrimination against women and should, thus, be repealed,¹⁸¹ and (ii) CEDAW is invoked by a wife that committed an honor killing requesting to benefit from the punishment reduction stipulated in Article 237 of the EPC.¹⁸²

The invocation of CEDAW in the previous two scenarios evokes the trilemma. As a demonstration, the competent court will have to resolve the discriminatory character of the penal provisions against CEDAW's obligation to revoke any discriminatory provisions; in addition, the court must find that the revocation of those provisions is consistent with the rulings of Shari'a law; otherwise, the Shari'a law reservation should halt the treaty.

As for the first scenario, the discriminatory character of the EPC in establishing and punishing adultery does not stem from the rulings of Shari'a law. Conversely, the latter prescribes the same punishment for adultery committed by the husband or the wife. 24:2 of the Holy Quaran reads: "The adulterer and the adulteress, scourge ye each one of them with a hundred stripes."¹⁸³ As a result, the revocation of Article 274 does not contradict rulings of Shari'a law.

As for the second scenario, the rulings of Shari'a law with regards to reward and punishment have, in plentiful verses, showed utter equality between men and women. In the context of rewarding, 16:97 reads: "Whosoever doeth right, whether male or female, and is a believer, him verily we shall quicken with good life."¹⁸⁴ Likewise, 9:72 reads: "Allah promiseth to the believers, men and women, Gardens underneath which rivers flow, wherein they will abide - blessed dwellings in Gardens of Ede."¹⁸⁵ In the context of punishment, Shari'a law has stipulated equal punishment for men and women who commit adultery or robbery.¹⁸⁶ Verse 5:38 reads: "As for the thief, both male and female, cut off their hands."¹⁸⁷ In addition, Verse 9:68 reads: "Allah promiseth the hypocrites, both men and women, and the disbelievers fire of hell for their abode."¹⁸⁸ Based on the mentioned verses, one can argue that the Holy Qur'an designate an equal treatment for men and women in the concept of punishment and

¹⁸¹ See III.D.1.a).

¹⁸² See III.D.1.b).

¹⁸³ See 24:2 of the Holy *Qur'an*. English translation: Mohammed Marmaduke Pickthall. The Holy Qu'ran. Islamabad Shalimar Recording Co. Ltd., 1975. Available at: <http://www.khayma.com/librarians/call2islaam/quran/pickthall/surah24.html> [accessed 23 February 2018].

¹⁸⁴ See 16:97 of the Holy *Qur'an*. *Id.*

¹⁸⁵ See 9:72 of the Holy *Qur'an*. *Id.*

¹⁸⁶ *Supra* note 183.

¹⁸⁷ See 5:38 of the Holy *Qur'an*. *Id.* See also *Supra* note 183.

¹⁸⁸ See 9:68 of the Holy *Qur'an*. *Id.*

rewarding. Therefore, the male-privileging provision of Article 237 is not Shari'a driven, and its revocation does not contradict the rulings with Shari'a law.

Against this backdrop, one can argue that the competent court is entitled to refuse the application of the discriminatory provision of Article 274 or to extend the benefit of Article 237 to the honor killing committed by a wife. The competent court may premise its finding on the force of CEDAW. Whereas the latter obliges Egypt, as a signatory member, to repeal the discriminatory penal provisions, and whereas CEDAW has acquired the force of domestic laws, the publication of CEDAW's ratification considerably deems to repeal such discriminatory penal provisions, except the ones which stem from the rulings of Shari'a law.

In sum, this section discusses the trilemma that can evoke among (i) gender discriminatory penal provisions, (ii) Article 2 lit (g) of CEDAW, and (iii) Shari'a law reservation formulated to Article 2 lit (g) of CEDAW. The section presents two examples of discriminatory penal provisions, namely: adultery and the honor killing.

IV. Resolving the Trilemma

This Chapter presents a methodology for the resolution of the trilemma. The first section breaks down the trilemma into two tasks: (i) assessing the legal force of ratified treaties versus non-compliant laws, and (ii) interpreting Shari'a law reservations under the Constitution of 2014. The second section responds to these tasks through the interpretation to the regulating provisions of the trilemma.

A. Dismantling the Trilemma

When the trilemma arises, the competent court should: (a) decide over the conflict between the invoked human rights instrument and the non-compliant law; and where the instrument is found to overrule the non-compliant law, (b) ascertain that application of the human rights instrument is consistent with the rulings of Shari'a law. In fulfilling these two tasks, the competent court should premise its verdict upon the relative constitutional provisions. However, the reading of such provisions brings about a magnitude of ambiguity, as shall be further discussed in the following two subsections.

1. Shall Ratified Human Rights Instruments “Have the Force of Law”¹⁸⁹ or Supersede It?

The Egyptian Constitutions have traditionally regulated the enforcement of ratified treaties in Article 151.¹⁹⁰ This Article confers the force of law upon treaties which are ratified and published in the Official Gazette. As per this article, ratified treaties have the force of law, but they do not supersede the law. Thus, the Article does not deal with the situation when the treaty and a law is contradictory since both are equally enforceable.

Similar to Article 151, the Constitution of 2014 has introduced Article 93 as a specific rule to the enforcement of ratified human rights instruments. The Article binds the state with those instruments and confers upon them the force of law.¹⁹¹ However, the Article does not provide an explicit resolution of the conflict between those instruments and laws.

At a first glance, the reading of Article 93 poses multiple questions with regards to its denotations and instances. One can argue that the application of ratified human rights instruments prevails over non-

¹⁸⁹ Article 93 and 151 of the constitution of 2014. *Supra* note 60.

¹⁹⁰ The provision has not been significantly changed since the constitution of 1971 till the present constitution. The second section of Chapter II discusses the enforcement of ratified international treaties. See II.B.1. Article 151 of the constitution of 2014 states: “The President of the Republic shall represent the State in its foreign relations and conclude treaties and ratify them after the approval of the House of Representatives. Such treaties shall acquire the force of law following their publication in accordance with the provisions of the Constitution.” *Supra* note 60 & 62.

¹⁹¹ Article 93 states: “The State shall be bound by the international human rights agreements, covenants and conventions ratified by Egypt, and which shall have the force of law after publication in accordance with the prescribed conditions.” See *Id.*

compliant laws. Such an argument is premised on the obligation imposed by the Article upon the state to enforce human rights instruments.¹⁹² As an elaboration, the competent court, as part of the state, is obliged to uphold the application of ratified human rights instruments. Hence, the competent court should overrule the application of such instruments over any non-compliant law. On the other hand, one can argue that the provision of the Article is not much different than Article 151 based on the indefinite reference to the term “the state” and for the explicit wording that such instruments “have the force of law;”¹⁹³ thus not superior to the law. The ambiguity of this Article can be relied on to reinforce both arguments. Furthermore, the Article confers the force of law upon ratified human rights instruments “in accordance with the prescribed conditions.”¹⁹⁴ The reference to those conditions is another ambiguity that the Article bears.

In sum, the Constitution has traditionally conferred the force of law upon ratified and published treaties. In addition, the Constitution of 2014 has introduced a specific Article for the enforcement of human rights instruments. However, the conflict between ratified instruments and non-compliant laws is not resolved by a constitutional provision.

2. The Interpretation of Shari’a Law Reservation and the Constitutional Interpretation of the Rulings of Shari’a Law

The second difficulty that the competent court encounters in resolving the trilemma is to articulate an interpretation of Shari’a law reservations. These reservations halt the application of the ratified instrument if it is not compatible with the rulings of Shari’a law. The competent court should, hence, apply a compatibility test between the provisions of the invoked instrument against the rulings of Shari’a law. However, the massive breadth and multiplicity of Islamic jurisprudence complicates the conduct of such test.¹⁹⁵

Nevertheless, the competent court may cite the interpretation of rulings of Shari’a law as coined by the SCC.¹⁹⁶ With reference to the second Article of the Constitution which designates the rulings of Shari’a law as the main source of legislation,¹⁹⁷ the SCC confined the reference of those rulings to the ones which are “absolutely certain with respect to both their authenticity and meaning.”¹⁹⁸

¹⁹² Article 93 reads: “The state shall be bound...” See *Id.*

¹⁹³ See *Id.*

¹⁹⁴ See *Id.*

¹⁹⁵ The Third Section of Chapter II elaborates on the breadth and multiplicity of the jurisprudence of Islam. See II.C.

¹⁹⁶ The SCC has found that the interpretation of the rulings of Shari’a law should be confined to those rulings which are absolute in their authenticity and meaning. *Supra* note 108.

¹⁹⁷ The third section of Chapter II further discusses the meaning of the reference to Shari’a law in the Constitution. See II.C.2.

¹⁹⁸ *Supra* note 108.

Accordingly, one can argue that the competent court is obliged to follow the SCC in interpreting Shari'a law reservations. Nonetheless, one can also argue that the SCC interpretation is in reference to the constitutional designation of Shari'a law as the main source of legislation; thus, it is not binding over the competent court to follow it in interpreting Shari'a law reservations.¹⁹⁹

Defining the obligation of the competent court to follow the SCC in interpreting Shari'a law reservation plays a crucial role in the resolution of the trilemma. If, *arguendo*, the competent court is obliged to follow the SCC, then ratified human rights instruments will only be halted if they violate a ruling of Shari'a law which is absolute in terms of its authenticity and meaning. If, however, the competent court is not obliged to follow the SCC, the application of the ratified human rights instrument can be halted, at the discretion of the court, when it violates any ruling of Shari'a law irrespective of the authenticity of such a ruling.

B. Interpreting the Trilemma

Reading the indefinite terms of Article 93 along with Article 151 of the Constitution of 2014 provides no clear answer to the question of supremacy between ratified human rights treaties and non-compliant laws. Likewise, the obligation of the competent court to follow the SCC in interpreting Shari'a law reservation is debatable. As a result, the regulating rules of the trilemma should be examined in the realm of legal interpretation. By that token, one can deduce the meaning of those provisions and follow that meaning in the resolution of the trilemma.

The purpose of this subsection is to examine the regulating provisions of the trilemma in order to grasp the meaning of their terms. The first part presents the methods of legal interpretation. The second part investigates the obligation of the competent court to prevail the application of ratified human rights instrument over non-compliant laws under the terms of Article 93. The third part argues that the competent court is obliged to follow the SCC in the interpretation of Shari'a law reservations.

1. Canons of Interpretation

The statutory text should be sufficiently clear in order to determine its "plain meaning."²⁰⁰ The statute is not clear when "it is open to two or more constructions, or where it is of such obscure or doubtful meaning that reasonable minds might disagree or be uncertain as to its meaning."²⁰¹ The determinacy of the statutory text is crucial to the judicial decision making. When the terms of the text are clear,

¹⁹⁹ The obligation of the competent court to follow the SCC interpretation of Shari'a law in interpreting Shari'a law reservation is further discussed in the second section of Chapter IV. See IV.B

²⁰⁰ Farrell, 365 Ark. 465, 231 S.W.3d 619.

²⁰¹ See *Id.*

courts effortlessly apply the rule with no discretion in interpreting it. However, the language of the statutes commonly leaves a magnitude of uncertainty within it.²⁰² H.L.A Hart claims that language, in general, is inherently limited in its capability to provide guidance.²⁰³ For example, a rule that forbids any individual from taking a vehicle into a public park.²⁰⁴ This rule clearly applies to automobiles; however, questions can be raised about the application of this rule to bicycles, roller skates, toy automobiles, or even aeroplane.²⁰⁵ Hart theorizes that the statutes have a core meaning which is surrounded by “a penumbra of uncertainty.”²⁰⁶ Against any vagueness or ambiguity that a statutory text may cast, the resort to the canons of interpretation is unavoidable. Judges use those canons in order to dig beyond the wording of the statute in order to grasp its meaning. Those canons form the legal science of statutory interpretation; hence, the process of interpretation must be conducted with their accordance.

In interpreting a statute, emphasis should be primarily given to the text itself.²⁰⁷ If the statute is sufficiently clear in its wording, judges should not attempt to interpret the text. When, however, the wording of the statute bears uncertainty or ambiguity, judges should find its meaning through the interpretation of the text.²⁰⁸ Textual interpretation analyzes the literal meaning of the words, terms, and statements of the ambiguous text in an attempt to grasp its meaning. However, the wording of statutes might be open to several interpretations. In that event, judges should analyze the text in alignment with the rest of the statute. By that token, the meaning of the ambiguous text could appear within the framework prescribed in the whole statute. If the text is, nonetheless, ambiguous, judges should find the purpose of the legislature through investigating the *travaux préparatoires* of the statute and interpret the meaning of the ambiguous text in accordance with the legislative purpose.²⁰⁹

In common law countries, some codified canons guide the process of statutory interpretation.²¹⁰ For example, *expressio unius est exclusion alterius* dictates that the inclusion of one thing indicates the

²⁰² Solan, Lawrence M. *The Language of Statutes: Laws and Their Interpretation*, University of Chicago Press, 2010. ProQuest Ebook Central, <https://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=648151>. Page 3.

²⁰³ H.L.A Hart, *The Concept of Law*, 1961. Page 124.

²⁰⁴ See *Id.*

²⁰⁵ See *Id.*

²⁰⁶ See *Id.*

²⁰⁷ Salah El Deen Fawzy, *The Constitutional Law: The General Theory*, 2014. Page. 300.

²⁰⁸ See *Id.* Page 301.

²⁰⁹ See *Id.* The term “travaux préparatoires” means: the literary meaning of this French term is preparatory works. It constitutes the materials used in preparing the ultimate form of an agreement or statute” See the official website of the US legal. Available at: <https://definitions.uslegal.com/t/travaux-preparatoires/> [accessed 23 February 2018].

²¹⁰ See, Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 *Geo. L.J.* 341, 432 (2010). See also, Hutton, Christopher. *Language, Meaning and the Law*, Edinburgh University Press, 2009. ProQuest Ebook Central, <https://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=420678>. Cross, Frank B. *The Theory and Practice of Statutory Interpretation*, Stanford University Press, 2014. ProQuest Ebook Central, <https://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=888455>.

exclusion of others. Likewise, *noscitur a sociis* infers that an ambiguous word is better understood in alignment with other words grouped in the same statute.²¹¹ Moreover, *in pari materia* suggests that an ambiguous statute is better understood in alignment with other statutes.²¹² More importantly, the rule against surplusage directs the interpreters to avoid formulating interpretations that would render other provisions of the statute superfluous or redundant.²¹³

Similar to the content of the rule against surplusage, Egypt and other Arab countries regard the legislature as immune to redundancy and superfluity. This perception has been voiced in multiple judgments in Egypt and other Arab courts.²¹⁴ Hence, the interpretation of an ambiguous statutory text should not render other provisions of the statute redundant or unnecessary.

2. “The State Shall Be Bound,” but Shall be the Competent Court?

At a first glance, the reading of Articles 93 and 151 of the Constitution of 2014 does not resolve the conflict between ratified treaties, and laws. However, the synthesis of both Articles can be argued to confer supremacy on the judicial application of ratified human rights instruments over non-compliant laws. Such an argument can be premised on the textual, contextual, and purposive understanding of the articles.

Prior to putting the terms of the Articles under the scrutiny of interpretation, it is of primary importance to point out the differences between these two Articles.²¹⁵

Article 151 vests upon the president the power to sign international treaties and ratify them upon the approval of the parliament. The Article confers the force of law upon such treaties after their publication in the Official Gazette.²¹⁶ In contrast, Article 93 binds the state with the ratified human rights agreements, covenants, and conventions. Such instruments are given the force of law upon their publication. Accordingly, both Articles regulate the enforcement of international instruments, and both Articles confer the force of law upon these treaties. However, in addition to the obvious difference that Article 93 is confined to human rights instruments, it bears three other differences: (i) whereas Article 151 only mentions treaties, Article 93 mentions agreements, covenants, and conventions; (ii) Article

²¹¹ See *Id.*

²¹² See *Id.*

²¹³ See *Id.*

²¹⁴ The Egyptian Court of Cassation, Criminal Circuit, Challenge no. 48, Judicial year 26. 20/3/1956. See also, The Egyptian Supreme Administrative Court, Challenge No. 3411, Judicial Year 31. 1/4/1993.

The UAE Supreme Union Supreme Court, Commercial and Civil Judgements, Challenge No. 92- Judicial Year 25 8/6/2003.

²¹⁵ The traditional provisions of Article 151 and Article 93 of the Constitution of 2014.

²¹⁶ The second Section of Chapter II examines the domestic enforcement of ratified treaties. See II.B. See also *Supra* note 60.

151 requires the approval of the parliament as a prerequisite for the ratification of a treaty while Article 93 does not require such prerequisite; and (iii) in addition to conferring the force of law upon human rights instruments, Article 93 binds the state with those instruments. For the purpose of solving the questing of supremacy between the ratified treaties and laws, the terms of the third difference will be textually, contextually, and purposively analyzed below.

a) The Textual Interpretation

The interpretation of the term “the state” mentioned in Article 93 has a significant impact on the question of supremacy between ratified human rights instruments, and laws. If, *arguendo*, the reference of the term “the state” extends to apply to all state authorities, then the judiciary as well as the SCC are bound by the ratified human rights instruments.

Before the Constitution of 2014, the SCC found that the application of non-compliant laws over ratified human rights instruments is not a constitutional violation;²¹⁷ however, such a dictum can be argued to be unacceptable under the Constitution of 2014. As per Article 93, ratified human rights instruments not only possess the force of law, but they are also binding upon courts to apply. Therefore, courts are obliged to uphold the application of ratified human rights instruments in spite of any non-compliant laws.

The obligation of the judiciary to prevail the application of ratified human rights treaties over non-compliant law is premised on the theorized interpretation of Article 93 that extends the reference of the term “the state” to the judiciary. In order to investigate the validity of this interpretation, the term “the state” should be textually interpreted.

On the international level, various definitions have been articulated for the term “the state.”²¹⁸ These definitions have listed three main elements for the recognition of a state, namely: people, a defined territory, and a supreme authority.²¹⁹ However, the term “the state” on a domestic level refers to the authorities, or powers, of the state. In Egypt, there are three main state powers: (i) the legislative power (the parliament), (ii) the executive power (the government), and (iii) the judiciary (the courts). Those powers are numerated respectively in chapter 1, 2, and 3 under part (V) of the Constitution of 2014.

²¹⁷ See the *Supra* note 117.

²¹⁸ For example, See Willoughby: “The state exists whenever there can be discovered in any community of men a supreme authority excising a control over the social actions of individuals and groups of individuals, and itself subject to no such regulations.” Woodrow Wilson: “A people organized for law within a definite territory.” See Sa‘d ‘Asfūr, *al-Qānūn al-dustūrī*, 1954. Pages 225- 230.

²¹⁹ See *Id.*

Therefore, the term “the state” can be argued to apply to the judiciary. The competent court, as part of the judiciary, is thus bound by ratified human rights instruments and should uphold their application over non-compliant laws.

b) The Contextual Interpretation

The phraseology of Article 93 as well as the Preamble of the Constitution suggests the supremacy of the application of ratified human rights instruments over non-complaint laws.

On the one hand, if the legislature is immune to redundancy and superfluity,²²⁰ then Article 93 must not be mere replication of the traditional provision of Article 151. If the latter confers the force of law upon all kinds of ratified treaties, it would be redundant to draft Article 93 which likewise only confers the force of law upon ratified human rights instruments. As a result, Article 93 must be interpreted in a way that does not render the traditional provision of Article 151 as unnecessary. In attempting to grasp that meaning, light should be shed on the inclusion of the statement “the state shall be bound” in addition to conferring the force of law on ratified human rights instruments. Moreover, Article 93 is listed under Part IV of the Constitution of 2014. This part outlines the freedoms and rights of citizens. Therefore, one can deduce that those instruments have the force of law; in addition, the competent court is bound to enforce those instruments over non-compliant laws in cases of contradictions.

On the other hand, the reading of Article 93 in alignment with the rest of the Constitution highlights the unprecedented attention the Constitution of 2014 draws to human rights. This attention can be seen in different areas of the Constitution. The preamble of the constitution states: “We are drafting a Constitution that paves the way to the future for us, and which is consistent with the Universal Declaration of Human Rights which we participated in drafting and adopted.”²²¹ Article 5 regards the respect for human rights as a main pillar of the Egyptian political system.²²² In addition, the Constitution recognizes human rights councils and guarantees their independence.²²³ Moreover, the Constitution regards any violation of the rights and freedoms guaranteed by the constitution as a crime which does not abate by laps of time.²²⁴ The Constitution also binds universities to teach the values of human rights in all academic disciplines.²²⁵ The reading of Article 93 should be situated within the

²²⁰ See IV.B.1. *Supra* note 214.

²²¹ *Supra* note 60.

²²² The article reads: “The political system is based on political and partisan pluralism, peaceful rotation of power, separation and balance of powers, the inevitable correlation between powers and responsibilities, and respect for human rights and freedoms, as stated in the Constitution.” See *Id.*

²²³ Article 214 of the constitution of 2014. See *Id.*

²²⁴ Article 99 of the constitution of 2014. See *Id.*

²²⁵ Article 24 of the of the constitution of 2014. See *Id.*

constitutional tendency to elevate human rights in Egypt. Therefore, it can be argued that the framework of the present Constitution suggests supremacy to the application of ratified human rights instruments over non-compliant laws.

c) The Purposive Interpretation

The legislative purpose of Article 93 is to be located in the *travaux préparatoires* of the Constitution of 2014. Before exploring these *travaux préparatoires*, it's important to shed light on how the Constitution of 2014 came into being. The commencement of drafting the Constitution was initiated by virtue of Presidential Decree No. 489 of Year. 2013 which formed a ten-member Committee to revise the provisions of the revoked Constitution of 2012 and make recommendations for the drafting of the new Constitution.²²⁶ Based on the recommendations of the ten-member Committee, Presidential Decree No. 570 of Year 2013 formed another fifty-member Committee and assigned it to the task of drafting the Constitution of 2014.²²⁷ The committee held 63 meetings in the last of which it presented the final draft of the suggested provisions. The phraseology of the draft was subsequently revised by an expert committee. Then, the draft was finally offered for public referendum on January 14 and 15 2014.²²⁸ The results of the referendum was announced on January 18th, 2014 showing 98.1% had voted for the constitution.²²⁹

In revealing the legislative purpose of Article 93, recourse should be made to the minutes of the meetings held by the fifty-member committee which drafted the provisions of the Constitution.²³⁰ In the first few meetings, the members of the committee gave introductory speeches expressing their aspiration about the work and held general discussions. In the following meetings, the members formed subcommittees such as: State and Basic Pillars Subcommittee, Rights and Freedoms Subcommittee, and Social Communication Subcommittee. Each Subcommittee proposed provisions to be included in the constitutional draft; after such proposals were discussed, they were referred to voting.

In the introductory speeches of the members, the enforcement of human rights was abundantly echoed. Among the words of the introductory speeches made in the fifth meeting, international human rights instruments were cited as a binding reference for the political, civil, economic, and social rights that

²²⁶ The procedures of the drafting of the constitution of 2014 at *Supra* note 207 Page 277.

²²⁷ See *Id.* at Page 280.

²²⁸ See *Id.* at page 292.

²²⁹ See *Id.*

²³⁰ The minutes of the 63 meetings held by the fifty-member committee are available at: <https://manshurat.org> [accessed 23 February 2018].

the constitution will express.²³¹ In a similar view, it has been said that: “Regarding international obligations imposed on Egypt, especially those related to human rights, it is important for this Constitution to confirm that every national deserves all human rights akin to developed countries; thus, we must assure that obligations of human rights instruments are binding.”²³² Likewise, another introductory speech claimed that the practice of rights should not be subject to the provisions of law “I wrote that the constitution usually, and specially with regards to rights and freedoms, mentions the statement of “as prescribed by law.” ... Sadly, this statement was being abused by arbitral governments to limit rights and freedoms.”²³³ In addition, the Chair of Rights and Freedoms Subcommittee, in her introductory speech: “we discussed the necessity to include an explicit provision that confirms the binding nature of ratified human rights treaties.”²³⁴ Moreover, Pastor El Biady suggested: “Why cannot we regard international treaties and agreements as a main part of the political system. Not the treaties which have been signed or ratified but those treaties which have been approved by the parliament should be a source of legislation.”²³⁵ Most importantly, the introductory speech made by Mrs. Mourad in which she stated that:

There are certain general principles that we must adhere to in drafting the constitution. I will focus on two principles. The first is the respect of the human rights treaties and its obligation. Thus, the constitution must clearly stipulate that no law, decree, regulation should violate the UDHR, ICCPR, ICESCR, The Declaration of The Right to Develop, labour rights related treaties, and women’s rights, and CEDAW...²³⁶

Based on these introductory speeches, it could be argued that the drafters of the Constitution had the intent to reinforce the application of ratified human rights instruments.

The provision of Article 93 was proposed in the nineteenth meeting of the fifty-member Committee.²³⁷ The proposal came from State and Basic Pillars Subcommittee as a novel Article.²³⁸ The text read:

²³¹ Mr. Hussien Abd El Razik, The Fifth Meeting of the fifty-member drafting committee, September 11th, 2013. Page 7. See *Id.*

²³² Mr. Muhammed Abu El Ghar, The Fifth Meeting of the fifty-member drafting committee, September 11th, 2013. Page 21. See *Id.*

²³³ Mr. Mahmoud Badr, The Sixth Meeting of the fifty-member drafting committee, September 11th, 2013. Page 23. See *Id.*

²³⁴ Ms. Hodda El Satta, The Sixth Meeting of the fifty-member drafting committee, September 11th, 2013. Page 35. See *Id.*

²³⁵ Pastor.Safwat El Baiady, The Sixth Meeting of the fifty-member drafting committee, September 11th, 2013. Page 20. See *Id.*

²³⁶ Ms. Safaa Zaki Mouad, The Sixth Meeting of the fifty-member drafting committee, September 11th, 2013. Page 3. See *Id.*

²³⁷ The Nineteenth Meeting of the fifty-member drafting committee, November 3rd, 2013. Page 3. See *Id.*

²³⁸ Unlike an abundance of constitutional provisions which are a plain copy or a modified one of former constitutional provisions, novel articles are those that are introduced by the committee.

“The state shall be bound by the rights and freedoms stipulated in human rights agreements, covenants and conventions which Egypt ratifies.”²³⁹ Upon reading the text, it was hotly debated by the members invoking the ambiguity which this Article bears. Some members theorized that the instance of this Article is identical to the traditional provision of Article 151 and thus redundant; others found the difference in the language of the text that details agreements, covenants, and conventions whereas Article 151 only mentions treaties. Other members endorsed the text because the inclusion of such an Article in the Constitution would elevate how Egypt is pictured on the international level. Against the multiplicity of views raised by the members regarding this text, emphasis should be given to the comment raised Mrs. El Telawy criticizing the status of human rights fulfillment in the last political era. In the wording of her comment, she stated that:

First, I want to say that the inclusion of this Article in the constitution is very necessary. Why? Because the previous government wanted to conceal that reference (the reference to the enforcement of ratified international treaties)²⁴⁰ so as to revoke any social laws which have been enacted under that reference... you are saying that Egypt already complies with the obligations of international instruments. In fact, Egypt does not.... This can be seen in the human rights reports about Egypt which raise numerous allegations against Egypt because it signs the treaty, but it does not comply with the obligations of it.²⁴¹

To a similar sense, Mr. El Naggar justified his endorsement to this text by stating that:

[t]his text benefits the people, and we represent the people in claiming their rights. The text binds the state with the rights and freedoms, and we should assure more rights and freedoms to the people. If this text does not grant the people with more rights and freedoms recognized by the international community, it, at least, equalize the people with the international community.²⁴²

The question about the legal force of ratified human rights instruments and their position in the hierarchy of legality was posed by Mr. Abd El Salam. He questioned if, based on this text, ratified human rights instruments should have the legal force of the constitution, and thus trump any non-compliant law.²⁴³ The responses made to that question did not give a clear answer. Many responses held that ratified human rights instruments do not possess the legal force of the constitution. Other

²³⁹ See *Id.*

²⁴⁰ Added by the author.

²⁴¹ Ms. Mervet El Telawy. See *Id* at page 86.

²⁴² Mr. Abdullah El Naggar. See *Id* at page 86.

²⁴³ Mr. Muhammed Abd El Salam. See *Id* page 88.

responses supported that Egypt must be obliged by ratified human rights instruments. The text was finally referred to voting and passed by 80% of the members.²⁴⁴

The examination of the *travaux préparatoires* does not provide an explicit answer to the question of supremacy between the application of ratified human rights instruments and non-compliant laws. However, one can point out multiple statements that showed rejection of the non-enforcement of ratified human rights instruments on the domestic level, and other comments attempted to secure as many freedoms and rights as possible for the Egyptian people. Although some of these comments were contested by other members, the text eventually passed by 80% of the members who voted for it.²⁴⁵

Upon the textual, contextual, and purposive interpretation of the terms of Article 93, it could be argued that the Constitution of 2014 opens the door for further judicial application of human rights instruments. However, this finding can be countered by other interpretation that can be derived from the ambiguous terms of the Article.

3. The Interpretation of SCC is Binding on The Competent Court

The interpretation of Shari'a law reservations should not be left to the discretionary power of the competent court. Rather, the latter should follow the interpretation articulated by the SCC in defining the rulings of Shari'a law.²⁴⁶

The SCC has found that reference to the rulings of Shari'a law is confined to the ones which are absolutely certain with respect to their authenticity and meaning.²⁴⁷ Nonetheless, The Administrative Court has formulated broader interpretations of Shari'a law reservations formulated to ratified human rights instruments. This subsection argues that the competent court should follow the SCC in the interpretation of Shari'a law reservation. The argument is chiefly premised on the constitutional and legislative provisions regulating the powers of the SCC.

The Constitution of 2014 regulates the powers of the SCC in the fourth chapter of Part (V). Article 192 outlines the powers of the court as follows: "The Supreme Constitutional Court shall be solely competent to decide on the constitutionality of laws and regulations, to interpret legislative provisions..."²⁴⁸ Following the terms of this Article, the interpretation of legislative provisions should be an exclusive power possessed by the SCC. As prescribed by the Constitution, ratified treaties should

²⁴⁴ Only six members out of thirty members who attended this meeting voted against this article. See *Id.*

²⁴⁵ See *Id.*

²⁴⁶ *Supra* note 108. Also see II.C.2.

²⁴⁷ See *Id.*

²⁴⁸ *Supra* note 60.

be examined by the parliament, and their approval should be published in the Official Gazette;²⁴⁹ thus, the treaty becomes a legislative instrument. Whereas interpreting legislative provisions is exclusively in the hand of the SCC, therefore the competent court should follow the legislative interpretation articulated by the SCC.

The judgments of the SCC are of absolute authority. Article 195 of the Constitution of 2014 reads: “The judgments and decisions issued by the Supreme Constitutional Court shall be published in the Official Gazette, and they shall be binding upon everyone and all of the State authorities. They shall have Res judicata vis-à-vis all of them.”²⁵⁰ Therefore, courts are constitutionally obliged to adhere to the decisions and judgments ruled by the SCC.

The interpretations of the SCC are also of binding nature. Article 49 of the Law of the SCC reads: “The court judgements and interpretations are binding to all state authorities and to all.”²⁵¹ Therefore, not only are courts obliged to adhere to the judgements ruled by the SCC, the interpretations made thereby are also not to be altered by any court.

With relations to the Second Article of the Constitution which has traditionally designated the rulings of Shari’a law as the main source of legislation,²⁵² the SCC has found that the reference to those rulings is confined to the ones which are “absolutely certain in terms of their authenticity and meaning.”²⁵³ In this judgement, the SCC differentiated between the rulings which are directly driven from a divine source and whose meaning is undisputedly clear, and the rulings which are deduced by the intellectual process of *Ijtihad*.²⁵⁴ The court found that the interpretation of Shari’a law should be confined to the first category of rules.²⁵⁵

With this being said, the competent court should follow the SCC in interpreting Shari’a law reservation formulated to ratified human rights instruments. The ratified instrument, with the reservation formulated thereto, is a legislative instrument based on its approval by the parliament. Whereas the interpretation of legislative provisions is one of the judicial task which the SCC solely possesses, the competent court should not use its discretion in defining Shari’a law reservation formulated to the treaty.

²⁴⁹ Article 151 of the constitution of 2014. See *Id.* Also see II.B.1.

²⁵⁰ See *Id.*

²⁵¹ See Egypt: The Supreme Constitutional law [Egypt], No. 48 of 1979, September 1979.

²⁵² *Supra* note 60. Also see II.C.2.

²⁵³ *Supra* note 108

²⁵⁴ See *Id.* See also II.C.1.

²⁵⁵ See *Id.*

Moreover, based on the absolute authority of the judgements and interpretations of the SCC,²⁵⁶ the competent court is obliged to adhere to the interpretation of Shari'a law as articulated by the SCC.²⁵⁷ This obligation is crystalized by the preamble of the Constitution of 2014 which states: "We are drafting a Constitution that affirms that the principles of Islamic Sharia are the principal source of legislation, and that the reference for the interpretation of such principles lies in the body of the relevant Supreme Constitutional Court Rulings."²⁵⁸ As a result, the competent court should not use its discretion to interpret Shari'a law reservation formulated to international treaties.

Nevertheless, the SCC interpretation was made to Shari'a law as the main source of interpretation, and not as a reservation formulated to a treaty. As a result, the obligation of the competent court to follow such interpretation with regards to Shari'a law reservation can be contested because the competent court is only obliged to follow it in the same context. However, this contention can be countered by two arguments. Firstly, the unity of the theme of the second Article of the Constitution and the reservation makes the obligation of the competent court plausible. As an elaboration, the content of the second Article as well as the reservation is Shari'a law; if the latter has been interpreted by the SCC, such interpretation is binding upon other courts. Secondly, the power to interpret legislative provisions is exclusively conferred to the SCC; as a result, if the competent court should not articulate a different definition to Shari'a law reservation and should follow insofar the interpretations made by the SCC.

C. Deciding the trilemma

Based on the theorized finding of the last two sections, the judicial application of ratified human rights instruments should prevail over any non-compliant law. Such instruments should only be halted if found inconsistent with the rulings of Shari'a law as interpreted by the SCC. This section briefly applies these finding of the discussed trilemma cases of apostasy and labour strike.²⁵⁹

The Egyptian Administrative Court has dismissed the request to notarize conversion from Islam.²⁶⁰ The case was filed by an apostate who faced rejection from the Civil Status Department to notarize conversion from Islam to Christianity. The plaintiff's request was, among other grounds, premised on Egypt's obligation to guarantee freedom of religion as prescribed in the ICCPR. The Court reviewed

²⁵⁶ *Supra* notes 250 & 251

²⁵⁷ *Supra* note 108

²⁵⁸ *Supra* note 60.

²⁵⁹ See respectively, III.B & III.C.

²⁶⁰ *Supra* note 138.

the case and found that apostasy is incompatible with the rulings of Shari'a law; thus, the court struck down Egypt's obligation towards the ICCPR by virtue of Shari'a law reservation formulated thereto.²⁶¹

The finding of this judgment is justified by some views in the Islamic jurisprudence that regards apostasy as a great sin that is punishable by the death penalty.²⁶² However, other Islamic jurisprudential schools contest the existence of a corporal punishment for apostasy. Those views stress on the non-binding character of Islam; they suggest that Non-Muslims cannot be compelled to follow Islam, and Muslims should not be compelled to remain Muslims.²⁶³ As a result, the prohibition of apostasy is not one of the rulings of Shari'a law which are absolute in terms of their authenticity and meaning. Whereas the SCC interpretation of Shari'a law is confined to these rulings, the Administrative Court should, thus, only halt the application of ratified human rights instruments based on violating one of these rulings. Therefore, notarization of conversion from Islam should not be withheld because of Shari'a prohibition.

Similarly, the Egyptian Administrative Court held the illegality of labor strike and applied penalties upon its doers.²⁶⁴ Although the strikers' defense relied on Egypt's obligation to guarantee the legality of labor strike as prescribed by the ICESCR, the court rejected the defense and found them guilty. The court reasoned its judgment upon the prohibition of strike in the Islamic jurisprudence.²⁶⁵ Nevertheless, the theorization of such prohibition is by far not one of the rulings which are absolute in terms of their authenticity and meaning.²⁶⁶ As a result, the application of the ICESCR should not be halted thereof.

²⁶¹ See *Id.*

²⁶² Based on *Hadith* (a statement of Prophet *Muhammed*) which reads: "kill he, who changes his religion."

²⁶³ Nassar Y. The Legal Framework of Apostasy in Egypt: An Illegal Limitation on Freedom of Belief (2014). Under the heading: "The Diversity of Opinion in Islamic Shari'a on Apostasy through Abandoning Islam" the author demonstrates the scholarly disagreements about the punishment of apostasy in life.

²⁶⁴ *Supra* note 154.

²⁶⁵ See *Id.*

²⁶⁶ The prohibition of labor strike as theorized by the Court is not premised on a divine source of Shari'a law. See 154. See also III.C.2

V. Conclusion

The trilemma arises when a ratified human rights instrument is invoked against the application of a non-compliant law. In this situation, the competent court encounters two inconsistent legal instruments, namely the non-compliant law and the treaty. Similar to laws, ratified treaties are legally enforceable instruments.²⁶⁷ As a result, those instruments are to be judicially applied akin to laws. However, the situation is perplexing due to the conflict between the two instruments. In resolving this conflict, the competent court will inevitably use its discretion to place one instrument over the other, but such decision should be premised on a constitutional or a legal ground. In this regard, no clear constitutional or legislative provision deals with the situation. As a result, a previous judgement has attempted to resolve the conflict based on the rule of “*lex posterior derogat legi priori*”²⁶⁸ i.e. the subsequent instrument renders the earlier instrument inoperative. Although the latter judgement presents a plausible way of resolving the inconsistency between legal instruments, the SCC held that the application of a non-compliant law in spite of ratified instrument is not a constitutional violation because “[t]hose treaties hold the legal force of laws, yet they do not supersede laws.”²⁶⁹ Against this absence of legislative guidance or determinate judicial practice, the resolution of the conflict remains a conundrum to the competent court.

In addition to the difficulty of resolving the conflict between the application ratified instruments and laws, the interpretation of Shari’a law reservation constitutes another legal difficulty for competent court. Egypt has formulated Shari’a law reservations to numerous human rights instruments; thus, the application of those instruments is halted in cases of incompatibility with the rulings of Shari’a law. Hence, before the ratified instrument is judicially implemented, its compatibility with the rulings of Shari’a law should be ascertained. However, the compatibility assessment between the treaty and the rulings of Shari’a law is confounded due to the multiplicity and indeterminacy of Shari’a law jurisprudence.²⁷⁰ Although, the SCC has narrowed the reference of Shari’a law to the rules which are “absolutely certain with respect to both their authenticity and meaning,”²⁷¹ the Administrative Courts articulated broader definition of Shari’a law.

Against this backdrop, the Egyptian Administrative Court struck down obligations of ratified human rights instruments based on the broad interpretation of Shari’a law. For example, the Court revoked

²⁶⁷ *Supra* note 60. See II.B.1.

²⁶⁸ *Supra* note 73. Also see the court judgement of the Court of High State Security in which ICESCR overruled article 124 of the EPC based on the rule: “*lex posterior derogat legi priori*” at *supra* note 75.

²⁶⁹ *Supra* note 117.

²⁷⁰ See II.C.1.

²⁷¹ *Supra* note 108.

Egypt's obligation to guarantee freedom of religion based on the Islamic prohibition of apostasy. Likewise, The Court renounced Egypt's obligation to guarantee the legality of labor strike on the basis of Islamic prohibition.

This judicial assassination of ratified human rights instruments can be attributed to two main reasons: (i) the absence of any legislative or judicial guidance for resolving the conflict between ratified human rights instruments and laws, and (ii) the difficulty of interpreting Shari'a law reservations. Because of these two reasons, the competent court, by its own discretionary, decides the conflict.

Moreover, the EPC embodies numerous provisions which constitute discrimination against women. Since Egypt is a signatory member to CEDAW, then Egypt has undertaken to repeal those provisions. As a result, CEDAW as an enforceable legal instrument can be invoked against the application of those penal provisions.

Nonetheless, this paper argues that the application of ratified human rights instruments is superior to any non-compliant law. The argument of this paper is chiefly premised on novel provisions of Article 93 of the constitution of 2014. In addition to the traditional provision of Article 151 of the Constitution which confers the force of law over ratified treaties, Article 93 binds the state with ratified human rights instruments. The term "the state" refers to the authorities of the state; thereby, it extends to the judiciary and all courts. Furthermore, Article 93 should be situated within the unprecedented attention to respect and protect human rights in the Constitution of 2014. Thus, ratified treaties not only have the force of law, but their application is binding upon courts in spite of any non-compliant law.

With relation to the interpretation of Shari'a law reservation, the paper argues that the competent court should follow the SCC's interpretation of the rulings of Shari'a law. Based on the absolute authority of the judgements and interpretations made by the SCC, the competent court should not use its discretion in interpreting Shari'a law. Rather, the competent court should assess the compatibility between the ratified instrument and the rulings of Shari'a law according to the interpretation of Shari'a law articulated by the SCC. The latter found that the reference to the rulings of Shari'a law is confined to the rules which are absolute in terms of their authenticity and meaning. Thus, the competent court should only halt the application of ratified human rights instruments when they are inconsistent with those absolute rulings.

The paper suggests that the Constitution of 2014 presents a resolution of the trilemma. Following the two arguments presented herein, domestic courts should give supremacy to the application of ratified human rights instruments over any non-compliant law. However, when the ratification of those

instruments embodies a Shari'a law reservation, domestic courts should only halt those instruments if they violate the rulings of Shari'a law which are absolute in their authenticity and meaning.