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The American University in Cairo

School of Global Affairs and Public Policy

**THE LEGAL FRAMEWORK OF APOSTASY IN EGYPT:
AN ILLEGAL LIMITATION ON FREEDOM OF BELIEF**

A Thesis Submitted to the

Department of Law

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

By

Yara Yasser Nassar

June 2014

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

THE LEGAL FRAMEWORK OF APOSTASY IN EGYPT: AN ILLEGAL
LIMITATION ON FREEDOM OF BELIEF

Yara Yasser Nassar

Supervised by Professor Gianluca Parolin

ABSTRACT

In 1996 the Egyptian Court of Cassation annulled the marriage of scholar Nasr Hamed Abou Zayd. The court ruled that through his blasphemous religious statements, he had committed apostasy. Four decades later, in 2007 the Egyptian Administrative Court did not recognize the conversion of 22 citizens from Islam to Christianity considering it an act of apostasy not recognizable by Islamic Shari'a. Egyptian authorities have arrested citizens converting from Islam citing that their apostasy was considered a belittlement of Islam and hence a violation of Egyptian Criminal Law. These are but just three examples and simply the tip of the iceberg of the legal framework of apostasy in Egyptian law and its effect on the lives of citizens and their right to freedom of belief and worship. This thesis will analyze limitations on freedom of belief in Egypt through an analysis of the legal framework of the right to abandon Islam, apostasy. In the Thesis, through a thorough analysis of Egyptian jurisprudence in regards to apostasy, we will understand that Egyptian judges wrongfully consider the rules of apostasy as an undisputed part of Islamic Shari'a and therefore a part of Egyptian public policy that is legally binding. The Diversity of opinion in Islamic Shari'a in regards to apostasy will be analyzed to prove that its rules are in fact disputed and should not be applied as part of Egyptian public policy. The Thesis will then move to see the danger of the legal framework of apostasy as it is used for political means. Finally, after understanding the framework of apostasy we will attempt to understand the choice of the Egyptian judges to apply the most conservative understanding of Islamic Shari'a in regards to apostasy and consequently choose to limit freedom of belief and violate Egypt's international obligations.

TABLE OF CONTENTS

I. Introduction	1
II. Understanding the Legal Framework of Apostasy in Egyptian Law	6
A. General Observations Regarding the Legal Framework of Apostasy in Egyptian Law.....	6
B. Legal Consequences of Apostasy in Egypt.....	7
1. Egyptian Constitutional Law	8
2. Egyptian Administrative Law.....	10
a. Egyptian Administrative Law and Conversion from Islam.....	11
b. Practice of the Administrative Courts.....	13
1) The Practice of the Administrative Courts and the Recognition of the Conversion from Islam in Identification Cards.....	13
a) Non-Recognition of Conversion from Islam.....	14
b) The Exceptions to the Established Jurisprudence.....	15
2) Illegality of the Marriage of an Apostate.....	17
3. Egyptian Penal Code.....	18
a. Egyptian Penal Code and the Criminalization of Blasphemy.....	19
b. Practice of Criminal Courts.....	22
4. Egyptian Personal Status Law.....	24
a. History of the Egyptian Personal Status Law.....	25
b. Hisba Law.....	26
c. Practice of the Personal Status Courts.....	27
1) Court of Cassation and Declaring a Muslim an Apostate.....	27
2) Marriage.....	28
3) Status of Children of Apostates.....	32
4) Inheritance.....	32
5) Property.....	32
III. International Law and Apostasy	34
A. ICCPR and Apostasy	34
B. Egyptian Reservation on the ICCPR.....	37
IV. State Premises the Legal Consequences of Apostasy on Confessional Law.....	38

A.	Public Policy as a Legal Justification for the Non-Recognition of Apostasy and the Application of its Legal Consequences.....	39
1.	Public Policy.....	39
a.	Egyptian Public Policy.....	40
1)	Islamic Shari'a as Public Policy.....	40
a)	Apostasy Rules as Islamic Public Policy.....	42
V.	Challenging the Justification of the State: the True Stance of Shari'a in Regards to Apostasy.....	45
A.	Context in which Apostasy Rules Exist: General Approach of Islam to Freedom of Belief.....	47
1.	Islam and Tolerance.....	47
a.	Islam and Tolerance towards Other Religions.....	47
b.	Islam and Tolerance towards Other Muslims.....	48
2.	Islam and the Prohibition Against Coercion.....	50
B.	Diversity of Opinion in Regards to the Rules of Apostasy in Islamic Shari'a.....	51
1.	Nonexistence of Temporal Punishment for Apostasy in the Qur'an.....	52
2.	Diversity of Opinion in Islamic Shari'a on Apostasy through Abandoning Islam.....	53
a.	Apostasy and Treason.....	53
1)	Understanding the prophet's Hadith and Sunnah in its historical context.....	54
2)	Understanding the tradition of the Caliphates in its historical context.....	56
3)	Stance of Hanafi school in Regards to Female Apostates.....	57
b.	Political Context in which the Classical Jurisprudence on Apostasy Developed.....	57
c.	Diversity of Opinion in Islamic Shari'a on Blasphemy and Its Relationship to Apostasy.....	59
1)	Sab Allah w Sab Al Rasoul.....	59
2)	The Right of God and The Right of Man.....	60
1)	Blasphemy As Apostasy.....	61
C.	Diversity of Opinion in Islamic Shari'a in Regards to Apostasy and Its Legal Consequence on Personal Status.....	62

1. Consequences of Apostasy on Marriage.....	62
2. Consequences of Apostasy on Inheritance.....	63
3. Consequences of Apostasy on Property.....	64
VI. Apostasy as a Legal Tool against Religious and Political Dissent.....	65
A. Use of the Blasphemy Penal Code Articles against Religious Converts and Dissent.....	67
B. Near-Monopoly of the Public Prosecution over Apostasy Cases.....	68
1. Presidency of Morsi.....	70
VII. Possibility of Change in Egyptian Jurisprudence and the Judges' choice not to.....	72
A. An Exception to the Conservative Jurisprudence.....	72
B. Understanding the Choice of the Judges.....	74
1. Role of Precedent.....	75
2. Selective Understanding of Apostasy Law in Islamic Shari'a.....	75
VIII. Conclusion	78

I. Introduction:

In 1996 the Egyptian Court of Cassation annulled the marriage of scholar Nasr Hamed Abou Zayd. The court ruled that through his blasphemous religious statements, he had committed apostasy.¹ Four decades later, in 2007 the Egyptian Administrative Court did not recognize the conversion of 22 citizens from Islam to Christianity considering it an act of apostasy not recognizable by Islamic Shari'a.² Egyptian authorities have arrested citizens converting from Islam citing that their apostasy was considered a belittlement of Islam and hence a violation of Egyptian Criminal Law.³ These are but just three examples and simply the tip of the iceberg of the legal framework of apostasy in Egyptian law and its effect on the lives of citizens and their right to freedom of belief and worship.

The relationship between freedom of belief within the society and the state is an overwhelming topic that has been subjected to great academic debate. The questions that often arise when discussing this relationship are constantly increasing in number due to the diversity of the societal context in which the legal right to freedom of belief and worship functions. In an attempt to add to this massive academic field, scholars have delved into a more specific analysis of the different topics, terms, laws and legal consequences. Countries that claim Islamic legitimacy, apply Islamic law or are of a majority Muslim population are of special interest to academics studying freedom of belief and worship as well as the various limitations set on it. The clearest limitation on freedom of belief and worship is the very much intrusive limitation on the right to abandon a religion, whether for the sake of another

¹Maurits Berger , *Secularizing Interreligious Law In Egypt*, (2005) available at <http://dare.uva.nl/document/196604>.

²*HossamBahgat and Joe Stork, Prohibited Identities, the Egyptian Initiative for Personal Rights and Human Rights Watch (Nov. 2007)*, available at <http://eipr.org/en/report/2007/11/01/261>.

³*Id.*

or not. This thesis will analyze limitations on freedom of belief in Egypt through an analysis of the legal framework of the right to abandon Islam, apostasy.

Egyptian statutory law is silent in regards to the issue of abandoning Islam or 'apostasy' as it is called in Islamic and Egyptian Jurisprudence.⁴ *Nulla poena sine lege* (Latin: no penalty without a law) is a basic legal principle considered a building block for rule of law within states.⁵ The basic consequence from applying such a principle is that the silence of the law in regards to an act entails that the act is allowed; hence, the performance of such act should not lead to punishment. It would however be superficial to assume that the silence of the law in regards to apostasy automatically means that it is allowed to all citizens without any limitations or consequences. In fact the analysis of Egyptian jurisprudence shows that in Egypt apostasy is not allowed and leads to a number of legal consequences. This thesis argues that the Egyptian legal framework in regards to the non-recognition of apostasy and the application of its legal consequences is in violation of Egyptian international obligation according to article 18 of the International Convention for Civil and Political Rights (ICCPR).

In Classical Islamic Jurisprudence apostasy is defined as the abandonment of Islam. It is wrongfully argued that mainstream thought within classical Islamic jurisprudence states that apostasy can take place through the conversion to another religion, or atheism, or making statements that are considered blasphemous towards to Islam.⁶ Moreover, it is also wrongfully argued that mainstream thought in classical Islamic Jurisprudence believes that committing apostasy leads to legal consequences in regards to personal status, for example divorce from spouse, losing the right to inherit and the control over ones property.⁷ This wrongful understanding of Shari'a is

⁴Maurits Berger, *Apostasy and Public Policy in Contemporary Egypt: An Evaluation of Recent Cases from Egypt's Highest Courts*, 25 Hum. Rts. Q., 720 (2003).

⁵*Nulla Poena Sine Lege Law & Legal Definition*, available at <http://definitions.uslegal.com/n/nulla-poena-sine-lege/>

⁶Rudolph Peters and Gert J. J. De Vrie, *Apostasy in Islam Rudolph Peters and Gert J. J. De Vries*, 17 Die Welt des Islams 1 (Nov. 2011).

⁷*Id.*

adhered to and implemented by the Egyptian Legal System. Egyptian Courts do not recognize apostasy through conversion from Islam to another religion. Egyptian courts apply the legal consequences of apostasy on the apostate's personal status. Egyptian penal codes criminalize the act of apostasy through blasphemy and Egyptian Courts have even acknowledged on occasion that blasphemy is an automatic commitment of apostasy. The Egyptian Courts and authorities argue that this understanding of apostasy in Islamic Shari'a which they are applying as part of the undisputed rules of Islamic Shari'a.⁸ This is important given that the Courts see the application of these rules as a legal obligation and this is made especially important given the main role that Shari'a has within Egyptian public policy.

This thesis will challenge the argument out forward by the Egyptian judiciary. This thesis argues that Egyptian courts not recognizing apostasy and applying of the legal consequences of apostasy on the apostate are in fact illegal limitations on the right to freedom of belief and worship which Egypt is obligated to uphold according to the ICCPR. Firstly, this thesis argues that the rules regarding apostasy and its legal consequences are disputed rules within Islamic Shari'a and jurisprudence; therefore, they should not part of Egyptian Public Policy and do not have to be applied according to Egyptian law. Secondly, this thesis argues that state authorities use the legal framework for apostasy to prevent any departure from mainstream state backed readings of religion or politics. Thirdly, the thesis argues that the majority of Egyptian judges choose to apply the most conservative understanding of apostasy rules in Islamic Shari'a by wrongfully choosing to use the legal precedent as a binding source of law and by consciously not researching the diversity of opinion in Islamic Shari'a in regards to apostasy.

The thesis is composed of six chapters. Each chapter has a main purpose and argument. Chapter I addresses the legal framework of apostasy in Egyptian law, including the application of the consequences of apostasy and not allowing apostasy

⁸ Berger, *Apostasy and Public Policy in Contemporary Egypt: An Evaluation of Recent Cases from Egypt's Highest Courts*, *supra* note 4.

through conversion. To understand the legal framework this chapter will discuss the current stance of Egyptian Statutory Laws and courts in regards to both types of apostasy in Egyptian law, apostasy through abandoning Islam and apostasy through blasphemy, and their legal consequences. The chapter is divided into four sections. The first section discusses the stance of the Egyptian Constitutional law on apostasy and the role of Islamic Shari'a in Egyptian law. The second section discusses the stance of the Egyptian Administrative laws, including statutory law and court practice, on apostasy, specifically in relation to not allowing the recognition of apostasy through conversion from Islam. The third section discusses the stance of Egyptian Criminal laws, including statutory law and court practice, in regards to apostasy, specifically in regards to apostasy through committing blasphemy. The fourth section discusses the stance of Egyptian Personal Status laws, including statutory law and court practice, in regards to apostasy, specifically the application of the legal consequences of apostasy on personal status. All the sections will lead to a full understanding of the legal framework of apostasy in Egyptian law, in both codified law and judicial practice.

Chapter II of the thesis addresses very briefly the stance of international law on apostasy, specifically article 18 of the International Convention for Civil and Political Rights (ICCPR) pertaining to freedom of belief and the Egyptian reservation on the convention.

Afterwards, Chapter III addresses the justification put forward by Egyptian Authorities and Courts for not allowing the recognition of apostasy through conversion from Islam and the application of the legal consequences for apostasy. This chapter discusses how Egypt considers the rules pertaining to not allowing apostasy and the application of its legal consequences as part of the undisputed principles Islamic Shari'a, which are legally a main part of its public policy that must be enforced. Therefore, allowing it legally to limit freedom of belief by applying that legal framework of apostasy.

In Chapter IV of the thesis, the justification of the Egyptian state which was discussed in the previous chapter will be challenged. Chapter IV aims to prove the rules regarding not allowing the recognition of apostasy and the application of the legal consequences of apostasy are in fact disputed rules in Islamic Shari'a and are only opinions of some Islamic jurists. This chapter addresses the diversity of opinion in Islamic Shari'a in regards to the act of apostasy itself, in both its types, and its legal consequences on personal status. This chapter also addresses how Islamic Shari'a calls for religious freedom and tolerance and prohibits religious coercion.

Chapter V addresses the use of legal framework of apostasy, specifically its legal consequences, as a legal tool against religious and political opposition. This chapter discusses the use of the criminal articles regarding blasphemy against religious converts and members of religious minorities. It also discusses the use of apostasy as a legal tool against political and religious dissent and how the state, represented in the Public Prosecution office has a semi-monopoly of over referring apostasy cases to the judiciary, and hence on when the legal framework of apostasy will be applied.

Finally, chapter VI addresses the choice of the Egyptian judges to applying the most conservative rules of apostasy in Islamic Shari'a. The chapter discusses one of the cases that are an exception to Egyptian jurisprudence in regards to apostasy, the Blasphemy case of Adel Imam in the Agouza Court. The case applies a lenient understanding of apostasy rules, which shows that Egyptian law is accepting of such an approach to apostasy and that the majority of the judges choose to apply the conservative rules. The chapter argues that judges wrongfully use legal precedent and choose not research the diversity of opinion in Islamic Shari'a to ensure continuation of the application of the conservative rules of apostasy.

II. Understanding the Legal Framework of Apostasy in Egyptian Law:

This chapter will aim to critically analyze the legal framework of apostasy in Egyptian law. For the aim of the analysis the codified law and courts' practice pertaining to apostasy will be examined. The chapter will start off by stating general theories applicable to the legal framework of apostasy in Egyptian law. Afterwards we will move to understand the legal framework of apostasy in the different fields of law and understand more how the general theories are applied in the legal system, both codified law and court jurisprudence.

A. General Observations Regarding the Egyptian Legal Framework of Apostasy:

As stated earlier, Egyptian law does not directly and explicitly regulate apostasy. Still research and analysis of Egyptian laws and jurisprudence show a strong presence of legal rules regarding apostasy. Researching and analyzing Egyptian laws and court rulings in regards to apostasy leads to a number of important general theories pertaining to the issue.

The first general observation regarding the Egyptian legal framework of apostasy is that the issue of apostasy can rise in all fields of Egyptian law. The legal framework of apostasy is clearly fragmented. In Islamic Shari'a itself the rules of apostasy are fragmented in the different field; therefore, this fragmentation is also present in the legal framework of apostasy as Islamic Shari'a must be applied in all fields of Egyptian law. As will be discussed in details in this chapter, the issue of apostasy arises in the different fields of Egyptian law in a diversity of ways specific to each one of them. For example, the issue of apostasy appears in administrative law in the cases of attempting to change the religious affiliation of the citizen in his/her identification card, it rises in criminal law in the cases of blasphemy and it rises in personal status law in the issue of marriage, inheritance and others. Because there is no codified law the courts do not go back to a specific written article, except the constitutional one regarding Islamic Shari'a as a main source of legislation in

Egyptian law. In the end all the different courts in the various fields of law apply what they wrongfully understand as the undisputed rules of Islamic Shari'a in regards to apostasy, as that is the only legal source for rules on apostasy. Secondly, the role of Islamic Shari'a as the base of the legal framework of apostasy in Egypt proves the existence of a legal duality in Egypt, the written codified law, what can be called the 'visible law' and the un unwritten applied law, which can be called the 'invisible law'. The visible law does not mention apostasy. It gives the impression that religious conversion is not regulated or criminalized. The invisible law, the one that emerges from looking holistically at how courts interpret the rules in different fields shows otherwise.

The second general observation regarding the Egyptian legal framework of apostasy is that the duality and fragmentation serve the function of policing religious belief without formally challenging relevant international human rights norms, in particular article 18 of the ICCPR. The duality and fragmentation insures that there is a legal way, in every field of the law, to eliminate any form of external expression of apostasy, whether through conversion from Islam or blasphemy, without having Egypt in breach of its international obligations.

B. Legal Consequences of Apostasy in Egypt:

This Section will answer a number of questions with the aim of understanding the legal consequences of apostasy in Egyptian law. What is the definition of apostasy in Egyptian law? What are the different legal consequences of apostasy? How does committing apostasy affect the life of the apostate? What articles in Egyptian administrative, criminal and personal status laws are of importance to understand the legal framework of apostasy in Egypt? With the lack of a specific article in Egyptian law defining apostasy and its legal consequences, these questions will be answered through the analysis of the courts' rulings in cases regarding the legal consequences of apostasy. Moreover, to understand these courts' rulings we will examine the legal provisions in administrative, criminal and personal status laws that are related to the legal consequences of apostasy. The coming parts of this section aim to elaborate on

both theories stated in the previous section of this chapter. Through the analysis of the different fields of Egyptian law and their courts' rulings it will be clearer how the role of Islamic Shari'a in Egyptian law is the base for the entire legal framework of apostasy. Moreover, the analysis will also show how Egyptian law and courts are only concerned with the internal belief of the person if it takes any external form.

This section adopts the hierarchal construction of law offered by mainstream Egyptian academic. Consequently, we will first examine the Egyptian constitutional law and its relationship to apostasy, including the role of Islamic Shari'a in it. This will show the vital role Islamic Shari'a plays in Egyptian law, which is essential in understating how it is the legal base for the legal framework of apostasy. Afterwards, the Egyptian administrative laws related to apostasy will be examined, including the rulings of the Egyptian Administrative Courts on cases regarding the consequences of apostasy. Later, the Egyptian Penal Code related to apostasy will be examined, including the rulings of the Egyptian Criminal Courts regarding apostasy. Finally, the Egyptian Personal Status laws related to apostasy will be examined, including the practice of the Egyptian Personal Status Courts in cases related to the legal consequences of apostasy. The examination of these fields will show how the two general theories stated earlier are applied in all sections of Egyptian law pertaining to apostasy.

1. Egyptian Constitutional Law:

Understanding Egyptian constitutional law is of the utmost importance, since it is the guiding law of the state, to understanding of apostasy in Egyptian law. The Egyptian constitutions, current Constitution, do not have a provision regarding apostasy. However, the status of Islam and Islamic Shari'a in Egyptian constitutional law is of importance to the understanding of the legal framework of apostasy in Egypt. Understanding that status will help in understanding how it makes Islamic Shari'a the base of the legal framework of apostasy in Egyptian law.

According to the current Constitution, drafted by the Committee of 50 Representatives of the People that was appointed to amend the suspended constitution of 2012,⁹ the principles of Islamic Shari'a are the main source of legislation in Egypt. Article 2 of the Constitution states the following: "Islam is the religion of the state and Arabic is its official language. The principles of Islamic Shari'a are the principle source of legislation."¹⁰

Islamic Shari'a, and not just Islam as a religion, was first mentioned as a main source of legislation in the 1971 constitution.¹¹ Since then, principles of Islamic Shari'a have been a main part of Egyptian constitutional law. In the 1980 amendments to the Egyptian constitution the principles of Islamic Shari'a were stated to be "the main source of legislation" and not just "a main source of legislation".¹² Most recently, in the 2012 constitution insured that Islam is the religion of the state and in article 2 insured that the principles of Islamic Shari'a are the main source of legislation.¹³ Uniquely the 2012 constitution included a definition to the phrase "principles of Islamic Shari'a" in article 219. The article states that "The principles of Islamic Shari'a include general evidence, foundational rules, rules of jurisprudence, and credible sources accepted within in Sunni doctrines and by the larger community."¹⁴ The current Constitution removed article 219 defining the phrase 'principles of Islamic Shari'a' and leaving only article 2.¹⁵ Consequently, the legal definition of the phrase will be the one put forward by the Supreme Constitutional Court.

⁹ Egypt's Draft Constitution 2013 - Unofficial Translation, *available at* <http://allafrica.com/stories/201312100582.html>

¹⁰*Id.*

¹¹ Clark B. Lombardi and Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 Am. U. Int'l L. Rev., 379-435 (2006).

¹²*Id.*

¹³*Final Draft Constitution 11 (2012)*, *available at* http://www.democracy-reporting.org/files/egypt_draft_constitution_unofficial_translation_dri.pdf

¹⁴*Id.*

¹⁵*Supra* note 9.

The Supreme Constitutional Court of Egypt defined the principles of Islamic Shari'a as scriptural commands of absolute certainty in regards to its authenticity and meaning.¹⁶ The Court takes the Qur'an as an authentic source of Islamic Shari'a but it has no clear method of identifying the authenticity of a specific Hadith it is using as a base for a ruling. In the case of an ambiguous meaning for an authentic text, the court requires that the interpretation of the specific authentic source is applied by the majority of the Islamic jurists throughout history. Therefore, the court requires that the principles of Islamic Shari'a be based on authentic texts in both source and meaning.¹⁷

Another constitutional article that is of importance to the understanding the legal framework of apostasy in Egypt is the article regarding freedom of belief. In the current Constitution article 64 states that "Freedom of belief is absolute. The freedom of practicing religious rituals and establishing places of worship for the followers of revealed religions is a right organized by law."¹⁸

These constitutional provisions, which will be explored further in coming parts, show the essential role Islamic Shari'a plays in Egyptian law. Moreover, these provisions are used as bases for the court rulings regarding apostasy, showing the how the role of Islamic Shari'a in Egyptian law is the base for the legal framework of apostasy. Therefore, it is of importance to bare them in mind while discussing the other fields of law in Egypt and their legal provisions and rulings in regards to apostasy and its legal consequences.

2. Egyptian Administrative Law:

After looking the Egyptian Constitutional law and its legal provisions that can be related to apostasy, we move to examine in this part the Egyptian administrative law and the practice of the Administrative courts in regards to apostasy and its legal consequences. What legal provisions of the Egyptian Administrative law are of

¹⁶*Supra* note 11.

¹⁷*Id.*

¹⁸*Supra* note 9.

relationship to the legal consequences of apostasy? What are the rulings of the Egyptian Administrative Courts regarding cases of apostasy and its legal consequences? The examination of Egyptian administrative law and jurisprudence in regards to apostasy will show how the role of Islamic Shari'a in Egyptian law is the base for the legal framework of apostasy in this field of law. Moreover, it will show how this field of law only deals with external apostasy and is not concerned with the internal beliefs of the citizens.

The Egyptian Administrative courts mainly deal with the issue of apostasy in cases regarding the conversion from Islam. This issue exists since the Egyptian administrative law mandates citizens to mention their religion in their required computerized identification cards.¹⁹ The law also requires the citizens to inform the state of any change in their information.²⁰ The relationship between apostasy and administrative law through the computerized identification cards will be examined in the first part of this section. In the second part of this section we will look at how the Egyptian Administrative Courts also dealt with the issue of apostasy in regards to administrative cases that require the examination personal status laws.

a. Egyptian Administrative Law and Conversion from Islam:

Egyptian law requires all citizens to obtain computerized national identification cards by the age of 16. Within these computerized identification cards, citizens are required to state their religion while choosing only from the three monotheistic religions: Islam, Christianity and Judaism.²¹ The issue of apostasy in administrative law rises when a Muslim citizen attempts to change the religion in their identification card. Article 47 of law 143 put forth in 1994, which deals with civil status, enables citizens to change information in their identification card as long as they have supporting

¹⁹Karlijn van der Voort , EGYPT'S SUPREME ADMINISTRATIVE COURT DENIES CONSTITUTIONAL RIGHTS TO BAHÁ'Í RELIGIOUS MINORITY, (2007)

http://works.bepress.com/karlijn_van_der_voort/1/

²⁰*Id.*

²¹*Id.*

papers from the appropriate authorities.²² The change of the information takes place through the Civil Status Department of the Ministry of Interior. The Civil Status Department of the Ministry of Interior does not allow for conversion from Islam stating that since the codified law does not regulate the issue, then Islamic law should be applied as stated in article 1 of the civil code.²³ This shows how the Civil Status Department uses role of Islamic Shari'a in Egyptian law as the base for dealing with apostasy and disallowing it.

In the codified Egyptian administrative laws the issue of religious conversion is only mention mentioned in terms of conversion to Islam. Law 70 of 1964, which addresses the fees of registration and authentication; states that certificates regarding conversion to Islam are without fees. Moreover, the office of the public notary is responsible, as stated in law 68 of 1947, to authenticate the information of all Egyptian citizens, including the conversion to Islam. The internal regulations of the Public Notary include a chapter regarding procedures that should be followed before the authentication of the conversion to Islam.²⁴ There is no equivalent to these procedures and laws in regards to the conversion from Islam.

A Citizen's identification card is an essential requirement for a functioning life in Egypt. For example, without an identification card, a citizen cannot legally work, obtain health insurance or have a passport issued. Moreover, citizens can be stopped in the street by the police and be asked for their identification card at any moment and without cause. In the case of the unavailability of the card the citizen should be

²²Bahgat and Stork, *supra* note 2.

²³*Id.* article 1 of the civil code states that "...In the absence of a provision of a law that is applicable, the Judge will decide according to custom and in the absence of custom in accordance with the principles of Moslem Law. In the absence of such principles, the Judge will apply the principles of natural justice and the rules of equity." The Civil Code, Art. 1, available at <http://www1.umn.edu/humanrts/research/Egypt/Civil%20Law.pdf>

²⁴*Id.* The procedures included in this chapter state that the convert has to be at least 16 years old and must file a request to the ministry of interior after which the ministry should arrange a meeting with representatives of the original religion of the convert. After the meeting the citizen can withdraw their request or the conversion is authenticated and recognized.

arrested. If the citizen is asked for their identification card and is found to not be carrying it, then the law states that they should be arrested²⁵

Lastly, it is stated within the application for the identification card: that the inclusion of false information is considered forgery and is made punishable by the articles of the penal code²⁶

b. The Practice of the Administrative Courts:

1) The Practice of the Administrative Courts and the Recognition of the Conversion from Islam in Identification Cards:

The administrative judiciary rules in all cases in which a state administrative body is involved.²⁷ Consequently, The Egyptian administrative courts deal with the concept of apostasy when a case is filed by a convert from Islam against the Ministry of Interior. As stated earlier, The Civil Status Department of the Ministry of Interior refuses to authenticate conversion from Islam arguing that it is not allowed by Islamic law. Moreover, cases are filed by many members of the Baha'i religion because the state refuses to acknowledge their religion in the identification cards and sees it as apostasy.²⁸

The stance of the Egyptian administrative courts in regards to recognition of conversion from Islam in identification cards has been almost consistent since the early 1980s. Since the 1980s, the court ruled that The Civil Status Department of the Ministry of Interior is not obliged to recognize or honor requests for religious conversion from Islam. Only between 2004 and 2007 did the court, under Judge Farouq Abdel Qader, altered its rulings and ruled that the Ministry of Interior is in fact obliged to recognize and authenticate the conversion from Islam, but only in such

²⁵*derVoort*, *supra* note 19.

²⁶*Id.*

²⁷ Administrative Judiciary, *available at* <http://www.sis.gov.eg/En/Templates/Articles/tmpArticles.aspx?CatID=257>

²⁸*Bahgat and Stork*, *supra* note 2.

cases of reconversion to Christianity. These rulings were later reversed.²⁹ The legal base for both types of rulings and how it is related to the role of Islamic Shari'a in Egyptian law and the states' concern with only external expression of apostasy will be discussed in the next section.

a) The Non-Recognition of Conversion from Islam:

As far back as at least the early 1980s, the Egyptian administrative courts have consistently ruled that the Ministry of Interior is not obliged to authenticate the conversion of a citizen from Islam. The court states that in accordance with the civil law and the personal status law; Islamic Shari'a must be applied in the issue of conversion. The courts state that, although there is no codified law dealing with this issue, Islamic Shari'a does not allow apostasy, which includes conversion from religion. In April 2007, the administration court ruled on 22 cases filled by citizens that wanted to return to Christianity after converting to Islam. The court stated that the Civil Status Department should not recognize the re-conversion to Christianity stating that "to accept the return of someone who abandons the Islamic religion to a different religious affiliation is an assault on the Islamic religion he had endorsed."³⁰ Moreover, the court stated that conversion is not acceptable because it cannot be considered an expression of freedom of belief but rather of manipulation of religion, which is deemed unacceptable. In addition, in the rulings of April 2007, the court restated a standard principle, which was that freedom of belief must not undermine public order. The court stated that since Islamic Shari'a, which prohibits apostasy, is part of public order; the state cannot recognize conversion from Islam. An example of the stance of the court can be seen in a ruling in 2001 when the court stated that "Although the constitution guarantees freedom of belief and the freedom to perform religious rites, this constitution has taken Islamic Shari'a as the principal source of legislation including the provisions related to apostasy."³¹ Another agreed upon reasoning used by administrative courts can also be seen in a case in 2008. In this

²⁹*Id.*

³⁰*Id.*

³¹*Id.*

case; it was stated that the freedom to convert from one religion to another is guaranteed to everyone except Muslims. The court stated that freedom to practice religious rituals is limited by public order and morals and the principles of Islam. Moreover, the court stated that public order is defined based on the official religion of the state, which is Islam. The fact that it is a main source of legislation and the religion of the majority of the citizens also plays a large role in the matter of public order. Therefore, conversion from Islam is not allowed as it constitutes apostasy in Islamic law which is the foundation of public policy.³² It is clear that the consistent base for not allowing the acknowledgment of the apostasy is based on the role Islamic Shari'a plays in Egyptian law. Moreover, it is also clear that in these cases the court is not concerned with the change of internal beliefs of the citizen but is concerned with the external expression of such an apostasy, which is through changing the religious affiliation in the identification card.

b) The Exceptions to the Established Jurisprudence:

On the 9th of February, 2008, the Supreme Administrative court issued the most recent ruling that can be considered an exception to the established Jurisprudence. The court ruled in favor of an appeal filed by a citizen wanted to return to Christianity after converting to Islam. The court ruled that the Ministry of Interior is obliged to include the correct information in the identification card of the citizen. The ruling stated that the legislator throughout the different laws aimed to ensure that the correct information was added in to the identification card so that the citizen would receive the right treatment, for examples in matters of personal status where treatment is based on the religion of the citizen. The court stated that the Ministry of Interior should include the true religion of the citizen as well as her previous ones. Put simply, the court ruled that the citizen's identification card should state that she is a Christian

³² The Section Pertaining to Egypt in the International Human Rights Report, (2010) *available at* http://egypt.usembassy.gov/pa/ar_irf11.html

who was previously a Muslim.³³ The court also stated that the inclusion of wrong information in the identification card is in fact against public order. The court stated that the inclusion of wrong information disturbs public order as the person will have to fake his religious affiliation in front of the society which can be potentially dangerous. An example could be, having an apostate marry a Muslim woman because his identification card states that he is a Muslim. The court went on to state that the refusal to add the correct information in the identification card is a breach of law 143 of 1994.

Earlier a similar exception to the established jurisprudence also took place between April 2004 and April 2007. Within this period, the Human Rights Watch and the Egyptian Initiative for Personal Rights documented at least 22 cases in which the court ruled in favor of the convert. The logic of the court is very similar to that of the 2008 ruling. The difference between these cases and the most recent case of 2008 is that the court did not require the Ministry of Interior to include the previous religion of the convert in their identification card. Within this period in a ruling in 2005, the court uniquely mentioned the concept of religious coercion. The court stated that allowing conversion from Islam is in accordance with Islamic Shari'a as it prohibits coercion. Moreover, the court disputed the arguments made by the officers of the Civil Status Department in calling the converts apostates. The court stated that "Islamic jurisprudence only considers an "apostate" deserving chastisement to be a Muslim who repudiates Islam and "who finds comfort in disbelief."³⁴ The court required the Ministry of Interior to include the correct current information within the Identification Card of the citizen without including their previous religion; hence, constituting a much tolerant and accepting approach. This case is the perfect representation of the court looking at the different concepts in Islamic law that can be associated with the issue of apostasy, for example the prohibition of coercion. Even in these exceptions to the norm the legal logic is based on Islamic Shari'a and how with

³³ Stating that the citizen was previously a Muslim in her identification card puts her in risk of facing discrimination due to the intolerant society and possibly facing social punishment for being an apostate in the eyes of some. *Id.*

³⁴ *Id.*

the lack of a provision discussing apostasy it is the sources of the applicable legal rules.

In both the established jurisprudence and the exception to it the court deals apostasy based on rules of Islamic Shari'a and that is based on the vital role Islamic Shari'a plays in Egyptian law. Moreover, in established jurisprudence regarding apostasy in administrative law the court is only concerned with the external apostasy and does not care about what the actual internal beliefs of the citizens is. Only in the exceptional change in the jurisprudence does the court care about what the internal beliefs of the citizens are. These exceptions are so minor that it does not change the stance of Egyptian court in regards to only being concerned with external apostasy.

2) Illegality of the Marriage of an Apostate:

Although the Administrative Court is not the judicial body which deals with personal status issues, the court ruled on the illegality of the marriage of an apostate in a case in 1984. This case is an example of the Administrative Court looking at a personal status issue because it is required in the process of reaching a ruling on the administrative issue, which is within the jurisdiction of the court.

On the 27th of February, 1984, the court had to settle an appeal filled by Malak Al Sayed against the Judicial Committee for Agrarian Reform. The Committee refused to reconcile the familial situation of appellant based on Law 50 of 1969, which addresses the maximum allotted ownership of land for a family. The committee did not recognize the marriage of the plaintiff because she was previously a Muslim who then converted to Christianity and married a Christian. The court thus ruled in favor of the Judicial Committee. The court went on to state: that codified Egyptian law and Egyptian customs do not set rules which address the marriage of an apostate and therefore, in accordance with article one of the Civil Codes, the principles of Islamic Shari'a are applicable. The court stated that it in Islamic Shari'a "the apostasy of a person is not recognized and is of no legal significance." Therefore, the court upheld the decision of the Judicial Committee and stated that the marriage

contract between the plaintiff and her husband is null and void. Consequently, the plaintiff did not meet the legal requirements for law 50 of 1969 as to reconcile the family situation.³⁵ The court only looked at the legality of the marriage, a personal status issue, because it was a requirement for the administrative law, which is the actual issue the court ruled on.

This case also showed how the status of Islamic Shari'a in Egyptian law is the base for the legal rules used in regards to apostasy. With the lack of a provision the court turned to Islamic Shari'a, just as the law stated. This proves that the role of Islamic Shari'a in Egyptian law shapes the court's ruling in regards to apostasy cases. Moreover, the court only dealt with the issue of apostasy because it included an external expression of apostasy, which is the plaintiff marrying a Christian. The court would not have looked at the case if the plaintiff changed her belief internally but did not act on it by marrying a non-Muslim, which is not allowed in Islamic Shari'a and hence in Egyptian law.

3. The Egyptian Penal Code:

After understanding the legal framework of apostasy in both constitutional and administrative law, we now move to understand it within the Egyptian penal code. First of all, it must be understood that within mainstream Islamic jurisprudence a number of scholars equate blasphemy with apostasy. These scholars argue that committing blasphemy, through actions or statements, automatically leads to the apostasy of the person.³⁶ The different opinions in Islamic Fiqh in regards to this issue will be discussed later on. Because some scholars see the act of blasphemy as apostasy, a full understanding of the legal framework of apostasy in Egypt requires understanding the legal framework of blasphemy. The provisions of the Egyptian Penal Code that can be related to apostasy are only the ones regarding the criminalization of blasphemy. With the aim of understanding blasphemy this section

³⁵ Supreme Administrative Court, 28 Nov.1984, Appeal 1359 , judicial year 28.

³⁶ ABDALLAH SAEED AND HANSSAN SAEED, FREEDOM OF RELIGION, APOSTASY AND ISLAM 38 (Ashgate Publishing Company) (2004).

will answer a number of questions. How does Egyptian law treat the act of blasphemy? Is blasphemy in Egyptian penal code related to apostasy or is it an independent crime? What does the practice of the Egyptian criminal courts state in regarding to blasphemy? This section will discuss the legal framework for blasphemy in Egyptian criminal law and jurisprudence, mainly the criminalization of blasphemy and treating it as an independent crime. The examination of Egyptian penal law and jurisprudence in regards to blasphemy will show how the role of Islamic Shari'a in Egyptian law is the base for the legal framework of apostasy in this field of law. Moreover, it will show how this field of law only deals with external apostasy and is not concerned with the internal beliefs of the citizens.

a. Egyptian Penal Code and the Criminalization of Blasphemy:

The Egyptian Penal Code deals with the issue of apostasy in regards to: making or publishing blasphemous statements or committing blasphemous actions. That definition in itself shows how blasphemy is an external expression. Although the Code does not mention the terms apostasy or blasphemy in any of its articles, three of its articles are used to penalize blasphemy. The Code through article 98 (f), especially, and articles 160 and 161, treats blasphemy as a misdemeanor. The main article used in by the courts and the police in regards to blasphemy is article 98 (f). The article states the following:

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.³⁷

³⁷The Penal Code, art. 98 (f), *available at*

<https://www.google.com.eg/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&sqi=2&ved=0CgQFjAA&url=http%3A%2F%2Ftrack.unodc.org%2FLegalLibrary%2FLegalResources%2FEgypt%2FLaws%2FEgypt%2520The%2520Penal%2520Code%2520Law%25201937.pdf&ei=y1tVUvC-G4XDtAbYkoH4DA&usg=AFQjCNHiRjzauUODRTHUkoDRc4nYY9iUXw&bvm=bv.53760139,d.Yms>

The Peoples' Assembly passed law no.29 of 1982 as a result of the bloody sectarian clashes that took place in El Zawya Al Hamra in Cairo and that led to the death of tens of citizens. The law introduced article 98 (f) to the Penal Code and increased the penalty stated in article 160 of the same Code. Article 98 (f) was later amended in 2006. In the amendment the phrases “favoring” and “collective peace” were removed from the article due to their ambiguity. However, it is still argued that article 98 (f) does not meet the constitutional standards regarding a penal article. The article is argued to be ambiguous since it does not specifically state the acts that lead to the penalty and includes general phrases and therefore, can potentially be abused by the state.³⁸

In a study titled “Prohibited identities” issued by the Egyptian Initiative for Personal Rights (EIPR); a quick analysis of the use of the blasphemy prohibition article takes place. The report states 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.³⁹

Moreover, article 160 and article 161 of the same Code are also sometimes used to in regards to blasphemy. Article 160, which deals mainly with blasphemous actions, states the following:

A penalty of detention and paying a fine of not less than one hundred pounds and not exceeding five hundred pounds or either penalty shall be inflicted on the following:

First: Whoever perturbs the holding of rituals of a creed or a related religious ceremony, or obstructs it with violence or threat.

³⁸ Adel Ramadan, *Adam Dostoreyat “Madat Tagreem Tarweeg Al Afkar Al Motatarefa”*, EIPR (2012).

³⁹Bahgat and Stork, *supra* note 2.

Second: Whoever ravages, breaks, destroys, or violates the sanctity of buildings provided for holding religious ceremonies, symbols or other objects having their profound reverence and sanctity in relation to the members of a creed or a group of people.⁴⁰

Article 161 states that:

These penalties shall be imposed on any encroachment that takes place by one of the methods prescribed in Article 171, on a religion whose rituals are publicly held.

The following shall fall under the provisions of this Article:

First: Printing and publishing a book which is viewed as holy by members of a religion whose rituals are publicly held, if a text of this book is perverted in a way that changes its meaning.

Second: Imitating a religious celebration in a public place or public community, with the aim of ridicule, or for the attendants to watch.⁴¹

A blasphemy case cannot reach the court through an individual but only through the Public Prosecutor, since Article 1 of the Egyptian Criminal procedures law states that only the office of the Public Prosecutor can file criminal cases. Since Article 1 of the Egyptian Legal Procedures Law states that only the office of the Public Prosecutor can file criminal cases, which includes violations of articles 98 (f), 160 and 161.⁴² Moreover, the Public Prosecution can decide not to send the case to the court. Therefore, whether or not a complaint regarding blasphemy will reach the courts is a matter in the hands of the Public Prosecution.⁴³

Lastly, on a constitutional level, the suspended constitution of 2012 included an article dealing specifically with blasphemy. Article 44 of that document stated that

⁴⁰*Supra* note 37, at article 160.

⁴¹*Id.*, at article 161.

⁴² The Criminal Procedures law, Art. 1, *available at* [http://ar.jurispedia.org/index.php/%D9%86%D8%B5%D9%88%D8%B5_%D9%82%D8%A7%D9%86%D9%88%D9%86_%D8%A7%D9%84%D8%A5%D8%AC%D8%B1%D8%A7%D8%A1%D8%A7%D8%AA_%D8%A7%D9%84%D8%AC%D9%86%D8%A7%D8%A6%D9%8A%D8%A9_\(eg\)](http://ar.jurispedia.org/index.php/%D9%86%D8%B5%D9%88%D8%B5_%D9%82%D8%A7%D9%86%D9%88%D9%86_%D8%A7%D9%84%D8%A5%D8%AC%D8%B1%D8%A7%D8%A1%D8%A7%D8%AA_%D8%A7%D9%84%D8%AC%D9%86%D8%A7%D8%A6%D9%8A%D8%A9_(eg))

⁴³ Ishaq Ibrahim, *Hesar Al Tafkeer: Qadayalzd'ra' al-AdyanKhelalAman Men Al Thawra*, EIPR (Aug 2013).

“Insult or abuse of all religious messengers and prophets shall be prohibited.”⁴⁴ The new constitution does not include article 44. However, the previous inclusion of an article addressing blasphemy in the constitution indicates that the issue of blasphemy is important in Egyptian law.

b. The Practice of Criminal Courts:

The Egyptian Criminal Courts, in all their different levels, have dealt with a sufficient number of blasphemy cases. The Court of Cassation, which is the highest court in Egypt which was created with the specific aim “to provide exclusive and uniform interpretation and application of law”⁴⁵ issued a ruling regarding article 98 (f) of the penal code. While ruling on an appeal filed by a defendant, accused of blasphemy, against the merit of his respective case; the court of cassation provided an interpretation of the article. The court stated that article 98 (f) does have a material (مادي) and a moral (معنوي) aspect. In the material (مادي) aspect, the article requires that the criminal “exploits and uses the religion in advocating and propagating by talk or in writing, or by any other method, extremist thoughts”.⁴⁶ The moral (معنوي) aspect requires that the criminal must be doing these actions with the intention of committing an illegal act which is “instigating sedition and division or disdain and contempting any of the heavenly religions or the sects belonging thereto, or prejudicing national unity or social peace.”⁴⁷ The court stated that every legal ruling must state, in detail, the evidence proving the satisfaction of the elements of the crime. In this specific case, it was alleged that the defendant, who is a barber, used a razor to cut the sign of the cross on the plaintiff and threatened to do the same sign with fire on the plaintiff’s face. The court ruled that although the actions of the barber are criminal they are not sufficient for the application of article 98 (f). The court of cassation stated that the lower court did not prove the elements of the crime as it did

⁴⁴ *Supra* note 13.

⁴⁵ Court of Cassation, *available at* <http://www.sis.gov.eg/En/Templates/Articles/tmpArticles.aspx?ArtID=473>

⁴⁶ Court of Cassation, Jan. 7, 1996, appeal 41774 judicial year 54.

⁴⁷ Court of Cassation, Jan. 7, 1996, appeal 41774 judicial year 54.

not address the ways in which the defendant had committed the moral element of the crime, meaning that the lower court failed to show how the actions of the defendant affected national unity or social peace.⁴⁸

The number of blasphemy cases increased after the 25th of January revolution. In 2011 a case was filed against a Shi'i citizen for desecration of a place of worship, which is a violation of article 160 of the Penal Code. The issue started when the people praying in the mosque did not approve of the defendant, Mohamed Fahmy Abdel Sayed Asfour, praying in the mosque because he is a Shi'i. The people did not approve because of some of the ritual difference in the act of praying, for example praying on the prayer beads. The issue then escalated inside the mosque leading to a fight and security forces closed it. A case was filed by the public prosecutor against the defendant after a complaint was filed by residents of the village. On the 24th of April, 2012, the Court of Kar El Zayat ruled that the defendant should serve 3 years with mandatory labor and set bail at 100 thousand Egyptian Pounds. The misdemeanor appeal court of Kafr el Zayat on the 26th of July 2012 accepted the appeal filed by the defendant in form but did not accept the merit. The court ruled that the defendant should serve a year in prison with labor and settle the expenses of the court. The court stated that when the defendant prayed, he engaged in acts that indicated that he was a Shi'i which led to discomfort of the rest of the individuals praying and thus led to the fights and subsequent desecration of the mosque.⁴⁹

The role of Islamic Shari'a, as a main source of legislation in Egyptian law, in defining the framework of blasphemy in Egyptian law is not as prevalent as it is in other fields of Egyptian law. This is because blasphemy has clear provisions regarding its illegality and its punishment, hence there is no need to go back to Islamic Shari'a to get the legal rules. Still the role Islamic Shari'a plays in setting the legal framework of blasphemy will be clearer in the coming section, where the link

⁴⁸ Court of Cassation, Jan. 7, 1996, appeal 41774 judicial year 54.

⁴⁹ Case no 1905 year 2012 issued 26 July 2012 misdemeanor appeal court of Kafr el Zayatsee Ibrahim, *supra* note 43.

between blasphemy and apostasy was done by Egyptian courts based on Islamic Shari'a.

The other general theory of the legal framework of apostasy is definitely applicable in how Egyptian penal code deals with blasphemy. Blasphemy by its definition requires an external expression. Egyptian law and jurisprudence is not concerned if a person has internal blasphemous beliefs or thoughts, these are only of concern if these beliefs or thoughts are expressed externally.

4. The Egyptian Personal Status Law:

After examining the legal framework of apostasy and its legal consequence in constitutional, administrative and criminal law, this section will address the Egyptian personal status law and case law in regards to apostasy and its legal consequences. For a full understanding of the legal framework of apostasy in Egyptian personal status law this section will start off with a quick look at the history of the Egyptian personal status law and its religious nature. This will explain why the role of Islamic Shari'a plays an even more essential role in setting the legal framework of apostasy in personal status law and jurisprudence. Afterwards, we will discuss a specific religious and legal concept used in personal status and apostasy cases. The concept called the Hisba law, regarding the obligation of a Muslim to forbid evil, and its origin and amendments will be discussed. Then, the practice of the Egyptian personal status courts in regards to apostasy will be address. This part will discuss the annulment of the marriage of an apostate and their incapacity to marry again, the status of the children of apostates, the incapacity of the apostate to inherit and the incapacity of an apostate to control his property. Therefore, this section will aim to answer a number of questions. How is the Egyptian personal status law of a religious nature? What is the Hisba law and how is it related to cases regarding personal status and apostasy? What are the different rulings issued by the personal status courts in regards to the legal consequences of apostasy? The examination of Egyptian Personal Status law and jurisprudence in regards to apostasy will show how the role of Islamic Shari'a in Egyptian law is the base for the legal framework of apostasy in this field of law.

Moreover, it will show how this field of law only deals with external apostasy and is not concerned with the internal beliefs of the citizens.

a. The History of the Egyptian Personal Status Law:

In matters of personal status law, religion has always played a role in Egypt. Since Egypt became part of the Ottoman Empire, there has been a system of multiple jurisdictions. Each religious group had its own courts with the jurisdiction of ruling on personal status issues. Courts dealing with Muslims, which were known as Shari'a Courts, had jurisdiction over non-Muslims only in two cases.⁵⁰ By the Nineteenth Century, Egypt had 15 different religious sects using 9 different personal status laws. In 1955 the family courts were abolished and placed under the ordinary courts. The abolishment of the family courts did not unify the different laws and until this day there are 9 different personal status laws. The application of a law is based on the religion of the parties. The Court of Cassation stated that the parties to the conflict cannot choose which law to be applied, as a matter of public policy.⁵¹ Moreover, the role of religion in civil law is still strong. The prevalent opinion of the Hanafi School in of Islamic Fiqh is still applied in matters where codified law does not state a rule.⁵² As stated earlier, in article 1 of the Civil Code states that "...In the absence of a provision of a law that is applicable, the Judge will decide according to custom and in the absence of custom in accordance with the principles of Moslem Law. In the absence of such principles, the Judge will apply the principles of natural justice and the rules of equity." Therefore, the article ensures the application of the status of the Shari'a in Egyptian personal status laws.

⁵⁰ Firstly, the court had jurisdiction if one of the spouses was a Muslim, as Shari'a law must be applied. Secondly, in instances when two non-Muslim courts had jurisdiction over the same issue, the case would be referred to the Shari'a court which would apply Islamic law. *see Berger, supra* note 1.

⁵¹ Moreover, the interreligious laws of Egypt did not change after 1955. Even now, the concept of Al Shari'a Al Amma, which basically means the superiority of Islamic law in personal status matters, is still applicable. *See Berger, supra* note 1.

⁵² *Id.*

This history explains why personal status law, more than any other law, is shaped and based on Islamic Shari'a. This will help in understanding the issue of apostasy rises in the field of personal status law more than any other field of Egyptian law, as will be elaborated on later.

b. The Hisba Law:

In traditional Islamic *Fiqh*, the concept of Hisba has two applications. First, it is related to the duty of each and every Muslim "to promote good and forbid evil". Second, it was related to the office of the Muhtasib, who was to represent the government in the market place and to ensure the abidance by public morals. This office was abolished in the first half of the 19th century.⁵³ The first application of the concept of Hisba is the one that is of significance to current Egyptian law. The Islamic legal principle of Hisba basically gave citizens, which would be regularly considered to have no personal interest in the case, the right to file cases against others in the name of protecting "the right of god' or the essential elements of the Islamic Faith"⁵⁴. In 1996, the Egyptian Parliament amended article 3 of the Civil Code, which deals with Hisba. The amendment stated that citizens can only file claims regarding Hisba to the office of the Public Prosecutor and the office decides if it will file the case in the courts or not.⁵⁵ Based on this amendment, it could be argued that the office of the Public Prosecution is the modern equivalent of the office of the Muhtasib.

Understanding the Hisba law is essential to understand the cases that will be discussed in the coming part. It must be noticed that this law is yet another example of the role of Islamic Shari'a in the legal framework of apostasy. Not only is Islamic Shari'a the base for the 'invisible law' that is applied but it is also the base of the 'visible law' which is codified.

⁵³Kilian Bälz, *Submitting Faith to Judicial Scrutiny through the Family Trial: The "Abu Zayd Case"*, 37 *Die Welt des Islams* 135-155 (Jul. 1997).

⁵⁴Berger, *Supra* note 4, at .

⁵⁵*Id.*

c. Practice of the Personal Status Courts:

Egyptian Personal Status Courts have dealt with the concept of apostasy from many different angles. The courts ruled on cases regarding the capacity of the courts in declaring a person an apostate, the marriage of apostates, the status of their children, the right to inheritance of the apostate and the status of the property of an apostate. The practice of the courts will be discussed in the coming part. In discussing the jurisprudence the role of Islamic Shari'a as the base for the legal framework of apostasy in Egyptian penal code will become much clearer. Moreover, it will be also clear that the stance of Egyptian personal status courts in regards to internal apostasy is consistent with that of the other courts, which is that apostasy is only a legal issue when it takes an external form.

1) Court of Cassation and Declaring a Muslim an Apostate:

Before dealing with the different cases within personal status laws it is important to understand the stance of the Court of Cassation in regards to declaring a Muslim an Apostate or *takfir*. In the article "Submitting Faith to Judicial Scrutiny Through the Family Trail: The "Abu Zayd Case" Kilian Balz states that there is a specific opinion regarding how a court can establish that a person committed apostasy. Balz states:

In the past, the Court of Cassation, in particular, followed a rough and pragmatic approach. According to this approach, apostasy can only be established in two cases: (i.) if someone pronounces an acknowledgement [iqrar] declaring to have turned away from Islam, or (ii.) if a document is presented according to which he has opted for another religion. In other words, someone who considers himself a Muslim is also legally considered a Muslim. The question whether someone is truly a Muslim is beyond judicial scrutiny: A court has no right to declare someone an infidel but is bound to the submissions of the parties.⁵⁶

⁵⁶ Berger, *supra* note 1.

However it is still stated that the court does not follow these guidelines in all cases. The court does commit judicial scrutiny by taking the accounts of witnesses or the writings of a person as a base for declaring a Muslim an apostate. An example of these cases will be discussed in the coming parts.

The quoted section also shows that Egyptian courts are not concerned with the internal beliefs of the person. It is only concerned if the apostasy takes an external form, which is by pronouncement or the existence of a document that proves it. According to the ruling, if a person does not do anything that shows his apostasy then it is not a legal issue for the court.

2) Marriage:

The principle regarding the marriage of an apostate, among many other principles regarding the status of an apostate, was dealt with in the most prominent apostasy case in Egyptian law, the Nasr Hamed Abou Zayd case. This case will be discussed first because of its importance to understanding the relationship between apostasy and blasphemy and apostasy and marriage in Egyptian law. As Berger summarizes the case:

In 1996, the Egyptian Court of Cassation ruled that the writings of the Egyptian Muslim scholar, Nasr Abu Zayd, on Islam constituted an act of apostasy, the abandonment of one's religion. Being declared an apostate by the court resulted in the ugly repercussion that Abu Zayd's marriage was declared void.⁵⁷

The case is of tremendous importance to Egyptian law as it reached the highest court, the Court of Cassation. The court applied many of the principles regarding apostasy showing how Islamic Shari'a plays a main role in shaping the legal framework of apostasy in Egyptian law. First, the court stated that the applied law in regards to issues of personal status is Islamic Shari'a, and more specifically the prominent opinion of scholars of the Hanafi Islamic school. The court also stated that

⁵⁷*Id.*

the lack of a codified law regarding an issue does not mean that the legislator intended to contradict Islamic law. In its application of Islamic Shari'a, the court stated principles regarding apostasy in Islam. The court defined apostasy as "a clear declaration of unbelief (kufr)"⁵⁸, the court also stated that this clear declaration of kufr takes place through "a proclamation of apostasy or by denying the Quran or the Sunnah, or mocks it or denies it or opposes what was stated in them, knowing the truth, worshiping other than Allah or another with him or denies the prophet or his prophecy or stopped doing what is required from a Muslim making him an unbeliever or did what is prohibited as if it is allowed."⁵⁹

Moreover, the court stated that:

Merely believing the mentioned [unbelief] is not considered apostasy, unless it is embodied in words or actions. According to the majority of the Muslim legal scholars, among them the Hanafis, it suffices to consider a person an apostate once he deliberately speaks or acts in unbelief, as long as he meant to be degrading, contemptuous, obstinate, or mocking.⁶⁰

The court stated that after committing an act or making statements of unbelief, a person is considered an apostate even if the person states that they are a Muslim.⁶¹ Berger states that the court overlaps the concepts of heresy, blasphemy, apostasy and unbelief. He argues that the court has a different definition for each concept but that it agrees that they all lead to apostasy.⁶² The court ruled that the writings of Nasr Hamed Abou Zayd went beyond the allowed interpretations of the Qur'an, as it looked into issues that are based on definitive texts and what is necessarily known in the religion. The court therefore ruled that Abou Zayd is an apostate and his marriage to his Muslim wife must be annulled, since a Muslim woman cannot marry a non-

⁵⁸Bälz, *supra* note 53.

⁵⁹Court of Cassation, Aug. 5, 1966, appeals 475, 478 and 481, judicial year 65.

⁶⁰Berger, *supra* note 4.

⁶¹Court of Cassation, Aug. 5, 1966, appeals 475, 478 and 481, judicial year 65.

⁶²Berger, *supra* note 4.

Muslim.⁶³ This case is of great importance because it does not deal with a Muslim that declared his conversion from Islam. The case deals with a Muslim that expressed his opinion and consequently was declared an apostate despite that, up to the moment of his death, Abou Zayd maintained that he is a Muslim. The case is an example of Egyptian courts dealing with blasphemy as apostasy.

One of the most interesting and discussed aspects of the Abou Zayd ruling is the court's distinction between freedom of belief and worship. The court states that every person has full freedom of belief without any limitation and that any person can convert their religion except Muslims. The court states that when a person agrees to become a Muslim they agree to not having the right to convert from Islam. The court states that conversion from Islam is part of freedom of worship and not freedom of belief; therefore, conversion can be limited due to the protection of public order and morals. The court states that Islamic Shari'a is part of public order, and since it does not allow or recognize apostasy; apostasy can be prohibited from the protection of public order.⁶⁴ The case of Abu Zayd also is an important example of the court committing *takfir*, which is declaring a Muslim an unbeliever.⁶⁵ This case also shows how the Egyptian legal framework of blasphemy as apostasy is based on the legal requirement to apply Islamic Shari'a.

Other cases regarding apostasy and marriage took place in Egyptian Courts. For example, the court of appeals ruled for the annulment of a marriage between a Muslim woman and her husband who reconverted to Islam. Despite the husband having never attended the court to declare his conversion, a witness stated that the husband baptized his daughter in a church and the court deemed this as sufficient evidence of his apostasy and annulled the marriage.⁶⁶ This case is another example of the courts committing *takfir*.

⁶³ Court of Cassation, Aug. 5, 1966, appeals 475, 478 and 481, judicial year 65.

⁶⁴ Berger, *supra* note 4.

⁶⁵ *Id.*

⁶⁶ Berger, *supra* note 1.

Another case took place in 1966 when the court also accepted a Hisba case calling for the annulment of the marriage between a convert woman and her Christian husband. The case was filed by the landlord of the apartment that the couple lived in. The landlord argued that the marriage contract of the couple is null since the woman is an apostate; and that they should be evicted from the apartment. The court of cassation accepted the case based on the concept of Hisba and ruled that the marriage is in fact null.⁶⁷

Lastly, in 1995 the court of Cassation ruled that in application of Islamic Shari'a; an apostate does not have the right to get married. The court stated that an apostate is equal to a dead person, meaning that the apostate does not have the right to marry a Muslim or a non-Muslim. Moreover, the court stated that if an apostate does in fact marry then, their children are not considered legal and do not have the right to inherit from him/her.⁶⁸ Therefore, this case is of great importance as it deals with the capacity of an apostate to marry and not just with the status of the current marriage of the apostate.

In all of the stated cases the legal requirement to apply Islamic Shari'a creates the base and legal rules for the rulings of the courts. Moreover, all of the cases include what the court considers an external expression of apostasy. The Nasr Hamed Abu Zayd includes an external expression through his writings. In the first marriage annulment case, the baptism of the husband's kid was considered a public expression of apostasy. In the second marriage annulment case, the marriage of the woman to a non-Muslim man was considered the public expression of apostasy. All of these cases prove once again that Egyptian courts are not concerned with the internal belief of the person but only the public expression of apostasy.

⁶⁷*Id.*

⁶⁸ Court of Cassation, May 16, 1995, appeal 162 judicial year 162.

3) Status of Children of Apostates:

On the 28th of December, 1998, the Court of Cassation issued a ruling regarding the status of the children of apostates. The court stated that the religion of the child of an apostate depends on when the child was born. If the child was born before the father became an apostate, then the child remains a Muslim and does not follow the apostasy of the parent. If the child is born after the apostasy of the father, then the child has the right to choose their religion when they become an adult, either by showing the signs of puberty or reaching the age of fifteen years Hijri.⁶⁹ The court's ruling was based on what it considered the agreed upon rules of Islamic Shari'a, which must be applied because of the legal status of Islamic Shari'a in Egyptian law.

4) Inheritance:

On 19th of January 1966 the court of cassation ruled that an apostate does not inherit from a Muslim or a non-Muslim or an apostate.⁷⁰ Moreover, on the 15th of January, 1991, the Court of Cassation ruled that the apostasy of a person is a barrier against others inheriting from him. The court stated that if a person dies an apostate then no one has the right to inherit from him or her.⁷¹ This again is an application of what the court saw as the agreed upon rules of Islamic Shari'a, which must be applied because of the legal status of Islamic Shari'a in Egyptian law.

5) Property:

On the 27th of November, 1990, the Court of Cassation issued a ruling regarding the property of an apostate. Within an inheritance case, the court stated that the property of an apostate returns to him/her after he/she returns to Islam. The court stated that the ownership of the apostate to his inheritance is suspended. Moreover, the court

⁶⁹ Court of Cassation, Dec. 28, 1998, appeal 255 judicial year 68.

⁷⁰ Court of Cassation, Jan. 19, 1966, appeal 28 judicial year 33.

⁷¹ Court of Cassation, Jan. 15, 1991, appeal 79 judicial year 56.

stated that an apostate should be asked to repent. The court did not give more information in regards to repentance of an apostate.⁷² This ruling is also based on the court applying what it considered the established rules of Islamic Shari'a that must be applied in accordance with the status of Shari'a in Egyptian law.

⁷² Court of Cassation, Nov. 27, 1990, appeal 34 judicial year 55.

III. International Law and Apostasy:

After addressing the legal framework for apostasy in Egyptian law and jurisprudence, it is essential to address the stance of international law in regards to the issue. This chapter will only discuss international law and apostasy to the depth sufficient for this thesis. The chapter will mainly discuss the international Convention on Civil and Political Rights (ICCPR),⁷³ which Egypt is a party to, and its stance in regards to apostasy through religious conversion. This chapter will answer the following questions. What is the stance of the ICCPR in regards to apostasy? What is the stance of the ICCPR in regards to limiting freedom of belief based on rules of a specific religious tradition? And what is the stance of Egypt in regards to the ICCPR?

A. ICCPR and Apostasy:

Article 18 of the ICCPR insures freedom of religion and belief. The article states the following:

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

⁷³ We only look at the ICCPR because it is the convention in the international bill of rights that is of a binding nature on the states, unlike the Universal Declaration of Human Rights, and it deals directly with freedom of belief.

and moral education of their children in conformity with their own convictions.⁷⁴

The article basically states that freedom of thought, conscious and religion cannot be limited by the state in any manner. On the other hand, freedom to express religion and belief through worship or rituals can be limited based on the protection of public safety, order, health or morals or for the protection of the rights and freedoms of others. It is required that these limitations be prescribed by law.

Although the article does not mention directly the right to apostasy through conversion from religion, many states believe that this right is guaranteed in the article. When the drafting the article many state parties saw that the statement insuring the freedom “to adopt a religion or belief” is broad enough to insure freedom to convert.⁷⁵

Scholarly analysis of the article is abundant. Still, only a number of statements and analyses are mainly of interest when it comes to the right to religion conversion and the possibility of legally limiting it.

The ICCPR established a Human Rights Committee to review the reports sent by the state parties every four years in regards to their compliance with the Convention and to issue its interpretations of the provisions of the Convention. The Committee is made up of prominent international law experts that belong to countries that are part to the Convention.⁷⁶ In the Committee’s General Comment on article 18 of the ICCPR it is stated that freedom of religion and belief naturally entails the freedom to convert one's religion.⁷⁷ The General Comment states:

⁷⁴ the International Convention for Civil and Political Rights art.18, Mar. 23, 1979, *available at* <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>

⁷⁵ Susan Waltz, Universal Human Rights: The Contribution of Muslim States, 26 *Hum. Rts. Q.* 818, (nv. 2004).

⁷⁶ Civil and Political Rights : The Human Rights Committee, *available at* <http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf>

⁷⁷ General Comment No.22 [ICCPR Article 18] Human Rights Committee, Forty-Eighth Session, Jul. 20, 1993 *available at* <http://www.unhchr.ch/tbs/doc.nsf/0/9a30112c27d1167cc12563ed004d8f15>

Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice.⁷⁸

Moreover the general comment ensures that freedom of religion and belief cannot be limited based on morals. In the general comment it is stated that:

The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.⁷⁹

This comment implies that limitations on freedom of belief cannot be based on a religious tradition only. Therefore, this comment shows that the Human Rights Committee believes that adherence to religious traditions cannot be the base for limiting freedom of belief, including the freedom to convert.

In addition, the United Nations Special Rapporteur on the Freedom of Religion and Belief also asserts the same point by stating that

[t]he right to freedom of religion or belief protects primarily the individual and, to some extent, the collective rights of the community concerned but it does not protect religions or beliefs per se.⁸⁰

These two statements are of importance as they provide the perspective of international law in regards to freedom of religion and belief, which essentially includes concludes that the right to conversion, cannot be limited based on morals or tradition. If these statements are accepted; it would be right to assume that limiting the right to convert from Islam or preventing it as well as enforcing punishments on it, will not be in accordance with international law as interpreted by its most prominent scholars and experts.

⁷⁸*Id.*

⁷⁹*Id.*

⁸⁰*Speaking Freely About Religion: Religious Freedom, Defamation and Blasphemy* 10 (2009), available at <http://iheu.org/files/Speaking%20Freely%20about%20Religion.pdf>

B. Egyptian Reservation on the ICCPR:

As stated earlier, Egypt is a party to the International Convention on Civil and Political Rights (ICCPR). After ratifying the Convention in 1982 Egypt added the statement: “Taking into consideration the provisions of the Islamic Shari’a and the fact that they do not conflict with the text [i.e. the Covenant] . . . we accept, support and ratify it.”⁸¹ This statement is seen by some as a reservation on the Convention, in which Egypt states that it will not apply any aspect of the Convention that is not in accordance with Islamic Shari’a. Others see that this statement is an acknowledgment by the Egyptian State that the Convention does not contradict Islamic Shari’a, especially because Egyptian government officials stated that there is no contradiction between Islamic Shari’a and the Convention when asked by the Human Rights Committee established by the ICCPR.⁸² The first interpretation sees that only the aspects in the convention that are in accordance to Islamic Shari’a will be applied. The second interpretation sees that Egypt only ratified this convention as it does not contradict Islamic Shari’a. Both interpretations show that Islamic Shari’a does play a role in the interpretation of the international obligations of the Egyptian State. Both interpretations also show that Islamic Shari’a is a higher source of law in Egypt than international obligations and that its application is the highest legal obligation. This shows that in the case of apostasy and the application of its legal consequences Egyptian courts will only follow their obligation to insure freedom of belief and practice as long as it does not contradict Islamic Shari’a.

⁸¹ Berger, *supra* note 2.

⁸² *Id.*

IV. State Premises the Legal Consequences of Apostasy on Confessional Law:

The justification for not allowing apostasy was briefly mentioned in the first chapter regarding the practice of the Egyptian judiciary. By examining the judicial rulings and law of the Egyptian state it can be concluded that freedom of belief is limited based on the legal requirement to apply confessional law, Islamic Shari'a. This conclusion is supported by both the actions of the state authorities and its judiciary. First of all there are no available official statements by state authorities in regards to basing the legal consequences of apostasy on the application of Islamic Shari'a. Still, government officials have constantly refused to recognize a citizen's apostasy through conversion from Islam. Those government officials argue the conversion cannot be recognized because apostasy is not allowed in Islam. This refusal is based on their interpretation of Islamic Shari'a and not based on any legal article.⁸³ Second of all, Egyptian courts also base their limitation on freedom of belief on the application of Islamic Shari'a. Courts' rulings regarding apostasy mention that Shari'a is the reason behind the application of the legal consequences of apostasy and its non-recognition. The rulings of the courts mentioned in the first chapter show that in most cases the court only states that apostasy is not allowed in Egyptian law because it is not allowed in Islamic Shari'a, which is the main source of Egyptian legislation. Moreover, the courts also apply the legal consequences of apostasy because it is an application of Islamic Shari'a. In most cases the courts do not elaborate on the legal reasoning. Only in few cases, mainly the Nasr Hamed Abou Zayd case, the court elaborates more on its obligation to apply Islamic Shari'a. The courts simply argue that undisputed rules of Islamic Shari'a, which according to the courts include the rules regarding the non-recognition of apostasy and the application of its legal consequences, are a part of Egyptian public policy and therefore must be applied. This legal justification put forward by the state will be discussed in the following part.

⁸³Bahgat and Stork, *supra* note 2.

To address the legal justification used by Egyptian courts in regards to the non-recognition of apostasy and the application of its legal consequences and its relationship to the application of Islamic Shari'a, this chapter will answer a main question. How does the state use the concept of public policy as a legal justification for the application of the undisputed rules of Islamic Shari'a, including the rules regarding apostasy?

A. Public Policy as a Legal Justification for the Non-Recognition of Apostasy and the Application of its Legal Consequences:

This section will discuss the use of the concept of public policy by Egyptian judiciary as the justification for the non-recognition of apostasy and the application of its legal consequences. To understand this legal logic the relationship between public policy and Islamic Shari'a will be addressed. This section will address this point through answering a number of questions. What is the definition of the legal concept of public policy? What role of the concept of public policy play in Egyptian jurisprudence? What is the definition of public policy as given by Egyptian court and how do the courts definite the undisputed rules of Islamic Shari'a as part of public policy? And finally, how is Islamic Shari'a as public policy used as the legal base for the non-recognition of apostasy and the application of its legal consequences?

1. Public Policy:

The concept of public policy is mainly used in regards to conflict laws. The concept is applied in regards to the application of foreign laws in national courts.⁸⁴Public policy can be defined as “those legal principles that are considered fundamental to a society, and which may not be contradicted, altered, or violated by any rules or laws of that same society.”⁸⁵Public policy insures that the foreign laws that contradict the fundamental values of the nation cannot be applied. This concept is mainly applied in

⁸⁴ Berger, *supra* note 1.

⁸⁵ Berger, *supra* note 4.

regards to family law since it is the legal field in which foreign laws could play a role.⁸⁶For example, a foreigner would have the right to apply his foreign laws in regards to marriage and divorce but these laws will not be applied if they contradict the fundamental values, the public policy, of the national state. The concept of public policy can also play a role when there is a conflict between national laws. This requires the existence of multiple national laws and a superiority of one, as exists in the Egyptian law in regards to interreligious personal status laws and the superiority of Islamic Shari'a.⁸⁷

a. Egyptian Public Policy:

The concept of public policy was introduced into the Egyptian legal system by the European system, especially France, in the late 1800s. The Egyptian court of Cassation has defined public policy in more than one case as “the social, political, economical or moral principles in a state related to the highest (or essential) interest (maslaha ‘ulya, or: masalihjawhariyya) of society,’ or as ‘the essence (kiyan) of the nation.’”⁸⁸ The legislator does not define what exactly constitutes public policy but leaves the definition to the judiciary. This shows that what constitutes public policy, as a representation of the fundamental values of the nation, can be changed and altered depending on the times.

1) Islamic Shari'a as Public Policy:

The analysis of the practice of the Egyptian courts in regards to the apostasy and its legal consequences shows the use of Islamic Shari'a as public policy as a justification. Egypt's highest courts constantly ruled that Islamic Shari'a is in fact a defining aspect of the public policy of the state, since Egypt is an Islamic state and the majority of its citizens are Muslim. The Egyptian courts, including the Supreme

⁸⁶Berger, *supra* note 1.

⁸⁷*Id.*

⁸⁸Berger, *supra* note 4.

Constitutional Court, defined Islamic Shari'a as the "essential principles of Islamic law' as the principles that are considered fixed and indisputable (nasssarihqati' al-thubutwaqati' al-dalala)."89To discuss the role is Islamic Shari'a as part of Egyptian public policy we will mainly rely on the research conducted by the scholar Maurits Berger in his articles "Apostasy and Public Policy in Contemporary Egypt: An Evaluation of Recent Cases from Egypt's Highest Courts" and "Conflicts Law and Public Policy in Egyptian Family Law: Islamic Law through the Back Door." The stated articles are used as a main base for information in this section as they represent a full analysis of Egypt jurisprudence in regards to Islamic Shari'a as part of Egyptian public policy and in regards to the relationship between apostasy and public policy. For example, in the analysis of different Egyptian courts' rulings and scholarly articles regarding Islamic Shari'a as public policy, which takes place in "Conflicts Law and Public Policy in Egyptian Family Law: Islamic Law through the Back Door", a list of the principles considered part of Islamic public policy was compiled. The list includes the following principles (Berger specifics that the principles put between brackets are the ones that were only mentioned by one or two scholars or rulings or are disputed by some):

- The prohibition of a marriage between a Muslim woman with a non-Muslim man (and its mirror image rule: allowing for a marriage between a Muslim man and a non-Muslim woman);
- The husband's right of polygamy;
- Marriage conditions: a) mutual consent (taradi) between bride and groom and b) the presence of two male Muslim witnesses (ishhad);
- The relatives with whom marriage is not allowed (maharim);
- [Prohibition of re-marriage without observing the waiting period ('idda) after divorce or decease of the husband]
- [The bridal gift (mahr)]
- [The prohibition of adoption]
- The interdiction to acknowledge illegitimate children;
- Unilateral divorce (talaq) by the husband;
- Certain rules of Islamic intestate law, the most important being:
 - a) the share of the woman is half of her brother's, b) the order of precedence of the relatives assigned as heirs by the Quran, c) the size of each of the shares allotted by the Quran;

⁸⁹*Id.*

- Intestate succession between a Muslim and non-Muslim;
- Bequest of the testator amounting to more than one third of his property;
- Conversion to Islam renders Islamic law immediately applicable;
- Conversion to Islam becomes effective as of the pronouncement of the shahada;
- [The prohibition of apostasy from Islam.]⁹⁰

These principles are a representation of what Egyptian courts and scholarly analysis considered part of public policy because they are undisputed Islamic law principles. Moreover, it is noticed that most of the mentioned rules were stated in the Holy Qur'an; therefore, the authenticity of their source is undisputed.⁹¹ Still some of the stated principles are not based on Qur'anic texts but are based on the work and interpretations of Islamic Scholars.

a) Apostasy Rules as Islamic Public Policy:

As stated in the list the prohibition of apostasy is considered one of the rules constituting Islamic Shari'a as public policy. Both the Court of Cassation and the State Council ruled in multiple cases that the rules regarding apostasy are part of these undisputed principles of Islamic Shari'a.⁹² Therefore, the courts see that the application of the legal consequences of apostasy and the non-recognition of the apostasy through conversion from Islam are based on essential principles of Islamic Shari'a, making their non-application a violation of public policy. In other words, the courts structure the limitation on freedom of belief, in the form of limitations on apostasy through conversion and the application of the legal consequences of apostasy, as the fulfillment of existing and necessary public policy. This rationale in itself is detrimental to religious conversion as it elevates religious conversion from a religious issue to a national issue. A religious convert, aiming to convert out of personal conviction can thus be argued to be damaging towards society. This legal

⁹⁰Maurits Berger, *Conflicts Law and Public Policy in Egyptian Family Law: Islamic Law through the Back Door*, 3 AM. J. COMP. L. (2002).

⁹¹*Id.*

⁹² Berger, *supra* note 4.

logic takes the matter of apostasy, which is matter of personal belief, and makes it an issue of public policy. This leads to the legal requirement to limit this personal belief and not recognize the apostasy or/and apply its legal consequences as not doing so would be considered a violation of Islamic Shari'a as public policy.

Having Islamic Shari'a, including the rules regarding apostasy, as part of public policy is used by Egypt as an explanation to why limiting of freedom of belief and practice, is not a violation of its international obligations. This argument is made despite the fact that Egypt stated that nothing in the ICCPR conflicts with Shari'a law. Egyptian courts rule, in accordance with the ICCPR, that freedom of belief is absolute and cannot be limited in any way or for any reason. On the other hand, the freedom of practice of that said belief can be limited by public order, policy, morals and values. The Supreme Constitutional Court stated the following:

The first of these two [i.e. the freedom of belief] is unrestricted, while the second [i.e. the practice of this belief] may be restricted by means of its [internal] order to affirm some of its highest interests, and in particular on the grounds of preserving public policy and moral values [al-nizam al-'ammwa al- 'adab] and to the protection of the rights and freedoms of others.⁹³

That same distinction was applied by the Court of Cassation and Administrative Court in regards to apostasy. For example in 1980 the Administrative Court ruled that:

Since Islam protects the freedom of belief—for Islam may not be forced on anyone—freedom of belief as granted by the Constitution means that each individual may freely embrace whichever religion he believes without constraint. However, this freedom does not restrict the application of the Islamic Shari'a to those who embrace Islam. The State's religion is Islam. . . . Since the plaintiff has embraced Islam, he must then submit to its law which does not condone apostasy.⁹⁴

And the court of Cassation, in the Nasr Abu Zayd Case, ruled that:

⁹³*Id.*

⁹⁴*Id.*

The purpose of entering Islam is to abide by its rules, including those of apostasy. . . . The rules for apostasy are no more than measures to keep a Muslim in his Islam, distinguishing him from others. . . . This is what also happens in other religious laws with regard to their followers: they demand continuous loyalty to them. Once an individual joins in, he is to abide by its rules which can expel or segregate him if he violates their fundamental principles which he embraced. . . . Certain religious laws . . . consider a difference of religion an impediment to marriage which prevents its conclusion, and they consequently impose separation or divorce. The same applies when one of the spouses embraces another religion. This does not violate the freedom of belief.⁹⁵

Basically, Egyptian Courts rule that apostasy is not a matter of belief but rather a matter of practice of belief. Therefore, in accordance with the ICCPR and the Supreme Constitutional Court, practice of belief can be limited by public policy and order, which includes the undisputed Shari'a rules regarding apostasy and its legal consequences. The concept of Islamic Shari'a as public policy is used to insure the application of essential Islamic Shari'a rules that are not found in statutory laws.⁹⁶ This understanding and interpretation of the law gives the Egyptian state the capacity to base the application of the legal consequences of apostasy and its refusal to recognize apostasy on Islamic Shari'a as public policy.

It must be noticed that the recognition of apostasy as part of freedom of practice and not freedom of belief is in contrary to popular scholarly opinion and interpretation of article 18 of the ICCPR, as mentioned in section 2.1. of this thesis. The courts chose to label apostasy as an act of freedom to practice belief and not an act of freedom of belief without giving a convincing argument to why they contradict what the Human Rights Committee of the ICCPR stated in its interpretation of the article, which is that freedom to convert from one religion is a matter of freedom of belief and that the interpretation of the article cannot be based on a specific tradition, which would include Islamic Shari'a.

⁹⁵*Id.*

⁹⁶*Id.*

V. Challenging the Justification of the State: the True Stance of Shari'a in Regards to Apostasy:

As stated in the previous section, the state uses Islamic law as a base for the non-recognition of apostasy and the application of its legal consequences. The state, which includes the courts, argues that the rules regarding apostasy and its legal consequences are part of the indisputable rules of Islamic Shari'a. Therefore, they are considered part of the principles of Islamic Shari'a that must be applied as part of the state's public policy. In this chapter, this argument will be challenged. This chapter will aim to prove that the rules regarding apostasy and its legal consequences are in fact disputable as they are not a matter of consensus between Islamic jurists. Consequently, the non-application of the legal consequences of apostasy and its recognition are not violations of Egyptian public policy as Islamic Shari'a.

This chapter will discuss all previously mentioned Islamic Shari'a concepts and how the rules regarding them are in fact disputable. To address this issue and challenge the justification given by the state, this chapter is divided into three sections. The first section of this chapter will discuss the general approach of Islam to freedom of belief. What is the stance of Islam in regards to tolerance to others religions? What is the stance of Islam in regards to religious tolerance between Muslims? What is the stance of Islam in regards to religious coercion? All these questions will be answered in the first section of this chapter.

The second section of this chapter will discuss the stance of Islamic Shari'a in regards to the act of apostasy, its prohibition and its punishment. The first part of the second section will discuss the stance of the Holy Qur'an in regards to apostasy. Does the Qur'an state a temporal punishment for the act of apostasy? Does the Qur'an call for the non-recognition of apostasy? Afterwards, the second part of the second section will move to a detailed analysis of how the rules of Islamic jurisprudence in regards to apostasy are in fact disputable and not a matter of consensus. Since according to Egyptian courts apostasy can be committed through the abandonment of Islam, or

conversion from it, and the committing the act of blasphemy, we will have to look at the disputed nature of the rules regarding both kinds of apostasy separately. The first fraction of this part will address the rules of Islamic Shari'a pertaining to apostasy through the abandonment of Islam or the conversion of another religion. The second fraction will address the rules of Islamic Shari'a in regards to apostasy through committing blasphemy. In the first fraction we will examine the relationship between the first type of apostasy, which is through the abandonment of Islam or the conversion to another religion, and the concept of treason. Basically, the argument is that due to the close relationship between religion and politics in the early Islamic nation, Islamic jurists confused the punishment for treason and applied it as the punishment for committing apostasy by abandoning Islam. In the second fraction we will move to examine the disputed nature of the rules regarding the second type of apostasy, which is through committing blasphemy. To do so we will look at the stance of the Holy Qur'an and difference of opinions of Islamic Jurists in regards to committing apostasy through committing blasphemy. Basically, the argument is that considering blasphemy an automatic apostasy is not an undisputed rule of Islamic Shari'a.

In the third section of the chapter, we will move to discuss how the rules regarding the legal consequences of apostasy on personal status are in fact disputed within Islamic Shari'a. In this section we will specifically look at the diversity of scholarly opinion pertaining to the relationship between apostasy and personal status, including marriage, inheritance and property.

By proving that all of the rules regarding the non-recognition of apostasy and the application of its legal consequences are in fact disputed within Islamic Shari'a, we will prove that their application is not a legal requirement, as they are not part of the undisputed rules of Islamic public policy.

A. The Context in which Apostasy Rules Exist: General Approach of Islam to Freedom of Belief:

To understand the stance of Islamic Shari'a in regards to apostasy and its legal consequences, one must understand the general approach of Islamic Shari'a towards freedom of belief. In this section we will look at two different concepts and their relationship to Islam. Firstly, the strong relationship between Islam and religious tolerance will be examined. This includes tolerance towards other religions and towards other Muslims, represented in the concept of the prohibition of Takfir Al Muslim (declaring a Muslim an apostate) in Islamic Shari'a. Secondly, the stance of Islamic Shari'a against religious coercion must be analyzed. Understanding these two concepts and their importance in Islamic Shari'a shows that the general context in which the rules of apostasy and its legal consequences exist is in fact very supportive of freedom of belief.

1. Islam and Tolerance

The relationship between Islam and religious tolerance is of a strong nature. Islam insures tolerance towards both followers of other religions and towards other Muslims. The part will discuss both kinds of tolerance.

a. Islam and Tolerance Towards Other Religions:

Islam as presented in the Holy Scripture the Qur'an acknowledged, from the very beginning, the diversity of religions. The Qur'an gave a special position to Judaism and Christianity as religions based on revealed Scriptures as well, which are The Torah and The Gospel respectively. The Qur'an mentioned both religions and stated that it is a continuation of them. On the other hand, the Qur'an rejected aspects of both religions arguing that they were not in accordance with the original teachings of the prophets.⁹⁷ Other beliefs were not recognized in the Qur'an, for example idolatry

⁹⁷ The Qur'an rejected the concept of trinity in Christianity and the concept of the chosen people in Judaism. Saeed and Saeed, *Supra* note 36, at 21.

that was widespread in the region. Even though that belief system was not recognized like the revealed religions, the Qur'an called on Muslims to respect all people and to interact with them regardless of their religion as long as the respect was reciprocated.⁹⁸ "The Muslims were commanded not to abuse or slander the deities of the any religion including the idolaters."⁹⁹ When Muslims had more political control it was stated that non-Muslims that do not act in hostility will not face any threat and their religious traditions will be respected. The religious tolerance toward peaceful non-Muslims continued after the death of the Prophet. For example, when Caliphates conquered new regions they did not inhibit the rights of the inhabitants to keep their religion, which included unrevealed religions such as Zoroastrianism, so long as they acknowledged the political supremacy of the Muslims.¹⁰⁰ Moreover, the principle of religious tolerance was maintained throughout the history between Muslims and non-Muslims, except for "relatively few"¹⁰¹ exceptions.¹⁰² Modern scholars have argued that Islam has always recognized the freedom of religion, whether it meant believing in a revealed religion, an unrevealed one, or even atheism.¹⁰³

b. Islam and Tolerance Towards Other Muslims:

In Islam religious tolerance is not only given to followers of other religions but it is also a must between Muslims. This type of tolerance is mainly represented in the concept of Takfir al Muslim, which is declaring a Muslim an unbeliever. The act of Takfir al Muslim by another individual is prohibited in Islam.¹⁰⁴ The Qur'an

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰ Non-Muslims had to pay a tax, called Al Jizyah, for their Muslim conquerors in exchange for their protection against all kinds of threads. The Jizyah was in accordance with the traditions of the region in regards to the relationship between the conquerors and conquered. See *Id.*

¹⁰¹*Id.*, at 22.

¹⁰²*Id.*, at 23.

¹⁰³JavaidRehman, *Freedom of expression, apostasy, and blasphemy within Islam: Sharia, criminal justice systems, and modern Islamic state practices*, Criminal Justice Matters 4-5 (Mar. 2010).

¹⁰⁴Declan O'Sullivan, *Egyptian Cases of Blasphemy and Apostasy against Islam: Takfir al-Muslim*, 7 Int'l J. Hum. Rts. 97,97-137 (2003).

commands that tolerance must be given to all believers and that a Muslim, in accordance with 4:94 of the Holy Qur'an, should not treat others with "predisposed assumptions".¹⁰⁵ Moreover, there are a number of Hadiths that limit the action of Takfir al Muslim. One Hadith states "Whoever prays our prayer, facing the *qiblah* that we face and eats what we have slaughtered, is a Muslim. He shall have the same rights and obligations as we have."¹⁰⁶ This Hadith ensures that it should be enough for a person to recognize the other as a Muslim if they pray facing Mecca. Another Hadith states, "When a man calls his brother a 'kafir', one of them is afflicted with the charge. Either it is as he says or (if the accusation is not true), it befalls the person who uttered."¹⁰⁷ This Hadith aims to deter Muslims of accusing others of disbelief.

Baring in mind the prohibition against takfir al Muslim by an individual, early Islamic scholars discussed the methods by which ascertaining apostasy in court can take place. It can take place through confession of apostasy or the testimony of two witnesses.¹⁰⁸ Widely respected Islamic Scholar Mawduwdi states that "This matter is directly to do with God, and it is He Who shall decide it on the Day of Judgment."¹⁰⁹ This statement ensures that in Islamic law, no person has the right to judge whether or not a person is a believer and that this is a matter between a person and God, thus God is the only person with the capacity to judge the conscious of a person. This statement is in accordance with what Egyptian Courts state their position to be. Therefore and as stated in the First Chapter, Egyptian Courts claim that unbelief or apostasy is only known when a person declares it, commits an act or says a statement that proves his apostasy. Still, as stated earlier the courts in all cases do not follow this position. The clearest example is the Nasr Hamed Abu Zayd case. As stated earlier, during the Abu Zayd case the court did not see his proclamation of Islam as

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ The investigation of the testimonies of the witnesses is required by some schools of fiqh and not others. For more information see Saeed and Saeed, *supra* note 36, at 52-53.

¹⁰⁹ O'Sullivan, *supra* note 104.

useful without taking back the statements he wrote in his books. The court saw his statements as sufficient evidence of his apostasy even if he states al Shehada.

2. Islam and the Prohibition Against Coercion

As stated earlier, the context in which the rules pertaining to apostasy and its legal consequences exist is one that calls for freedom of belief and embraces it. Beside the stance of Islam in regards to tolerance towards others, Islam also supports freedom of belief by prohibiting religious coercion. In 2:256 of the Holy Qur'an a straightforward statement insuring freedom of religion is provided. The verse states "there is no compulsion in religion." according to Donna E. Arzttthe author of the article "The Role of Compulsion in Islamic Conversion: *Jihad, Dhimma and Ridda*" :

This freedom has been said to encompass not only the freedom to hold theistic beliefs as well as the freedom to hold non-theistic beliefs, but also the freedom to change one's religion or belief or to refuse to change one's religion or belief, all without coercion or discrimination.¹¹⁰

The Qur'an forbids religious coercion in other verses as well. For example, in 18:29 it is stated that "The truth [has now come] from your Sustainer: Let, then, him who wills, believe in it, and let him who wills, reject it,"¹¹¹ And in 17:15 it states: "Whoever chooses to follow the right path follows it but for his own good; and whoever goes astray goes but astray to his own hurt"¹¹² the Prophet and his successors followed the commands of the Qur'an. An example of this can be when the caliphate Omar Ibn Al Khattab thought that a Christian woman who refused to join Islam might have understood his invitation as coercion, he stated the following: "O my Lord I have not intended to compel her, as I know that there must be no

¹¹⁰Donna E. Arzt, *The Role of Compulsion in Islamic Conversion: Jihad, Dhimma and Ridda*, 8 Buff. Hum. Rts. L. Rev. 15 (2002).

¹¹¹Abdullah Saeed, *The Islamic Case for Religious Liberty*, First things (Nov. 2011) available at <http://www.firstthings.com/article/2011/11/the-islamic-case-for-religious-liberty>

¹¹²*Id.*

compulsion in religion.... [R]ighteousness has been explained and distinguished from misguidance."¹¹³

It is argued that the verses of the Qur'an also imply that a Muslim must not be coerced to stay in Islam.¹¹⁴ In the article "The Dark Ages of Islam: Ijtihad, Apostasy and Human Rights in Contemporary Islamic Jurisprudence" by David A. Jordan the author argues that "Islam means submission to the will of God. Forcing one to remain Muslim in name and action only when their conscience and beliefs lay elsewhere is offensive to the very tenets of the Islamic faith."¹¹⁵

B. The Diversity of Opinion in Regards to the Rules of Apostasy in Islamic Shari'a:

The non-recognition of apostasy by Egyptian courts shows that they perceive apostasy as a prohibited act that should not be allowed. As stated earlier, the Egyptian Judiciary premises these legal consequences on their application of Islamic Law. This section will aim to show that there is disagreement in opinion regarding the non-recognition of apostasy and the application of corporeal punishment in this life. This disagreement in opinion makes it a disputed rule within Islamic Shari'a. This section will start off by discussing the lack of temporal punishments for the act of apostasy or its non-recognition in the Holy Qur'an. Afterwards, this part will move to show in details why the rules regarding the non-recognition of apostasy and the application of temporal punishment are disputed rules in Islamic jurisprudence. To do so we will have to deal with the rules regarding the two types of apostasy, which are apostasy through abandonment of Islam or conversion to another religion and apostasy through committing blasphemy. The first fraction will discuss the difference of opinion regarding the rules pertaining to apostasy as abandonment of Islam or the conversion to a different religion. In this part, the argument is that the view of some of Islamic

¹¹³*Id.*

¹¹⁴David A. Jordan, *THE DARK AGES OF ISLAM: IJTIHAD, APOSTASY, AND HUMAN RIGHTS IN CONTEMPORARY ISLAMIC JURISPRUDENCE*, 9 Wash. & Lee Race & Ethnic Anc. L. J. 55 (2003).

¹¹⁵*Id.*

jurists that apostasy is prohibited and results in temporal punishment is disputed because they confuse the prohibition of treason and its temporal punishment with apostasy. In the second fraction, we will look at the diversity of opinion in regards to considering blasphemy an automatic declaration of apostasy.

1. Nonexistence of Temporal Punishment for Apostasy in the Qur'an:

The Holy Qur'an, as the primary source of Islamic Shari'a, does not mention a temporal or corporal punishment for apostasy, both types. The Qur'an mentioned clear temporal sanctions for a number of acts, including stealing and adultery. No similar verse stating the temporal sanction for apostasy is found in the Qur'an.¹¹⁶ The act of apostasy is mentioned thirteen times in the Qur'an. In each of the thirteen verses, there is no temporal sanction for apostasy. Specifically, there is no mention of the death penalty, which many Scholars argue is the punishment according to Shari'a, as a sanction for apostasy. The Qur'an only mentions a punishment in the afterlife, making apostasy according to the Qur'an act receiving religious retribution in the afterlife but no corporal punishment in this life.¹¹⁷ The Qur'an places moral punishment on the act of apostasy and not temporal one.¹¹⁸ The opinion of Scholar Al Awa summarizes the stance of the Qur'an in relation to apostasy. Al Awa states that:

We do not find in the texts of the noble Qur'an related to apostasy any temporal punishment [specified] for the apostates. However we find therein repeated threats and strong warnings of punishment in the Hereafter. There is no doubt that such threats do not come unless they are related to a major sin. It is sufficient that Allah (glory be to Him) has promised the believers that He will forgive all of their sins, and has warned those who revert to unbelief after they become believers and then increase in their defiance in unbelief, that God will not forgive the and will not show them the true path. Apostasy in the view of the Qur'an is a major sin even though Qur'anic verses do not impose a temporal punishment.¹¹⁹

¹¹⁶*Supra* note 7.

¹¹⁷David A. Jordan, *THE DARK AGES OF ISLAM: IJTihad, APOSTASY, AND HUMAN RIGHTS IN CONTEMPORARY ISLAMIC JURISPRUDENCE*, 9 Wash. & Lee Race & Ethnic Anc. L. J. 55 (2003).

¹¹⁸Rehman, *Supra* note 103.

¹¹⁹ Saeed and Saeed, *Supra* note 36, at 81.

2. The Diversity of Opinion in Islamic Shari'a on Apostasy through Abandoning Islam:

In this fraction we will look at a specific type of apostasy, which is abandoning Islam including converting to another religion, and the diversity of jurists' opinion in its regards. This part will mainly discuss the relationship between treason and abandonment of Islam. This part basically argues that jurists' calling for the prohibition of apostasy and the application of a temporal punishment on it in this life confused the act of abandoning Islam with the act of treason. This resulted in their application of the temporal punishment for the act of treason on Muslims who abandoned Islam and therefore became an apostate.

a. Apostasy and Treason

Mainstream Islamic Scholars argue that Islamic Shari'a prohibits apostasy and imposes a temporal punishment, the death penalty, on apostates.¹²⁰ The Scholars mainly base their argument on the Hadith stating that "Whoever changes his religion, kill him."¹²¹ Many modern scholars argue that this mainstream Islamic thought is confusing the act of treason with the act of apostasy through abandoning Islam; therefore they are wrongfully applying the prohibition of the act of treason and its punishment in this life on Muslims who commit apostasy through abandoning Islam. This part will aim to elaborate on this argument. First we will look at the interpretation of this Hadith in the religious and political context of its time and how it is meant as an enforcement of a corporal punishment for treason and not apostasy through abandoning Islam.¹²² We will also look at the tradition of the prophet, the Sunnah, in regards to dealing with Muslims who abandoned Islam and how the prophet did not prohibit it and did not enforce a corporal punishment on them.

¹²⁰ *Id.*, at 51.

¹²¹ *Id.*

¹²² O'Sullivan, *supra* note 104.

Second, we will look at the tradition of the Guided Caliphates and how they also did not prohibit abandoning Islam and did not enforce a corporal punishment on it but did so in regards to the act of treason. Third, we will look at the Hanafi School of Islamic jurisprudence did not apply a death penalty on Muslim women that abandoned Islam and how this also shows that the penalty was meant for the act of treason. Lastly, we will look at the general context in which the classical jurisprudence regarding the prohibition and the penalization of committing apostasy rose and how it also shows confusion between the act of treason and the act of apostasy.

1) Understanding the prophet's Hadith and Sunnah in its historical context:

The temporal punishment for apostasy is based on a specific Hadith, mentioned earlier. Classical jurists fail to consider the context in which the Hadith was stated, as its context plays a major role in reaching its rightful interpretation. The Hadith was stated in a time when Islam was the main religion of the society. The structure of the society as whole, including politically, was based on Islam. Therefore, at the time of the prophet and throughout the period in which Islam dominated the society religiously and politically, the act of leaving Islam as a religion did not just simply mean apostasy but also included treason.¹²³ An apostate was thus considered a traitor to the society and the state and therefore his elimination was required.¹²⁴ In the article “Egyptian Cases of Blasphemy and Apostasy against Islam: Takfir al-Muslim” the author Declan O'Sullivan argues that:

Clarifying that by definition apostasy differs from treason indicates that there has been a misunderstanding based on the assumption that the act of a person simply leaving their religion is equal to the act of physically rebelling against the state authorities. Although the same behaviour is rebellious, in terms of rejecting the set rules, there is still a dramatic difference between the two forms of rejection. Apostasy is the passive change of a person's religion, and is not the same as undertaking murder, arson or rape, in order to cause public disorder and to attempt a coup d'ht, or a coup de main against the authority

¹²³ Peters and De Vrie, *supra* note 6.

¹²⁴ *Id.*

who rules the community. Therefore, a precise definition of each form of act will show where a misguided use of the words portray the apostate as a person who has undertaken a crime they have not either technically, or practically, committed.¹²⁵

Other scholars explain the confusion between apostasy and treason through understanding the tribal system. The tribal system was the main system in the Arabian Peninsula at the time of the Prophet. With the rise of Islam as a religion and a political power, converts from other tribes not only join Islam as a religion but also as a political alliance. In addition, at that time there were significant amounts of conflict taking place between the Muslims and other tribes. Therefore, leaving Islam at that time not only meant apostasy but also meant treason through leaving the political alliance and becoming an enemy.¹²⁶

The misinterpretation of the Hadith of the Prophet is also evident by the fact that the Prophet never killed a person specifically for their conversion from Islam. The Prophet never imposed the death penalty on an apostate because of his apostasy but it was always accompanied with treason.¹²⁷ Moreover, a Hadith mentioned in the Bukhari collection told of a man who came to Medina and converted to Islam but later decided that he wanted to return to his religion. The Hadith states that the Prophet did not impose the death penalty on the man but instead let him go.¹²⁸

Other Hadiths also show the relationship between apostasy and treason at the time of the Prophet. One Hadith states, “A man who leaves Islam and engages in fighting against God and His Prophet shall be executed, crucified, or exiled.”¹²⁹ This Hadith basically shows the strong relationship between apostasy and treason at that

¹²⁵ O'Sullivan, *supra* note 104.

¹²⁶ *Id.*

¹²⁷ David A. Jordan, *THE DARK AGES OF ISLAM: IJTIHAD, APOSTASY, AND HUMAN RIGHTS IN CONTEMPORARY ISLAMIC JURISPRUDENCE*, 9 Wash. & Lee Race & Ethnic Anc. L. J. 55 (2003).

¹²⁸ O'Sullivan, *supra* note 104.

¹²⁹ *Id.*

time. It also shows that the death penalty was not imposed as a penalty for merely committing apostasy but for committing treason.¹³⁰ Moreover, the Hadith stating

The blood of a Muslim who professes that there is no God but Allah and I am His Messenger is sacrosanct except in three cases: in the case of a married adulterer, one who has killed a human being, and one who has abandoned his religion, while splitting himself off from the community.¹³¹

The statement ‘while splitting himself off from the community’ is argued to mean “one who actively boycotts and challenges the community and its legitimate leadership.”¹³² Therefore, this Hadith also proves that the death penalty is not to be imposed for simply committing apostasy but for also committing treason.

2) Understanding the tradition of the Caliphates in its historical context:

The relationship between treason and apostasy, resulting in the application of the punishment of the first on the second, can be explained even more by understanding the tradition of the Caliphates in its historical Context. Many argue that the ‘wars of apostasy’ fought by the first Caliphate, Abu Bakr Al Seddiq, are evidence of the criminality of apostasy. Again this argument lacks a deeper analysis of the wars. The wars were not of a religious nature but mainly of a political one. After the death of the Prophet, many tribes declared their rebellion against Medina. Some of the tribes abandoned Islam, while others did not but decided that they will not pay the taxes (*zakat*) to the main authority in Medina. Moreover, some of the tribes did not even have a Muslim majority, but did have an alliance with Medina. Therefore, these wars should not be seen as ones against apostates but ones against tribes that rebelled against the main authority, hence committing treason.¹³³ This too proves that the

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Saeed and Saeed, *Supra* note 36, at 65.

corporal punishment in this life was a result of treason and not apostasy through the abandonment of Islam.

3) Stance of Hanafi School in Regards to Female Apostates:

One can look at the disagreement between classical jurists in regards to the enforcement of the corporal punishment in this life on Muslims women who abandon Islam and find more support to why the temporal punishment was actually for treason. The Hanafi School of Islamic Shari'a rules that the death penalty should not be applied on female Muslims that apostate by abandoning Islam. The School argues that the penalty should not be applied on women because they cannot carry weapons. Moreover, they argue that women should not be killed because of the Prophet's general prohibition against killing women.¹³⁴ This stance shows that the prohibition and the temporal penalty on the abandonment of Islam were not related to the act of apostasy itself but to the consequences of it, which is committing treason by becoming an enemy of Islam and the state. Therefore, it shows that the criminality of apostasy was not because of converting from Islam but because the apostate will consequently commit treason, due to the structure of the society back then.

b. Political Context in which the Classical Jurisprudence on Apostasy Developed:

For a full understanding of the wrongful prohibition and temporal punishment of abandonment of Islam, one must look at the context in which the classical jurisprudence regarding it developed. During the thirty years after the death of the Prophet the Muslim, conquests increased. Therefore, with the diversity of cultures and traditions within the expanding umbrella of Islam, many theological and political debates arose. Muslims were discussing what makes a true Muslim and who has the right to represent religious and political authority.¹³⁵ Diversity in opinions and schools increased during the Umayyad period. Examples of the diverse schools would

¹³⁴*Id*, at 52.

¹³⁵*Id*, at 23.

be the Kharijis and the Murji'is. The Kharijis believed that a person who committed a major sin or fought against another Muslim is consequently an apostate.¹³⁶ On the other hand, the Murji'is believed that the person's faith should not be judged based on their actions but rather their words.¹³⁷ More diversity appeared with the rise of groups like the Mu'tazili and the Traditionalists. The Mu'tazili believed that the Qur'an was not the word of God but was created by God.¹³⁸ On the other hand, the Traditionalists, through a literalistic understanding of the Qur'an, believed that the Qur'an was the word of God.¹³⁹ The political powers at the time used the diversity of opinions to their advantage, by accepting one theological position and renouncing the other as an act of apostasy through the abandonment of Islam. For example, during the Abbasid period, Caliph Mutawakkil supported the Mu'tazili view.¹⁴⁰ Later, when Traditionalists had more power, Mu'tazili views were denounced and its followers were prosecuted as Muslims that abandoned Islam. Jurists from other schools called many leading Islamic Scholars apostates due to their support of a different theological opinion.¹⁴¹ The diversity of theological schools as well as their declaration of the apostasy of others and the use of such diversity for political gains is the climate in which the classical jurisprudence on apostasy developed. Therefore, it is safe to understand that this climate, in which religious and political authority were intertwined completely, the punishment for religious and political disagreement was the same, the death penalty. This climate again proves an existing wrongful confusion between the prohibition and criminalization of treason and apostasy.

¹³⁶*Id*, at 24.

¹³⁷*Id*, at 25.

¹³⁸*Id*, at 26.

¹³⁹*Id*, at 29.

¹⁴⁰*Id*, at 28.

¹⁴¹*Id*, at 30. See page 30-31 to see more examples of scholars accusing other scholars of apostasy.

c. Diversity of Opinion in Islamic Shari'a on Blasphemy and Its Relationship to Apostasy:

As stated earlier, in this part we will look at the second type of apostasy, which is through committing blasphemy, and the stance of Islamic Shari'a in regards to this issue. In the First Chapter it was stated that the Egyptian Government and Judiciary use articles 98(f), 160 and 161 of the Penal Code to criminalize blasphemy or unorthodox religious statements. Moreover, in the case of Nasr Hamed Abou Zayd, the courts equated the unorthodox statements, or blasphemy, found in the books of the defendant to an act of apostasy. This section aims to understand the stance of Islamic Shari'a in regards to blasphemy and its relationship to apostasy. This full understanding is essential to know whether or not Egypt is in fact prohibiting blasphemy, and in some cases defining it as an act of apostasy, based on undisputed rules of Islamic Shari'a. This section will address this issue by firstly understanding the meaning of blasphemy in Islamic Shari'a, including what was stated in its regards in the Holy Qur'an. Secondly, we will look at the stance of classical Islamic jurisprudence in regards to the right of Muslims or the state to punish blasphemers, through the concepts of the Right of God and the Right of Man. Finally, we will address the diversity of opinion among Islamic jurists in regards to considering the act of blasphemy an act of apostasy. This section basically aims to show that considering blasphemy as apostasy is not one of the undisputed rules of Islamic Shari'a, therefore it should not be considered part of Egyptian public policy and it does not have to be applied.

1) Sab Allah w Sab Al Rasoul

In classical Islamic jurisprudence scholars discussed the use of foul language in regards to the prophet and in regards to God, Sab Al Rasoul and Sab Allah respectively.¹⁴² Both these actions and the use of foul language against Islam as a whole represent what is now commonly referred to as blasphemy. The Holy Qur'an

¹⁴²*Id*, at 37.

does not mention a temporal punishment of blasphemy in any of its verses.¹⁴³ Moreover, no temporal sanction can be found stated directly in the statements of the Prophet.¹⁴⁴ This action was penalized during the post-prophetic period. The scholars at that time discussed the nature of such an action and its consequences. Some jurists saw insulting God or the Prophet or Islam as an act of apostasy; hence the blasphemer should be sentenced to death. Other scholars ruled that the blasphemer is not an apostate but could face the death penalty simply for their offence of blasphemy. Lastly, some scholars saw that the act of blasphemy removes the blasphemer from the fold of Islam, but did not specify a punishment for this.¹⁴⁵ It is argued, that jurists see blasphemy as a threat to the state and an attack on it, making its punishment in this life a must.¹⁴⁶ This shows that blasphemy was also not just understood within a religious perspective but also from a political one. Moreover, the punishment of blasphemy in this life was used to eliminate dissent among the Muslims.¹⁴⁷ This also shows that the temporal punishment for the act of blasphemy, whether it constituted apostasy or not, is not a matter of agreement among Islamic jurists; therefore, it does not have to be applied in Egyptian criminal law.

2) The Right of God and the Right of Man:

In dealing with questions regarding blasphemy, jurists distinguished between the person who insults the Prophet and the person who insults God. Insulting God was considered a violation of the right of God, while insulting the Prophet was considered a violation of the right of Man.¹⁴⁸ Jurists argued that Muslims have more responsibility in punishing the person that violates the right of Man, because the

¹⁴³*Supra* note 103 and *supra* note 36, at 38.

¹⁴⁴*Id.*

¹⁴⁵*Supra* note 36, at 38.

¹⁴⁶*Id.*, at 39.

¹⁴⁷*Id.*, at 39.

¹⁴⁸*Id.*, at 39.

Prophet cannot punish that person himself and cannot forgive him. While in the case of the violation of the right of God, the person can ask for forgiveness and repent.¹⁴⁹

The distinction is hard to accept because it assumes that only the Prophet can forgive the violator of the right of Man, it ignores the role of God in forgiving that violation. These two concepts can be related now to the Hisba law, according to which, Muslims have the obligation to promote good and forbid evil. The Muslims would then have to forbid the violation of the Right of Man. Even if the distinction between the Right of God and the Right of Man, as well as the fact that forgiveness is impossible to attain after violating the right of Man, are accepted; Egyptian law gives the State not only the right to impose punishment in cases of the violation of the Right of Man, but to also impose punishment in the cases of the violation of the Right of God. Therefore, the Egyptian State does not follow the mainstream jurisprudence, which in itself is not even undisputed, in regards to the punishment of blasphemy.

3) Blasphemy As Apostasy

As stated earlier, in the case of Nasr Hamed Abou Zayd, Egyptian Courts stated that the unorthodox statements mentioned in the books of the defendant are proof of his apostasy. Therefore, the courts equated between the acts of blasphemy and apostasy, ruling that the first leads to the second. The court even stated that the only way Abou Zayd can prove that he is not an apostate is through denying all of the controversial statements and that just stating that he is a Muslim will not be sufficient.

The equation between blasphemy and apostasy exists in Islamic Jurisprudence but should not be considered an undisputed rule of Islamic Shari'a. As stated in the previous section, some jurist of classical Islamic jurisprudence saw that a blasphemer is consequently an apostate and the legal punishment for apostasy should be applied to him. Others disagreed seeing that blasphemy does not automatically equate to apostasy.¹⁵⁰ With the lack of a clear Qur'anic or Sunna command for a temporal

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*, at 38.

punishment for blasphemy, a great number of jurists see that blasphemy is a moral issue that only has a punishment in the Hereafter.¹⁵¹ This shows that the Egyptian courts treated the equation of blasphemy with apostasy in the Nasr Abou Zayd case as an application of rules of Islamic Shari'a, while they were only applying one understanding of the rules and not an undisputed one.

C. Diversity of Opinion in Islamic Shari'a in Regards to Apostasy and its Legal Consequences on Personal Status:

After proving that Islam is a religion that embraces freedom of belief and that the rules regarding apostasy, in both its types, are in fact of a disputed nature in Islamic Shari'a, we now move to analyzing the disputed nature of the rules regarding the application of the legal consequences of apostasy. Egyptian Courts have sustained that the rules regarding the consequences of apostasy on personal status are a part of the undisputed rules of Shari'a. The courts failed to give further elaboration on the Shari'a bases used for understanding these rules. This section will look at the rules of Islamic Shari'a in regards to the consequences of apostasy on personal status, specifically marriage, inheritance and property. This section does not create a distinction between the method by which apostasy is considered to be committed, whether blasphemy or abandonment of Islam. According to Egyptian courts both types of apostasy lead to the legal requirement to apply the legal consequences on personal status.

1. Consequences of Apostasy on Marriage:

In classical Islamic jurisprudence the apostasy of one of the spouses leads to the separation of the couple, according to the Hanafi and Malaki schools of fiqh.¹⁵² While in the case of the apostasy of both spouses, according to the Shafi'is and Hanbali

¹⁵¹Rehman , *Supra* note 103.

¹⁵²*Saeed and Saeed, Supra* note 36, at 53.

schools of *fiqh*, the couple should also be separated.¹⁵³ On the other hand, the Hanafi School does not require the separation of the couple when both spouses commit apostasy.¹⁵⁴ Moreover, some jurists argue that the apostasy of the woman does not lead to the dissolution of the marriage and others argue that the apostasy of the wife turns her into a slave.¹⁵⁵ The diversity of opinions regarding the details of the issue shows that the matter is not one of consensus. Egyptian courts do not elaborate on the Shari'a bases they use for the separation of the couple, except for saying that in the case of the apostasy of the man the Muslim woman cannot stay married to a non-Muslim; hence they should be separated. The court deals with the issue as if there are no disputes in regards to its details, while in fact the details are not a matter of consensus. Therefore, the general rule state by the Court of Cassation, says that an apostate's marriage is dissolved and they cannot remarry, even a non-Muslim, is in fact not part of the undisputed rules of Shari'a that make up the Egyptian public policy.

2. Consequences of Apostasy on Inheritance

Like the consequences of apostasy on marriage, its consequences on inheritance are also a matter of diversity of opinion. With the lack of Qur'anic verses regarding the issue jurists reached, through *ijtihad*, a number of rules on inheritance and apostasy. Many jurists argue that the apostate does not have the right to inherit, even from members of the new religion he joined.¹⁵⁶ Hanafi jurists argue that the apostasy of a person consequently makes him a member of the enemy territory therefore he is considered as legally dead.¹⁵⁷ Jurists also have diverse opinions in regards to inheriting an apostate. Some argue that all what was owned by the apostate is given to the state's treasury after his death.¹⁵⁸ Others argue that anything that the apostate owned before his apostasy, should be inherited by his Muslim heirs, while anything

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Peters and De Vrie, *supra* note 6.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

that was owned after his apostasy is given to the state.¹⁵⁹ Lastly, some argue that the Muslim heirs regardless of when the ownership started should inherit everything that the apostate owned.¹⁶⁰ Therefore, the diversity of opinions regarding the consequences of apostasy on inheritance shows that there is no undisputed Shari'a rule regarding the issue; hence, it should not be considered part of the Egyptian public policy.

3. Consequences of Apostasy on Property

As stated earlier, the Egyptian Court of Cassation stated that in Islamic Shari'a an apostate loses control over their property until he repents.¹⁶¹ Although the court states it as a general rule, this also is a matter of diverse opinions amongst jurists. Jurists of the Malaki and the Hanbali schools of *fiqh*, and some of the Shafi'i school, argue that the control of the apostate over his property is stopped until such time as he repents and returns to Islam.¹⁶² Some jurists argue that the property of the apostates automatically becomes 'spoils of war' and cannot be returned to him even if he repents.¹⁶³ Other jurists, such as Hanafi jurist Abu Yusuf and Shaybani, argue that the right of ownership of property of the person should not be affected at all by committing apostasy.¹⁶⁴ Again this shows that the consequences of apostasy on the right to own property is not one of the undisputed rules of Shari'a that make up Egyptian public policy.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Repentance and apostasy is vast in which diversity of jurists' opinions can be found. Some argue that the apostate should not be asked to repent, while others argue that he must be asked. The duration in which and repentance is accepted is also a matter of disagreement. For more details on apostasy and repentance see *Saeed and Saeed, supra* note 36, at 54-55.

¹⁶² *Id.*, at 53.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

VI. Apostasy as a Legal Tool against Religious and Political Dissent:

It is already clear that the rules regarding apostasy and its legal consequences are disputed rules of Islamic Shari'a. Apostasy rules are used by the state for more than the purpose stated by the Judiciary, which is protecting public policy. Evidence suggests that state authorities employ the legal devices of apostasy to prevent any departure from mainstream state backed readings of religion and politics. The Egyptian state is abusing the laws of apostasy, including blasphemy laws. The abuse of the rules regarding apostasy and its legal consequences has been taking place since the development of the Islamic jurisprudence in regards to apostasy, for example during the Umayyad and the Abbasid period. It is argued that abuse of apostasy legal devices takes place by almost every country that has them.¹⁶⁵ Apostasy legal devices are basically used to eliminate opposition. The opposition most of the time is both religious and political because of the official role that Islamic law plays in the state and society. The opposition could be represented in religious minorities, reformists or any anyone that goes against the mainstream state backed understanding of religion and politics.¹⁶⁶

Scholars have warned against the possibility of abusing laws of apostasy and blasphemy. Apostasy laws can easily be open to misuse, if they are used by any political group to eliminated political opposition. This sort of elimination can take place through accusing the opposition of apostasy, including blasphemy, with the aim of removing them from the political field.¹⁶⁷ As stated earlier, the abuse of apostasy laws by political powers is not a novelty that rose in modern Islamic states but it has been taking place since the Umayyad and Abbasid dynasties. For example, Ghaylan al-Dimanshqi was executed by the order of Caliph Abdul Malik bin Marwan for the

¹⁶⁵Rehman, *supra* note 103.

¹⁶⁶*Id.*

¹⁶⁷ O'Sullivan, *supra* note 104.

accusation of heresy and Ahmed bin Nasir was executed by the order of Caliph al-Wathiq because of the same accusation.¹⁶⁸

In Egypt the Nasr Hamed Abou Zayd case is a perfect example of the abuse of apostasy laws by political powers. Although the case was not filed by the political power representing the state authority, it was still filed by a political power aiming to eliminate opposition. It is argued that the case was filed by the Islamist lawyers with the aim of fighting the interpretation of Islam put forward by Abu Zayed, as to insure that their interpretation of Islam is of dominance and hence their understanding of Islam will not be challenged within the Egyptian society. Therefore, their legitimacy as the ones talking on behalf of the religion will not be challenged and subsequently their control and dominance over the society would be stable.¹⁶⁹ Moreover, this case shows that the judiciary is the authority that has the legal right to decide whether or not a person's view is in accordance with the mainstream understanding of religion. The judiciary turns into the decision maker in regards to what constitutes the right interpretation of Islam. The judiciary is no longer deciding on legal issues but also on religious ones.

This Chapter will discuss how legal devices of apostasy can be abused in Egypt and how the Egyptian authorities are already abusing it. This Chapter will start by addressing how Egyptian authorities abuse the blasphemy articles in the Penal Code and use them against religious converts and reformists. Then the near-monopoly of the Public Prosecution office over sending the apostasy and blasphemy cases to court will be addressed. This will include looking again at the Hisba law and its amendments. This chapter aims to show that the legal devices of apostasy in Egypt are used to eliminate dissent and insure the control of the state over the interpretation of religion and politics.

¹⁶⁸*Id.*

¹⁶⁹Susanne Olsson, *Apostasy in Egypt: Contemporary Cases of Hisba*, 98 *The Muslim World*, 95 (2008).

A. Use of the Blasphemy Penal Code Articles against Religious Converts and Dissent:

Egyptian state authorities have already abused the Penal Code articles regarding apostasy. The state authorities use these penal articles to punish religious converts and reformists. With the lack of a penal article prohibiting the act of apostasy, in the form of the abandonment of Islam, or religious dissent the Egyptian state abuses the blasphemy article to penalize any opposition to its mainstream readings of religious affairs. In the study titled “Prohibited identities” issued by the Egyptian Initiative for Personal Rights (EIPR) and Human Rights Watch (HRW) a quick analysis of the abuse of the blasphemy prohibition article takes place. The report states 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.¹⁷⁰

This quick analysis gives an indication of how the executive branch in the Egyptian state, with the lack of a specific legal article prohibiting apostasy, uses the blasphemy article as a legal base for the arrest of the converts from Islam. In the report it is stated that a number of converts, apostates as the government sees them, were arrested based on article 98 (f). The government argues that by converting the person is denying Islam. They argue that announcing such a change in belief and stating the reasons for it are actions that qualify as blasphemy.¹⁷¹ Therefore, this shows that the state not only sees that blasphemy could be an automatic act of apostasy, like the AbouZayd case, but it also sees that apostasy could be an automatic act of blasphemy.

The state also abuses the articles to eliminate reformists. For example, in 2007 a group of men calling for peaceful reform in the Islamic world were arrested in Cairo

¹⁷⁰Bahgat and Stork, *supra* note 2.

¹⁷¹*Id.*

because of their ideas.¹⁷² The police took the men from a house belonging to one of them. At least one man was accused of violating article 98 (f), regarding the use of religion for the promotion of extremists ideas.¹⁷³ Another man was accused of “rejecting the penalty of apostasy.”¹⁷⁴ The men were imprisoned for 20 days, questioned by the Public Prosecution and their families and lawyers were not given access to them.¹⁷⁵ Moreover, the Penal Code articles were also used on members of the Shi’ie sect of Islam, seeing as how some core ideas of their belief can be seen as extreme in relation to the Sunni sect, which is the majority Muslim Sect in Egypt.¹⁷⁶

B. The Near-Monopoly of the Public Prosecution over Apostasy Cases:

Not only does the state abuse the penal articles regarding blasphemy and uses them to eliminate religious and political dissent, represented in religious converts and reformists, the state also has a near-monopoly over sending apostasy cases to the judiciary. These cases include both types of apostasy, which are abandoning Islam and blasphemy. This part of this chapter will discuss this near-monopoly of the state. Moreover, we will look at the blasphemy cases that took place during the presidency of Morsi to elaborate on the how the near-monopoly of the state over sending apostasy cases to the judiciary insures the legal devices of apostasy can be abused for the interest of the state authority.

The Public Prosecutor office “acts as public attorney before criminal courts with the right to file criminal actions. It was given the right by the Egyptian legislation to initiate action even if plaintiff has relinquished his right to do so.”¹⁷⁷ The Public Prosecution is part of the Egyptian state and has been a reflection of the political power in control of the state.

¹⁷²Nicholas Garces, *Islam Till Death Do You Part? Rethinking Apostasy Laws Under Islamic Law and International Legal Obligation*, 16 Sw. J. Int'l L. 229 (2010).

¹⁷³*Id.*

¹⁷⁴*Id.*

¹⁷⁵*Id.*

¹⁷⁶Bahgat and Stork, *supra* note 2.

¹⁷⁷ Public Prosecution, State Information Service, *available at* <http://www.sis.gov.eg/En/Templates/Articles/tmpArticles.aspx?CatID=256>

As stated earlier, the Public Prosecution is the only office with the capacity to file a blasphemy case, claiming a violation of article 98 (f), 160 and/or 161 of the penal code. Moreover, with the amendments to the Hisba law in 1996, the Public Prosecution became the only office with the capacity to file Hisba cases which regard the right of god, or the forbidding wrong.¹⁷⁸ Therefore cases regarding Hisba can only be filed by the Public Prosecution office or a person with direct interest in the case,¹⁷⁹ for example, the earlier mentioned case of the woman asking for the dissolvent of her marriage because of her husband's reconversion to Christianity. These two facts make sending the apostasy cases, in the form of blasphemy cases based the violation of the penal code or personal status cases based on the violation of the rules of Islamic law, to the courts a matter almost exclusively in the hands of the Public Prosecutor.¹⁸⁰

Baring in mind of the circumstances regarding apostasy cases in Egypt, the state basically now has a near-monopoly over using the legal devices of apostasy for its own advantage. The very likely abuse of the legal devices of apostasy by one group against another, the fact that the Egyptian state is already doing so and the near-monopoly of the state over filing the related cases to the courts are the main circumstance that should be kept in mind. Therefore, whoever is in control of the state, and consequently the Public Prosecution office, will have control over what constitutes the mainstream understanding of apostasy. this mainstream understanding of apostasy is most likely abused in regards to defining blasphemy, in the Penal Code or through understanding blasphemy as apostasy as was done in the Nasr Hamed Abou Zayd case. For example, in 2001 Islamists lawyers filed a complaint in the Public Prosecution calling for filing a case against Nawal Al Saadawi, a prominent Egyptian writer, to divorce her from her husband because of her apostasy.¹⁸¹ The complaint was filed because of the statements put forward by Al Saadawi. Al

¹⁷⁸Bälz, *supra* note 53.

¹⁷⁹*Id.*

¹⁸⁰ The near-monopoly is because in personal status a person with a direct interest in the issue can file the case.

¹⁸¹Garces, *supra* note 172.

Saadawi called the pilgrimage to Mecca a "vestige of pagan practices"¹⁸² and argued against the Islamic inheritance law in which a woman takes half of what the man takes.¹⁸³ The plaintiff filed the case directly in the court and not through the public prosecution. The Public Prosecution sent a memo to the court stating that the case is baseless. The court later dismissed the case because it was not filed through the Public Prosecution, which is in accordance to the amendments to the Hisba law.¹⁸⁴ This shows that if the Islamists were in power their understanding and agenda would have been followed by the Public Prosecution and the case would have been supported by the State. Therefore, the case would have taken place and resulted in defining apostasy of Al Saadawi by the act of blasphemy and the court would have ruled for the dissolution of marriage, like the Abou Zayd case.

1.The Presidency of Morsi:

The Presidency of Morsi represents a period of time where the Islamists had control over the state and subsequently over the Public Prosecution. That control led to a full manifestation of the misuse of the apostasy legal devices, specifically blasphemy cases. In a report studying the blasphemy cases, that took place after the 25th of January Revolution, a number of conclusions are reached. First, there is an increase in complaints filed to the Public Prosecution by non-officials regular citizens. Second, there is a prosecution of many ordinary citizens and not just public figures or scholars, unlike what happened in previous eras. Third, in many cases the defendants were not members of a minority group or a sect contradicting the beliefs of the Majority but they were Sunni Muslims.¹⁸⁵ The report shows that the increase was not just in the complaints filed but in the ones forwarded by the Public Prosecution to the courts. Moreover, it is mentioned that state authorities failed to protect the defendants

¹⁸²Khaled Dawoud, Did *hisba* ever go away?, Al-Ahram Weekly Online, *available at* <http://weekly.ahram.org.eg/2001/539/eg7.htm>

¹⁸³*Id and Garces, supra* note 172.

¹⁸⁴*Id.*

¹⁸⁵ Ibrahim, *supra* note 43.

of such cases from attacks on them or their property, the report calls it “failure because of intolerance” “فشل بلون التعصب”.¹⁸⁶ Both of these factors are reflective of the state and its tolerance and encouragement of such claims and limitations on freedoms of expression and belief. The state used the penal code as a tool to limit religious dissent. Any person that seemed to express opposing views to the state backed reading of religion was faced with the possibility of criminal charges under the blasphemy articles.

This presidential period is a proof of the inclination of the Public Prosecution to the abuse of blasphemy articles to eliminate opposition. The research for this thesis has failed to find a Hisba personal status complaint that was filed to the Public Prosecution in this period. Still it is safe to assume that if one of these cases was filed at that period it would have been transferred by the Public Prosecution to the courts and would have reached the same verdict as the Abou Zayd case.

¹⁸⁶ *Id.*

VII. The Possibility of Change in Egyptian Jurisprudence and the Judges' choice not to:

As stated in details in the first chapter, Egyptian courts have almost always applied the most conservative understanding of apostasy rules in Islamic Shari'a. This most conservative understanding is applied in all fields of Egyptian law. Still, there are rulings that can be considered an exception to the Egyptian jurisprudence. These rulings show the possibility of accepting the diversity of opinion regarding apostasy in Islamic Shari'a and the application of more lenient rulings. In this chapter we will look ruling no.529 issued in 2012 by Agouza District Court, which can be considered an exception to Egyptian jurisprudence. We will then move to examine why the majority of judges choose not to apply a similar legal logic to the Agouza ruling but stand by the application of the most conservative understanding apostasy rules in Islamic Shari'a.

A. An Exception to Conservative Jurisprudence:

The ruling no.529 issued in 2012 by Agouza District Court is an example of the possibility to apply a different understanding of apostasy in Islamic Shari'a, which is much more in accordance with the diversity of opinion. The ruling was issued in regards to the accusation of actor Adel Imam of breaching article 98 (f) of the Penal Code, by committing blasphemy. In the ruling the judge takes a step away from the rest of the Egyptian jurisprudence. The judge challenges the notion of abiding by previous rulings of higher courts.¹⁸⁷ In almost all of the cases mentioned in the first chapter the judges do not go into the details of how they reached the interpretation of the law. In most cases the judges just refer to previous judgments by higher courts and apply the rules stated by them.¹⁸⁸ In The Agouza case the judge argues that

¹⁸⁷ Case no.529 for the year 201, Agouza District Court, *available at <http://qadaya.net/?p=3465>*.

¹⁸⁸ See Supreme Administrative Court, 28 Nov.1984, Appeal 1359 , judicial year 28. And Court of Cassation, Jan. 7, 1996, appeal 41774 judicial year 54. And Court of Cassation, Aug. 5, 1966, appeals 475, 478 and 481, judicial year 65. And Court of Cassation, May 16, 1995, appeal 162 judicial year 162. And Court of Cassation, Jan. 19, 1966, appeal 28 judicial year 33. And rt of Cassation, Dec. 28, 1998, appeal 255 judicial year 68. And Court of Cassation, Jan. 15, 1991, appeal 79 judicial year 56. And Court of Cassation, Nov. 27, 1990, appeal 34 judicial year 55.

abiding by precedent reached by higher courts is not a legal requirement in Egyptian law. The judge states that the sources of law in Egypt, according to the civil law, are legislation, Islamic Shari'a and equity and that there is not mention of precedent.¹⁸⁹ Therefore, the Egyptian legal system allows the judges to divert from previous rulings, including looking into Islamic Shari'a and reaching the applicable rules. Bearing that in mind, the judge goes on to interpret article 98 (f) and elaborates on the legal reasoning behind his interpretation. The judge is not just basing his understanding of the law on precedent but he analyzes the law, the intention of its drafters and other aspects to reach correct interpretation. The Judge also does not follow precedent in finding the applicable rule of Islamic Shari'a. In the ruling the judge challenges the mainstream interpretation of Islamic Shari'a rules regarding apostasy and their allegedly undisputed nature. The judge mentions that the apostasy rules, including blasphemy, in Islamic Shari'a are in fact of a disputed nature and that there is no mention of a temporal punishment for it in the Quran.¹⁹⁰ Moreover, he speaks of the stance of Islam in regards to religious tolerance and freedom. Most importantly, the judge believed that his role is to interpret the codified law itself, article 98 (f), and not Islamic Shari'a. The judge saw that this as rule of written law that might give rise to Islamic Shari'a. By interpreting the statutory law the judge did not discuss the criminalization of the act of blasphemy, but he only its criminalization when it takes place with the intention of causing social strife. The judge did not unnecessary dwell in Islamic Shari'a but stuck to his role of interpreting the statutory law.

The Agouza case shows that the Egyptian legal system does not require judges to abide by precedent and the understanding of the law stated in them. The case shows that the law actually gives the judges the right to interpret the codified law and in the case of the lack of one, like in the case of apostasy, the judge looks into Islamic Shari'a to find the applicable rules. The legal system only requires the judges to abide by the law and not the interpretation of it that was reached in the previous rulings.

¹⁸⁹ Case no.529 for the year 201, Agouza District Court, available at <http://qadaya.net/?p=3465>.

¹⁹⁰ Case no.529 for the year 201, Agouza District Court, available at <http://qadaya.net/?p=3465>.

Moreover, nothing requires the judges to accept the interpretation of Islamic Shari'a reached by previous rulings and not challenge it. The law gives the judges the space to reach the rules and the interpretations themselves.

The Agouza case shows that the judges have the right and the possibility to apply a more lenient interpretation of apostasy rules in Islamic Shari'a but they do not. Consequently, the question rises why do the judges choose to apply the most conservative interpretation of apostasy rules in Islamic Shari'a?

B. Understanding the Choice of the Judges:

As stated in details in previous chapters, Islamic Shari'a includes a diversity of jurist opinions pertaining to apostasy and its legal consequences. One can safely argue that the rules regarding apostasy are in fact disputed. With such obvious diversity of opinion, that only requires sufficient research into the issue of apostasy in Islamic Shari'a, why do Egyptian judges choose to apply the most conservative interpretation of Islamic Shari'a rules pertaining to apostasy? Not only do Egyptian judges not admit the diversity of opinion in regards to the rules of apostasy, but they also choose to apply the conservative interpretation of Islamic Shari'a regarding the topic. This section will analyze the possible reason behind the judges choosing the conservative rules and not choose the possible lenient rule, like the Agouza ruling.

To understand the reason behind the choice of the judges one must understand more what they claim to be the legal base to their rulings. By analyzing the rulings of most of the Egyptian judges in apostasy cases it is noticed that they are based on two justifications. The legal precedent of higher courts and what the rulings see as 'the rules agreed upon in Islamic Shari'a'. These two justifications give us an insight into what the judges put forward as the logic behind the rulings; therefore, the logic behind their choice.

1. Role of Precedent:

The massive difference between the majority of the court ruling regarding apostasy and the Agouza ruling is based on the legal importance they give to precedent. As stated earlier the majority of judges base their interpretation of the law, including Islamic Shari'a rules, on precedent of higher courts.¹⁹¹ The judges look at precedent to find the interpretation of the law and sometimes, in issues of Islamic Shari'a, the legal rule itself. In the majority of the cases the judges just cite the legal precedent. They do not state the legal logic behind accepting these previous rulings as the right interpretation of the law. As stated in the Agouza ruling and the Egyptian civil law, precedent is not a source of law. It can be used to find the interpretation for the law but that does not mean that the judge has to abide by it. The judges choose not to challenge the case law, they do not even elaborate on their choice to abide by it. The judges consciously give up their right to interpret the law themselves and easily follow the precedent. This shows that the majority of judges abide by the previous case law not out of obligation but out of conviction and without giving a legal logic behind this conviction.

2. Selective understanding of Apostasy Law in Islamic Shari'a:

In addition to basing their rulings on precedent, the judges also claim that the rules they apply are the ones agreed upon in Islamic Shari'a. But what knowledge do Egyptian judges have of Islamic Shari'a? And is scholarly knowledge of Islamic Shari'a truly needed for the judges to comprehend the disputed nature of apostasy rules?

Egyptian Judges, like lawyers, receive their education in law schools. These schools offer the Students an education in the different fields of law, including

¹⁹¹See Supreme Administrative Court, 28 Nov.1984, Appeal 1359 , judicial year 28. And Court of Cassation, Jan. 7, 1996, appeal 41774 judicial year 54. And Court of Cassation, Aug. 5, 1966, appeals 475, 478 and 481, judicial year 65. And Court of Cassation, May 16, 1995, appeal 162 judicial year 162. And Court of Cassation, Jan. 19, 1966, appeal 28 judicial year 33. And rt of Cassation, Dec. 28, 1998, appeal 255 judicial year 68. And Court of Cassation, Jan. 15, 1991, appeal 79 judicial year 56. And Court of Cassation, Nov. 27, 1990, appeal 34 judicial year 55.

Islamic Shari'a. Still, the Islamic Shari'a education offered in law school is not enough to make the student an Islamic Shari'a jurist. For example, in the Law School of Ain Shams University the students take 10 courses every year, only one of which is Islamic Shari'a.¹⁹² The students do not receive detailed education in Islamic Shari'a as that received by students in Al Azhar University. Prior to the establishment of Egyptian law schools in their current form, Al Azhar University educated its students in Islamic law to do both the functions of an Islamic jurist and a judge.¹⁹³ That intense education in Islamic law is not given to students in law schools. These students, that become both judges and lawyers, only have a relatively limited understanding of Islamic law.

This limited knowledge and understanding of Islamic law by Egyptian judges might be another reason behind their choice to apply one of the most conservative interpretations of Islamic Shari'a rules in regards to apostasy and claiming that it is the one agreed on by Islamic jurists or 'undisputed'. They do not have the education or the knowledge to know the historical context of these rules, their diversity and so on. The stated reason is not very convincing seeing as the author of this thesis also only received education in a law school and did not receive any professional Islamic law education that would make her an Islamic jurist. Still, by conducting sufficient research regarding the rules of Islamic Shari'a pertaining to apostasy it was easily concluded that these rules are in fact disputed and are not a matter of agreement by Islamic jurists. Therefore, it is logical to conclude that the Egyptian judges also choose to not genuinely look into the disputed nature of Islamic law rules pertaining to apostasy but chose to follow the mainstream understanding, which is the most conservative one.

Why would the judges choose to follow the precedent and not challenge the mainstream understanding of apostasy rules? The only logical answer would that the precedent and the mainstream understanding are compatible with what they judges

¹⁹² كلية الحقوق, available at <http://law.asu.edu.eg/course/index.php?action=categorycourse&cval=218>.

¹⁹³ AmrShalakany, 'I Heard It All Before': *Egyptian Tales of Law and Development*, 27 THIRD WORLD Q 833, 839 (2006).

believe the law should be. Still, that is not how the legal system operates. The judges do not have the right not to elaborate on the legal logic behind their choice to apply the most conservative understanding of apostasy rules. The precedent is not legally binding and they can easily find out the true disputed nature of the rules in Islamic Shari'a. The judges should elaborate on the legal logic stated in their rulings so that their biases are out in the open. Therefore, it would be obvious that the rulings is not based on binding law but based on a choice of the judge that can be challenge using the law.

This ruling shows that the Egyptian judges applying the conservative mainstream rules of Islamic Shari'a in regards to apostasy are doing so out of choice. They have the legal capacity to challenge the precedence and to genuinely look into the disputed nature of apostasy rules in Islamic Shari'a. The judges simply choose not to. They choose to be a tool of ensuring the application of one of the most conservative understanding of Islamic law. They chose to not use their legal function to genuinely judge interpret the law and apply it. They choose to support a logic that creates a gap between Islamic Shari'a and human rights. They choose to breach the Egyptian international obligation to article 18 of the ICCPR.

VIII. Conclusion:

In conclusion, Egypt is in violation of its international obligation to ensure freedom of belief. The state's argument that Islamic Shari'a does not allow apostasy and sets legal consequences on it is in fact based on an incorrect understanding of Islamic Shari'a. As stated in chapter IV the rules regarding apostasy and its legal consequences are a matter of diversity of opinion amongst Islamic jurists. The application of such rules is not a matter of legal obligation as they are not part undisputed rules of Islamic Shari'a and therefore not part of Egyptian public policy, but rather a matter of limited understanding of Islamic Shari'a. Islamic Shari'a does not require a temporal punishment for apostasy or legal consequences resulting from it. Islamic Shari'a prohibits religious coercion and acknowledges that belief is an issue between the individual and God. Islamic Shari'a does not order not allowing the recognition of apostasy. The Judges choose to ignore the stance of Islam in regards to religious tolerance and freedom of belief. They choose to not recognize the context in which the jurisprudence regarding apostasy was developed. They choose to not understand the historic relationship between apostasy and treason and the subsequent confusion in regards to punishment.

The Judges following this limited understanding of Islamic Shari'a leads to acts that oppose the foundations of Islam as this constitutes religious coercion. Moreover, following this limited understanding leads to wrongfully limiting the right to freedom of belief through not allowing the recognition of apostasy and the application of legal consequences on apostates which punish them through 'civil death'. Adhering to this limited understanding makes the legal framework of apostasy simply a tool in the hand of the state to eliminate dissent. It makes it a tool in the hands of the conservative judges to use it as a legal base for their biases. Following of this limited understanding creates a society where calling for reform and expression of one's thoughts are punishable actions, through the criminalization of blasphemy and its equation with apostasy. The following of such an understanding limits the rights of religious minorities. Apostasy laws, including blasphemy, that are applied in

Egypt now are killing diversity within the Egyptian State and bluntly violating the rights of its citizens. Moreover, the application of the legal consequences of apostasy are seen by many scholars as punishments. For example, in the article "Islam, Till Death Do You Part? Rethinking Apostasy Laws Under Islamic Law and International Legal Obligations" it is stated that "Another punishment is civil-death, which eliminates certain civil rights including: invalidating an apostate's marriage or stripping property or inheritance rights."¹⁹⁴ The article continues to argue that in Egypt, apostates have two options: the first is to express their true beliefs and consequently face civil-death and the second is to not express their true beliefs and commit the crime of fraud in official documents.¹⁹⁵ It is clear that the civil-death resulting from apostasy deters citizens from stating their true beliefs to the state.¹⁹⁶ Therefore, the legal framework of apostasy clearly limits the life of Egyptian citizens.

Islam, the main source of Egyptian legislation, ensures freedom of belief. The only undisputed rule in Islamic Shari'a regarding apostasy is that it is a sin that will be punished by God in the afterlife. This is the understanding of Islamic Shari'a that the Egyptian state should apply. This understanding will ensure that a Muslim can abandon Islam, have the abandonment acknowledged and not face civil death as a legal consequence. Moreover, this understanding will ensure that a citizen can express a dissenting religious opinion or even a reformist one and not be penalized for it and not be proclaimed an apostate by the court. This understanding is based on Islamic Shari'a, first and foremost, and is in accordance with the ICCPR. Consequently, the Egyptian State should fix its legal system and comply with Islamic Shari'a, its own national laws, as well as its obligations under international law.

¹⁹⁴Nicholas Garces, *Islam Till Death Do You Part? Rethinking Apostasy Laws Under Islamic Law and International Legal Obligation*, 16 Sw. J. Int'l L. 229 (2010).

¹⁹⁵Nicholas Garces, *Islam Till Death Do You Part? Rethinking Apostasy Laws Under Islamic Law and International Legal Obligation*, 16 Sw. J. Int'l L. 229 (2010).

¹⁹⁶ For stories of citizens that fear changing the religion stated in their identification cards see Bahgat and Stork, *Prohibited Identities*, *supra* note 2.