PUBLIC POLICY AND ISLAMIC LAW:
THE MODERN DHIMMI IN CONTEMPORARY EGYPTIAN
FAMILY LAW*

MAURITS BERGER
(University of Amsterdam)

Abstract

Egyptian law has maintained the Islamic system of interreligious law in which the Muslim, Christian and Jewish communities are governed by their own courts and their own laws. In the course of the twentieth century, however, these separate courts were abolished and the application of non-Muslim laws was restricted to matters of marriage and divorce, and then only if the non-Muslim spouses share the rite and sect of the same religion. In all other cases Islamic law applies. In addition, non-Muslim laws may not be applied if they violate Egyptian “public policy”, a European concept which refers to the fundamentals of a national legal order. Egyptian public policy can be defined as those principles which are essential in Islamic law. In this article I analyse the status of the non-Muslim Egyptian in contemporary personal status law, based on Egyptian case law and legal literature. The concept of public policy plays a key role in understanding the mechanics of interreligious law in Egypt. I will argue that public policy serves as a legal barometer of the coexistence between Muslim and non-Muslim communities in Egypt.

Introduction

IN CONTEMPORARY EGYPT, the Muslims, Christians and Jews are governed by the personal status laws of their respective communities. This implies that the personal status of Egypt’s legal subjects is based on their belonging to a religious community. In this respect, a person without religion is a legal non-entity. The Egyptian legal literature refers to the coexistence of religious laws as the “plurality of [religious] laws” (ta‘addud al-sharā‘i‘i‘),1 but I shall use the term “interreligious law,” which is common in most European literature.

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1 In the Egyptian legal literature and case law, the term shari‘a is used for Islamic as well as Christian and Jewish personal status laws, all of which are regarded as having been divinely inspired; the term qānūn is reserved for positive law (cf. ‘Abd I-Wahhāb, 1959: 58). In this article, I use Islamic law to refer to the Islamic Shari‘a in general, and (non-)Muslim law to refer to the personal status law of the (non-)Muslim community.

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In this article, I will analyse the relations and tensions between these legal spheres in Egypt. What if the laws of one religious community contradict or violate the values of another community? Is there a hierarchy among these laws? Which law applies in case of conversion to the religion of another community or in case of intermarriage between members of different communities?

In Part I of this article I will focus on conflicts law, that is the legal procedure used to determine which law is applicable in a case in which more than one law applies to a situation, e.g., the marriage between a Catholic and a Copt or between a Copt and a Muslim. Readers who are not lawyers should note that the term conflicts law is usually reserved for the field of private international law, which deals with conflicts between laws of different countries. The subject of this article, however, is conflicts between laws of different religious communities within a single country. I refer to the procedure to solve these conflicts as interreligious conflicts law.

Egypt’s interreligious conflicts law is codified in Law 462 of 1955, which allows the application of non-Muslim personal status laws, albeit under certain conditions, and only within the limits of public policy (al-nizām al-ʿāmm). This public policy will be discussed in Part II. The term public policy (also known as ordre public) is of European origin and was introduced into Egyptian legal doctrine at the end of the nineteenth and the beginning of the twentieth century. The terms public policy and ordre public can be misleading, since they bring to mind state policy or the maintainance of law and order. This is not the case in conflicts law, where public policy is a technical term denoting the principles which are considered of essential importance to a national legal order. To accomodate the changes in social, economical and moral values of a society, the interpretation of public policy is usually left to the courts rather than defined by law. The understanding of public policy may differ from one country to the next, and these differences are an important indicator of the principles held dear by a society. It is my contention that public policy plays a crucial role in Egyptian interreligious law.

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2 This is the terminology used in the French (conflit inter-confessionnel) and German (interreligiöses Kollisionsrecht) legal literature, but not by the Egyptian legal literature, which commonly refers to “internal conflicts law” (qānūn al-tandzu’ al-dākhlī) as opposed to the term “international conflicts law” (qānūn al-tandzu’ al-duwali) which belongs exclusively to the realm of private international law.
This article is based on two major sources: Egyptian legal literature and the rulings of the Egyptian Court of Cassation, the highest court in civil cases. I focus on the period from the promulgation of Law 462 of 1955 until the latest relevant material I could find, 1997 for case law and 1999 for the legal literature. Whereas there is little case law or legal literature in matters of interreligious law before 1955, Law 462 obviously sparked a new interest in this field, as demonstrated by the increase in both case law and legal literature.

**Part 1: The Legal Framework**

1. **Interreligious Law**
1.1 Islamic law, interreligious law and conflicts law

A religious legal system like Islamic law is both exclusive, because it will not recognise other laws let alone apply them, and defensive, because it wants to preserve the religious integrity of its community. Consequently, some contemporary scholars argue that Islamic law by its nature does not recognise a concept like conflicts law, since it will always apply its own law and hence does not allow the problem of conflicting laws to occur.

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3 The rulings of the Court of Cassation are published in an annual collection known as “Collection of Rulings of the Court of Cassation” (Majmu‘at al-Ahkām li-Mahkamat al-Naqd), published by Maktab al-Fanni in Cairo. For this article, I have used only the collection with Civil, Commercial and Personal Status rulings. The filing references in this collection are elaborate and confusing. First, each annual collection is dated with two years: the year according to the Gregorian calendar, and the year dating from 1949, the year of the first publication of the collection (i.e. 1949 is Year 1). Second, the rulings in each annual collection are listed in chronological order, but again with two dates: the date of the ruling according to the Gregorian calendar, and the year dating from 1931, the year the Court of Cassation was established (i.e. 1931 is Year 1). Finally, each ruling has two numbers: a court file number and the sequence number of the annual collection.

In this article, the rulings will be referred to in accordance with the practice followed by Egyptian legal scholars: court file number, the year dating from 1931, and the Gregorian date of the ruling (which is also the same year as the collection in which it is published).

4 In this article, I also will refer to the Supreme Constitutional Court (SCC) in Egypt.

5 Nearly half a century ago, Linant de Bellefond observed that if one asks for a book on non-Muslim law in a Cairo bookstore, one receives a “pitying smile” (Linant de Bellefonds, 1956: 424).


7 Benattar (1967); Wähler (1978).
Although theoretically correct, this observation requires qualification. In order for conflicts law to be operative, some measure of recognition of other legal systems is required. Here we encounter a major difference between Christianity and Islam: Islamic law recognises other monotheistic religions and has institutionalised a level of coexistence and freedom of religious practice never attained in Christian canonical law. Nevertheless, although Islamic law accords certain legal liberties to non-Muslim communities, these liberties may only be exercised within these communities. As soon a Muslim becomes involved in a dispute with a non-Muslim, thereby generating a conflict of laws, Islamic law applies. It may therefore be argued that conflicts law does indeed exist in Islamic interreligious law, albeit merely to demarcate the boundaries between the legal spheres of the religious laws. This demarcation usually takes place when the boundaries are crossed, as in mixed religious marriages and conversion.

1.2 The dhimmī

The legal status of non-Muslims in Muslim countries may differ from their actual social, economical and political status. The Islamic position with respect to non-Muslims under Islamic sovereignty is encapsulated in the expression “tolerance of religious pluralism based on inequality”. Non-Muslim scholars tend to stress the inequality of non-Muslim residents as citizens of secondary rank, whereas most Muslim scholars emphasise the tolerance of Islam. However, both inequality and tolerance were — and remain — legal realities which have been colored in various shades of white and black throughout Islamic history. Before turning to the legal realities of the twentieth century, we need to examine, albeit briefly, the legal status of non-Muslims in Islamic law.

Islamic law recognises two categories of legal subjects: Muslims and non-Muslims. Non-Muslims are subdivided into three legal subcategories: harbis are those who reside outside the Islamic territories,
**dhimmis** are those who reside within the Islamic territories, and **musta’mins** are **harbis** who are allowed temporary entry into the Islamic territories. In modern terms, international conflicts law would apply to **musta’mins**, and interreligious conflicts law to **dhimmis**.13

Islamic law holds that non-Muslim communities living under Islamic rule (i.e. **dhimmis**) are entitled to legislative and judicial autonomy with regard to their religious and personal status affairs. This rule is captured by the legal maxim: “We leave them and what they believe” (*natruka-hum wa má yadināna*).14 For all other matters, **dhimmis** were subjected to Islamic law, albeit with modifications to some rules.

Modern Arab nation-states have adapted the legal status of **dhimmis** in order to meet the standards of statehood in the nineteenth and twentieth century. The notion of an Islamic imperium run by and for Muslims, with a separate statute for its non-Muslim inhabitants, gave way to the notion of the nation-state, based on the equality of its citizens regardless of their religious creed. In the **Hatti Humayoun** of 1856, the Ottoman sultan abolished the status of **dhimmi** and proclaimed the equal treatment of all citizens of the empire. One of the few religion-based differences that were maintained was the judicial and legislative autonomy of most religious communities. When Egypt became a British protectorate and therewith gained de facto independence from the Ottoman empire in 1914, it declared the continuation of the **Hatti Humayoun** by Law 8 of 1915.15

1.3 Contemporary Egyptian law

Although Egyptian legislation grants Egyptian non-Muslims a certain degree of autonomy in matters of personal status law, it does so by way of exception. In the first instance, the personal status law of **all Egyptians**, regardless of their religion, is governed by Islamic law. This

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13 The literature on the legal aspects of Islamic interreligious law is abundant. Useful titles include: Benattar (1967); Boghdadi (1937); Cahen (1986); Cardahi (1937); Edge (1990); Elgeddawy (1971); Fattal (1958); Gervers and Bikhazi (1990); Khadduri (1966); Marāghi (n.d.); Maḥmaṣṣāni (1972); Tritton (1936); Žaydān (1976).

14 For instance, the **Hanafi** scholar Kāšānī (d. 587/1191), when discussing whether the conditions for the marriage of Muslims should apply to **dhimmis**, writes: “We instruct that we leave them and what they believe” (*amarna bi-an natruka-hum wa má yadināna*). (*Bādā’i’ al-Ṣanāʾi’ fī Tartīb al-Sharāʾi’,* Vol. II, 311-12.)

15 For a historical overview of these developments see Abu Sahlieh (1979); Abū Saʿūd (1986); Boghdadi (1937); Brugman (1960); Cardahi (1937); Meinhofer (1995).
is stipulated in Article 280 of the Decree on the Organisation of the Sharī‘a Courts:16

Judgments [in personal status cases] will be passed in accordance with what is stipulated in this Decree, and in accordance with the prevalent opinion of the school of Abū Ḥanīfa (...)

The exception to the overriding jurisdiction of Islamic law is stipulated in Article 6(2) of Law 462 of 1955 on the Abolition of the Sharī‘a and Milli Courts,17 which allows non-Muslims to be governed by their own personal status laws, albeit under certain conditions:

With regard to disputes related to the personal status (ahwāl shakhshiyya) of non-Muslim Egyptian [couples] who share the same sect and rite (al-muttahidī al-tā’īfa wa al-milla), and who at the time of promulgation of this law have [their own] organised sectarian judicial institutions, judgments will be passed in accordance with their law (shārī‘ati-him), all within the limits of public policy (al-nizām al-‘āmm).

Egypt’s interreligious conflicts law is based on these two articles. According to Egyptian legal doctrine, Islamic personal status law — that is, according to Ḥanafi jurisprudence — is the “general law” (al-qānūn al-‘āmm or al-shari‘a al-‘āmm) in matters of personal status for all Egyptians.18 Only when a non-Muslim Egyptian couple fulfills the conditions stipulated in Article 6 of Law 462, will their own “special” non-Muslim law (al-qānūn al-khāṣṣ or al-shari‘a al-khāṣṣa) be applied to their personal status affairs, by way of exception to the general law.19 The criterion by which interreligious conflicts law in Egypt determines which one of the personal status laws applies is therefore religion, as the Court of Cassation has stated.20

2. Limitations to the Autonomy of Non-Muslim Personal Status Law

Before 1956, the Muslim, Christian and Jewish communities in Egypt had their own personal status laws and their own courts.21 Whereas

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17 Qānūn bi-Ilghā‘ al-Mahākīm al-Sharī‘a wa al-Millīya.
18 The Islamic personal status law in Egypt is codified only in matters of succession, guardianship, legal capacity, family relations, and some aspects of marriage and divorce. The non-codified rules of Islamic personal status law are based on the jurisprudence of the Ḥanafi school.
19 See also the Explanatory Report of Law 462 of 1955, and the Court of Cassation (cf. Nr. 29, Year 34, 30 March 1966; Nr. 8, Year 36, 14 February 1968; Nos. 16 and 26, Year 48, 17 January 1979).
20 No. 23, Year 46, 26 April 1978.
21 The Egyptian laws and most case law and legal literature refer to Christians...
there was one Muslim community, Christians and Jews were divided into a number of sub-communities, each with its own personal status law and court. The courts for the Muslims were called Shari'a Courts, for non-Muslims Milli Courts. Whereas the personal status law for Muslims was promulgated by the Egyptian legislature, and the judges in the Shari'a Courts were government officials, the laws and courts of the Christians and Jews were internally regulated by these communities, except that their internal substantive and procedural laws had to be submitted to the Egyptian government for approval.\footnote{For additional details, cf: Brown (1997); Faraj (1969); Linant de Bellefonds (1956); Meinhofer (1995).}

During the twentieth century, Egyptian legislation has reduced the autonomy of Egyptian non-Muslims in matters of personal status in three ways. First, by means of the general law, the applicability of non-Muslim personal status laws was limited to matters of marriage and divorce. Second, in 1956, the Muslim, Christian and Jewish family courts were abolished by Law 462. Finally, the same law codified the existing practice that non-Muslim rules of marriage and divorce are applicable only under certain conditions.

2.1 Narrowing the scope of non-Muslim personal status law

Throughout Islamic history, the extent of legislative autonomy for non-Muslims has been dependent on the will of the Muslim ruler. For their present legal status, most contemporary non-Muslims refer to the Ottoman Hatti Humayoun decree of 1856, which granted legislative autonomy with regard to legal matters which we would currently define as personal status law, including capacity, guardianship and inheritance.

Egyptian legal practice, however, has restricted the application of non-Muslim personal status laws to marriage and divorce. In the course of the twentieth century, this practice was codified, and matters such as guardianship (1925, 1952), intestate succession (1943), bequest (1946), family names, family ties and legal capacity (1949) were removed from the realm of "special" law and classified as "general" law. Thus, the legislative autonomy of Egypt’s non-Muslim communities, strictly speaking, is confined to family law (qānūn al-usra) rather than personal status law.\footnote{\textit{ghayr al-muslimin}. Occasionally, the Islamic terms \textit{ahl al-dhimma} ("protected people" under Islamic sovereignty) and \textit{ahl al-kitāb} ("People of the Book") are also used.\footnote{\textit{Boghdadi} (1937: 343) observes that this was already the case in the 1930s.}
By classifying matters like capacity, guardianship and inheritance under “general law”, the Egyptian legislature has brought about a situation in which the relations of non-Muslims in these areas are governed by Islamic law. In most cases this will make little or no difference for non-Muslims. The law of intestate succession is an exception in this regard, since Islamic law differs greatly from the Christian laws. Although Egyptian non-Muslims were formally subjected to Islamic intestate succession law long before the Hatti Humayoun, they were allowed to apply their own law under certain conditions. In the 1960s, however, the Court of Cassation ruled that these conditions were abrogated, and that Islamic intestate succession law applied to all Egyptians, regardless of their religion.

Different rationales have been offered for subjects non-Muslims to Islamic inheritance law. Some argue that Christian inheritance law has no religious character because it is based on Roman law, and therefore forfeits its need to be implemented. In several rulings, the Court of Cassation has held that Islamic inheritance law prevails because it has a “strong link to the legal and social foundations of society”. This prompted one scholar to conclude that application of inheritance rules of non-Muslim laws would constitute a violation of Egyptian public policy.

2.2 Abolition of family courts

Since the nineteenth century, Egypt’s multiple court system has undergone many changes as it has sought to achieve unification. The abolition of the Shari’a and Milli Courts in 1956 marked the final stage of this process. The activities of these courts were all incorporated into the

24 Cf. Boghdadi (1937: 152, 350); Brugman (1960: 173). According to Sayyida Kāshif, the application of Islamic inheritance law to non-Muslim Egyptians dates from the 2nd/8th century when a decree to that effect was issued by the Egyptian wali Ḥafs b. al-Walid (Kāshif, 1993: 125ff).
25 The application of non-Muslim inheritance law was allowed on two conditions: the heirs are determined in accordance with Islamic law, and all heirs must agree unanimously on the application of the inheritance law of the religion to which the deceased belonged. This legal practice was codified in Law 25 of 1944 on Clarifying which Law is to be implemented in Matters of Inheritance and Testament (Bayān al-Qāni‘an al-Wājib al-Taḥqiq fi Masā’il al-Mawārith wa al-Wāsāyā).
26 The Court based its ruling on Article 875 of the Civil Code of 1949, which stipulates that in matters of inheritance Islamic law is to be applied to all Egyptians, Muslim and non-Muslim alike (No. 40, Year 29, 19 June 1963; No. 330, Year 34, 29 February 1968; No. 32, Year 40, 18 December 1974).
28 These rulings will be discussed in Part II.
29 Ismā‘īl (1957: 59-61).
“national courts” (mahākim wataniyya). The jurisdiction of non-Muslim religious authorities (who until 1956 had presided as judges in non-Muslim courts) was henceforth limited to non-legal religious affairs. The national courts are divided into sections (dawā’ir), of which the Family Section is one. Each court, as a matter of internal administrative organisation, is free to make subdivisions within its Family Section, “to divide the work” between matters regarding Muslims, non-Muslims and foreigners. Also, although the religion of a judge is not a condition for being assigned to a case, there appears to be a tendency to avoid having a Christian judge rule in a Muslim case (see Part II).

2.3 Conditions for applying non-Muslim family laws

Article 6 of Law 462 stipulated two conditions for the application of non-Muslim family law: “sharing the same sect and rite” (al-muttaḥidā al-tā’ifā wa al-milla), and non-violation of public policy. Only the first condition concerns us here.

The terms “sect” and “rite” are not defined by law. Egyptian case law and legal literature use the following definitions to categorise Egyptian non-Muslims. First, a distinction is made between religions (sg: dīn), of which usually only Christianity, Judaism and Islam are mentioned. A religion can be divided into “rites” (sg: milla), which are defined as ways of practising that particular religion. Each rite can be subdivided into “sects” (sg: tā’ifa), which are defined by the Court of Cassation as “groups of people [...] who share a common ethnic origin, language or customs”. Each sect and its religious organisation (hai’a) obtain the status of a legal person upon recognition by the state (Article 52/2 Civil Code).

The Muslim community in Egypt, from a legal point of view, constitutes one religious community, without any rites or sects, adhering to the legal doctrine of the Ḥanafi madhhab. The largest non-Muslim minority is the Christian community, which is subdivided into twelve sects that were officially recognized at the time of the promulgation of

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30 Court of Cassation, No. 3, Year 47, 28 June 1978.
32 No. 23, Year 46, 26 April 1978; No. 29, Year 47, 28 March 1979.
33 No exact numbers are available. Estimates of the number of Christians in Egypt vary from 3 to 15 million out of a total population of approximately 60 million, with 6 million (10 percent of the population) being the most common figure.
Law 462 of 1955.34 The Jewish community of Egypt, which, historically, was composed of two sects,35 has dwindled to negligible numbers since the 1950s;36 for this reason there is little relevant case law available on their personal status laws. I will therefore focus mainly on the legal status of Christians in Egypt.

Law 462 stipulates that the application of non-Muslim law is limited to couples who “share the same sect and rite”. This means that non-Muslim law does not apply to the marriages of non-Muslim spouses who are of different religion (e.g., Christian and Jew), of different rite (e.g., Catholic and Protestant), or even of different sect (e.g., Coptic-Orthodox and Greek-Orthodox).37 In such cases, Islamic personal status law is applied in the same manner as it is applied to Muslim Egyptians.38 Although this practice may seem odd, there is a historical justification for it. Prior to 1956, all Jewish and Christian sects (with the exception of the Latin-Catholics) had their own courts and in order to avoid problems of conflicting jurisdiction, it was standard procedure for these courts to refer non-Muslim couples of different rite or sect to the Shari’a Court, which was competent to apply only Islamic law.

The existence of a court for every Christian sect has created another oddity in Law 462. The Christian rites and sects have a total of six personal status laws.39 Thus in addition to its three rites and twelve

34 These are:
1. the Orthodox rite, divided into: Coptic, Greek, Armenian and Syrian sects;
2. the Catholic rite, divided into: Armenian, Syrian, Coptic (all three seceded from the Orthodox church), Latin (or Greek-Catholic, from Lebanon), Maronites (from Lebanon) Chaldeans (from Iraq), and Roman sects;
3. the Protestant rite (which was mistakenly recognized as one sect by governmental decree of 1850, and hence still retains the official status of a single sect, regardless of its subdivisions).
35 These are the Rabbinic and the Karaite sects, each with its own personal status law, one compiled by Hay bin Sham’ûn in 1912 for the Rabbinites, and the law compiled by Ellyahu Bishias in 1912 for the Karaites.
36 According to the Ahram Center for Political and Strategic Studies, less than 100 Jews lived in Egypt in 1997 (1998:108).
37 The only exception is with Protestant couples of different sects, because the Protestants are legally considered to be one sect (see note 34)—Court of Cassation, cf. No. 50, Year 46, 28 March 1978; No. 29, Year 48, 28 March 1979; No. 41, Year 54, 9 April 1985; No. 23, Year 56, 16 December 1986.
38 This conflicts rule is not shared by all Muslim countries with non-Muslim minorities. In Syria and Jordan, for instance, the law of one of the spouses will be applied when they do not share the same non-Muslim religion, sect or rite. (See, for Syria: Berger, 1997: 122.)
39 These laws are:
- Coptic-Orthodox: Li’iha al-Ahwâl al-Shakhîyya li-l-Aqbat al-Urthâdhuks (1938)
- Greek-Orthodox: Qânûn al-Ahwâl al-Shakhîyya li-l-Rûm al-Urthâdhuks (1927)
- Syrian-Orthodox: Qânûn al-Ahwâl al-Shakhîyya li-l-Širyân al-Urthâdhuks (1929)
sects, the Christian community also constitutes six legal communities. It would have been more logical if Law 462 had referred to these six legal communities, and if Islamic law applied only when a couple does not share the same law. In that case, for example, Catholic spouses who do not share the same Catholic sect would nevertheless be governed by Catholic law because this is the law shared by all seven Catholic sects. However, Law 462 is based on the situation that existed prior to 1956, when all sects had their own courts, and hence stipulates that Islamic law is applicable to a couple who do not share the same sect, even if they share the same law.

3. Changing Religion

Conversion is the second situation to which interreligious conflicts law applies. Whereas the conflicts rule with regard to mixed religious marriages is regulated by Law 462, the conflicts rule with regard to conversion receives only limited attention in Law 462 and is mainly determined by case law which, in turn, refers to Islamic law.

In Egypt's interreligious law, it is the religion of the legal subject that determines which personal status law is applicable to him or her. Hence, conversion is not a private religious matter, but an issue with far-reaching legal implications. Indeed, one can imagine conversion occurring not only for reasons of personal belief, but also as a legal stratagem. A Christian may convert to the sect of his or her spouse in order to avoid application of Islamic law to their marriage. More practical, however, in light of the near impossibility of obtaining a divorce under the Egyptian Christian laws, the conversion by a

\[\text{Armenian-Orthodox: } Q\ddot{a}n\ddot{u}n\text{ al-}\text{Ahwâl al-Shakhshîyya li-}\text{l-Arman al-Urthîdhuks (1940)}\]

\[\text{Catholic: } Shari\text{‘}a al-Kâthîlîk (1949)\]

\[\text{Protestant: } Ld\text{‘}îha al-Ahwâl al-Shakhshîyya li-l-Injîlîyîn (1902).}\]

The Court of Cassation has held that the sources of non-Muslim personal status rules are not limited to their written laws, but also comprise the large number of legal sources that have been applied by the non-Muslim courts, ranging from the New and Old Testaments to ordinances from patriarchs and bishops, customary law and case law (cf: No. 25, Year 38, 1 December 1971; No. 3, Year 43, 6 June 1973; No. 26, Year 26, 21 December 1978; No. 4, Year 48, 30 December 1980; No. 7, Year 52, 30 November 1982).

\[\text{40 Catholic law does not allow divorce under any circumstances (Art. 107). The Christian Orthodox laws do allow divorce on various grounds. In the case of Copt-Orthodox law, the grounds for divorce as listed in the law have been limited to adultery by Papal Decree No. 7 of 18 November 1971 of the Coptic-Orthodox Church (repeated in Papal Decree of 18 June 1996). Also, divorced Coptic-Orthodox women are by the same papal decree forbidden to re-marry.}\]
Christian to a different sect or rite than his or her spouse in order to have Islamic law, which is much more favorable towards divorce, applied. Or the Christian wife may have her marriage nullified by converting to Islam. These examples will be discussed in the following paragraphs.

3.1 Conversion and applicable law

In order to establish which law is applicable, the court must determine whether an alleged conversion has actually taken place. The Court of Cassation has issued two rules of thumb. Firstly, the decision as to whether or not a conversion has taken place is to be made by the religion, rite or sect to which one converts, and not the one that is being abandoned.41 (This rule does not apply when a Muslim converts to another religion, in which case, Islam, as the religion that has been abandoned, remains the religion which determines the [in]validity of the conversion.)

Secondly, a court may seek to determine whether the convert has complied with the procedures and rules of conversion, but it may not scrutinize the intentions of the convert.42 Whereas conversion to Islam is easy to establish since it is a unilateral act performed by the mere will of the convert, conversion to a Christian rite or sect requires additional recognition by the religious authorities of the rite or sect to which one converts.43 In both cases the Court of Cassation has issued numerous rulings.44

In order to prevent possible (ab)use of conversion, Article 7 of Law 462 stipulates that conversion from one non-Muslim rite or sect to another is legally effective only when carried out before the litigation

41 No. 28, Year 37, 31 January 1968; No. 44, Year 40, 29 January 1975.
42 In most of its rulings the Court of Cassation explains this with the phrase: “Religious belief (i’tiqād dīnī) is a psychological matter, which cannot be examined by any judicial institution except through its formal external manifestations (mazāhir khārijīya rasmiyya).”
43 Court of Cassation, No. 19, Year 43, 19 November 1975; No. 15, Year 45, 26 January 1977; No. 21, Year 45, 9 March 1977.
44 Rulings regarding conversion to Islam: No. 27, Year 33, 19 January 1966; No. 20, Year 36, 7 May 1969; No. 27, Year 40, 11 December 1974; No. 27, Year 45, 1 March 1978; No. 34, Year 55, 27 November 1990; No. 152, Year 59, 24 June 1992. With regard to conversion from one non-Muslim rite or sect to another, the Court of Cassation has issued dozens of rulings, of which only a few will be mentioned here: No. 37, Year 32, 21 April 1965; No. 28, Year 33, 19 January 1966; No. 19, Year 36, 29 January 1969; No. 17, Year 43, 5 November 1975; No. 14, Year 44, 11 February 1976; No. 21, Year 45, 9 March 1977; No. 23, Year 46, 26 April 1978; No. 46, Year 48, 27 January 1981; No. 71, Year 54, 27 May 1986; No. 34, Year 55, 27 November 1990; No. 36, Year 61, 25 December 1995.
has been initiated.\textsuperscript{45} During the litigation, the parties will be judged according to the law of the religion to which they belonged at the moment when they initiated the court case. If, on the other hand, the litigating party converts to Islam, Article 7 stipulates the immediate applicability of Islamic law, even if the conversion takes place during the litigation. This rule is considered to be self-evident in the legal literature. Some scholars justify it with the argument that a Muslim may never be subjected to non-Islamic law, regardless of the moment when he became a Muslim.\textsuperscript{46}

3.2 Changing from Islam to a non-Muslim religion

Islam, like most Egyptian non-Muslim religions, forbids apostasy, i.e. abandoning one’s religion. In legal practice, conversion to Islam is allowed in Egypt, as well as conversion from one non-Muslim rite or sect to another. Conversion from Islam, on the other hand, is not allowed. This rule is not codified in Egyptian legislation, but is part of the general law through Article 280 of the Decree on the Organisation of the Shari’a Courts. Although apostasy from Islam is a capital offense under Islamic law, it is not prohibited in Egypt in the sense that it is punishable. However, it is deemed a violation of public policy (see Part II), and also has serious repercussions in the field of personal status law: it renders the marriage of the apostate null and void,\textsuperscript{47} prevents him from entering into a (new) marriage,\textsuperscript{48} even with a non-Muslim,\textsuperscript{49} and excludes him from inheritance.\textsuperscript{50}

\textsuperscript{45} Confirmed on numerous occasions by the Court of Cassation: cf. No. 36, Year 29, 6 March 1963; No. 2, Year 37, 31 January 1968; No. 3, Year 37, 14 January 1970; No. 44, Year 45, 17 November 1975; No. 3, Year 47, 28 June 1978; No. 29, Year 47, 28 March 1979; No. 23, Year 46, 26 April 1978; No. 68, Year 53, 24 December 1985.

\textsuperscript{46} Ahwānī (1993/4: 112); Jārīḥī (1984/85: 46-47); Mursī (1996: 117-18); Rīḍā (1968: 44); Salāmah (1961/62: 122). One scholar has offered a legal-technical motivation for the direct applicability of Islamic law. He argues that the court, while referring to the conflicts rule in order to determine which law is applicable, is in fact referring to Islamic law in its capacity as general law. Article 7 of Law 462, which is part of this general law, stipulates that in case of conversion the law of the new religion becomes not applicable until after the case has been decided. In case of conversion to Islam, however, there is no need to wait for the court to rule, since the general law in its capacity as Islamic law is already the applicable law. (Mujāhid, 1997: 78-80)

\textsuperscript{47} Court of Cassation, No. 20, Year 34, 30 March 1966; No. 25, Year 37, 29 May 1968; Nos. 475, 478, 481, Year 65, 5 August 1996.

\textsuperscript{48} Court of Cassation, No. 9, Year 44, 24 December 1975.

\textsuperscript{49} Court of Cassation, No. 162, Year 62, 16 May 1995.

\textsuperscript{50} Court of Cassation, No. 28, Year 33, 19 January 1966; No. 17, Year 39, 10 April 1974; No. 162, Year 62, 16 May 1995.
3.3 Changing from a non-Muslim religion to Islam

For conversion to Islam, the only requirement is to pronounce the shahāda or “testimony of faith” (“There is no god but God, and Muḥammad is His messenger”) in the presence of two witnesses. This procedure is considered by the Court of Cassation to be part of public policy (see Part II). In order to convert to Islam, the convert must be more than seven years old.

According to Article 7 of Law 462, conversion to Islam, before as well as during litigation, renders Islamic law immediately applicable to a marriage. When a Christian woman who is married to a Christian man converts to Islam, she encounters the rule that she, as a Muslim woman, may not be married to a non-Muslim man (see Part II). Her marriage is deemed invalid, unless her husband also converts to Islam; he is given this option by the court and if he refuses, the marriage will be considered null and void from the moment of the conversion (tafriq). When it is a husband who converts, his marriage remains valid, since a marriage between a Muslim man and a Christian woman is allowed under Islamic law.

3.4 Changing from one non-Muslim sect or rite to another

This kind of conversion depends on the recognition of the specific non-Muslim rites and sects, and is left to their respective rules. Conditions relating to the age of conversion are stricter than when converting to Islam: in order to convert from one non-Muslim sect or rite to another, the convert must be more than fifteen years old.

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51 Court of Cassation, No. 27, Year 40, 11 December 1974; No. 8, Year 44, 21 January 1976; No. 27, Year 45, 1 March 1978; No. 34, Year 55, 27 November 1990; No. 152, Year 59, 24 June 1992; No. 36, Year 61, 25 December 1995.
52 Court of Cassation, Nos. 27 and 66, Year 49, 23 June 1981. This is the age of discernment (tamyiz), which, according to Article 45/2 of the Civil Code, is seven years. If the father of the child converts to Islam after his child is born, the child automatically becomes a Muslim if he is less than fifteen years old (No. 44, Year 40, 29 January 1975), the age when a person is considered to be physically and intellectually mature (baligh wa ‘aqil).
53 Court of Cassation, No. 76, Year 55, 27 January 1987.
54 Court of Cassation, No. 5, Year 24, 29 November 1954; No. 54, Year 49, 23 June 1981.
Part II: Public Policy

1. Introductory Remarks

In the previous paragraphs, I have discussed the boundaries between the legal spheres in interreligious law and the conflicts rules which determine the applicable law when these boundaries are crossed. What happens, however, if the rules applied by one religious community are diametrically opposed to the core values of another religious community? Can Christians accept polygamous marriages among Muslims, and can Muslims accept the impossibility of divorce among the Catholics?

This is the realm in which public policy becomes relevant. Public policy comprises the norms and rules which are considered essential to the national legal order. When conflicts rules determine that a law or rule (foreign or national) is applicable, it may nevertheless be prevented from being applied if it constitutes a violation of public policy. In the case of interreligious law, being a a plurality of laws, which norms are considered to pertain to the national legal order? On a theoretical level, three solutions present themselves: (1) public policy is a set of neutral rules providing the principles of the legal order for the entire interreligious legal system; (2) the law of one of the communities will be considered the prevailing normative order within the country; or (3) the rules and values of the different communities, notwithstanding their contradictions, are internal communal affairs. Egypt, following in the footsteps of Islamic law, has chosen a mixture of the latter two solutions, which together are embodied by the concept of public policy.

The role of public policy in interreligious law has received very little attention in the relevant scholarly literature, where it is argued that public policy has limited importance in interreligious law because conflicts hardly arise among the religious laws. However, when public policy is discussed, it is usually with reference to, and often erroneously equated with, public policy as used in international conflicts law. It is my contention that public policy in Egyptian interreligious law plays a

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56 Boghdadi (1937: 301 ff) and Elgeddawy (1971: 25 ff) emphasise this distinction. The Egyptian legal literature and case law generally does not make this distinction (see below).
larger role than is generally assumed;\textsuperscript{57} indeed, it plays a crucial role in the interaction among the religious legal systems.

Egyptian public policy, as reflected in the case law of the Court of Cassation and the Egyptian legal literature, can be defined as the principles which are deemed essential in Islamic law. As a matter of principle, the Court of Cassation holds that public policy is a secular concept that applies to all Egyptians regardless of their religion. The Court nevertheless admits that certain principles of Islamic law prevail over the laws of non-Muslims. The same approach is taken in the elaborate and often vague discussions on this subject in the legal literature.

Although the examples yielded by Egyptian legal literature and case law clearly show that public policy can be equated with principles of Islamic law, there is a marked reluctance by the same sources to clearly state that this is the case. I am of the opinion that the reason for this reluctance must be sought in the innate ambivalence of Egypt’s system of interreligious law: on the one hand, the nearly sacred concept of “national unity” requires the legal equality of all nationals and their laws; on the other hand, interreligious law by definition divides the nationals into separate legal communities, and the prevalence given to the normative system of the majority community necessarily creates a degree of inequality.

In the following paragraphs, I analyze the definitions of public policy as presented by the Egyptian legislature, Court of Cassation and the legal literature, followed by a discussion of all case law of the last fifty years regarding public policy.

2. Definitions of Public Policy

2.1 Public policy in Egyptian legislation

Aside from Article 6(2) of Law 462 of 1955, public policy is mentioned only in the Civil Code and the Code of Procedure.\textsuperscript{58} Egyptian law does not define this term. Of the Explanatory Memoranda, only the one to the Draft Law of the Civil Code elaborates on its concept, using the

\textsuperscript{57} E.g., Abu Sahlieh (1979: 177-179) and Meinhofer (1995: 86, 90-92) mention only three cases of public policy in Egyptian interreligious law, whereas the Egyptian literature and case law mention many more.

\textsuperscript{58} Articles 28, 135-136, 200, 266 and 551 Civil Code (on, respectively, international conflicts law, the subject-matter of a contract, natural obligation, conditions of an obligation, and settlement) and Article 298/4 Law of Procedure (on execution of a foreign ruling).
common European interpretation of public policy as a flexible concept which may change with time and space in accordance with society’s needs. The flexibility of the concept also manifests itself in the fact that the judge is its sole interpreter.\textsuperscript{59} This description might also apply to public policy in interreligious conflicts law, since both the Court of Cassation and a large part of the legal literature regard public policy in Civil Law and Law 462 as one and the same.

2.2 Public policy as defined by the Court of Cassation

The Court of Cassation gave the most elaborate definition of public policy in its ruling of 17 January 1979.\textsuperscript{60} The Court begins by pointing out that public policy in both international and interreligious conflicts law is the same, and defines public policy as a secular concept:

[Public policy] comprises the principles (\textit{qawā'id}) that aim at realising the public interest (\textit{al-maslaha al-\textsuperscript{2}āmma}) of a country, from a political, social and economic perspective. These [principles] are related to the natural, material and moral state (\textit{wad\textsuperscript{a}}) of an organised society, and supersede the interests of individuals.

The concept [of public policy] is based on a purely secular doctrine that is to be applied as a general doctrine (\textit{madhhab \textsuperscript{2}āmm}) to which society in its entirety can adhere and which must not be linked to any provision of religious laws.

The Courts then makes an exception to this secular concept:

However, this does not exclude that [public policy] is sometimes based on a principle related to religious doctrine, in the case when such a doctrine has become intimately linked with the legal and social order, deep-rooted in the conscience of society (\textit{damir al-mujtama'\textsuperscript{2}}), in the sense that the general feelings (\textit{al-shu'\textsuperscript{2}ur al-\textsuperscript{2}āmm}) are hurt if it is not adhered to.

This means that these principles [of public policy] by necessity extend to all citizens, Muslim and non-Muslim alike, irrespective of their religions. This is because the notion of public policy cannot be divided in such a manner that some principles apply to the Christians, and others to Muslims, nor can public policy apply only to a person or a religious community. The definition (\textit{taqdir}) [of public policy] is characterised by objectivity, in accordance with what the general majority (\textit{aghlab a\textsuperscript{2}āmm}) of individuals of the community believes.

\textsuperscript{59} Volume 2, 223 of \textit{al-Mudhakkira al-\textsuperscript{2}Idāhiyya li-Mashr\textsuperscript{2}a al-Q\textsuperscript{2}ân\textsuperscript{2}n al-Madani}, published as part of the parliamentary Collection of Preparatory Works (\textit{Majm\textsuperscript{2}a at al-A\textsuperscript{2}m\textsuperscript{2}al al-Tahd\textsuperscript{2}riyya}).

\textsuperscript{60} Nos. 16 and 26, Year 48, 17 January 1979.
Without explicitly saying so, the Court stipulates that Egyptian public policy is rooted in Islam, since it is Islamic law to which the “general majority” in Egypt adheres in personal status affairs. In a ruling issued twenty years later, the Court of Cassation is more outspoken:

(....) Islamic law is considered an [inalienable] right of the Muslims (fi haqq al-muslimin), and is therefore part of public policy, due to its strong link to the legal and social foundations which are deep-rooted in the conscience of society.

2.3 Public policy as defined in the Egyptian legal literature

The Egyptian legal literature on interreligious law devotes many pages to the concept of public policy. Most legal scholars share the view of Court that no distinction should be made between public policy in interreligious and international conflicts law. In other words, Egyptian public policy plays the same role and has the same content in relation to rules of foreign law as in relation to rules of national non-Muslim laws. Only a few scholars hold that there should be a difference between the two, since the violation of Egyptian public policy by Egyptian laws seems to be a contradiction in terms.

This is a thorny issue, because most scholars emphasize the equal status of Egyptian legal subjects and Egyptian personal status laws within the framework of national unity, but at the same time regard the Egyptian non-Muslim personal status laws as being alien, that is, different from Islamic personal status law. They argue that the Egyptian non-Muslim laws are of foreign origin because they are promulgated, not by the Egyptian legislature, as is the case with Muslim personal status law, but by religious institutions (some of which are indeed foreign, such as the Vatican).

Whether the Egyptian non-Muslim laws are foreign or not, the question is: what are the essential legal standards against which all Egyptian personal status laws should be judged, and what are the rules that are considered of essential importance for the national legal order? In short, what is the criterion of Egyptian public policy in interreligious

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61 The term haqq al-Muslimin is often used in Egyptian legal literature: Islamic law in general, but also specific issues such as polygamy and unilateral divorce are considered to be inalienable “rights” of the Muslim.

62 No. 10, Year 48, 20 June 1979; No. 85, Year 63, 2 January 1997.

63 Faraj (1969: 260); Muhammad (1997: 158); Tanāghū (1997/98: 67). These scholars do not explain what this difference should be, however.

law? Some scholars have advanced a secular approach: without excluding religious principles from public policy, they find a common ground for the principles of all the religious personal status laws in Egypt. This point of view, advocated in the late 1950s, has since then lost ground.  

In general, the contemporary Egyptian legal literature assumes the prevalence of Islamic rules and norms in Egyptian public policy. Some argue that this is the case because Islam is not only the state religion, but also the religion of the majority of Egyptians. Others justify the prevalence of Islamic law with the maxim that "Islam supersedes and cannot be superseded" (al-Islām ya'llū wa lā ya'llū 'alay-hi), or that Islamic law has "general sovereignty" (wilāya 'āmma).

It is striking that this central role of Islamic law is never mentioned when scholars define public policy, but only when they interpret it. When defining public policy, reference is usually made to the above-mentioned ruling of the Court of Cassation, or to the similar definition of the main drafter of the Civil Code, 'Abd al-Razzāq al-Sanhūrī, which was also the inspiration for the Court.

The absence of any reference to Islam or Islamic law in these definitions may perhaps be attributed to the fact that almost all Egyptian legal literature on interreligious conflicts law is written by Muslim scholars, most of whom assume the dominant role of Islamic law to be self-evident. For many of them, Islamic law is their vantage point, and the non-Muslim laws are "different" or "other". This becomes clear

66 Jāriḥi (1984/85: 53) and Mansūr (1983: 44) still subscribe to this 'common ground' view.
67 'Abd al-Wahhab (1959: 141); 'Adawi (1993/94: 137-38); 'Aṭṭār (1978: 201-03); Muhammad (1997: 159); Mursi (1996: 127, 198). The reasons for the majority-rule differ. Mursi calls Islamic law an "essential legacy (turāth asāsī) of Egyptian society". 'Aṭṭār argues that each religious law has its unique essential values, none of which should be favoured over the other. Since a public policy is needed, however, the rule of the majority should prevail.
70 "[Public policy] consists of those principles that aim at realising the public interest, from a political, social as well as economic perspective, [principles] which are related to the highest order of society and which supersedes the interests of individuals." (Sanhūrī, 1964: I, 399).
when public policy is being discussed. Some scholars assert that the principal aim of public policy, the “realisation of public interest”, can be entrusted only to Islamic law.\textsuperscript{71}

If Islamic law is to prevail in public policy, does thus mean Islamic law in its entirety or just part of it? The first view is usually rejected because a full application of Islamic law logically would entail the exclusion of non-Muslim laws. Most scholars therefore agree that Egyptian public policy is related only to certain “essential principles of Islamic law” (\textit{al-mabādi’ al-asāsiyya fi aḥkām al-shari‘a al-islāmiyya}).\textsuperscript{72} These principles are defined by most scholars as those rules of Islamic law which are considered fixed and indisputable (\textit{nass ṣarīḥ qāṭi‘ al-thubūt wa qāṭi‘ al-dalāla}).\textsuperscript{73} This phrase is a technical term for rules of Islamic law which are not subject to change or interpretation.\textsuperscript{74} It is these rules — hereafter referred to as “essential principles of Islamic law” — that belong to the realm of Egyptian public policy, or, in other words, are essential to the Egyptian legal order.

This definition of public policy gives rise to further questions. For instance, is Egyptian public policy composed solely of these essential Islamic principles to the exclusion of other principles, or do they make up only a part of public policy in addition to other norms? Although this question is often broached in the legal literature, it is never answered.\textsuperscript{75} Also, is Egyptian public policy subject to change with time

\textsuperscript{71} Abū Sa‘ūd (1986: 437); Muhammad (1997: 160).


\textsuperscript{73} ‘Abd al-Wahhab (1958: 350, 1959: 142-43); Abū Sa‘ūd (1986: 437); ‘Awhānī (1993/4: 180); ‘Arafa (1993: 141); Khallaf (1950/51: 188); Mursi (1996: 192 ff). The phrase \textit{nass ṣarīḥ qāṭi‘ al-thubūt wa qāṭi‘ al-dalāla} is a common expression in the \textit{usūl al-fiqh} literature (Kamali, 1991: 9-12). In twentieth century Egypt it has been used by modern reformers such as Rashīd Rida (Hallaq, 1997: 218-19), and by the courts: the Supreme Shari‘a Court (\textit{Mahkamat al-Shari‘a al-‘Ulyā}), for instance, cited it in its ruling of 22 September 1946 (No. 84, Year 44).

\textsuperscript{74} Compare the Supreme Constitutional Court, which defines this phrase as “those rules [of Islamic law] for which interpretative reasoning (\textit{ijtihād}) is not allowed (...) and which are immutable and cannot be submitted to exegesis. It is therefore inconceivable that their meaning changes with time and place” (from the French translations rendered by Bernard-Maugiron, 1999: 115 ff, and Dupret, 1997: 96-97).

\textsuperscript{75} ‘Abd al-Wahhab (1958: 357) and Muhammad (1997: 160) are the exceptions: they clearly state that the essential principles of Islamic law are only one of the components of Egyptian public policy.
and place? Many scholars argue that this is the case, in accordance with the general Egyptian (as well as European) concept of public policy. The same authors, however, acknowledge the immutable nature of the essential rules of Islamic law. It appears that the definition and the interpretation of public policy are indeed two different things.

Finally, there is the matter of "Islamic public policy", a term used by several legal scholars. It comprises the essential Islamic principles which are incumbent on Muslims in the sense that they may not be altered or deviated from, but are not obligatory for non-Muslims, such as the right of unilateral divorce (talāq) and polygamy. Consequently, within Egyptian public policy there exists a distinction between rules that are obligatory for all Egyptians, and rules that apply to Muslims only.

3. Public Policy Cases

3.1 Introductory remarks

Functions of public policy
The public policy cases presented here demonstrate that public policy in Egyptian interreligious laws has a variety of functions. The Egyptian legal literature and the Court of Cassation do not distinguish between these functions. In order to analyse these cases in an orderly fashion, I will borrow from international conflicts law the terms “negative” and “positive” public policy.

Public policy is called negative (or defensive) when it prevents unwanted rules of foreign law from being applied, after conflicts law has established that they are applicable. This is the public policy as intended by Article 6 of Law 462: even though interreligious conflicts law determines that a non-Muslim law is applicable, those rules which are considered a violation of public policy will not be applied.

Positive (or assertive) public policy pertains to those rules of national law that are considered of essential importance for the national legal order. Positive public policy prevents parties from deviating from these laws. An example of positive public policy is criminal law — it can actually be considered to be “a law of public policy” in its

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77 In English legal terminology, positive public policy is usually referred to as mandatory rules.
entirety, because it can never be set aside by foreign rules, nor can nationals agree to deviate from it. As will be observed, positive public policy in Egyptian interreligious law applies to both codified and uncodified rules.

To this point, I have used terminology borrowed from international conflicts law. In Egypt’s interreligious law, public policy has an additional function, what I would call the *dhimmi*-function. Whereas the functions of positive and negative public policy serve the interests of essential principles of Islamic law, it may happen that the essential interests of non-Muslim laws are violated by the application of Islamic law. Does this also constitute a violation of Egyptian public policy? According to the Court of Cassation, Egypt’s public policy does not embody essential principles of non-Muslim laws. However, an essential rule of Islamic law — and thus of public policy — is the protection of these non-Muslim principles (a typical *dhimmi* right). Based on this rule the violation of these principles by Islamic law might be considered wrongful.

Several scholars qualify the reverse effect of the *dhimmi*-function of public policy as *Islamic* public policy. When non-Muslims are exempted from rules of Islamic law (e.g., they do not need to have two male witnesses to a marriage), these rules remain essential to Islamic law and therefore part of public policy, albeit for Muslims only. These rules constitute Islamic public policy, that is the part of Egypt’s public policy which in certain cases applies only to the Muslim Egyptians.

*How to determine what is public policy?*

Laws and rules acquire the status of public policy by virtue of a court ruling. This is in accordance with the essence of public policy: what is considered to be part of the national legal order may change with time, and the competence to assess the fundamental components of the legal order at any given time is vested in the courts. One will therefore never have a full picture of what comprises public policy, because many issues which may be considered to be part of public policy have not yet been raised in the courts. This gap in our knowledge may be partly filled by the legal literature. Still, it is confusing that certain rules of Egyptian law clearly have a public policy nature, but are not mentioned as such by case law or in the legal literature. This is especially true of positive public policy. In order to obtain the most comprehensive view of Egyptian public policy, all these sources must be examined.
3.2 Positive public policy

The rules of positive public policy discussed in the case law have two distinctive features. The first is that they make a distinction between Muslims and non-Muslims in the sense that these two communities are to be treated differently. Most rules are discriminatory, based on the Islamic maxim, “Islam supersedes and cannot be superseded”, which means that a non-Muslim should not have legal power (wilāya) over a Muslim, and that a Muslim can never be subjected to non-Muslim law.78 Second, with the exception of intestate succession, the character of public policy is usually considered to be self-evident; legal foundations, reasoning or justifications are rarely presented.

With the exception of inheritance law, all matters of personal status law which are considered — explicitly or implicitly — to be of public order, are uncodified. These matters in all cases constitute rules of Islamic law which are deemed applicable based on Article 280 which holds Islamic law as the general law in cases of personal status.

Inheritance law

The Court of Cassation has emphasized in several rulings that the rules of Egyptian inheritance law are a matter of public policy.79 In other words: individuals are not at liberty to make adjustments to the rules of inheritance law in accordance with their own needs (examples from the case law are the alteration of legal shares, transactions involving future inheritance shares, and the exclusion of legal heirs from succession). Bearing in mind the definition of public policy as essential rules of Islamic law, it is not surprising that Egypt’s inheritance law is specifically categorised as a law of (positive) public policy, because the field of inheritance law is considered the ultimate example of essential rules of Islamic law, many of which can be found in the Qur’an. In the words of the Court: “its rules are based on the irrefutable texts (nuṣūṣ qāṭ‘a) of Islamic law” and consequently have a “strong link to the

78 Mursi (1996: 117-18) argues that this maxim in itself constitutes a rule of public policy.

79 No. 355, Year 29, 9 April 1964; No. 17, Year 32, 27 May 1964; No. 60, Year 34, 25 May 1967; No. 125, Year 34, 21 November 1967; No. 351, Year 33, 7 December 1967; No. 330, Year 34, 29 February 1968; No. 550, Year 34, 2 January 1969; No. 38, Year 36, 31 March 1970; No. 89, Year 37, 7 March 1972; No. 239, Year 38, 18 December 1973, No. 44, Year 40, 29 January 1975; No. 9, Year 44, 24 December 1975; No. 10, Year 48, 20 June 1979; No. 36, Year 61, 25 December 1975; No. 482, Year 50, 14 June 1981; No. 36, Year 61, and No. 154, Year 63, 25 December 1995.
legal and social foundations which are deep-rooted in the conscience of society (damir al-mujjama’).80

Paternity
Paternity, or blood relationship (nasab), is part of the non-Muslim family law, except when a claim of paternity is raised in connection with a claim to inheritance from an alleged father. The Court of Cassation has ruled that in this specific case paternity is governed by Islamic law.81 The Court reasoned that these claims of paternity belong to the realm of inheritance, and should therefore be subject to the same law, which is Islamic law. In a recent ruling, the Court gave a more specific explanation: “The prevalent opinion of the Hanafi school says that the rules of paternity are authoritative for all, since Islamic law deems paternity to be part of public policy.”82 The last phrase is peculiar, because it turns the concept of public policy upside down: although public policy normally embodies those rules which are essential to Egypt’s legal order, now it has its own master in the form of Islamic law, which determines which rules pertain to public policy. It is premature to assess whether this ruling represents a new trend or is an incidental confusion of concepts.

Marriage of a Muslim woman with a non-Muslim man
Under Islamic law, the marriage of a Muslim woman with a non-Muslim man is prohibited (ḥaram) and considered null and void. A Muslim man, however, may marry a non-Muslim woman. Unlike other Muslim countries, this rule is not codified by Egyptian law,83 but is part of the personal status law through Article 280 of the Decree on the Organisation of the Shari’a Courts, and, as such, applies to all Egyptians. The Court of Cassation has on various occasions confirmed this rule.84 Neither the Court nor the legal literature has made any

80 No. 17, Year 32, 27 May 1964; No. 482, Year 50, 14 June 1981; No. 36, Year 61, and No. 154, Year 63, 25 December 1995.
81 No. 40, Year 29, 19 June 1963; No. 14, Year 32, 7 December 1966; No. 44, Year 33, 8 March 1967; No. 19, Year 29, 25 April 1979.
82 No. 27, Year 63, 17 March 1997 (still unpublished as of the time of the writing of this article; quoted in Mansur, 1998: 316).
83 Syria, Morocco, Iraq, Jordan and Kuwait have codified this rule in their personal status laws.
84 No. 28, Year 33, 9 January 1966; No. 16, Year 35, 8 March 1967; No. 9, Year 44, 24 December 1975; No. 61, Year 56, 29 March 1988; Nos. 475, 478, 481, Year 65, 5 August 1996.
reference to public policy. However, this rule is a typical example of public policy: it is an essential rule of Islamic law from which parties may not deviate, even if their own non-Muslim laws would allow them to do so.

**Party autonomy**

Although Islamic law allows non-Muslim litigants to opt for the application of Islamic law, Egyptian case law denies this freedom to non-Muslim couples who share the same sect and rite. Islamic law applies to non-Muslim couples who do not share the same rite and sect. In one case, when such a couple requested the application of the Christian law of one of the spouses, the Court of Cassation responded that non-Muslims are not allowed to “shop” among non-Muslim personal status laws, “because the matter relates to the distribution of jurisdiction (wilâya) between Islamic law and special laws; this matter is the core of public policy, and any agreement to the contrary is not permissible”.

**Procedure of conversion to Islam**

A Christian heir who feared that the conversion to Islam of a person from whom he stood to inherit might frustrate his inheritance rights (non-Muslims and Muslims may not inherit from each other under Islamic law), argued that the conversion, which had taken place in Lebanon, had no legal effect because it was not registered as required by Lebanese law. The Court of Cassation rejected this plea on the ground that conversion to Islam requires only the pronunciation of the “testimony of the faith” in the presence of two witnesses, without any other formalities. As such, the Court added, conversion to Islam

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85 The only exception is ‘Abd al-Wahhāb, who argues that this prohibition pertains to Egyptian public policy (1959: 138). Another scholar sees no reason to explain or justify rules stipulated by the Divine Legislator: “What else can the believer do but listen and obey His orders and prohibitions?” (Manṣūr, 1998: 133).

86 In Islamic sources it is unanimously agreed that this prohibition on a marriage between a non-Muslim man and a Muslim woman is based on Qur’an II: 221 and LX: 10. Some Egyptian jurists explain this rule by arguing that, since the husband—regardless of his religion—is the custodian (qawwām) of his wife (Quran IV: 34), it is improper for a non-Muslim man to be the custodian of a Muslim woman (Baltājī, 1984: 550 ff; Manṣūr, 1998: 132). This is a corollary of the maxim that Islam supersedes and cannot be superseded.

87 Court of Cassation, No. 182, Year 35, 20 March 1969.

88 No. 6, Year 25, 26 June 1956; No.12, Year 48, 17 January 1979. Also: Jāriḥī (1984/85: 50-51); Jindi (1997b: 35).
pertains to public policy, because it “is one of the essential principles of Islamic law which is firmly linked to the legal and social order, and which is deep-rooted in the conscience of society, so much so that it would hurt the general feelings if it were not adhered to.”

Apostasy from Islam
A few scholars explicitly state that the “rules of apostasy” from Islam — i.e. the definition of apostasy, its prohibition, legal consequences, and penalty — pertain to public policy. The Court of Cassation has agreed with this, albeit with motivations that have varied over the years. In a ruling issued in 1966, the Court deemed the rules of apostasy to be part of the general law, in 1975 part of public policy, and in 1996 it considered that they were based on Article 2 of the Constitution, which stipulates that Islam is the state religion and Islamic law the main source of legislation.

Testimony of non-Muslims against Muslims
When Islamic law applies to matters of personal status, its rules of evidence are also regulated by Islamic law. This principle, which is not stipulated by either the Law of Evidence or by the Law of Procedure, is established in Egyptian case law, based on Article 280. According to Islamic law, a non-Muslim may not testify in court against a Muslim, nor may non-Muslims act as witnesses to the marriage of Muslims. However, a Muslim may testify against a non-Muslim and serve as a witness to a non-Muslim marriage. Also, when non-Muslim law applies to marriage or divorce, the rules of evidence particular to that law are applied. In that case, for instance, the testimony of two women is considered sufficient, whereas Islamic

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89 No. 28, Year 45, 1 March 1978; No. 10, Year 48, 20 June 1979.
92 No. 9, Year 44, 14 December 1975.
93 Nos. 475, 478, 481, Year 65, 5 August 1996.
94 Qānūn al-Ithbāt fi Mawāḍd al-Madaniyya wa al-Tijāriyya, Law No. 25 of 1968, which has replaced Chapter 7 of the Law of Procedure.
96 Court of Cassation, No. 48, Year 30, 2 January 1963; No. 61, Year 56, 29 March 1988.
97 This rule is based on the Qur’an IV: 141.
98 No. 168, Year 60, 22 February 1994.
law demands that the witnesses should be two males, or one male and two females.99 This rule, abolished by the Hatti Humayoun,100 has been re-instated by Egyptian interreligious law.

Neither the Court of Cassation nor the legal literature refers to public policy in connection with such testimony. However, this procedural rule is a typical example of public policy, based on the Islamic legal maxim that a non-Muslim may not exercise legal power (wilāya) over a Muslim.101

**Jurisdiction of non-Muslim judges over Muslims**  
The religion of judges presiding in the Family Sections of the national courts is not relevant to the assignment of cases. In theory, a Muslim judge may preside over a Christian divorce case, or vice versa. I have been assured by Egyptian lawyers, however, that, if it were the case that Christian judges presided in the Family Section of the Egyptian courts (which they denied), they would not be allowed to judge in Muslim cases. There are no rules regarding this matter, and this issue is hardly touched upon by legal scholars.102 Additional research on the practice of Egyptian Family Courts is needed to substantiate this assumption. If further study were to confirm this assumption, this rule of public policy would have the same basis as the rule mentioned in the case of testimony: a non-Muslim may not exercise legal power (wilāya) over a Muslim.

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99 Judicial technicalities can lead to unexpected results, as in the case of Coptic-Orthodox husbands who claimed their marital right of obedience by their wives. Both Coptic-Orthodox law and Muslim law stipulate the obligation of obedience (tā'a) by the wife. When the husband claimed this right by means of writ as prescribed in the personal status law for Muslims (Article 11bis, Law 25 of 1929), his wife objected that this law is not applicable. The Court of Cassation rejected the plea, arguing that the issue was not a matter of substantive law, i.e. the interpretation of the obligation of obedience (in which case Coptic-Orthodox law would indeed be applicable), but a matter of jurisdiction and procedure. These principles, the Court said, “are the same for all disputes regarding marital obedience, regardless of the religion of the parties”. The husband’s invoking of Muslim law in this respect was therefore allowed. (No. 76, Year 54, 27 May, 1986; No. 53, Year 59, 8 May 1990; No. 81, Year 58, 27 February 1991.)

100 Abu Sahlieh (1979: 88).
3.3 Negative public policy

Article 6 of Law 462 stipulates that when non-Muslim family law is applicable it should not violate Egyptian public policy. The Court of Cassation has produced very little case law in this matter, and the legal literature usually refers to rulings of the lower courts. Legal scholars tend to connect public policy in these cases with rules that are typically Islamic, although it can be argued that these rules are related more to general interests, like freedom of marriage and the interests of the child.

*Forced marriage of the childless Jewish widow ("levirate marriage")*

This is the most common example used in the legal literature, even though there are hardly any Jewish citizens in Egypt today. According to Article 36 of the Jewish Personal Status Law as compiled by Ḥāy bin Shamʿūn, the childless widow is obliged to marry the brother of her deceased husband. This is considered to be a violation of Egyptian public policy, on the ground that it violates the principle of marriage by consent.103

*Coptic divorce prohibiting remarriage*

Article 69 of the Coptic-Orthodox personal status law allows the court to grant a divorce, and, at the same time, to prohibit one of the divorced spouses to remarry.104 This is considered by the legal literature to constitute a violation of public policy, on the ground that it violates the freedom to marry and establish a family.105 It is interesting to note that the same scholars who defend the freedom to marry never extend this

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103 'Abd al-Wahhab (1959: 146); Abū Saʿūd (1986: 444-54); Ismāʿīl (1957: 55-56, 61-64); Jāriḥi (1984/85: 54); Maʾmūn (1984: 40); Maḥsūr (1983: 45-46); Muḥājir (1997: 109); Muhammad (1997: 164-165); Mursī (1996: 205); Najīdah (1998/99: 54); Surūr (1998: 49). Occasional reference is made to the Cairo Court of First Instance which ruled in such a case on 25 June 1956 (No. 1012, Year 1956). Interestingly, none of these authors refers to the Qurʾānic prohibition of the levirate marriage (IV: 23). One scholar has remarked that this is a bad example of violation of Egyptian public policy, since “in Egyptian society the will of the woman does not play any role in the conclusion of her marriage” (Tanāghū, 1997/8: 66-67).

104 Even if the court does not avail itself of this possibility, Coptic-Orthodox divorcees are prohibited from entering into a new marriage by the Papal Decree of 18 November 1971 of the Coptic-Orthodox Church (repeated in the Papal Decree of 18 June 1996).

freedom to the prohibition of a Muslim woman to marry a Christian man.\textsuperscript{106}

\textit{Divorce in case Christian husband converts to Islam}

The Protestant and some Christian Orthodox personal status laws stipulate that one spouse may ask for divorce if the other spouse converts to a non-Christian religion. Some legal scholars consider this rule to be a violation of public policy if it is the husband who converts to Islam. In that case, they argue, Islamic law is immediately applicable to both spouses, and this law does not grant the wife the right to file for a divorce solely on the grounds that her husband has converted to Islam.\textsuperscript{107} If it is the wife who converts to Islam, she will indeed be divorced from her Christian husband, not because his (non-Muslim) law requires this, but because the applicable Islamic law deems such a marriage to be void.

According to the Court of Cassation, this issue has nothing to do with public policy. The Court advanced a more technical-legal approach, arguing that Islamic law, as the general law, is immediately applicable upon the conversion of a spouse and, consequently, supersedes the non-Muslim law of the convert's spouse.\textsuperscript{108}

\textit{Waiting period}

Islamic and Christian Orthodox laws stipulate that, after the dissolution of her marriage, a woman must wait for a certain period before she can remarry. The length of this waiting period (\textit{\textquotesingle}idda\textquotesingle) differs from law to law. In Islamic law the \textit{\textquotesingle}idda\textquotesingle period after divorce is three menstrual cycles (or, if the woman is pregnant, until delivery), and after the decease of the husband four months and ten days. In most Christian Orthodox laws this period is ten months in case of both divorce and widowhood. Many legal scholars consider the absence of an \textit{\textquotesingle}idda\textquotesingle in Catholic and Protestant law a violation of public policy, because of the risk of dubious paternity.\textsuperscript{109} They argue that the Islamic \textit{\textquotesingle}idda\textquotesingle needs to

\textsuperscript{106} Granted, there is a difference between these two cases: the Coptic injunction is an absolute impediment, whereas mixed marriage is a relative impediment that can be overcome by conversion.

\textsuperscript{107} 'Abd al-Wahhāb (1959: 152); Abū Sa'ūd (1997: 164); Ismā'īl (1957: 64-65); Mansūr (1983: 45-46); Mursi (1996: 202).

\textsuperscript{108} No. 51, Year 52, 24 February 1984.

be imposed on those non-Muslims whose laws do not prescribe an 'idda.\textsuperscript{110}

\textbf{Adoption}

Adoption \textit{(tabannî)} is not mentioned in Egyptian legislation. It is not allowed by Islamic law, but permitted by certain Egyptian Christian laws. The Court of Cassation has ruled on several occasions that adoption, in accordance with Islamic law, is prohibited \textit{(harâm)} and void \textit{(bâtîl)}.\textsuperscript{111} These rulings, however, refer to Muslims. It is not clear whether they extend to non-Muslims as well. Some scholars argue that, since adoption is not allowed in Islamic law and is not mentioned in Egyptian law, it is prohibited for all Egyptians, Muslims and non-Muslims alike.\textsuperscript{112} Others use the same argument but reach the opposite conclusion: since it is not explicitly prohibited, it is allowed for non-Muslims if their laws grant such a right.\textsuperscript{113}

\textbf{Custody}

Guardianship \textit{(wilâya)} and custody \textit{(ḥadâna)} of a child are two separate issues in Islamic law. Guardianship rests with the father until a child reaches the age of majority, which is twenty-one years. The guardian represents the child not only with regard to his or her property, but also in matters relating to general and religious education. Custody is the day-to-day care of a child. It is the duty of both parents, but after divorce it is the duty (and right) of the mother if the child is still young (and on the condition that the mother remains unmarried). This means that after divorce a young child stays with the mother, although the father has the final say in important matters.

The laws on guardianship are considered to be part of the general law and as such are applicable to Muslim as well as non-Muslim Egyptians.\textsuperscript{114} Custody, on the other hand, is regulated by the individual personal status laws. Both the Egyptian Muslim and Christian personal status laws regulate guardianship and custody in a similar fashion.\textsuperscript{115}

\textsuperscript{110} Jindi (1997b: 178) disagrees, arguing that the 'idda is not part of the religious doctrine of Catholics and Protestants, and therefore may not be imposed upon them.
\textsuperscript{111} No. 2, Year 43, 10 March 1976; No. 17, Year 46, 22 February 1978; No. 753, Year 58, 5 November 1992; No. 80, Year 63, 15 February 1994.
\textsuperscript{114} Law 119 of 1952 (Guardianship of property), Law 118 of 1952 (Guardianship of persons).
\textsuperscript{115} Custody for Muslims is regulated by Articles 18b(3) and 20 of Law 25 of
The maximum age of custody, however, differs from law to law. The decision of a lower court which held, as a matter of public policy, that the maximum age of custody should be the same for all Egyptians, was overruled by the Court of Cassation with the argument that the age of custody is not a matter of public interest (maṣlaḥa ‘āmma) for society because “it does not hurt society”, and is therefore not related to public policy.116

Four years later, however, the Supreme Constitutional Court (SCC) ruled in a similar case, but came to a different decision than the Court of Cassation. The SCC was of the opinion that a long period of custody is in the interest of the child. Since the custody age mentioned in Coptic-Orthodox law is shorter than that in Islamic law,117 and Coptic-Orthodox law does not allow for an extension of the custody period, as is the case in Islamic law, the SCC ruled that Islamic law serves the interest of the child better than Coptic-Orthodox law, and it declared the age of custody mentioned in Coptic-Orthodox law to be unconstitutional.118

3.4 Islamic and dhimmi public policy

Public policy serves as a protective tool against violations of essential rules of Islamic law. What happens, however, if Islamic rules conflict with the essential values of non-Muslim family law? This may occur in those instances in which Islamic law applies to non-Muslim couples who do not share the same rite and sect. Case law and legal literature mention cases involving polygamy, unilateral divorce and the conditions for concluding a marriage. These are all essential principles of Islamic family law, but they violate essential principles of Christian laws.

In several rulings, the Court of Cassation has argued that the application of Islamic law as general law should require (or permit) non-Muslims to act in ways that are contrary to the essence of their faith. In the words of the Court:

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116 No. 4, Year 42, 6 June 1973.
117 In Coptic-Orthodox law, a mother is entitled to custody until a boy has reached the age of seven years and a girl nine years (Article 139); in Islamic law she is entitled to custody until a boy has reached the age of ten years and a girl twelve years (Article 20, Law 25 of 1929, amended by Law 100 of 1985).
118 SCC, 1 March 1977 (Official Gazette No., 11, 13 March 1977). The unconstitutionality of Article 139 of the Coptic-Orthodox law was based on Articles 9-12, 40, 65, 68 and 165 of the Constitution.
These principles of substantive general law (...) are not to be applied only when they are in conflict with any of the principles of the essence of the Christian faith (al-mabaddi' al-muttaṣṣila bi-jawhar al-'aqida al-masihiyya), which, if violated by the Christian, will render him an apostate of his own religion, corrupting his doctrine and infringing on his Christianity.\footnote{Nos. 16 and 26, Year 48, 17 January 1979.}

If the application of Islamic law to mixed Christian marriages indeed violates the essence of their faith, does this also constitute a violation of public policy? The Court has categorically rejected this plea. Public policy, it argues, is reserved for those rules which are essential to Islamic law, being the law of the majority of Egyptian society. Logically, this public policy cannot be violated by its own rules. Five years later, the Court took another approach in this argument. It held that the protection of the faiths of non-Muslims is an essential rule of Islamic law and hence of public policy.\footnote{No. 1392, Year 50, 5 February 1984; No. 31, Year 53, 10 April 1984.} The reasoning has been reversed: whereas applying Islamic law in these particular cases can never be considered a violation of public policy, the non-application of Islamic law constitutes a rule of public policy. This is what I have called the dhimmi-function of public policy.

But with the dhimmi-function a new problem presents itself. Some of the Islamic rules that are considered a violation of the essence of the Christian faith are themselves part of the essence of the Islamic faith. As such, they constitute rules of public policy. The dhimmi-function of public policy allows for these essential rules to be set aside. But if so, what is the status of these rules for Muslims? The Court does not answer this question. In the legal literature this problem is solved with the concept of “Islamic public policy”: Christians may be exempted from some of its rules, but these rules remain obligatory for the Muslim community. The silence of the Court may be explained by the fact that Islamic public policy is inconsistent with the concept of public policy as defined by the Court: “(...) public policy cannot be divided in such manner that some principles apply to Christians and other to Muslims (...).”\footnote{Nos. 16 and 26, Year 48, 17 January 1979.}

What follows are cases in which the Court of Cassation has either applied the dhimmi function of public policy or explained why it did not do so.

\footnotesize
\begin{itemize}
\item Nos. 16 and 26, Year 48, 17 January 1979.
\item No. 1392, Year 50, 5 February 1984; No. 31, Year 53, 10 April 1984.
\item Nos. 16 and 26, Year 48, 17 January 1979.
\end{itemize}
Conclusion of a marriage
The validity of a mixed Christian marriage was challenged on the ground that it did not fulfill one of the conditions for conclusion of a marriage under Islamic law: it should have been concluded in the presence of two male witnesses. The Christian marriage was concluded by a priest, without any witnesses ("not even one woman," the Court of Cassation remarked) being present.

The Court of Cassation affirmed that Islamic law is applicable to the marriage, but stated that the nature of the Christian marriage is one of the essential principles of the Christian faith. The formalities for its conclusion should therefore be considered valid. The application of Islamic law would violate this essential Christian principle. The Court hence made an exception to the rule that Islamic law applies to Christian couples who do not share the same rite and sect: with regard to the formal conditions to conclude a marriage they are exempted from Islamic law, and can marry in accordance with their own laws and rituals.

The Court added that such an exception can be made only if the "essential principles of the special [i.e. non-Muslim] laws" do not contradict Egyptian public policy. This is a confusing remark: the issue started because the formal conditions for conclusion of Christian and Muslim marriages were contradictory. Does not the absence of two male witnesses constitute a violation of public policy? The Court's remark can only be understood in light of the concept of "Islamic" public policy. What the Court apparently meant to say is that the presence of two male witnesses remains part of public policy, but for Muslims only. Their "general feelings" are not "hurt" — to paraphrase one of the Court's definitions — if the Christians conclude their marriages in accordance with their own rituals.

Polygamy
A Christian husband in a mixed Christian marriage argued that, since his marriage was governed by Islamic law, he would be allowed to enter into a second, polygamous marriage, as is allowed for Muslims. As in the previous case, the Court of Cassation acknowledged the legal logic of the argument, but rejected the outcome. In an elaborate historical overview, the Court explained that polygamy has always and

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122 No. 89, Year 62, 8 January 1996 (still unpublished at the time of writing of this article: quoted in Mujähid, 1997: 149-150).
unanimously been rejected by all the rites and sects of the Christian faith, and the prohibition of polygamy should therefore be considered to be an “essential principle” of the Christian faith. Allowing a Christian husband to enter into a polygamous marriage that was legally valid according to Islamic law would constitute a violation of this essential principle and therefore should not be allowed,\(^{123}\) even if the spouses of the first marriage had agreed to it.\(^{124}\)

**Unilateral divorce**

The Court of Cassation has always maintained that in a mixed Christian marriage the Christian husband is entitled to exercise the right of unilateral divorce without specific cause (talāq bi-l-irāda al-munfarida), just like a Muslim husband.\(^{125}\) This is different from divorce according to Christian sects and rites, which can be pronounced only by the judge, based on grounds stipulated in the law.

It was argued before the Court that Islamic unilateral divorce contradicts the essential principles of the Christian faith. The Court rejected this argument on the ground that the prohibition of a unilateral divorce should not be considered an essential principle of Christian faith for two reasons. First, the principle of divorce *per se* has always been allowed by most Christian rites and sects, albeit by pronouncement of the judge and not by the mere will of the husband. Second, the right of the Christian husband to pronounce divorce unilaterally was only prohibited “after nine centuries, by the Corpus of Constantine in the year 920”.\(^{126}\)

The main reason for raising this issue was the problem of the validity of the unilateral divorce: without the interference of a court such a divorce would be valid from a Muslim perspective, but not from a Christian perspective. A divorced couple could therefore still be considered married by their church and community, rendering remarriage impossible. The Court of Cassation presented a compromise: a Christian husband may pronounce a unilateral *talāq* only before a

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\(^{123}\) Nos. 16 and 26, Year 48, 17 January 1979.  
\(^{124}\) No. 62, Year 54, 22 April 1986.  
\(^{125}\) cf. No. 36, Year 29, 6 February 1963; No. 25, Year 33, 26 May 1965; No. 29, Year 34, 30 February 1966; No. 8, Year 36, 14 February 1968; No. 30, Year 37, 14 January 1970; No. 16, Year 41, 20 December 1972; No. 7, Year 41, 18 April 1973; No. 17, Year 43, 5 November 1975; No. 44, Year 45, 17 November 1975; No. 19, Year 43, 19 November 1975; No. 24, Year 45, 17 November 1976; Nos. 16 and 26, Year 48, 17 January 1979; No. 68, Year 53, 24 December 1985.  
\(^{126}\) Nos. 16 and 26, Year 48, 17 January 1979.
court, because the judge first needs to verify whether Islamic law is applicable. In other words, the Christian husband cannot pronounce the divorce at any time or place, as a Muslim can, but must go to court.

**Divorce for Catholics**

Here it was not the courts but the Egyptian legislature which decided that Islamic law is not applicable to a mixed Christian marriage. This is the rule that Islamic divorce (unilateral as well as judicial) does not to apply to those non-Muslims whose laws do not allow divorce. Egyptian case law and legal literature is unanimous on the fact that only Catholic law qualifies for this status. Therefore, when Islamic law is applicable to Catholic spouses of different sects, or to a marriage in which only one of the spouses is Catholic, there is still no possibility to divorce.

The Court of Cassation has argued that the impossibility of dissolving a marriage is such an essential principle of the Catholic faith, that this principle “must be respected” in the sense that Islamic law should not be applicable in this instance. The legislature took a slightly different view, arguing that a non-Muslim couple should not be granted rights under Islamic law which they do not enjoy under their own law.

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127 This was held by the Court of Cassation in most of its abovementioned rulings. It is unclear from these rulings whether the court actually pronounces the divorce, or merely establishes the husband’s right to a unilateral divorce. (See next note.)

128 There remains room for disagreement regarding the date on which the Islamic divorce of the Christian husband takes legal effect. Most scholars argue that the divorce takes effect at the moment the court renders judgment. Others argue that the divorce takes effect already at the time it is pronounced and is merely confirmed by the judge.

129 Article 99/7 of the Decree on the Organisation of the Shari’a Courts: “A petition by one of the non-Muslim spouses for divorce (talāq) from the other will not be heard, unless [the religious laws of] both agree to divorce.” Although the wording is cryptic, the Explanatory Memorandum of the law, as well as the Surpeme Court and the legal literature, unanimously agree on its interpretation.

130 No. 36, Year 29, 6 February 1963; No. 8, Year 36, 14 February 1968; No. 30, Year 37, 14 January 1970; No. 3, Year 46, 29 December 1976; No. 31, Year 45, 15 December 1976; No. 31, Year 53, 10 April 1984; No. 71, Year 58, 19 December 1989.

131 Nos. 16 and 26, Year 48, 17 January 1979.

132 Explanatory Memorandum to Article 99/7.
The Modern Dhimmi: Concluding Remarks

1. The duality of Egyptian interreligious law

Interreligious law has its foundations in Islamic law, which prescribes tolerance for non-Muslim monotheistic religions. Legally, this tolerance has developed into a legislative and judicial autonomy for religious communities regarding personal status law. Throughout the centuries of Islamic rule, this autonomy was relative: the extent of its practice and scope always depended on the will of the Muslim ruler.

In Egypt interreligious law is regarded as a plurality of religious personal status laws. This is a misrepresentation. Interreligious “duality” or “bi-polarity” would be more accurate, since a distinction is usually made between Islamic law, on the one hand, and the collective of non-Muslim laws on the other. Also, “plurality” assumes a degree of equality among the laws, whereas Islamic personal status law enjoys the status of primus inter pares by being the general law.

2. Unification

Since the nineteenth century, the Egyptian state has sought to unify its personal status laws and communal courts. The merging of Family Courts into the national courts in 1956 was the final move in the unification of the court system. The unification of the personal status laws, on the other hand, appears to have come to a standstill in the 1950s, although it is still a matter of consideration. At that time, the unification of the court system was seen as a first step towards unification of the personal status laws.\(^\text{133}\) Until then, unification had resulted in declaring non-controversial matters of personal status law, such as capacity, guardianship and inheritance, part of the “general law”. Efforts to unify activities relating to the remaining issues of marriage and divorce have not yet yielded any legislative results. For this purpose, committees were appointed as early as 1936 and 1944, but their preliminary draft laws did not get beyond the unification of non-Muslim laws, separately from Islamic law. In 1980, the Ministry of Justice submitted a proposal for two Christian laws, one for Catholics and the other for the remaining sects.\(^\text{134}\) All these initiatives concentrated on the unification of the laws of non-Muslims.

\(^\text{134}\) Cf. Abu Sahlieh (1979: 116-117); Barsum, 1981.
The term unification is problematic in the Egyptian interreligious context. Although it implies that unified — or general — laws should apply to all Egyptians equally, it does not always mean that all Egyptians are treated equally by the general law. This is not strange, given the fact that the general law is in fact Islamic law, which often dictates the differential treatment of non-Muslims, such as prohibiting non-Muslims from testifying against Muslims in court, or presiding as judges in Muslim cases. Another example is the registration of marriage and divorce, which is different for Muslims and non-Muslims.\footnote{The marriages and divorces of Egyptian Muslims are registered with the ma‘dhân, a government official of the Ministry of Justice. Marriages and divorces of non-Muslim Egyptians are registered with the Document Registry office (shahr al-‘iqārî wa al-tawḥīq) of the Ministry of Justice, as is the case with the marriages and divorces of a Muslim with a non-Muslim Egyptian.}

The unifying role of the general law in personal status law is constantly underlined by the legal literature, and it is all the more striking that hardly any reference is made to those rules of the general law which do not unify, but make an explicit distinction between Muslims and non-Muslims. The difference in legal status between Muslim and non-Muslims is therefore not limited to family law, but extends into the “unified” personal status law as well.

3. The balancing act of public policy

As long as Egypt maintains its system of interreligious law, public policy will serve to maintain the balance between Muslim and non-Muslim personal status law.\footnote{Charfi (1987: 385) argues that interreligious law in Egypt has always been “balanced, preserving the harmony which it had for fourteen centuries”, until its “disruption” by Law 462 of 1955.} Public policy may not be invoked frequently by Egyptian courts — although it is invoked more often than is commonly assumed in the European legal literature — but it is the only tool by which the boundaries between the two legal realms can be delineated and adjusted. As such it serves as a legal barometer of the level of coexistence between the two communities.

In international conflicts law, public policy comprises the principles of the national legal order. This is essentially different from the role of public policy in an interreligious law system that contains more than one legal order. In Egyptian interreligious law, public policy is derived from one legal order (Islamic law) but its role is not necessarily to endorse the norms of this order but to preserve an equilibrium between
the Muslim and non-Muslim legal orders. In this respect, public policy plays three roles.

Positive public policy
Public policy plays a “positive” role when it endorses certain rules of Islamic law on a national level, for all Egyptians, regardless of their religion. The Egyptian legislature has already codified some of these rules; case law and the legal literature have added the following by means of “positive” public policy:

- inheritance law, and paternity if related to inheritance;
- prohibition of party autonomy in choosing the applicable law;
- prohibition of a marriage between a Muslim woman and a non-Muslim man;
- prohibition of a non-Muslim testifying against, or ruling in case of, a Muslim;
- the rules of conversion to Islam, and the prohibition of apostasy from Islam;
- prohibition for non-Muslims to testify against, or administer justice over, a Muslim.

With the exception of the prohibition of party autonomy, the characteristic feature of these rules is the distinction they make between Muslims and non-Muslims. Most rules are discriminatory, based on the Islamic maxim that “Islam supersedes and cannot be superseded”, which means that a non-Muslim should not have legal power over a Muslim, and that a Muslim can never be subject to non-Muslim law.

Negative public policy
Public policy plays a “negative” role when it denies the application of a non-Muslim rule, although the application of the non-Muslim law is generally allowed. This is the public policy as meant by Article 6 of Law 462. Case law and the legal literature unanimously agree that the following non-Muslim rules constitute violations of public policy:

- forced marriage of a childless Jewish widow (“levirate marriage”);
- the possibility in Coptic law to prohibit the remarriage of a divorcee;
- divorce demanded by a Christian woman after her husband has converted to Islam;
- absence of a waiting period (‘idda) after divorce or decease.

Whether or not the following rules are against public policy is debated:

- adoption;
- the maximum age of a child at which its mother loses her right to custody.
The nature of these rules differs from those mentioned under positive public policy. Negative public policy rules do not deal with typical religious rules or distinctions, but with the general protection of family life. As such, the cases yielded by negative public policy can be considered proper rules of public policy, since they represent a general interest.

Dhimmi and Islamic public policy
Whereas the positive and negative roles of public policy resemble its role in international conflicts law, its third role is unique to Egyptian interreligious law. The function of positive and negative public policy is to safeguard the essential principles of Islamic law, but public policy sometimes also protects the essential values of non-Muslim laws. This occurs in cases in which non-Muslims of different rites and sects are governed by Islamic law. The Court of Cassation has ruled that the Islamic rules of polygamy, divorce (only in the case of Catholics), and the requirement of witnesses for the conclusion of a marriage constitute a violation of essential principles of the Christian faith. As a matter of public policy, the Court argued, these Islamic rules should not be applied to mixed Christian marriages, not because these rules constitute a violation of public policy, but because the protection of essential non-Muslim principles is considered a rule of public policy. This is what I have called the dhimmi-function of public policy. This function is intrinsically connected to what several scholars call Islamic public policy, that part of Egyptian public policy which applies only to the Muslim community.

4. Interreligious law as an Islamic dominion
Now that the Court of Cassation has paid heed to essential non-Muslim values by means of dhimmi public policy, why not define public policy as the essential principles of the faiths of the respective personal status laws? The duality of interreligious law would then contain a duality of public policy: one for Islamic law and one for non-Muslim laws. This is what the Court in fact has allowed to happen.

The Court, however, has made it clear that it is not in favor of more than one public policy. Within the plurality of religious personal status laws, there should be only one normative system to which all legal orders are subjected. For the Court, as well as for legal scholars, it is obvious that Islamic law should be the ruling norm, to the exclusion of norms derived from other religious communities present in Egypt.
In the Egyptian legal literature this view has dominated since the seventies; the fifties and sixties manifested a distinctly secular approach to interreligious law, especially with regard to public policy. The view of the Court of Cassation, on the other hand, has remained more or less consistently Islamic-oriented. This might be explained by the fact that the Islamic tradition of the Shari’a Courts continued, notwithstanding their abolition in 1956, because the Shari’a judges and advocates were transferred to the national courts.\footnote{137}

It is tempting to draw a causal connection between the changing attitude among Egyptian jurists and the political situation in the fifties, the period when Nasser and his Officers tried to implement secular principles into Egyptian society. This is a topic that requires additional research. It is a fact, however, that the superior status of Islamic law was not dictated by Egypt’s legislature in its codification of interreligious conflicts law. It could be argued that Law 462 of 1955 actually gives sufficient room for a secular approach, because it does not define public policy in Islamic terms, and its Explanatory Report states that “no right of any group of Egyptians, Muslim or non-Muslim, should be infringed when applying their law.”

This secular approach remains the starting point in the definitions presented by the Court of Cassation and Egyptian legal literature. These definitions usually have a non-religious ring, refering only to “the realisation of the general interest” of society as a whole. It appears that both the Court and legal scholars want to pay tribute to religious coexistence and to the plurality of religious personal status laws, as well as to the unity of the Egyptian nation and its legal order. When it comes to interpreting the definitions of public policy, however, the Islamic nature of public policy is assumed to be a self-evident fact.\footnote{138} Whereas the theory of Egyptian interreligious conflicts law still lingers in the ideology of the Nasser era, its practice has turned more and more towards the Islamic maxim “Islam supersedes and cannot be superseded”.

\footnote{137} Articles 9 and 10 of Law 462 provide for this transfer, without making similar arrangements for judges and lawyers of non-Muslims courts. See also Abu Sahlieh (1979: 119); Brown (1997: 68).

\footnote{138} Ann Elizabeth Mayer has noted a similar reluctance by authors of Islamic human rights schemes to expound critically on the legal status of non-Muslims. According to her, most Muslims see the inequality between men and women as well as between Muslims and non-Muslims as the natural order of things. In order not to break ‘the widely accepted tenet of modern political and legal thought’, many Muslim authors ‘disguise’ the discriminatory rules of Shari’a law. (Mayer, 1995: 80-81.)
5. Any change in the legal situation of Egyptian non-Muslims?

In the twentieth century, Egypt’s system of interreligious law has been subjected to two opposing currents. One was initiated by the Ottoman decrees of the nineteenth century, which, according to some, gave non-Muslims wide autonomy. The non-Muslim communities regard these rights as a vested interest which they want to maintain and protect. The counter current, the call for unification of laws and courts, also has its origins in the nineteenth century.

In the introduction I observed that the judicial and legislative autonomy of non-Muslim Egyptians has been “limited” in the twentieth century as opposed to what they had been granted by the Ottomans in the previous century. With regard to judicial autonomy, this is indeed the case with the abolition of the Family Courts in 1956. With regard to legislative autonomy, however, some scholars have claimed that this is not a limitation but rather a restoration of the way this autonomy was intended under Islamic law. They argue that the legislative autonomy of dhimmis was based on the freedom to practice their religion, and that only marriage and divorce are of such strong religious character that they pertain to this religious freedom. It is due to misinterpretations and faulty translations of the relevant Ottoman laws and regulations that this autonomy was interpreted so liberally in the nineteenth century.¹³⁹ Other scholars — and they constitute the majority view — recognise that the legislative autonomy has indeed being limited, but they argue that this was done in the name of unification, which, for all practical purposes, is in the interest of the entire nation.

Whatever the reasoning behind the limitation of the non-Muslims’ legislative autonomy, this autonomy was discontinued after 1956. After that, the boundaries between the realms of Muslim and non-Muslim personal status law have been determined by means of public policy. The Egyptian case law and the legal literature point to a trend towards a more religious — i.e. Islam-dominated — approach towards interreligious law, starting in the early seventies. This has resulted in enforcing additional Islamic norms on non-Muslims by means of positive and negative public policy, but, interestingly enough, it has also resulted in recognition of essential non-Muslim norms by means of dhimmi public policy.

In 1971 Elgeddawy expressed concern that personal status law in Egypt had lost its original religious connotation.\textsuperscript{140} It has not. On the other hand, Charfi’s observation in 1987 that the prevalence of Islamic law has been “pushed to its extremes” has proven to be correct, although he wrongly attributes this development to the reforms of Law 462 of 1956:\textsuperscript{141} the penetration of Islamic law in personal status matters of non-Muslims is in my opinion a result of developments in legal doctrine since the 1970s.

Generally speaking, one can observe a secular and pragmatic approach in the first half of the century aimed at unification, and a religious approach in the second half which re-claims the disunity of interreligious law. What does this development mean for the modern dhimmi, the Egyptian non-Muslim? Assuming that he wants to maintain his autonomy, the religious (Islamic) approach to interreligious law, as opposed to unification, may be to his distinct advantage. Whereas the unification of Egypt’s personal status laws ultimately aims at the abolition of non-Muslim laws, Islamic law actually asserts the existence and autonomy of non-Muslim laws. However, a negative consequence for the non-Muslim may be that the prevailing norms of Islamic law will be enforced more than before by means of public policy, which necessarily means a limitation to the application of non-Muslim family law.

Conclusion

In Egypt’s system of interreligious law, the multitude of religious personal status laws, is \textit{de facto} treated as a duality: Muslim and non-Muslim laws. The prevailing norms and rules, however, are Islamic law, as in interreligious conflicts law, which determines which law is applicable when more than one religious law applies to a person or situation (such as mixed religious marriages or conversion). In most cases, Islamic law is the applicable law.

The prevailing norms of the interreligious legal order, the so-called public policy, are also based on Islamic law. Public policy can be applied in three ways: it can endorse Islamic rules (“positive” public policy), it can prevent non-Muslim rules from being applied because they violate essential rules of Islamic law (“negative” public policy),

\begin{itemize}
  \item Elgeddawy (1971: 32).
  \item Charfi (1987: 385-387).
\end{itemize}
and it may protect essential values of non-Muslim laws ("dhimmi" public policy).

Whereas legislative activity during the first half of the twentieth century focused mainly on the unification of personal status laws, interreligious law in the second half of the century has been dominated by case law, in which public policy played an important role. It is through public policy that the boundaries between the realms of Muslim and non-Muslim law have been further defined and adjusted. Although public policy it is usually defined as a secular concept, since the 1970s the courts and legal literature have increasingly interpreted it as an Islamic concept. This means that the autonomous position of non-Muslim personal status laws will not be subjected to unification, because interreligious law is a basic principle of Islamic law. It also means that public policy in its Islamic form may place additional limits on this autonomy.

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