



UvA-DARE (Digital Academic Repository)

Sharia and public policy in Egyptian family law

Berger, M.S.

[Link to publication](#)

Citation for published version (APA):

Berger, M. S. (2005). Sharia and public policy in Egyptian family law. Amsterdam: in eigen beheer.

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <http://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

LIST OF CONTENTS

<i>INTRODUCTION</i>	15
1. Conflict Law, Interreligious Law and Public Policy	16
1.1 Conflict law	16
1.2 Public policy	16
1.3 Interreligious law	17
2. Set-up of the Research	18
3. Methodology (1): Comparative Law	20
4. Methodology (2): 'Shari'a' and 'Islamic law'	20
4.1 Comparative issues: the Western approach to Shari'a law	21
4.2 Shari'a as moral, jurists' and codified law	22
4.3 Shari'a in Egypt	23
4.4 Definitions of Shari'a	23
<i>Chapter 1</i>	25
Public Policy and Islamic Law:	25
The Modern <i>Dhimmi</i> in Contemporary Egyptian Family Law	25
1. Introduction	25
2. The Legal Framework	26
2.1 Interreligious law	26
2.1.1 Islamic law, interreligious law and conflicts law	26
2.1.2 The dhimmī	27
2.3 Contemporary Egyptian law	27
3. Limitations to the Autonomy of Non-Muslim Personal Status Law	28
3.1 Narrowing the scope of non-Muslim personal status law	28
3.2 Abolition of family courts	29
3.3 Conditions for applying non-Muslim family laws	30
4. Changing Religion	31
4.1 Conversion and applicable law	31
4.2 Changing from Islam to a non-Muslim religion	32
4.3 Changing from a non-Muslim religion to Islam	32
5. Public Policy	33
5.1 Introductory Remarks	33
5.2 Definitions of Public Policy	34
5.2.1 Public policy in Egyptian legislation	34
5.2.2 Public policy as defined by the Court of Cassation	34
5.2.3 Public policy as defined in the Egyptian legal literature	35
6. Public Policy Cases	37
6.1 Introductory remarks	37
6.1.1 Functions of public policy	37
6.1.2 How to determine what is public policy?	38
6.2 Positive public policy	38
6.2.1 Inheritance law	38
6.2.2 Paternity	39

6.2.3	Marriage of a Muslim woman with a non-Muslim man	39
6.2.4	Party autonomy	39
6.2.5	Procedure of conversion to Islam	40
6.2.6	Apostasy from Islam	40
6.2.7	Testimony of non-Muslims against Muslims	40
6.2.8	Jurisdiction of non-Muslim judges over Muslims	41
6.3	Negative public policy	41
6.3.1	Forced marriage of the childless Jewish widow ('levirate marriage')	41
6.3.2	Divorce in case Christian husband converts to Islam	42
6.3.3	Waiting period	42
6.3.4	Adoption	42
6.3.5	Custody	43
6.4	Islamic and dhimmī public policy	43
6.4.1	Conclusion of a marriage	44
6.4.2	Polygamy	45
6.4.3	Unilateral divorce	45
6.4.4	Divorce for Catholics	46
7.	The Modern Dhimmī: Concluding Remarks	46
7.1	The duality of Egyptian interreligious law	46
7.2	Unification	46
7.3	The balancing act of public policy	47
7.3.1	Positive public policy	47
7.3.2	Negative public policy	48
7.4	Dhimmī and Islamic public policy	48
8.	Interreligious law as an Islamic dominion	48
9.	Any change in the legal situation of Egyptian non-Muslims?	49
10.	Conclusion	50

Chapter 2 51

Conflicts Law and Public Policy in Egyptian Family Law: 51

Islamic Law Through the Backdoor 51

1.	Introduction	51
2.	Egyptian Conflicts Law	51
2.1	Historical background	51
2.1.1	Islamic conflicts law	51
2.1.2	European influences	52
2.1.3	Stagnation of Egyptian conflicts law after 1960s	53
2.2	Egyptian conflicts law: the role of religion and religious law	54
2.2.1	Religion as connecting factor	54
2.2.2	Characterization	56
3.	Theoretical Framework of Egyptian Public Policy	56
3.1	Introduction	56
3.2	General definitions in Egyptian law	58
3.3	Egyptian public policy in matters of personal status	59
3.3.1	'Islamic' and 'general' public policy	60
3.3.2	Islamic public policy and 'Islamic law'	60

4.	Cases of Public Policy	61
4.1	Validity of marriage	62
4.1.1	Marriage of Muslim woman with non-Muslim man	62
4.1.2	Polygamy	63
4.1.3	Other substantive conditions	63
4.1.4	Consent and witnesses: public policy?	63
4.2	Mutual obligations of spouses	64
4.3	Children	65
4.3.1	Illegitimate children	65
4.3.2	Adoption	65
4.4	Divorce	65
4.4.1	Divorce by the husband	66
4.4.2	Divorce by the wife	66
4.4.3	Prohibition of divorce	66
4.5	Law of succession	66
4.5.1	Intestate succession	67
4.5.2	Testamentary succession	68
4.6	Changing religion	68
4.6.1	Changing from a non-Muslim religion to Islam	68
4.6.2	Changing from Islam to a non-Muslim religion	69
4.6.3	Changing from one non-Muslim sect or rite to another	70
5.	Comparative Analysis of Egyptian Public Policy	70
5.1	Functions of general public policy	70
5.2	Functions of Islamic public policy	71
5.3	Defining Islamic public policy - a comparative approach	72
5.4	The silence surrounding Islamic public policy	74
6.	Conclusion	75

Chapter 3 76

Regulating Tolerance: Protecting Egypt's Minorities		76
1.	Introduction	76
2.	Legal Structure: Attempts at Unification	76
2.1	Dhimmī and citizen	76
2.2	Contemporary Egyptian plurality of religious laws	77
3.	First Case: Protecting the Italian and Greek Communities in Alexandria (1953-54)	78
3.1	Historical background	78
3.2	Legal background	78
3.3	The court cases	79
3.4	Comments on the ruling	80
4.	Second Case: Protecting the Essential Values of the Christians (1979 and 1984)	81
4.1	Legal background	81
4.2	The court cases	82
4.3	Comments on the rulings	83
5.	Tolerance	84
5.1	'Protecting the rights of religious minorities'	85

5.2	The concept of tolerance: A comparison	85
6.	Conclusion	87

Chapter 4 89

Apostasy and Public Policy in Contemporary Egypt: An Evaluation of Recent Cases from Egypt's Highest Courts 89

1.	Introduction	89
2.	The Consequences of Apostasy	89
3.	Public Policy (1)	91
4.	Apostasy: The Act Itself	93
5.	Public Policy (2)	96
6.	Freedom of Religion	97
7.	Public Policy (3)	99
8.	Conclusion	100

Chapter 5 102

Secularizing Interreligious Law in Egypt 102

1.	Introduction to Interreligious Law	102
2.	Interreligious Law in Ḥanafī fiqh	104
2.1	Jurisdiction	104
2.2	Conflict rules	104
3.	Contemporary Egyptian Law and the Reforms of 1955	105
3.1	Historical developments	105
3.2	The reforms of 1955	106
4.	Public Policy	107
4.1	Public policy in contemporary Egyptian law	108
4.2	Public policy in Ḥanafī fiqh	109
5.	Developments in Contemporary Egyptian Interreligious Law	111
5.1	Abū Ḥanīfa replaced by Zufar	111
5.2	Content of the 'essential principles' of Islamic law	112
5.3	Protection of non-Muslim principles	112
6.	Conclusion	113

CONCLUSION 115

1.	Introduction	115
2.	The Mechanism of Egyptian Interreligious and International Conflicts Law	115
2.1	Egyptians: interreligious law	116
2.2	Foreigners: international conflicts law	117
3.	Public Policy	118
3.1	Definitions	118
3.2	Functions	120
3.3	The oscillation of Islamic Sharīʿa	122
4.	Understanding the Role of Religion in Interreligious and International Conflicts Law	124

5. Final Remarks	126
<i>APPENDIX 1</i>	128
<i>APPENDIX 2</i>	134
<i>BIBLIOGRAPHY OF LITERATURE IN WESTERN LANGUAGES</i>	140
<i>BIBLIOGRAPHY OF LITERATURE IN ARABIC</i>	157
<i>INDEX</i>	165

