Sharia and public policy in Egyptian family law
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Chapter 3

Regulating Tolerance: Protecting Egypt's Minorities

1. Introduction

Throughout Islamic history, non-Muslim communities under Muslim sovereignty have been granted a degree of autonomy to administer their own religious and family law affairs. The subsequent situation of separate courts and laws for Muslims and non-Muslims, the legal system of a 'plurality of religious family laws', has been maintained in contemporary Egypt, albeit in an adapted form. In this research, I examine the status of non-Muslim communities within the framework of Egyptian plurality of religious family laws in the second half of the twentieth century by addressing the preliminary question of this book: have there been any changes in the legal status of the individual Egyptian in the course of the twentieth century, and can these changes be attributed to European influences? While Egypt's religious family laws, like most - if not all - contemporary Egyptian laws, have been influenced by European legal thought in both substance and doctrine, I will argue that Egypt's system of plurality of religious laws has remained, in essence, truthful to its Islamic legal roots. This especially shows in the treatment of the individual: even though the introduction of conceptions such as citizenship might have given rise to an individualisation of the Egyptian legal subject, in matters of family law, the individual Egyptian is still considered to be a member of a collective, that is his or her religious community. In this study, I discuss some elements of this collective approach. First of all, the legal structure of the Egyptian plurality of religious laws upholds that the applicable family law is determined by one's religion. Changing religion is equal to becoming a member of another community, including its family law. More important, however, is that the Egyptian non-Muslim communities are, indeed, treated as collectives when it comes to family law. This appears from two sets of court cases which explicitly deal with this issue, one dating from the 1950s and the other from the 1980s, in which the courts express a concern for the preservation of the identity and cohesion of these minorities. This concern is given voice by means of the legal concept of 'public policy', which is also examined in this chapter. The third element of the collective approach is its legal-political framework of religious tolerance. Based on these considerations, I intend to demonstrate that one of the main characteristics of Egypt's system of plurality of religious laws is the protection of the collective identity of the non-Muslims.

2. Legal Structure: Attempts at Unification

2.1 Dhimmi and citizen

IN ORDER TO understand the origin of contemporary Egyptian plurality of religious laws, a short detour must be made regarding Islamic law as described in fiqh literature. Islamic law distinguishes between persons residing within Islamic territory (dār al-islām) and those outside this territory (dār al-harb). Within Islamic territory, a further distinction is made between Muslim and non-Muslim residents, the dhimmis. Dhimmis are legal subjects under Islamic sovereignty, with the explicit understanding that it is the duty of the Muslim sovereign to protect the dhimmis. The relationship between Muslim and dhimmi communities was modelled as an 'indefinitely renewed contract through which the Muslim community accords [...] on condition of their acknowledging the domination of Islam'. Dhimmis were granted religious freedom, which, in legal terms, translated into a...
certain degree of judicial and legislative autonomy with regard to their religious and family law (the latter being considered an intrinsic part of religion). In all other matters, Islamic courts were competent to pass judgement and Islamic law was applicable. The ensuing coexistence of Muslim and non-Muslim family-law systems is what has been named a plurality of religious laws. It meant, in effect, the existence of separate courts and family laws for Muslims and non-Muslims. While Muslim courts and laws were part of the Islamic state, the non-Muslim communities could administer their religious and family-law affairs in a relatively autonomous manner. It should be borne in mind that, in addition to the relative autonomy in the field of religion and family law, dhimmi status also marked a separate status in many respects in the legal, political and social spheres. Since the 1950s, many Western and non-Muslim authors have written on the nature of this status, mostly depicting it as derogatory and inferior. What concerns me in this research, however, is the particular issue of family law which, in my opinion, is of an entirely different nature. Dhimmi status was a collective, not an individual status: it was determined by virtue of membership of a non-Muslim religious community and not by being a non-Muslim subject of the state. This changed by the end of the nineteenth century by the Ottomans with the introduction of the concepts of nationality and citizenship.

The Ottoman Empire (of which Egypt was an autonomous province from 1517 until 1914) officially abrogated the separate legal dhimmi status for its non-Muslim subjects in 1856 and declared all subjects equal before the law, therewith introducing the concept of Ottoman citizenship. However, Muslim and non-Muslim citizens still maintained a separate legal status in the field of personal status law. This new status of non-Muslim subjects, being Ottoman citizens on one hand, and enjoying a separate status in family matters on the other, was continued by Egypt when it was detached from the Ottoman Empire and became a British Protectorate in 1914. With its independence in 1922, Egypt came under the growing influence of the ideology of nationalism, which emphasised the unity of the republic and its citizens and was also one of the reasons for unification of the legal system.

2.2 Contemporary Egyptian plurality of religious laws

THIS MOVEMENT FOR unification led to two radical changes in Egyptian plurality of religious laws. First, the legislative autonomy, which in the nineteenth century encompassed what would nowadays be called personal status law, was limited in the course of the twentieth century to matters of marriage and divorce. All other issues such as inheritance, guardianship and capacity were codified in laws largely based on Islamic law, but applied to all Egyptians regardless of their religion, hence becoming Egypt's common law in matters of personal status. Second, the judicial autonomy was abolished in 1956 with the abrogation of Muslim, Christian and Jewish family courts and the integration of their activities into a single national court system. The unification of the court system was seen as a first step towards unification of personal status laws. This final and most radical step in the process of unification was never put into effect, however. Committees had been appointed as early as 1936 to look into this matter and proposals have been submitted — and rejected — ever since, but all these initiatives concentrated on the unification of non-Muslims laws, never on the unification of Muslim and non-Muslim laws. This is one of the most telling demonstrations of Egypt’s plurality of religious laws persevering in its communal structure. It means that, although the semiautonomy of non-Muslim communities has been narrowed down considerably during the first half of the twentieth century, the origins of this legal system have still been maintained in two respects.

303 This legal system is also called a 'personal legal system', indicating the rules of a religiously or ethnically homogeneous community without territorial bonds: cf. Arminjon (1949: 83–84); Vitta (1970: 188–89).
305 Egypt confirmed the continuation of this system by Law 8 of 1915.
144 It has been argued that marriage and divorce were originally the fields of law for which Islamic law had intended a degree of autonomy. The extension of this autonomy into other matters of personal-status law occurred during the Ottoman period: Boghdadi (1937: 87, 343/f); Elgeddawy (1971: 18–19, 29–30).
First, religious freedom granted to non-Muslims is still upheld in legal matters which are essential, namely, marriage and divorce. This, in turn, means that Egyptians still derive their legal status in these matters from their religion or, rather, their belonging to a certain religious community. Second, the fact that non-Muslims have lost the authority to administer their family-law affairs to the national courts, which are predominantly staffed by Muslim judges, seems to be largely compensated by the sensitivity of the Egyptian judiciary to the preservation of these communities and their identities within the context of their respective religious laws, as will be demonstrated when discussing the court cases below. The means to express this sensitivity is the use of the notion of 'public policy' (النظام العام). It is a legal concept of European origin that was introduced into Egyptian legal doctrine in the late nineteenth century. Public policy denotes the norms and rules considered essential to the legal order of a society. Its interpretation is left to the courts and its discussion will therefore be left to the following paragraph. As a preliminary remark, however, it may be observed that the preservation of the identity of religious minority communities appears to be essential to Egypt's legal order.

3. First Case: Protecting the Italian and Greek Communities in Alexandria (1953–54)

3.1 Historical background

SINCE PTOLEMAIC TIMES, Alexandria has had a mixed community of Egyptians, Greeks and Jews. During the nineteenth century, the city of Alexandria had also become a safe haven for many Mediterranean peoples who fled wars and famine at home: Greeks, Armenians, Italians, Lebanese. Their settlement in Egypt was encouraged by the Egyptian ruler Mehmet Ali (1805–48), who had ambitious plans for modernising his country. Alexandria grew from a sleepy town of 13,000 inhabitants in 1821 to a thriving city with ca. 100,000 inhabitants in 1840, doubling to ca. 200,000 in 1872 and again tripling to ca. 600,000 in 1937. By then, Alexandria had become a commercial centre with Egypt's only stock market and major banks and trade houses. The Greeks and Italians, who are the focus of the discussion below, constituted the largest non-Egyptian communities in Alexandria during the first half of the twentieth century. In the census of 1937, Alexandria had almost 600,000 inhabitants, with more than 88,000 foreigners, 36,822 of whom were Greek and 14,030 Italians. According to the Alexandrian court ruling that will be examined below, the two communities together had almost doubled to 90,000 people in 1954. During the 1960s however, foreign communities had dwindled to negligible numbers. Their exodus started with the Suez Crisis in 1956, which prompted the Egyptian state to expel most of the Jews, British and French from the country and to nationalise foreign assets. The following waves of nationalisation strangled private enterprise and drove off many of the remaining foreigners.

3.2 Legal background

IN MOST MATTERS of personal status law, the Egyptian Civil Code of 1949 allows foreigners residing in Egypt to have their national personal status laws applied to them. This was also the case with foreigners who had been living in Egypt for generations, but were still considered legal aliens since residence or birth in Egypt did not entitle them to Egyptian citizenship. The choice by the Egyptian legislature to apply the law of nationality rather than the law of domicile appears to have been made out of consideration for foreigners residing in Egypt: applying the

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310 These figures and most of the following historical information is based on Ilbert and Yannakakis (1997).
312 In 1960, Linant de Bellefonds spoke of 120,000 Greek nationals in all of Egypt (1960: 835).
313 The 1986 census counted 10,834 foreigners out of almost 3 million inhabitants, 64 of which were Jews (Courbage and Fargues, 1998).
law of their domicile would have meant the application of Egyptian (Muslim) personal-status law, which was considered 'unfair' to them.\footnote{Abdalla (1970: 166).}

For cases involving more than one nationality, the so-called 'conflicts rules' of the Egyptian Civil Code, the guidelines on how to determine which law is applicable provides solutions. For instance, the national law of the husband applies to divorce and the national law of the deceased applies to inheritance. In the following court cases, Articles 12 and 28 of the Egyptian Civil Code are of relevance. Article 12 stipulates that the national laws of both spouses are to be taken into account with regard to 'the substantive conditions of a marriage', i.e. the (in)validity of a marriage. Article 28 stipulates that foreign law will not be applied if it violates public policy.

3.3 The court cases

IN THE 1950’S, a specific issue repeatedly arose before the courts of Alexandria. It concerned the situation of the marriage between a Catholic Italian and an Greek-Orthodox Greek which was concluded in the Catholic church. It was argued that such a marriage was void because the Greek Civil Code deems a marriage involving a Greek-Orthodox only valid if concluded by a Greek-Orthodox priest. This argument was based on Article 12 of the Egyptian Civil Code which demands that the marriage should be valid according to both Italian and Greek law.\footnote{Apparently, the conclusion of a marriage by a priest was considered to be a substantive rather than a formal condition for the validity of the marriage.} The Alexandrian courts, in several instances, concurred with this argument.\footnote{cf. Court of Appeal, 9 April 1950 (Revue Egyptienne de Droit International, 1950, Vol.6); Court of First Instance, 25 December 1951 (Revue Egyptienne de Droit International, 1953, Vol.9).} Given the fact that both Italian and Greek laws at that time made divorce virtually impossible, these rulings of the Alexandrian courts served as an alternative way for dissolving these kind of marriages. Apparently, the number of petitions applying for nullity of Italian-Greek marriages came as a shock to the Alexandrian judiciary, because the Court of First Instance found it necessary to put a halt to it. Initially, the court repealed its previous rulings with the following argument:

Considering that in the large city of Alexandria, Greeks and Italians have lived side by side for many centuries, are linked by bonds of matrimony and have multiplied on a large scale to the extent that their number nowadays reaches 40,000 to 50,000 people, the annulment of a marriage based on the ground that the religious ceremony has been performed by one priest rather that another is a serious threat which will shake the foundations of this mixed community [...] and will ruin conjugal life without plausible reason. Moreover, the Catholic and Orthodox rites as well as the Protestant rite share the same faith; their doctrines are very much alike, especially with regard to marriage which they all consider to be a sacrament. Therefore, this court considers that a woman of the Orthodox rite who accepts to celebrate her marriage in a Catholic church and to receive the blessing of a Catholic priest, has implicitly converted to the other (i.e. Catholic) rite. Not only because her husband - whom she has chosen and has accepted to live with under the same roof and carrying his name - is Catholic, but because the two rites are virtually identical with regard to their substantial principles and their doctrines. Matters relating to the form of marriage are exempted, but these have no influence whatsoever on the foundation of the Christian faith.\footnote{Court of First Instance, 23 June 1953 (Revue Egyptienne de Droit International, 1953, Vol.9). This is also briefly mentioned in Linant de Bellefonds (1960: 835).}

The court tried to save the mixed marriage with the feeble ground of the 'implicit conversion'. Indeed, the annotator to the published ruling exposed the weakness of this argument by remarking that the Catholic Church itself does not accept conversion to Catholicism by mere consent to marriage in its church.
A year later, an identical case was raised before the same court, which seized the opportunity to make some corrections to its previous ruling. First, the 'many centuries' of intermarriage between the Greek and Italian communities was changed into 'many generations' and their number was doubled to 90,000. More important, however, is the way that the court modified its argument not to accept the nullity of these marriages. It recognised the shortcomings of its argument of 'implicit conversion' and turned to the concept of public policy to reach the same result:

In the city of Alexandria only, the number of Greeks and Italians has reached 90,000 people, united by bonds of marriage for many generations. Due to these mixed unions, a special environment has been created which differs profoundly from those in Greece and Italy. Therefore, Egyptian public policy demands the protection of this situation, now and in the future, in order to safeguard the family against religious quarrels, quarrels which in no respect touch the foundations of these religions themselves.\footnote{Court of First Instance, 23 February 1954 (Revue Egyptian de Droit International, 1954, Vol.10). This is also briefly mentioned in Linant de Bellefonds (1960: 835).}

3.4 Comments on the ruling

THE COURTS' PRIMARY concern waivers between, on the one hand, the harmony between the Greek and Italian communities and, on the other hand, the sanctity of matrimony. On closer inspection, however, the latter consideration seems not to have been of great importance for the courts. In both court cases, the claimant had demanded nullity of the marriage on two grounds: the omission of a Greek-Orthodox celebration (nullity under Greek law) and impotence of the husband (nullity under Italian law). Whereas the court had great difficulty with the first plea, it easily accepted the second, and in both court cases declared the marriage void.

Apparently, the court was concerned with the bond of matrimony only insofar as it reflected the integrity of each of the two communities. The court made the following causal connections: the two communities are united by means of marriage; marriage is a religious union; in order to establish this union, a choice must be made for the religion of one of the spouses which is also the religion of his or her community. The court at first concurred with a strict application of the Egyptian conflicts rules and ruled that a marriage validly concluded in accordance with one religion (Catholicism) was void because it was not validly concluded in accordance with another (Greek-Orthodoxy). Later, however, the court became apprehensive for reasons which are not entirely clear, but the court mentions 'religious quarrels'. These could possibly be inspired by previous rulings which, in effect, said that the Greek (Orthodox) law untied what had been united by Italian (Catholic) law.

The crucial point of the latter ruling is that the court deems the prevention of communal disorder within the city of Alexandria to be of greater importance than the strict application of the law. The court does so by means of the doctrine of public policy. Based on Article 28 of the Civil Code, the application of foreign laws as stipulated by that code is precluded due to their violation of Egyptian public policy. In the opinion of the court, disharmony and possible disintegration of these Alexandrian communities constituted such a violation. While one could argue that the city's social or economic peace might be at the heart of the court's reasoning, the ruling does not make any mention of such considerations.

It appears, therefore, that indeed the integrity and stability of religious-ethnic communities themselves are considered to pertain to public policy, that is, they are considered essential for the Egyptian national legal order. What is intriguing is that the foreignness of both the communities and their respective laws are not the issue; the fact that, in the reasoning of the court, these communities have deep-rooted social and economical ties to Alexandria is apparently enough to make them a integral part of the Egyptian legal order.

But what exactly was the status and identity of the Greek and Italian communities of Alexandria? As seen, very few of them carried Egyptian nationality and, as a matter of law, the court considered them to be legal aliens and applied their national laws. At the same time,
however, the court pointed out that most of these foreigners were born and raised in Alexandria, often descending from families who had lived in Alexandria for generations. The court indicated explicitly that the members of these communities consider themselves Alexandrian, rather than Italian or Greek, having more affinity with Egypt than with their national countries. Thus, although they were legal aliens from a legal perspective, they were considered an intrinsic part of Egyptian society.

The comparison with the communities of non-Muslim Egyptians comes to mind, but fails for two reasons. First, the Italian and Greek communities in Alexandria were essentially ethnic rather than religious communities. The Italian community, for instance, consisted of both Catholics and Jews. Also, as opposed to Egyptian non-Muslims, the applicable law of the foreigners was connected with their nationality, not their religion. An Egyptian Copt converting to Catholicism, would change from Coptic to Catholic family law, while Italian family law would apply to an Italian, regardless of his or her religion.

Whatever the definitions of the identity of the Italian and Greek communities in Alexandria (the court did not give any), the court felt that it had sufficient reason to disregard the foreign national law in order to protect their integrity and identity.


AS IN THE previous case, the following conflicts that were decided by the Egyptian Court of Cassation were related to religiously mixed marriages. In the present case, the parties involved were not foreigners, however, but non-Muslim Egyptians.

4.1 Legal background

EGYPT HAS RECOGNISED a number of religious communities which are entitled to application of their own family laws. These communities are categorised as follows. First, distinction is made between religions (din), of which usually only Christianity, Judaism and Islam are mentioned. A religion can be divided into 'rites' (milla or madhhab) which are defined as ways of practising that particular religion. Each rite can be subdivided into 'sects' (ta'fa), which the Court of Cassation has defined as 'groups of people [...] who share a common ethnic origin, language or customs'.

The Muslims, who constitute the majority of the Egyptian population, are governed by Egyptian Muslim family law. The largest minority are Christians, consisting of three rites which are subdivided into a total of twelve sects which share a total of six personal-status laws.

319 Ilbert and Yannakakis, (1997: 25, 66), use the term 'colonies' for the Greeks and Italians of Alexandria, arguing that this refers to a common ethnicity or nationality, rather than the term 'community', which historically refers to a common religion.
320 This paragraph is an elaboration of the cases discussed in Chapter 1, paragraph 5.4.
321 No.23, year 46, 26 April 1978.
322 Estimates of the number of Christians in Egypt vary from 3 to 15 million out of a total population of more than 60 million. The official figure of 5.7 percent (ca. 3.5 million), albeit vehemently opposed by Egyptian Christian authorities, seems to be a correct indicator (see, for the same figure, Courbage and Fargues, 1997: 209).
323 These are the Orthodox rite, divided into Coptic, Greek, Armenian and Syrian sects; the Catholic rite, divided into Armenian, Syrian, Coptic (all three seceded from the Orthodox church), Latin (Greek-Catholic from Lebanon), Maronite (from Lebanon) Chaldean (from Iraq), and Roman sects and the Protestant rite (mistakenly recognised as a sect by governmental decree of 1850 and, hence, still retaining the official status of a single sect, regardless of its subdivisions).
324 These are the personal status laws of the Coptic-Orthodox (1938), Greek-Orthodox (1927), Syrian-Orthodox (1929), Armenian-Orthodox (1940), Catholic (1949) and Protestant (1902). As with Muslim law, a large part of the Christian laws – as lay down, for instance, in the New and Old Testament, ordinances from patriarchs and bishops, customary law and case law – are not codified.
325 These are the Rabbinitic and the Karaite sects, each with their own personal status law: the law compiled by Ben Schomu'm in 1912 for the Rabbinites and the law compiled by Eliyahu Bischias in 1912 for the Karaites.
has become almost non-existent. In case of mixed religious marriages, Egyptian Muslim family law always applies if one of the spouses is Muslim.

Relevant for the case in question is the rule that Egyptian Muslim family law also applies to a Christian couple if the spouses do not share the same rite and sect. (Note that this rule does not apply to foreign couples, as illustrated by the previous case, except if one of the spouses had Egyptian nationality.) Egyptian Muslim family law will hence be applied in case of a marriage between, for instance, a Christian and a Jew, a Catholic and an Orthodox, or an Armenian-Catholic and a Roman-Catholic. Consequently, Christian family law only applies to those Christian couples who share the same rite and sect.

4.2 The court cases

IN ONE EGYPTIAN Christian couple, husband and wife belonged to different Christian sects. Because Egyptian Muslim family law was applicable to their marriage, the husband had drawn the conclusion that he was entitled to enter into a second polygamous marriage. His wife claimed the nullity of this second marriage, arguing that such marriage might be valid according to the law, but was a violation of public policy. This case was brought before the Court of Cassation, which issued an elaborate ruling.

The court started with the consideration that the husband was right from a purely legal point of view. Egyptian Muslim family law applied to his marriage, hence, the Christian husband enjoyed the same rights as a Muslim husband. In principle, therefore, he was entitled to enter into a second polygamous marriage. The court then continued to make an exception to this rule. Egyptian Muslim family law is not applicable, it argued, when its rules are in conflict with any of the principles of the essence of the Christian faith [al-mabādiʾ al-muttassila bi-jawhar al-ʿaqīda al-masāḥiy] and which, if violated by the Christian, will render him an apostate of his own religion, corrupting his doctrine and infringing on his Christianity. The court concluded that polygamy is indeed against the essence of the Christian faith, based on the following consideration:

The unity in Christian marriage is considered to be one of the principles of Christianity [...] and one of the characteristics of a Christian marriage is its single relationship which can only be founded by one man and one woman. [...] The prohibition of polygamy for men and women has been one of the principles that has been predominant in Christianity for the past twenty centuries and never has been subject of dispute, not even when the church split up into a European and an Eastern [church] and in Catholic, Orthodox and Protestant rites [...]. This [prohibition of polygamy] has been considered one of its essential principles, regardless of the church, rite or sect [...]. Due to this principle, a second marriage concluded during the existence of the first marriage is considered null and void, even if both spouses agreed to it.

Moreover, the court argued, polygamy is a right which God has endowed specifically to Muslim men:

It is clear that polygamy is allowed by Islamic Shāfīʿa [...]. It is also obvious that this divine message is directed only to Muslims. The largest part of it [i.e. the message] is religious to the extent that it would be hard to claim that this purely religious principle is applicable to someone who does not originally believe in the doctrine to which the permission of polygamy is related. [...] Therefore, permitting a Christian to enter into a polygamous marriage, despite the fact that this contradicts the most basic tenet of his religious faith, constitutes a violation of the law.

326 According to the Ahram Center for Political and Strategic Studies, less than 100 Jews lived in Egypt in 1997: [1998: 108].
327 Article 6 of Law 462 of 1955. This is not a rule of Islamic law, but is based on the practice of Christian courts in Egypt which refer mixed Christian couples to Shāfīʿa courts which were only allowed to apply Islamic law. This is an exclusively Egyptian solution which does not exist in the plurality of religious laws in, for instance, Syria, Lebanon and Jordan.
328 Court of Cassation, Nos.16 and 26, 17 January 1979.
In short, the prohibition of polygamy is considered to be such an essential rule of the Christian faith that a Christian husband may never enter into a second marriage even if the applicable Egyptian Muslim family law grants him the right to do so. Could it be argued, as the wife had done, that the polygamous marriage of her husband was against public policy? The court rejected this argument, stating that public policy in matters of law related to religious doctrine, that is personal status law, is governed by principles of Islamic law, being the religion of the majority of Egyptians. It would therefore be inconceivable that the Islamic concept of polygamy in itself is a violation of public policy. The court argued that the nonapplication of Islamic law, in this particular instance, was based on the spirit of the law:

The Explanatory Memorandum of Law 462 of 1955 reads: ‘Respect is to be ensured for the sovereignty of the law that is to be applied so that no right of any group of Egyptians, Muslim or non-Muslim, will be infringed when their law is applied.’ This is a clear indication that the legislature has demanded respect for all laws, general as well as special [i.e. the non-Muslim family laws]. Therefore, the violation of basic principles connected with the core of the doctrine and the essence of the religion constitutes a circumvention of its [i.e. the legislature’s] spirit and a transgression of its intentions.

Five years later, however, the court made a slight modification to this consideration in two other cases of mixed Christian marriages. Although the subject-matter of these cases was quite different from the one of 1979, the line of reasoning is similar. The question laid before the court was whether the Catholic spouses of different rites could use their rights of divorce as stipulated under Egyptian Muslim family law, even though this law itself specifically prohibited divorce for Catholics.229 The court went on to explain that the Catholic prohibition of divorce was codified by the Egyptian legislator in deference to Catholic law: ‘[This rule] is for the benefit of this particular sect [i.e. the Catholics] in order to protect their religious fait and is not for the benefit of the person of the claimant. As such, this rule pertains to public policy’.330

While in the case of polygamy, it was said that essential rules of a non-Muslim faith should not be violated, the Court has now gone a step further by stating that the protection of a non-Muslim faith in itself is a matter of public policy.

4.3 Comments on the rulings

THE 1979 AND 1984 rulings are key rulings in matters of Egyptian plurality of religious laws. They are important for two reasons. First, because they define the core issues which make up the legal personality of Christian communities. It answers the question of Ricœur, albeit related to a collective rather than a person: what are the characteristics of a person to deserve respect which, in turn, entities that person to become a legal subject?331 In the words of the court, the identity of the Christian communities is based on ‘the principles of the essence of the Christian faith which, if violated by the Christian, will render him an apostate of his own religion, corrupting his doctrine and infringing his Christianity’. This is the identity on which the existence of these communities as legal entities is based, separate from the other Egyptian citizens.

This gives rise to the second issue: the conflict between communal and national interests. It is in the interest of the communities to apply their own family laws, as it is in the interest of the state to apply its national laws. Egyptian Muslim family law applies as common law to mixed Christian marriages. The question to be answered by the Court of Cassation was what to do when this common law infringed upon essential rules of the particular Christian communities to which the spouses belonged. The issue is a principal one: if Egyptian common law recognises the freedom of religion for non-Muslim minorities and creates autonomous frameworks within which these communities can administer their own religious affairs, what will this common law do if it, itself, is the cause of infringement of these rights? In both cases – polygamy and Catholic divorce – the court ruled that ‘a rule of Islamic law’ is not to be applied

329 Article 99/7 of the Decree on the Organisation of the Sharfa Courts.
330 Court of Cassation, No.1392, 5 February 1984; No.31, 10 April 1984.
when it constitutes a violation of the 'essence of Christian faith'. National interests had to give way to communal interests, albeit interests which are 'essential' to their faith.

In the polygamy ruling, the court based this consideration on the spirit of the law and the intentions of the legislature. In the Catholic divorce rulings, however, it argued that the protection of the faiths of the non-Muslim communities in Egypt is a rule of public policy. This protection rule of non-Muslim minorities is reminiscent of the aforementioned collective *dhimmī* status under Islamic law. Thus, this solves the paradox that had arisen earlier: the polygamous marriage by a Christian can, in itself not be considered a violation of public policy, but such a marriage can be prevented by invoking public policy on the grounds that the integrity and identity of the Christian community must be protected.

5. Tolerance

THE 'COLLECTIVE APPROACH' which is so typical of the Egyptian plurality of religious laws cannot be explained by the mere fact that specific laws are being applied to specific groups of people. The application of law is, indeed, often based on a communal quality of the person involved: his nationality, religion, function or place of residence. In the two case studies mentioned above, these qualities are, respectively, nationality and religion. What is distinctive of these cases, however, is the assumption of communal cohesiveness and shared identity of the communities involved. Specific laws also apply, for example, to the Greeks of Alexandria or the state employees of Egypt, but they cannot be considered 'sufficiently homogeneous communities of a corporate type' who are allowed to maintain their community laws. One may be a Greek national, but, according to the Egyptian court, being a Greek national belonging to the Greek community of Alexandria makes quite a difference. One may be a Greek Orthodox or Italian Catholic, but being an *Egyptian* Orthodox or Catholic calls for special consideration for respective religious identities.

It goes beyond the scope of this chapter to point out the historical, social, political and other reasons for this distinctive communal nature of the non-Muslim (both foreign and local) communities in Egypt — and in the Middle East in general, for that matter — but, it may suffice here to remark that native non-Muslim communities in this region have always been more or less homogeneous and exclusive since the arrival of Islam, not only because of their semi-autonomous status, but also because they often lived apart from Muslims.

The situation of the Greek and Italian communities in Alexandria in the 1950s had different and less deep historical roots, but they were nevertheless treated by the courts in a fashion similar to Egyptian non-Muslim communities. In both cases, these communities behaved and were tolerated as separate communities within Egyptian society and, in both cases, there was a 'collective approach', i.e. identities and interests of the communities received different attention by the Egyptian judicial and legislative authorities.

In order to understand the relations and interactions between the Egyptian state and its ethnic and religious minorities, I suggest examining the legal-political tenet on which its system of plurality of religious laws is based, namely religious tolerance. In the following, I argue that the system of Egyptian plurality of religious laws could perhaps be best understood

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332 This is a characteristic of a 'personal legal system' (see note 303) as defined by Vitta (1970: 188).
334 This was especially the case in the cities where inhabitants organised themselves in quarters in accordance with their religion and social status: cf. Chabry (1984: 40–41); Hodgson (1974, Vol.2: 109–10). These religious alignments can still be found in most Egyptian cities and villages today.
335 Historically, 'integration' of non-Muslims into Muslim society was never an issue — neither requested by Muslims nor asked for by non-Muslims. This can be interpreted as a form of tolerance, but it has also been argued that Muslims opposed integration to prevent the Islamic system from being compromised by mixing with non-Muslim systems: Jambu-Merlin (1958: 8). In the opinion of Chabry (1984: 26) however, to preclude equality between Muslims and non-Muslims. Others argue that there was, indeed, no integration, but also never a full segregation nor a divided society (Courbage and Fargues, 1997: xii). As a side remark, it should be noted that segregation is not necessarily the same as inequality, an issue which is still a subject of heated debate among modern scholars of the status of *dhimmīs* and non-Muslims.
in terms of 'us' and 'them', i.e. Muslims and non-Muslims, rather than Norbert Elias's 'I' and 'we', which is also the underlying premise used by the theories and studies mentioned in the introduction to this book.\textsuperscript{336}

5.1 'Protecting the rights of religious minorities'

RELIGIOUS TOLERANCE IS an issue with which every religious community in the world is confronted. The historical, political and social circumstances are, of course, different for every one of them. The main historical difference between religious tolerance practised in Europe and the Arab-Muslim world,\textsuperscript{337} for instance, is that large non-Muslim communities have been – and still are – living within the latter region ever since the sovereignty of Islam, while non-Christian minorities in Europe have until recently been very limited in number. Also, many non-Muslim communities under Islamic rule were granted legal status as \textit{dhimmis} from the moment of Islamic conquest. Although their treatment as \textit{dhimmis} differed from region to region within the Arab-Muslim world\textsuperscript{338} and often went hand-in-hand with discriminatory measures by Muslim rulers, the shared basis of this status was the tolerance professed by Islam for non-Muslim monotheistic religions which resulted in unhindered freedom and virtual autonomy in matters of religion and family law.

In Europe, on the other hand, the issue of religious tolerance was not raised until the twelfth century and was primarily concerned with Christian heretics and schismatics. It was not until the sixteenth century that religious tolerance was actually practised in order to settle the violent strife between Catholics and Protestants. As far as non-Christians were concerned, they were tolerated, but just barely, often suffering various forms of persecution.\textsuperscript{339} Tolerance of non-Christian minority communities in Europe again became the subject of debate in the second half of the twentieth century with the large numbers of mostly Muslim immigrants.

5.2 The concept of tolerance: A comparison

HISTORICALLY, TOLERANCE HAS not been an issue in the Arab-Muslim world in the way that it was in the West. While religious tolerance may \textit{de facto} have been practised by means of the \textit{dhimmis} status, Islamic political and legal thought has never made reference to, or developed a concept of tolerance. The reasons for the absence of such concept can only be speculated at and are beyond the scope of this chapter. One of the main reasons might be sought in the fact that different schools of thought as well as the largest movement that separated from Islamic Sunni orthodoxy, the Shi'ites, were considered part of the Muslim community and, therefore, needed not to be 'tolerated'. Tolerance exercised towards non-Muslim communities has been coined by the Hanafite\textsuperscript{340} doctrine of Islamic law with the phrase 'Leave them and what they believe',\textsuperscript{341} meaning that Muslim authorities will not interfere in non-Muslim religious affairs, including their family law.

The Islamic legal literature never developed a theoretical framework for this legal principle, but has limited itself to deliberations on what was to be considered within or without

\[\text{\textsuperscript{336} Elias (1991: 206–7).}\]
\[\text{\textsuperscript{337} I use this term to refer to the geographical area from Morocco to Iraq, including the Middle East, but excluding the Gulf countries where, with the exception of Yemen, most non-Muslims were expelled. This used to be, by and large, the territory of the Muslim Empires of the first centuries of Islam, later to be incorporated into the Ottoman Empire.}\]
\[\text{\textsuperscript{338} See, e.g., Courbage and Fargues (1997).}\]
\[\text{\textsuperscript{339} The Jews in Europe were not forced to convert, but their religious freedom and practices were limited to what the Christians believed to be the correct interpretation of the Old Testament, the pope being the ultimate judge of what constituted correct Jewish doctrine: cf. Muldoon (1979: 30–31). The other group of non-Christians in Europe were the \textit{mudéjars}, the indigenous Muslims of territories that were conquered as part of the reconquista of Muslim Spain during the thirteenth, fourteenth and fifteenth centuries. Their situation was not much better than the Jews in Europe, being treated 'with a mixture of toleration and prosecution', but they ceased to be a matter of concern after 1499, when they were given the choice between conversion or emigration: cf. Fletcher (1992: 135–44).}\]
\[\text{\textsuperscript{340} This is the doctrine to which Egypt adheres insofar as Islamic personal-status law applies (Article 280 of the Decree of 1931 on Organisation of the \textit{Shari'a} Courts.)}\]
\[\text{\textsuperscript{341} \textit{Natraku-hum wa-mä yadinuñu}: see Chapter 5 for an analysis of this concept.}\]
the boundaries of legal autonomy to which the non-Muslims were entitled. Egypt, by the same token, also has not developed a political-legal doctrine of tolerance in relation to its religious minorities. In order to discuss concepts of tolerance, I therefore resort to vocabulary used in Western discourse.

Contemporary Western literature defines tolerance as 'a deliberate choice not to interfere with the conduct of which one disapproves'. This definition has two aspects. First, tolerance is exercised by someone who has the power to not also tolerate the conduct of which he or she disapproves, but nevertheless chooses to be tolerant. When certain behaviour is tolerated or rights are granted, the tolerator merely indulges him or herself. Second, tolerance is exercised in matters involving firmly held beliefs. It implies that the tolerator strongly objects to a certain behaviour or opinion, but nevertheless decides to accept it. These characteristics are shared by the religious tolerance as exercised in the Arab-Muslim world of the past as well as contemporary Egypt: the dominant Muslim majority has the power not to accept non-Muslim beliefs, which, in cases such as the consumption of wine and pork and the belief in Christ as the son of God are indeed abhorrent to a Muslim believer, but the choice had been made to 'leave them and what they believe'. It is very well possible that this choice was made on practical rather than moral grounds, for instance, because the Muslim conquerors were initially outnumbered by their non-Muslim subjects, but that does not change the practice of tolerance itself.

However, the practise of religious tolerance in the Arab-Muslim world differed completely from any Western concept of tolerance. Both concepts initially dealt with religious-minority communities to which certain rights and autonomies were attributed. During the Catholic-Protestant strife of the sixteenth and seventeenth centuries, however, Western religious tolerance acquired an individual approach. The inter-Christian conflicts were resolved, 'not by granting special rights to particular religious minorities, but by separating church and state, and entrenching each individual freedom of religion. Religious minorities are protected indirectly, by guaranteeing individual freedom of worship'. Moreover, minorities, tribes, kin groups and other communities that Elias names as 'pre-state units' disappeared altogether under 'the dominant pressure urging people towards state integration', being left with only three alternatives for survival: preservation of their identity 'as a kind of museum piece', renouncing a part of their identity or 'the encapsulation of an older, pre-state society within a larger state society which is so powerful and self-confident that it can tolerate such encapsulated earlier societies in its midst'. The latter seems an apt description of the non-Muslim communities in Egypt.

Western tolerance, as it is today, developed from the freedom of religion of the individual into the larger concept of liberalism with its strong emphasis on individual freedoms and rights. Religious tolerance in contemporary Egypt, on the other hand, has maintained the freedom of religion which under Islamic law was attributed to non-Muslim communities. The resulting collective approach towards non-Muslim minorities in the Egyptian plurality of religious laws has, as a main characteristic, the prevention of any direct interaction between state and individual. Non-Muslim communities may enjoy protection against persecution and may even be

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343 Horton (1993: 3). See also Kymlicka (1995); King (1976); Raz (1994).
344 Courbage and Fargues (1997: x). It has even been argued by some that Muslim authorities opposed the conversion of their non-Muslim subjects to Islam because that would entail the loss of income of taxes specially imposed on non-Muslims: Dennet (1950); Courbage and Fargues (1997: 22–23). Of course, it could also be argued that Islamic tolerance for non-Muslim religions was a purely moral one, based on the Qur'anic prohibition of coerced conversion to Islam.
347 Coincidentally, this collective approach has also become fashionable in the West after World War II, albeit in terms of minority rights and the aforementioned multicultural societies; the question as to how these rights should be recognised is still a matter of debate: cf. Kymlicka (1995: 2–4).
allowed to manage their own religious and family-law affairs, but this protection does not extend to individual members of these communities. The communities are free to act against deviant individual members. Western literature, when referring to this particular exercise of tolerance in the Ottoman Empire, has labelled it an 'imperial regime of tolerance' because tolerance was exercised by an imperial power in order to maintain peace and to collect taxes, regardless of intolerance among the subjects of the minority communities;\(^{348}\) it has also been called a 'federation of communities'\(^{349}\) or a 'federation of theocracies'.\(^{350}\)

This communal approach is essentially still in place within the Egyptian system of plurality of religious laws, which has created separate legal realms, each for one of the religious communities. The separation allows them to coexist with each other and with the larger Muslim community while maintaining their differences on essential issues. Rules of Christian law may be incompatible with those of Egyptian Muslim family law (such as polygamy, for instance), but each community can live according to its rules within the confines of its legal boundaries. The Coptic Pope is free to issue decrees making divorce among Copts even more difficult, while such limitations are considered against the Islamic concept of freedom of divorce. Heresy is only taken to the courts when it is directed against Islam; theological dissent among Christians is a matter for the relevant Christian community authorities.

Another difference with the Western concept is the individual's freedom of choice. The religious communities in the Egyptian system of plurality of religious laws are not voluntary associations. Membership is predetermined by religion. The individual who wants to step out of his or her community has no choice other than to change community by conversion (although this is not allowed for members of the Muslim community). One's religion determines one's social and, definitely, one's legal identity. A Copt is subject to Coptic family law whether he likes it or not. In this respect, tolerance could be defined as allowing an individual to belong to a community and to have the community's rules applied, rather than allowing him to choose a community.

6. Conclusion

AS MENTIONED ABOVE, the theories and studies mentioned in the introduction to this book are not to much avail for our understanding of the system of Egyptian plurality of religious laws. The basic premise of this system should be seen in the dichotomy of 'us' and 'them', i.e. Muslims and non-Muslims, rather than 'I' and 'we', as is common in the approach in Western thought towards religious tolerance. While Egyptian society has undergone tremendous changes in the past century in making the non-Muslims part of 'us', they have retained a separate status in matters of family law that, in that respect, sets them apart as 'them'. This attitude also shows in the Egyptian legal literature on the subject of non-Muslim family law.\(^{351}\)

The comparative approach to religious tolerance which I present here is of course rather superficial, but serves the purpose of illustrating that one of the main characteristics of Egypt's system of plurality of family law, i.e. the separate and semi-autonomous status of religious communities, has no relation whatsoever with European political and legal thought. This is interesting since Egypt has gone to great lengths in the first half of the twentieth century to discontinue the separate status of the religious family laws in Egypt. Nevertheless, the system of the plurality of religious laws has, in essence, been preserved. Moreover, it is telling that, against a background of an increasing tendency to abrogate ethnic and religious differences, Egyptian courts did the exact opposite by championing the preservation of the identity of non-Muslim minority communities. For this purpose, they used the (originally European) concept of public policy, hence indicating that protecting the integrity and identity of non-Muslim communities is essential to the Egyptian legal order.

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\(^{351}\) See Chapter 1.
The approach to the non-Muslim communities in Egypt in matters of family law can most clearly be seen through two aspects: the structure of the Egyptian legal system and the way in which these communities are dealt with by the system.

First of all, the relations between state, communities and individuals are made up of a two-tier system: the state allows a certain measure of autonomy to non-Muslim communities – again, only in the field of family law. The legislature and judiciary make an effort to protect the religious identities of these communities while the relation between communities and individual members is left to the communities themselves as part of their autonomy; this relation is not touched by the state. Communities may hold on to their privileges based on the rights acquired as far back as the early years of Islam, and thereafter repeatedly reiterated, but it is the Egyptian state authorities that uphold and maintain the system. The role of communities in defining and developing their own rules and identities is directed inwards towards the religious minority communities themselves, and seems of little consequence in relation to their identity and position within the larger social and legal framework of the Egyptian state.

Second, it is the Egyptian authorities that decide what is in the best interest of the religious minorities as collectives. The recent (Western) developments in the interaction between state and individual have apparently not been able to encroach upon this situation. Even the initiative to defend and protect their identity is not taken by the communities themselves, but by state authorities such as the legislature and the judiciary. This protection of minority rights is therefore more a duty for the authorities rather than a right to be exercised by the communities. The care with which the Egyptian judiciary concerns itself with the rights of the religious-minority communities in Egypt is illustrative. The courts could have made it easy upon themselves by merely implementing the laws regardless of the consequences, but there was an unwritten obligation to pay heed to the identities of the communities involved.

It could, therefore, be argued that the manner in which Islamic legal tradition had granted protection for religious minorities under Islamic rule has continued in the contemporary Egyptian system of plurality of religious laws, regardless of the steady influence of (European) concepts such as citizenship, nationality and legal unity. Moreover, it is especially the benevolent but patronising attitude of Egypt’s legislature and judiciary that seems to be an indication that non-Muslims in Egypt still enjoy – although restricted to the realm of family law – a status akin to their former status under Islamic law as ‘protected people’, the dhimmis. This has become a pejorative term, due to discriminatory measures that were connected to it such as the special poll tax, dress code, denial of political positions and a separate legal status with regard to the law of evidence in the Muslim courts. These measures have long been abrogated, but the non-Muslim communities nevertheless seem still ‘protected’ within the field of personal-status law. I would therefore argue that this particular feature of dhimmi status, i.e. a protective and patronising attitude by a Muslim state, has been preserved in contemporary Egyptian plurality of religious laws.