Sharai and public policy in Egyptian family law

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Citation for published version (APA):
Chapter 5

Secularizing Interreligious Law in Egypt

Among the fifteen recognized Muslim, Christian and Jewish communities in contemporary Egypt, nine religious family laws are applicable. There is no civil or secular marriage: the creed of the individual Egyptian determines which family law is applicable. The question as to which law applies when the spouses are of different religions is answered by the so-called interreligious rules that determine which law prevails. According to Egyptian legal doctrine, these interreligious rules are based on Islamic law and, in particular, the prevailing opinion of Hanafi legal doctrine. In this chapter it will be shown that the legal reforms of 1955 have created substantial changes, not of, but within the framework of Egyptian interreligious law. These developments illustrate how Egyptian law formally adheres to the legacy of Islamic law, but allows for new albeit unobtrusive interpretations of Islamic law that are of a secular rather than religious nature.

1. Introduction to Interreligious Law

WITHIN THE ISLAMIC family law system, Muslims and non-Muslims each have their own religious family laws as well as their own separate courts that adjudicate these laws. The separation of legal realms has been preserved until today in most Muslim countries with non-Muslim minorities, including Egypt, which is the setting for this chapter.

This coexistence of family laws does not, however, imply parity between and among these laws. Islamic family law is upheld as the general, overriding law. The application of non-Muslim laws is an exception to the rule of Islam's legal supremacy. The community of family laws is not a 'plurality of family laws,' as commonly mentioned in contemporary Egyptian legal doctrine, but rather a duality of family laws, since a distinct difference is drawn between the family laws for Muslims and non-Muslims.

This schism between the two legal spheres raises certain legal problems. If legal supremacy lies with Islamic law, how should one regard the rules of non-Muslim family laws that not only are different from Islamic law, but also violate certain essential rules of Islamic law? For instance, in most Christian churches marriage is a holy sacrament, concluded by a priest, while Islamic law considers the presence of two witnesses as a constitutive condition for the validity of a marriage. Should one let the Christians follow their own rules, with the result that essential principles of Islamic law will be violated? Or should these principles of Islamic law be upheld, and certain non-Muslim rules declared invalid?

The same issue arises when Islamic (family) law applies to a non-Muslim, e.g., when a non-Muslim applies to a Muslim court, or when he or she converts to Islam. In both cases the Muslim court, which may apply only Islamic law, is faced with a marriage that has been validly concluded under non-Muslim law. Should the court declare the non-Muslim marriage invalid merely because it was not concluded in accordance with Islamic family law? Or should the court disregard its own family law and recognize the validity of the marriage under non-Muslim law?

These are matters of interreligious law, the legal mechanism of choosing among more than one applicable religious family law.420 The easiest solution would be to give Islamic law overriding authority, but that solution is undesirable because it would exclude the non-Muslim law in its entirety, and hence violate the principle of Islamic tolerance (see below). A balance

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420 Jurists usually speak of 'conflicts law' when two or more national laws apply to a single case (e.g., when a French man and a Greek woman are married in Spain). Here, however, we are dealing with a collision of laws that are all Egyptian. Egyptian jurists commonly refer to 'internal conflicts law,' as opposed to 'international conflicts law' (the latter pertains exclusively to the realm of private international law). I have chosen the term 'interreligious law,' in accordance with the terminology used in the French ('conflit inter-confessionnel') and German ('interreligiöses Kollisionsrecht') legal literature.
therefore had to be struck between upholding Islamic law in matters of family law, on the one hand, and tolerating non-Muslim law, on the other.

This balance rests on the concept of ‘public policy’, which signifies the essential values of the dominant legal order. These values represent the limits of legal tolerance vis-à-vis other (i.e. non-Muslim) laws. The general premise is that although non-Muslim laws may be contrary to Islamic law, they may not violate principles that are essential to Islamic law.

Elsewhere, I have made an inventory of these principles in contemporary Egyptian interreligious law.421 In this chapter, I will compare Egyptian interreligious law with the Islamic legal principles from which it is derived, i.e. Hanafi fiqh. I will attempt to demonstrate that the principles of interreligious law have undergone substantial changes in contemporary Egypt since the legal reforms of 1955.

Two points must be made at the outset. First, interreligious rules work bilaterally. When more than one law applies to a single case, each law will have both its own interreligious rules and public policy, and consider itself superior to the other. For instance, in a Christian marriage, if the husband converts to Islam, the marriage remains intact according to Islamic law but not according to the relevant Christian law. A Christian court therefore will not recognize the Muslim court’s pronouncement that the marriage is valid and, conversely, a Muslim court will not recognize a Christian court’s pronouncement that the marriage is invalid. This is not necessarily a problem when the legal systems exist on the basis of parity and the litigants live within their own religious communities. In that case, the Muslim will abide by the ruling of the Muslim court and not pay heed to the ruling of the Christian court, and the Christian will do likewise. In Islamic and contemporary Egyptian family law, however, the family law of the Muslims has overriding authority over the other family laws and sometimes even overrules them.

Secondly, there is the issue of terminology. Contemporary Egyptian legal doctrine and case law use the term ‘Islamic Sharia’ (al-Sharfa al-islamiyya) when discussing the Egyptian family law for Muslims. This is confusing, because ‘Sharia,’ in my opinion, carries more than one meaning: a divine code which is not clearly defined; a legal code developed by early Muslim jurists, and which serves as the generic root of contemporary family law, like one may refer to ‘Roman law’ as the predecessor and source of inspiration for many contemporary European laws; and finally, contemporary developments and applications of Sharia law, in particular family law.

In this chapter I make the following distinctions. ‘Islamic law’ is used in a generic sense to signify the general concept of the religious law of Islam with its multiple (theological, metaphysical and legal) connotations. The specific rules of this law will be referred to as fiqh, i.e. Islamic legal doctrine as laid down in the legal literature of early Muslim jurists.422 The Egyptian system of family law and interreligious law is indebted to the fiqh, in particular to Hanafi doctrine which became the dominant doctrine in the Egyptian courts in the early nineteenth century.423 In 1931, Egyptian Muslim courts, confronted by a family law case that was not covered by legislation, were instructed to judge in accordance with ‘the prevalent opinion of the school of Abu Hanifa.’424

Finally, there are ‘Muslim’ and ‘non-Muslim’ family laws, i.e. the family laws of the Muslim and various non-Muslim communities, respectively. Although fiqh and Egyptian legal doctrine commonly treat these laws as two distinct and static legal systems, it must be emphasized that these laws have undergone many changes, both in time and place. The Egyptian family law for Muslims has been amended significantly since its first promulgation in the 1920s, and is different from that of, say, Syria, Iran or Morocco.

421 See Chapters 1, 2 and 3.
422 Layish makes a similar distinction, but with different names: ‘classical Islamic law’ and ‘codified Islamic law’ (2004).
423 Although the majority of Egyptian Muslims adhere to either the Shafi’i doctrine (Lower Egypt) or Malik! doctrine (Upper Egypt), Hanafi doctrine gained supremacy in the Sharia courts under Ottoman rule (R. Shaham, forthcoming).
2. Interreligious Law in Hanafi fiqh

2.1 Jurisdiction

ACCORDING TO ISLAMIC legal doctrine, non-Muslims who live under Muslim rule may freely practice their religion in exchange for their recognition of Islamic rule and the payment of a poll tax. This freedom is collective rather than individual, with the result that each of the non-Muslim communities is free to manage its own religious affairs, including matters relating to family law, especially marriage and divorce, which are considered an inextricable part of religion. Each non-Muslim community therefore legislates, upholds and adjudicates its own family law.

Central to Islam's system of religious family law is the concept of wilāya, that is the sovereignty of Muslim authority or, in legal terms, the jurisdiction of Islamic law. Although Islamic law has universal jurisdiction with regard to all Muslims, in practice this jurisdiction can be exercised only within the territorial realm of Islam (Dar al-Islām). Islamic law has no such universal jurisdiction with regard to non-Muslims, unless they reside or travel in the realm of Islam, a distinction that corresponds to two legal categories of non-Muslims: dhimmīs, i.e. those who live within the realm of Islam and thus under Muslim rule, and musta′mins, i.e. non-Muslim foreigners who enter the realm of Islam on the strength of a safe-conduct. The non-Muslims who do not reside in or enter in the Realm of Islam are harābs, i.e. inhabitants of the Realm of War (Dār al-Ḥarb).

With respect to non-Muslims, therefore, the wilāya of Islamic law has a territorial scope, since it applies only to the dhimmīs, i.e. those residing within the realm and under sovereignty of Islam. With regard to Muslims, however, the wilāya of Islamic law has a personal scope, since it applies to a Muslim regardless of where he stays or resides, even within the realm of the harāb. (The wilāya of the Muslim authorities to implement Islamic law has no personal scope, however: according to the fiqh, their judicial authority does not extend beyond the realm over which they exert effective power.)

Islam's wilāya over dhimmīs is not all-embracing. It does not extend to the religion of the dhimmīs, which is considered inviolable. As a consequence, the religious rules of the dhimmīs are exempted from Islam's wilāya. This exemption applies especially to the laws of marriage and divorce, which, as noted, Islamic law considers as an intricate part of religion. In fiqh literature, for instance, it is said that non-Muslims 'believe' (yātaqīdūna) in their rules of family law. Similar exemptions from Islamic law apply to non-Muslim customs that are not entirely religious, such as the consumption of alcohol and pork, both prohibited in Islamic law: for example, Islamic contract law, which is applicable to all residents of the abode of Islam, Muslim and non-Muslim, allows non-Muslims to sell, purchase and handle pork and alcohol.

2.2 Conflict rules

The fact that non-Muslims and Muslims have separate family laws and courts points to a strict use of the lex fori rule: each court exclusively applies its own religious law. If the religion of one litigant is different from that of the court, e.g., when a Muslim applies to a Coptic court or a Jew

425 In this paragraph I have made use of the following literature: Abu Sahlieh (1979); Arminjon (1949: 79-172); Cardahi (1937: 511-649); Fattal (1958); Friedman (2003); al-Samdan (1986); Mahmassānī (1972); Marāghī (n.y.).

426 This freedom was enjoyed by Christians and Jews and, to a lesser extent, by Zoroastrians. Whether this status was to be enjoyed exclusively by Arab non-Muslims, was debated among the jurists in the first centuries of Islam. According to Hanafi jurists, it should also be granted to non-Arab non-Muslims (Fattal, 1958: 74).

427 Kasānī (1986, Vol.2: 192); Sarakhsī (1906, Vol.10: 95; Vol.13: 121). Also: al-Samdan (1986: 30f.). One Hanafi opinion, attributed to Abū Hanifa and al-Shaybānī holds that Islamic law is not applicable to Muslims outside the realm of Islam, for practical reasons that this law cannot be implemented there. A Muslim in Dār al-Ḥarb remains religiously accountable, however (Kasānī and Sarakhsī, idem).


to a Muslim court, the basic rule is that a Muslim court may hear non-Muslim cases, but a non-Muslim court may not do so with regard to Muslims.\(^{430}\) Non-Muslim courts are prohibited to hear cases involving Muslim parties, let alone pass judgment on them, because that would imply the submission of a Muslim to non-Muslim authority or law. This, again, is the rule of wilāya, the sovereignty of Islamic law and Muslim authority: a non-Muslim may never rule, judge or otherwise exercise authority (wilāya) over a Muslim – hence a non-Muslim may not testify against a Muslim\(^{431}\), and a Muslim woman may not marry a non-Muslim man.\(^{432}\) This understanding of wilāya is encapsulated in the maxim 'Islam supersedes and cannot be superseded' (al-Islām yālū wa lā yūlū tālay-hi).\(^{433}\)

Thus, with respect to interreligious law, Muslim family law applies whenever a Muslim is involved and whenever a non-Muslim refers his case to a Muslim court. In the latter case, the Muslim judge may apply only Islamic law, although some schools of law argue that the Muslim judge is not compelled to pass judgment, while others hold that he should not hear such case at all. Hanafi doctrine maintains that when a non-Muslim seizes a Muslim court,\(^{434}\) the Muslim judge should hear the case and pass judgment in accordance with Islamic law.\(^{435}\) According to Hanafi doctrine, therefore, by referring to a Muslim court a non-Muslim implicitly applies for the application of Islamic law to his marriage or divorce.

3. Contemporary Egyptian Law and the Reforms of 1955

3.1 Historical developments

AFTER EGYPT CAME under Muslim rule in the 7th century CE, a system of separate jurisdictions was implemented: the Muslim court exercised jurisdiction in all civil and penal cases, while non-Muslims were granted their own jurisdiction in religious matters.\(^{436}\) Most authors maintain that this system has remained more or less intact until the present,\(^{437}\) although the Egyptian historian Girgis points out that the Coptic church has at times been deprived of its judicial powers (especially during the 7th-11th centuries), while at other times the jurisdiction of the church was extended to penal and civil law (as in the early Ottoman period).\(^{438}\)

Non-Muslims, especially Christian men, sometimes appealed to the Muslim court because it served their interest. Once a non-Muslim had referred his or her case to the Muslim court, Muslim law was applied to him which sanctioned for instance polygamous marriages or a marriage between a Muslim man and a non-Muslim woman - because the man is considered to be superior to his spouse.

\(^{430}\) I have no information on non-Muslims appealing to other non-Muslim courts than their own (for instance, a Jew seizing a Coptic court). With regard to Muslims, insofar as they appealed to a court of Muslim legal school (madhhab) other than their own, the four Sunni Muslim schools had often made arrangements among themselves for mutual recognition (for the Ottoman empire, see: Peters, 2005).

\(^{431}\) In certain periods and places of Islamic history, however, non-Muslims were allowed to testify against Muslims. See, e.g., Cohen (1984) on Jews under Muslim rule in 16th century Jerusalem.

\(^{432}\) The reverse - marriage between a Muslim man and a non-Muslim woman - is allowed because the man is considered to be superior to his spouse.

\(^{433}\) Both the term wilāya and the maxim 'Islam supersedes...' are repeatedly invoked in Hanafi fiqh to deny the applicability of non-Muslim law over Muslims or to deny non-Muslims passing judgment over Muslims: cf. Käsäni (1986, Vol.5: 54, 55, 253, 254, 239); Sarakhsi (1906, Vol.5: 40, 45; Vol.30: 30, 31); Ibn ʿAbidin (1987, Vol.2: 312, 387). The term wilāya is mentioned in the Quran (4: 140): 'The Law denies the unbeliever any jurisdiction over Muslims' (al-Shafī’ī qaṣaʿa wilāya al-kafir ‘ala al-muslimin). The maxim 'Islam supersedes...' occurs in a hadith attributed to the Prophet (Bukhārī, Janalz, 79).

\(^{434}\) According to ʿAbū Hanīfa, a Muslim judge may examine a non-Muslim case only if both spouses appeal to his his court, whereas according to ʿAbū ʿUṣuf and Muḥammad Shaybānī, the action of a single spouse is sufficient.

\(^{435}\) The controversy over the competence of a Muslim court in matters relating to non-Muslims is based on two Qur'anic verses: Q.5:42 ('and if they [the unbelievers] come to you [for judgment], judge between them or turn aside from them' - fa-in jatj-ka fa-uhkum bayna-hum aw tfrid an-hum), and Q.5:49 (Judge between them by what God has revealed and do not follow their evil desires' - wa an uhkum bayna-hum bi-mā anzala al-Lāh wa lā tatatabfū ahdā- hum). Whereas the first verse gives the judge a choice whether or not to hear a non-Muslim case, the second verse implies that the judge must always hear such a case. According to Hanafi doctrine, the first verse was abrogated by the second.

\(^{436}\) Girgis (1999: 47).

\(^{437}\) ʿAbd Allāh (1986 : 76-9); Abu Sahlieh (1979, 68-9); Linant de Bellefonds (1956: 413-9).

\(^{438}\) Girgis (1999, 47-54).
divorce by means of the *talāq* – both practices forbidden by his Christian family laws. In 1868, however, a ministerial decree prohibited Muslim courts ('Shari’a courts') from hearing cases initiated by non-Muslims in matters of testament and marriage and divorce, which were assigned to the exclusive competence of the non-Muslim court. This prohibition applied even to non-Muslim couples who had agreed on the application of Islamic family law to their marriage or divorce. This division between Muslim and non-Muslim jurisdiction was not always adhered to in practice, but was strictly upheld by the Court of Cassation during the second half of the twentieth century. As a result, a non-Muslim who wants Muslim family law applied to his marriage or divorce has no option but to convert to Islam. The option to apply for another family law by converting to the religion of that law was denied to Muslims, however, because such conversion constituted an act of apostasy which was not recognized by Islamic law.

While the optional application of Muslim family law was restricted, an Egyptian non-Muslim still faced mandatory application of Muslim family law in two instances. First, if a non-Muslim is married to a Muslim, Muslim family law applies to the marriage because one of the spouses is a Muslim. Second, since non-Muslim courts in Egypt until their abolition in 1955 did not recognize each other’s jurisdiction, mixed non-Muslim couples (Catholic and Jewish, for instance, or Coptic and Catholic, or even Coptic-Orthodox and Greek-Orthodox) were referred to Muslim courts that applied Muslim family law — and apparently made an exception to the rule that they were not to hear these cases (see further below).

By the nineteenth century, one Muslim, twelve Christian and two Jewish communities were recognized in Egypt as semi-autonomous with regard to their personal status laws. Each community retained its own court, even if these separate courts sometimes applied the same law (as was the case with the seven Catholic sects). The fifteen religious communities in Egypt adhered to a total of nine family laws.

### 3.2 The reforms of 1955

A FUNDAMENTAL RUPTURE with this legacy of separate legal spheres of family law occurred in 1955: the family courts (both Muslim and non-Muslim) were abolished and consolidated under a single, national court. According to the Explanatory Memorandum to Law 462, the abolition of

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440 Islamic intestate law (mirāḍ) was applied to both Muslims and non-Muslims.
443 No. 6, Year 25, 26 June 1955, and No. 12, Year 48, 17 January 1979.
444 See for details Chapter 4.
445 If a Muslim man marries a non-Muslim woman, the marriage is allowed and subjected to Muslim family law. If a non-Muslim man marries a Muslim woman, on the other hand, this marriage is considered void by Muslim family law.
446 These are:
1. the Orthodox rite, which includes the Coptic, Greek, Armenian and Syrian sects;
2. the Catholic rite, which includes the Armenian, Syrian, and Coptic sects (all of which seceded from the Orthodox church), the Latin sect (or Greek-Catholic, from Lebanon), and the Maronites (from Lebanon) the Chaldeans (from Iraq), and the Roman sects;
3. the Protestant rite (which was mistakenly recognized as one sect by a governmental decree of 1850, and, hence, retains the official status of a single sect, regardless of its subdivisions).
447 The Rabbinc and the Karait sects. According to Linant de Bellefonds (1956: 416) the Rabbinc courts in Alexandria and Cairo were separate entities.
448 Formal recognition of the jurisdiction of the non-Muslim communities had been granted by the Ottoman decree of 1856, and was reiterated by Egypt in 1915. See also Shaham (1995).
449 Egyptian law and legal doctrine refer to these courts as the ‘minority community court’ (*maḥkama miliyya*) for Christians and Jews, and ‘Shari’a court’ (*Mahkama Shar’i’a*) for Muslims.
450 The nine family laws applicable in Egypt are: Muslim (a number of laws on separate personal status issues, the first promulgated in 1920 and 1929); Coptic-Orthodox (1938); Greek-Orthodox (1927); Syrian-Orthodox (1929); Armenian-Orthodox (1940); Catholic (1949); ‘Evangelic’ or Protestant (1902); Rabbinc Jewish (1912); and Karaite Jewish (1912).
451 Law 462 of 1955 on Abolition of theShar’i and Milli Tribunals (Qānūn bi-’Ighā al-Maḥkām al-Shar’i al-Milliyya).
the family courts was intended to put an end to the 'chaos and abuse of litigation' caused by the plurality of jurisdictions. Also, both Muslim and non-Muslim courts - but especially the latter - were often mismanaged and did not function properly. In addition to these practical considerations, the reform of the judiciary served the purpose of national unity by subjecting all Egyptians, regardless of their religion, to a single judiciary that was both Egyptian and secular. The general feeling among the judiciary and political leadership was that 'the existence of separate and autonomous personal status courts, with their own laws, procedures, training and personnel, was inconsistent with a unified, centralized, national judiciary.' The only objection to the unification of the courts was voiced by the conservative lawyers of the Shari'a-courts and members of minority and foreign communities.

The abolition of the Muslim and non-Muslim family courts, however radical it may seem, did not entail any change to the content and jurisdiction of the religious family laws. The nine family laws of the Muslim, Christian and Jewish communities in Egypt remained in force, with their applicability being determined by the creed of the litigant. In several instances non-Muslims requested the application of Muslim law, or of a non-Muslim law other than their own, arguing that the abolition of the family courts had also annulled their jurisdictions. However, the Egyptian Court of Cassation ruled that, as a matter of public policy, parties are not at liberty to opt for the family law of their choice.

The legal structure of Egyptian interreligious law has remained intact. The 'prevalent opinion of the school of Abû Hanîfa' is still the default doctrine for judgments in family cases in which the relevant family law does not provide answers. What was formerly referred to as the 'wilâya of Muslim family law is maintained as the 'general law' (al-Sharî'a al-'amma), i.e. the law with overriding authority in matters of family law. Also, the practice of applying Muslim family law to non-Muslim couples who are not of the same religion, rite or sect, was formally legalized by Law 462 of 1955.

However, Egyptian case law after 1955 shows that significant albeit inconspicuous changes did occur within the legal fabric of interreligious law. It was not the institutions or the law itself that underwent alterations, but rather the interpretation of the law. The courts' reading of Egyptian interreligious law after 1955 manifests a shift in Egypt's legal perspective on relations between Muslim and non-Muslim law and, by consequence, an adaptation of Hanafi legal doctrine in this respect. Central to this change in Egyptian legal doctrine is the concept of 'public policy' (al-nizâm al-`amm), which was newly introduced by the same reform law of 1955.

4. Public Policy

THE LEGAL NOTION of 'public policy' is particular to conflicts law. Although the term has various meanings, within the context of Egyptian family law it refers to the situation in which foreign law rules violate fundamental values of the national (Egyptian) legal order, which can

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452 The Egyptian legal scholar Ahmad Sallimah applauded the 1955 reforms as 'repairing odd legal situations' (1960: 307). Linant de Bellefonds (1956: 413-4) observed that Millî courts, unlike Sharî'a courts, had no bar association and their judges and staff were non-professionals, recruited from the clergy and notables. Botiveau (1993 : 192-3); Brown (1997a: 62-4). The fact that some judges sitting in non-Muslim family courts held foreign citizenship and knew neither the Arabic language nor Egyptian law was one of the points of criticism (Brown (1997a: 63).
454 Abu Sahlieh (1979, 117-9); Brown (1997a: 64-5).
455 Court of Cassation No.182, Year 35, 20 March 1969.
456 Explanatory Memorandum to Law 462 of 1955, confirmed in several rulings by the Court of Cassation (Nr. 29, Year 34, 30 March 1966; Nr. 8, Year 36, 14 February 1968; Nos.16 and 26, Year 48, 17 January 1979).
457 Article 6 of Law 462, 1955: 'Religion' (din) refers to Islam, Judaism and Christianity, 'rite' (milla) to denominations like Catholicism and Orthodoxy, and 'sect' (tâfî'a) to further subdivisions like Greek-Orthodox and Coptic-Orthodox.
458 Article 6 of Law 462, 1955. The notion of public policy was already introduced in the Civil Code of 1949, but had relevance only for family law cases involving foreigners.
459 Lagarde (1994: 3-8).
only happen in the cases in which Egyptian law allows foreign laws to be applied in Egypt. As in most countries, this occurs mainly within the realm of family law.

As a basic rule, a foreigner may have his own national family law applied by the court of the country in which he happens to be, e.g., a French court may apply English marriage or divorce law to an Englishman travelling or residing in France. There is one exception to the rule: if the application of a particular rule of foreign law constitutes a violation of the fundamental values of the court's national order, that rule will not be applied. In our example: if a rule of English law violates essential values of the French legal system ('violates public policy'), that rule will not be applied by the French court.

In addition to the application of public policy, there is the issue of its content: what are the fundamental values that are being violated? Contemporary legislators deliberately leave this question open in order to give courts the possibility to adapt the notion of public policy to changing social and historical circumstances. Suffice it to say that public policy constitutes either national (lex fori) rules or fundamental legal principles that must be applied at all times.\(^{461}\) The determination of which principles or rules ought to be considered public policy is left to the discretion of the courts. To determine the content of public policy, one must therefore turn to the case law and, to a lesser extent, legal literature.

4.1 Public policy in contemporary Egyptian law

THE TERM 'PUBLIC POLICY' was first introduced into Egyptian civil law with reference to foreign family law in 1949 and with reference to Egyptian non-Muslim family law in 1955.\(^{462}\) The fact that the notion of public policy was introduced in connection with interreligious law is significant, because it indicates that the non-Muslim laws are considered to be foreign laws rather than national laws.\(^{463}\)

Both the term 'public policy' and its usage in Egyptian law draw heavily on the Western concept, as confirmed by a key ruling of the Egyptian Court of Cassation in 1979.\(^{464}\) After pointing out that public policy is the same in both international and interreligious conflicts law, the Court defined public policy as a secular concept:

[Public policy] comprises the principles that seek to realize the public interest of a country, from a political, social and economic perspective. These [principles], which are related to the natural, material and moral state of an organised society, 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 to which society in its entirety can adhere and which must not be linked to any provision of religious laws.

With regard to family law, however, the Court made an exception to the secular doctrine:

It is the established jurisprudence of this court that the Islamic Sharīʿa is the general law in the sense that it applies as a matter of principle to the rules of family relations of Muslims as well as non-Muslims. All other [non-Muslim family] laws apply only by way of exception and only if they fulfil the conditions as stipulated in articles 6 and 7 of Law 462 of 1955 (...).

The Court reiterates the standard Islamic legal doctrine: Muslim family law applies to non-Muslims, except in matters relating to marriage and divorce. It is for this reason that non-Muslim marriage and divorce rules are subjected not to the principles of a 'purely secular doctrine' but rather to those of 'Islamic Sharīʿa,' which, in its capacity as the 'general law,' continues to apply to non-Muslims in all remaining fields of family law.

\(^{461}\) Lagarde (1994, 3-8).

\(^{462}\) 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 6 (2) of Law 462.

\(^{463}\) Several Egyptian jurists refer to non-Muslim family laws, in particular Catholic law, as foreign laws because they are of foreign origin (see Chapter 1).

\(^{464}\) Court of Cassation Nos.16 and 26, Year 48, 17 January 1979.

108
In conformity with Western legal doctrine, the content of public policy is left to the courts. Elsewhere, I have identified and analysed the rules of Egyptian non-Muslim family laws that have been held to be a violation of Egyptian public policy since 1955. Briefly, these rules include: not observing the wife's mandatory waiting-period ("idda) after her divorce or her husband's death; the forced marriage of a childless Jewish widow to the brother of her deceased husband (the so-called 'levirate marriage'); the Coptic prohibition of a divorcee to remarry; the conversion of a spouse to Islam as a ground for divorce.

According to Egyptian case law and legal literature, these non-Muslim rules violate Egyptian public policy because they contravene 'essential principles of Islamic law' (al-mabâdi' al-'asasiyya fi aňākâm al-Sharf a l-islâmîyya). These 'essential principles' are further defined as rules that Islamic legal doctrine has established as fixed and indisputable (nass sarih qâ'îf al-thubât wa qâ'îf al-dalâla), because of their explicit mention in the Quran and Sunna. In defining public policy thus, contemporary Egyptian legal doctrine is adamant in its adherence to Islamic law, especially Hanafi fiqh. This is remarkable because both the mechanism of contemporary Egyptian public policy and its contents are different from that of Hanafi fiqh.

4.2 Public policy in Hanafi fiqh

However sharp the separation appears to be between the legal realms of Muslim and non-Muslim family law, two problems of conflicting laws remain. First, there is a matter of principle. If non-Muslims are allowed to apply their own family laws, what happens when these laws violate rules of Islamic law considered essential to Islamic religious standards, as in the case of a Christian marriage concluded by a priest, rather than in the presence of two witnesses, as required by the fiqh? Should Christians who are subject to the Islamic legal order be permitted to violate its essential principles? Or should the Islamic legal order prevail at the expense of certain non-Muslim rules?

The reverse side of this question occurs when a non-Muslim converts to Islam or appeals to a Muslim court. In both cases, Islamic law is to be applied. But how should the court treat a marriage concluded under non-Muslim law: should that marriage be declared invalid merely because it was not concluded in accordance with Islamic law? Or should the court recognize the validity of the marriage as established under non-Muslim law, which is tantamount to disregarding Islamic law?

There was no unanimity on these issues among the three founding fathers of the Hanafi school. Abu Hanifa (d. 150/767) was inclined to a laissez-faire attitude, while 'the two companions' Abu Yusuf (d. 182/798) and Muhammad al-Shaybâni (d. 189/805) argued that Islamic legal principles were to be upheld, a position that was even more staunchly advocated by the fourth authoritative Hanafi jurist, Zufar b. al-Hudhayl (d. 158/775). During the formative period of Hanafi doctrine, the varying opinions of different Hanafi jurists were considered equally valid. Beginning in the twelfth century, however, they were put into a hierarchical order: when confronted with conflicting opinions among these Hanafi jurists, a judge had to follow, first, the opinion of Abu Hanifa, then Abu Yusuf, then Muhammad Shaybâni and, finally, Zufar. Although by the eleventh centuries these jurists were considered 'old jurists' (mutaqaddimîn) and preference was occasionally given to the 'later jurists' (muta'akhkhirîn), contemporary Egyptian legal doctrine – both literature and case law – commonly refer to the 'old jurists, maintaining among them the old order of preference, as we will see below.

Hanafi jurists all agreed that Muslim family law should not be imposed upon non-Muslims unless they appear in a Muslim court, which takes place only upon the initiative of the

465 See Chapter 1.
466 See Chapter 1.
467 In this paragraph I have relied on the Hanafi fiqh literature which is predominantly used by Egyptian judges (see Shaham (forthcoming): Bada'il al-san'āfi fi Tartîb Sharî'î by Ksâsîâ; Kītâb al-Mabsît by Sarâkhsî and Radd al-Muhtâr 'alâ al-Durr al-Muhtâr by Ibn 'Abîdîn. In addition I made use of, Aňâkâm 'Ahl al-Dhimma, one of the few comprehensive studies on the subject by the Hanbâli scholar Ibn Qayyîm al-Jawziyya.
non-Muslim, either by appealing to the Muslim court or by conversion to Islam. Islamic family law therefore may be imposed upon non-Muslims only as a consequence of a voluntary act by a non-Muslim. As we have seen, if a non-Muslim seizes the Muslim court, Hanafi doctrine requires that the judge hear the case and bases his judgment on Islamic law. This is the phase in which controversies arose among the prominent Hanafi jurists.

Hanafi jurists disagreed over how a Muslim court should assess the legal status of a non-Muslim marriage. Abū Yūsuf, al-Shaybānī and Zufar advocated what is called nowadays public policy.\(^{469}\) I.e., legal facts relating to non-Muslims should not be upheld by a Muslim court if they violate essential principles of Islamic family law. According to these three jurists, a non-Muslim marriage should be treated as voidable (fāsid) in three circumstances: if it was concluded in the absence of witnesses,\(^{470}\) or without observing the mandatory waiting-period (ʿidda), or between persons who are too closely related by blood ties (mahārim).\(^{471}\) A non-Muslim marriage concluded without payment of the dower (mahr) is irregular, but should not be dissolved, because it can be repaired by imposing the proper dower (mahr al-mitha).\(^{472}\)

Abū Hanifa disagreed. He accorded non-Muslims complete immunity from Islamic family law. Non-Muslims have absolute freedom within the field of marriage and divorce, he argued, even if their rules contradict Islamic rules. The right of non-Muslims to exercise complete freedom in managing their own family law matters is embodied in a maxim attributed to Abū Ḥanīfa: 'We were ordered [by God] to leave them and their religion' (naḥnu 'umir-nā bi-ṣan natruka-hum wa mā yadinūna).\(^{473}\) Abū Ḥanīfa drew an analogy with wine and pork, which, although expressly forbidden by Islam, may nevertheless be consumed by non-Muslims.\(^{474}\) In this view, a marriage validly concluded under non-Muslim law may never be dissolved, retroactively, due to its violation of Islamic law.\(^{475}\)

The Hanafi doctrine with regard to public policy may be summarized as follows:

1) Abū Ḥanīfa and his two companions maintain that non-Muslims who have jurisdiction over their own family laws and family courts may apply any of their rules, even if these contradict or violate essential principles of Islamic law. Only Zufar disagrees. In his view, a marriage concluded without witnesses or without observing the ʿidda is always null and void, regardless of whether or not a Muslim judge has heard the case.\(^{476}\) (Zufar does not explain how his position should be implemented: should a Muslim court declare all Christian marriages ex officio invalid?)

2) Once a Muslim court is seized by a non-Muslim, Muslim family law applies automatically. Hanafi jurists differ as to whether or not this holds retroactively: if answered affirmatively, Muslim family law will cancel out specific rules of non-Muslim law, and, as a result, a Muslim court may have to dissolve a marriage that was validly concluded under non-Muslim law. Abū Ḥanīfa stands alone in his rejection of this view: he argues that a non-Muslim marriage, if validly concluded under non-Muslim law, should be considered valid before a Muslim court. Islamic family law is to be applied only from the moment that the marriage is brought before the court, not from its contracting date.

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\(^{469}\) The Egyptian authors Salāmah (1960, 322), and Thābit (1998: 207, 213), use the term 'public policy' when discussing the views of Abū Yūsuf and Muhammad al-Shaybānī.

\(^{470}\) The fiqh refers to 'witnesses' (shuhūd) in general, but probably means, in accordance with Islamic legal doctrine, two male witnesses, whereby each male witness may be substituted by two females.


\(^{473}\) Literally: 'to leave them and what they profess [as religion].'


\(^{475}\) Legally speaking, this amounts to a Muslim court recognizing a legal fact, i.e. a marriage, established under non-Muslim law. In doing so, the Muslim court does not apply non-Muslim law, as some contemporary authors assume. The distinction between allowing for a rule or legal fact, and applying the law, sometimes gives rise to misunderstandings which lead to statements like Abū Ḥanīfa allowing the Muslim court to apply non-Muslim law to non-Muslims. This is an incorrect reading of Abu Hanīfa’s doctrine. (For instance, Pierre Gannagé (1951 : 227, note 2) claims that Boghdadi (1937) would have said so.) Only in cases in which a Muslim court allows for specific non-Muslim rules, like the sale of alcohol and pork, may it be argued that the Muslim court actually applies non-Muslim law ('Abd Allāh, 1986, 77).

Contrary to what some contemporary jurists have argued, Hanafi doctrine has mostly treated the opinion of Abū Hanîfa as the prevalent opinion of the Hanafi school. This raises an interesting question with regard to contemporary Egyptian interreligious law following the 1955 reforms: on the one hand, the law of 1931 explicitly instructed judges to adhere to the prevalent opinion of the school of Abū Hanîfa; on the other hand, the law of 1955 stipulates that non-Muslims may apply their family laws only if this does not violate public policy. This seems to be a contradiction: how can a non-Muslim law violate public policy, i.e., essential principles of Islamic law, if the prevalent Hanafi opinion says that it cannot?

5. Developments in Contemporary Egyptian Interreligious Law

THE DIRECT APPLICATION of the 'essential principles of Islamic law' to non-Muslim law by means of public policy is a unique feature of interreligious law. Until 1955, Muslim family law applied only to non-Muslims who voluntarily submitted to it, either by conversion to Islam or by appealing to the Muslim court. As long as non-Muslims referred their cases to their own courts, their law remained untouched and unhindered by any rule of Egyptian Muslim family law. After 1955, however, non-Muslim family law might not violate public policy, i.e., the essential principles of Islamic law. Although only a few rules of non-Muslim family law were considered to constitute such a violation, it is the principle of public policy that interests us here because it has significantly changed the legal mechanisms that regulate interactions between Muslim and non-Muslim family laws. Three observations can be made in this respect:

5.1 Abū Hanîfa replaced by Zufar

CONTEMPORARY EGYPTIAN LEGAL doctrine has re-interpreted the 'prevalent opinion' of the Hanafi school by replacing the opinions of Abū Hanîfa's with those of Zufar. Whereas Abū Hanîfa held for the inviolability of non-Muslim law, and Abū Yusuf and al-Shaybânî held that a few specific rules of Muslim law might be applied retroactively, but only when a non-Muslim appeals to a Muslim court, Zufar held that non-Muslim rules that violate essential Islamic principles should be considered invalid at all times. Zufar's position seems to have become the rule in contemporary Egyptian law: non-Muslim family laws may not be applied if they violate Egyptian public policy, i.e., the essential principles of Islamic law. (Although this sounds dramatic, it should be borne in mind that situations which are de jure considered null and void due to their violation of public policy only become de facto void when the case has been looked into by the court.)

From a doctrinal point of view, this shift is interesting. Egyptian family law and interreligious law adhere to the 'prevalent opinion' of the Hanafi doctrine which, for centuries, was embodied in the views of its four most prominent jurists, arranged in hierarchical order, with Abū Hanîfa ranking first and Zufar last. This order has now been reversed.

The reason for this change in legal doctrine should probably be sought in the unification of the different Egyptian religious family courts into one national court. The distinction between Muslim and non-Muslim family laws as separate systems of law remained intact, but the newly established singular judicial body demanded a single set of principles that serves as an umbrella under which the separate family laws are grouped. Prior to 1955, the 'essential principles of Islamic law' were determined exclusively by Muslim courts applying Muslim family law to non-Muslims. After 1955, however, Islamic essential principles were determined by national courts applying both Muslim and non-Muslim family law.

Another explanation for the emphasis on Islamic principles in the realm of non-Muslim family law may be the training of the judges, the primary interpreters of public policy. The

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477 Exceptions to the preponderance of Abū Hanîfa's opinion are indicated by Libson (2002, in Hebrew).
479 The 1931 Decree on the Organisation of the Sharia Courts.
480 See Chapter 1, paragraph 5 and further.
Family Sections of the national secular courts that were established as part of the judicial reforms of 1955 were staffed mainly by Muslim judges with a background in fiqh and Muslim family law. With the abolition of the family courts, Law 462 provides for the judges and advocates of the Muslim tribunals to be transferred to the national tribunals, without making similar arrangements for judges and lawyers of the non-Muslim tribunals. In the first years after the judicial reforms, some of these judges probably did perceive a difference between their former courts and the new national court, and some of them occasionally referred to the national courts as 'our' courts or 'Muslim' courts. In addition, the judges continued to receive their training at the Azhar University until the 1960s, when law faculties were established at other universities where prospective lawyers received a more general training in law (although the education in family law was still dominated by Islamic law and Muslim family law rather than non-Muslim family law). These circumstances may explain the Islamic legal orientation of the judges and their interpretation of the new concept of public policy.

5.2 Content of the ‘essential principles’ of Islamic law

BY INTERPRETING THE ‘essential principles of Islamic law’ that constitute public policy, Egyptian jurists have created another shift in Hanafi doctrine. As explained above, the classical Hanafi jurists considered the following rules essential to Muslim family law: witnesses to the marriage, observing the waiting period (‘idda), prohibition of marriage between persons who are closely related by blood (mahārīm), and payment of the dower (mahr). Since 1955, Egyptian case law and literature have concurred only with the mandatory ‘idda, without mentioning any of the other rules. In other words, contemporary Egyptian legal doctrine does no longer consider witnesses, dower, and absence of certain blood ties to pertain to the essential rules of Islamic law that need to be observed by non-Muslim Egyptians.

However, Egyptian legal doctrine has introduced other ‘essential principles of Islamic law’ that non-Muslims should adhere to. The common denominator of these general principles is, arguably, the protection of family life: the ‘idda protects the paternity of the unborn child, and a forced marriage (as the levirate marriage in Jewish law) or a prohibition of marriage (as the prohibited remarriage by a divorcee in Coptic law) infringes upon the freedom to marry. Although the Egyptian legal literature claims that these are principles of Islamic law, they are not mentioned as such by Hanafi doctrine.

Thus, although public policy is accorded an Islamic legal character, the definition of its content deviates from Hanafi doctrine and it may not even be typical of Islamic law. Indeed, one might argue that the new content of ‘essential principles of Islamic law’ is secular, as suggested by another development in Egyptian case law after 1955.

5.3 Protection of non-Muslim principles

LAW 462 OF 1955 stipulates that a non-Muslim law applies to a non-Muslim couple only if they share the same religious rite and sect. Otherwise, i.e., in the case of a mixed non-Muslim marriage, Muslim family law applies automatically, even if the non-Muslim couple have agreed differently. As we have seen, this rule represents the codification of an existing practice in Egypt. While Hanafi doctrine maintains that difference of religion or rite among dhimmī couples

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482 Articles 9 and 10 of Law 462. See also Abu Sahlieh (1979, 119).
483 For instance, Cairo Tribunal of Appeal, Nr. 187, Year 74, 13 December 1958 (quoted by Salamah (1960, 338) and Court of Cassation on 6 February 1963 (Nr. 36, Year 29).
484 Botiveau (1993, 183-5); Shaham (forthcoming).
485 Based on this new rule, the Egyptian Court of Cassation denied a non-Muslim couple who shared the same sect and rite the right to apply Muslim family law (case No.182, Year 35, 20 March 1969). The Court likewise denied a non-Muslim couple that did not share the same sect and rite the right to apply for the Christian law of one of the spouses (cases No.6, Year 25, 26 June 1955, and No.12, Year 48, 17 January 1979).

112
is not an issue, the non-Muslim courts in Egypt considered mixed non-Muslim marriages a problem. In the case of a Catholic-Orthodox marriage, for example, both the Catholic and the Orthodox court would declare the marriage void if it was concluded in accordance with the law of the other spouse. Until 1955, such cases as a matter of practice referred to a Muslim court which applied Muslim family law. This practice was subsequently put into law in 1955. What was new, however, was that the application of Muslim family law to mixed non-Muslim couples now became mandatory.

In this new legal context, three issues were contested. First, should a mixed Christian marriage be declared invalid if concluded by a priest, i.e., without the mandatory witnesses as required by Islamic law. Second, is the husband in a mixed Christian marriage permitted to marry a second wife? Third, can he divorce his wife by means of repudiation, as allowed by Muslim family law (this issue is of particular relevance to the Catholics who have no right of divorce whatsoever).

In several rulings, the Court of Cassation argued that the principles of Muslim family law are not to be applied [to Christian mixed couples] when they are in conflict with any of 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 on his Christianity. With regard to the three abovementioned issues, the Court ruled that only the conclusion of a marriage by a priest and the prohibition of multiple marriages are 'principles of the essence of the Christian faith.' Consequently, when Muslim family law was applicable to Christian mixed couples, the rules of witnesses to the marriage and the possibility of polygamy were not to be applied. The prohibition of divorce, on the other hand, was not considered a 'principle of the essence of the Christian faith,' and husbands of mixed Christian couples were allowed to exercise the right of *talaq* (with the exception of Catholics, for whom the law made a special provision).

In other words: Muslim family law generally applies to a mixed non-Muslim marriage, although exceptions are made for rules that are essential to the Christian faith. This raises the question as to whether or not there is something like a Christian public policy. Indeed, it seems to be the same procedure: whereas non-Muslim family laws may not violate essential principles of Islamic law, here we see that Muslim family law may not violate essential principles of non-Muslim family law. It had been argued by some that two public policies co-exist, one for Muslims and one for non-Muslims. The Court of Cassation could not be persuaded to accept that argument, however, and strictly adhered to a single Egyptian public policy, which the Court defined as essential principles if Islamic law. But it also ruled that one of those essential principles is the protection of the religious practices ("aqā'id) of non-Muslims.

### 6. Conclusion

The legal reforms of 1955 have broadened the scope of Egyptian Muslim family law considerably. It formalized the existing practice of applying Muslim family law to mixed marriages between non-Muslims but, more importantly, it introduced the notion of public policy which was interpreted by jurists as 'essential principles of Islamic law.' This meant in practice.
that rules of non-Muslim family law were not to be applied if they violated these essential principles.

Whereas the realm of non-Muslim family law was restricted by the rule that they should not violate 'essential principles of Islamic law,' the definition of these essential principles by Egyptian jurists turned out to be different from the essential principles defined by Hanafi doctrine. First, the content given to these principles by Egyptian legal doctrine was not that of the 'essential principles' (al-ahkām or al-mabādi' al-asāsiyya) as mentioned by the fiqh, but principles of a more general nature, such as the protection of family life and freedom of marriage. Second, the scope of these principles was limited: they were not to be applied if they themselves violated essential non-Muslim principles.

These developments constitute a change in the internal mechanisms of the Egyptian system of interreligious law. This change is characterized by reclaiming the sovereignty of Islamic law, on the one hand, but by reinterpreting the content of its essential rules in a more generalized fashion, on the other. While formally maintaining adherence to Islamic law, Egyptian interreligious law has effectively been secularized, in the sense that typical rules of Islamic law have been abandoned in favour of principles that are not necessarily 'Islamic'.