Sharia and public policy in Egyptian family law

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CONCLUSION

1. Introduction

At the time when I was finishing the research for my PhD I met a Kuwaiti lawyer, a woman in her fifties who had studied law in the United Kingdom and now presided over a thriving law firm in Kuwait. As a matter of personal interest she had taken it upon herself to travel the Arab world to instruct Muslim women on their rights under their family codes. In the coffee parlor in one of the hotels in Damascus we discussed issues of personal status law and interreligious law in the Arab countries. She then asked me about the family laws of Muslims and Jews in my own country, the Netherlands. I replied that in matters of marriage and divorce all Dutch citizens are subjected to one and the same civil law. The faithful may, in addition, conclude and dissolve their marriages in accordance with Islamic, Catholic, Jewish or any other religious family law, but these are not recognized by the Dutch courts. The Kuwaiti lawyer was upset: ‘You mean that they cannot apply their own personal status laws? But that is a violation of their human rights! If I were a Dutch Muslim, I would appeal to the court [of European Human Rights] in Strasbourg immediately!’ There was no use in explaining her that the situation was not as extreme as she envisaged it to be: the fact that one’s personal, religious family law was not recognized by the national courts was in her opinion tantamount to being deprived of one’s basic human rights.

This encounter illustrates in a nutshell the clash of legal civilizations that I faced continuously during my research. The self-evidence of connecting a person’s family law to his nationality or place of habitual residence was not shared by any Arab lawyer I have met. They all considered religion a much more relevant and logical factor to determine the applicable family law. Indeed, religion is of major importance for Arabs, whether Jewish, Christian or Muslim, in determining their identity. Egypt, as well as most other Arab countries, when adopting the Western model of international conflicts law in its Civil Code of 1949, has therefore adhered to religion as one of several connecting factors that establish the applicable family law.

The result, however, has been most complex, as is demonstrated by both Egyptian case law and legal doctrine. First, religion as a connecting factor draws lines between communities that differ from the lines drawn on the basis of nationality. Using both nationality and religion as connecting factors is bound to give rise to legal difficulties. Second, mixed marriages and conversion create complex situations of conflicts law that are hard to disentangle. Moreover, religious family law assumes that a person is connected indefinitely to his or her religion (and hence the law thereof) while Egyptian case law shows that conversion to other religions is used as a tool to secure certain rights under the law of that new religion. This practice became so commonplace that it caused the Egyptian Court of Cassation, in its ruling of 1979, to call on the legislature to undertake action (see Appendix 1, final paragraphs).

In the following paragraphs, I will first present a summary of these complexities of the system of interreligious and private international law, based on the research underlying the five preceding chapters. To understand the principles of this system, I will then turn to the issue of public policy, which will also be presented as the composite conclusion of the previous chapters. Both these mechanics and principles of the system will lead us to the final conclusions on the nature of the role of religion in interreligious and international conflicts law and, hopefully, to a better understanding of the indignation of the Kuwaiti lawyer.

2. The Mechanism of Egyptian Interreligious and International Conflicts Law

The system of conflicts law in contemporary Egyptian family law is in accordance with the principles of private international law in Europe. What makes Egyptian conflicts law different from most European choice-of-law systems, however, is the fact that religion serves as a connecting factor, i.e. the religion of the legal subject determines the applicable law, as will be shown in the following paragraphs.
2.1 Egyptians: interreligious law

EGYPT RECOGNIZES ONE Muslim community, twelve Christian and two Jewish communities, each with their own family laws. They also used to have their own family courts, but this practice was abolished in 1955. Since then, matters of family law are adjudicated by the national courts.

As indicated before, the religion of the legal subjects is the connecting factor, i.e. the religion of a person determines which family law is applicable. A civil or otherwise ‘neutral’ family law does not exist: the Egyptian who is atheist, or who has a religion other than the three monotheistic religions, or who belongs to a Christian sect that is not one of the twelve recognized sects in Egypt, will be subjected to Egyptian Muslim family law. Consequently, conversion to another religion leads to the applicability of the law of that religion. Only conversion from a non-Muslim religion to Islam is recognized, however, not the other way round.

The family law of the Egyptian Muslims, usually referred to by Egyptian jurists as ‘Islamic Sharī‘a’, is considered the dominant law. It is called the ‘general law.’ This general law applies as a matter of principle to all Egyptians, regardless of their religion. With regard to non-Muslim Egyptians, their own family laws only apply to marriage and divorce, and merely by way of exception: all other personal status matters are subject to the ‘general law’. In addition, the applicability of non-Muslim family law depends on the requirement that the non-Muslim couple share the same rite and sect. In combination, these factors lead to a rather restricted application of Christian and Jewish family laws in Egypt (see illustration 1).

Illustration 1: Family laws applicable to Egyptians

<table>
<thead>
<tr>
<th>MUSLIMS</th>
<th>'general law'</th>
<th>Mixed rite and sect</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Same rite and sect</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(marriage and divorce)</td>
</tr>
</tbody>
</table>

Muslim family law

Non-Muslim family laws
2.2 Foreigners: international conflicts law

WITH REGARD TO foreigners, the connecting factor refers to the nationality of one (or both) of the parties involved. The domicile or habitual residence of the foreigner is of little or no relevance, as has been illustrated by the study of the Greek and Italian communities that had resided in Alexandria for generations and to whom the Egyptian courts applied Greek and Italian family law.

However, in three situations religion is a relevant factor again, both in case Egyptian law is applied, and in case of the recognition of a marriage concluded outside Egypt: (1) when the spouse of the foreigner has the Egyptian nationality, (2) when a foreign couple celebrates their marriage in Egypt, or (3) when the foreigner is Muslim (which then becomes a matter of public policy). Only the first two will be discussed here; the issue of public policy will be dealt with extensively later.

When one of the spouses has the Egyptian nationality at the time the marriage is concluded outside Egypt, recognition of the validity of this marriage will be in accordance with the conditions set by Egyptian law. Also, when the marriage is concluded in Egypt, Egyptian law applies. In both instances the question arises: which Egyptian law? One has to resort to Egyptian internal conflicts law, i.e. interreligious law, to determine which of the personal status laws is applicable. Muslim family law will then apply when at least one of the spouses is Muslim, or when the non-Muslim spouses belong to different rites or sects. If, on the other hand, the spouses are non-Muslims and both belong to the same rite and sect, the relevant Egyptian non-

Illustration 2: Family laws applicable to foreigners

FOREIGNERS MARRIED TO AN EGYPTIAN, OR MARRIED IN EGYPT

OTHER FOREIGNERS

MUSLIMS

NON-MUSLIMS

Mixed rite and sect

Same rite and sect

Muslim family law

Non-Muslim family laws

Foreign national law
3. Public Policy

3.1 Definitions

EGYPTIAN LEGAL DOCTRINE commonly defines public policy as the norms and rules which are considered essential to the national legal order. This definition is in accordance with the doctrine generally supported in Western law systems. However, the elements mentioned in Egyptian legal doctrine as characteristic for public policy are highly contradictory: on the one hand there is a dogmatic adherence to the flexible and secular nature of public policy consisting of general and neutral norms but, on the other hand, public policy is applied as a set of unchangeable Islamic rules. For a foreign observer this is particularly confusing because the central role of Islamic law is never mentioned when Egyptian jurists define public policy, but only when they interpret it. Based on the case law of the Egyptian highest courts – in particular the Court of Cassation - the definition of Egyptian public policy can be presented as follows:

1. Scope

The public policy rule of international conflicts laws has been laid down in Article 28 of the Civil Code of 1949, and the public policy rule of interreligious law in Article 6 of Law 462 of 1955. Egyptian legal doctrine holds that public policy is the same for both interreligious and international conflicts law. The study of Egyptian case law and legal literature shows that this is not the case, however, as will be discussed in the paragraph 'Functions.'

2. Flexibility

In accordance with the European concept of public policy, Egyptian legal doctrine holds public policy to be flexible, so that it remains adapted and connected to social, moral and political developments of contemporary society. The Explanatory Memorandum to the Civil Code phrases it as follows:

'It should be noted that the notion of public policy is very flexible (marīna). [...] It is not possible to reject the notion of public policy without also rejecting what is consolidated and established by tradition. It is considered necessary that a place is singled out in the texts of the law for this notion (of public policy), to leave an important outlet through which the social and moral tendencies (tayārat ijtimāʿiyya wa akhlaqīyya) can find a way into the legal order in order to insert those components of modernity and life (anāsir al-jidda wa al-hayya) which it (viz. the legal order, MB) needs.

It is the judge who must assess 'the social and moral tendencies' of society at a given time and place. The Explanatory Memorandum warned against too personal interpretations:

'The judge should be cautious not to hold his private opinions on social justice to be the general tenor of public policy and morals. He is obliged to apply the general opinion (madhhab 'āmm) to which society in its entirety adheres, and not a private individual opinion.'

3. Secular

Egyptian legal doctrine adheres to the tenet that public policy refers to the norms and values of all Egyptians, regardless of their religious or communal differences. This assumes a set of neutral norms, as is confirmed by the Court of Cassation:

[Public policy] comprises the principles (qawā'id) that aim at realising the public interest (al-maslaha al-ī'amma) of a country, from a political, social and economic perspective.

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493 So far, all cases and examples refer to the situation that at least one of the spouses is Muslim or Egyptian. When the foreign couple is neither Muslim nor Egyptian, their national law will apply, and when the foreigners have different nationalities Egyptian conflicts rules usually refer to the national law of the husband.
These principles are related to the natural, material and moral state (wadad') of an organised society, and supersede the interests of individuals. The concept of public policy is based on a purely secular doctrine that is to be applied as a general doctrine (madhhab 'ammin) to which society in its entirety can adhere and which must not be linked to any provision of religious laws. There is one exception to the general and secular concept of public policy, however, and that is family law.

4. Religious

In Egyptian family law, the concept of public policy is problematic for two reasons: there is more than one family law, and the family laws are all religious laws, which implies a high degree of normative morality. As mentioned briefly in the introduction to this thesis, three solutions present themselves: a) a set of neutral rules supersedes all family laws, b) the norms of one of the laws serve as the standard norm, or c) there are no separate norms outside the family laws. Egyptian public policy is a mix of b) and c): whereas the Islamic Sharī'a is deemed to have overriding authority in matters of personal status for all Egyptians, non-Muslims are allowed to have their own rules applied in matters of marriage and divorce. Only if the non-Muslim rules touch upon 'essential principles of Islamic Sharī'a' may they be deemed to violate Egyptian public policy.

The Court of Cassation makes it very clear that there can only be one public policy for all Egyptians, but that this public policy, due to the religious nature of the family law to which it applies, must follow the beliefs of the 'larger majority' of Egyptians:

'However, this [i.e. the secular nature of public policy] does not exclude that [public policy] is sometimes based on a principle related to religious doctrine, in the case when such a doctrine has become intimately linked with the legal and social order, deep-rooted in the conscience of society (jamīr al-mujtama‘), in the sense that the general feelings (al-shad’i‘), are hurt if it is not adhered to. This means that these principles [of public policy] by necessity extend to all citizens, Muslim and non-Muslim alike, irrespective of their religions. This is because the notion of public policy cannot be divided in such a manner that some principles apply to the Christians, and others to the Muslims, nor can public policy apply only to a person or a religious community. The definition (taqdir) [of public policy] is characterised by neutrality, in accordance with what the larger majority (aghlab al-'amm) of individuals of the community believes. In two subsequent rulings the Court phrased it more explicitly:

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

In Egyptian legal literature the precedence of Muslim family law over other family laws is often justified with the maxims taken from the fiqh that 'Islam supersedes and cannot be superseded' (al-Islam yelü wa la yiflahi‘ alay-hi) or that Islamic law has 'general sovereignty' (wilāya 'āmma).

5. Rules, not principles

Not all rules of the Islamic Sharī'a are thought to protect public policy. Only those rules that are called 'essential principles of the Islamic Sharī'a' (al-mabādi‘ al-asāsiyya fi āhkām al-sharī‘a al-islāmiyya) have that status. The term 'principles' is misleading, however, suggesting that broad legal and ethical principles are at play rather than specific rules of behavior. Both Egyptian case law and legal literature make clear that these principles are indeed rules of substantive law, defined as rules of Islamic law which are considered 'fixed and indisputable' (nass sārih qatt al-thubūt wa qaṭf al-dalāla). This phrase is a technical fiqh-term for rules of Islamic law which are not subject to change or interpretation.
With regard to this particular definition of public policy, the following observations can be made. First, public policy is not the 'outlet' through which 'social and moral tendencies' can be expressed in legal norms, but it is a set of rules. Second, this set of rules does not have the capacity to change with time and place, but they are fixed and unchangeable rules of Islamic Shari'a. Third, this concept of public policy is differentiated in its international and interreligious use, as will be demonstrated in the following paragraph.

3.2 Functions

EGYPTIAN LEGAL DOCTRINE commonly refers to public policy as the exception to the rule that Egyptian non-Muslims and foreigners may have their own family laws applied. Set in these terms, however, public policy is confined to its so-called 'negative' function. Egyptian case law and legal literature show that public policy has other functions as well:

1. Positive function
Public policy plays a 'positive' role when it gives precedence to certain rules. In matters of family law, this is the case with rules of Islamic law. However, in the use of this public policy there is a distinct difference between non-Muslim Egyptians and foreigners.

1.a. Non-Muslim Egyptians
In matters of personal status other than marriage and divorce, non-Muslim Egyptians are subject to the 'general law' which has been defined by Egyptian legal doctrine as Islamic Shari'a. In addition to these codified rules (inheritance, bequest, custody and guardianship), case law and the legal literature have added the following rules by means of 'positive' public policy:
- Prohibition of party autonomy in choosing a family law other than one's religion;
- Prohibition of a marriage between a Muslim woman and a non-Muslim man;
- Prohibition of a non-Muslim testifying against, or ruling in case of, a Muslim;
- The rules of conversion to Islam, and the prohibition of apostasy from Islam.

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

1.b. Muslim foreigners: 'Islamic public policy'
When foreigners appear in the Egyptian court for matters of personal status, the judge will apply two connecting factors in order to determine the applicable law: nationality and religion. When the foreigner is not a Muslim, his national law will be applicable, but its rules may be set aside by public policy in its 'negative' function (see below, under 2.b).

When the foreigner is a Muslim, however, a whole set of rules (i.e. those considered essential to Islamic law) becomes automatically applicable by virtue of positive public policy. Public policy in this respect has two functions: it introduces religion as an extra connecting factor and determines that, if the foreigner is Muslim, the rules of Islamic law will be applied, not as an exception, but on the strength of their own authority. The prerequisites of negative public policy - the court's scrutiny of the foreign law - become irrelevant the moment the Islamic religion of the foreigner has been established.

strain of 'untraditional' Islamic legal thought wherein 'the analysis of the Qur'an and sunna does not lead to the discovery of specific rules of behavior. Instead, it leads to the discovery of broad legal and ethical principles rather than specific rules of behavior. One derives Islamic law by coming up with laws that conform to all of the basic Shari'a principles' (Lombardi, 1998: 95).
Egyptian case law has yielded the following legal rules and concepts that have been applied to Muslim foreigners. They all refer to legal acts taking place in Egypt, and are all applied as a matter of public policy (whereby those in brackets are still debated in Egyptian legal doctrine):

- The prohibition of a marriage between a Muslim woman with a non-Muslim man (and its mirror image rule: allowing for a marriage between a Muslim man and a non-Muslim woman);
- The husband's right of polygamy;
- Marriage conditions: a) mutual consent (tarādī) between bride and groom and b) the presence of two male Muslim witnesses (īshhād);
- The relatives with whom marriage is not allowed (māḥārim);
- The interdiction to acknowledge illegitimate children;
- Unilateral divorce (talāq) by the husband;
- Certain rules of Islamic intestate law, the most important being:
  a) the share of the woman is half of her brother's,
  b) the order of precedence of the relatives assigned as heirs by the Quran,
  c) the size of each of the shares allotted by the Quran;
- Intestate succession between a Muslim and non-Muslim;
- Bequest of the testator amounting to more than one third of his property;
- Conversion to Islam renders Islamic law immediately applicable;
- Conversion to Islam becomes effective as of the pronouncement of the shahāda;
- [The prohibition of apostasy from Islam.]
- [Prohibition of re-marriage without observing the waiting period (ʿidda) after divorce or decease of the husband];
- [The bridal gift (mahr)];
- [The prohibition of adoption].

Egyptian legal doctrine considers these rules and concepts to be in the interest, in fact, a right, of every Muslim. Perhaps the most important characteristic of this function of public policy is its universality, even if it is limited to Muslims. It does not seek to protect Islamic values which are an essential part of the Egyptian society, but rather the endorsement of (essential) Islamic 'rights' of Muslims all over the world. Or, in other words, it does not guard national interests confined to a national territory, but inalienable and by their very nature unchangeable rules related to an international religious community. The name 'Islamic' public policy therefore seems to be appropriate here.

2. Negative function

Public policy plays a 'negative' role when it denies the application of a non-Muslim or foreign rule, although the application of these rules is permitted as a matter of principle. As with its positive function, 'negative' public policy treats non-Muslim Egyptians and foreigners differently:

2.a. non-Muslim Egyptians

Egyptian case law and the legal literature unanimously agree that the following non-Muslim rules constitute violations of public policy:

- The rule forcing a childless Jewish widow to marry ('levirate marriage');
- The possibility in Coptic law to prohibit a divorcee to remarry;
- The rule demanding divorce by a Christian woman after her husband has converted to Islam;
- Absence of a waiting period (ʿidda) after divorce or decease.

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

- Adoption;
- The maximum age of a child at which its mother loses her right to custody.

It is interesting to observe that the nature of these rules and institutions differs from those mentioned under positive public policy. In both instances, public policy is defined as 'essential
rules of Islamic law,' but while positive public policy endorses these specific rules, negative public policy merely applies expresses. Paraphrasing the essence of the case law discussed, these norms could be summed up as pertaining to the 'protection of family life.' Negative public policy can therefore be considered as 'proper' public policy, since it represents a general interest regardless of religion (even though these general norms are justified with being 'Islamic principles').

2.b Non-Muslim foreigners
There is hardly any Egyptian case law on foreign rules being set aside by Egyptian public policy in its negative function. Sporadic and casual mention is made in the legal literature of rules which lay down 'general principles of freedom and equality as adhered to in Egyptian society.' The examples usually mentioned are discriminatory rules based on color or ethnicity. Occasional reference is made to discrimination based on gender or religion, although the interpretation of what discrimination means in these two cases must be understood, for obvious reasons, as quite different from Western concepts.

Of an equally speculative nature – because never brought into practice and lacking consensus in Egyptian legal literature – are the following rules of Islamic law that might support the invocation of public policy in its negative function:
- The prohibition of marriages between certain relatives (mahārim);
- Rules pertaining to the marital obligations of obedience (tā'ā) by the wife;
- Rules pertaining to the marital obligation of maintenance (nafaqa) by the husband;
- The interdiction to acknowledge illegitimate children.

Insofar as public policy is invoked against non-Muslim foreigners, it is not necessarily of an Islamic nature. Here we see a similarity with negative public policy as applied against non-Muslim Egyptians.

3. Dhimmī-function
Whereas the positive and negative roles of public policy resemble its role in international conflicts law, its third role is unique to Egyptian interreligious law. The function of positive and negative public policy is to safeguard the essential principles of Islamic law, but public policy sometimes also protects the essential values of non-Muslim laws. This occurs in cases in which non-Muslims of different rites and sects are subject to Muslim family law in its capacity as the 'general law'.

The Court of Cassation has ruled that the Islamic rules of polygamy, divorce (only in the case of Catholics), and the requirement of witnesses for the conclusion of a marriage constitute a violation of essential principles of the Christian faith. Mixed Christian marriages where Muslim family law is to be applied are exempted from these Islamic rules by virtue of public policy. Non-application of these Islamic rules is not the result of their violation of public policy, the Court explains (because that would be a tautology: these Islamic rules are part of public policy); they are inapplicable because the protection of essential non-Muslim principles is considered an essential rule of Islamic Shari'ā, and hence of Egyptian public policy. It is because of this specific reference to the Islamic concept of dhimma, i.e. protection of religious minorities, that I have named this particular use of public policy the 'dhimmī-function' of public policy.

3.3 The oscillation of Islamic Shari'ā
IN MATTERS OF interreligious law, we see that the general law as well as public policy (both negative and positive) expands the application of Muslim family law into the realm of non-Muslim family law. This is even more the case with non-Muslim couples who do not share the same rite and sect: Muslim family law is applied in its entirety to them. Here, however, an exception is made by dhimmī-public policy: it is considered a matter of public policy that certain
rules of Muslim family law are not applicable. In this case one could argue that the realm of non-Muslim law is being expanded, albeit in a very limited way. (See illustration 3.)

Illustration 3: Public policy and interreligious law

In matters of international conflicts law, Muslim family law is applied to foreigners in two instances. First, when the foreigner is married to a Muslim Egyptian or to a non-Muslim Egyptian of different rite or sect, Muslim family law applies as a matter of internal conflicts law. Second, 'essential rules of Islamic Sharia' are imposed on any foreigner who happens to be Muslim. Research into case law and Egyptian legal literature has yielded quite a few of these rules, the most prominent being the husband's right of unilateral divorce (talāq) and polygamy, and some rules of inheritance. (See illustration 4.)
4. Understanding the Role of Religion in Interreligious and International Conflicts Law

IN MATTERS OF Egyptian family law, whether Muslim or non-Muslim law, religious faith is considered essential to any legal subject. It is the core of the individual that is to remain intact, and hence to be protected from any outside interference. This protection, when not enshrined in the rules of interreligious and international conflicts law, is to be guaranteed by public policy. Hence, a Muslim foreigner will be 'granted' his or her essential Islamic rights, even though the conflicts rules have determined his national law to be applicable, or when his national law has created legal facts contrary to these essential Islamic rights. Conversely, the same protection works for religious rights of non-Muslims. First, by granting them the right to have their own religious laws applied to them, and if this is not the case (as in the case of mixed non-Muslim marriages), to have their essential religious rights protected by means of public policy. The protection of these essential rights is said to pertain to the rights of the individual Muslim or non-Muslim. But to understand the mechanisms of Egyptian interreligious law, one
must not regard the individual as the legal subject but rather the religious community to which he belongs. The individual is merely a member of a religious community, and his 'rights' are a derivative of the rights attributed to and upheld by his community. This approach shows in the fabrics of the Egyptian legal system itself, but becomes very clear in certain instances of case law. An illustrative example is presented by the cases adjudicated in Alexandria in the 1950s, where the courts plainly voiced their concern on the effects the actions of individual Greek and Italian litigants would have on their communities and, consequently, gave priority – by means of public policy - to the community over the individual (see Chapter 3). Even though these cases regard ethnic rather than religious communities (although Catholic and Greek-Orthodox family law was considered essential to the identities of these communities), it is demonstrative of a legal outlook that appears to have been consistently present in Egyptian family law.

The communal approach was expressed again categorically by the Court of Cassation in its ruling of 1979 (see Appendix 1), and further expounded in its subsequent rulings. In the 1979 ruling, the Court had to weigh national interests (public policy, i.e. essential Sharī'a rules) against communal interests (i.e. essential non-Muslim rules). The Court deftly declared that as a matter of national interest no infringement on communal interests is to be allowed. This means, however, that national interests may have to give way to communal interests whenever the religious 'essence' of that community is threatened by national rules.

Here, we may begin to comprehend the fierceness of the Kuwaiti lawyer's reaction. She was not to be convinced or mollified by the argument that in the Dutch system - or any Western system, for that matter - essential civil rights were guaranteed by the national codes that applied to all citizens regardless of their creed or ethnicity, while they were perfectly free to exercise their religious rights privately in their own manner. For her, exercising one's religious rights in matters of family law was tantamount to exercising one's human rights, so that they should at least be given equal status to, if not priority over, the civil family law. These religious rights, however, are not to be understood as individual rights, but as communal rights; and these communal rights are not to be understood as rights that have been merely attributed to them, but as rights that make up their essence.

This is where Egyptian interreligious law becomes confusing for a Western observer. The Egyptian state and Egyptian law recognize as a matter of principle individual citizenship rather than communities. But in matters of family law, the legal subjects are basically reduced to two communities: Muslims and non-Muslims. Moreover, these communities do not coexist on an equal footing: Muslim family law is the dominant law from which the essential principles are derived that make up public policy. The prerogative and even superiority of Muslim family law is sometimes underscored in Egyptian legal literature by referring to the Constitution which mentions since 1980 the Sharī'a as 'the principal' (i.e., the only) source of legislation and Islam as the religion of the state.

I have argued that this situation may best be compared to, if not identified with, a continuation of the status of dhimmī under Sharī'a law (see Chapter 1). From an Islamic perspective, dhimmī was indeed perceived as a status of 'protection,' i.e. protection of the core religious values of the non-Muslim communities against any Islamic or other outside interference. But this seems to run counter to the abolition of the dhimmī-status in 1856, and the vigorous endorsement of equality under the law and equal citizenship by the Egyptian state ever since the 1920s. This apparent contradiction can be understood in the light of the reasoning of the Court of Cassation in the case just cited: the granting of equal rights to all Egyptian citizens does not preclude, but rather includes, the right to maintain one's religion and, consequently, one's religious family law.

Contemporary Egyptian citizenship has indeed stripped the dhimmī-status of all discriminatory features which pertained to civil rights, such as separate taxation, different clothes and exclusion from government positions, but has maintained the separate status with regard to religious rights, including family law. One could therefore argue that the dhimmī-status has been kept intact, albeit reduced to its essential proportions. This also shows in another feature typical of the dhimmī-status: that of the 'protected minority.' The minority's rights do not exist autonomously, but they must be upheld and protected by the state. Indeed,
Egyptian case law and legal literature treat the protection of non-Muslim rights not as a right granted to the minority community but as a responsibility assumed by the majority (i.e. the state). This is underscored by the fact that the protection of these rights is commonly undertaken upon the initiative of the courts rather than claimed by community members.

The communal approach that distinguishes between Muslims and non-Muslims helps to understand the peculiar outcome of public policy decisions in matters of family law concerning Egyptians and foreigners. We have seen that public policy is the tool with which the umbrella of protection is extended over the non-Muslim Egyptians, but that it is also an instrument that enforces 'essential' rules of Shari'a law upon a Muslim foreigner. We need to adjust our point of view, however. The basic rule is that the Muslim and non-Muslim communities enjoy their religious family rights, and public policy will ensure that these rights are guaranteed. In the case of non-Muslims, whether Egyptian or foreign, we therefore see little interference from Egyptian public policy in terms of upholding Islamic rules. To the contrary: if need be, public policy will interfere to guarantee essential elements of these family laws. In the case of Muslims, on the other hand, whether Egyptian or foreign, we see that public policy plays a major role in the case of Muslim foreigners to ensure that their 'rights' are 'protected,' i.e. that essential rules of Shari'a law are being applied, whether in the choice-of-law process or in legal procedures involving the recognition of rights acquired abroad.

5. Final Remarks

THE EGYPTIAN APPLICATION of the system of conflicts law, which at face value is perfectly recognizable to any Western lawyer, acquires completely different features and produces different results due to another conception of the rights and values to be protected. As mentioned before, using religion rather than nationality as a connecting factor draws different lines between groups of people and may consequently lead to different legal conclusions. This explains why the Kuwaiti lawyer and I were at odds. But whether one system is 'better' than the other is not the issue: with good reason, each system sees a justification in its methodologies and approaches. Preference for one system over the other, in my opinion, is therefore not a matter of legal logic, reason or even concepts of justice, but merely induced by one's historical, political, social and legal legacy.

Having said this, I want to return to my remark in the Introduction to this study where, in a rather off-handed manner, I wrote that 'I tend to see public policy as a measure of tolerance.' Although I realize that public policy is a legal instrument in a highly sophisticated and at times very technical field of law, during my research I became convinced that public policy as used in both the Netherlands (and most Western countries) and Egypt (and most Arab-Islamic countries) can best be understood when seen in terms of tolerance. As I observed in Chapter 3, tolerance has two aspects: first, tolerance is exercised by someone who has the power to also not tolerate the conduct that he disapproves of and, second, tolerance is exercised in matters involving firmly held beliefs. The conception of allowing the application of other laws than one's own but under the restriction of (negative) public policy is phrased in the same way: in this country everyone is subject to our national laws, except for specific fields of law like family law where one is entitled to the application of one's own foreign or religious law, unless this law violates the fundamentals of our national legal order.

From a comparative point of view, I am of the opinion that it may have certain advantages to study and compare Islamic and Western legal systems of conflicts law in terms of tolerance. In my own research, it helped me to understand that two apparently juxtaposed systems - one orientated to national individuals, the other to religious communities - were both founded on the principle of tolerance - in particular religious tolerance - but subsequently developed into different legal directions. The concept of tolerance might be equally helpful to Western jurists dealing with and thinking about the newly arrived national and religious communities in Europe. In terms of family law, comparing the European national-individual
legal systems with religious-communal systems like that of Egypt or other Arab-Islamic countries may yield interesting results, not in the least new insights in one's own system or even provide new solutions. This seems all the more appropriate now that the Muslim community in Europe is increasingly linking its minority status to the right to apply its own communal law. However, tolerance in this respect should not be understood as the mere motivation to allow for such communal laws, but as a concept that may shed new light on the interaction between mind sets based on individual and communal societies, and their respective legal systems.

499 This comparative approach has been taken, but mostly on a philosophical level: Kymlicka (1995), Modood (1997), Raz (1994), Walzer (1997).