EGYPTIAN INTERRELIGIOUS LAW: PUBLIC POLICY OR SHARIE'A DOMINION?

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Egypt has preserved the Islamic system of interreligious law under which Muslim, Christian, and Jewish societies are each governed by their own courts and their own laws. Over the course of the 20th century, however, these separate courts were abolished, and the application of non-Muslim laws was limited to matters of marriage and divorce, and even then, only if the non-Muslim spouses shared the rite and sect of the same religion. In all other cases, Islamic law (Sharie'a) applies. In addition, non-Muslim laws may not be applied if they infringe on Egypt's 'public policy,' which includes principles that are indispensable in Islamic law. This Article will analyze the status of the non-Muslim Egyptian in modern personal status law based on Egyptian case law and legal literature. The concept of public policy plays a key role in understanding the mechanics of interreligious law in Egypt. I argue that public policy serves as a legal barometer of the coexistence between Muslim and non-Muslim communities in Egypt.

TABLE OF CONTENTS

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60 THE DARTMOUTH LAW JOURNAL VOL. XXI:1

I. INTRODUCTION

Recently, the issue of *Sharie*‘*a* courts dominating Egyptian law has been drawing the attention of the Western media. Legal scholars and activists are quite reluctant to contribute to the discourse held mostly by reporters, religious figures, and politicians. This reluctance could be why the matter is covered cursorily, resting upon emotional, prejudiced, and politically-motivated debates. Moreover, the jurisdiction of *Sharie*‘*a* courts is not always obviously specified, and there are sometimes questions about which law applies in a particular case.

In contemporary Egypt, Muslims, Christians, and Jews are governed by the personal status laws of their respective societies. Thus, the personal status of Egypt's legal subjects under family law is based on their belonging to a religious community. In this respect, a person without a religion is a legal non-entity. The Egyptian legal literature refers to the plurality of coexisting religious rules as the *ta*‘*addud al-shara*,‘ or "*interreligious law*" in most European literature. In this Article, I examine the relations and tensions between the varying legal spheres in Egypt. What if the laws of one religious community contradict or violate those of another community? Is there a hierarchy among these laws? Which law applies in the case of conversion to the religion of another community or in the case of intermarriage between members of different communities? This Article will also focus on conflict of laws—that is, the legal procedure used to determine which law is applicable when more than one law applies to a situation (e.g., marriage between a Catholic and a Copt or between a Copt and a Muslim).

The term "conflict of laws" is typically reserved for international law, where the laws of different countries come into conflict. This Article, however, discusses conflicts between the laws of different religious communities within a single country. The procedure to solve these conflicts therefore belongs to the field of interreligious conflicts law. Egypt's interreligious conflicts law is codified in Law 462 of 1955, which allows the application of non-Muslim family laws, albeit only under certain conditions and within the limits of *al-nizam al-*‘*amm* (public policy). The term "public policy" is of European origin and was introduced into Egyptian legal doctrine at the end of the 19th and the beginning of the 20th century. The term can be confusing since it seems to refer to state policy or the maintenance of law and order. However, in conflicts law, "public policy" is a technical term denoting the principles considered to be of crucial significance to a national legal order. To accommodate changes in social, economic, societal, and moral values, the interpretation of public policy is usually left to the courts rather than legislatures. Differences in public policy across different countries are important indicators of the principles held dear

Spring 2023 *THE DARTMOUTH LAW JOURNAL* 61

by their respective societies. This Article's interpretation is founded on two major sources: the Egyptian legal literature and the rulings of the Egyptian Court of Cassation – the highest court in the land for civil cases.

A. Justice under Sharie'a Law: Modern Practices of Muslim Nations

In Islamic jurisprudence, justice and law have always held significance as a science of rules governing the express behavior of human beings.[1] The second Caliph of Prophet Mohammad, 'Umar ibn al-Khattab, famously described the *Sharie'a* judiciary, guided by Islamic law, as capable of governing all the major aspects of life.[2] Islamic law shapes both the organization and function of the *Sharie'a* courts, which then play a critical role in enforcing Islamic law.[3] In fact, the application of *Sharie'a* at the hands of judicial bodies is considered the primary designation of power according to Islamic jurisprudence.[4] The leading power is that of the judiciary, not the legislature, as *Sharie'a* rules cannot take effect without Islamic judicial bodies implementing them.[5]

Historically, in most Arab and Muslim countries, *Sharie'a* courts were the core of the judicial system and ensured *Sharie'a*'s implementation. However, in the second half of the 19th century, political and administrative transformations in the Ottoman Empire and Egypt led to Islamic law taking a less dominant position in the legal system compared to civil European statutes.[6] In most countries, these courts' jurisdiction was limited to the family law (personal status) of Muslims.[7] Such 19th century reforms

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[1] Islamic jurisprudence is known as *fiqh. See* IBN AL-KAYYIM AL-GAWZIYYA, ADMONITION FOR THOSE WHO SING ON BEHALF OF THE MASTER OF THE WORLDS, Ch. 1, at 86–383 & Ch. 2, at 3-182.

[2] Natasha Bakht, *Family Arbitration Using Sharia Law*: *Examining Ontario's Arbitration Act and its Impact on Women*, 1 MUSLIM WORLD J. HUM. RIGHTS 1, 7 (2004).

[3] AL-MARSOUM BI-QANUN: RAQM 78 II-SANNA 1931 AI-MUSHTAMII 'A/A LAI HA TARTI B AL-MAHAKIM AL-SHARFA. (Emphasis added, as most of its rules were abolished by Law 462 of 1955).

[4] *See The Explanatory Memorandum to Law 462 of 1955*, *and the Court of Cassation* (*cf.* Nr. 29, Year 34, March 30, 1966; Nr. 8, Year 36, February 14, 1968; Nos.16 and 26, Year 48, January 17, 1979).

[5] *See generally* Leonid R. Sykiainen, *Islamic Law*: *Interaction between Legal and Religious Sides*, 1 ANN'L OF LIBERTARIAN LEGAL THEORY (2007). *See also* CENTER FOR SECURITY POLICY, SHARIAH IN AMERICAN COURTS: THE EXPANDING INCURSION OF ISLAMIC LAW IN THE U.S. LEGAL SYSTEM (2014).

[6] *See generally* MUHAMMAD BAQIR AL-SADIR; HAMID ALAGR, PRINCIPLES OF ISLAMIC JURISPRUDENCE: ACCORDING TO SHI'I LAW (Arif Abdul Hussain trans., 2005). In this regard, it should be noted that the *Sharie'a* courts were expressively altered as a result of those changes.

[7] *See generally* WAEL B. HALLAQ, THE FORMATION OF ISLAMIC LAW (Ashgate/Variorum 2004) (discussing the emergence and evolution of law during the first three and a half centuries of Islam and reflecting the different and, at times, widely divergent scholarly approaches to this subject matter [*Sharie'a* courts]).

62 THE DARTMOUTH LAW JOURNAL VOL. XXI:1

determined the specifics of the Islamic judicial bodies which function in the Muslim world today.[8]

Currently, the *Sharie'a* courts are organized to be compatible with the modern civil European law.[9] Classical *Sharie'a* justice was based upon the sitting of a single *qadi* (judge), and medieval *Sharie'a* courts operated on one level, rendering court verdicts irrevocable.[10] The current practice in Muslim countries, however, is a panel hearing with the opportunity for appeals.[11] While the organization of *Sharie'a* courts has evolved to comport with European standards, *Sharie'a* courts continue to rely on specific procedures expounded by Islamic legal doctrine, such as the acceptance of testimonial evidence to prove legal facts and the use of analogical reasoning to connect modern questions (such as in the realm of banking) back to traditional principles (such as the prohibition on charging interest).[12] Likewise, *Sharie'a* courts continue to enforce Islamic values—namely, the preservation of religion, life, mind, posterity, and property. In Islam, "*Shārīe'ā*" refers to the path God provided Muslims on both spiritual and worldly matters.[13] Across the region, however, broadly different interpretations of *Shārīe'ā* exist. For instance, Iran and Saudi Arabia inflict capital punishment on violators of blasphemy laws, while most Muslim-

[8] However, the modifications of these bodies meaningfully differ from traditional *Sharie'a* courts working in medieval Muslim countries and from the ideal model of *Sharie'a* justice explained by classical *fiqh*.

[9] *See generally* WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES (Ashgate/Variorum 1997) (elaborating on the history of Islamic legal theory from its early beginnings until the modern period, especially the early formation of this theory, analyzing its central themes and examining the developments which gave rise to a variety of doctrines along with a discussion of modern thinking about the theoretical foundations and methodology of Islamic law).

[10] *Id*. Given the modern practice of some Muslim countries, the *Sharie'a* system of justice should not be understood as a certain form of court but a model which is distinct due to specific *Sharie'a*-related features.

[11] *Id*. It is conceivable to recognize some modern *Sharie'a* courts – or to be more precise – some forms of the imposition of the *Sharie'a* model of the judiciary or elements of it in the contemporary judicial and legal system of Arab and Muslim nations.

[12] HALLAQ, *supra* note 9. Some of the courts have administrative or structural principles that are distinctive in their features, mainly with respect to the requirements imposed on the judges. Records of the operations of *Sharie'a* courts during the British occupation of Egypt are quite limited. This gap in the literature is due in part to the fact that the jurisdiction of the *qadis* had been shrinking since the reign of the *Mamluk* Sultanates in the 13th century. As reformers and many scholars have argued, the marginalization of the *Sharie'a* courts was a byproduct, rather than a primary objective, of the legal reforms. However, whether intentional or not, the result was the same: by the late 18th century, the jurisdiction of *Sharie'a* courts was largely restricted to personal status matters. Though it is easy to interpret these reforms as the infiltration of imperial powers into Muslim judiciaries, the history tells a different story. The legal reform policies were primarily the products of Egyptian and Ottoman administrations which sought to take advantage of foreign investment and consolidate power. When the British officially began occupying the country in 1882, they adopted—rather than created—the scheme of restricting the power of the *qadis* (judges).

[13] *Id*.

Spring 2023 *THE DARTMOUTH LAW JOURNAL* 63

majority nations, like Egypt, only imprison or fine violators, and others like Nigeria lack blasphemy laws altogether.[14]

In some Muslim countries, all regular courts are called *Sharie*‘*a* courts, but they are not always *Sharie*‘*a* courts in the precise sense.[15] While these countries rely on Islamic legal principles to govern civil, criminal, and personal status disputes, some of their laws may also be more secular, especially in emerging areas of science and technology.[16] Countries with mixed systems might codify elements of Islamic law into statutes and require that their laws do not violate Islamic principles, but such countries may also have laws incorporating customary law or non-Muslim legal principles.[17] For example, Pakistan has a federal *Sharie*‘*a* court established in 1980 to check that all laws and regulations in the country comply with *Sharie*‘*a* standards.[18] In some modern Muslim countries, such as Jordan, Lebanon, and Egypt, independent *Sharie*‘*a* courts resolve family law issues for Muslims on the basis of Islamic law.[19] In Egypt, such courts are called family courts, but in fact they are also *Sharie*‘*a* judicial bodies.[20] Other courts of general jurisdiction in Muslim countries, such as courts with territorial jurisdiction,

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[14] *Id*.

[15] Mohamed ‘Arafa, *Islamic Criminal Law*: *The Divine Criminal Justice System between Lacuna and Possible Routes*, 2 FORENSIC & CRIME ST. J. 102 (2018). For instance, in Saudi Arabia, courts of general jurisdiction are genuine *Sharie*‘*a* courts, not only in name. According to the *nizam* (order) regarding the judiciary, all courts are obliged to implement *Sharie*‘*a* according to their *Hanbali* or *Wahabi* interpretation and only then according to the state’s normative acts which do not contradict *Sharie*‘*a* law. The current procedural legislation for administrative courts implements numerous *Sharie*‘*a* rules and recruits only judges who have certificates or diplomas verifying *Sharie*‘*a* educational credentials.

[16] *Id*.

[17] Countries following this mixed model include Egypt, Iraq, Syria, Afghanistan, Nigeria, Algeria, Morocco, Indonesia, Malaysia, the Philippines, and Mali. Secular civil and criminal codes may be influenced by Islamic law or drafted so as not to violate Islamic legal principles. Thus, personal status laws (addressing inheritance, marriage, divorce, and custody) are typically regulated by Islamic law. Many mixed-Islamic law systems also recognize the religious law of other faiths, including Christianity, Judaism, and various denominations within Islam. Generally, personal status laws are not codified entirely, requiring the application of uncodified Islamic rulings based on the country’s dominant Islamic school of thought or the school of thought commonly adhered to by the parties to the dispute. In cases where parties abide by different schools of thought, judges may turn to Islamic scholars or scholarship to identify and determine the applicable law.

[18] NICHOLAS HEER & FARHAT JACOB ZIADEH, ISLAMIC LAW AND JURISPRUDENCE (Washington Univ. Press 1990). The appellate court for judgements represents the courts of general jurisdiction passed in accordance with the law which stipulates *Sharie*‘*a* punishment for certain criminal activities.

[19] WAEL B. HALLAQ, LAW AND LEGAL THEORY IN CLASSICAL AND MEDIEVAL ISLAM (Variorum 1994) (discussing the law and legal theory in classical and medieval Islam; regarding the non-analogical arguments in *Sunni* juridical *Qiyas*; logic and formal arguments in *Sunni* jurisprudence; inductive corroboration; and *al-Shafi*‘*i* and his influence on Islamic jurisprudence).

[20] The judicial systems of countries such as Libya, United Arab Emirates, and Kuwait do not include *Sharie*‘*a* courts and are generally guided by European civil traditions. However, regular courts use principles of Islamic law to, for example, resolve disputes on family and inheritance issues.

64 THE DARTMOUTH LAW JOURNAL VOL. XXI:1

cannot be called *Sharie'a* courts because the term connotes particular substantive and procedural rules they do not possess.[21] Conversely, *Sharie'a* law is applied in some non-Muslim countries of Asia and Africa, where the Muslim minority is customarily entitled to govern relations of their personal status in accordance with Islamic principles. For example, in India, Israel, and South Africa, *Sharie'a* courts apply Islamic law to issues of marital relations.[22]

II. SHARIE'A COURTS IN EGYPT: STILL THERE OR ABOLISHED?

A. Literature Review: Early Sharie'a Courts

Islamic law began to take shape as Prophet Mohammad settled into Medina, where the city's Jewish and Christian populations had established codes but where the growing Muslim population lacked a code of its own. Mohammad's early laws were heavily based on Arab tribal values. Namely, tribal *Sunan* norms presented exemplary conduct for Muslims to follow, such as honesty and respect, and laid the early foundations for *Sharie'a*. By vivifying Islamic values in the *Sunan*, Mohammad created a religion-based normative legal structure.[23] This was a revolutionary development, as previously there had been no infusion of religious law into existing tribal laws.

On principle, Islamic law was never enforced over conquered communities. This policy of legal pluralism would become a signature of the Islamic empires and ultimately allow European powers to infringe upon their sovereignty.[24] In the 9th century, as garrison towns grew into metropolitan cities and conquered people became more religious, *qadis* were required to abandon their supplementary roles as tax collectors and storytellers for full-time judicial duties.[25] Accordingly, *qadis* were expected to hold extensive religious knowledge in order to adjudicate cases based on the *Qur'anic* texts and *hadiths*. As representatives for the highest courts in the land, *qadis* heard

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[21] HALLAQ, *supra* note 19. They not only underscore the Islamic law rules occasionally, for instance, litigation of Islamic business organizations negotiating deals using the *Sharie'a* conditions, but also within the framework of general procedural norms not using the Islamic or divine criteria.

[22] *Id*. The Islamic personal status law in Egypt is codified only in matters of succession, guardianship, legal capacity, family relations, and some aspects of marriage and divorce. The non-codified rules of Islamic personal status law are based on the jurisprudence of the *Hanafi* school.

[23] Soon after the Prophet's death, the position of the *qadi* (judge) was established. In the early days of Islamic expansion, these judges had wide-ranging duties like storytelling and policing in addition to providing legal oversight. These broad duties were the product of the narrow territorial jurisdiction of the time. *Qadis* at the time only presided over the affairs of Muslim Arab territories and the garrison towns of the conquering armies.

[24] *See generally* JAMES E. BALDWIN, ISLAMIC LAW AND EMPIRE IN OTTOMAN CAIRO (2017).

[25] *Id*.

Spring 2023 *THE DARTMOUTH LAW JOURNAL* 65

all cases regarding penal, civil, criminal, and personal statutes. Only the governor-administrated *mazalim* (complaints) tribunals held overlapping jurisdictions with the *Sharie*‘*a* courts.[26] But even then, the *qadis*, with legal supremacy, could exercise veto power over any decisions made by the *mazalim* magistrate.[27]

The Ottoman Empire's judicial system, much like previous Islamic empires, was characterized by legal pluralism, with the *qadis* presiding over only one of several executive and religious courts. The jurisdictions of various courts and tribunals often overlapped, creating a confusing legal environment. It is difficult to discern the rationale behind the creation of such convoluted jurisdictions.[28] After defeating the Mamluk Sultanate of Egypt, the Ottomans sought to consolidate their power over the preexisting religious institutions. However, the Ottoman institution tasked with enforcing *Sharie*‘*a* (the *Hanafi ilimye*) faced a challenge in Cairo, where the courts mixed schools of thought. The policy of judicial inclusion had created a setting where *qadis* from each school of thought held significant power within the court system, though the *Shafi* school of thought was still given deference.[29] Thus, the Ottomans transferred the traditional duties of the *qadis*, like regulating the marketplace and maintaining public morality, to professional police forces and bureaucrats, leaving the *Sharie*‘a courts to deal only with personal matters like property and family disputes.[30] Even with these enduring responsibilities, the Ottoman state had methods for restricting the *Sharie*‘*a* courts' jurisdiction.[31]

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[26] JAMES E. BALDWIN, *Cairo's Legal System*: *Institutions and Actors*, *in* ISLAMIC LAW AND EMPIRE IN OTTOMAN CAIRO, 33-54 (2017).

[27] *Id*. From the 9th to the 13th century, *Sharie*‘*a* courts reached their zenith of power. Their jurisdiction included a wide range of issues, and there were few challenges to their authority. The rise of the *Mamluk Sultanate* marked a turning point in the judicial standing of these courts as legal reforms allowed the administration to assume portions of the *qadis*' original jurisdiction. This marginalization of traditional duties, in addition to the strengthening of parallel judicial institutions, set the stage for the Ottoman sidelining and subordination of the *Sharie*‘*a* courts.

[28] *Id*. Some have argued that the legal pluralism was designed to divide and weaken existing judicial structures, while other scholars have noted that legal pluralism has been a major component of Islamic empires since their advent. Both of these arguments provide a valuable framework for interpreting the legal reform policies leading up to the British occupation in 1882.

[29] *Id*. Thus, the Ottoman attempt to *Hanifize* the courts was met with fierce opposition from the well-established non- *Hanifi qadis*. But the existing legal pluralism allowed the Porte's administrators to circumvent the *Sharie*‘*a* courts by reallocating their jurisdiction to judiciaries more aligned with the Ottoman vision.

[30] The *Diwan al*‘Ali – much like the *mazalim* under the *Mamluk Sultanate* – was established by executive authorities to deal with matters like petty theft which would normally be adjudicated by *qadis*. The final limitation to the *qadi*s' ability to act independently during the early period came via the Ottoman inclination towards mediation over adjudication. This strong preference for mediation essentially stripped the *qadis* of their discretion in judging cases. Under the directive of the Porte, *Sharie*‘*a* courts were expected to encourage the litigants to resolve their disputes independently, with *qadis* intervening only as a last resort.

[31] BALDWIN, *supra* note 26, at 50.

66 THE DARTMOUTH LAW JOURNAL VOL. XXI:1

Implementation of these legal reforms was incredibly slow due to the weak nature of the Ottoman state. The Ottoman Empire began to sacrifice its own sovereignty in exchange for foreign investment, beginning with the first Capitulation to the French in 1535. Because of the large presence of powerful European populations, Egypt was the scene of the most far-reaching concessions. The Capitulations guaranteed foreigners (a) freedom of residence and trade, (b) freedom of religion, (c) immunity from all direct tax, (d) consular jurisdiction over crimes by their nationals and over civil cases where their nationals were defendants, and (e) freedom from domiciliary searches unless the consul was present.[32] These concessions had devastating effects on the Egyptian government's ability to enforce the law. While it was within Muslim tradition to allow religious minorities to handle matters of personal status in their respective courts, the total surrender of civil and penal infractions to foreign tribunals was a completely different matter.[33] Thus, the reforms of the 19th century only accelerated the reduction of *Sharie*'*a* jurisdiction. This era of modernization saw the adoption of more European-based codes and the rapid absorption of traditional *Sharie*'*a* court duties into the state bureaucracy. Hence, the new laws were designed to act in accordance with *Sharie*'*a*, nullifying the *qadis*' claims that the reforms were un-Islamic.[34]

The jurisdiction of *Sharie*'*a* courts was even further diminished in 1875 with the introduction of so-called Mixed Courts, targeted at reforming the Egyptian judiciary by mixing European and Egyptian judges. These courts marginalized the power of the *qadis*, allowing the Egyptian government to exercise some autonomy once again over its judiciary. Though Article 11 of the Mixed Civil Code of Egypt officially integrated *Sharie*'*a* into the mixed judiciary, *qadis* were rarely appointed to the mixed bar.[35] After three centuries of marginalization, *Sharie*'*a* courts were of negligible importance during the British occupation. The *Sharie*'*a per se* was

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[32] *See generally* REEM A. MESHAL, SHARIA AND THE MAKING OF THE MODERN EGYPTIAN: ISLAMIC LAW AND CUSTOM IN THE COURTS OF OTTOMAN CAIRO (2014).

[33] *Id*. The Ottomans themselves recognized the dangers of such concessions and refused to exempt foreigners in Turkey from taxes or search and seizures. With foreign consuls handling cases involving non-Egyptians, Coptic and Jewish courts handling the cases of non-Muslims, and various Ottoman courts presiding over cases involving Egyptian Muslims, the jurisdiction of independent *Sharie*'*a* courts was very narrow going into the 19th century.

[34] These efforts to attract foreign investment were further advanced during the reign of *Khedive* Ismail, though he took a more measured approach. Throughout the 1860s and 1870s, the *Khedive* negotiated the foundations for Mixed Courts, which would hold jurisdiction over cases involving foreigners and Egyptians.

[35] After establishing the Mixed Courts, Ismail's successor began to consolidate the many components of the judicial apparatus into one secular National Court, which became operational in 1883. Combined, these new courts held jurisdiction over civil cases involving foreigners and Egyptians and penal cases involving Egyptians – leaving only personal status cases to the Islamic courts.

Spring 2023 *THE DARTMOUTH LAW JOURNAL* 67

still an important source of judicial legitimacy, but the state had integrated Islamic principles into the legal doctrine, making the *qadis* themselves largely irrelevant.[36] Thus, from 1883 until their merger with the National Courts under President Nasser, the operations of *Sharie*‘*a* courts were officially limited to cases regarding personal status and family issues.[37]

The elimination of religious courts in Egypt marks a vital point in the nation's religious and political development, as well as that of other Arab countries. This conclusive step has stimulated heated discourse but has not received the attention it deserves from Islamists in the Middle East.[38] In 1955, a law was enacted that declared the abolition of *Sharie*‘*a* courts, which adjudicated based on Islamic law, and communal courts, which adjudicated based on the religious laws of different communities.[39] It is important to delve into the immediate aspects and substance of this law, along with the reasons for its promulgation and reactions to it in Egypt and other Arab countries. The law transfers lawsuits from *Sharie*‘*a* and communal courts to domestic courts that use civil law.[40] The law also provides for the establishment of first instance and appellate courts to adjudicate family matters and *waqf* (endowment) matters, which used to be in the exclusive competence of religious courts, according to the national code of procedure.[41]

For such disputes, the domestic courts follow the civil code of procedure except where certain rules had been adapted from the *Sharie*‘*a* courts and other complementary laws.[42] In addition, all the domestic courts' *Sharie*‘*a* rulings are issued according to the *Hanfi* school of thought, the most moderate school, except where specific laws dictate otherwise.[43] For non-

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[36] *See generally* LEONARD WOOD, ISLAMIC LEGAL REVIVAL: RECEPTION OF EUROPEAN LAW AND TRANSFORMATIONS IN ISLAMIC LEGAL THOUGHT IN EGYPT, *1875-1952* (2016).

[37] BALDWIN, *supra* note 26, at 41. *See also* RON SHAHAM, FAMILY AND THE COURTS IN MODERN EGYPT: A STUDY BASED ON DECISIONS BY THE SHARĪ‘A COURTS, 1900-1955 (1997).

[38] It represents the conclusion of a nearly century-long process to end the *Sharie*‘*a* (religious) State in Egypt.

[39] *Qanun bi-Ilgha*a'*al-Mahakim al-Shari*‘*ia wa al-Milllya* [Law 462 of 1955 on the Abolition of the *Shari*‘*a* and *Milli* Courts], at art. 1. Suits that will have remained unresolved . . . were to be shifted to the national courts which should deal with them in accordance with their own code of procedure and in accordance with the current law.

[40] *Id*. at art. 2. One of the main rules for the appointment of the *dayanim* (Rabbinical court judges) in Israel is that judges must have wisdom, humility, awe, hatred of money, the love of truth, and the love of the people, and must be known for their "*Shem Tov*" (decency). *See Rambam*, *Sanhedrin 42b* (*Jewish halakha*).

[41] *Id*. at art. 3. It also stipulates that "in matters pertaining to personal status, the court of first instance shall be composed of a bench of three judges which may include one or two members of the benches of the equivalent *Sharie*‘*a* courts who will have been attached to the civil cadres." The same norms apply to the appellate courts, except that there, only one *Sharie*‘*a* judge must be included in the bench.

[42] *Id*. at art. 5.

[43] *Id*. at art. 6.

68 THE DARTMOUTH LAW JOURNAL VOL. XXI:1

Muslim Egyptians who had communal jurisdiction at the time of the law's enactment (Coptic Christians and Jews), the law instructs domestic courts to adjudicate their family law based on their own religious laws but taking into account the public order.[44] The law reads, "The rules of public order, require that the sovereignty of the state be complete and absolute in the interior, and that all those who live in it, without distinction of nationality, be submitted to the laws of the country, to its courts and to a single juridical jurisdiction, taking into account the diversity of the conflicts *ratione materim* and of the laws applied to them."[45]

Despite this unifying principle, there are still many family law jurisdictions in Egypt.[46] Egypt has inherited a diversity of judicial organizations, beginning with the *Sharie*'*a* courts and followed by the communal courts.[47] In response to the many conflicts that arose between the various jurisdictions, giving rise to contradictory rulings on the same issues, this law repressed the rights that citizens of foreign countries enjoyed by submitting them to the regular regime of the domestic courts.[48] At that time, non-Muslim communities possessed fourteen jurisdictions, some of which convened very infrequently and in areas far from the parties' homes.[49] The judiciary fees were not unified, as some of these courts did not have any clear regulation on this issue, and most did not have a regular judicial corps to

[44] *See* WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW (2005). The Egyptian laws, most case law, and legal literature refer to Christians and Jews as *ghayr al-muslimin* (non-Muslims). Occasionally, the Islamic terms *ahl-al-dhimma* (protected people under Islamic sovereignty) and *ahl-alkitab* (people of the book) are also used in that context. Article 7 of this law reads that "change of confession or communal affiliation of a party to the dispute in the course of the procedure shall not affect its march, unless the change is done in the favor of Islam, in which case the first clause of article six shall be applied." In the same vein, Article 9 reads, "for merging the judges of the *Sharie*'*a* courts of all levels in the cadres of the national courts, the committees on personal status or the technical committees of the Justice Ministry."

[45] Lama Abu-Odeh, *Modernizing Muslim Family Law*: *The Case of Egypt*, 37 VANDERBILT L. REV. 1043 (2021); *see also* Saba Mahmood, *Sectarian Conflict and Family Law in Contemporary Egypt*, 39 AMERICAN ETHNOLOGIST 1 (2012).

[46] HARALD MOTZKI, THE ORIGINS OF ISLAMIC JURISPRUDENCE (2001). In this respect, each jurisdiction applies its own law and its own peculiar procedure without any bond uniting them and without any organism to preside over its judicial activity. This has held true even though the nation has already reassumed its judicial authority over foreigners, so that the national courts have become entirely competent in all their disputes, even in those that relate to their personal status.

[47] NOAH FELDMAN, THE FALL AND RISE OF THE ISLAMIC STATE (2008) (revealing how the classical Islamic constitution governed through and was legitimated by law, how executive power was balanced by the scholars who interpreted and administered the *Shari*'*a*, and how this balance of power was destroyed by the tragically incomplete reforms of the modern era). Feldman argues "that a modern Islamic state could provide political and legal justice to today's Muslims, but only if new institutions emerge that restore this constitutional balance of power."

[48] All of these are fragments of Ottoman legislation which applied then to Egypt, and these legislative vestiges were not characterized by a desire for clarity and precision; rather, they were the fruit of deliberate unawareness forced by the political circumstances of the time.

[49] This makes the justice process very difficult for some individuals and indicates oppression.

Spring 2023 *THE DARTMOUTH LAW JOURNAL* 69

fulfill their commitments.[50] The complicated judicial system made it difficult for the general public to access justice, and the Egyptian government would not tolerate the continued presence of separate judicial systems. Thus, *Sharie*'*a* judges and lawyers were placed in charge of interpreting the law's clauses referring to changing one's religion or collective affiliation.[51]

The Egyptian legislature adopted Article 13 of the Civil Code, which says that "divorce is subject to the legislation of the country to which the husband belongs at the time of the divorce [and] the law that governs the process and the separation is that of the husband at the time of the opening of the process."[52] Since *Sharie*'*a qadis* sit in the national courts to decide family law conflicts for both Muslims and non-Muslims alike, the new law "does not impose on everybody a single civil legislation which deprives Muslims and non-Muslims equally of the application of their own religious law – on the contrary, the Muslim legislation will in fact be applied to Muslims and even to non-Muslims" in at least two cases: (a) when the parties are not of the same Christian denomination, and (b) when one of the parties adopts Islam even in the course of the consideration of the case.[53] Accordingly, Christians did not accept that provision and urged the president to continue allowing Christians to have their own religious courts, a practice which dates back to the days of Prophet Mohammad and the *Qur*'*an*.[54] They

[50] HALLAQ, *supra* note 19. Further, a person shall not be qualified to be appointed as a judge in a regional *rabbinical* court in Israel unless (a) he was ordained to the *Rabbinate* "*Yoreh Yoreh Yadin Yadin*" (qualification level in the Jewish *halakha*) by an expert *rabbi* or *Torah* institution that the Council of the Chief Rabbinate; (b) he is thirty years old and married [or divorced]; (c) his way of life and character suit *Dayan*'s status in Israel, and (d) he has passed all the examinations conducted by the Judicial Council unless he is exempted by the Council. *See* REGULATIONS OF THE DAYANIM (*Terms of Certification and its Regulations*) 1–1955.

[51] It should be emphasized that changing one's religion changes his rights, analogous to a change in nationality.

[52] *See* AL-QANUN AL-MADANI AL-MASRY [*The Egyptian Civil Code Law No*.131 of 1948 *in force since October 15*,*1949*]. The enactment of this law was instantly followed by an energetic reaction on the part of the Coptic minorities in Egypt. Within a few days, the spiritual leaders of all the Christian communities in Egypt assembled in the seat of the Coptic-Orthodox patriarchate to unanimously adopt a memorandum addressed to President Gamal 'Abd al-Nasser on October 3, 1955.

[53] Religious leaders – at this point – argued that this provision reflects "trafficking in religion" and insisted that marriage in Christianity is essentially a religious contract governed by eternal or immutable divine law, as Jesus Christ said that "no man has the right to separate that which God has united." History explains that communal jurisdiction is not contradictory to the national sovereignty notion.

[54] *See generally* BERNARD G. WEISS, THE SPIRIT OF ISLAMIC LAW (1998) (outlining the prominent features of Muslim judicial thought: espousal of divine sovereignty; a fixation on divine texts; an uncompromisingly *intentionalist* approach to the interpretation of those texts; a frank acknowledgment of the fallibility of humans in capturing divine intent; a toleration of legal diversity; and a moralistic bent grounded in a [specific] social vision).

70 THE DARTMOUTH LAW JOURNAL VOL. XXI:1

argued that it would be a dangerous precedent for Muslims to establish a model that enforces the religious law of the majority on the minority.[55]

The circumstances in which Muslim *qadis* would be applying Christian canon law are clumsy. When a government cannot tolerate independent judicial organizations, it is also not likely to put up with independent legislative authorities, which must exist if non-Muslim Egyptians are to be tried according to their own religious law.[56] The government would decide to establish a unified law for all citizens, and this legislation cannot be Muslim due to clear political motives and because the government itself is not satisfied with the current family laws, which are the outcome of past negotiations between secular Westernizers and conservatives that left several desirable improvements unrealized.[57] The government established an obvious conflict between "the rules of [public] law" regarding sovereignty and the congenital Egyptian classical '*adaat* (traditions and customs), which provided for the launching of autonomous *Sharie*'*a* courts.[58] For the first time in the modern Egyptian history, the government directly faced the choice between *Sharie*'*a* state courts and courts based on the Western concepts of sovereignty; the government chose the latter clearly.[59] The government thus introduced secular legislation in the last sphere that had remained for divine law, putting an end to the six-century old *Sharie*'*a* state courts in Egypt.

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[55] *See* Matthijs de Blois, *Religious Law Versus Secular Law*: *The Example of the Get Refusal in Dutch*, *English and Israeli Law*, 6 UTRECHT L. REV. 2 (2010).

[56] The rulings of the Court of Cassation are published in an annual collection known as *Majmaatal-Ahkam li-Mahkamat al-Naqd* [Collection of Rulings of the Court of Cassation], published by *elMaktab al-Fannï* in Cairo.

[57] Religious leaders along with legal authorities have been in favor of civil marriage legislation for both Muslims and non-Muslims. Moreover, the Justice Minister at that time decided to enact the new law with "necessary complements" to address the oppression of the autonomous jurisdictions.

[58] A notable illustration of trying to complicate issues is the attempt to validate judging a convert to Islam according to Islamic law even if the conversion takes place during a case's consideration before the courts. Thus, the law begs the question when it equates change of religion with change in nationality. Also, the law equates two separate acts, marriage and divorce, with a single act at different phases, but it ignores the noticeable discrimination against Christians: why is the same principle not applied when individuals convert to a different denomination within Christianity, or from Christianity to Judaism, or vice-versa?

[59] From the political and legal perspectives, the national courts may still apply a divine religious law. However, if they choose to do so, this law will only implemented via tolerance and sanction of the sovereign will, in courthouses formed by the sovereign, acting within a procedure which he/she willfully controls and not by virtue of it being divine law, which is absolute and eternal, binding upon the sovereign and his subjects and applicable generally.

Spring 2023 *THE DARTMOUTH LAW JOURNAL* 71

B. The Legal Framework: Interreligious Law, Islamic Law, and the Conflict of Laws

A religious legal system as Islamic law is both exclusive, because it will not identify other laws let alone apply them, and defensive, because it wants to preserve the religious integrity of its community.[60] Accordingly, some contemporary scholars argue that Islamic law *per se* does not recognize a concept like conflict of laws, since it will always apply its own law and hence does not allow the problem of conflicting laws to arise.[61] Some measure of recognition for other legal systems is required in order for conflicting laws to be operative. However, unlike Christianity, Islamic law recognizes other monotheistic religions and has institutionalized a level of coexistence and freedom of religious practice never attained in Christian canonical law.[62] Nevertheless, although Islamic law accords certain legal liberties to non-Muslim communities, these freedoms may only be exercised within these communities. As soon as a Muslim becomes involved in a dispute with a non-Muslim, generating a conflict of laws, Islamic law applies. It may consequently be argued that conflicts law does indeed exist in Islamic interreligious law, albeit merely to demarcate the boundaries between the legal spheres of the religious laws.[63] This separation usually takes place when the boundaries are crossed, as in mixed religious marriages and conversions.

1. Legal Status of Non-Muslims (Dhimms)

The legal status of non-Muslims in Muslim countries may differ from their actual social, economic, and political status. The Islamic perspective regarding non-Muslims under Islamic sovereignty is compressed in the expression "*tolerance of religious pluralism based on inequality*."[64] Non-Muslim jurists tend to stress the inequality of non-Muslim residents as second class citizens, whereas most Muslim scholars emphasize the tolerance of Islam.[65] However, both inequality and tolerance were – and remain – legal realisms which have been colored in various shades of white and black throughout Islamic history. Thus, Islamic law recognizes two categories of legal subjects: Muslims and non-Muslims. Non-Muslims are

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[60] *See* KLAUS WAHLER, INTERRELIGIÖSES KOLLISIONSRECHT IM BEREICH PRIVATRECHTLICHER RECHTSBEZIEHUNGEN [Interreligious Conflict of Laws in the Field of Private Legal Relationships] (Cologne: Carl Heymanns Verlag, 1978), 157–158.
[61] *Id*.
[62] *Id*. at 159-160.
[63] *Id*.
[64] de Blois, *supra* note 55.
[65] *Id*.

72 THE DARTMOUTH LAW JOURNAL VOL. XXI:1

subdivided into three legal subcategories: *harb*(*s*) are those who reside outside of Islamic territories, *dhimms* are those who reside within the Islamic lands, and *musta*'*minin* are *harbis* who are permitted temporary entry into the Islamic territories. In modern terms, international conflicts law would apply to *musta'mins*, and interreligious conflicts law to *dhimms*. Islamic law holds that non-Muslim communities living under Islamic rule (*dhimms*) are entitled to legislative and judicial autonomy over their religious and family affairs. This rule is captured by the legal maxim: "*we leave them and what they believe*."[66] For all other matters, dhimms are subjected to Islamic law, albeit with modifications to some rules. Modern Arab nation states have adopted the legal status of *dhimms* in order to meet the values of statehood in the 19th and 20th century. The notion of an Islamic imperium run by and for Muslims, with a separate statute for its non-Muslim inhabitants, gave way to the notion of the nation-state, based on the equality of its citizens irrespective of their religious creed.[67]

The contemporary Egyptian legal system grants Egyptian non-Muslims a certain degree of autonomy in family law (personal status) matters, but it does so by way of exception. The personal status law of all Egyptians, irrespective of their religion, is governed by Islamic law, as stipulated in Article 280 of the Decree on the Organization of the *Sharie*'*a* Courts before its abolition:

> Judgments [in personal status cases] will be passed in accordance with what is stipulated in this Decree, and in accordance with the prevalent opinion of the *Abü Hanïfa* School of thought [...][68]

The exception to this overriding jurisdiction of Islamic law is stipulated in Article 6[2] of Law 462 of 1955 on the Abolition of the *Sharie'a* and *Millia* Courts, which allows non-Muslims to be governed by their own personal family laws, given that non-Muslim Egyptian couples share the same sect and rite, that they had their own organized sectarian judicial institutions at the time the law was promulgated, and that their religious law is used within the limits of public policy.[69] Egypt's interreligious conflicts law is based on these two articles. According to Egyptian legal doctrine,

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[66] HALLAQ, *supra* note 19.

[67] In the *Hatti Humayoun* of 1856, the Ottoman Sultan abolished the status of dhimmi and proclaimed the equal treatment of all citizens of the empire. One of the few religion-based differences that was maintained was the judicial and legislative autonomy of most religious communities. When Egypt became a British protectorate and gained de facto independence from the Ottoman Empire in 1914, it declared the continuation of the *Hatti Humayoun* by Law 8 of 1915.

[68] WAHLER, *supra* note 60.

[69] *Id*.

Spring 2023 *THE DARTMOUTH LAW JOURNAL* 73

Islamic personal status law – based on the *Hanafi* jurisprudence – is the *al-Sharie*‘*a al*‘amma (general law) in family matters for all Egyptians.[70]

2. The Islamic Jurisdiction: The Applicable Law for Religious Conversions

Conversion is a situation in which interreligious conflicts law applies. Whereas the conflicts rule regarding mixed religious marriages is regulated by Law 462, the conflicts rule about conversion receives only limited attention in Law 462 and is chiefly determined by Islamic case law. In Egypt's interreligious law, the legal subject's religion regulates which family law is applicable to him or her. Therefore, conversion is not a private religious matter but an issue with far-reaching legal implications.[71] A Christian may convert to the sect of his/her spouse to avoid the application of Islamic law to their marriage. Alternatively, a Christian might convert to a different sect or rite than his/her spouse so that *Sharie*‘*a* law may govern their marriage, since it is much more favorable towards divorce than Egyptian Christian laws. A Christian wife might also convert to Islam to have her marriage nullified. The Court of Cassation has issued two rules of thumb in recognizing conversions: (1) the decision as to whether a conversion has taken place is to be made by the religion, rite, or sect to which one converts, and not the one that is being abandoned (this rule does not apply when a Muslim converts to another religion, in which case, Islam, as the religion that has been abandoned, remains the religion which determines the invalidity of the conversion); (2) a court may seek to identify whether the convert has complied with the procedures and the conversion rules, but it may not inspect the convert's intentions. Whereas conversion to Islam is easy to establish since it is a unilateral act performed by the mere free will of the convert, conversion to a Christian rite or sect requires additional recognition by the religious authorities of the rite or sect to which one converts. In both cases, the Court of Cassation has issued numerous rulings. In order to prevent possible abuse of conversion, Article 7 of Law 462 reads that conversion from one non-Muslim rite or sect to another is legally effective only when carried out before the litigation has begun. Amidst litigation, the parties will

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[70] *Id*. Only when a non-Muslim Egyptian couple fulfills the conditions stipulated in Article 6 of Law 462 will their *al-qanün al-khass or al-Sharie*‘*a al-khassa* own 'special' non-Muslim law be applied to their personal status affairs, by way of exception to the general law. The criterion by which interreligious conflicts law in Egypt determines which personal status laws apply is therefore religion, as the Supreme Court (Cassation Court) has emphasized.

[71] Indeed, one can imagine conversion occurring not only for reasons of personal belief but also as a legal stratagem. In order to establish which law is applicable, the court must determine whether an alleged conversion has taken place. This rule is self-evident in the legal literature, as some assert that a Muslim may never be subject to non-Islamic law.

74 THE DARTMOUTH LAW JOURNAL VOL. XXI:1

be judged according to the religious law to which they belonged when they initiated the court case. If, on the other hand, the litigating party converts to Islam, Article 7 requires the immediate applicability of Islamic law, even if the conversion takes place during the litigation.

III. SHARIE'A COURTS OR ISLAMIC JUDICIAL BODIES IN THE WEST: ARE THEY EVIL?

The *Sharie'a* philosophy of justice has been long known to Western Europe since it functioned for some centuries in the Middle Ages, albeit with some alterations.[72] Historically, *Sharie'a* laws were in force when some European countries were occupied by the Ottoman Empire, and their influence expanded into those judicial and legal systems, which included the Islamic courts. In modern times, the intensive population growth of Muslim minorities in Western countries has led to the formation of *Sharie'a* courts, earning *Sharie'a* justice recent attention.[73] There are substantial differences between the values and norms of the Islamic and European legal philosophies, and the practical experience of these judicial mechanisms underscores this distinction.[74]

Two basic forms of *Sharie'a* courts exist. The first form is dispute resolution bodies founded on the legislation of the country; the second form is religious and public institutions (*Sharie'a* courts) that are not included in the standard system of legal dispute resolution.[75] There are also bodies which combine the tasks of courts and religious organizations at the same time.[76] A significant example of a European country where the *Sharie'a* justice model is applied not only in the form of divine or public institutions but also as bodies of judicial or alternative dispute resolution is the United Kingdom.[77] In most cases, these judicial bodies resolve family and minor property

[72] This refers to Spain, where certain areas were exposed to Muslim conquest and the substantial impact of Islamic laws and Muslim traditions and culture. *See*, *e.g.*, Michael Kirkland, *Under the U.S. Supreme Court: Islamic Law in U.S. Courts*, UPI (May 19, 2013), https://www.upi.com/Under-the-US-Supreme-Court-Islamic-law-in-US-courts/64481368948600/ ("Does Islamic law, Sharia, have a place in American courts? A lot of state legislatures don't think so, and there is a movement to ban its application in domestic courts, state and federal . . . *Sharia*, based on the sayings of the Prophet Muhammad, is often a consideration in family issue cases involving U.S. Muslims. But its precepts apply to all aspects of life, and its severest critics allege it is a factor in some acts of terror . . . During those two years, Arizona, Kansas, Louisiana, Oklahoma, South Dakota, and Tennessee enacted such bills. In Oklahoma, the law explicitly banned judicial consideration of Islamic law, or Sharia. The ban was approved by the voters.")

[73] *See generally* Sykiainen, *supra* note 5.

[74] HALLAQ, *supra* note 19.

[75] *Id*.

[76] *Id*.

[77] In the 1980s, the appearance of these judicial bodies started in the UK. The first one was the Islamic *Sharie'a* council created in 1982 in Leyton. Some of these bodies are sometimes charitable, and their decisions have no legal standing.

Spring 2023 *THE DARTMOUTH LAW JOURNAL* 75

disputes, and most of the decisions taken by those courts refer to dissolution of marriages, divorces, and their consequences. Since these decisions could run counter to the UK legal system, they have encountered a trend of negative public opinion in the UK.[78] British religious leaders and scholars promoted acknowledging Muslims' right to follow their law(s) and including some of these rules in the country's legal system, and they argued that there is no reason for UK national courts to not admit decisions based on *Sharie'a* values.[79]

The main harsh criticism from the media and some far-right wing pundits – all over the globe – is that Islamic norms discriminate against women and enable polygamy, prohibit Muslim women from marrying non-Muslim men, legalize forced marriages, restrict women's rights after divorce, and allow severe criminal punishments.[80] One of their main arguments to deny *Sharie'a* courts is that they do not meet modern human rights standards; however, it is unfair to disapprove of the Islamic justice model as a whole based on the activity of certain institutions.[81] In the same vein, there are other *Sharie'a* courts which work correctly and truly function within the legal framework of UK legislation, such as, for instance, those that were formed and function in accordance with the Arbitration Act of 1996.[82] This law allows an arbitration tribunal to resolve civil conflicts should the parties, by their own motivation, agree to allow this and be willing to follow the decision made by this body. Notably, cases regarding the public interest or disputes requiring serious consideration, such as criminal cases, cannot be resolved by arbitration proceedings.[83]

The Muslim arbitration tribunal is one of the most authoritative bodies among them, as it takes up cases of forced marriages and domestic violence, family disputes, divorce, commercial and debt conflicts, inheritance cases, and fights in mosques.[84] The decisions the tribunal makes

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[78] *See Women's Equality in the UK*: *A Health Check*, WOMEN'S RESOURCE CENTRE (Apr. 2013), https://www.wrc.org.uk/Handlers/Download.ashx?IDMF=a527a91a-ff47-4108-b68f-24c15d09128d. *Shadow report from the UK CEDAW Working Group assessing the United Kingdom Government's progress in implementing the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW). *See also* UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, UNITED NATIONS (Feb. 29, 2020), http://www.refworld.org/docid/3ae6b3970.html.

[79] John R. Bowen, *How Could English Courts Recognize Shariah*?, 7 ST. THOMAS L. J. 3 (2010).

[80] *Id*. Radical opponents of these courts have stated that Muslim women apply to these bodies not of their own will but compulsorily since Muslim communities essentially prohibit them from seeking the protection of their rights by applying to state courts, which is inaccurate.

[81] WEISS, *supra* note 54.

[82] *See*, *e.g.*, Arbitration Act 1996, c. 23 (UK) http://www.legislation.gov.uk/ukpga/1996/23/data.pdf. (last retrieved Apr. 30, 2024).

[83] *Id*. The parties before the arbitration tribunal have opportunities to set procedural regulations to resolve the dispute, and they are entitled to choose the legislation to be applied to their dispute.

[84] *Id*.

76 THE DARTMOUTH LAW JOURNAL VOL. XXI:1

take into consideration British law as well as the conclusions of the acknowledged jurisprudential school of Islamic law.[85] In Canada, a similar neutral view of *Sharie*‘*a* courts has shaped the function of religious arbitration.[86] Canadian legislation allows for the arbitration of family cases, and the arbitration contract on these matters is considered to be a private contract stipulated in and to be executed in compliance with the 1990 Act on family law.[87]

In 2003, the Congress of Canadian Muslims decided to establish a similar structural body for Muslims, and the Islamic Institute of Justice was created, which used *Sharie*‘*a* arbitration within its framework implementing the 1991 Arbitration Act.[88] Thus, the prohibition of free choice is restricted only to family issues, and Western communities have argued that no danger exists in implementing *Sharie*‘*a* norms for issues other than family ones. This trend has something in common with *Sharie*‘*a* justice in European countries, such as Germany, Spain, Belgium, and the UK, where there are unofficial *Sharie*‘*a* courts within Muslim communities.[89] *Sharie*‘*a* courts can be established and function in compliance with a country’s federal legislation. The mere establishment of a court by a Muslim body does not qualify it as an Islamic court. The main feature of a *Sharie*‘*a* court is that it implements moderate Islamic norms on questions of banking and finance, human rights issues (including women’s rights), criminal law, and transitional justice.[90] This notion is confirmed by modern Islamic jurisprudential thought concerning civil courts and the prospect of using these institutions for dispute resolution under *Sharie*‘*a* law.

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[85] *Id.*

[86] *See*, *e.g.*, Arbitration Act 1991, S.O. 1991, c. P. 17 (Can.), https://www.ontario.ca/laws/statute/91a17.

[87] Nevertheless, the arbitration acts coincided until 2006 in that the parties of the arbitration case themselves determined the legislation to be used in resolving the conflict. By the beginning of the 2000s, arbitration bodies of confessional and national orientation had been formed. Particularly, there were courts for Jews, followers of various branches of Christianity, and for the aborigines. *See*, *e.g.*, Arbitration Act 1996, *supra* note 82.

[88] *See*, *e.g.*, Family Statute Law Amendment Act 2006, S.O. 2006, c. P.1 (Can.), http://www.ontario.ca/laws/statute/s06001/ (last visited Apr. 29, 2024).

[89] Trevor C.W. Farrow, *Re-Framing the Sharia Arbitration Debate*, 15 CONSTITUTIONAL FORUM 2 (2006).

[90] Reconciliation procedures are explained in detail in the Islamic concept of dispute resolution and Islamic transitional justice. For further account on the Islamic reconciliation, *see*, *e.g.*, Mohamed ‘Arafa, *Transitional Justice*, *the Seeds of Change*: *Secular Law or Divine* (*Islamic*) *Law*, *Quo Vadis*?, 9 CREIGHTON INT’L & COMP. L. J. 2 (2018). *See also* Mohamed ‘Arafa, *Death Penalty*: *Is That the Case for Justice Under the Egyptian Criminal Justice System*? *A New Understanding*, 12 CREIGHTON INT’L & COMP. L. J. 4 (2022). Thus, Islamic norms can be applied to gain the case’s agreement and its confirmation by the arbitral court. Arbitration courts can work in accordance with their personal rules or the rules agreed upon by the parties, and such procedures can be oriented to the *Sharie*‘*a* conditions that are compatible with the practice adopted in the positive law norms.

Spring 2023 *THE DARTMOUTH LAW JOURNAL* 77

IV. PUBLIC POLICY CONCERNS: WHAT IS ISLAMIC PUBLIC POLICY IN SHARIE'A COURTS?

Case law demonstrates that public policy in Egyptian interreligious laws has a variety of tasks. The Egyptian legal system and the Supreme Court (Court of Cassation) distinguish between 'negative' and 'positive' public policy. Defensive (negative) public policy prevents unsolicited rules of foreign law from being applied after conflicts law(s) has recognized that they are applicable.[91] Assertive (positive) public policy protects rules considered indispensable to the national legal order by preventing parties from deviating from them.[92] Positive public policy applies to both codified and uncodified rules in preserving the crucial values of Islamic law although this law might violate the important interests of non-Muslim legislation.[93] Does this violation constitute a breach of Egypt's public policy? According to the Court of Cassation, "Egypt's public policy does not exemplify vital principles of non-Muslim laws, though, a crucial rule of Islamic law, including public policy, is the protection of the *dhimmi* (non-Muslim) principles and rights."[94] Thus, various legal scholars have argued that Islamic public policy includes protecting *dhimmi* interests. For instance, scholars assert that when non-Muslims are exempted from Islamic rules such as having two male witnesses to a marriage, these norms remain significant to Islamic law and consequently part of public policy, though for Muslims

[91] For more details on the interaction between Islamic law and civil law in the context of the last 150 years of Egyptian real property law, *see* RICHARD A. DEBS, ISLAMIC LAW AND CIVIL CODE: THE LAW OF PROPERTY IN EGYPT (2010). *See*, *e.g*., Article 6 of Law 462 of 1955, *supra* note 4. Even when the interreligious conflict of laws determines that non-Muslim legislation is applicable, rules considered a violation of public policy will not be implemented.

[92] *Id*. For example – in the field of the criminal law – positive public policy can be *a law of public policy* in its entirety, as it can never be set aside by foreign rules, nor can citizens agree to deviate from it.

[93] TARIQ AL-BISHRI, AL-WADʿ AL-QANUNI AL-MU'ASIR BAYN AL-SHARIE'A WA AL-QANUN AL-WAD'I, THE POSITION OF MODERN LAW: BETWEEN THE ISLAMIC SHARIʿA AND POSITIVE LAW 5-6 (1996) (criticizing 19th and 20th century reforms for creating parallel institutions rather than integrated ones). In Israel, for example, some critics argue that the judges of the religious courts lack legal education and knowledge of the secular Jewish society and its political ideals. Most of these judges, known as *Dayanim*, are ultra-Orthodox, and ultra-Orthodox parties stand behind them. The judicial appointment process in the civilian court system is determined by various *Haredi* parties – and only men are appointed. This rule is not explicitly written anywhere but is nevertheless clear, as the first condition is recognition by the Chief *Rabbinate* of Israel, which has yet to accredit any women.

[94] For another account on al-Sanhūrī and his contributions to modern Islamic law, see, e.g., Enid Hill, *The Place and Significance of Islamic Law in the Life and Work of ʿAbd al-Razzāq al-Sanhūrī, Egyptian Jurist and Scholar*, *Part I*, 3(1) ARAB L. Q. 33 (1988) and *Part II*, 3(2) ARAB L. Q. 182 (1988). Accordingly, the breach of these policies by Islamic law might be considered unjust. *See also* Mohamed Arafa, "*Islamization*" *of Egyptian Law*: '*Abd alRazzāq alSanhūrī's Rule of Law's Doctrine*, 17 CHARLESTON L. REV. 3 (2023).

78 THE DARTMOUTH LAW JOURNAL VOL. XXI:1

only.[95] So, the question arises of how to determine what constitutes public policy. Positive law and man-made rules attain the status of public policy through court rulings that define the essence of the national legal order. Public policy may change with time, as evaluated by the courts.[96] It should be noted that certain rules of Egyptian legislation obviously embody public policy, but they are not cited as such by case law or in the legal doctrine.[97]

When analyzing Egyptian public policy using case law, two distinct features should be noted. First, there is a distinction between Muslims and non-Muslims, in that these two communities are to be treated differently. Most rules are sort of discriminatory, based on the Islamic maxim "*Islam supersedes and cannot be superseded*," meaning that a non-Muslim should not have legal authority over a Muslim and that a Muslim can never be subjected to non-Muslim law. Second, what constitutes public policy is generally considered self-evident in family matters (with the exception of inheritance issues), so legal reasoning is rarely presented, and public policy remains uncodified.[98] As long as Egypt maintains its system of interreligious law, public policy will serve to preserve the balance between Muslim and non-Muslim family law.[99] The main task of both positive and negative public policy is guaranteeing the essential principles of Islamic law, along with protecting the essential values of non-Muslim laws, which always occurs in cases in which non-Muslims of different rites and sects are governed by

[95] These rules constitute Islamic public policy (Egypt's public policy which in most circumstances applies only to the Egyptians). In Islamic law, the separation between public and private law is vague than in the European legal theory.

[96] *See* Baber Johansen, *The Relationship Between the Constitution*, *the Sharīʿa and the Fiqh*: *The Jurisprudence of Egypt's Supreme Constitutional Court*, 64 ZaöRV 881, 881-82 (2004). ("In the twentieth century, the *fiqh* norms that are introduced into the modern codes of the Arab states owe their validity to the fact that the national legislators has enacted them. In other words, these norms no longer qualify as a jurists' law.").

[97] *See* Asifa Quraishi-Landes, *Five Myths about Sharia*, THE WASHINGTON POST (June 24, 2016), https://www.washingtonpost.com/opinions/five-myths-about-sharia/2016/06/24/7e3efb7a-31ef-11e6-8758-d58e76e11b12_story.html.

[98] Baudouin Dupret, *What is Islamic Law*? *A Praxiological Answer and an Egyptian Case Study*, 24 THEORY, CULTURE & SOC'Y (2), at 79-88 (2007) (describing the practice of an Egyptian judge, even when implementing "Islamic" norms, as one that seeks: "[T]o publicly manifest the correct accomplishment of his job. At this procedural level, it is obvious that the judge orients himself exclusively to the technicalities of Egyptian procedural law. These technicalities may include some reference to provisions explicitly relating to *Hanafite* or *Malikite* law, but this is always through the provisions of Egyptian law, as interpreted by the Court of Cassation.").

[99] Moderate Muslim scholars argue that interreligious law in Egypt has always been "*balanced*, preserving the harmony which it had for fourteen centuries, until its *disruption* by Law 462 of 1955." In other words, in the Egyptian legal system, public policy is derived from one legal order (Islamic law), but its role is not essentially to endorse the norms of this order but to preserve an equilibrium between Muslim and non-Muslim legal orders.

Spring 2023 *THE DARTMOUTH LAW JOURNAL* 79

Islamic law.[100] In this regard, the Court of Cassation has ruled that "the Islamic rules of polygamy, divorce (only for Catholics), and the requirement of witnesses for the conclusion of a marriage constitute a violation of essential principles of the Christian faith."[101]

V. CONCLUSION: THE FACE, THE BACK, AND THE FUTURE OF THE SHARIE'A COURTS

Family law in Egypt is treated as a dual system based on religious identification: Muslim or non-Muslim. Although there are procedures to decide which law is applicable when more than one religious law applies to an individual or specific situation (such as religious conversion or mixed marriages), Islamic law will prevail in most cases. Egyptian public policy includes endorsing Islamic norms and preventing the application of non-Muslim rules that breach essential Islamic norms. It may also protect certain standards of non-Muslim public policy. The first half of the 20th century was characterized by Egyptian legislation attempting to unify family laws, while the second half of the century was dominated by case law in which public policy played a fundamental role.[102] The distinction between Muslim and non-Muslim legislation has been defined through the notion of public policy. Although public policy has been defined as a secular notion since the 1970s, courts and legal doctrine have increasingly interpreted it through an Islamic lens. Islamic law values allowing different religious communities their own laws, so according to Islamic public policy, non-Muslim family laws will not be subjected to unification efforts. While Egyptian law preserves Islamic law, it allows tempered interpretations of Islamic law that are of a more secular nature. Revelation through the *Qur'an* and *Sunnah* remains important to defining public policy, but the law maintains sufficient flexibility to adapt to diverse contexts and to respond to changing and complex questions.

In the West, some countries allow *Sharie'a* justice techniques to apply through mediations, but there are also unofficial *Sharie'a* courts. That the West can incorporate *Sharie'a* justice in the form of arbitration courts does not necessarily testify to the need for them. Nevertheless, there are

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[100] *See*, *e.g.*, Law No. 25/1920 on *Maintenance and Personal Status*, Law No. 25/1929 of *Personal Status* (marriage's dissolution & family disputes), *Civil Code* No. 38 of 1931, Law No. 77/1943 & No.71/1946 on *Inheritance & Bequest*.

[101] *See* Law Nos. 16 and 26, Year 48, Jan. 17, 1979; No.1392, Year 50, Feb. 5, 1984; No.31, Year 53, Apr. 10, 1984. As a public policy matter, the Court stated that: "*these Islamic rules should not be applied to mixed Christian marriages*, *not because these rules constitute a violation of public policy*, *but because the protection of essential non-Muslim principles is considered a rule of public policy* […] *This function is intrinsically connected to what several scholars call Islamic public policy*, *that part of Egyptian public policy which applies only to the Muslim community*."

[102] *See generally* SUMNER B. TWISS, MARIAN GH. SIMION, & RODNEY L. PETERSEN, RELIGION AND PUBLIC POLICY: HUMAN RIGHTS, CONFLICT, AND ETHICS (Cambridge Univ. Press, 2015).

80 *THE DARTMOUTH LAW JOURNAL* VOL. XXI:1

significant reasons for establishing such institutions. First and foremost, forms of *Sharie*‘*a* justice officially stipulated in Western law can be set against unofficial *Sharie*‘*a* courts carrying out illegitimate actions. These prohibited courts often refer to ancient customs that are not compatible with *Sharie*‘*a* law or Western law. Legislation that recognizes the Islamic justice model in arbitration settings can preserve classical tradition and affirm values of justice in Muslim life. While Egyptian interreligious law formally preserves adherence to Islamic law, it has effectively been secularized in the sense that typical Islamic norms have been abandoned in favor of principles that are not necessarily Islamic. With no doubt, the experience of *Sharie*‘*a* courts and Islamic tribunals is still actively debated. In some Muslim countries, *Sharie*‘*a*’s application needs a comprehensive reform. The Islamic world needs a cultural revolution – enlightenment, critical thinking, and humanism – before it can forgo all religious law at last.